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## Freedom of Speech in School and Prison

Aaron H. Caplan

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## FREEDOM OF SPEECH IN SCHOOL AND PRISON

Aaron H. Caplan\*

*Abstract:* Students often compare their schools unfavorably to prisons, most often in a tone of rueful irony. By contrast, judicial opinions about freedom of speech within government-run institutions compare schools and prisons without irony or even hesitation. This Article considers whether the analogy between school and prison in free speech cases is evidence that the two institutions share a joint mission. At a macro level, there is an undeniable structural similarity between the constitutional speech rules for schools and prisons. At a micro level, however, there are subtle but significant differences between the two. These arise primarily from the judiciary's belief that differences exist between the purposes of schools and prisons—although, somewhat ominously, the differences appear even more subtle when comparing schools to jails. Just as judicial beliefs about social reality affect constitutional outcomes, the constitutional rules in turn affect social reality. Courts should be wary of language that equates schools with penal institutions, lest the analogy become a self-fulfilling prophecy.

|  |    |
|--|----|
| INTRODUCTION .....                         | 73 |
| I. MACRO-LEVEL SIMILARITIES .....          | 75 |
| II. MICRO-LEVEL DIFFERENCES.....           | 80 |
| A. Differences in Doctrine .....           | 80 |
| B. Differences in Application .....        | 83 |
| 1. Prior Restraint.....                    | 83 |
| 2. Vulgarity.....                          | 84 |
| 3. Defiance of Authority.....              | 85 |
| 4. Decisions with No Control Group .....   | 87 |
| C. Differences in Judicial Deference ..... | 88 |
| 1. Scope of Deference.....                 | 88 |
| 2. Reasons for Deference.....              | 90 |

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\* Associate Professor of Law, Loyola Law School Los Angeles; clerk to Judge Betty Binns Fletcher (1991–1992). This Article was inspired by Judge Fletcher's commitment to full and fair consideration of claims brought by all litigants—including unpopular litigants like prisoners bringing free speech actions. *See, e.g.,* Hargis v. Foster, 312 F.3d 404 (9th Cir. 2002); Murphy v. Shaw, 195 F.3d 1121 (9th Cir. 1999), *rev'd*, 532 U.S. 223 (2001); Mauro v. Arpaio, 147 F.3d 1137 (9th Cir. 1998), *rev'd en banc*, 188 F.3d 1054 (9th Cir. 1999). This Article benefitted from the ideas of Anne Bloom and the participants at the Washington Law Review and the University of Washington School of Law Symposium: *A Tribute to the Honorable Betty Binns Fletcher*. Special thanks to research assistants Omid Haghighat and Ari Dybnis.

III. HOW COURTS VIEW THE INSTITUTIONS ..... 94  
    A. Schools ..... 94  
    B. Prisons ..... 99  
    C. Schools as Jails ..... 101  
CONCLUSION ..... 104

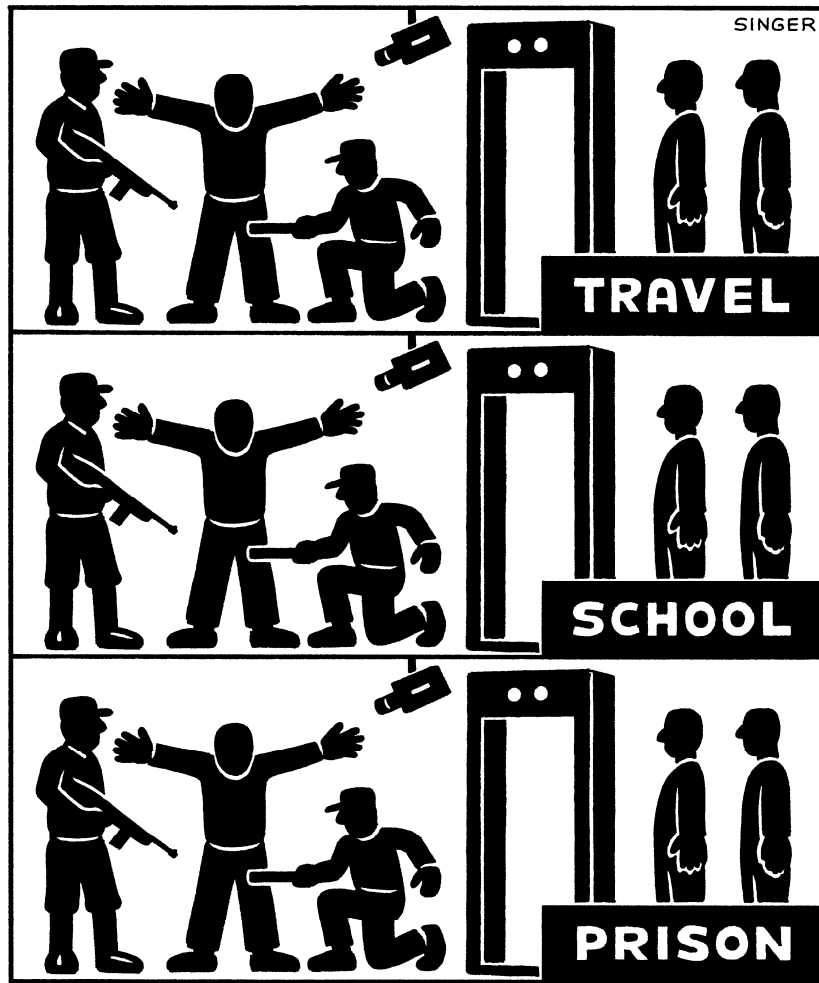


Figure 1 (© Andy Singer; reprinted with permission)

## INTRODUCTION

It is the rare public school student who has not at least once complained that her school is like a prison, with the principal as warden and the teachers as guards. The trope of school-as-prison appears regularly in popular culture, most often voiced in a tone of rueful irony. For example, in an obituary for actor Patrick McGoohan, a critic wrote that McGoohan's 1968 production *The Prisoner* was "the most important television series of my life" because "I was just then working out that my own junior high school was a kind of jail."<sup>1</sup> Andy Singer's cartoon succeeds as satire because most people believe that school is not supposed to be like prison. *Figure 1*. School is supposed to be a site of uplift and optimism, providing students with the mental and social tools to thrive as free citizens. Prison, by contrast, is the antithesis of freedom, a place to quarantine a deviant population for whom our best efforts at education, uplift, and optimism have failed. With these expectations, identifying similarities between the two institutions amounts to an implicit call for change.

By contrast, judicial opinions about freedom of speech compare schools and prisons without irony, and indeed without hesitation. Courts litter their decisions about prisoner speech with citations to decisions about student speech and vice versa. Many judges treat the analogy as if it were innately persuasive, requiring no special justification or explanation.

Michel Foucault would say the judges are onto something. In *Discipline and Punish*, Foucault traced the historical progression from medieval forms of punishment that exacted retribution on the body of the accused (think torture or public execution) to the modern practice of incarceration.<sup>2</sup> The shift was not, Foucault argued, evidence of evolving standards of decency. Rather, a well-developed prison system could simply be a more effective deterrent to wrongdoing by inculcating in prisoners the mental habits of discipline and subservience. Internalizing discipline in young minds is also, he believed, the essential function of the public school. Hence, it is no accident that the prison resembles the school, even down to its architecture: "Is it surprising," Foucault asked,

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1. Robert Lloyd, *McGoohan Really Had Our Number: The 'Prisoner' Actor's Indelible, Implacable Number 6 Lives On*, L.A. TIMES, Jan. 15, 2009, at E1.

2. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., Vintage Books 1979) (1977).

“that prisons resemble factories, schools, barracks, hospitals, which all resemble prisons?”<sup>3</sup>

This Article explores the analogy between school and prison in constitutional free speech cases. Is the analogy best understood as a mordant punch line or as evidence that the two institutions share a joint mission? In answering this question, I draw on a body of recent First Amendment scholarship debating the degree to which speech rules should operate differently within government-run institutions than they do in society at large.<sup>4</sup> The literature often addresses the trio of schools, prisons, and military bases together as prototypical institutions where speakers enjoy less constitutional protection.<sup>5</sup> The government workplace<sup>6</sup> and the courtroom<sup>7</sup> are also sometimes included. The similarities in judicial treatment across these institutions cause Professor Erwin Chemerinsky to lament that constitutional protections “apply least where they are needed the most.”<sup>8</sup> Professor Frederick Schauer, by contrast, believes courts should go further in “incorporating institutional realities and demarcations into the First Amendment.”<sup>9</sup>

A careful side-by-side comparison of speech doctrines for schools and prisons reveals some truth in both positions. Part I compares speech rules for schools and prisons at a macro level, concluding that commentators are correct to note a substantial structural similarity. Part II then turns to a micro-level comparison not undertaken in previous scholarly literature. This reveals that student speech seems to enjoy

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3. *Id.* at 228.

4. *E.g.*, Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821 (2008); Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 SUFFOLK U. L. REV. 441 (1999); Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061 (2008); Frederick Schauer, *Institutions as Legal and Constitutional Categories*, 54 UCLA L. REV. 1747 (2007).

5. *E.g.*, Stanley Ingber, *Judging Without Judgment: Constitutional Irrelevancies and the Demise of Dialogue*, 46 RUTGERS L. REV. 1473, 1548 (1994); Kevin Francis O’Neill, *A First Amendment Compass: Navigating The Speech Clause With A Five-Step Analytical Framework*, 9 SW. U. L. REV. 223, 291–96 (2000); Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1088 (2008); Robert Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1770 (1987); David M. Rabban, *A Functional Analysis of “Individual” and “Institutional” Academic Freedom Under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227, 248–49 (1990).

6. *E.g.*, Scott A. Moss, *Students and Workers and Prisoners—Oh My! A Cautionary Note About Excessive Institutional Tailoring of First Amendment Doctrine*, 54 UCLA L. REV. 1635, 1642, 1649–52 (2007).

7. *E.g.*, Jona Goldschmidt, “Order In The Court!”: *Constitutional Issues in the Law of Courtroom Decorum*, 31 HAMLIN L. REV. 1, 39 (2008).

8. Chemerinsky, *supra* note 4, at 441.

9. Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1279 (2005).

marginally more constitutional protection than prisoner speech, albeit in subtle ways.

With this description of the relevant legal doctrines in hand, Part III asks what about these institutions—or more specifically, what about judges’ perceptions of these institutions—contributes to the similar-yet-different constitutional outcomes. Tellingly, the constitutional rules for speech in school have changed over time, in parallel with the Supreme Court’s stated views about the purpose of public education. At times, the Court has seemingly accepted the Foucaultian thesis<sup>10</sup> that the goal of a public school is to create uniformly docile citizens; this belief leads to constitutional decisions acquiescing in suppression of student speech. At other times, the Court insists that schools exist to foster critical thinking and individuality, resulting in greater judicial protection for potentially disruptive student speech. A similar dynamic is harder to detect in prison speech cases, most likely because there is no comparable variation in judicial beliefs about the purposes of a prison. However, courts do recognize subtle differences between the institutions of prisons and jails, which raises an unsettling question: does the law treat speech in school the way it treats speech in jail?

This Article concludes with a reminder that institutional sensitivity in judicial opinions operates in two directions. Just as judicial beliefs about social realities affect constitutional outcomes, the resulting constitutional rules affect social reality. For this reason, courts should be wary of invoking language that equates schools with penal institutions, lest the analogy become a self-fulfilling prophecy.

## I. MACRO-LEVEL SIMILARITIES

Schools and prisons share many surface similarities. Both house populations that are relatively homogenous compared to the population at large. Both have clear hierarchies within their staffs, and between the staff and a subservient general population. Both populations have cultures against snitching. Both have cafeterias, recreation areas, and on-site infirmaries. Both limit access by outsiders. But do these similarities

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10. I use Foucault as a shorthand for the idea that a school’s function is to create a socially compliant populace, but he is not the only social critic to make the observation. Decades earlier, H.L. Mencken said the aim of public education “is simply to reduce as many individuals as possible to the same safe level, to breed and train a standardized citizenry, to put down dissent and originality.” Richard W. Garnett, *Can There Really Be “Free Speech” in Public Schools?*, 12 LEWIS & CLARK L. REV. 45, 56 n.73 (2008). Pink Floyd framed the issue in the couplet “We don’t need no education / We don’t need no thought control.” Or, in the words of an aphorism I once saw pinned to an office worker’s cubicle: “If you liked school, you’ll love work.”

of structure reflect a similarity of purpose? Those who presume—or at least hope—that the institutions serve different functions may be disconcerted at the ease with which court opinions analogize between speech in school and speech in prison.

The analogy sometimes reveals itself through the half-conscious process of selecting legal authorities for citation. When ruling on the speech rights of prisoners, judges frequently cite to cases about the speech rights of students. In *Procurier v. Martinez*<sup>11</sup> and *Pell v. Procurier*<sup>12</sup>—two early prison speech cases decided within one month of each other in 1974—Supreme Court opinions cited the leading case on student speech in high school, *Tinker v. Des Moines Independent Community School District*,<sup>13</sup> for the proposition that the First Amendment should be applied “in light of the special characteristics of the . . . environment” in which it is invoked.<sup>14</sup> There was no particular need for the Justices to cite school speech law for this proposition. They could just as easily have cited one of the oldest free speech chestnuts available, namely Justice Oliver Wendell Holmes’s influential hypothetical of “falsely shouting fire in a theater” as an illustration of the principle that “the character of every act depends upon the circumstances in which it is done.”<sup>15</sup> For good or ill, the urge to cite school speech decisions in prisoner speech cases continues to the present day. For example, the Seventh Circuit recently upheld a prison rule against drawing “gang symbols,” relying in part on cases approving similar rules for public schools.<sup>16</sup>

The analogy is also used in the opposite direction, with student speech cases citing prisoner speech cases as precedent. The Ninth Circuit recently held that a vice principal’s allegedly threatening words to a student were not actionable, in part because similar words said by a guard to a prisoner were found not actionable.<sup>17</sup> In deciding whether a Native American elementary student had a First Amendment right to wear long hair to school, a Texas court stated that “prison cases, while not controlling in the context of public schools, are instructive on the

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11. 416 U.S. 396 (1974).

12. 417 U.S. 817 (1974).

13. 393 U.S. 503 (1969).

14. *Procurier*, 416 U.S. at 409–10 (quoting *Tinker*, 393 U.S. at 506); *Pell*, 417 U.S. at 837 (Douglas, J., dissenting) (quoting *Tinker*, 393 U.S. at 506).

15. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

16. *Koutnik v. Brown*, 456 F.3d 777, 783–84 (7th Cir. 2006).

17. *Corales v. Bennett*, 567 F.3d 554, 564–65 (9th Cir. 2009) (citing *Gaut v. Sunn*, 810 F.2d 923, 925 (9th Cir. 1987)).

issue.”<sup>18</sup>

Indeed, students and prisoners sometimes make joint appearances in cases having nothing to do with the rights of either group. For example, in *City of Renton v. Playtime Theaters, Inc.*,<sup>19</sup> a case about zoning ordinances for theaters showing sexually explicit films, the Supreme Court combined *Tinker* (school) and *Procunier* (prison) in a string cite as support for the proposition that “the government can tailor its reaction to different types of speech according to the degree to which its special and overriding interests are implicated.”<sup>20</sup> Most recently, in *Citizens United v. Federal Election Commission*,<sup>21</sup> the Supreme Court embarked on a mighty string cite identifying “a narrow class of speech restrictions that operate to the disadvantage of certain persons . . . based on an interest in allowing governmental entities to perform their functions.”<sup>22</sup> The list included (in order) schools, prisons, the military, and the government workplace.<sup>23</sup> Lower courts have duly followed the Supreme Court’s lead. A Ninth Circuit case considering deportation procedures listed “schools” and “prisons” at the top of its list of “institutional settings with special needs,” although the case involved neither.<sup>24</sup> A Seventh Circuit decision involving teachers’ access to school buildings compared public school students to “other involuntary guests of the government, such as prison inmates.”<sup>25</sup>

On rare occasions, judges reveal discomfort over the analogy. In another case about teacher access to buildings, the First Circuit explained that “neither teachers, students, nor anyone else has an absolute constitutional right to use all parts of a school building for unlimited expressive purposes,” citing to cases about schools and prisons (and military bases).<sup>26</sup> Somewhat sheepishly, the court included a

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18. *Alab. & Coushatta Tribes of Tex. v. Trs. of Big Sandy Indep. Sch. Dist.*, 817 F. Supp. 1319, 1323–24, 1332 (E.D. Tex. 1993).

19. 475 U.S. 41 (1986), *rev’g* 748 F.2d 527 (9th Cir. 1984) (Fletcher, J.).

20. *Id.* at 49–50.

21. 558 U.S. \_\_\_, No. 08-205, 2010 WL 183856 (Jan. 21, 2010).

22. *Id.* at \*19.

23. *Id.*

24. *American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1052–53, 1066 (9th Cir. 1995) (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (school); *Turner v. Safley*, 482 U.S. 78 (1987) (prison)).

25. *May v. Evansville-Vanderburgh Sch. Corp.*, 787 F.2d 1105, 1112 (7th Cir. 1986) (Posner, J.) (citing *Procunier v. Martinez*, 416 U.S. 396 (1974) (prison); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (school)).

26. *Conn. State Fed’n of Teachers v. Bd. of Educ.*, 538 F.2d 471, 480 (1st Cir. 1976) (citing *Greer v. Spock*, 424 U.S. 828 (1976) (military base); *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (school); *Adderly v. Florida*, 385 U.S. 39 (1966) (prison)).



footnote that stated: “In citing [prison cases], we are aware that ‘a school is not like a hospital or a jail enclosure.’”<sup>27</sup> The court did not explain why, despite its awareness of this difference, it pursued the analogy anyway.

Beyond these citation choices, the analogy between school speech and prison speech finds expression in the governing legal standards. In its most famous passage, *Tinker* proclaimed that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>28</sup> The leading case on prisoner speech rights, *Turner v. Safley*,<sup>29</sup> said that “prison walls do not form a barrier separating prison inmates from the protections of the Constitution,”<sup>30</sup> echoing an earlier statement that “there is no iron curtain drawn between the Constitution and the prisons of this country.”<sup>31</sup> Having leaped these physical barriers in a single bound, however, the Constitution is drained by the effort. The Court tells us that “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings,”<sup>32</sup> and also that “a prison inmate retains [only] those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.”<sup>33</sup> Speech in these settings is subject to greater governmental restriction, but the government’s control is not absolute: administrators of both schools and prisons may not suppress speech merely out of disagreement with the speaker. Prison regulations must not constitute an “exaggerated response” to inmate speech,<sup>34</sup> and school discipline may not be based upon “undifferentiated fear or apprehension of disturbance”<sup>35</sup> or “a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”<sup>36</sup>

Lower courts have duly noted the parallels. “[T]he Supreme Court has recognized that the special demands placed on public school administrators, like the demands placed on prison administrators,

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27. *Id.* at 480 n.5 (1st Cir. 1976) (quoting *Tinker*, 393 U.S. at 512 n.6).

28. *Tinker*, 393 U.S. at 506.

29. 482 U.S. 78 (1987).

30. *Id.* at 84.

31. *Wolff v. McDonnell*, 418 U.S. 539, 555–56 (1974).

32. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 682 (1986).

33. *Pell v. Procunier*, 417 U.S. 817, 822 (1979).

34. *Turner*, 482 U.S. at 89–90.

35. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969).

36. *Id.* at 509.

necessitate special leeway.”<sup>37</sup> As a D.C. Circuit opinion dealing with prison speech explained:

Cases analyzing constitutional claims by those within governmental institutions such as prisons [and] public schools . . . often open with the axiom that the boundaries of those institutions do not separate inhabitants from their constitutional rights. This observation is invariably followed by the complementary principle that by their nature such environments must allow regulation more intrusive than what may lawfully apply to the general public. In these environments, the government is permitted to balance constitutional rights against institutional efficiency in ways it may not ordinarily do.<sup>38</sup>

The similarity of structure can express itself in the very words chosen to describe the legal standards. Where *Turner* asks whether prison speech regulations are “reasonably related to legitimate penological interests,”<sup>39</sup> *Hazelwood School District v. Kuhlmeier*<sup>40</sup> asks whether a principal’s decision to remove content from a school newspaper is “reasonably related to legitimate pedagogical concerns.”<sup>41</sup> Many commentators have commented on this mirror-image language in *Turner* and *Hazelwood*,<sup>42</sup> some calling it “striking”<sup>43</sup> or “virtually fungible.”<sup>44</sup>

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37. *Torres v. Wis. Dept. of Health & Human Servs.*, 859 F.2d 1523, 1534 (7th Cir. 1988) (Cudahy, J., dissenting). See also *Kikumura v. Hurley*, 242 F.3d 950, 964 (10th Cir. 2001) (Holloway, J., concurring in part) (implying resemblance between the *Turner* and *Tinker* standards).

38. *Amatel v. Reno*, 156 F.3d 192, 195 (D.C. Cir. 1998); see also *Bridges v. Gilbert*, 557 F.3d 541, 547–48 (7th Cir. 2009) (noting the same pattern).

39. 482 U.S. at 89.

40. 484 U.S. 260 (1988).

41. *Id.* at 273.

42. Clay Calvert, *Bylines Behind Bars: Fame, Frustration & First Amendment Freedom*, 28 LOY. L.A. ENT. L. REV. 71, 96–99 (2008); Kenneth Lasson, *Controversial Speakers on Campus: Liberties, Limitations, and Common-Sense Guidelines*, 12 ST. THOMAS L. REV. 39, 67 & n.135 (1999); James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335, 1368 n.102 (2000); Adam Samaha, *Litigant Sensitivity in First Amendment Law*, 98 NW. U. L. REV. 1291, 1314 & n.112 (2004). Looking at prison speech and school speech cases as a group, one writer claims that when the *Turner* and *Hazelwood* lines of cases are considered together, they “stand for the broad proposition that prisoners and public school students have few free speech rights worth protecting.” Jim Chen, *Embryonic Thoughts on Racial Identity as New Property*, 68 U. COLO. L. REV. 1123, 1143 n.134 (1997).

43. Lance D. Cassak, *Hearing The Cries Of Prisoners: The Third Circuit’s Treatment Of Prisoners’ Rights Litigation*, 19 SETON HALL L. REV. 526, 581 n.290 (1989) (“The equation of prisoners and students for constitutional purposes probably provides little comfort to either group.”).

44. Calvert, *supra* note 42, at 98.

## II. MICRO-LEVEL DIFFERENCES

The macro-level similarities are certainly a big story, but they are not the whole story. Beyond their structural resemblance, the speech rules for schools and prisons have some noteworthy differences in detail and emphasis. The dissimilarities reveal themselves in the formal legal doctrine, the application of that doctrine, and—perhaps most strikingly—in judicial discussions of the deference that is due to school and prison administrators. In subtle ways, current law conforms to the common expectation that school should be a more free place than prison. The difference between the two bodies of law is not as great as it could be, but a rank ordering does exist, within which prisons are allowed greater ability to restrict speech than schools.

### A. *Differences in Doctrine*

We should begin by debunking the “striking” parallel between prison speech restrictions that are “reasonably related to legitimate penological interests” under *Turner*<sup>45</sup> and school speech restrictions that are “reasonably related to legitimate pedagogical concerns” under *Hazelwood*.<sup>46</sup> These similarly worded standards apply to different ranges of speech within the institutions. With a few narrow exceptions,<sup>47</sup> the *Turner* standard applies “to all circumstances in which the needs of prison administration implicate constitutional rights.”<sup>48</sup> Thus it reaches all instances of speech by prisoners, as well as to prisoner attempts to exercise other rights, such as privacy or association.<sup>49</sup> The *Hazelwood*

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45. *Turner v. Safley*, 482 U.S. 78, 89 (1987). To decide whether a regulation satisfies this test, courts consider the connection between the regulation and the prison’s actual needs; the ability of the prisoner to exercise the restricted right in other ways; the adverse impact of any accommodation on others within the prison; and the existence of any ready alternative that might suggest that the restriction was an “exaggerated response.” *Id.* at 89–90.

46. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

47. Thus far, two exceptions have been recognized to the general statement that *Turner* controls every case involving constitutional rights of prisoners. First, *Turner* does not ratchet down the protections of the Eighth Amendment’s Cruel and Unusual Punishment Clause, since it applies uniquely to prisoners to begin with. *Jordan v. Gardner*, 986 F.2d 1521, 1530 (9th Cir. 1993). Second, *Turner* does not relax the equal protection prohibition against disparate treatment on the basis of race. *Johnson v. California*, 543 U.S. 499, 509–12 (2005).

48. *Washington v. Harper*, 494 U.S. 210, 224 (1990).

49. See, e.g., *Gerber v. Hickman*, 291 F.3d 617 (9th Cir. 2002) (right to procreate). The *Turner* standard was applied to free exercise of religion in *O’Lone v. Estate of Shabazz*, 482 U.S. 342 (1987). A more rights-protective standard now applies to prisoners’ free exercise claims under the Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000. 42 U.S.C. § 2000cc-1 (2006). See *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

standard, by contrast, applies only to “school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.”<sup>50</sup> Students’ self-sponsored speech enjoys much greater protection.<sup>51</sup> Finally, within its sphere of influence, the *Hazelwood* “pedagogical concerns” standard actually represents a limit on school administrators’ power over government-sponsored speech. Other government agencies enjoy near-plenary power to determine the content of their sponsored speech.<sup>52</sup>

The better comparison is between the two baseline rules expressed in *Turner* for prisoners and in *Tinker* for students. Unlike *Turner*, *Tinker* requires more than a merely legitimate reason to restrict student speech. The trial court in *Tinker* stated that school administrators have the power and also the “obligation to prevent anything which might be disruptive” of the educational process.<sup>53</sup> The Supreme Court rejected this notion, holding instead that schools may only restrict student speech that “materially and substantially interferes with the requirements of appropriate discipline in the operation of the school.”<sup>54</sup> Comparing these two baseline rules suggests that speech in school should enjoy more protection than speech in prison—the school must prove that the speech will cause a significant problem before any restriction is attempted.

Since *Tinker* was decided in 1969, the Supreme Court has announced a number of exceptions to its general rule. Schools need not show substantial disruption, the Supreme Court has said, to censor school-sponsored newspapers,<sup>55</sup> or to punish students for on-campus remarks that are sexually suggestive or vulgar<sup>56</sup> or that could reasonably be perceived as advocating illegal drug use.<sup>57</sup> A debate has long waged as to whether these cases represent exceptions to *Tinker* or repudiations of

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50. 484 U.S. at 271.

51. *Fleming v. Jefferson County Sch. Dist.*, 298 F.3d 918, 933 (10th Cir. 2002) (contrasting student speech with school-sponsored speech).

52. *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 562 (2005); *Rust v. Sullivan*, 500 U.S. 173, 193–94 (1991).

53. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 258 F. Supp. 971, 972 (S.D. Iowa 1966).

54. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (1966)). For a more thorough discussion of the *Tinker* standard, see Aaron H. Caplan, *Public School Discipline for Creating Uncensored Anonymous Internet Forums*, 39 WILLAMETTE L. REV. 93, 120–31 (2003).

55. *Hazelwood*, 484 U.S. at 272–73.

56. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685–86 (1986).

57. *Morse v. Frederick*, 551 U.S. 393, 397 (2007).

it.<sup>58</sup> This debate seems likely to continue in light of the Supreme Court's recent statement in *Morse v. Frederick*<sup>59</sup> (the "BONG HITS 4 JESUS" case) that "the mode of analysis set forth in *Tinker* is not absolute."<sup>60</sup> If Justice Alito's concurrence in *Morse* is to be believed, there are no new exceptions waiting in the wings.<sup>61</sup> If Justice Thomas's concurrence is to be believed, ad hoc exceptions will proliferate because "our jurisprudence now says that students have a right to speak in schools except when they don't."<sup>62</sup> Whatever changes may be in the offing for student speech protections, for present purposes the point remains that students enjoy a more-protective baseline rule subject to less-protective exceptions, while prisoner speech has a less-protective baseline rule that to date has not been subjected to any more-protective exceptions.

This comparison of baseline rules suggests that a speech restriction that would be excessive for prisoners would, by definition, be excessive for students. This reasoning was employed in *Big Sandy*,<sup>63</sup> where a district court relied on prison cases to require a Native American religious exception to a school's ban on long hair for male students.<sup>64</sup> "[S]everal courts have found viable alternatives to hair length restrictions in prison cases . . . . Surely, school officials can likewise implement alternatives which pass constitutional muster."<sup>65</sup>

At the very least, a court choosing to uphold treatment of a student that would not be allowed for a prisoner will have some explaining to do. The need for such an explanation occurred in *Ingraham v. Wright*,<sup>66</sup> where a majority of the Supreme Court held that the Eighth Amendment cruel and unusual punishment clause did not apply to corporal

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58. See Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of Tinker*, 48 DRAKE L. REV. 527 (2000); Jennifer A. Giuttari, *Morse v. Frederick: Locking The "Schoolhouse Gate" On The First Amendment*, 69 MONT. L. REV. 447, 460 (2008); Mark Yudof, *Tinker Tailored: Good Faith, Civility, and Student Expression*, 69 ST. JOHN'S L. REV. 365, 367-68 (1995).

59. 551 U.S. 393 (2007).

60. *Id.* at 396, 405. This passage may be the most far-reaching aspect of the *Morse* opinion. Aaron H. Caplan, *Visions of Public Education In Morse v. Frederick*, 3 J. OF EDUC. CONTROVERSY 1 (2008), <http://www.wce.wvu.edu/Resources/CEP/eJournal/v003n001/a013.shtml>, also available at <http://ssrn.com/abstract=1201869>.

61. *Morse*, 551 U.S. at 425 (Alito, J., concurring).

62. *Id.* at 418 (Thomas, J., concurring).

63. *Ala. & Coshatta Tribes of Tex. v. Trs. of Big Sandy Indep. Sch. Dist.*, 817 F. Supp. 1319 (E.D. Tex. 1993).

64. *Id.* at 1332.

65. *Id.* at 1333 (citation omitted).

66. 430 U.S. 651 (1977).

punishment in a public school.<sup>67</sup> A vigorous dissent decried the result, saying that punishments that are too barbaric for convicted criminals must by definition be too barbaric for school children.<sup>68</sup> The majority felt obliged to respond to the charge, evidently fearing that its textual and historical review of the Eighth Amendment was not enough.<sup>69</sup> The seemingly anomalous result decried by the dissent was acceptable, said the majority, because “[t]he schoolchild has little need for the protection of the Eighth Amendment.”<sup>70</sup> The majority reasoned that students are not likely to be beaten as badly as prisoners are, and because students leave school at the end of the day and are usually surrounded by witnesses, severe school beatings will be quickly discovered and redressed through tort suits.<sup>71</sup> Whatever one thinks of this logic, it is notable that the *Ingraham* majority did not argue that it actually would be acceptable to treat students worse than prisoners.

### B. *Differences in Application*

To know what the words of a legal doctrine really mean, one must see it applied in practice. In the right hands, even a standard designed to be lenient (like “legitimate penological purpose”) may impose a significant limit on governmental action.<sup>72</sup> Therefore, we should consider how the *Turner* and *Tinker* standards have been applied on analogous facts.

#### 1. *Prior Restraint*

Prisons routinely screen incoming mail—both letters from individuals and publications, such as magazines and books—and refuse to deliver mail that is deemed inimical to the institution. The dangers may come in the form of physical contraband, such as drugs, cash, or weapons hidden in the package.<sup>73</sup> Or the danger may come from the information itself, such as plans for escape or other information detrimental to prison

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67. *Id.* at 664.

68. *Id.* at 684 (White, J., dissenting).

69. *Id.* at 668–70 (majority opinion).

70. *Id.* at 670.

71. *Id.*

72. For example, Judge Fletcher once argued in an Eighth Amendment case that “a bare desire to exact blood vengeance from the perpetrator of a crime, harbored and nursed along over the course of years and decades” is not a “legitimate penological goal.” *Ceja v. Stewart*, 134 F.3d 1368, 1375 (9th Cir. 1998) (Fletcher, J., dissenting).

73. *E.g.*, *Crofton v. Roe*, 170 F.3d 957, 960 (9th Cir. 1999).

security.<sup>74</sup> As a result, screening of prisoner mail for content is routinely upheld in the interests of prison security.<sup>75</sup>

The same security concerns are not present in a school setting. Students are therefore free to bring whatever communicative materials they wish to school without prior restraint, subject only to subsequent punishment if the material causes substantial on-campus disruption.<sup>76</sup> A mostly unbroken string of court decisions from the heyday of the underground newspaper movement uphold students' rights not only to publish outside of school, but also to bring their writings on campus with the presumption of legitimacy.<sup>77</sup>

## 2. *Vulgarity*

Most lower court opinions have interpreted *Bethel School District v. Fraser*<sup>78</sup> to mean that a school's "interest in teaching students the boundaries of socially appropriate behavior"<sup>79</sup> justifies punishment for vulgarity or sexual innuendo delivered in inappropriate school settings, such as a salacious nomination speech delivered during a school assembly.<sup>80</sup> One might expect that a prison, segregated by sex and filled with adult convicted felons, would tolerate a much higher level of vulgarity and sexual content. Indeed, it is likely that prison administrators let most instances of vulgar prisoner speech slide without taking disciplinary action. But when prison rules against vulgarity exist and are challenged, they are often upheld. For example, a prisoner who complained that he was tired of "chickenshit rules" could be disciplined for "vulgar or insolent language" in order to teach inmates to comport themselves in a decent, mature, and civil manner.<sup>81</sup> More often, however, curbs on prisoners' vulgar speech are justified not for educational or rehabilitative purposes, but because of the risk that such speech could erode discipline or lead to violence (even if the speech

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74. *E.g.*, *Procunier v. Martinez*, 416 U.S. 396, 413 (1974).

75. *E.g.*, *Thornburgh v. Abbott*, 490 U.S. 401, 404, 415 (1989).

76. *Burch v. Barker*, 861 F.2d 1149, 1159 (9th Cir. 1988). *But see* *Bystrom v. Fridley High Sch.*, 822 F.2d 747, 755 (8th Cir. 1987).

77. *See, e.g.*, *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1049–50 (2d Cir. 1979); *Shanley v. Ne. Indep. Sch. Dist.*, 462 F.2d 960, 967–68 (5th Cir. 1972); *Scoville v. Bd. of Educ.*, 425 F.2d 10, 15 (7th Cir. 1970).

78. 478 U.S. 675 (1986).

79. *Id.* at 681.

80. *See* Caplan, *supra* note 54, at 131–34; *see also* *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 531–33 (9th Cir. 1992) (Goodwin, J., concurring).

81. *Durkin v. Taylor*, 444 F. Supp. 879, 880, 883 (E.D. Va. 1977).

does not meet the constitutional definitions of incitement or fighting words). Thus, male inmates who direct vulgar or sexually explicit comments toward female prison staff may be punished,<sup>82</sup> and prison rules against vulgar language generally have been upheld on their face.<sup>83</sup>

But the precedents are not unanimous on this point. Some courts refuse to accept a prison's assertions that prisoner vulgarity poses a genuine security problem. In *McNamara v. Moody*,<sup>84</sup> a prisoner wrote a letter to his girlfriend speculating that the mailroom staff reading his outgoing mail were masturbating and having sex with cats.<sup>85</sup> The Fifth Circuit held that no genuine threat to prison security was at stake, only disapproval of the prisoner's speech.<sup>86</sup> The Eighth Circuit used similar reasoning to overturn discipline of a prisoner who wrote a letter to his brother complaining that the mailroom screener was "a beetle-eyed bit . . . who enjoys reading people's mail," and who hoped "to read a letter . . . talking dirty sh—, so she could go in the bathroom and masturbate."<sup>87</sup> Because the intemperate language did not implicate "security concerns,"<sup>88</sup> discipline for such a letter violated the First Amendment.<sup>89</sup> These cases may well be anomalies best explained by the fact that the vulgarities were contained in letters directed outside the prison, and not hurled orally in the face of prison staff in conditions that might result in loss of face.

### 3. *Defiance of Authority*

The vulgar speech most likely to lead to prison discipline is speech directed at those in authority. The prison vulgarity cases described above probably have more to do with protecting prison staff from challenges to their authority than with protecting them from naughty words. Indeed, one would read the advance sheets in vain to search for a case in which a prisoner is punished for vulgar speech directed at another prisoner.

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82. See, e.g., *Jackson v. Onondaga County*, 549 F. Supp. 2d 204, 208 (N.D.N.Y. 2008) (prisoner calls guard "ugly" and uses profanity); *Kirsch v. Franklin*, 897 F. Supp. 1173, 1175 (E.D. Wis. 1995) (prisoner propositions female staff); *Mujahid v. Apao*, 795 F. Supp. 1020, 1022 (D. Haw. 1992) (prisoner makes sexually explicit comments to staff nurse).

83. See, e.g., *Gibbs v. King*, 779 F.2d 1040, 1045 (5th Cir. 1986); *Ustrak v. Fairman*, 781 F.2d 573, 580 (7th Cir. 1986).

84. 606 F.2d 621 (5th Cir. 1979).

85. *Id.* at 623.

86. *Id.* at 624.

87. *Loggins v. Delo*, 999 F.2d 364, 365 (8th Cir. 1993) (redactions in original).

88. *Id.* at 367.

89. *Id.*



Schools, by comparison, are more likely to discipline students for insults against other students. (In recent years, more attention has properly been paid to the role of school staff in eradicating a culture of school bullying. School discipline for this purpose is generally considered proper, as reflected in the fact that so few students bother to go to court to challenge that sort of discipline.)

For a school or a prison to punish speech in defiance of authority is a clear deviation from ordinary free speech principles that give special protection to speech criticizing governmental authority.<sup>90</sup> In addition, speech aimed directly at government officials implicates the First Amendment right to petition for redress of grievances. The more clear it is that a student (or a prisoner) is expressing a substantive point whose political content can be readily perceived, the more likely it is that a court will overlook any vulgarity or insolence it contains. Thus, students who wore black armbands to protest a new school dress code stated a claim,<sup>91</sup> as did students who attempted to organize a boycott of a school's annual chocolate sale for the same purpose.<sup>92</sup> Students are allowed to wear t-shirts criticizing a school's disciplinary decisions<sup>93</sup> and to wear buttons supporting a striking teacher's union that read, "I'm not listening, scab."<sup>94</sup> Courts have also upheld students' rights to gather signatures on actual petitions.<sup>95</sup> But if the student's language veers into threatening language not clearly aimed at airing grievances, discipline may still result.<sup>96</sup>

On occasion, courts will also strike down prison discipline that has potential to chill the expression of legitimate grievances. When a prison issued an infraction against a prisoner for complaining to a guard about the guard's refusal to accommodate the prisoner's disability, the prisoner

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90. *See* *Houston v. Hill*, 482 U.S. 451, 453, 466–67 (1987) (First Amendment protects right to verbally challenge police); *Watts v. United States*, 394 U.S. 705, 707–08 (1969) (First Amendment protects political hyperbole that contains violent imagery about shooting the President); *N.Y. Times v. Sullivan*, 376 U.S. 254, 283 (1964) (First Amendment protects some false statements made about public officers).

91. *Lowry v. Watson Chapel Sch. Dist.*, 508 F. Supp. 2d 713, 722 (E.D. Ark. 2007).

92. *Hatter v. L.A. City High Sch. Dist.*, 452 F.2d 673, 674 (9th Cir. 1971).

93. *Latour v. Riverside Beaver Sch. Dist.*, No. Civ.A 05-1076, 2005 WL 2106562, at \*2–3 (W.D. Pa. Aug. 24, 2005).

94. *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 526, 530 (9th Cir. 1992).

95. *Pinard v. Clatskanie Sch. Dist.*, 467 F.3d 755, 764 (9th Cir. 2006). *But see* *Walker-Serrano v. Leonard*, 325 F.3d 412, 418 (3rd Cir. 2003) (no right for elementary school students to circulate petition).

96. *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 374 (9th Cir. 1996); *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 869 (Pa. 2002).

was found to state a triable free speech claim.<sup>97</sup> In another case, a prison rule against using “hostile, sexual, abusive or threatening” language in prison was upheld on its face, but was found to violate the First Amendment as applied to an inmate grievance complaining that a guard “shows her misuse of her authority and her psychological disorder needs attention.”<sup>98</sup> The prison vulgarity rule could not be used to punish criticism of government agents. “Prisoners should be allowed to file grievances within the prison system without fear of being sanctioned for an unhappy choice of words, except to the extent that [the words include] criminal threats.”<sup>99</sup> More typical, however, are cases upholding discipline against insolent prisoner speech.<sup>100</sup>

#### 4. *Decisions with No Control Group*

The speech that tends to be restricted in school is not necessarily the same speech that tends to be restricted in prison. Many of the prison speech cases, for example, deal with restrictions on mail delivery between prisoners and outsiders.<sup>101</sup> No school speech cases address this question, since students do not receive their mail at school. Cases that refuse to recognize a right of the press to enter prison grounds to interview prisoners<sup>102</sup> have no counterpart at school, since journalists may interview students at home. In the other direction, prisons tend not to sponsor newspapers staffed by prisoners, so there is no prison counterpart to *Hazelwood*.<sup>103</sup> And because most prisons do not allow internet access, there have yet to be reported decisions involving discipline for prisoners’ online speech, in contrast to the growing docket of student internet speech cases.<sup>104</sup>

Even when imposing discipline for a similar reason (such as vulgarity or insolence), school and prison administrators may have different thresholds for action. For example, the preceding section found a higher rate of cases upholding the right to challenge institutional officials in a

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97. *Hargis v. Foster*, 312 F.3d 404, 408 (9th Cir. 2002) (Fletcher, J.).

98. *Bradley v. Hall*, 64 F.3d 1276, 1278 (9th Cir. 1995).

99. *Id.* at 1279 (quoting *Bradley v. Hall*, 911 F. Supp. 446, 450 (D. Or. 1994)).

100. *E.g., In re Parmelee*, 115 Wash. App. 273, 287, 63 P.3d 800, 807 (Ct. App. 2003).

101. *See, e.g., Beard v. Banks*, 548 U.S. 521 (2006); *Thornburgh v. Abbott*, 490 U.S. 401 (1989); *Turner v. Safley*, 482 U.S. 78 (1987); *Procurier v. Martinez*, 416 U.S. 396 (1974).

102. *See, e.g., Houchins v. KQED, Inc.*, 438 U.S. 1 (1978); *Pell v. Procurier*, 417 U.S. 817 (1974); *Saxbe v. Wash. Post Co.*, 417 U.S. 843 (1974).

103. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). In the absence of internal outlets, some prisoners contribute material to outside publications. *See also Calvert, supra* note 42.

104. *See Caplan, supra* note 54; *Papandrea, supra* note 5.

school setting than in a prison setting. This might be seen as evidence that courts are more interested in protecting students' rights to this type of speech. However, it could also mean that the same legal protection applies, but that school administrators with a lower tolerance for disobedience are more likely to violate it.

We are left to conduct thought experiments to try to determine how courts would resolve directly comparable cases in areas where they have not arisen on their own. For example, there do not appear to be any cases involving prisoners disciplined under a *Morse*-type rule barring speech that could be interpreted as advocating illegal drug use.<sup>105</sup> This is most likely because prison administrators have bigger fish to fry. But I predict most courts would uphold such discipline if a warden were to argue that legitimate penological interests existed, such as the state's interests in lowering in-prison demand for contraband and in reforming drug abusers. Similarly, a hypothetical prison-sponsored newspaper would likely be subject to at least as much editorial censorship as a school-sponsored newspaper.

### C. *Differences in Judicial Deference*

The most visible difference between school and prison speech cases may be found in their discussions of judicial deference. Although the comparison is by necessity impressionistic, courts seem to place far more emphasis on deference to institutional authority in cases involving prisons and comparatively less in cases involving schools.<sup>106</sup>

#### 1. *Scope of Deference*

When explaining why prisoners' rights receive less protection than

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105. See *Morse v. Frederick*, 551 U.S. 393 (2007).

106. One author's impressionistic sense is that the deference courts show to prison and school administrators are roughly congruent. Scott Moss, *Reluctant Judicial Factfinding: When Minimalism and Judicial Modesty Go Too Far*, 32 SEATTLE U. L. REV. 549, 554–59 (2009). For its part, Congress seems to believe judicial deference is more important in prisoner rights cases. The Prison Litigation Reform Act of 1995 was aimed specifically at the perceived problem of insufficient judicial deference to prison administrators, and imposes both procedural and substantive requirements that make it harder for a court to rule in a prison conditions case. Pub. L. No. 104-134, 110 Stat. 1321-71 (codified at 42 U.S.C. § 1997e(a)–(g) (2006)). No similar statute limits the ability of courts to hear constitutional complaints of students. Indeed, several statutes expressly authorize judicial review of educational decisions. See Individuals with Disabilities Education Act, 20 U.S.C. § 1400 (2006); Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (2006); Equal Access Act, 20 U.S.C. § 4071 (2006); see generally Aaron H. Caplan, *Stretching the Equal Access Act Beyond Equal Access*, 27 SEATTLE U. L. REV. 273, 300–01 (2004) (discussing the congressional choice to create a cause of action within the Equal Access Act).

those of non-incarcerated persons, courts very frequently turn to theories of judicial deference. The Supreme Court has stated that “prison administrators . . . and not the courts, [are] to make the difficult judgments concerning institutional operations.”<sup>107</sup> Prison management decisions “are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters.”<sup>108</sup>

By contrast, overt statements about deference to school administrators are harder to find. Perhaps the most extended effort to instill an ethic of deference came in Justice Frankfurter’s opinion in *Minersville School District v. Gobitis*,<sup>109</sup> which asserted that “the courtroom is not the arena for debating issues of educational policy.”<sup>110</sup> This view was rejected by a majority of the Court when *Gobitis* was overturned by *West Virginia State Board of Education v. Barnette*<sup>111</sup> only three years later:

The [Constitution] protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous [judicial] protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.<sup>112</sup>

Justice Frankfurter’s cries for deference to school administrators were relegated to a fretful dissent in *Barnette*,<sup>113</sup> and no subsequent Supreme Court decision about student speech rights has restated it at similar length or intensity.

The closest the Supreme Court has come to a renewed discussion of deference to school administrators is *Wood v. Strickland*,<sup>114</sup> which held

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107. *Jones v. N.C. Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 128 (1977).

108. *Pell v. Procunier*, 417 U.S. 817, 827 (1974). For other statements about the importance of deference to prison officials, see *Beard v. Banks*, 548 U.S. 521, 528 (2006); *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003); *Procunier v. Martinez*, 416 U.S. 396, 404–05 (1974).

109. 310 U.S. 586 (1940).

110. *Id.* at 598.

111. 319 U.S. 624 (1943).

112. *Id.* at 637.

113. *See id.* at 656–58 (Frankfurter, J., dissenting).

114. 420 U.S. 308 (1975).

that federal courts should not be in the business of correcting school districts' errors of interpretation of their own disciplinary regulations.<sup>115</sup> At the same time, the majority made clear that no similar deference would be forthcoming where a student's allegations "rise to the level of violations of specific constitutional guarantees."<sup>116</sup> A partial dissent complained that the Court "appears to impose a higher standard of care upon public school officials, sued under § 1983, than that heretofore required of any other official."<sup>117</sup>

Language about deference in modern school speech opinions usually takes the form of a quick aside, while the main focus is elsewhere. For example, *Bethel* mentions that punishment of student speech "properly rests with the school board,"<sup>118</sup> but the overall tenor of the opinion is a condemnation of Fraser's off-color nomination speech and praise for the decision to punish it. Similarly, *Morse* mentions that the principal had to make a split-second decision whether to punish the students who hoisted the BONG HITS 4 JESUS banner,<sup>119</sup> but the discussion is more in the nature of a qualified immunity analysis than to suggest that the court was declining to decide whether the banner merited punishment. The primary impression left by most recent cases is not so much that the Court is deferring to school disciplinary decisions, but that it agrees with them.<sup>120</sup>

## 2. *Reasons for Deference*

School and prison opinions also express different views about why deference is appropriate. The prison cases assert arguments that are familiar from any setting where judges do not wish to overturn decisions of other governmental entities. Prisons are creatures of the legislative and executive branches, these opinions say, so deference should be

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115. *Id.* at 326.

116. *Id.*

117. *Id.* at 327 (Powell, J., dissenting in part).

118. 478 U.S. 675, 683 (1986). A similar pattern can be seen in *Hazelwood*, where the court's opinion seems more interested in expressing agreement with the censorship decision than with elaborating on the "oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." 484 U.S. 260, 273 (1988).

119. *Morse v. Frederick*, 551 U.S. 393, 410 (2007).

120. On the distinction between deference and agreement, see Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1072-78 (2008). Interestingly, there is no discussion of deference in the series of cases reviewing school officials' decisions to allow or disallow access to school grounds for expressive purposes. See *Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98 (2001); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Westside Cmty. Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990).

afforded out of respect for separation of powers.<sup>121</sup> Where state prisons are involved, federal courts should defer for reasons of federalism.<sup>122</sup> Or when push comes to shove, managing prisons is simply not the court's job.<sup>123</sup>

But beyond these standard arguments for judicial deference, one justification is voiced more regularly and with greater pride of place than any of the others: running a prison is difficult. The task involves "Herculean obstacles" that "are too apparent to warrant explication."<sup>124</sup> As a result, "the problems of prisons in America are complex and intractable."<sup>125</sup> The sheer difficulty of the task is commonly described as the primary reason for judicial deference:

[T]he problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.<sup>126</sup>

Deference is considered appropriate because "courts are ill equipped to deal with" the difficulty of prison management.<sup>127</sup> The task is so hard, in fact, that "[j]udicial scrutiny of prisoner regulations is an endeavor fraught with peril."<sup>128</sup> By contrast, the difficulty of the school disciplinarian's job is virtually never raised as a justification for deference even in those school speech opinions that mention deference as a virtue.

Is it really true that running a prison is so much harder than running a school? Or that it is so much more foreign to the expertise of the judge? Of all executive functions, running the prison may be the one most closely connected to the judicial role, as the courtroom is a necessary gateway to incarceration. Even if running a prison were uniquely difficult, deciding cases and controversies in which the parties may be engaged in complex or difficult tasks is a standard part of a judge's job.

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121. *Turner v. Safley*, 482 U.S. 78, 85 (1987).

122. *Sandin v. Conner*, 515 U.S. 472, 482 (1995).

123. *Id.* at 482 (decrying "the involvement of federal courts in the day-to-day management of prisons, often squandering judicial resources with little offsetting benefit to anyone"); *Turner*, 482 U.S. at 84; *Procunier v. Martinez*, 416 U.S. 396, 405 (1974).

124. *Procunier*, 416 U.S. at 404.

125. *Id.* at 404-05.

126. *Bell v. Wolfish*, 441 U.S. 520, 547 (1974); *see also Turner*, 482 U.S. at 84.

127. *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 126 (1977).

128. *Beard v. Banks*, 548 U.S. 521, 536 (2006) (Thomas, J., concurring).

To take but one example, a senior judge on the Ninth Circuit might, throughout her career, decide cases involving such difficult endeavors as wildlife management,<sup>129</sup> human resources management,<sup>130</sup> or computer cryptography.<sup>131</sup>

I suspect that the palpably different volume and content of deference language in school and prison cases may flow from the needs of yet another institution: the judiciary itself. Prisoner cases are less appealing to adjudicate than student cases. Much of this stems from the vastly greater volume of prisoner litigation. Although prison speech cases were not tracked separately, 32.3% of all civil appeals to the Ninth Circuit Court of Appeals in 2008 involved prisoners.<sup>132</sup> This far outstrips appeals brought by other private parties.<sup>133</sup> At the trial court level, federal judicial districts that are home to large prison populations can expect even more: for the Eastern District of California, prisoner petitions amount to 41.6% of the district's total case load.<sup>134</sup> By contrast, student-rights litigation is such a small portion of the case load that the Ninth Circuit does not bother to track it separately.

Consider the litigation obstacles and incentives for each group. Except in unusual circumstances, school discipline for speech tends to be short-term suspension from school. A student upset with a school's disciplinary proceedings is ordinarily not able to obsess over the grievance too much, as the rest of life competes for the student's attention. Students are unlikely to litigate without support from their families, and families have many reasons not to escalate into litigation: parents may agree with the discipline; job and family obligations compete for parents' available time; and parents may worry that one child's litigation might adversely affect relationships for other children still enrolled in the school system. Then there is the out-of-pocket cost: hiring a lawyer is a practical necessity for student rights litigation, as the

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129. *Natural Res. Def. Council, Inc. v. Winter*, 518 F.3d 658 (9th Cir. 2008) (Fletcher, J.), *rev'd*, 555 U.S. \_\_\_, 129 S. Ct. 365 (2008).

130. *Johnson v. Transp. Agency of Santa Clara County*, 770 F.2d 752 (9th Cir. 1984) (Fletcher, J.), *aff'd*, 480 U.S. 616 (1987).

131. *Bernstein v. U.S. Dept. of Justice*, 176 F.3d 1132 (9th Cir. 1999) (Fletcher, J.). Judge Fletcher so excelled in the art and science of cryptography that a writer said of her: "Judge Fletcher was a cypherpunk in robes!" STEPHEN LEVY, *CRYPTO: HOW THE CODE REBELS BEAT THE GOVERNMENT* 302 (2001).

132. NINTH CIRCUIT COURT OF APPEALS, UNITED STATES COURTS 2008 ANNUAL REPORT 41 (2008) [hereinafter ANNUAL REPORT], available at <http://www.ce9.uscourts.gov/publications/AnnualReport2008.pdf>.

133. *Id.* at 42.

134. *Circuit Responds to Influx of Prisoner Petitions*, *in id.* at 23.

students themselves do not have the maturity or the legal training to represent themselves.

A prisoner with a grievance, on the other hand, has plenty of time to focus on the injury, as daily prison life offers far fewer attractive distractions. There is less need to obtain counsel, because the prisoner has ample time to work on briefs and there may be writ-writers in residence to provide pointers.<sup>135</sup> The prison litigant need not enlist family members as allies, and there is no reason to worry that the litigation could damage otherwise valuable ongoing relationships with prison authorities. Although the Prison Litigation Reform Act imposes some procedural hurdles, in forma pauperis status is usually granted so filing fees are not a barrier. Overall, other than the time and effort involved, there is little downside to litigating. Indeed, the litigation can provide some much-needed direction and purpose for the prisoner. (I do not mean to suggest that cases brought by prisoners are inherently meritless, only to explain why prisoner litigation greatly outnumbers student litigation, even though students outnumber prisoners.)

In light of these realities, many judges will understandably feel that adjudicating prisoner claims is less enjoyable than adjudicating student claims. The prisoner cases present a never-ending stream of low-priority decisions that take time away from more interesting fare. As a group, they blend together and lack a sense of drama. The briefs tend to be amateur at best, baffling at worst, and some of them may even be handwritten.<sup>136</sup> Oral argument presents logistical headaches. By contrast, student cases are a novelty, a break from the typical case load. The parties are represented by counsel. All of those involved in deciding the case (including the court staff and judicial clerks) can relate to the facts, through memories of their own student years, or those of their children. The press may be interested in the dispute. Overall, school cases are much more fun to decide. All of this matters when it comes to judicial deference. Deferring to prison authorities is an attractive option when dealing with a large group of tedious cases whose volume one would like to reduce. Deferring to school authorities does little more than remove a tiny number of attractive cases from the docket.

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135. Rules forbidding prisoners from helping each other with their legal documents are unconstitutional, *Johnson v. Avery*, 393 U.S. 483, 490 (1969), but a prison need not create special exemptions to otherwise valid rules in order to facilitate such assistance, *Shaw v. Murphy*, 532 U.S. 223, 231 (2001).

136. According to the Ninth Circuit's Annual Report: "Most prisoner petitions are filed pro se, or without benefit of counsel, and generally require more time and effort to process." *Circuit Responds to Influx of Prisoner Petitions*, in ANNUAL REPORT, *supra* note 132, at 23.



Even if my musings about the willingness of courts to use deference doctrines as a method of docket control are wrong, there remains one other factor that may explain why school and prison cases are written differently. The main audience for prisoner speech opinions (in addition to the parties, counsel, and other judges) will be prisoners eager to use a favorable opinion as ammunition in support of potential future litigation. By contrast, the readers of student speech opinions include (in addition to the parties, judges, and lawyers) other students, educators, and—if the opinion draws press attention—the general public. These cases feel like teaching moments, a fact that may explain why so many school speech opinions devote considerable attention to describing the court’s vision of public education. The public, moreover, is accustomed to the notion that courts will rule on the merits of school-related disputes. Even without formal legal training, many citizens know that the Supreme Court ordered desegregation of the schools in *Brown v. Board of Education*<sup>137</sup> and that it forbade government-sponsored prayer in schools in the early 1960s.<sup>138</sup> The public expects a decision. For this audience, the deference message—“it’s not our job”—will be far less persuasive.

### III. HOW COURTS VIEW THE INSTITUTIONS

Part I explained that courts afford less constitutional protection to speech within schools and prisons than to speech in society at large. Part II documented subtle but persistent differences in the speech rules for these two institutions. This Part asks what it is about those institutions—at least as judges perceive them—that might create those patterns.

#### A. *Schools*

Supreme Court decisions involving the speech rights of public school students seem to take affirmative delight in expounding upon the purpose of the public school. The flag salute cases of the early 1940s—*Gobitis* and *Barnette*—nicely reveal how a court’s beliefs about an institution will affect the law it applies to that institution.

The Court first considered the speech rights of public school students in a pair of cases in which Jehovah’s Witnesses raised religious objections to reciting the Pledge of Allegiance. In *Gobitis*, the Court

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137. 347 U.S. 483 (1954).

138. See *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1962); *Engel v. Vitale*, 370 U.S. 421 (1961).

voted eight to one to uphold the expulsion of Witness children from their Pennsylvania public school for their refusal to recite the Pledge.<sup>139</sup> The Court acknowledged that reasonable people might disagree on whether mandatory recitation of the Pledge is a good idea, but asserted that “the courtroom is not the arena for debating issues of educational policy.”<sup>140</sup> Although it professed not to take sides in curricular matters, the majority opinion in fact endorsed a very specific vision of the educational mission, in which the highest purpose of public school is to instill an ethic of patriotic conformity.<sup>141</sup> The majority observed that the time children spend in school constitutes “the formative period in the development of citizenship,” and that the school’s goal is to prepare youth to become citizens of a democratic society.<sup>142</sup> The majority also believed that “[t]he ultimate foundation of a free society is the binding tie of cohesive sentiment,”<sup>143</sup> and that without a “unifying sentiment . . . there can ultimately be no liberties.”<sup>144</sup> Hence, freedom requires a population that has been thoroughly schooled in conformity.

Having identified inculcation of “cohesive sentiment” as the purpose of a school, it was simple enough for the Court to conclude that mandatory recitation of the Pledge of Allegiance was acceptable, even preferred. The Pledge is simply one of “those compulsions which necessarily pervade so much of the educational process.”<sup>145</sup> Allowing exceptions for religious or conscientious objectors “might introduce elements of difficulty into the school discipline, [and] might cast doubts in the minds of the other children which would themselves weaken the effect of the exercise.”<sup>146</sup> In the majority’s view, instilling unified sentiments was so crucial that anything that might “cast doubts” about the validity of those sentiments should be expunged.

*Gobitis* drew national attention to the nonconformity of the Jehovah’s Witnesses, and pressures mounted to make them conform. Assaults, kidnappings, lynchings, and even torture of Witnesses occurred in

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139. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 591–92, 600 (1940). For more information, see Vincent Blasi & Seana V. Shiffrin, *The Story of West Virginia State Board of Education v. Barnette: The Pledge of Allegiance and the Freedom of Thought*, in *CONSTITUTIONAL LAW STORIES* 433 (Michael C. Dorf, ed., 2004).

140. *Gobitis*, 310 U.S. at 598.

141. *Id.*

142. *Id.*

143. *Id.* at 596.

144. *Id.* at 597.

145. *Id.* at 598.

146. *Id.* at 600.

several states.<sup>147</sup> In one instance, a perpetrator reportedly told police that Witnesses were being run out of town because “[t]hey’re traitors—the Supreme Court says so. Ain’t you heard?”<sup>148</sup> Some states enacted statutes requiring a flag salute in all public schools, even if the matter had previously been left to local control. Among these states was West Virginia, whose 1941 statute was to be enforced by expelling objecting students from school, declaring them delinquent, and jailing their parents.<sup>149</sup>

Although much popular sentiment favored mandatory flag salutes in public schools, sizable portions of public opinion (and particularly elite opinion) had turned against them. *Gobitis* had not been well received by scholarly legal commentators.<sup>150</sup> The persecution of Witnesses—unmentioned in *Barnette*—surely left a sour taste in the mouths of some justices, and in *Jones v. City of Opelika*,<sup>151</sup> another case involving the speech rights of Jehovah’s Witnesses, three Justices stated that they now believed *Gobitis* had been wrongly decided.<sup>152</sup> Emboldened by these developments, several state courts declined to follow *Gobitis*.<sup>153</sup> Furthermore, the nation’s entry into World War II prompted soul-searching over the nature of American democracy as compared to the fascist states we were fighting overseas. In June 1942, Congress passed a statute recognizing a set of best practices for voluntary respect towards the flag, including the method for saluting the flag and reciting the Pledge.<sup>154</sup> When Congress realized that the preferred method of salute bore an uncomfortable resemblance to the gestures of goose-stepping Nazis, *Figure 2*, Congress amended the law to its current form, where

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147. Blasi & Shiffrin, *supra* note 139, at 443–45.

148. *Id.* at 445 & n.61 (quoting SHAWN FRANCIS PETERS, *JUDGING JEHOVAH’S WITNESSES: RELIGIOUS PERSECUTION AND THE DAWN OF THE RIGHTS REVOLUTION* 79 (2000)).

149. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 629 & nn.5–8 (1943) (citing W. VA. CODE §§ 1847, 1851, 4904(4) (Supp. 1941)).

150. *See, e.g., id.* at 635 n.15 (citing a series of disapproving articles from, among others, the law reviews of Fordham University, New York University, Washington University, and the University of Michigan).

151. 316 U.S. 584 (1942).

152. *Id.* at 624 (Black, J., dissenting).

153. State court cases departing from *Gobitis* include *Bolling v. Superior Court for Clallam County*, 16 Wash. 2d 373, 379–82, 133 P.2d 803, 806–08 (1943) and *State v. Smith*, 127 P.2d 518, 521–22 (Kan. 1942).

154. Act of June 22, 1942, Pub. L. No. 77-623, 56 Stat 377 (1942). “[T]he pledge of allegiance to the flag . . . [should] be rendered by standing with the right hand over the heart; extending the right hand, palm upward, toward the flag at the words ‘to the flag’ and holding this position until the end, when the hand drops to the side.” *Id.* § 7.

the hand remains over the heart.<sup>155</sup> The stage was thus set for the Supreme Court's six-to-three decision in *West Virginia State Board of Education v. Barnette*.<sup>156</sup>



**Figure 2** School children in Hawaii salute the flag, March 1941.

Like *Gobitis* before it, the majority opinion in *Barnette* took efforts to express a vision for public education. The starting point was the same, namely that a school's purpose is "educating the young for citizenship."<sup>157</sup> But *Barnette* rejected the notion that unthinking conformists made good citizens. To the contrary, a truly American educational system would cultivate "intellectual individualism" and "rich cultural diversities," and these can thrive only where there is "freedom to differ."<sup>158</sup> Schools may not "strangle the free mind at its source" or "teach youth to discount important principles of our government [such as freedom of speech] as mere platitudes."<sup>159</sup> National

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155. Act of Dec. 22, 1942, Pub. L. No. 77-829, 56 Stat. 1074 (codified at 4 U.S.C. § 4 (2006)). "[T]he pledge of allegiance to the flag . . . [should] be rendered by standing with the right hand over the heart." *Id.* § 7.

156. 319 U.S. 624 (1943).

157. *Id.* at 637.

158. *Id.* at 641–42.

159. *Id.* at 637.

unity may be encouraged “by persuasion and example” but not commanded by force of law.<sup>160</sup> Indeed, “history indicates a disappointing and disastrous end” for systems of “officially disciplined uniformity.”<sup>161</sup> The Court was aware of the rigid educational system in Nazi Germany and saw no reason to emulate “the fast failing efforts of our present totalitarian enemies.”<sup>162</sup> The danger to national security lay not in insufficient conformity; it lay in conformity itself.

With *Barnette* expressing a vision of public education diametrically opposed to the one in *Gobitis*, it is no surprise that *Barnette* reached the opposite legal conclusion: schools are constitutionally required to allow dissenting students to opt out of the pledge.<sup>163</sup> This remains the law today.

As I have described in more detail elsewhere,<sup>164</sup> school cases in the decades after *Barnette* followed a similar pattern in which a court’s beliefs about education drove its legal conclusions. The majority in *Tinker* rejected the notion that “foster[ing] a homogeneous people” was a legitimate purpose of a public school.<sup>165</sup> Echoing *Barnette*, the majority stated that “[i]n our system, state-operated schools may not be enclaves of totalitarianism.”<sup>166</sup> Instead, “[t]he Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, [rather] than through any kind of authoritative selection.’”<sup>167</sup> This view of the educational institution results in a (comparatively) speech-protective rule.

By contrast, the majority in *Bethel* believed that preparation for citizenship required a school to “inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.”<sup>168</sup> Thus, a school has an “interest in teaching students the boundaries of socially appropriate behavior.”<sup>169</sup> This interest may

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160. *Id.* at 640.

161. *Id.* at 637.

162. *Id.* at 641.

163. *See id.* at 642.

164. Caplan, *supra* note 60.

165. 393 U.S. 503, 511 (1969) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923)).

166. *Id.* at 511.

167. *Id.* at 512 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

168. 478 U.S. 675, 681 (1986) (quoting CHARLES A. BEARD & MARY R. BEARD, *THE BEARDS’ NEW BASIC HISTORY OF THE UNITED STATES* 228 (William Beard ed., rev. 1968) (1944)).

169. *Id.*

properly express itself in punishment of a student who delivers a salacious speech at a school assembly. *Morse* involved a similarly constricted view of the purpose of a school. The majority never proposed what the purpose of a school might be, or what type of citizenship would result from a good public education. The Court said only that schools should “protect those entrusted to their care from the dangers of drug abuse,”<sup>170</sup> and “safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use.”<sup>171</sup> Where these are the only stated goals for a school, a rule against pro-drug speech is inevitable.

### B. Prisons

It is tempting to describe a macro-level rhythm in the Supreme Court’s prison speech cases resembling the dramatic pendulum swing of the school speech cases (from *Gobitis*, to *Barnette* and *Tinker*, and then back to *Bethel*, *Hazelwood*, and *Morse*). This prison speech narrative would begin before the rights revolution, when courts adopted a “hands-off” attitude to prisoner litigation,<sup>172</sup> with some courts explicitly viewing prisoners as “slave[s] of the State” without claim to individual rights.<sup>173</sup> *Procunier v. Martinez* repudiated this extreme view, making it the *Tinker* of prison speech cases. The liberalizing vision of *Procunier*, however, was expressly reversed by *Turner* and its reasonableness standard. While valid in its general outlines, this prison speech narrative creates an illusion of greater change than actually occurred. It ignores that *Procunier* did not push the pendulum very far in the direction of free speech for prisoners within the institution, and as a result, *Turner* did not have very far to push back.

The issue in *Procunier* was a prison’s ability to censor mail sent by prisoners to persons outside the institution. The Supreme Court found “no occasion to consider the extent to which an individual’s right to free speech survives incarceration” because the case implicated the speech rights of free persons outside the prison.<sup>174</sup> “Whatever the status of a prisoner’s claim to uncensored correspondence with an outsider, it is

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170. *Morse v. Frederick*, 551 U.S. 393, 408 (2007).

171. *Id.* at 397.

172. *Shaw v. Murphy*, 532 U.S. 223, 228 (2001) (quoting *Procunier v. Martinez*, 416 U.S. 396, 404 (1974)).

173. *Id.* (quoting *Jones v. N.C. Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 139 (1977) (Marshall, J., dissenting)).

174. *Procunier*, 416 U.S. at 408.

plain that the latter's interest is grounded in the First Amendment's guarantee of freedom of speech."<sup>175</sup> To uphold the rights of non-prisoners, *Procunier* invalidated prison rules that would censor letters to outsiders that "unduly complain[ed]" or criticized prison staff,<sup>176</sup> and required the creation of procedures to challenge mail censorship.<sup>177</sup> Later cases disavowed some of the precise language used in *Procunier* (primarily regarding a prison's need to show that its mail censorship is "no greater than is necessary or essential" to serve "important" government interests<sup>178</sup>) as a standard by which to judge speech within a prison, but *Procunier*'s actual holdings regarding outside communications remain good law.<sup>179</sup> For prisoners' speech within the institution that does not implicate the speech rights of non-incarcerated persons, the Court has never supplied more protection than found in *Turner*.

If the changing constitutional rules for student speech flow from changes in judicial perceptions of school as an institution (as seen in the comparison of *Gobitis* and *Barnette*), does the prevailing stasis in constitutional rules for prisoner speech reflect a similar lack of movement in judicial perceptions of prisons as institutions? This seems to be the case. There is remarkable consensus as to the purposes of a prison. Its functions are retribution, incapacitation (keeping the prisoner off the streets for the duration of the sentence),<sup>180</sup> deterrence (dissuading the prisoner and others from committing crimes in the future), and rehabilitation (improving the prisoner).<sup>181</sup> These interests are routinely recited together. There is no pendulum here, only a constellation of fixed stars.

One could imagine a scenario where the relative weight of these penological interests might vary over time, perhaps with rehabilitation taking on a greater role in some historical periods than others. Although conceivable, this movement is not reflected in Supreme Court opinions. Consistently over time, rehabilitation is of secondary importance. Many opinions do not mention rehabilitation at all when listing the purposes of incarceration. For example, the portion of *Turner* that struck down a

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175. *Id.*

176. *Id.* at 415–16.

177. *Id.* at 417–19.

178. *Id.* at 413–14.

179. See *Thornburgh v. Abbott*, 490 U.S. 401, 410–12 (1989).

180. *E.g.*, *Procunier*, 416 U.S. at 426 (Marshall, J., concurring) ("Prison walls serve not merely to restrain offenders but also to isolate them.").

181. *Wolff v. McDonnell*, 418 U.S. 539, 562–63 (1974).

prison regulation forbidding prisoners from getting married made no mention of any potential rehabilitative purpose that marriage might serve.<sup>182</sup> And when rehabilitative interests are acknowledged, they will be trumped by any legitimate assertion of the security considerations that are necessary for punishment and incapacitation.<sup>183</sup> Indeed, if an opinion by a Supreme Court Justice elevates rehabilitation to a decisive place, the chances are good that it is a dissent.<sup>184</sup>

With such a solid judicial consensus behind the purposes of a prison, it is perhaps not surprising that the constitutional speech rules for prisoners have not changed much either. However, a different comparison—between prisons and jails—sheds light on the judiciary’s understanding of penal institutions.

### C. *Schools as Jails*

Prisons house convicted felons serving their sentences. Jails house detainees being held for trial (along with some convicted misdemeanants serving short sentences). The leading case on the rights of detainees is *Bell v. Wolfish*,<sup>185</sup> which explained that because pretrial detainees are innocent until proven guilty, they have a “right to be free from punishment”<sup>186</sup> even though they are not free from physical restraint in the form of incarceration.<sup>187</sup> The state may take measures necessary to ensure detainees’ appearance at trial and may also enforce measures necessary for the security and safety of the facility.<sup>188</sup> But detainees are, at least in theory, to be treated better than convicted felons when it comes to punitive regulations.

The distinction between prison and jail is clearest in Fourth Amendment cases challenging searches or seizures within the institution. DNA may be routinely collected from some categories of convicted

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182. 482 U.S. 78, 95–96 (1987).

183. *E.g.*, *Procnier*, 416 U.S. at 412–13 (“While the weight of professional opinion seems to be that inmate freedom to correspond with outsiders advances rather than retards the goal of rehabilitation, the legitimate governmental interest in the order and security of penal institutions justifies the imposition of certain restraints on inmate correspondence.”).

184. *E.g.*, *Beard v. Banks*, 548 U.S. 521, 548 (2006) (Stevens, J., dissenting); *Meachum v. Fano*, 423 U.S. 215, 234 (1976) (Stevens, J., dissenting).

185. 441 U.S. 520 (1979).

186. *Id.* at 534.

187. *See id.* at 535–40.

188. *Id.* at 540; *see also* *Block v. Rutherford*, 468 U.S. 576, 589–91 (1984) (upholding suspicionless searches of jail cells similar to those conducted on prison cells).



felons,<sup>189</sup> but not from pretrial detainees.<sup>190</sup> Strip searches and even body-cavity searches in prisons are generally allowed without individualized suspicion,<sup>191</sup> but in jails such searches may only be performed upon a showing of individualized suspicion that the detainee is concealing contraband.<sup>192</sup>

Occasionally, one sees a judicial opinion in a speech case that reveals a similar sensitivity to the different institutional functions of prisons and jails. *Mauro v. Arpaio*<sup>193</sup> involved a rule at the Maricopa County Jail in Phoenix, Arizona banning delivery of any magazines containing nudity.<sup>194</sup> Judge Fletcher's opinion for the panel concluded that the rule was overbroad (reaching even medical photographs or artistic nudes that one might find in an art history magazine), and hence not reasonably related to a legitimate pedagogical concern under *Turner*.<sup>195</sup> An en banc panel reversed, drawing a dissent from Judge Kleinfeld, which Judge Fletcher joined in part.<sup>196</sup> This dissent pointed out that the inmates in this case were pretrial detainees in a jail and not convicted felons in a prison.<sup>197</sup> There was substantial evidence in the record that the anti-nudity rule was imposed for the punitive purpose of making detention more onerous.<sup>198</sup> If that motive proved to be true, the speech restriction would be an improper punitive measure for a jail, even if it might be allowed within a prison.<sup>199</sup>

The dissent from the en banc opinion in *Mauro* reveals how sensitivity to institutional purposes should affect the applicable legal rules. It also raises a disquieting question: perhaps school speech fares better than prison speech only insofar as schools resemble jails. Like a jail, a school holds a population that is, if not quite imprisoned, not quite free either.

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189. *E.g.*, *Rise v. Oregon*, 59 F.3d 1556, 1562 (9th Cir. 1995) (Fletcher, J.).

190. *E.g.*, *Friedman v. Boucher*, 580 F.3d 847, 856–57 (9th Cir. 2009).

191. *E.g.*, *Michenfelder v. Sumner*, 860 F.2d 328, 332–33 (9th Cir. 1988) (Fletcher, J.).

192. *Hartline v. Gallo*, 546 F.3d 95, 100 (2d Cir. 2008); *Kennedy v. L.A. Police Dep't*, 901 F.2d 702, 713–14 (9th Cir. 1989). *But see* *Powell v. Barrett*, 541 F.3d 1298, 1302 (11th Cir. 2008).

193. 147 F.3d 1137 (9th Cir. 1998) (Fletcher, J.), *rev'd en banc*, 188 F.3d 1054 (9th Cir. 1999).

194. *Id.* at 1138.

195. *Id.* at 1140–41.

196. *Mauro*, 188 F.3d at 1063; *accord* *Jones v. Salt Lake County*, 503 F.3d 1147, 1155–56 (10th Cir. 2007) (upholding a jail's ban on sexually explicit publications).

197. *Mauro*, 188 F.3d at 1067–70 (Kleinfeld, J., dissenting).

198. *Id.* at 1067.

199. *See id.* at 1067–70.

This potential link between jails and schools becomes clearer if we consider how the Fourth Amendment applies in public schools. Just as *Tinker* held that First Amendment free speech rights exist in school (but in modified form), *New Jersey v. T.L.O.*<sup>200</sup> held that Fourth Amendment search-and-seizure rights also exist in school (but again in modified form).<sup>201</sup> Searches by school officials are not subject to the warrant requirement,<sup>202</sup> and in the case of drug tests for student athletes, searches may be performed without individualized suspicion if justified by “special needs.”<sup>203</sup>

The Supreme Court recently held in *Safford Unified School District v. Redding*<sup>204</sup> that a school violated the Fourth Amendment when it strip searched a junior high school girl to see if she was hiding ibuprofen tablets.<sup>205</sup> Strip searches are not per se violations of the Fourth Amendment, the Court said, but they require individualized suspicion and must be limited in scope.<sup>206</sup> The majority did not analogize directly to the rules for strip searches in jails, but the end result is similar. (Justice Thomas’s opinion unapologetically compared the strip search in *Redding* to that in *Bell v. Wolfish*.)<sup>207</sup>

When *Vernonia School District v. Acton*<sup>208</sup> approved a random drug testing policy for student athletes, the dissent objected (in an argument reminiscent of the dissent in *Ingraham v. Wright*) that the majority was treating students worse than prisoners.<sup>209</sup> The dissent cited *Bell v. Wolfish*, the leading jail case, to the effect that individual suspicion was required for searches even amongst incarcerated persons.<sup>210</sup> In an inadvertently revealing footnote, Justice Scalia responded for the majority that the dissenters had it all wrong:

There is no basis for the dissent’s insinuation that in upholding the District’s Policy we are equating the Fourth Amendment

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200. 469 U.S. 325 (1985).

201. *Id.* at 333, 336–37.

202. *Id.* at 340.

203. *See* Bd. of Educ. v. Earls, 536 U.S. 822, 829 (2002) (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)); *see also* *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 653 (1995).

204. 557 U.S. \_\_\_, 129 S. Ct. 2633 (2009).

205. *Id.* at 2637–38.

206. *Id.* at 2639, 2643.

207. *Id.* at 2649 n.2 (Thomas, J., concurring in the judgment in part and dissenting in part). Justice Thomas also equates school and prison cases. *Id.* at 2652 n.4 (citing Bd. of Educ. v. Earls, 536 U.S. 822, 837 (2002) (school search); *Beard v. Banks*, 548 U.S. 521, 536–37 (prison speech)).

208. 515 U.S. 646 (1995).

209. *Id.* at 681 (O’Connor, J., dissenting).

210. *Id.*

status of schoolchildren and prisoners, who, the dissent asserts, may have what it calls the “categorical protection” of a “strong preference for an individualized suspicion requirement.” The case on which it relies for that proposition, *Bell v. Wolfish*, displays no stronger a preference for individualized suspicion than we do today.<sup>211</sup>

What a relief. The Fourth Amendment does not treat students *worse* than it treats pretrial detainees. It treats them *exactly the same* as it treats pretrial detainees.

### CONCLUSION

As my tone of rueful irony may suggest, I agree with the premise of Andy Singer’s cartoon that too much similarity between educational institutions and penal institutions is a bad thing. The shorthand term “school-to-prison pipeline” describes a set of policies that, in many communities, are turning schools into adjuncts of the criminal justice system.<sup>212</sup> These include police in schools, formalized information-sharing between schools and police, and referrals of routine discipline problems to prosecutors for charging as crimes. A judicial discourse that analogizes schools to jails cannot help but strengthen the logic that supports the school-to-prison pipeline. The analogy suggests that schools, like jails, are warehouses for a suspect population not entitled to the full rights of citizenship. And we cannot claim surprise or alarm if some individuals remain under institutionalized government control in some other, harsher, form after doing their time in the present institution.

Courts do not create most of our society’s institutions. But just as judges’ perceptions about various societal institutions influence court opinions, the words of those opinions may affect social perceptions about institutions. The use of *Gobitis* to justify persecution of Jehovah’s Witnesses (“They’re traitors—the Supreme Court says so”) is a dramatic example. The process is ordinarily slower and more subtle. When *Vernonia* upheld drug testing for student athletes, the Court described the program as something “a reasonable guardian and tutor might

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211. *Id.* at 664 n.3 (majority opinion) (citations omitted).

212. See, e.g., Tona M. Boyd, Comment, *Confronting Racial Disparity: Legislative Responses to the School-to-Prison Pipeline*, 44 HARV. C.R.-C.L. L. REV. 571 (2009); TEXAS APPLESEED, TEXAS’ SCHOOL-TO-PRISON PIPELINE: DROPOUT TO INCARCERATION (2007), available at <http://www.texasappleseed.net/pdf/Pipeline%20Report.pdf>; THE ADVANCEMENT PROJECT & THE CIVIL RIGHTS PROJECT, OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE POLICIES (2000), [http://www.civilrightsproject.ucla.edu/research/discipline/opport\\_suspended.php](http://www.civilrightsproject.ucla.edu/research/discipline/opport_suspended.php).

undertake.”<sup>213</sup> My reaction at the time was that no reasonable guardian or tutor would ever require children to take suspicionless home drug tests as a condition of playing school sports. Twenty years later, radio stations near me play an advertisement for a drug testing company in which a mother speaks nervously to her teenage son. “Kevin,” she says, “I’ve heard they might start drug testing in your school, so I need to ask you some questions. Have you ever done pot? Cocaine? Prescription drugs?”<sup>214</sup> The declaration from the Supreme Court that reasonable guardians and tutors require home drug tests may be fulfilling its own prophecy. This experience suggests that even casual judicial reliance on analogies between school speech and prison speech may have dangerous consequences.

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213. 515 U.S. at 665.

214. As the mother continues questioning her son, an announcer cuts in to say: “Now there’s a way to get the whole truth at home, and keep it there.” FIRST CHECK HOME DRUG TEST, <http://psynchronous.com/clients/firstcheck/savvy.mp3> (last visited October 18, 2009).