Teach Your Children: High School Students and the First Amendment

SETH D. BERLIN AND SINCLAIR STAFFORD

In 2004, the John S. and James L. Knight Foundation surveyed 100,000 high school students, 8,000 teachers, and 500 administrators about their attitudes toward the freedoms protected by the First Amendment.[1] The survey revealed both that students were largely unaware of those protections and that they did not generally appreciate those freedoms' societal value, let alone how their absence fosters authoritarian regimes around the world. Many of them think that the First Amendment goes too far. The survey was repeated in 2006 and 2007 (albeit on a dramatically smaller scale); although some responses reveal a glimmer of hope on students' understanding and appreciation of First Amendment values, on the whole they confirm the extremely disturbing results of the initial survey.

The initial Knight Survey itself was released with significant press attention, generating discussion by both scholars and commentators.[2] In response to the finding that one in five students believes that Americans should be prohibited from expressing unpopular opinions, Bill Maher authored an op-ed in the *Los Angeles Times.* Noting that it was his "livelihood you're messing with," he chided that the "younger generation is supposed to rage against the machine, not for it; they're supposed to question authority, not question those who question authority."[3] Below we—a First Amendment lawyer and a student who just graduated from high school—examine some of the circumstances that lead to students' limited understanding and appreciation of First Amendment values.

The results of the survey themselves focused on several likely causes: not enough courses actually teaching the value of the individual liberties protected by the Bill of Rights or the role of a free press in ensuring a thriving democratic government; not enough student media outlets; and, remarkably, troubling attitudes toward First Amendment values among many teachers and administrators.

We focus here on what we perceive to be another pervasive cause: schools' response to controversial speech, whether on T-shirts, in newspapers and other student publications, in creative writing assignments, or even in off-campus settings or on the Internet. Rather than embracing the opportunity to teach students how to deal with speech that may be disagreeable, troubling, or even offensive—and in the process preparing them to be full citizens in our democratic society—schools routinely deal with such speech by censoring it and/or punishing the speaker.

Simply put, schools are missing out on a meaningful opportunity to teach students the principles of the First Amendment by example. Our courts, for their part, are deferring to school officials in a growing number of cases, putting First Amendment freedoms at serious risk in school settings.

The Knight Survey

The Knight Survey reveals that high school students generally show little knowledge of, or appreciation for, the First Amendment and the rights it protects. Three-quarters of students polled believe, erroneously, that people may not legally burn the American flag, and about half of them think, erroneously, that the government can censor indecent material on the Internet; the Supreme Court has held that both are constitutionally protected.[4] Not only do students believe that these types of government censorship are legal, but remarkable numbers of them actually think that they are a good idea. Roughly 50 percent of students think that newspapers should not be allowed to publish freely without government approval, and 72 percent of students think that the government should forbid its citizens from burning the American flag. Only one-quarter of students polled said that they think about the First Amendment, with close to 40 percent expressly responding that they take First Amendment rights for granted. Even worse, about a third of students overall think that the First Amendment "goes too far."

Students do, however, recognize the importance of First Amendment freedoms, at least to some degree. Eighty-two percent of students professed to having an abstract belief in protecting freedom of speech. Students especially care about free speech subjects that directly relate to them or their interests. For example, 63 percent of students would allow musicians to sing songs with offensive lyrics, and 58 percent would not restrict school newspapers from reporting on controversial issues. Thus, more students would protect freedom for school newspapers than for mass circulation newspapers.

Not surprisingly, student attitudes about the First Amendment can and do improve with increased participation in media activities and classes about the First Amendment, the media's impact on society, and journalism. The Knight Survey confirms that students who have had more classes dealing with First Amendment subjects are more likely to be aware of its protections and to value them.[5] However, more than 40 percent of respondents had no such class. Similarly, the survey results demonstrate greater awareness and appreciation of freedom of speech and the press among students who participate in a high school media activity. However, 86 percent of respondents said that they do not participate in any media activities at school, and more than one in five schools offer no student media

Seth D. Berlin (sberlin@lskslaw.com) is a partner in the Washington, D.C., office of Levine Sullivan Koch & Schulz, L.L.P. Sinclair Stafford, a former intern with the firm, is a 2008 graduate of the Maret School, an independent school in Washington, D.C., and will attend Tufts University, starting in the fall of 2008. The views expressed in this article are those of the authors and do not necessarily reflect the views of Levine Sullivan Koch & Schulz, its clients, or the Maret School.

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at all. Forty percent of those high schools that have no student newspaper had eliminated it within the preceding five years.

Tellingly, the survey suggests that some of the blame for the students' ignorance of the First Amendment and its importance does not rest entirely on their shoulders but instead rests with teachers and school administrators. A disturbingly high number of teachers are ignorant of basic First Amendment freedoms. For example, 40 percent incorrectly believe that Americans may not legally burn the flag. Only 35 percent of teachers believe that students should be permitted to publish freely, and a significant number of teachers (41 percent) think that the press in America already has too much freedom.

Although perhaps we might expect more from teachers charged with teaching our nation's students, these attitudes are consistent with other measures of adult understanding of the First Amendment. For example, a 2006 survey conducted by the McCormick Tribune Foundation found that more respondents could name all five main characters on *The Simpsons* than could name the five freedoms protected by the First Amendment.[6]

These educational gaps appear to be having long-term effects on our democracy. Other recent studies reveal that as students become young adults, they find little use for news and, in particular, in-depth news coverage that allows for critical thinking about controversial issues.[7] A similarly disturbing survey found that one in five college students would exchange the right to vote for an iPod.[8] Yet another recent study published by the Information Society Project at Yale School analyzed more than fifty years of research on the subject and then concluded that public opinion about the First Amendment can actually shape how the Supreme Court rules in First Amendment cases.[9] As a result, the study's authors called for intensified efforts to educate the public about the First Amendment, such as by involving students in journalism and political expression using new technologies such as blogs or podcasts.[10]

Teaching by Example

In the name of not disrupting the educational process, school administrators and teachers have routinely suppressed or punished speech that might cause controversy. When a Mormon high school student responded to a classmate who asked whether she had ten moms by saying "That's so gay," she was disciplined for having made a demeaning comment about homosexuality while the other student suffered no consequences.[11] At a Maryland school, an administrator threatened a student with discipline if she continued reading the Bible during her lunch hour.[12] A student in Reno had to go to court to be able to read a W.H. Auden poem aloud at a statewide competition; the school had prohibited it because it included the words *hell* and *damn*.[13] Other schools have banned or punished everything from posters for a conservative political club,[14] on the one hand, to posters for the Peace Shirt Coalition[15] or the film *An Inconvenient Truth* featuring Vice President Gore, on the other. At another high school, students were suspended, expelled, and in some cases arrested for organizing and participating in a peaceful protest of the Iraq war.[16]

Expressive aspects of student clothing often fare no better. Various schools have prohibited conservative students from protesting a pro–gay rights "Day of Silence" by wearing T-shirts that urge "Be Happy, Not Gay."[17] When nine students from Jena High School wore T-shirts reading "Free the Jena 6," the superintendent banned the shirts.[18] One Florida school refused to publish a yearbook photo of a lesbian student wearing a tux instead of a gown, a decision ultimately backed by the school board.[19] A Rhode Island school refused to publish a yearbook photo of a senior wearing chain mail and holding a "prop" sword (he is a member of the Society for Creative Anachronism, which studies medieval history) until the American Civil Liberties Union sued and the state education commissioner intervened.[20]

Even apparently patriotic dress has come under fire. In one school, a student faced the threat of suspension for wearing a red, white, and blue necklace to show her "respect and love for . . . family members . . . serving in the military" because it arguably "violated a dress code banning gang-related items."[21] In another school, an assistant principal ordered a high school student wearing an American flag in her back pocket—as a protest against the earlier censorship of her friend, who had also worn an American flag accessory—to remove the flag, preparing an incident report that would "remain in her . . . file until six months after graduation."[22]

School newspapers are also a prime target of administrators wanting to avoid all manner of controversial topics. These range from the articles at issue in *Hazelwood School District v. Kuhlmeier*,[23] which addressed pregnancy and divorce, to many much more recent examples. In one Florida high school, the principal censored a student column discussing teenage sexuality and urging fellow students not to have sex; it cautioned, "Make sure, when the time comes, you truly want to swipe your v-card, because this purchase is non-refundable."[24] Another principal removed from the student newspaper an article describing "the gap in academic performance between white and minority students," reasoning that it could "embarrass" students, even though the school was publicly working to close that gap.[25] A number of school officials have also censored articles on gay and lesbian student life.[26] One school newspaper was actually disbanded after students published a photo of someone burning the flag.[27]

When faculty advisors to high school newspapers have tried to use examination of a controversial issue as a "teaching moment," they, too, have often been subject to punishment or discipline. For example, after nineteen years of serving as an Illinois high school newspaper advisor, a teacher was reassigned at the end of the 2007–08 school year after the paper ran articles on drug use. These included a column opposing drug use, an anonymous personal account of a student's experience with drugs, and an article describing its effects on health.[28]

Concerned about this type of reaction by schools, California Senator Leland Yee (D-San Mateo) proposed legislation to protect adult advisors for student media, citing eight recent cases in California where journalism advisors were dismissed or reassigned based on articles that appeared in school newspapers.[29] Yee explained that he was disturbed by school administrators who "want to squash free thinking, particularly free thinking they don't agree with" and believes "[t]hat's not how you educate young people who are going to be the leaders of the next generation."[30] (As this article was going to print, Yee's bill passed the California legislature.)

Finally, students are increasingly

being punished for speech they engage in away from school or on the Internet. Arguably, students may at times go too far in their methods of criticizing their school officials,[31] sometimes reaching the level of defamation and/or bullying,[32] but schools have not shown much tolerance even for students who merely criticize them. A number of students across the country have been disciplined, and in some cases charged criminally, for posting satirical commentary about their school or administrators on Internet sites like MySpace.com.[33] At one Georgia school, a student posted a critical profile about his science teacher on MySpace.com stating that the teacher wrestled alligators and midgets. The student was both suspended and charged with criminal defamation, charges that the district attorney eventually dismissed.[34]

Admittedly, the most difficult category of speech that school administrators confront is speech that might be interpreted as a threat of violence. Even here, however, it appears that teachers and administrators have overreacted in a number of instances. In one Arizona school, "[s]chool officials suspended a 13-year-old boy for sketching what looked like a gun," explaining to the boy's father that following the shootings at Columbine, the boy's "crude sketch" was "'absolutely considered a threat.'"[35] At an Indiana school, the principal suspended two students for making a movie in which teddy bears are ordered to kill a teacher who had embarrassed the "teddy bear master."[36] Although one may question the students' sense of humor, no one, including the federal judge who ordered the students returned to school, could reasonably say that such a movie constituted anything but a joke.

To be sure, running a large public high school involves meeting a whole host of challenges. In the First Amendment area, however, teachers and administrators have often shown a profound unwillingness to use discussion of controversial and difficult subjects as teaching moments, even in circumstances where it would have been consistent with the educational mission of the school. If school authorities do not allow students to discuss controversial but important issues, they cannot expect them to be tolerant or even informed of other viewpoints as they become adult participants in our democracy.

Deference by Courts

Our courts typically serve as the institution charged with preserving individual liberties, but they have become increasingly deferential to schools and administrators on First Amendment issues. Although the primary responsibility for teaching First Amendment values lies with schools, schools often fall short of that responsibility; and the deference shown to them by courts exacerbates that educational void for today's students.

Taking seriously the Supreme Court's admonition in *Tinker v. Des Moines Independent Community School District* that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[37] some courts continue to protect students' First Amendment rights in the school setting.[38] One judge enjoined a school from prohibiting slogans supporting gay rights, rejecting the administrators' claims that this would be disruptive. The court observed that "the claimed interruption and disorder was really much the usual background noise" of a high school.[39] Others courts have carefully distinguished between the disruption allegedly caused by student speech and that caused by student reaction to administrators' decisions to punish the student for that speech.[40] And, as contemplated by the Supreme Court's decision in *Morse v. Frederick*,[41] courts have continued to afford greater protection for speech that takes place away from school than for speech on school campuses. In *Morse*, the Court ultimately concluded that the student's display of a "Bong Hits 4 Jesus" sign was school-related, thereby providing little guidance to lower courts on truly off-campus speech.

Despite these rulings protecting students' First Amendment rights, in the span of just a few weeks in April and May 2008, four federal appeals courts issued opinions that reflect little regard for high school students' free speech rights.

In *Morrison v. Board of Education of Boyd County*,[42] a devoutly Christian student wanted to communicate to other students his belief that homosexuality is a sin. He challenged a school's interpretation of its antiharassment policy to prohibit such speech, which included training videos that instructed "'Just because you believe that does not give you permission to say anything about it. It doesn't require that you do anything. You just respect, you just exist, you continue, you leave it alone. There is not permission for you to point it out to them.'"[43] When the next year the school changed its policy to state that "[t]he civil exchange of opinions or debate does not constitute harassment," the Sixth Circuit affirmed the entry of summary judgment because the student had not suffered any "injury-in-fact" despite his year of enforced silence.[44]

In *Jacobs v. Clark County School District*,[45] the Ninth Circuit decided, by a 2–1 vote, that a school did not violate the First or Fourteenth Amendment rights of a student suspended for wearing a T-shirt expressing her religious beliefs in violation of a uniform school dress code. The school's code allowed students to wear the school's logo as well as messages "touting the school's athletic teams" but prohibited both the religious message worn by Jacobs and a button worn by another student that stated "Say no to uniforms."[46] Although the policy therefore clearly favored proschool speech, the Ninth Circuit majority nevertheless concluded that the dress code was a content-neutral regulation subject to intermediate scrutiny and found no constitutional violation.[47]

In *Doninger v. Niehoff*,[48] the junior class secretary, upset over the rescheduling and possible cancellation of the annual Jamfest (a "battle of the bands" event), wrote a post at home on her blog on livejournal.com. She noted that Jamfest was "cancelled due to [the] douchebags in the central office" and urged people to e-mail the superintendent to protest that decision. She also reproduced an e-mail that her mother had sent to the superintendent "to get an idea of what to write if you want to write something or call her to piss her off more" (the opinion is silent on what the mother had written).

Finding that this post violated the school's expectations that students, and especially student leaders, refrain from profanity and work cooperatively with administrators to resolve disputes, the principal required the student to apologize to the superintendent, to show a copy of the post to her mother, and to withdraw her candidacy for senior class secretary. The student agreed to the first two items but refused to honor the third. The principal prohibited her name from being on the ballot and, although she won a plurality of the votes as a

write-in candidate, refused to permit her to take office (seating instead the runner-up) or to speak at the school's commencement ceremony.

In affirming the denial of motion for a preliminary injunction, the Second Circuit found no First Amendment violation. Quoting from *Bethel School District No. 403 v. Fraser*,[49] which upheld a school's decision to discipline a lewd speech at a school assembly, the Second Circuit noted that "the First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket."[50] It then found that these principles could be extended to Doninger's blog post because it "created a foreseeable risk of substantial disruption" at the school even though the speech was entirely off-campus and the alleged disruption principally affected administrators.

School boards must operate "within the Bill of Rights."

--West Virginia State Board of Education v. Barnette

Finally, in *Nuxoll ex rel. Nuxoll v. Indiana Prairie School District No. 204*,[51] although the school permitted observance of a national "Day of Silence," it prohibited a student from wearing a T-shirt that said "Be Happy, Not Gay" as a protest of homosexuality. Although the Seventh Circuit ultimately enjoined this action, its approach was extremely dismissive of student speech interests. According to Judge Posner's opinion, the "contribution that kids can make to the marketplace in ideas and opinion is modest." Continuing, he wondered "just how close debate by high-school students on sexual preferences really is to the heart of the First Amendment" and questioned whether "the suppression of adolescents' freedom to debate sexuality is not one of the nation's pressing problems, or a problem that can be solved by aggressive federal judicial intervention."[52] In examining the "benefits side of the First Amendment balance," Judge Posner, although recognizing that "18-year-olds can now vote," seriously questioned whether "uninhibited high-school student hallway debate over sexuality—whether carried out in the form of dueling T-shirts, dueling banners, dueling pamphlets, annotated Bibles, or soapbox oratory—[is] an essential preparation for the exercise of the franchise."[53]

There is another model, however. Judge Posner recognized it in his 2001 opinion striking down an Indianapolis ordinance limiting access of minors to video games depicting violence. As Judge Posner explained in that earlier opinion,

> [n]ow that eighteen-year-olds have the right to vote, it is obvious that they must be allowed the freedom to form their political views on the basis of uncensored speech before they turn eighteen, so that their minds are not a blank when they first exercise the franchise. . . . People are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble.[54]

Judge Posner then noted that students are routinely asked to study works ranging from "the *Odyssey*, with its graphic descriptions of Odysseus's grinding out the eye of Polyphemus with a heated, sharpened stake" to "*War and Peace* with its graphic descriptions of execution by firing squad, death in childbirth, and death from war wounds" to the stories of Edgar Allen Poe, Mary Shelley, and Bram Stoker.[55] In sum, he recognized that to "shield children right up to the age of 18 from exposure to violent descriptions and images would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it."[56]

The same can be said for much other speech that schools would like to avoid. As Justice Brennan explained in *Tinker*,

> [t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the marketplace of ideas. The Nation's future depends upon leaders trained through wide exposure to the robust exchange of ideas which discovers truth out of a multitude of tongues, (rather) than through any kind of authoritative selection.[57]

Thus, the Court held, "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression"; therefore, school officials must be able to show "more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" before prohibiting or punishing speech.[58] Similarly, another Seventh Circuit panel explained in *Hodgkins ex rel. Hodgkins v. Peterson*:

> The strength of our democracy depends on a citizenry that knows and understands its freedoms, exercises them responsibly, and guards them vigilantly. Young adults . . . are not suddenly granted the full panoply of constitutional rights on the day they attain the age of majority. We not only permit but expect youths to exercise those liberties—to learn to think for themselves, to give voice to their opinions, to hear and evaluate competing points of view—so that they might attain the right to vote at age eighteen with the tools to exercise that right.[59]

As the dissent in the recent *Nuxoll* case notes, "the young adults to whom the majority refers as 'kids' and 'children' are either already eligible or a few short years away from being eligible to vote, to contract, to marry, to serve in the military, and to be tried as adults in criminal prosecutions."[60]

Perhaps Justice Jackson put it best in *West Virginia State Board of Education v. Barnette* when he explained that school boards must operate

> within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind and its source and teach youth to discount important principles of our government as mere platitudes.[61]

Conclusion

It is probably obvious that we do not agree with what many of the students said in the examples above. And we acknowledge that, especially in a high school setting, controversial speech can turn into harassment, bullying, or threats, all of which are properly unprotected. But we do think that schools are missing out on teaching a vital lesson: that our nation was founded by a country of dissenters, both religious and political, and that we can survive—and

prosper—when we acknowledge, air, and discuss our divergent viewpoints, either to learn from each other or at least to learn to agree to disagree.

Endnotes

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5. For example, more students who are involved in media activities report personally thinking about the First Amendment (51 percent) than students who are not involved in any media activities (42 percent). Similarly, the survey shows that students who have taken more classes dealing with the First Amendment, the media, or journalism are more likely to think that newspapers should publish freely; and more students who have participated in their school newspaper believe that student papers should be free to report on controversial issues than do those who have not participated.

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44. *Id.* at 608. The panel had originally decided the case two-to-one in the student's favor; but on a petition for rehearing/rehearing en banc, one judge switched sides, and the case was decided two-to-one against the student. It is hard to imagine that the absence of any injury was so clear as to warrant an affirmance of summary judgment where the case was a sufficiently close call for the judge with the swing vote.

45. 526 F.3d 419 (9th Cir. 2008).

46. *Id.* at 442, 443 n.1, n.3 (Thomas, J., dissenting).

47. *Id.* at 441–42; *see also* Blau v. Fort Thomas Public Sch. Dist., 401 F.3d 381 (6th Cir. 2005) (no constitutional violation from Highlands middle school dress code that included prohibition on tops with writing on them and "logos larger than the size of a quarter . . . except 'Highlands' logos or other 'Highlands Spirit Wear'").

48. 527 F.3d 41 (2d Cir. 2008).

49. 478 U.S. 675 (1986).

50. *Id.* at 682–83 (referencing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969); Cohen v. Calif., 403 U.S. 15 (1971)).

51. 523 F.3d 668 (7th Cir. 2008); *see also* Harper *ex rel.* Harper v. Poway Unified Sch. Dist., 445 F.3d 1166 (9th Cir. 2006), *reh'g en banc denied*, 455 F.3d 1052 (9th Cir. 2006).

52. *Nuxoll*, 523 F.3d at 671–73.

53. *Id.* at 671.

54. Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 577 (7th Cir. 2001); *see also id.* ("The murderous fanaticism displayed by young German soldiers in World War II, alumni of the Hitler Jugend, illustrates the danger of allowing government to control the access of children to information and opinion.").

55. *Id.* at 577.

56. *Id.*

57. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512 (1969) (quoting Keyishian v. Bd. of Regents, 385 U.S. 589 (1967)) (citations omitted).

58. *Id.* at 508–09.

59. 355 F.3d 1048, 1055 (7th Cir. 2004) (citation omitted).

60. Nuxoll *ex rel.* Nuxoll v. Ind. Prairie Sch. Dist. No. 204, 523 F.3d 668, 678 (7th Cir. 2008) (Rovner, J., dissenting).

61. 319 U.S. 624, 637 (1943).