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FREEDOM OF SPEECH IN SCHOOLS AND THE RIGHT TO PARTICIPATION: WHEN THE FIRST AMENDMENT ENCOUNTERS THE CONVENTION ON THE RIGHTS OF THE CHILD

*Lotem Perry-Hazan**

I. INTRODUCTION

Public schools are necessarily not run as a democracy. Schools exist to provide a forum whereby those with wisdom and experience (the teachers) impart knowledge to those who lack wisdom and experience (the students).

-Lowery v. Euverard¹

Amanda Walker-Serrano created a petition stating, “[w]e 3rd grade kids don’t want to go to the circus because they hurt animals. We want a better feild [sic] trip.”² Derek Kelly drew gang signs on his school papers.³ Jacob Pinard refused to play a basketball game to demonstrate the team’s sincerity concerning claims against an abusive coach.⁴ Ryan Posthumus called the assistant principal a “dick.”⁵ First Amendment freedom of speech doctrine perceives Amanda’s petition, Derek’s drawing, Jacob’s refusal, and Ryan’s curse as types of speech. This

* L.I.B., L.I.M., Ph.D., Head, Management of Educational Systems Program, Department of Leadership and Policy in Education, Faculty of Education, University of Haifa, Israel. The idea to write this article developed nine years ago, when I was a student at New York University School of Law. The powerful legal culture of school children’s freedom of speech amazed me and raised the questions that were the basis for this study. The gradual implementation process of the right to participation in Israeli law, as well as my developing experience in teaching and in mothering, assisted in materializing the initial ideas. I would like to thank Elad Peled, Michael Birnhack, Arie Kizel, and Tali Gal for helpful comments and conversations. I would also like to thank John Calhoun for excellent research and editing assistance. Thanks also to the participants at the “Children’s Rights: Legal and Educational Perspectives” seminar at the University of Haifa Faculty of Education. This article is dedicated to my daughters Ella and Maya, who teach me invaluable lessons each and every day about the benefits, and challenges of children’s participation.

¹ 497 F.3d 584 (6th Cir. 2007).

² Walker-Serrano *ex rel.* Walker v. Leonard, 325 F.3d 412, 414 (3d Cir. 2003).

³ Kelly v. Bd. of Educ., No. 06 C 1512, 2007 U.S. Dist. LEXIS 1824 (N.D. Ill. Jan. 10, 2007).

⁴ Pinard v. Clatskanie Sch. Dist. 6J, 467 F.3d 755 (9th Cir. 2006).

⁵ Posthumus v. Bd. of Educ. of Mona Shores Pub. Sch., 380 F. Supp. 2d 891, 895 (W.D. Mich. 2005).

Article will look to the contours of children's right to participation in Article 12 of the United Nations Convention on the Rights of the Child⁶ in order to argue for distinctions between the types of student speech we should protect and the types we should not. The Article's primary aim is to offer educators, lawyers, judges, and scholars innovative perspectives to assist in analyzing children's controversial expressions in schools and in shaping just and educative policies for coping with those expressions.

Long before the ratification of the Convention on the Rights of the Child ("CRC"), international human rights law granted children special protection from abuse, neglect, and exploitation, and guaranteed their social and economic rights, such as education, health care, and an adequate standard of living.⁷ The CRC synthesized standards scattered among many international documents and introduced an additional—and revolutionary—dimension to the rights of children in international law, which recognized children as agents who share the power to shape their own lives.⁸ The right to participation, anchored in Article 12, is the core of the innovative approach that the CRC promoted.⁹ It provides as follows:

States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

This provision includes two elements. The first is the child's right to express views freely in all matters affecting the child. The second is the child's right to have his or her views given due weight in accordance with his or her age and maturity.

Article 12 is followed by Article 13, which protects children's freedom of expression and states the following:

⁶ *Convention on the Rights of the Child*, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990).

⁷ Gerson Lansdown, *Promoting Children's Participation in Democratic Decision-Making*, INNOCENTI INSIGHT, Feb. 2000, at 1, available at <http://www.unicef-irc.org/publications/pdf/insight6.pdf>.

⁸ See *id.*; Thomas Hammarberg, *The UN Convention on the Rights of the Child—and How to Make It Work*, 12 HUM. RTS. Q. 97 (1990). During the 1970s, the American "child liberation movement" advocated for children's rights to independent decision-making. See, e.g., CHARLES E. SILBERMAN, *CRISIS IN THE CLASSROOM* (1971); JOHN C. HOLT, *ESCAPE FROM CHILDHOOD* (1974); RICHARD FARSON, *BIRTHRIGHTS* (1974).

⁹ Lansdown, *supra* note 7, at 1. Additional provisions in the CRC that treat children as agents who shape their own lives are the right to freedom of conscience, thought and religion (Article 14), the right to freedom of association (Article 15), and the right to information (Article 17). A complementary provision protects parental rights to provide appropriate direction and guidance "in a manner consistent with the evolving capacities of the child" (Article 5).

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.
2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others; or
 - (b) For the protection of national security or of public order . . . or of public health or morals.

Article 13(2) restricts children's freedom of expression by limitations similar to those described in the four landmark U.S. Supreme Court cases regarding school children's freedom of speech. Article 13(2)(a), which concerns "the rights or reputations of others," and Article 13(2)(b), which relates to the protection of public "order," correspond to the ruling in *Tinker v. Des Moines Independent Community School District*.¹⁰ *Tinker* limited children's freedom of expression by refusing to protect speech that invades the rights of others or creates material and substantial disruption to the work and discipline of the school. The last part of Article 13(2)(b), which justifies restrictions on children's free speech for public "morals," corresponds to the pedagogical rationales of *Bethel School District v. Fraser*,¹¹ *Hazelwood School District v. Kuhlmeier*,¹² and *Morse v. Frederick*.¹³

The right to participation and the freedom of speech offer two normative frameworks for analyzing school children's expressions. What is the difference between these normative frameworks? Do they have the same justifications? How do they correspond in educational environments? These are the questions that animate this Article.

This Article's insights are highly relevant to scholars and practitioners of U.S. constitutional law. The First Amendment of the United States Constitution, which protects freedom of speech, was the basis for review of dozens of American cases regarding students' speech in schools. During the last few years, in the wake of the *Morse* ruling, American scholars have discussed the question of freedom of speech in school at great length. Comprehensive studies offered new analytical approaches,¹⁴ or criticized the courts for providing too much¹⁵ or too

¹⁰ 393 U.S. 503, 513–14 (1969).

¹¹ 478 U.S. 675 (1986).

¹² 484 U.S. 260 (1988).

¹³ 551 U.S. 393 (2007).

¹⁴ Martin H. Redish, & Kevin Finnerty, *What Did You Learn in School Today—Free Speech, Values Inculcation, and the Democratic–Educational Paradox*, 88 CORNELL L. REV. 62

little¹⁶ protection for students' speech. More focused studies explored specific settings, such as school sponsored activities,¹⁷ online speech,¹⁸ and online schools,¹⁹ or specific kinds of messages, such as expressions with sexual overtones²⁰ or cyber bullying.²¹ This Article expands the

(2002) (suggesting an “anti-indoctrination” model for the judiciary to reasonably police the educational process in order to restrict values inculcation to that essential minimum degree required for the educational process to function); Erwin Chemerinsky, *Teaching That Speech Matters: A Framework for Analyzing Speech Issues in Schools*, 42 U.C. DAVIS L. REV. 825 (2009) (suggesting a distinction between government control over the curriculum and student speech outside the school's curriculum); Bryan R. Warnick, *Student Speech Rights and the Special Characteristics of the School Environment*, 38 EDUC. RESEARCHER 200 (2009) (analyzing special characteristics of the school environment that should be evaluated in students' free speech cases); Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 FLA. L. REV. 395 (2011) (arguing that student speech should be treated differently depending upon whether the speech occurs under school supervision); Emily Gold Waldman, *Badmouthing Authority: Hostile Speech About School Officials and the Limits of School Restrictions*, 19 WM. & MARY BILL RTS. J. 591 (2011) (suggesting separating harassment from dissent).

¹⁵ R. George Wright, *Tinker and Student Free Speech Rights: A Functionalist Alternative*, 41 IND. L. REV. 105 (2008); Alan Brownstein, *The Nonforum as a First Amendment Category: Bringing Order Out of the Chaos of Free Speech Cases Involving School-Sponsored Activities*, 42 U.C. DAVIS L. REV. 717 (2009); ANNE PROFFITT DUPRE, *SPEAKING UP: THE UNINTENDED COSTS OF FREE SPEECH IN PUBLIC SCHOOLS* (2010).

¹⁶ Clay Calvert, *Misuse and Abuse of Morse v. Frederick by Lower Courts: Stretching the High Court's Ruling Too Far to Censor Student Expression*, 32 SEATTLE U. L. REV. 1 (2008); Abby Marie Mollen, *In Defense of the “Hazardous Freedom” of Controversial School Speech*, 102 NW. U. L. REV. 1501 (2008); Joanna Naim, *Free Speech 4 Students? Morse v. Frederick and the Inculcation of Values in Schools*, 43 HARV. C.R.–C.L. L. REV. 239 (2008); Jamin B. Raskin, *No Enclaves of Totalitarianism: The Triumph and Unrealized Promise of the Tinker Decision*, 58 AM. U. L. REV. 1193 (2009); Aaron H. Caplan, *Freedom of Speech in School and Prison*, 85 WASH. L. REV. 71 (2010); Dan V. Kozlowski, *Toothless Tinker: The Continued Erosion of Student Speech Rights*, 88(2) JOURNALISM & MASS COMM. Q. 352 (2011); Josie Foehrenbach Brown, *Inside Voices: Protecting the Student-Critic in Public Schools*, 62 AM. U. L. REV. 253 (2012); Chemerinsky, *supra* note 14.

¹⁷ Brownstein, *supra* note 15.

¹⁸ Brannon P. Denning & Molly C. Taylor, *Morse v. Frederick and the Regulation of Student Cyberspeech*, 35 HASTINGS CONST. L.Q. 835 (2008); Kyle W. Brenton, Note, *Bonghits4jesus.com? Scrutinizing Public School Authority over Student Cyberspeech Through the Lens of Personal Jurisdiction*, 92 MINN. L. REV. 1206 (2008); Benjamin F. Heidlage, *A Relational Approach to Schools' Regulation of Youth Online Speech*, 84 N.Y.U. L. REV. 572 (2009); Mickey Lee Jett, Note, *The Reach of the Schoolhouse Gate: The Fate of Tinker in the Age of Digital Social Media*, 61 CATH. U. L. REV. 895 (2012); Rory Allen Weeks, *The First Amendment, Public School Students, and the Need for Clear Limits on School Officials' Authority over Off-Campus Student Speech*, 46 GA. L. REV. 1157 (2012); Brittany L. Kaspar, Note, *Beyond the Schoolhouse Gate: Should Schools Have the Authority to Punish Online Student Speech?*, 88 CHI.-KENT L. REV. 187 (2012); Aaron J. Hersh, Note, *Rehabilitating Tinker: A Modest Proposal to Protect Public-School Students' First Amendment Free-Expression Rights in the Digital Age*, 98 IOWA L. REV. 1309 (2013); Allison Martin, Comment, *Tinkering with the Parameters of Student Free Speech Rights for Online Expression: When Social Networking Sites Knock on the Schoolhouse Gate*, 43 SETON HALL L. REV. 773 (2013).

¹⁹ Brett T. MacIntyre, Comment, *When the Classroom Is Not in the Schoolhouse: Applying Tinker to Student Speech at Online Schools*, 36 SEATTLE U. L. REV. 1503 (2013).

²⁰ Clay Calvert, *Mixed Messages, Muddled Meanings, Drunk Dicks, and Boobies Bracelets: Sexually Suggestive Student Speech and the Need to Overrule or Radically Refashion Fraser*, 90 DENV. U. L. REV. 131 (2012).

inquiry by offering an innovative analysis, which may assist in setting the scope of the educational rationales that justify restrictions on the free speech of children in school. Although the United States is one of only three United Nations members that did not ratify the CRC,²² the right of children to participate at school is consistent with American values²³ and with the pivotal role children have played in building American democracy and social justice.²⁴

This Article will also interest the growing community of international scholars who study children's participation in educational environments, and those who provided implementation guidelines for countries that signed the CRC.²⁵ The Article contributes a unique angle to this scholarly field by analyzing a significant subject that has not yet been explored and that is very important to educators who cope with controversial expressions on a daily basis.

The following section (Section II) examines the conceptual and

²¹ Darryn Cathryn Beckstrom, *State Legislation Mandating School Cyberbullying Policies and the Potential Threat to Students' Free Speech Rights*, 33 VT. L. REV. 283 (2008); Jocelyn Ho, *Bullied to Death: Cyberbullying and Student Online Speech Rights*, 64 FLA. L. REV. 789 (2012); Stacie A. Stewart, Comment, *A Trade-Off That Becomes a Rip-Off: When Schools Can't Regulate Cyberbullying*, 2013 BYU L. REV. 1645 (2013).

²² The United States signed the CRC in 1995 but never ratified it. To date, the United States is one of only three United Nations members that did not ratify the CRC. Other non-ratifying members include Somalia, whose President declared in November 2013 his intent to ratify the CRC, and the new United Nations member South Sudan, which passed a bill to ratify the CRC.

See Convention on the Rights of the Child, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-11&chapter=4&lang=en (last visited Apr. 10, 2014).

²³ *See* Susan Kilbourne, *The Wayward Americans—Why the USA Has Not Ratified the United Nations Convention on the Rights of the Child*, 10 CHILD. & FAM. L. Q. 243 (1998). American opponents to the CRC ratification make two arguments. One asserts that United States ratification of the CRC would be tantamount to surrendering American sovereignty. *Id.* at 244. The second type of argument focuses on Articles that American critics interpret as threatening parental rights. *Id.* None of these arguments concern freedom of speech in school.

²⁴ Barbara Bennett Woodhouse, *The Courage of Innocence: Children As Heroes in the Struggle for Justice*, 2009 U. ILL. L. REV. 1567, 1589 (2009). In her inspiring paper Bennett Woodhouse describes how children of all ages, but especially adolescents, have been key figures in American social justice movements, including the labor movement, the civil rights movement, the movement for gender equality, the movement for inclusion of persons with disabilities, and the struggle to secure equal access to education. *Id.* at 1568.

²⁵ *See, e.g.*, Priscilla Alderson, *School Students' Views on School Councils and Daily Life at School*, 14 CHILD. & SOC'Y 121 (2000); Zoran Pavlovic, *Cross-Cultural Study on the Rights of the Child in Slovenia: The First Ten Years*, 22 SCH. PSYCHOL. INT'L 130 (2001); Anne Stafford et al., *'Having a Say': Children and Young People Talk About Consultation*, 17 CHILD. & SOC'Y 361 (2003); Michael Fielding, *Leadership, Radical Student Engagement and the Necessity of Person-Centred Education*, 9 INT'L J. OF LEADERSHIP IN EDUC. 299 (2006); Dana L. Mitra & Steven Jay Gross, *Increasing Student Voice in High School Reform: Building Partnerships, Improving Outcomes*, 37(4) EDUC. MANAGEMENT, ADMIN. & LEADERSHIP 522 (2009); Gillean McCluskey et al., *'Take More Time to Actually Listen': Students' Reflections on Participation and Negotiation in School*, 39(2) BRIT. EDUC. RES. J. 287 (2013).

structural differences between the right to participation and freedom of speech in school. Section III analyzes the justifications for respecting, protecting, and fulfilling the right to participation and freedom of speech in school. Section IV(A) presents the four U.S. Supreme Court precedents that laid down several rationales for limiting school children's speech. Section IV(B) examines the interrelationships between the children's right to participation and free speech in school by analyzing 56 cases of American courts. It categorizes the cases and explores how the right to participation may influence a free speech analysis in each and every category. Section V offers conclusions and suggestions for future research. It also accounts for the role of empowered teachers as agents of children's participation rights.

II. CHILDREN'S RIGHTS TO PARTICIPTION AND FREE SPEECH: CONCEPTUAL AND STRUCTURAL DIFFERENCES

This Section argues that that there are several conceptual and structural differences between the right to participation and freedom of speech in schools. These differences stem from the character of the right to participation as a dialogic right that captures voices that strive for influence, leads to a gradual shift of power, and requires dialogic organizational spaces. The distinctions established in this Section will be redeployed in Section IV in order to analyze how children's rights to participation and free speech correspond in different situations.

A. Voices that Strive for Influence

Laura Lundy offers a model that conceptualizes the right to participation by four elements: (1) *Space*: children must be given the opportunity to express a view; (2) *Voice*: children must be facilitated to express their views; (3) *Audience*: the view must be listened to; and (4) *Influence*: the view must be acted upon, as appropriate.²⁶ Lundy's model deconstructs the two elements of the right to participation. The right to express views freely in all matters affecting the child requires *space* and *voice*. The right that these views would be given due weight in

²⁶ Laura Lundy, "Voice" Is Not Enough: Conceptualizing Article 12 of the United Nations Convention on the Rights of the Child, 6 BRIT. EDUC. RES. J. 927 (2007). Lundy also argues that Article 12 can only be understood fully when it is considered in the light of other relevant CRC provisions; in particular, Article 2 (non-discrimination); Article 3 (best interests); Article 5 (right to guidance); Article 13 (right to seek, receive and impart information); and Article 19 (protection from abuse). *Id.* at 933. This argument lays on the principle of indivisibility, interdependence, and interconnectedness of all human rights. *Id.* at 932.

accordance with the age and maturity of the child requires *audience* and *influence*.

According to Lundy, the right of children to freedom of expression is intertwined with the element of *voice*.²⁷ However, not all kinds of speech overlap with the right to participation. As Article 12(1) elaborates, the right to participation concerns views “in all matters affecting the child” that can be given “due weight in accordance with the age and maturity of the child.”²⁸ The views that are captured by the right to participation are, therefore, those that open a dialogue with adults and strive for influence—the fourth feature in Lundy’s model. The following figure conceptualizes the interrelationships of the right to participation and the freedom of speech.

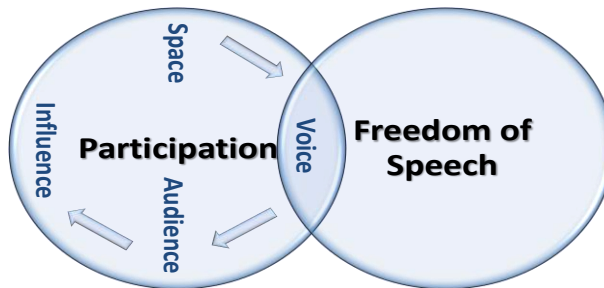


Figure 1: The interrelationships of the right to participation and freedom of speech

As this figure reflects, the right to participation captures only those voices that may turn eventually into influence. The distinction concerns the goal of the expressions. Children’s participatory expressions may be unpleasant, rebellious, and sometimes hurt those whose behaviors are being criticized.²⁹ Yet, they deserve special protection because they aim

²⁷ *Id.* at 936.

²⁸ *Convention on the Rights of the Child*, UNITED NATIONS TREATY COLLECTION, Article 12(1), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV11&chapter=4&lang=en (last visited Apr. 10, 2014).

²⁹ Nigel Thomas writes that children’s right to participation is too often described in non-conflictual terms “as if all that is required is for children and adults to sit down and talk together, and all will be well.” Nigel Thomas, *Love, Rights and Solidarity: Studying Children’s Participation Using Honneth’s Theory of Recognition*, 19 *CHILDHOOD* 453, 463 (2012). See also E. Kay M. Tisdall, *Is the Honeymoon Over? Children and Young People’s Participation in Public Decision-*

to change policies and practices.

B. Gradual Sharing of Power

Another feature of the dialogic character of the right to participation is the gradual shift of power of participatory practices. Classificatory models of participation attempted to differentiate between various practices by which children may express their voices and participate in decision-making.³⁰ These models exemplify the various ways that adults can share their power with children.

The most influential model is Roger Hart's, which includes an eight-stage "ladder of participation."³¹ At the bottom of the ladder, Hart located non-participatory practices, which include *manipulation*, *decoration*, and *tokenism*.³² The two next levels refer to practices in which children are *assigned but informed* or *consulted and informed*.³³ The highest levels include *adult-initiated* practices, which share decisions with children, *child-initiated and directed* practices, and at the top *child-initiated* practices that share decisions with adults.³⁴

Another model that offers a hierarchy of participatory practices is Gerison Lansdown's, which distinguishes between three kinds of processes. The first is *consultative processes*, in which adults initiate channels for obtaining information from children. The second is *participative initiatives*, where the aim is to strengthen processes of democracy, create opportunities for children to understand and apply democratic principles, or involve children in the development of services and policies that impact on them. The third is *promoting self-advocacy*, where the aim is to empower children to identify and fulfill their own goals and initiatives.³⁵

Making, 16 INT'L J. OF CHILD. RIGHTS 419, 422 (2008) ("There is a distinct risk that activities are only labeled 'participation' when they fit comfortably into the agendas of the organizing adults—and those of funders, policy makers, or governing structures."); Barry Percy-Smith, *Councils, Consultations and Community: Rethinking the Spaces for Children and Young People's Participation*, 8(2) CHILD. GEOGRAPHIES 107, 111–12 (2010) (arguing that "having a say in matters that affect you" does not mean having a say when it suits organizations and services, rather than when young people need to communicate needs, issues, ideas and concerns).

³⁰ Thomas, *supra* note 29, at 453–54. Nigel Thomas differentiates between "classificatory" and "explanatory" models of participation that were developed over the years.

³¹ Roger A. Hart, *Children's Participation: From Tokenism to Citizenship*, INNOCENTI ESSAYS NO. 4, Mar. 1992, available at www.unicef-irc.org/publications/100. The model is based on Sherry Arnstein, *A Ladder of Citizen Participation*, 35 J. OF THE AM. INST. OF PLANNERS 216 (1969).

³² Hart, *supra* note 31, at 9–10.

³³ *Id.* at 11–12.

³⁴ *Id.* at 12–14.

³⁵ Lansdown, *supra* note 7, at 16. A comparable categorization was suggested by Dana L.

Harry Shier's "pathways to participation" diagram offers additional complexities to the hierarchy of participatory practices. Shier categorizes five levels of participation: (1) children are listened to; (2) children are supported in expressing their views; (3) children's views are taken into account; (4) children are involved in decision-making processes; and (4) children share power and responsibility for decision-making.³⁶ At each level of participation, Shier notes, individuals and organizations may have different degrees of commitment to the process of empowerment.³⁷ Therefore, he identifies the levels of commitment at each level of participation: *openings*, *opportunities*, and *obligations*. An opening occurs when there is a personal commitment or a statement of intent to work in certain ways. An opportunity occurs when the needs that enable the worker or organization to operate at this level in practice are met (e.g., resources, training). An obligation is established when policies are adopted, enabling a specific level of participation to become built-in to the system.³⁸

The Hart, Lansdown, and Shier models conceptualize participation as a gradual shift of power. Higher levels of participation require adults to share more power with children, to provide them with more opportunities to initiate and direct practices, to advocate their goals, and to take responsibly for their actions. Freedom of speech does not require adults to share their power with children. It demands that adults not prohibit the speech, but it does not force adults to listen.

C. Dialogic Organizational Spaces

The right to participation and freedom of speech are mobilized in different ways. While speech that does not strive for influence can use various media, the right to participation requires organized spaces, in which children can transform their voices into influence. Some of these spaces have to be unfettered from the control and agenda of adults, so that new and creative ideas can be imagined, expressed, and explored.³⁹ Yet, they should also establish a dialogue, a cooperation between

Mitra and Steven Jay Gross, who portray a "pyramid of student voice," which begins at the bottom with the most common form of *being heard*, goes on with the level of *collaborating with adults*, and ends with the final level at the top of the pyramid—*building capacity for leadership*. At the final level, students can share in the leadership of the student voice initiative and also serve as a source of criticism and protest in schools. Mitra & Gross, *supra* note 25, at 523–24.

³⁶ Harry Shier, *Pathways to Participation: Openings, Opportunities and Obligations*, 15 CHILD. AND SOC'Y 107 (2001).

³⁷ *Id.* at 110.

³⁸ *Id.*

³⁹ Percy-Smith, *supra* note 29, at 119.

children and adults, in order to transform the children's innovative ideas into policies and practices.

There is no sharp distinction, however, between these two functions. A student council, for example, requires the cooperation of adults to fulfill its formal authority to participate in school policy-making, but it should also provide the opportunity for free innovation. Additionally, the right to participation may be fulfilled by establishing policy-making mechanisms in non-formal spaces in which children spend their everyday lives. As Barry Percy-Smith argues, more attention is needed to opportunities for children and young people to participate more fully in everyday community settings—home, school, neighborhood—through the actions, choices, relationships, and contributions they make, rather than being preoccupied with participation in political and public decision making processes in organizations and systems.⁴⁰ Percy-Smith points to the many different forms that participation as active citizenship should take in a democracy and shifts the attention out of the committee rooms to a wider array of social contexts wherein agency, identity, and empowerment, rather than structures, define participation.⁴¹ His arguments emphasize the opportunities to capture students' expressions in non-formal spaces and mobilize them into influence. Certain organizational features, such as restorative practices, collaborative learning, or students as key informants in the processes of inspection, may enable students' voices to achieve influence.

III. CHILDREN'S RIGHTS TO PARTICIPTION AND FREE SPEECH IN SCHOOL: EDUCATIONAL, SOCIAL, AND LEGAL JUSTIFICATIONS

There are several justifications for respecting, protecting, and fulfilling⁴² the right to participation and freedom of speech in schools. These justifications derive from a range of landmark legal and educational studies that focused on various theoretical perspectives including children's rights, students' voice, civic education, and the sociology of childhood.

A. Educating Children in Democracy and Not for Democracy

School policy that realizes the right to participation and freedom of

⁴⁰ *Id.* at 109.

⁴¹ *Id.* at 110.

⁴² On the obligation to respect, to protect, and to fulfill human rights, *see*, United Nations, Office of the High Commissioner of Human Rights, *International Human Rights Law*, available at <http://www.ohchr.org/en/professionalinterest/pages/internationallaw.aspx>.

speech acknowledges children's position as actual citizens rather than potential citizens in the making.⁴³ Such a policy should be part and parcel of citizenship education,⁴⁴ which is committed to education *in*, not just education *for*, democracy.⁴⁵ Moreover, when children exercise their right to participation and their freedom of speech they develop political literacy - critical thinking and civic skills useful for debate, communication, negotiation, and decision-making.⁴⁶ It is not surprising, therefore, that participatory experiences in schools are among the most powerful predictors of future civic engagement.⁴⁷

The right to participation and freedom of speech emphasize the interconnections of political literacy and practices of dissent. Prominent scholars of civic education, such as Amy Gutmann and Meira Levinson, points to the importance of teaching children to think critically about authority⁴⁸ and to reshape power relations.⁴⁹ As mentioned, the dialogic nature of the right to participation does not mean that it excludes rebellious and conflicting voices. Vice versa, as Kay Tisdall warns, there is a distinct risk that activities are only labeled "participation" when they fit comfortably into the agendas of adults.⁵⁰

B. Equalizing Educational Opportunities

In her influential book, *No Citizen Left Behind*, Meira Levinson argues that there is a civic empowerment gap between low-income citizens of color, on the one hand, and middle-class and wealthy white citizens, on the other. This gap, she contends, is as large and as disturbing as the reading and math achievement gaps, and it also

⁴³ See Dympna Devine, *Children's Citizenship and the Structuring of Adult-Child Relations in the Primary School*, 9 CHILDHOOD 303, 317 (2002). See also Jeremy Roche, *Children: Rights, Participation and Citizenship*, 6 CHILDHOOD 475, 484 (1999).

⁴⁴ Devine, *supra* note 43, at 317.

⁴⁵ Michael Fielding, *On the Necessity of Radical State Education: Democracy and the Common School*, 41 J. OF PHIL. OF EDUC. 539 (2007).

⁴⁶ Devine, *supra* note 43, at 318; Ruth Sinclair, *Participation in Practice: Making it Meaningful, Effective and Sustainable*, 18 CHILD. & SOC'Y 106, 108 (2004).

⁴⁷ MEIRA LEVINSON, *NO CITIZEN LEFT BEHIND* 180 (2012).

⁴⁸ AMY GUTMANN, *DEMOCRATIC EDUCATION* 51 (1987).

⁴⁹ LEVINSON, *supra* note 47, at 13. Sarah M. Stitzlein warns that a democracy that withholds the right to dissent until one reaches age eighteen risks worrisome results: "[D]issent may not be sufficiently valued for its role in maintaining a healthy democracy and therefore may either be ignored or squelched within daily political life; or . . . democracy may be allowed to slide into continuous and even unwarranted turbulence by adults who employ dissent in unwise or unjustified ways." Sarah M. Stitzlein, *The Right to Dissent and its Implications for Schooling*, 62 EDUC. THEORY 41, 43 (2012).

⁵⁰ Tisdall, *supra* note 29, at 422. For the importance of dissent to democracy, see CASS R. SUNSTEIN, *WHY SOCIETIES NEED DISSENT* (2003); Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745 (2005).

produces a gap in political participation.⁵¹ Levinson's arguments emphasize that when low-income or minority children exercise their right to participation they acquire empowering skills that may assist them in reshaping their future.⁵²

Unstructured forms of speech and participation are especially important for disempowered children. Research examining participation in student councils showed that low-income or non-conformist children are usually excluded.⁵³ These children lack the networks and social capital that are often the entry point to participatory frameworks.⁵⁴ The unrepresentative compositions of student' councils, as well as other barriers that stem from the involvement of adults in their operation, limit the issues that can be discussed.⁵⁵ Therefore, it is important to allow children unstructured forms of speech and participation, in which disadvantaged children can have voice. Jean Rudduck and Michael Fielding note in this regard that we need to find ways to hear the silent—or silenced—students, in order to understand why some disengage and what would help them get back on track.⁵⁶

C. Developing Better Educational Practices

The right to participation and freedom of speech broaden the marketplace of ideas.⁵⁷ A literature review that explored different practices of children's participation in schools indicates that children possess unique knowledge and perspectives that adults cannot fully

⁵¹ See LEVINSON, *supra* note 47, at 46–55.

⁵² As Sarah M. Stitzlein reminds us, “history has shown us that the well-being of oppressed groups is often not elevated until a strong dissenter or a multitude of dissenters working together attract attention.” Stitzlein, *supra* note 49, at 54.

⁵³ See Pavlovic, *supra* note 25, at 134; Michael Wyness, *Children, Young People and Civic Participation: Regulation and Local Diversity*, 58 EDUC. REV. 209, 216 (2006); Nigel Thomas, *Towards a Theory of Children's Participation*, 15 INT'L J. OF CHILD. RIGHTS 199, 204 (2007); Stitzlein, *supra* note 49, at 54.

⁵⁴ Rachel Hinton, *Children's Participation and Good Governance: Limitations of the Theoretical Literature*, 16 INT'L J. OF CHILD. RIGHTS 285, 293 (2008).

⁵⁵ See Percy-Smith, *supra* note 29, at 112; Claire Freeman et al., ‘Professionalizing’ Participation: From Rhetoric to Practice, 1 CHILD. GEOGRAPHIES 53 (2003); Anne Stafford et al., ‘Having a Say’: Children and Young People Talk about Consultation, 17 CHILD. & SOC'Y 361, 368–69 (2003); McCluskey et al., *supra* note 25.

⁵⁶ Jean Rudduck & Michael Fielding, *Student Voice and the Perils of Popularity*, 58 EDUC. REV. 219, 228 (2006).

⁵⁷ See JOHN STUART MILL, ON LIBERTY 16 (Elizabeth Rappaport ed., 1978). Mill contends that both right and wrong opinions are invaluable in the search for the truth: If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error. See also SUNSTEIN, *supra* note 50, at 82.

replicate.⁵⁸ Children's new and innovative insights may alert schools to shortcomings of schools' current performance.⁵⁹ Their ideas may lead to more accurate, relevant decisions, which may improve policies and practices to meet changing needs.⁶⁰ Moreover, as Barbara Bennett Woodhouse notes, children have "the sort of innocence that allows the boy in the fable to see and to say that the emperor has no clothes . . . to view old injustices with new eyes."⁶¹ Similarly, Emily Buss argues that the connection between speech and the pursuit of truth is particularly powerful in its application to children since "[a]t no time in life are humans more actively devoted to the pursuit of truth than in the period of rapid development and education associated with childhood."⁶²

D. Improving School Climate

Research finds that when children's voices are heard and respected they develop a better attitude towards the school.⁶³ However, as John Smyth contends, when children feel their lives, experiences, cultures, and aspirations are ignored, trivialized, or denigrated by the school and the curriculum, they develop hostility towards the institution of schooling.⁶⁴ In such cases, they might actively exercise "their right to resist" by choosing to "not learn."⁶⁵ These insights explain why rebellious expressions may actually improve school climate, by making children feel their rights are respected. Yet it should be noted that superficial implementation of policies that realize children's rights could increase disengagement, distrust, and alienation rather than help to resolve these problems.⁶⁶

⁵⁸ Mitra & Gross, *supra* note 25, at 523-24. See also Anne B. Smith, *Children and Young People's Participation Rights in Education*, 15 INT'L J. OF CHILD. RIGHTS 147, 158 (2007).

⁵⁹ Michael Fielding, *Students as Radical Agents of Change*, 2 J. OF EDUC. CHANGE 123 (2001). See also JULIA FLUTTER & JEAN RUDDOCK, CONSULTING PUPILS: WHAT'S IN IT FOR SCHOOLS? (2004).

⁶⁰ Sinclair, *supra* note 46, at 108.

⁶¹ Bennett Woodhouse, *supra* note 24, at 1568-69.

⁶² Emily Buss, *Constitutional Fidelity Through Children's Rights*, 2004 SUP. CT. REV. 355, 380 (2004).

⁶³ John Smyth, *Educational Leadership that Fosters "Student Voice,"* 9 INT. J. OF LEADERSHIP IN EDUC. 279 (2006); Mitra & Gross, *supra* note 25, at 533. Warnick, *supra* note 14, at 206 ("Through free and open expression—by encouraging students to express what they really think—we can identify troubled students who are on the verge of committing violent acts.").

⁶⁴ Smyth, *supra* note 63.

⁶⁵ *Id.* at 282.

⁶⁶ Mitra & Gross, *supra* note 25, at 536. See also Fielding, *supra* note 56, at 124; Smith, *supra* note 58, at 159.

E. Respecting, Protecting, and Fulfilling Human Rights

Last, but not least, is the human rights justification for the right to participation and freedom of speech, which emphasizes the interrelation of these rights to human dignity and autonomy.⁶⁷ Factors such as age or schooling may limit the right to participation and freedom of speech in certain circumstances, but they should not obscure the duty to respect, protect, and fulfill them as human rights. Moreover, as Laura Lundy argues, the right to participation has a “transformative potential” – it may act as a multiplier of rights, increasing a person’s capacity to enjoy all other rights.⁶⁸ It is difficult to imagine egregious breaches of children’s rights, Lundy contends, in situations where they have been fully and effectively involved in determining the outcome of the decisions which affect them.⁶⁹ Children’s participation has a transformative potential also because it develops children’s rights consciousness,⁷⁰ provides a sense of self-efficacy, and raises self-esteem.⁷¹ These arguments are also relevant to freedom of speech.⁷²

IV. HOW DOES THE RIGHT TO PARTICIPATION IMPLICATE A FREEDOM OF SPEECH ANALYSIS? AN INQUIRY INTO AMERICAN CASE LAW DISCUSSING FREEDOM OF SPEECH IN SCHOOL

The previous sections examined the conceptual and structural differences between children’s right to participation and freedom of speech in school, as well as the justifications for respecting, protecting, and fulfilling those rights. The following section employs these normative and theoretical frameworks in order to analyze how children’s rights to participation and free speech correspond in different situations. It uses as a database American case law analyzing children’s freedom of speech at school. Section IV(A) presents the four cases in which the U.S.

⁶⁷ Bennett Woodhouse, *supra* note 24, at 1589 (“Having a voice is a matter of basic human right, even when one does not yet have the right to make the ultimate decision about matters under discussion.”); *See also* Lundy, *supra* note 26, at 940; Sinclair, *supra* note 46, at 108.

⁶⁸ Lundy, *supra* note 26, at 940.

⁶⁹ *Id.*

⁷⁰ On the interrelations of rights consciousness and education *see* Calvin Morrill et al., *Legal Mobilization in Schools: The Paradox of Rights and Race among Youth*, 44 *LAW & SOC’Y REV.* 651 (2010); Shulamit Almog & Lotem Perry-Hazan, *The Ability to Claim and the Opportunity to Imagine: Rights Consciousness and the Education of Ultra-Orthodox Girls*, 40 *J. OF L. & EDUC.* 273 (2011).

⁷¹ *See* Sinclair, *supra* note 46, at 108.

⁷² *See* Roy Harris, *Freedom of Speech and Philosophy of Education*, 57 *BRIT. J. OF EDUC. STUD.* 111, 125 (2009) (arguing the freedom of speech is the archetypal freedom, which is a prerequisite to other freedoms).

Supreme Court set the guiding limits of school children's free speech. As mentioned above, the restrictions on school children's free speech set by these cases are similar to the restrictions found in Article 13 of the CRC. Section IV(B) categorizes fifty-six cases that discussed freedom of speech in school. The categories differ according to how the right to participation in each case implicates First Amendment free speech analysis. The inquiry does not pretend to provide unequivocal or comprehensive answers regarding each and every ruling. Instead, it offers an overview of the interrelationships between the right to participation and freedom of speech in different circumstances, which may serve as a road map for a detailed contextual analysis of specific cases.

The cases were located in the LexisNexis database by a systematic search of the U.S. Supreme Court cases discussing freedom of speech in schools. In order to keep the coherence of the analysis, several kinds of cases were excluded from the search results, which included more than 200 cases: (1) cases that raised questions that are unique to the American constitutional framework regarding the role of religion in public schools; (2) cases that concerned school policy and not a specific expression; (3) cases that regulated the forum rather than the speech itself; and (4) cases that discussed off-campus and online expressions. These cases raise additional questions beyond the scope of this Article.

A. The First Amendment Doctrine of Children's Free Speech in School

In the landmark 1969 Supreme Court case *Tinker v. Des Moines Independent Community School District*, the Court overturned the suspensions of three students who wore black armbands in a public school to protest the Vietnam War.⁷³ Students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," the Court declared.⁷⁴ The Court set standards for limiting student speech in school when school officials could reasonably forecast that it would materially and substantially disrupt the work and discipline of the school, or invade the rights of others.⁷⁵

Other decisions of the Supreme Court offered additional guidelines, effectively expanding the *Tinker* ruling. In the 1986 case, *Bethel School District v. Fraser*, the Court upheld the suspension of a student who delivered a vulgar speech nominating a fellow student for elective office.

⁷³ *Tinker v. Des Moines Indep. Cnty. Sch. Dist.*, 393 U.S. 503 (1969).

⁷⁴ *Id.* at 506.

⁷⁵ *Id.* at 513–14.

During the speech, the speaker referred to the candidate in explicit sexual metaphors. The Court ruled that the First Amendment does not prevent school officials from determining that vulgar and lewd speech is undermining “the school’s basic educational mission.”⁷⁶

Two years later, in *Hazelwood School District v. Kuhlmeier*, the Court approved the decision of a school principal to eliminate two articles from a school-sponsored student newspaper.⁷⁷ One of the articles described the pregnancy experiences of three of the school’s students. The other dealt with the impact of divorce on the author, who was identified by name and made critical comments about her father. The Court ruled that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are “reasonably related to legitimate pedagogical concerns.”⁷⁸ The Court differentiated between “educators’ ability to silence a student’s personal expression that happens to occur on the school premises” and “educators’ authority over 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.”⁷⁹ In the latter cases, the Court noted, these activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting.⁸⁰

In the 2007 case *Morse v. Frederick* – the most recent Supreme Court case regarding students’ free speech rights – the Court upheld a suspension of a student who displayed a banner stating “Bong Hits 4 Jesus” at a school-sanctioned and school-supervised event that took place off campus.⁸¹ The principal regarded the banner as promoting drug use and directed the student to take it down, but he refused to do so. The Court held that “schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use.”⁸²

In *Fraser*, *Hazelwood* and *Morse*, the Court affirmed the values

⁷⁶ *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986). “The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society’s countervailing interest in teaching students the boundaries of socially appropriate behavior.” *Id.* at 681.

⁷⁷ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1987).

⁷⁸ *Id.* at 273.

⁷⁹ *Id.* at 271.

⁸⁰ *Id.*

⁸¹ *Morse v. Frederick*, 551 U.S. 393, 398–400 (2007).

⁸² *Id.* at 397.

underlying the *Tinker* standard, but acknowledged the schools' educational justifications for diverging from those values in certain situations. As mentioned, these four cases create a normative framework that is similar to Article 13 of the CRC. It allows school officials to restrict students' speech if the speech invades the rights of others, if school officials could reasonably forecast that it materially and substantially disrupts the work and discipline of the school, or if there are legitimate pedagogical rationales for the restriction.

B. When the Right to Participation Encounters the First Amendment

Lower courts applied *Tinker*, *Fraser*, *Hazelwood*, and *Morse* in cases involving various circumstances of on-campus speech. In this subsection, I will examine the rulings and their correspondence with the right to participation. The first part of the analysis will present cases in which the courts approved the students' expressions. The second part of the analysis will present several categories of cases in which the courts prohibited the students' expressions. The categories include expressions of young students, threatening expressions, expressions that advocated illegal behavior, vulgar expressions, offensive expressions, and dissenting expressions.

1. Permitted expressions

Many of the rulings in favor of the students involve circumstances that were similar to *Tinker*, such as wearing controversial T-shirts,⁸³ armbands,⁸⁴ buttons,⁸⁵ and bracelets.⁸⁶ The courts also ruled in favor of students who distributed written materials during non-instructional

⁸³ See *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243 (3d Cir. 2002) (T-shirt inscribing with "redneck" jokes); *K.D. v. Filmore Central Sch. Dist.*, No. 05-CV-0336(E), 2005 US Dist LEXIS 33871 (W.D.N.Y. 2005) (pro-life T-shirt); *Guiles ex rel. Guiles v. Marineau*, 461 F.3d 320 (2d Cir. 2006) (T-shirt criticizing George Bush as a "chicken-hawk" president and accusing him of being a former alcohol and cocaine user); *Gillman ex rel. Gillman v. Sch. Bd. for Holmes Cnty.*, 567 F. Supp. 2d 1359 (N.D. Fla. 2008) (T-shirts expressing support for homosexual persons); *Zamecnik v. Indian Prairie Sch. Dist.* No. 204, 636 F.3d 874 (7th Cir. 2011) (T-shirt bearing a "Be Happy, Not Gay" slogan).

⁸⁴ *Lowry ex rel. Crow v. Watson Chapel Sch. Dist.*, 540 F.3d 752 (8th Cir. 2008) (black armbands in protest of the school uniform policy); *C.H. v. Bridgeton Bd. of Educ.*, No. 09-5815(RBK/JS), 2010 U.S. Dist. LEXIS 40038 (D.N.J. 2010) (black and red tape armbands saying "Life").

⁸⁵ *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524 (9th Cir. 1992) ("scab" buttons stating "Student united for fair settlement" worn by students who were children of striking school teachers); *DePinto v. Bayonne Bd. of Educ.*, 514 F. Supp. 2d 633 (D.N.J. 2007) (buttons stating "No School Uniforms" over a slashed red circle that contained a photograph of the Hitler Youth).

⁸⁶ *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293 (3d Cir. 2013) (cancer awareness bracelets bearing the slogan "I Love Boobies").

times,⁸⁷ published articles in the school newspaper,⁸⁸ and expressed controversial opinions in class.⁸⁹ These cases involved various expressions, which included, *inter alia*, a T-shirt criticizing George Bush as a “chicken-hawk” president and accusing him of being a former alcohol and cocaine user,⁹⁰ buttons stating “No School Uniforms” over a photograph of the Hitler Youth,⁹¹ pro-life and abortion literature,⁹² cancer awareness materials that included the word “Boobies,”⁹³ written materials criticizing a school official for having “a sick mind,”⁹⁴ and negative comments about homosexuality.⁹⁵ Most of the expressions in these cases were participatory. However, these expressions did not go beyond attempts to change students’ opinions. The few expressions that concerned school policy—the school uniform or the behavior of school officials—did not shape channels for mobilizing the students’ opinions into actions and did not use dialogic organizational spaces that may promote such actions. As will be elaborated later, when the students mobilized their expressions and strived for a stronger influence, their expressions did not receive the courts’ protection.

⁸⁷ *Scoville v. Bd. of Educ.*, 425 F.2d 10 (7th Cir. 1970) (criticism of school officials, including statements regarding the senior dean that has “a sick mind” and “poses a threat to our community”); *Bowler v. Town of Hudson*, 514 F. Supp. 2d 168 (D. Mass. 2007) (posters advertising a conservative club listing a website address, which contained a link to another website hosting graphic footage of hostage beheadings); *Raker v. Frederick Cnty. Pub. Sch.*, 470 F. Supp. 2d 634 (W.D. Va. 2007) (abortion literature); *C.H. v. Bridgeton Bd. of Educ.*, No. 09-5815 (RBK/JS), 2010 U.S. Dist. LEXIS 40038 (D.N.J. 2010) (anti-abortion flyers).

⁸⁸ *Dean v. Utica Cnty. Sch.*, 345 F. Supp. 2d 799 (E.D. Mich. 2004) (an article in the high school’s newspaper about a lawsuit filed by residents of a neighborhood adjoining the school district’s bus garage who claimed that diesel fumes from idling buses constituted a nuisance); *Desilets v. Clearview Reg’l Bd. of Educ.*, 647 A.2d 150 (N.J. 1994) (reviews of R-rated movies in the school paper. The reviews only referred to materials that included inappropriate content and did not include such content).

⁸⁹ *Glowacki v. Howell Pub. Sch. Dist.*, No. 2:11-cv-15481, 2013 U.S. Dist. LEXIS 85960 (E.D. Mich. 2013) (a student said in class “I don’t accept gays” during an anti-bullying day).

⁹⁰ *Guiles v. Marineau*, 461 F.3d 320.

⁹¹ *DePinto v. Bayonne Bd. of Educ.*, 514 F. Supp. 2d 633 (D.N.J. 2007).

⁹² *K.D. v. Filmore Cent. Sch. Dist.*, No. 05-CV-0336(E), 2005 US Dist LEXIS 33871 (W.D.N.Y. 2005); *Raker v. Fredrick Cnty. Pub. Sch.*, 470 F. Supp. 2d 634 (W.D. Va. 2007); *C.H.*, 2010 U.S. Dist. LEXIS 40038.

⁹³ *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293 (3d Cir. 2013).

⁹⁴ *Scoville v. Bd. of Educ.*, 425 F.2d 10 (7th Cir. 1970).

⁹⁵ *Zamecnik v. Indiana Prairie Sch. Dist.*, 636 F.3d 874 (7th Cir. 2011); *Glowacki v. Howell Pub. Sch. Dist.*, No. 2:11-cv-15481, 2013 U.S. Dist. LEXIS 85960 (E.D. Mich. 2013).

2. Prohibited expressions

a. The question of age: Expressions of elementary and middle school students.

There were four cases in which the prominent rationale for limiting students' expressions was their young age. Three cases discussed controversial statements on bracelets or clothing, including "Unfair Grades," "Racism," and "I Hate Lost Creek,"⁹⁶ pictures of fetuses,⁹⁷ and "I love Boobies! (Keep A Breast)."⁹⁸ As noted, similar statements were approved in high schools. In the fourth case, the prohibited expression was a petition stating, "[w]e 3rd grade kids don't want to go to the circus because they hurt animals. We want a better feild [sic] trip."⁹⁹

Limiting certain expressions to certain ages corresponds to the right to participation, which is adapted to the age and maturity of the children. Yet a blanket prohibition on controversial expressions in elementary and middle schools does not recognize the evolving capacities of children. For example, in *Baxter v. Vigo County School Corporation*¹⁰⁰ the Court avoided any discussion regarding the evolving capacities of the elementary school student who wore a T-shirt reading "Unfair Grades," "Racism," and "I Hate Lost Creek." The Court noted that given the indications in *Fraser* and *Hazelwood* that age is a relevant factor in assessing the extent of a student's free speech rights in school, in addition to the dearth of case law in the lower federal courts, the violation of the freedom of speech was not "clearly established."¹⁰¹

In *Walker-Serrano ex rel. Walker v. Leonard*¹⁰² the prohibited expression was a petition objecting to a planned third grade outing to the circus. The court ruled that, "even if elementary school children are entitled to some protection under the First Amendment, it might be argued that, under *Tinker*, they have no right to seek signatures from their peers on a petition of the kind at issue here."¹⁰³ Implicit in

⁹⁶ *Baxter v. Vigo Cnty. Sch. Corp.*, 26 F.3d 728 (7th Cir. 1994).

⁹⁷ *T.A. ex rel. Amador v. McSwain Union Elem. Sch.*, No. 1:08-cv-01986-OWW-DLB, 2010 U.S. Dist. LEXIS 71973 (E.D. Cal. 2010).

⁹⁸ *K.J. ex rel. Braun v. Sauk Prairie Sch. Dist.*, No. 11-cv-622-bbc, 2012 U.S. Dist. LEXIS 187689 (W.D. Wis. 2012). The Court noted that the school officials "made efforts to tailor their speech regulations to the age and maturity level of their students by not banning the bracelets in the high school." *Id.* at 23.

⁹⁹ *Walker-Serrano v. Leonard*, 325 F.3d 412 (3d Cir 2002).

¹⁰⁰ *Baxter*, 26 F.3d at 728.

¹⁰¹ *Id.* at 738.

¹⁰² *Walker-Serrano*, 325 F.3d at 412.

¹⁰³ *Id.* at 418.

petitioning activity, the court noted, “that the young listener is capable of comprehending the advocated position.”¹⁰⁴ Although the plaintiff pointed out that one of the third grade textbooks contained a lesson in which the students are asked to circulate a petition on a matter of community concern, the court found that the record does not support a First Amendment violation claim, “even if Walker-Serrano’s petition caused no disruption.”¹⁰⁵ The concurring opinion stated that “it is unlikely that the third grade children here could have had knowledge of how a circus treats its animals” and that “an eight or nine-year old child might not be able to resist the peer pressure to sign a petition and thus might do so even if the petition advocates a position with which he or she does not agree.”¹⁰⁶ In terms of promoting the right to participation, these difficulties may be benefits. When voices strive for influence by engaging other students, they become participatory. Amanda Walker-Serrano’s petition may have encouraged her classmates to ask questions about circus animals and to make more informed decisions. Are they too young to ask questions about how circus animals should be treated? What is the balance between the damage of signing a petition that they do not fully understand and the lessons that they can learn about participation, civic engagement, and responsibility? In which ways the overt and hidden school curriculum of this elementary school might clash? These questions remained unanswered.

b. Intimidating and silencing: Threatening expressions.

Another category of prohibited expressions includes threatening expressions. Students who threatened other students or teachers on school grounds,¹⁰⁷ as well as students who wrote or showed threatening expressions on school grounds,¹⁰⁸ did not receive the protection of the First Amendment. Prohibited expressions included severe threats,¹⁰⁹

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 420 (Greenberg, J., concurring).

¹⁰⁷ *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367 (9th Cir. 1996); *S.G. ex rel. A.G. v. Sayreville Bd. of Edu.*, 333 F.3d 417 (3d Cir. 2003); *Johnson v. New Brighton Area Sch. Dist.*, No. 06-1672, 2008 U.S. Dist. LEXIS 72023 (W.D. Pa. Sept. 11, 2008); *Cuff v. Valley Cent. Sch. Dist.*, 677 F.3d 109 (2d Cir. 2012).

¹⁰⁸ *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981 (9th Cir. 2001); *Demers v. Leominster Sch. Dep’t*, 263 F. Supp. 2d 195 (D. Mass. 2003); *Wilson v. Hinsdale Elementary Sch. Dist.*, 810 N.E.2d 637 (Ill. App. Ct. 2004); *Boim v. Fulton County Sch. Dist.*, 494 F.3d 978 (11th Cir. 2007); *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765 (5th Cir. 2007); *Kelly v. Bd. of Educ.*, No. 06 C 1512, 2007 U.S. Dist. LEXIS 1824 (N.D. Ill. 2007).

¹⁰⁹ *Lovell*, 90 F.3d at 367 (a student told a guidance counselor: “[i]f you don’t give me this schedule change, I’m going to shoot you!”); *Johnson*, 2008 U.S. Dist. LEXIS 72023 (a student told

drawing of gang signs,¹¹⁰ or shouting, “I’m going to shoot you” during a cops-and-robbers play at a kindergarten.¹¹¹ Threatening expressions do not collide with the right to participation. Whether they are more or less serious, threatening expressions have no dialogic goal. Moreover, threatening expressions may silence participatory expressions by creating an intimidating educational climate.

c. Questioning the law: Expressions advocating illegal behavior.

Advocating illegal behavior is also prohibited under current case law. Some of the relevant cases discussed expressions advocating physical violence, such as a T-shirt printed with “Terrorist Hunting Permit” and a “No Bag Limit” superimposed over a larger automatic handgun,¹¹² or a slogan on a student’s hands in support of a former student accused of shooting a police officer.¹¹³ Another case discussed an unofficial newspaper that included an article justifying vandalism against the homes of teachers.¹¹⁴ Several years before the Supreme Court’s *Morse* decision, lower courts prohibited a school band’s song advocating drug use¹¹⁵ and Marilyn Manson T-shirts promoting “destructive conduct.”¹¹⁶

In certain cases, expressions that advocate illegal behavior may be participatory. Restricting such expressions at school should start by surveying the political discourse in regard to the specific behavior. While it is plainly unacceptable to advocate violence or vandalism, there is a legitimate discourse regarding drug use. Yet the *Morse* case, which ruled that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug

other students: “[i]f you guys don’t quit calling me that, I’m going to pull a Columbine.”); *Cuff*, 677 F.3d at 109 (in response to a classroom assignment a student wrote: “[b]low up the school with the teachers in it”); *LaVine*, 257 F.3d at 981 (a poem that described the student author shooting other students); *Demers*, 263 F. Supp. 2d at 195 (a drawing that depicted the superintendent with a gun pointed at his head and explosives at his feet); *Wilson*, 810 N.E.2d at 637 (a song about the pregnant science teacher entitled “Gonna Kill Mrs. Cox’s Baby”); *Boim*, 494 F.3d at 978 (entry in a school notebook describing how the student shoots the math teacher); *Ponce*, 508 F.3d at 765 (a notebook diary, written in the first-person perspective, in which the student detailed the creation of a pseudo-Nazi group and a plan to commit a “Columbine shooting” attack).

¹¹⁰ *Kelly*, 2007 U.S. Dist. LEXIS 1824.

¹¹¹ *S.G.*, 333 F.3d at 417.

¹¹² *Miller ex rel. Miller v. Penn Manor Sch. Dist.*, 588 F. Supp. 2d 606 (E.D. Pa. 2008).

¹¹³ *Brown ex rel. Brown v. Cabell Co. Bd. of Educ.*, 714 F. Supp. 2d 587 (S.D.W. Va. 2010).

¹¹⁴ *Bystrom v. Fridley High Sch.*, 686 F. Supp. 1387 (D. Minn. 1987).

¹¹⁵ *McCann v. Fort Zumwalt Sch. Dist.*, 50 F. Supp. 2d 918 (E.D. Mo. 1999).

¹¹⁶ *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465 (6th Cir. 2000).

use,¹¹⁷ was not about participation. The goal of Joseph Frederick, who displayed a banner stating “Bong Hits 4 Jesus” at an off-campus school event, was to get the camera crews’ attention.¹¹⁸ He claimed that the words on the banner were “nonsense.”¹¹⁹ In Justice Alito’s concurring opinion, with whom Justice Kennedy joined, it was noted that the ruling “provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as ‘the wisdom of the war on drugs or of legalizing marijuana for medicinal use.’”¹²⁰ This statement focuses on the difference between participatory and non-participatory expressions. It may assist in identifying those expressions that aim to participate in a legitimate political discourse about the advantages and disadvantages of drug use. This is not to say that Frederick’s expression should not have been limited. It may be protected under freedom of speech doctrine, but it does not deserve additional protection for being participatory.

d. Bad taste or a generation gap? Vulgar expressions.

In accordance with *Fraser*, courts consistently disapprove of expressions that had sexual connotations. These expressions included condoms with stickers handed out during a student council campaign,¹²¹ a sexually-explicit cartoon that was published in an independent student newspaper accompanying an article entitled “Alumni Advice: Sex is fun!”¹²² a t-shirt reading “Drugs Suck,”¹²³ and a video made in connection with a film arts class, which depicted the story of teenage parents and contained profanity and explicit reference to sexual activity.¹²⁴

As the *Fraser* case exemplifies, vulgar expressions may have strong participatory elements. They may attract more attention to a debate, sharpen the messages on one or both sides of the issue, and engage students who usually do not join participatory frameworks. They may also question the limits of childhood and the expectable behavior of children. Yet vulgarity may be not merely poor taste. It may also make children uncomfortable and, in certain circumstances, lead to sexual

¹¹⁷ *Morse v. Frederick*, 551 U.S. 393, 397 (2007).

¹¹⁸ *Id.* at 401, 426, 443.

¹¹⁹ *Id.* at 401.

¹²⁰ *Id.* at 422.

¹²¹ *Henerey ex rel. Henerey v. City of St. Charles*, 200 F.3d 1128 (8th Cir. 1999).

¹²² *R.O. ex rel. Ochshorn v. Ithaca City Sch. Dist.*, 645 F.3d 533 (2d Cir. 2011).

¹²³ *Broussard v. Sch. Bd. of the City of Norfolk*, 801 F. Supp. 1526 (E.D. Va. 1992).

¹²⁴ *Lopez v. Tulare Joint Union High Sch. Dist. Bd. of Trs.*, 40 Cal. Rptr. 2d 762 (Ct. App.

harassment. In his dissenting opinion in *Fraser*, Justice Stevens noted that Matthew Fraser “was probably in a better position to determine whether an audience composed of 600 of his contemporaries would be offended by the use of a four-letter word—or a sexual metaphor—than is a group of judges who are at least two generations and 3,000 miles away from the scene of the crime.”¹²⁵ Indeed, it is difficult to determine what children understand to be the purpose of certain behaviors or expressions. Setting the pedagogical justifications for restricting expressions that have sexual connotations requires a dialogic process, in which children and adults share the power of decision-making. Such a process may assist in bridging the generation gap Justice Stevens described in his dissent and in shaping better decisions.

e. Hurting people’s feelings: Expressions that offended teachers, parents or students.

A related category of prohibited expressions includes different kinds of offensive expressions. Most of the prohibited offensive expressions were racial statements or symbols, such as the confederate flag¹²⁶ or a “Johnny Reb” cartoon.¹²⁷ One case prohibited Caucasian students from wearing American flag shirts in a school plagued by fights between Caucasian and Mexican students.¹²⁸ In the special context of this case, the shirts seemed clearly designed to offend the Mexican students, induce violence, and risk students’ safety.¹²⁹ Other cases discussed bullying and harassment include cyber bullying of a teacher who was photographed in class,¹³⁰ calling the assistant principal a “dick,”¹³¹ and putting a sign in a student’s work area stating “[m]aking a mountain out of a molehill” (relating to a fellow students’ parents who asked not to use quotes given by their son for publication in an Internet article).¹³² Such expressions, which have the main goal to offend, have no participatory elements.

More complicated cases involved offensive expressions that had a

¹²⁵ *Bethel School Dist.*, 478 U.S. at 692.

¹²⁶ *Denno ex rel. Denno v. School Bd.*, 218 F.3d 1267 (11th Cir. Fla. 2000); *West v. Derby Unified Sch. Dist.* No. 260, 206 F.3d 1358 (10th Cir. 2000); *B.W.A. v. Farmington R-7 Sch. Dist.*, 508 F. Supp. 2d 740 (E.D. Mo. 2007); *Barr v. Lafon*, 538 F.3d 554 (6th Cir. 2008); *Defoe v. Spiva*, 625 F.3d 324 (6th Cir. 2010); *Hardwick ex rel. Hardwick v. Heyward*, 711 F.3d 426 (4th Cir. 2013).

¹²⁷ *Crosby v. Holsinger*, 852 F.2d 801 (4th Cir. 1988).

¹²⁸ *Dariano v. Morgan Hill Unified Sch. Dist.*, 745 F.3d 354 (9th Cir. 2014).

¹²⁹ *Id.* at 359–360.

¹³⁰ *Requa v. Kent Sch. Dist.*, 492 F. Supp. 2d 1272 (W.D. Wash. 2007).

¹³¹ *Posthumus*, 380 F. Supp. 2d at 895.

¹³² *Fister ex rel. Fister v. Minnesota New Country Sch.*, 1998 149 F.3d 1187 (8th Cir. 1998).

participatory goal. In *Poling v. Murphy*,¹³³ the prohibited expression was a school assembly speech. Dean Poling, a candidate for the student council, delivered a speech that has the following peroration:

The administration plays tricks with your mind and they hope you won't notice. For example, why does Mr. Davidson stutter while he is on the intercom? He doesn't have a speech impediment. If you want to break the iron grip of this school, vote for me for president. I can try to bring back student rights that you have missed and maybe get things that you have always wanted.¹³⁴

Two of the other student candidates came to the faculty sponsors of the student council and complained Poling gained an unfair advantage in the election by his speech regarding Mr. Davidson.¹³⁵ The incumbent student council president also expressed this opinion.¹³⁶ Consequently, Poling was declared ineligible to run.¹³⁷ The court approved the decision and ruled that the school acted reasonably in line with constitutional aims by requiring students to state their views without ridiculing personalities and unnecessarily hurting the feelings of others.¹³⁸

Another case of an offensive expression with a participatory goal is *Wildman v. Marshalltown School District*.¹³⁹ In this case, Rebecca Wildman, who participated in the basketball team, distributed the following letter in the school's locker room:

To all of my teammates:

Everyone has done a great job this year and now is the time that we need to make ourselves stronger and pull together. It was a tough loss last night but we will get it back. We have had some bumps in the road to success but every team does and the time is here for us to smoothen it out. Everyone on this team is important whether they think so or not. After watching last nights [sic] Varsity game and seeing their sophomores play up I think and I think [sic] that some of you are think [sic] the same thing. I think that we have to fight for our position. Am I the only one who thinks that some of us should be playing Varsity or even JV? We as a team have to do something about this. I want to say something to Coach Rowles. I will not say anything to him without the whole teams [sic] support. He needs us next year and the year after and what if we aren't there for him? It is time to give him back some of the

¹³³ *Poling v. Murphy*, 872 F.2d 757 (6th Cir. 1989).

¹³⁴ *Id.* at 759.

¹³⁵ *Id.* at 759–60.

¹³⁶ *Id.* at 760.

¹³⁷ *Id.*

¹³⁸ *Id.* at 763.

¹³⁹ *Wildman v. Marshalltown Sch. Dist.*, 249 F.3d 768 (8th Cir. 2001).

bullshit that he has given us. We are a really great team and by the time we are seniors and we ALL have worked hard we are going to have an AWESOME season. We deserve better then [sic] what we have gotten. We now need to stand up for what we believe in!!!¹⁴⁰

The school told Wildman she could not continue to participate with the sophomore basketball team unless she apologized to her teammates for writing the letter. She refused to apologize and did not practice with the team or play in the season's remaining six games.¹⁴¹ Following the school year, Wildman and her family moved to another school district and sued for damages.¹⁴² The court ruled that Wildman's letter, "containing the word 'bullshit' in relation to other language in it and motivated by her disappointment at not playing on the varsity team, constitutes insubordinate speech toward her coaches."¹⁴³ Since the speech called only for an apology, the court noted "[N]o basis exists for a claim of a violation of free speech."¹⁴⁴

Poling's speech, which was delivered during a campaign for the student council, and Wildman's letter, which aimed to recruit her teammates for what Wildman thought was a just cause, are participatory expressions. Both of them strived for influence and mobilized opinions into actions. Both of them aspired to share decision-making power with adults. Poling wanted to use the structural organizational space of the student council. Wildman created her own channel of influence. Yet, as the court noted in regard to Poling's speech, students should learn not to offend other people when they participate. Participation, as freedom of speech, is not absolute. Its justifications are undermined when the expressions are offensive.

In each and every case there should be, however, careful consideration of whether or not the expression was limited because it was offensive or because it was unpleasant. In the *Poling* case, the offensive remark regarding Mr. Davidson was the direct reason for the restriction. Moreover, other students complained that Poling gained an unfair political advantage by his remarks. Contrarily, Wildman's offensive remark regarding the coach's "bullshit" did not lie within the core of the message. It was not clear whether the court disapproved of the letter because it contained the word "bullshit" or because it was

¹⁴⁰ *Id.* at 770.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 772.

¹⁴⁴ *Id.*

“insubordinate.”¹⁴⁵ An analysis that takes into account the right to participation should draw a clearer line between participatory offensive expressions and participatory unpleasant expressions, define the goal of the limitation, and shape educational reactions that emphasize the importance of mobilizing students’ voices into actions and influence. Accordingly, an apology for using the word “bullshit” rather than for writing the letter may have been a better educational solution, which could have prevented the entire controversy.

f. Criticizing and protesting: Dissenting expressions.

In *Pinard v. Clatskanie School District*¹⁴⁶ a group of students who played on the high school basketball team signed a petition requesting their coach resign.¹⁴⁷ The petition stated the following:¹⁴⁸

As of February 12, 2001, the Clatskanie Tigers Boys Varsity Basketball Team would like to formally request the immediate resignation of Coach Jeff Baughman. As a team we no longer feel comfortable playing for him as a coach. He has made derogative [sic] remarks, made players uncomfortable playing for him, and is not leading the team in the right direction. We feel that as a team and as individuals we would be better off if we were to finish the season with a replacement coach. We, the undersign [sic], believe this is in the best interest of the team, school, town, and for the players and fans. We would appreciate the full cooperation of all the parties involved.

When the students delivered the petition to the coach, he immediately took it to the high school principal and asked for permission to take off the remainder of the day, which the principal granted.¹⁴⁹ The principal did not ask the coach whether he would coach that evening’s game.¹⁵⁰ Once home, the coach called the junior varsity coach and stated that he wanted “to know who his back-stabbers were” and “to corner the little sons-of-bitches.”¹⁵¹

After the coach left the school, the principal called a meeting with all of the players who had signed the petition. The players were presented with two options: the players could participate in a mediation process and board the team bus for the game that evening or they could adhere to

¹⁴⁵ *Id.*

¹⁴⁶ *Pinard v. Clatskanie School District*, 467 F.3d 755 (9th Cir. 2006).

¹⁴⁷ *Id.* at 760.

¹⁴⁸ *Id.* at 760–61.

¹⁴⁹ *Id.* at 761.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

their position and forfeit their privilege to play in the game. They were not advised that they would be disciplined further for choosing the second option.¹⁵² Later in the day, the coach informed the principal and the superintendent that he was not going to coach the game that evening; the superintendent then made arrangements for a substitute coach but did not inform the players of the coach's decision.¹⁵³ With the exception of one student, each of the players who had signed the petition chose not to board the bus and did not play in the game "to demonstrate their resolve and sincerity concerning the petition and complaints."¹⁵⁴ At the game, the junior varsity team played in place of the eight missing players and lost the game by more than 50 points.¹⁵⁵ The next day, the players who signed the petition and refused to board the bus were permanently suspended from the team.¹⁵⁶

The court found that the coach was indeed verbally abusive and "highly intimidating," as the students had complained.¹⁵⁷ Applying *Tinker*, the court held that the students' petition and complaints against their coach were protected speech because that speech could not reasonably have led school officials to forecast substantial disruption of or material interference with a school activity.¹⁵⁸ However, the plaintiffs' refusal to board the bus was properly punishable by the defendants as unprotected speech because, as the District Court found, the game boycott substantially disrupted and materially interfered with the operation of the varsity boys basketball program.¹⁵⁹ The court asserted the fact that "the school succeeded in obtaining substitute players—albeit of lesser experience and ability—may have mitigated the disruptive effects of the plaintiffs' actions, but it did not eliminate them or render them less than substantial."¹⁶⁰

¹⁵² *Id.* at 761.

¹⁵³ *Id.* at 762.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 763.

¹⁵⁷ *Id.* at 760. For example, one of the students testified that after a game, the coach had him "hold a basketball while the coach 'slapped' and 'beat' at it (also hitting [the student's] arms) to make sure he was holding the ball tightly. [The coach] then made a triangular shape with his fingers and told the student, 'You know what this is? This is what you are. You are a fucking pussy.' Describing the coach's intimidation tactics, another student testified that [the coach] once told the team, 'I can fuck with your minds in so many ways you won't know which way is up, and don't think I can't. I'll make your lives a living hell.' [The student] explained that the players did not report Baughman's behavior because Baughman made it clear that 'anything that happened in the locker room stays in the locker room.'" *Id.*

¹⁵⁸ *Id.* at 772.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 770. The case was remanded to the district court to consider in the first instance whether the plaintiffs' protected speech (their petition and complaints against the coach) was a

The decisive argument in this case was the rationale of *Tinker*—the substantial disruption to the operation of the basketball program. A question remains whether there should be any balance between the substantial disruption rationale and educational rationales. Should educators ban any substantial disruption to the work and discipline of the school, even if the disruption is a protest that may teach students significant democratic lessons? In *Pinard*, a dialogue between the students and the school officials over the petition, in which the students felt that their complaints were heard and respected, may have prevented the strike. When school officials failed to create such dialogue, there are strong pedagogical reasons that justify participatory actions. Indeed, the students' actions disturbed the operation of the basketball program, just as strikes substantially disturb the work of businesses, paralyze the market, and harden the life of citizens. The court should have engaged in a much more substantial discussion regarding the role of protests and strikes in a democracy.

In a similar case, *Lowery v. Euverard*,¹⁶¹ high school football players were dismissed from their high school football team after signing a petition that stated, "I hate Coach Euverard and I don't want to play for him." The students alleged that the coach struck a player in the helmet, threw away college recruiting letters to disfavored players, humiliated and degraded players, used inappropriate language, and required a year-round conditioning program in violation of high school rules.¹⁶² They intended to give the petition to the school principal, in order to have the coach replaced.¹⁶³ When the coach found out about the petition, he dismissed all the students from the team who did not apologize.¹⁶⁴

The court noted that "[p]ublic schools are necessarily not run as a democracy. Schools exist to provide a forum whereby those with wisdom and experience (the teachers) impart knowledge to those who lack wisdom and experience (the students)."¹⁶⁵ The court applied *Tinker* and ruled, [r]equiring coaches to tolerate attacks on their authority would effectively strip them of their ability to lead.¹⁶⁶ The court noted, "[i]t would also do a great disservice to other players who wish to play on a team free from strife and disunity."¹⁶⁷ The "disrespectful and

substantial or motivating factor in the defendants' disciplinary action. *Id.* at 772.

¹⁶¹ *Lowery v. Euverard*, 497 F.3d 584 (6th Cir. 2007).

¹⁶² *Id.* at 585.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 586.

¹⁶⁵ *Id.* at 588.

¹⁶⁶ *Id.* at 599.

¹⁶⁷ *Id.*

insubordinate actions” of the students were compared by the court to a player “giving ‘lip’ to a coach during practice” or a student “making a smart aleck remark to a teacher.”¹⁶⁸ The court emphasized that *Tinker* does not require teachers to surrender control of the classroom to students, and it does not require coaches to surrender control of the team to players.¹⁶⁹

The *Lowery* decision is harsher than the *Pinard* ruling. It silences the voices of students who strive to change a disrespectful educational environment. A petition against an abusive coach is not comparable to a player “giving ‘lip’ to a coach during practice” or a student “making a smart aleck remark to a teacher.”¹⁷⁰ An analysis that takes into account the right to participation may reveal the educational differences between such cases. Indeed, we do not want to educate children to ridicule other people. We do want, however, to educate them to stand up when someone makes unjustified derogatory remarks towards them, especially in relationships of authority. The litigation in *Lowery* continued two more years after the sixth circuit’s decision in light of a dispute regarding the rights of the suspended athletes’ parents to appear before the board of education.¹⁷¹ It exemplifies the long-term damages of silencing participatory voices.

The expressions in *Pinard* and *Lowery* should be distinguished from the expressions in *Poling* and *Wildman*. The only rationale for the restrictions in *Pinard* and *Lowery* was the substantial disruption of the dissent. The right to participation provides a normative rationale for protecting dissenting expressions in school. It also supports the arguments of several American scholars who examined freedom of speech in school and identified the need to differentiate between harassment and dissent,¹⁷² discussed the democratic importance of dissent,¹⁷³ and indicated the tendency of school officials to insulate themselves from scrutiny and keep an image of infallibility.¹⁷⁴

V. CONCLUSION

The analysis in this Article highlights the distinctions between

¹⁶⁸ *Id.* at 594.

¹⁶⁹ *Id.* at 601.

¹⁷⁰ *Id.* at 594.

¹⁷¹ *Lowery v. Jefferson Cnty. Bd. of Educ.*, 685 F.3d 427 (6th Cir. 2009).

¹⁷² Waldman, *supra* note 14.

¹⁷³ Stitzlein, *supra* note 49.

¹⁷⁴ Brown, *supra* note 16, at 255.

participatory and non-participatory expressions in educational environments. The normative umbrella of free speech binds these expressions together. The right to participation unties the bind and captures only expressions that have a dialogic character. It assists in identifying those expressions that are invaluable for a democratic society, which integrate the civic education curriculum with the school's organizational practices.

In certain circumstances, such as threatening or offensive expressions, the right to participation does not apply. In other circumstances, such as dissenting expressions, the right to participation offers more protection than the freedom of speech doctrine. Additionally, the right to participation provides normative tools for crafting distinctions between various vulgar expressions or differing expressions that question the law. It also highlights the need to examine children's evolving capacities in each and every case.

The justifications listed in Section III apply both to the right to participation and freedom of speech in schools. However, the analysis of the cases demonstrates that most of these justifications are stronger when the expressions are participatory. Dialogic expressions that are captured by the right to participation have more potential to promote education in democracy, equalize educational opportunities, create better educational practices, and improve school climate compared to non-participatory expressions. They have also more potential to act as a multiplier of rights. Threatening or offensive expressions, vulgar expression that have no participatory goal, or expressions that promote violence or vandalism are not related to these justifications. Therefore, a careful balance is required regarding the gaps between participation and speech in educational environments.

In the American context, this Article provides complementary educational answers for shaping the limits of the U.S. Supreme Court guidelines regarding freedom of speech in school. As mentioned above, the right of school children to participation corresponds to American values;¹⁷⁵ it was not the reason for the rejection of the CRC.¹⁷⁶ For signatories of the CRC, this Article may provide guidelines to assist in analyzing the interrelationships between children's right to participation and their freedom of speech. The fact that the right to participation was

¹⁷⁵ See Kilbourne, *supra* note 23; Bennett Woodhouse, *supra* note 24; Shulamit Almog & Ariel L. Bendor, *The UN Convention on the Rights of the Child Meets the American Constitution: Towards a Supreme Law of the World*, 11 INT'L J. CHILD. RTS. 273 (2003–2004).

¹⁷⁶ Kilbourne, *supra* note 23.

tailored for children, rather than as an “adult-minus” right,¹⁷⁷ means the right to participation has the potential to adapt the contours of freedom of speech in school to the special circumstances of childhood and schooling.

Future research may examine how the right to participation may be applied in cases of students’ online expressions. Future research may also examine how the right to participation may be implemented in school policies regulating the reactions of school officials to controversial expressions. Participatory policies, such as restorative practices,¹⁷⁸ may not only fulfill the right to participation but also prevent the unnecessary conflicts that top-down zero tolerance policies induce.¹⁷⁹ The numerous American cases that were analyzed exemplify the high educational prices of legal battles over school discipline.¹⁸⁰ Adopting participatory policies for resolving conflicts in schools may benefit students, parents, teachers, and school officials.

The final words are dedicated to the most significant agents of school children’s participation—teachers. The distinction made between speech and participation may assist teachers in drawing the line between expressions that mock and degrade them and expressions that may nurture a collaborative educational climate. It may also assist teachers in articulating this line to students, parents, lawyers, and judges. Yet, in cases of dissenting expressions, it is not simple for teachers to respect, protect, and fulfill the right to participation. Without understanding the children’s right to participation, and believing in its benefits, teachers will not mobilize this right by sharing their power and by shaping participatory spaces. Therefore, it is important to provide teachers with human rights education and continuous professional support. As Mitra and Gross note, it is important to empower teachers as professionals in their broader institutional environment, since disempowered teachers cannot empower their students.¹⁸¹ The right to participation depends,

¹⁷⁷ Buss, *supra* note 62, at 356 (arguing that children’s rights in American case law usually have “adult-minus” orientation; they are shaped in light of the rights already afforded to adult).

¹⁷⁸ See, e.g., Brenda Morrison et al., *Practicing Restorative Justice in School Communities: The Challenge of Culture Change*, 5 PUB. ORG. REV.: A GLOBAL J. 335 (2005); Jean Kane et al., *Generating an Inclusive Ethos? Exploring the Impact of Restorative Practices in Scottish Schools*, 13(3) INT’L J. OF INCLUSIVE EDUC. 231 (2009); Gilean McCluskey et al., *Teachers Are Afraid We Are Stealing their Strength’: A Risk Society and Restorative Approaches in School*, 59(2) BRIT. J. OF EDUC. STUD. 105 (2011). For the interconnections of restorative justice and the right to participation, see TALI GAL, *CHILD VICTIMS AND RESTORATIVE JUSTICE: A NEEDS-RIGHTS MODEL* (2011).

¹⁷⁹ Warnick, *supra* note 14, at 211, arguing in this regard, that the importance of the educational purposes of schools suggests that speech must be restricted in a way that is itself educational.

¹⁸⁰ See PROFFITT DUPRE, *supra* note 15.

¹⁸¹ Mitra & Gross, *supra* note 25, at 537.

therefore, on education policies that refrain from marginalizing teachers in all levels of policy-making. A bottom-up school policy, which focuses on teachers as agents of children's participation, is much more useful, just, and educational than a top-down legal policy, which focuses on the protection of speech and participation in courts.