Preparing for Law School
Reading Materials
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Instructor: Leora Harpaz

PREPARING FOR LAW SCHOOL

These materials include suggestions for how to succeed in law school as well as an introduction to the legal system and the methods of legal analysis. They also include a number of edited court decisions which will be assigned to be discussed in class.

Chapter I: TIPS FOR SUCCESS IN LAW SCHOOL

A. 15 Tips for Success in Law School

1. Law School is Not Like College

Law school requires daily, focused, significant amounts of work. My own experience in college was that it was possible to put off assigned work and then work intensely for a few days and successfully complete an assignment or turn in a paper. That's the reason that the phrase "pull an all-nighter" is associated with college. By contrast to college, in some ways law school is more like high school or a job. Like high school there are daily assignments and homework and work has to be completed on a regular basis. Like a job, you have to be there and complete required tasks on a regular basis. That's why students who have been in the workforce for a year or two are sometimes better prepared for the rigors of law school than students who just graduated from college. However, many students have had summer jobs and part-time or full-time jobs while attending college so they are well aware of the differences between school and work. For students who have not had significant work experience, determination and discipline can substitute for time on the job.

2. Do All the Assigned Reading Before Each Class

You must do all the assigned reading in preparation for attending class. Without reading the assignments carefully and with total concentration, you cannot get the benefits you need from attending class. The reading and the classes work in conjunction with each other. Even if you read and reread diligently, there will be many things you won't understand about the reading material. Class discussions will help you to better understand what you've read. However, without having read the material in advance of class, you will not get any benefit in achieving a better level of understanding from attending class. They are both essential. In addition, you cannot afford to fall behind in your reading since there will always be new assignments and you will probably not be able to catch up if you fall behind. My only advice about this is NEVER fall behind in your reading for class.

While this list of tips is focused on the substantive classes you take in your first year, classes

such as contracts, torts, property, criminal law and other subjects, first year law students also usually take a legal research and writing course. Unlike their other courses, this class involves research and writing assignments with specific deadlines throughout the semester rather than readings in a casebook followed by a midterm or final exam. Also, unlike your other classes, these assignments are graded and provide you with a source of feedback as to how you are doing. This causes some students to overemphasize their work in the research and writing course and prioritize it over their substantive classes. This is a big mistake. If you add up the number of graded credits for the substantive subjects and compare those to the legal research and writing course, you will see that the research and writing course is only a small component of your first year performance. While you must, of course, complete all the required assignments for this course to the best of your ability, you cannot afford to allow research and writing assignments to cause you to shortchange your substantive subjects. Having made this point, I'll repeat the advice I gave at the end of the previous paragraph: NEVER fall behind in reading for class.

3. Read Actively

When you read assigned material in law school it is not enough to have your eyes pass over the words on the page. You must focus on what you are reading and develop a dialogue between you and the written words. You have to question what you've read if you don't understand it. You have to read it again if you're confused. You have to underline what you believe to be key phrases or sentences. You have to write in the margins to identify the various parts of the opinion - facts, proceedings below, the result or holding of the case, the rule of law the court applies, its reasons for the result it reaches, previous court decisions, referred to as precedents, that support the court's decision, etc. If you question something you're reading because it doesn't make sense to you, you can write that down including the all important question mark to indicate your uncertainty. This level of concentration requires that you do your reading at a time when you are alert and not when you can barely keep your eyes open so plan your schedule accordingly.

4. Brief the Assigned Cases

Briefing cases is a traditional part of legal education, particularly during the first year of law school. A brief is a summary of key aspects of a case that you were assigned to read. It identifies the decision that the court reached and the reasons for the decision. There are numbers of different formats for briefing cases. If you are provided with a format during your law school orientation, you should certainly start out using the recommended format, but you may eventually adjust it somewhat for your style of learning. If one of your professors suggests a format for their particular class, follow that format for cases read for that class. The active reading, including underlining and marginal notations, described above will help you to brief a case since it will identify many parts of the brief you need to write. However, it is not a substitute for briefing. After the first year of law school, many students rely on their marginal notes instead of briefing, but this is not something you can afford to do in your first year of law school. The brief you write forces you to translate the words of the court into your own words in order to summarize facts and key points in the court's analysis. This is a very valuable exercise that helps you to better

understand what you have read. It is not something you can afford to short circuit.

While there are many different formats for briefing cases, they usually have a number of basic aspects in common. A basic sample format for the brief of a case would include:

a. The name of the case, the court that decided the case, and the date it was decided.
b. A summary of the main facts of the case.
c. A summary of the procedural history of the case which means earlier legal proceedings in the case before the case reached the court whose opinion you are briefing.
d. The issue (or issues if more than one) that the court needs to decide.
e. The holding of the case which means the way that the court resolved the issue the court needed to decide and the legal principle that the court relied on as the basis for its decision.
f. The rationale for the court's holding. This means summarizing the chain of reasoning relied on by the Court that lead it to reach its holding.
g. The final disposition of the case which means at the end of the decision how did the court dispose of the case. Which party won? If the court discusses the remedy in the case, what remedy did the court award? In appellate decisions, how did the court deal with the decision of the court below? Did it affirm the decision, reverse the decision, remand to the court below for further proceedings, or some other disposition?
h. A short summary of the principal reasoning of any concurring or dissenting opinions.

5. Review What You've Read Before Each Class

You will usually have to read the assigned material for a block of classes one or more days before the class meets. In order to refresh your recollection before class, you should quickly scan the material again, looking particularly at material you underlined and notes you wrote in the margins. Lastly, you should read over your briefs for that class.

6. Attend All Your Classes

Law school classes are not just a rehash of the assigned reading materials. Initially, first year faculty will ask questions that require students to describe the facts of the case, proceedings in the lower court, the issue addressed by the court, the outcome of the case, and the reasons given by the court for its decision. These are exactly what you will address in your brief (see 4 above). However, faculty will move on to critically examine the materials that you read. The goals of this exploration are to focus on the opinions you read in ways that help you to understand the reasoning adopted by the court. Class discussion will, for example, usually go well beyond understanding what the court says to critically examining the strengths and weaknesses of the court's approach. Who benefits from the court's approach? Who is hurt by the court's approach? Does the court adopt a rule to apply in cases of this type? How will that rule apply in cases that are similar to, but not exactly the same as the assigned case? This will often be done by asking the class to analyze hypotheticals, imagined sets of facts, that change key facts in ways that may or may not change the outcome. You will need to identify how that set of facts would be resolved

under the rule the court adopts.

The classes you are required to attend are an important part of the law school experience and its hard to imagine a student doing well without attending and taking seriously the classroom experience. This may sometimes be possible in college, but not in law school. Just as you need to read actively, you need to attend class with a similar attitude and listen actively. You need to listen carefully to what is said in class, try to anticipate the answers to questions that are posed, take notes (see 7 below), and try to participate in class (see 8 below).

7. Take Notes in Class

It is necessary to take notes in class, but this is not an easy process. You are not sitting back and listening to a lecture where all you need to do is summarize what the professor is saying. Instead, classes will consist of some setting the stage by the professor, a series of questions posed to students, student answers which may or may not be correct, some further thoughts by the professor, more questions and student responses and on and on in that way. If the professor makes a specific clear statement about the law in the area you are discussing, it is easy to decide to write that down. But what about the rest of it? When I was in law school, I used to try and write down many of the questions the professor asked as well as the answers given by my classmates and often my assessment of whether they were right or wrong, which itself might be right or wrong. If a student gave an answer and the teacher followed up with what appeared to be a next question that assumed the student's answer was correct, I would assume that initial answer was correct. Eventually I came to realize that some students seemed to give answers the teacher seemed satisfied with so I would write the student's name in my notes as well. If a teacher asked a hypothetical question, a "what if" question that changed the facts of the case in a key way, I would write that down since it might help me in preparing for the exam if I was able to answer the hypothetical questions and such questions might even help me to anticipate what kind of questions might be on the exam. As you can tell from this description, my notes were a kind of summary of what had happened in class, but they were not designed to provide complete clarity about the law in an area since that wasn't something I could discern one class at a time. In addition to all of the difficulties in taking notes described above, you have to take notes while also actively listening (see 6 above) to the discussion and trying to participate in class (see 8 below). This can be a real challenge in multitasking, but it is what you need to try to do to the best of your ability. There are obviously trade offs that have to be made in this juggling act. If you are an active participant in class discussions, the likelihood is that your class notes will be less complete. You may be able to compensate for this by arranging with another student to exchange notes and/or you can make sure to review your notes (see 9 below) shortly after class to add additional material that you remember while it is still fresh in your mind.

8. Try to Participate in Class

One of the things that makes many law students nervous is participating in class discussions. Sometimes you have no choice in the matter. Many professors teaching first year law school courses "cold call" on students. This means students are called on without their volunteering to

speak. This is something many students dread, but in some ways getting it out of the way early is helpful. I was called on early in my first year property class. While I certainly wasn't sure I knew the answers to the questions I was asked, I did my best to answer the questions and before too long the professor moved on to question another student and I realized I had survived the experience and nothing terrible had happened to me. Being called on was never as scary once I had survived that first experience.

Some students are reluctant to speak because they don't want their classmates to judge them and conclude that they are inadequate. My view is that you shouldn't worry about others. If the teacher asks a question and you have an answer to that question based on your preparation for class, raise your hand. You may not be called on if other students also put their hands up. But just the act of raising your hand will get you over one of the hurdles to feeling comfortable participating in class. I'm not recommending you try and dominate class discussions by having your hand up all the time. That's definitely not a way to make friends with your classmates. By contrast, answering one or two questions each class or every other class puts you in the group of students who have enough self-confidence to try to contribute to the discussion. My own experience was that once you broke down that psychological barrier and volunteered to speak in class, it got progressively easier as well as helping you to understand the material. It's easy to sit back and hear another student give what the teacher acknowledges is the correct answer and think to yourself I knew that and could have given that answer. But until you actually provide the answer, you're probably not fairly assessing your ability to give the correct answer. There is no substitute for speaking in class and I recommend getting over your fear early on in the law school experience. After all, an important part of being a lawyer is talking about the law. This is true, of course, if you appear in court and must speak to a judge or members of a jury. However, it is also true for lawyers who never go near a courtroom. They still need to talk to their clients, other lawyers at their own law firm, or lawyers representing the other side in a legal dispute. Getting comfortable with talking about the law is something you should do in law school since it is an essential skill needed in the legal profession.

9. Review after Each Class

I've had law students complain that they didn't anticipate what I would focus on in advance of each class or understand all the material they read in advance of class. I always told them that if they could do those things, law would be something they could learn on their own and class would not be valuable. Instead, I told them that the real issue was whether they could understand the material they had read after it was discussed in class. As soon after each class as possible, I advise you to go over your notes while looking at the cases discussed and your case briefs. This may cause you to make changes or additions to your notes or add material to your case briefs or underline something in a case or write something in the margin. To the extent that your advance preparation and class attendance work in conjunction with each other, a necessary final stage is to go over what happened in class while it is still fresh in your mind. This review does not need to be a lengthy process. Even a quick review could help you to correct a mistake in a case brief or fill in an omission.

10. Join a Study Group or an Exam Review Group

By working with a group of classmates, you may be able to clarify what you don't understand and help your study group partners to understand something that you already understand. This kind of mutual assistance is one of the benefits of study groups. A study group can also serve as a support network to help you cope with the stress of law school (see number 12 below). Some students don't find study groups throughout the term helpful to them because they are not always the most efficient use of study time and there may be disagreements among study group members as to which study activities should be given the highest priority. Other students complain that some students in their study group know less than they do and therefore the group is not valuable. I think this particular complaint about study groups is shortsighted. When I was a law student I found that the most useful part of the study group experience was the need to explain something to others in the group. There is no better way to learn something than to teach it to others. The one critical aspect of using a study group effectively is to make sure that every member of the group does all the work, such as producing an outline for each course (see 13 below). A study group is not an opportunity to divide up the work. Only by having every member do their own work and then comparing the work product of each member of the group will you be able to improve your understanding of the subjects you are studying. In choosing members of your study group or agreeing to join an existing group, make sure the students in your group have a shared understanding of how the group will operate.

Even students who don't find study groups helpful during the school year, usually form a group to help them study for exams. Joining with others to review your outlines (see 13 below) and, even more importantly, to review old exams if they are available or hypotheticals discussed in class is very valuable in exam preparation. Since the goal on an exam is usually to identify as many relevant legal arguments as possible and apply those arguments to the facts of an exam question, it is unlikely that working alone you will be able to practice those skills as effectively as in a small group. When you work with others to pool the arguments you can identify individually as well as explain to each other why a particular argument is relevant, how that argument was identified, and how to develop that argument on the exam, it improves the ability of each member of the study group to identify and develop arguments on their own.

11. Learn to Live with Uncertainty

One of the stressful things about law school is that most of the time in your first year, and particularly your first semester, you don't know what you know. You frequently do not have any way to fully assess how you are doing for a substantial amount of time, often until the midterm, and sometimes not until the final. This uncertainty is a substantial contributor to the stress of the law school experience (see 12 below). Just understanding that uncertainty is the nature of this method of learning where things are not spelled out for you is helpful in dealing with this issue. If you don't expect to understand everything, while still trying to achieve that objective, you will avoid unrealistic expectations while trying to achieve realistic ones.

This raises a question that many law students ask: why don't law professors just tell them what the law is rather than torturing them with endless questions and no answers? The answer to

this question is that the principal thing law school is designed to teach you is how to teach yourself. Students often think they will go to law school and learn the law. In some ways that's correct, you will spend significant amounts of time in your classes learning about particular areas of the law. But that is not the main goal of legal education.

First, there is no way to know for sure what fields of law you'll need to know about after you graduate. In addition, the law is not static. It is always changing. If you learn what the law is today, it could change tomorrow and you would have to learn new law on your own. Therefore, law school has to teach you to develop the skill of reading and understanding legal material. It also has to teach you to develop your analytic skills. During your legal career, you are likely to be an advocate for a particular position. To be an effective advocate, you need to be able to develop arguments for one side, arguments for the other side, and responses to those arguments. The analytic skills learned in law school need to prepare you to develop these kinds of arguments, law school can't just spoon feed you the law and call that a legal education. During law school, you may never have taken courses in the field of law you are working in so you haven't learned the law in that area, but what you have learned is how to teach yourself the law. The same thing applies if the law has changed since you studied the subject in law school.

12. Find Healthy Ways to Cope with Stress

The first year of law school is a stressful experience for every law student. If someone is not experiencing stress, they are not taking law school seriously. However, how students react to that stress varies enormously from student to student and can be looked at as a range of stress reactions on a continuum. At one extreme, some students are able to shrug off the stress and continue with their work, and at the other extreme, some students are debilitated by stress so that it seriously interferes with their ability to do the necessary work. At this point in your life, you probably have a pretty good idea where you fall on the stress continuum. In addition, hopefully you have some healthy methods for dealing with stress such as exercise, listening to music, calls to a friend or family member, or playing a favorite game on your phone or tablet.

Most law schools, or at least the colleges and universities they are part of, have professional staff members that address stress management. If stress has been an issue for you in coping with school in the past, be proactive and identify sources of help in advance. Many law schools include stress management in their first year orientation and introduce you to staff members who can be of assistance. Another resource are classmates who are going through the same thing that you are during your first year. One benefit of a study group (see 10 above) is that you realize you aren't the only one who is having trouble understanding the reading or what is going on in your classes. As an alternative or in addition to a study group, every law school has student organizations that focus on a particular constituency - such as women or minorities or first generation professionals - or a particular area of the law - immigration law, entertainment law, criminal law, and many others. Don't overload yourself with these kinds of activities in your first year since you need most of your time for your studies, but you can certainly attend the meetings of one or two organizations in order to find a compatible group of students.

One source of stress, particularly early on, is feeling intimidated by your classmates. Some

students you meet will have extensive knowledge about the law already. Perhaps they worked as a paralegal before law school or have parents or other relatives who are lawyers. Whatever the reason, there is a tendency to doubt your own ability compared to students who seem so much more knowledgeable. However, whatever advantages come from this kind of knowledge usually turn out to be very temporary. Within a few weeks of the beginning of law school, the focus of learning has moved beyond the kind of knowledge anyone brings with them to law school.

A related source of stress is the credential comparison. One of my first memories of law school was in one of our first classes waiting for the professor to arrive. People around me starting asking each other where they had gone to college. I went to Stony Brook University, then a relatively new school without any national or even regional reputation. However, sitting next to me was someone who went to Princeton, behind me was someone from Harvard, in front of me someone from Dartmouth, and on and on. I remember thinking how am I ever going to compete with all these people from all these elite schools. However, within a day or so I realized that credentials aren't everything and they don't predict law school success. A student from an Ivy League school was just as likely to feel embarrassed in class because they gave wrong answers as someone from a relatively unknown school and someone from an unknown school was just as likely to give correct answers as someone from a highly prestigious school.

By avoiding comparing yourself to others, you can eliminate a significant source of stress. Just focus on you and whether you are doing everything you can to succeed in law school. Are you working as hard as you can? Are you thoroughly preparing for class, attending class and doing everything you can to follow the discussion, reviewing after class, and all the other suggestions on this list of tips? That's all you can expect of yourself and thinking about how others are doing is only a waste of time. Besides, you may well be wrong in your assessment. Some of the students I assumed early on in my first year of law school would do well because of their educational backgrounds struggled in the first year and didn't do that well. Just do the best job you can.

13. Prepare an Outline for Each Course

All of the advice above about preparing for, attending, and reviewing after class focuses on class by class learning. However, there is another level to what students must do to succeed in law school. You must translate those individual classes into general principles that can be applied to other factual situations that raise similar issues. Law school exams don't ask you to rehash the cases that you've read. It's not a process of regurgitation. Instead, essay exams typically provide you with a set of facts and ask you to discuss the issues raised by that set of facts. To do that effectively, you have to understand what issues are raised by those facts in the context of a particular area of the law, what general principles or rules of law apply to the resolution of those issues, and how to apply those principles or rules of law to a set of facts provided on the exam. To be able to do this, you must translate what you've learned class by class into a set of more general rules or principles. This is accomplished in large part by creating an outline of the subject matter you have studied divided by the issues addressed and the principles used to analyze and resolve those issues. The outline will include some information about specific cases, but only as examples of a general principle you have described. An outline is not a summary of each case

you've read. Such an outline would not be useful to prepare you to take an exam in a course.

There are many commercial outlines that you can purchase or outlines prepared by students in previous years that are available at no cost. However, these are not a substitute for making your own outline for each of your courses. The outline has to prepare you to take the exam written by your professor and not some unknown outline writer. What counts is what you've learned from the casebook you've been assigned to read and how that material has been addressed in the classes you've attended. Even an outline prepared for the same class taught by your professor a few years earlier is not enough. What if the professor has assigned a different book or changed their approach to some of the subjects taught? Besides, it is the act of preparing the outline that forces you to look at the material studied from this more general perspective. You have to learn to understand how related, but not identical factual situations should be approached. To truly gain this understanding, you need to do this work yourself.

If there is material you are simply not able to master no matter now hard you try, there are several things you can do. One is you can go to see your professor during the professor's office hours to ask about the issue you are having trouble understanding. Another is to talk about the issue that is confusing you with the members of your study group if you have joined one. A third is to identify a treatise or hornbook in the area, a discussion of an area of the law by an expert in the area. That book is likely to be in the law library and you should read the relevant section of the book and see how it compares to your understanding of the area of the law. It may provide some insight that helps you to figure out the source of your confusion. These methods are not mutually exclusive and you can do all three.

Another issue is the timing of preparing your outline. You cannot wait till the end of the semester. There will never be enough time to do this while you study for exams. Instead, after every unit of material, such as a chapter in your casebook, you should work on your outline. Each time you have new material to add you should also go over what you've already included in your outline. Many times there is a delay period in your understanding of material you are studying in a particular course. For example, it may be that it's only after you've studied the material in the next chapter that you can go back and truly understand the material in the previous chapter. Therefore, you want to go back to the earlier parts of your outline and make appropriate adjustments when you add new material. In addition, this kind of periodic review will help you to remember the points in your outline. This is critical because first year exams are frequently closed-book exams so you will not have your outline with you.

14. Take Advantage of Every Way Your School Provides to Prepare for Exams

Law school essay exams are different than typical exams in college. They usually provide you with several hypothetical fact patterns, usually ones where the outcome is uncertain, and then ask you to spot the legal issues raised by the fact patterns and discuss those issues in the context of the facts provided. They also usually require you to argue both sides of contested legal issues and provide alternative arguments if they are available. In addition, these exams are usually taken under time pressure and often in the first year are closed-book exams so students cannot bring their outlines with them to the exam and will have to rely on their memory. This is not always the

case, but open book or partially open book exams where you can bring limited material with you to the exam are still taken under time pressure where there will be little time to consult materials you have available. It's usually only after the first year that you will experience a take-home exam or other required writing such as papers or legal advocacy writing that do not have to be completed under the same level of time pressure as a timed exam taken during the exam period.

Because many students are confronting such exams for the first time, law schools often provide resources to help students to prepare for exams. Much of the work, reading, briefing, reviewing, and outlining, precedes these exam preparation sessions. However, some schools have more extensive programs throughout the first semester to help students succeed in law school and one of the aspects of such programs is to help students succeed on exams. Another very valuable resource is the availability of old exams often available in the law library. A principal use of exam study groups is to have every student in the group answer old exam questions and then compare their answers to the answers of other members of the group so hopefully all members of the group will improve their exam performance. In addition, some professors also make available sample or model answers for some of their old exams. These can be invaluable in spotting patterns in the kinds of questions asked and the kind of answers required. A number of professors schedule review sessions to go over the material covered in their course and you should always attend such sessions. Some professors even provide you with the opportunity to answer a practice question and provide feedback if you turn in your answer by a stated deadline. Such an opportunity is one you should definitely take advantage of, but not all students do. When I have offered students a chance to write a sample exam answer, I have usually been amazed at how few students take advantage of the chance. I assume it's because students are overwhelmed with other work, but it is really a mistake not to hand in a sample exam answer and take advantage of the feedback you get to improve your performance on the actual exam. Whatever resources there are, please make sure to use them all so you can do as well as possible on your exams.

15. Review Your Exams after You Receive Your Grades

Different law professors provide different levels of feedback after you receive your semester grades. Some are very helpful in explaining the deficiencies in your exam and others are not. Some provide information in a written form by posting model answers to the exam questions or using a grading sheet that identifies the issues for which credit was given, while others provide feedback by meeting with students to discuss their exams. Take advantage of every opportunity to review your performance. Even if you hear from second or third year students that meeting with a particular faculty member is not a useful source of feedback, meet with the professor anyway.

One of your objectives in gathering as much feedback as possible is, of course, to understand why you got the grade you did. This is true if you did well in your first set of exams because you want to make sure you understand why you did well so you can duplicate that performance on future exams. It is also true if you did less well because you want to figure out how to avoid a similar performance in the future. Another objective, and in my view even more important, is to identify a pattern in your performance on multiple exams. Do you have problems with time management on exams? Did you allocate your time badly so you spent more time on minor

issues and less time on major issues? Did you make substantive mistakes by relying on incorrect rules of law? Did you fail to spot important issues? By identifying a common failing on multiple exams, you can figure out ways to improve your exam taking no matter what the subject of the exam. For a discussion of using your past exams to improve your performance on future exams, see http://wneclaw.com/improvingyourexamperformance.html.

B. More Tips in Response to Student Questions

In addition to the 15 tips, I have been asked questions by students who will be starting law school. The questions and answers are below:

1. What are some ways that students can stand out in law school?

In the first year, because students are not involved in major ways in extracurricular activities or curricular activities that don't involve traditional classroom courses, the main path to standing out positively is based on performance in class. If students answer questions and the answers seem to meet with the professor's approval, everyone in their class is aware of that fact. On the other hand, students need to avoid always having their hand raised to answer questions because that may appear to be overdoing it. If you know, or think you know, the answers to many of the questions the professor asks when the professor is not cold calling on a specific student, try and save your hand raising for the harder questions where very few other hands are raised.

Beyond the first year there are many ways to stand out and/or succeed. Students can be invited to join the staff of one of the law journals. Students usually have to participate in a writing competition to be selected and your grades may also be taken into account. Another activity at law schools where you get to be a star if you do well is in one of the upper level moot court competitions. Most schools have some kind of mock oral argument students are required to do in their first year or first semester of the second year, but after that there are internal moot court competitions of various kinds. While the main intraschool competition is usually an appellate competition where you argue a legal issue before a judge, although not usually a real judge until later rounds of the competition, there are also trial competitions and even negotiation competitions where you negotiate against students representing the opposing party to reach a settlement of a legal dispute. Usually, second year intraschool moot court competitions are used to select students who will compete against teams from other schools in interschool competitions that are held the following semester or year. The interschool competitions can involve a specialized subject area or can be a general appellate or trial competition. If this is something that might interest you, there are opportunities to attend some of the moot court arguments taking place at your law school so you can decide if it's an activity for you. Another path for students to follow is to enroll in clinics, in lieu of traditional classes, to the extent the school allows you to do so. Most schools have numbers of clinics that represent clients in different settings and in different fields of the law. This gives you experience with real world lawyering and may introduce you to people who work in a field that interests you and can even open up summer or permanent job opportunities. Finally, law schools have a range of extracurricular activities that students participate in such as student organizations with a particular focus, a student newspaper

that covers events at the law school as well as developments in the law, a student government structure where students hold positions of leadership, and the opportunity to serve as a student representative on various faculty committees. No one can or should do all of these things because you still need to focus on your course work even though you have successfully survived the crucible of the first year. Therefore, you need to pick the opportunities that have the greatest appeal to you. That's very much an individual decision.

2. As a law professor, how do you feel about the usefulness of supplemental study aids or would you recommend that students stick to the assigned materials?

My recommendation is that you try to learn what you need to from the assigned reading and discussions of that reading in class. This is partly because it is the best path to true understanding of the material and it is partly because to a great extent the goal of a legal education is to teach you to be a self-learner, something you will have to be throughout your career as a lawyer no matter what kind of job you have. The law changes all the time. You have to able to learn new things relevant to your field of law - a new statute, a new regulation, a new court decision, whatever it is that impacts the law in your area of practice. Because law changes and because you may wind up practicing in an area you never studied in law school, something that happens to many people, law school can't just focus on imparting specific knowledge to you. It has to teach you how to read and understand legal material. Reading secondary sources, someone's analysis of a court decision, for example, can't provide you with the skill you need of being able to understand primary sources, the legal material itself.

However, there are situations when seeking outside assistance is necessary. When you are preparing an outline of the materials studied in a form that will be useful for studying for exams (organized by legal doctrine and not case by case), you may come across material you are uncertain about. At that point, I would recommend going to the law library and taking out a treatise or hornbook for the course you're taking and read the section on the concept you are having trouble understanding. Treatises and hornbooks are written by academics who are experts in the field you are studying and are less likely to steer you in the wrong direction by oversimplifying or misstating what you have been studying in class than the typical study aid. However, some study aids are prepared by academics, often by a professor who wrote a casebook on the subject, and they are much more reliable. Nevertheless, since you will be tested based on what your professor taught you, you should never substitute a view of the law provided by someone other than your professor for what your professor taught. Professors grade exams based on what they taught and not based on someone else's view of the law, even an expert in the field. Therefore, you have to be cautious in your use of material other than the material read for the course and the way that material was taught in class.

3. In the classes you have taught, what are the gaps that students need to fill in between lectures and readings in order to do well on the final exam?

The biggest gap is in issue spotting. Classes are taught topic by topic and students always know what issue will be talked about during any given class. By contrast, exams will give you a

set of facts that raise a number of different issues and you have to identify the issues, describe the applicable legal rules used to resolve those issues, and then apply the facts of the exam question to those legal rules. It's the first of those three tasks that isn't really taught in law school classes. Students must review old exam questions, hopefully with your study group, and identify all the issues and discuss how to analyze those issues. The second thing that is critical to doing well on an exam that is not taught in class is time management. Exams are usually very time pressured so you have a lot to write about in a limited time. You have to use your time efficiently to do well.

4. What role does a student's cold-call performance play in their overall grade?

At my law school and probably most law schools, faculty are limited in the amount they can count class participation in a student's grade. Moreover, faculty usually don't have to count class participation at all, it's only an option. That limit on class participation is always true for first year classes and usually for large enrollment classes, but it's less likely to be true for small seminar classes. When I say count participation, I mean increase a student's grade. Poor class participation is not used to decrease a student's grade. In addition, all law school exams are graded anonymously so faculty don't know whose exam they are grading since the exam is only identified by an exam number. That means that any impression a teacher has of the student's ability, positive or negative, can't be a factor in exam grading. I've always thought anonymous exam grading was a great strength of the law school grading system and I'm surprised it isn't a standard practice in undergraduate exam grading and in other graduate programs.

Because of the anonymous grading system, I submitted a list of students by name who received class participation points and a separate list of examination grades by exam number. The participation points were added to a student's exam grade by the registrar's office. The current law school rule at my school is as follows: "An instructor may recognize superior classroom performance by individual students by adding a one-third (1/3) letter grade increase to the student's course grade for grades other than A or F. To make an addition to the grades of individual students, the instructor shall submit a list of the names of those students whose course grades are to be benefited by the practice at the same time that the instructor submits the list of final examination grades by student examination number. The Registrar's Office shall integrate the classroom participation letter grade increase with examination grades."

Now that you have all that background information, my answer to your question is poor performance in answering questions in class doesn't adversely impact a student's grade except in a comparative sense. If some students get some minor credit for class participation and others don't, the students who don't could get a slightly lower grade, but how much it matters depends on how a student did on the exam. If a student did very well on the exam, participation would have a very minimal impact, if any. More importantly, poor cold-call performance could be a signal that the student is unlikely to do that well on the exam, but that isn't always true.

5. Do you know of any programs (e.g. writing workshops, boot camps) or any books that are great resources to study over the summer before starting law school?

I'll start with writing workshops and boot camps. Some law schools have summer early start

programs they make available to some of their entering students. If one is offered to you by the law school you'll be attending, you should enroll in it if you can. It will be helpful not just in getting a head start on your legal education, but getting comfortable with the school you'll be attending and getting to know some of your classmates, faculty, and school administrators. Otherwise, I'd advise you to create your own program of preparation if you want to improve certain skills rather than enrolling in an existing program. My reason for preferring a self-directed program is that succeeding in law school requires a lot of self-discipline. You have to be able to create a study schedule and stick to it every day without anyone else providing a structure that forces you to keep to the schedule.

You could start preparing for the discipline needed to succeed in law school by designing and completing a summer preparation program for yourself. The good thing about that practice in scheduling work for you to do and keeping to the schedule is that not much turns on it. If you didn't do anything to prepare for law school before you started, you wouldn't be behind when you started. This is just about getting a head start. In fact, some people recommend you take time off the summer before law school and enjoy yourself. Here's a link to a list of things to do during the summer before you start law school provided by the Law School Academic Support Blog called Ten Tips for Preparing for Your 1L Year: https://lawprofessors.typepad.com/academic_support/2011/05/ten-tips-for-preparing-for-your-1l-year.html. It includes things like "Have fun with family and friends this summer." Another kind of advice I've heard is to take care of personal things you won't have time to do during your first year such as going to the doctor and dentist, buying presents you will need to give to friends or family during the year and may not have time to shop for while in school, and things of that kind.

If you want to do some reading that will help to prepare you for law school, there are quite a few books that are recommended for that purpose, but I've never actually read any of them. It's possible that the law school you'll be attending will make such a list available. I found a list of 3 books on one website about law school preparation that show up on many lists of books to read before starting law school: The Legal Analyst: A Toolkit for Thinking about the Law by Ward Farnsworth, Getting To Maybe: How to Excel on Law School Exams by Richard Michael Fischl and Jeremy Paul, and Getting To Maybe: How to Excel on Law School Exams by Robert H. Miller. The American Bar Association has a longer list on its website at https://abaforlawstudents.com/2019/06/12/books-to-read-before-starting-law-school/. I googled "beginning law student book recommendations" and got links to lots of lists and you can do the same thing.

As an alternative to reading several books, you could explore some of the content on the list of links to free online material that I maintain for beginning law students. Some of the material is an overview of the law school experience and other material is more specific. The list is divided by category. If you read a number of articles within one of the general categories, you'll see some of the same points repeated. That tells you it is something that law school professors and others agree is important for succeeding in law school and you should place it on a "things to do to succeed" list you create for yourself. My list of online material is available at http://www.lharpaz.com/americanlegalsystem/firstyearresources.html. I update the list each year so the links should work.

If writing is the skill you want to work on, that requires a different kind of material. Once again, however, there are plenty of free resources online. One example is https://legalstudiesms.com/learning/free-legal-writing-resources/. It is a list of 30 free legal writing resources. There are other lists of resources as well as tips for improving your legal writing. I searched for "improving your legal writing skills" to find relevant material. If you want to improve your basic writing skills, such as following grammatical rules, there is also plenty of general material on improving your writing skills available online.

Legal writing and writing for other purposes have many things in common, but there are some special characteristics of legal writing. One characteristic of legal writing is that it is formal writing so you don't use slang and often don't even use contractions - although I used two in this sentence, but then this isn't legal writing. Another is that you don't use inflammatory or exaggerated language to make a point. You let the legal analysis make the point and then you reach a conclusion in an understated way such as "Therefore, the plaintiff can prove that . . . ." You don't add adverbs to say, "Therefore, the plaintiff can clearly prove . . . ." because the argument has to persuade the reader and not the writer's summary of the argument's strength. A third aspect of legal writing is that organization is very important. Legal writing uses headings and subheadings to divide the material and which provide, in effect, an outline of the document whether it is a legal memorandum written to send to another lawyer, a brief presented to a court, or any other form of legal writing. Finally, and perhaps most importantly, the goal of legal writing is clarity so that the reader can easily understand the points the writer is making. There are often complicated concepts to describe so communicating them clearly is the goal of the writer. That means accurate word choices are important and many times a simpler word is more appropriate than a sophisticated vocabulary word added to dress up your writing. Clarity is also achieved by avoiding overcomplicated and overlong sentences. These can frequently be divided into several sentences to make it easier for the reader to understand. Any work you do before law school to improve your writing should work to achieve these attributes of good legal writing.

6. How has the pandemic changed law school and will it have long term consequences?

The pandemic has made profound changes in the law school experience. Ask any law student who began law school school in Fall 2019 and then had to transition to a completely online education sometime during March 2020. They will tell you that many things changed in their law school experience. The ways law students experienced the changes depended at least in part on the technology the school used for its online education. Did it use asynchronous learning so students and teachers were not simultaneously in a virtual classroom? By contrast, did it use synchronous learning so students met virtually at the same time with their teacher and classmates for each class or at least for some classes? In synchronous online learning, it is possible to get closer to the dialogue between teacher and student that takes place in a traditional class. That, of course, requires that students have the necessary equipment and a good enough internet connection. Some law schools did a better job than others of making sure that students got the technology they needed to participate in online classes. For example, using a cell phone to join a Zoom meeting is not as satisfactory an experience as using a tablet or a laptop that is up to date enough so it has the necessary camera and microphone.

Whatever system the law school used, it was nowhere near the experience of being physically present in the law school building, able to study in the law library, have meetings with classmates of both a social and academic character, go to meetings of organizations, and hear an array of speakers accompanied by the ever-present free food. One traditional aspect of the law school experience is bonding with classmates who are divided into sections where they take most of their classes with the same students. This intense bonding does not occur when classes are virtual and students don't get to know each other well. Some law professors make efforts for students to get to know each other by having students prepare "getting to know me" videos and other similar techniques. However, these techniques cannot make up for the constant interaction that occurs in the law school building. In addition, other aspects of student life have changed as well. Most students were required to move out of their dorms and often moved home to conditions that were frequently not as conducive to studying.

This fall, many if not most law schools are returning to in-person education in large part, although with some restrictions. For example, many law schools, and universities and colleges in general, are requiring students to be vaccinated in order to return to campus. There may, however, be some individual classes that will continue to be online, but they are more likely to be upper level classes. Some law school extracurricular events, particularly ones that involve speakers from outside the law school community, may continue to be virtual or at least hybrid with some participants and audience members appearing in person and others participating virtually. Some of these events may become a permanent part of the law school experience since they are much cheaper to organize and easier to sign up speakers, particularly if they would have to travel from other parts of the country to appear in person. In addition, virtual events frequently draw a larger audience since people who don't attend the law school are more likely to join events that are free and open to the public and don't involve the burden of traveling. Ideally these could be hybrid events with the law school community attending in person, but speakers and audience members from other locations attending virtually, but not all schools have the technology necessary for this kind of event that successfully combines a live audience with a virtual audience. Whether there will be other permanent changes, it's too soon to know.

CHAPTER II: INTRODUCTION TO THE AMERICAN LEGAL SYSTEM

A. Structure of the American Court System

The structure of the American judicial system parallels the division of the American system of government into sovereign states and a sovereign federal government. Under this system of divided sovereignty, each state has a judicial system consisting of trial courts, intermediate courts of appeals, and a highest court. A system with a similar general structure exists at the federal level as well.

1. State Courts

Each state organizes its own court system. At a very general level, state courts mirror the

hierarchical structure that is common to all court systems. Cases begin in a particular court, the court of first instance or trial court, are appealed to an intermediate appellate court, and in some circumstances may be able to be appealed to the highest state court.

Other than this very general scheme, however, state court systems vary in their details. Those details include even what they name their courts. For example, while the highest state court is usually called the state supreme court, that is not always the case. In New York, the highest court is the New York Court of Appeals and in Massachusetts it is called the Supreme Judicial Court. Adding to the confusion, New York calls its trial courts of general jurisdiction the New York Supreme Court and that court is divided into a trial division as well as an appellate division and an appellate term which serve as intermediate appellate courts.

Aside from differences in the names of courts, the states also differ in other aspects of how they organize their courts. States usually have both trial courts of general jurisdiction as well as some courts of limited jurisdiction including specialized courts that hear cases falling within a particular subject area. In New York, there are family courts (hearing cases involving guardianships, adoptions, foster care issues, juvenile delinquency, child abuse and neglect, family violence, child support, child custody, and visitation), surrogate's courts (ruling on the validity of wills and handling the administration of estates), and courts of claims (hearing lawsuits seeking money damages from the state). In addition, courts are often organized by geographic reach. The New York judicial system has county courts, district courts, city courts, town courts, and village courts operating in various parts of the state. Another distinction is the treatment of criminal cases versus civil cases. Some states use the same courts for both and others sometimes divide the two.

In addition to its organizational scheme, state courts also vary in how they select judges. States may elect judges, appoint judges, or use some combination of those two methods varying with the particular court. In New York, for example, appellate court judges are appointed and trial court judges are elected. The methods used for selection can also vary in other ways with some states using a partisan appointment or election process and others using a nonpartisan or merit selection method. New York's appointment system for appellate judges utilizes a judicial nominating commission to create a list of potential candidates from which the Governor selects a nominee. The nominee must then be confirmed by the State Senate.

The court system also requires rules of procedure that describe many details about the operation of the courts. In New York, the Civil Practice Law and Rules and the Criminal Practice Law contain those provisions. The federal court system rules are the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure and many states have adopted the federal rules in whole or in part to govern their state courts.

2. Federal Courts

The federal court system consists of trial courts, called federal district courts, intermediate appellate courts, called courts of appeals, and a highest court, called the United States Supreme Court. In the U.S. Constitution, the only aspect of the federal judicial system that is constitutionally mandated is the existence of the Supreme Court, although no specific number of

justices is required.

The rest of the federal court system is left to the discretion of Congress which has the power to "ordain and establish" "inferior Courts." Art. III, Section 1. Congress began to exercise that power as early as 1789 when the Judiciary Act of 1789 was enacted during the first session of the First Congress of the United States. The Judiciary Act of 1789 created 13 federal districts in the 11 states that had ratified the Constitution, as well as circuit courts that had the power to serve as trial courts for some categories of cases, and hear appeals from the district courts. The circuit courts had no specially appointed federal circuit court judges, but were staffed by district court judges and Supreme Court Justices who "rode circuit" to hear cases before the various circuit courts.

The general contours of this system remain to the present day, although on a much larger scale. There are now 89 districts in the 50 states, and at least one district for each state. There are also federal districts in Puerto Rico and in various U.S. Territories. These district courts can hear both civil and criminal cases.

Federal judges are nominated by the President of the United States exercising the appointment power described in Article II, Section 2, and confirmed by the United States Senate under that same provision in the Constitution. These appointed federal judges have lifetime tenure, but "hold their offices during good Behavior," Art. III, Section 1, and can be removed from office by impeachment, Article I, Section 3.

The circuit courts are now called United States Courts of Appeals for the various federal circuits. They serve as the intermediate appellate courts for the federal court system. There are 13 federal circuits, 11 of which are numbered 1 through 11, with the Second Circuit hearing appeals from the district courts in Connecticut, New York, and Vermont. There is also a United States Court of Appeals for the District of Columbia and a United States Court of Appeals for the Federal Circuit. They are separately staffed by courts of appeals judges, although district court judges can sit by designation when needed. Congress has authorized 179 judges to sit on the United States Courts of Appeals, although at any given time some of those positions are unfilled due to vacancies.

The United States Court of Appeals for the Federal Circuit is a specialized court that hears appeals from district courts throughout the country based on their subject matter. Those include cases involving patents, and various issues involving U.S. energy policy and international trade. It also hears appeals from various specialized courts including the United States Court of Federal Claims, the United States Court of Appeals for Veterans Affairs, and the International Trade Commission. These specialized courts are created by Congress under its Article I regulatory powers rather than under Article III.

The jurisdiction of the Article III federal courts is described in Article III of the U.S. Constitution. It describes the categories of cases which the federal courts have the authority to adjudicate. They include cases involving issues arising under the U.S. Constitution, federal statutes, treaties, disputes between states, cases in which the United States is a party, diversity jurisdiction, and several other categories.

At the top of the federal judicial system is the U.S. Supreme Court. The Supreme Court also sits at the top of the judicial structure of the state courts on issues relating to federal law and the U.S. Constitution. Since 1869 the number of justices has been fixed at nine. Currently, the bulk of the Court's jurisdiction is discretionary rather than mandatory. That means that the Court is free to choose the cases it hears from the thousands that seek review each year. This is done by the certiorari process.

A petition for a writ of certiorari (an order issued by a higher court to a lower court ordering the court to send the record of a case for review) is filed by a party seeking review of an adverse decision issued by a lower court. The party filing the petition states the reasons why the case is appropriate for Supreme Court review. The winning party below can file a petition in opposition to granting the writ of certiorari. The petition states the reasons why the court should not agree to review the case. Four members of the Court must vote in favor of the petition for it to be granted. In recent years, under 75 cases are granted review in any Term of the Court which begins each year on the first Monday in October and typically ends its work for the Term during the last week in June.

B. Reading a Judicial Decision

An opinion of a court announces the outcome of the case and states the reasons for the decision reached by the court. The opinion will contain a variety of pieces of information. One is the caption or title of the case. This consists of the names of the litigants. If the case is a civil suit, when it is first filed the caption will include the plaintiff(s), the party or parties bringing the lawsuit, and the defendants, the party or parties being sued separated by "v." which stands for versus. While the full name may include multiple parties, cases are typically known by a shorthand caption which lists one plaintiff and one defendant. In a criminal case, the party bringing the suit is the government and the person charged with a crime is the defendant.

In addition to the case name, other information about the case is included such as the court that decided the case and the date of the decision. This information may appear in the form of a citation, which is a series of abbreviations including information such as the series of books, called reporters or reports, that contain the decision, the volume in the series, the first page of the decision, the court, the jurisdiction, and the date.

An example of a citation to a United States Supreme Court decision following these rules is 393 U.S. 503 (1969). This refers to volume 393 and page 503 of the United States Reports, a series that only contains decisions of the U.S. Supreme Court, and the date of the decision. As of April, 2021, there were 574 bound volumes of this series with the most recent volumes including cases from the 2014 Term. More recent opinions are printed first on the day of decision in the form of a "bench opinion," a few days later as a "slip opinion," later in a preliminary soft cover volume of the U.S. Reports, and finally in a hard cover bound volume. Between three and five volumes are added per Term of the Court. The United States Reports is the official government publication of U.S. Supreme Court opinions. In addition, U.S. Supreme Court opinions are published in bound volumes by two unofficial sources, the Supreme Court Reporter (West Publishing Co.) and the United States Supreme Court Reports, Lawyer's Edition (Lexis).

Decisions are also available from multiple online sources.

In most cases, the opinion will next include the name of the judge who wrote the opinion. One exception is an opinion that begins "per curiam." Per curiam is a Latin phrase meaning by the court. A per curiam decision is a majority opinion issued by an appellate court with multiple judges deciding the case. In the federal court system, multi-member decisional bodies include three judges on a panel of the court of appeals for a particular federal circuit, an en banc opinion by the full bench of one of the federal circuits, or the nine U.S. Supreme Court justices. The per curiam designation means that the judges who joined the opinion are acting collectively and no individual judge is signing the opinion. Per curiam decisions usually deal with uncontroversial issues where the court is relying on established legal principles rather than altering the law in some way. However, there are exceptions where the per curiam designation has been used even though the decision is far from routine. The use of a per curiam decision has been criticized when used in this way.

Judicial opinions typically begin with an introductory paragraph announcing the issue or issues to be decided and possibly the outcome as well. That paragraph is followed by a description of the facts relevant to the dispute as well as the prior judicial history of the case if the opinion is an appeal from a lower court decision. In an appeal, the party who lost in the court below and who is appealing to a higher court may be referred to as the appellant or the petitioner. The party that won below is the appellee or respondent.

Following the facts and procedural history, the decision will discuss the law relevant to the first issue to be decided, if there are more than one, whether it is a constitutional provision, statute, a regulation, a common law principle, or some combination of these. The opinion will also discuss previous cases that have addressed the same or a similar issue that will be useful to the court in reaching its decision either because they are binding precedent that the court must follow or because their reasoning is persuasive and the court decides to adopt the same or a similar analysis. Sometimes there may be conflicting precedent, and the court may have to decide which decision to follow and which to reject, assuming neither are binding.

Binding precedent exists where an earlier opinion has decided the exact same issue that the court is now presented with and the court deciding the case is a higher court that the lower court now confronted with the issue is required to follow. The lower court can, for example, be a state trial court required to follow an appellate court of that same state. If the precedent is a decision of the U.S. Supreme Court interpreting the federal constitution or a federal statute or regulation, that decision would be binding on all state and federal courts.

Once the court determines the applicable law, it will then apply that law to the facts of the case. As necessary, it will follow the same process with all issues relevant to reaching a decision in the case. The opinion will usually end by announcing what action the court is taking. In an appellate court, that will typically be framed in terms of the impact of the decision on the lower court decision. The appellate court may affirm the decision below, reverse the decision, or remand to the lower court for further proceedings.

If the case is decided by more than a single judge, there may be opinions in addition to the opinion of the court. There may be concurring opinions that agree with the outcome reached in

the court's opinion, but not the reasons given. Concurring opinions may rely on different reasoning or, at least, announce some limiting principle that may be relevant in future cases that are similar, but not identical. There may also be dissenting opinions that disagree in both outcome and rationale. Identifying the views of the judges can sometimes be complicated because judges can join parts of opinions, rather than the entire opinion.

A question often asked by students assigned to read cases is "what do I need to know when a case is assigned as reading?" That isn't an easy question to answer. A case tells a story. You need to understand that story from beginning to end. It starts with the facts, what happened that resulted in a lawsuit being filed, and what procedural history led to the case being before the court issuing the opinion. It goes on to identify the issue or issues that the court must resolve to reach a result in the case and why those issues are critical to the outcome of the case. For each issue, the court identifies a chain of reasoning that leads it to reach a particular conclusion. That chain of reasoning, as described above, will include the source of law that applies to the situation before the court. It may also include prior cases that decided the same or similar issues that need to be considered in reaching a resolution of a particular legal issue, similarities and differences between those cases and the one before the court, the policies at issue in reaching a decision in the case, the application of the facts of the case to the legal principle the court has decided governs the case, the rationale for the decision reached, and the outcome of the case. In some opinions, a court will also consider the implications of the decision for other cases not before the court. This tells you how broad or narrow the ruling in the case is and what implications it has for subsequent cases.

In addition to the reasoning of the court, the opinion may include information about the arguments made by each of the parties and how the court responds to those arguments. This allows you to think about the case from the point of view of the parties rather than the judge writing the opinion. Did the parties make the right arguments? In a subsequent case, is there some way for a party who appears to be on the losing side to re-frame the issue to avoid defeat?

If there is more than one opinion in the case, you need to also understand the reasoning that underlies each concurring and dissenting opinion. These opinions may help you to think critically about the majority opinion. You may conclude one of the other opinions is better reasoned than the majority opinion. In addition, a concurring opinion may give you some insight into the scope of the majority decision as precedent, particularly when a judge whose vote is essential to the outcome announces that the judge would not reach the same result if the facts were somewhat different.

Below is an example of a judicial opinion. Identify the various parts of the opinion and try to understand why the court decided the case the way that it did.

Conti v. ASPCA (American Society for the Prevention of Cruelty to Animals)
77 Misc.2d 61, 353 N.Y.S.2d 288 (N.Y. Civil Court, Queens County, 1974)

RODELL, J.

Chester is a parrot. He is fourteen inches tall, with a green coat, yellow head and an orange

streak on his wings. Red splashes cover his left shoulder. Chester is a show parrot, used by the defendant ASPCA in various educational exhibitions presented to groups of children.

On June 28, 1973, during an exhibition in Kings Point, New York, Chester flew the coop and found refuge in the tallest tree he could find. For seven hours the defendant sought to retrieve Chester. Ladders proved to be too short. Offers of food were steadfastly ignored. With the approach of darkness, search efforts were discontinued. A return to the area on the next morning revealed that Chester was gone.

On July 5th, 1973 the plaintiff, who resides in Belle Harbor, Queens County, had occasion to see a green-hued parrot with a yellow head and red splashes seated in his backyard. His offer of food was eagerly accepted by the bird. This was repeated on three occasions each day for a period of two weeks. This display of human kindness was rewarded by the parrot's finally entering the plaintiff's home, where he was placed in a cage.

The next day, the plaintiff phoned the defendant ASPCA and requested advice as to the care of a parrot he had found. Thereupon the defendant sent two representatives to the plaintiff's home. Upon examination, they claimed that it was the missing parrot, Chester, and removed it from the plaintiff's home. Upon refusal of the defendant ASPCA to return the bird, the plaintiff now brings this action in replevin.[1]

The issues presented to the Court are twofold: One, is the parrot in question truly Chester, the missing bird? Two, if it is in fact Chester, who is entitled to its ownership?

The plaintiff presented witnesses who testified that a parrot similar to the one in question was seen in the neighborhood prior to July 5, 1973. He further contended that a parrot could not fly the distance between Kings Point and Belle Harbor in so short a period of time, and therefore the bird in question was not in fact Chester.

The representatives of the defendant ASPCA were categorical in their testimony that the parrot was indeed Chester, that he was unique because of his size, color and habits. They claimed that Chester said 'hello' and could dangle by his legs. During the entire trial the Court had the parrot under close scrutiny, but at no time did it exhibit any of these characteristics. The Court called upon the parrot to indicate by name or other mannerism an affinity to either of the claimed owners. Alas, the parrot stood mute.

Upon all the credible evidence the Court does find as a fact that the parrot in question is indeed Chester, the same parrot which escaped from the possession of the ASPCA on June 28, 1973.

The Court must now deal with the plaintiff's position, that the ownership of the defendant was a qualified one and upon the parrot's escape, ownership passed to the first individual who captured it and placed it under his control.

The law is well settled that the true owner of lost property is entitled to the return thereof as

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[1] Instructor's Note: Replevin is a legal action in which the court orders the sheriff to seize personal property that has been wrongfully held and return it to its owner.

against any person finding same. (*In re Wright's Estate*, 177 N.Y.S.2d 410 (1958). This general rule is not applicable when the property lost is an animal. In such cases the Court must inquire as to whether the animal was domesticated or ferae naturae (wild).

Where an animal is wild, its owner can only acquire a qualified right of property, which is wholly lost when it escapes from its captor with no intention of returning. Thus in *Mullett v. Bradley*, 53 N.Y.S. 781 (1898), an untrained and undomesticated sea lion escaped after being shipped from the West to the East Coast. The sea lion escaped and was again captured in a fish pond off the New Jersey Coast. The original owner sued the finder for its return. The court held that the sea lion was a wild animal (ferae naturae), and when it returned to its wild state, the original owner's property rights were extinguished. In *Amory v. Flyn*, 10 Johns. 102 (NY Sup. Ct. 1813), plaintiff sought to recover geese of the wild variety which had strayed from the owner. In granting judgment to the plaintiff, the court pointed out that the geese had been tamed by the plaintiff and therefore were unable to regain their natural liberty. This important distinction was also demonstrated in *Manning v. Mitcherson*, 69 Ga. 447, 450--451(1883), where the plaintiff sought the return of a pet canary. In holding for the plaintiff the court stated "To say that if one has a canary bird, mockingbird, parrot, or any other bird so kept, and it should accidentally escape from its cage to the street, or to a neighboring house, that the first person who caught it would be its owner is wholly at variance with all our views of right and justice."

The Court finds that Chester was a domesticated animal, subject to training and discipline. Thus the rule of ferae naturae does not prevail and the defendant as true owner is entitled to regain possession.

The Court wishes to commend the plaintiff for his acts of kindness and compassion to the parrot during the period that it was lost and was gratified to receive the defendant's assurance that the first parrot available would be offered to the plaintiff for adoption.

Judgment for defendant dismissing the complaint without costs.

C. Sources of Law: Common Law, Stare Decisis and the System of Precedent

The United States legal system is rooted in English common law which began to develop in the eleventh century. The common law was exported to the American colonies and even now continues to be an important source of law for areas of the law that have not been altered by constitutional or statutory law. The common law is particularly important in the areas of property, torts, and contract law. Of the American states, only Louisiana's civil legal system does not have English common law origins. It is instead rooted in the French civil law system which is based on the Napoleonic Code and earlier Roman counterparts. However, the criminal law system of Louisiana is based on the common law.

Common law principles are found in judge-made law and not law embodied in statutes. Common law principles evolve over time by courts deciding individual cases and writing legal opinions explaining the basis for the result in a particular case. Legal principles described in these opinions are then applied to other similar cases. The earlier cases are relied on as precedent. Precedent constrains judges so that they are not free to ignore earlier cases, but are instead bound

by the principle of stare decisis.

Stare decisis means "to stand by things decided." According to the United States Supreme Court, stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). The doctrine also has some negative consequences. It can permit decisions to continue to be relied on despite recognition that the decision is erroneous and it can slow down the ability of the legal system to adapt to changes in society.

However, the system of following precedent is not as simple as it sounds. It is easy to identify the appropriate precedent if two cases raise the exact same legal issue and are identical in all aspects, but that is rarely the case. More likely, the case before the court will be similar to, but not identical to an earlier case. In deciding whether to follow precedent in that situation, the court must decide if the similarities between the two cases requires the court to follow the earlier case despite the differences or not.

If the differences are viewed as insignificant in relation to the legal issue before the court, the court will decide to follow the precedent despite the differences. By contrast, if the differences are significant in light of the legal issue before the court and the policies that underlie the legal rule applied in the precedent, the court may decide to carve out an exception to the rule applied in the earlier case because the differences require a different legal rule. In some cases, there may be two or more potentially applicable precedents. In that circumstance, the court must decide which is the most relevant precedent based on the similarities and differences between the applicable cases and the policies at issue.

While relatively rare, it is also possible for a court to explicitly overturn an earlier decision. Although courts seldom overrule precedent, Chief Justice Rehnquist explained that stare decisis is not an "inexorable command." However, any decision to overrule precedent is made cautiously.

Overturning a precedent also relates to the hierarchical nature of the court system and whether the court has the authority to overturn an earlier decision or not. Not surprisingly, the court that most frequently overturns its own precedents is the United States Supreme Court. As the highest court in the nation on all issues of constitutional law and federal statutory law, it is not bound by the decisions of any other court in deciding such issues and, therefore, it is free to reject even its own precedent. It occasionally does so because the earlier decision has been eroded by changes in legal doctrine, because the decision has become unworkable in practice, or because changes in society have caused the Court to rethink the earlier precedent. This ability to overturn its own past decisions with greater frequency than lower courts is also true for the highest state court on an issue of state law.

Despite the U.S. Supreme Court's ability to overrule its own past decisions, stare decisis still plays a major role in convincing the Court to adhere to precedent. In a 2015 opinion in *Kimble v. Marvel Entertainment LLC*, 135 S. Ct. 2402 (2015), Justice Kagan wrote about stare decisis:

> Respecting stare decisis means sticking to some wrong decisions. The

> doctrine rests on the idea, as Justice Brandeis famously wrote, that it is usually "more important that the applicable rule of law be settled than that it be settled right." Indeed, stare decisis has consequence only to the extent it sustains incorrect decisions; correct judgments have no need for that principle to prop them up. Accordingly, an argument that we got something wrong—even a good argument to that effect—cannot by itself justify scrapping settled precedent. Or otherwise said, it is not alone sufficient that we would decide a case differently now than we did then. To reverse course, we require as well what we have termed a "special justification"—over and above the belief "that the precedent was wrongly decided."

Some recent Supreme Court decisions suggest that some members of the Court are now willing to depart from stare decisis more frequently. For example, in 2018 in *Janus v. American Federation of State, County and Municipal Employees, Council 31*, in an opinion by Justice Alito upholding a free speech claim, he overturning *Abood v. Detroit Board of Education,* a 40 year-old precedent. In doing so, he wrote that the doctrine of stare decisis "applies with perhaps least force of all to decisions that wrongly denied First Amendment rights." In her dissenting opinion, Justice Kagan responded to the majority's willingness to overturn precedent, writing that "the worse part of today's opinion is where the majority subverts all known principles of stare decisis," overturning "*Abood* because it wanted to."

Whether a precedent is binding on a court depends on which court decided the original case and which court is now faced with the decision of whether or not to adopt the reasoning of the earlier decision. This question relates back to the structure of the American court system. On issues of state law decided by state courts, lower courts in that state are bound by the decisions of higher courts, but not courts at the same level or below them. In the federal court system, federal district courts must follow the decisions of the court of appeals for the federal circuit they are part of as well as decisions of the United States Supreme Court, but not the decisions of other circuits. When precedent is not binding, however, it can nevertheless be followed because a court faced with the same issue can find its reasoning to be persuasive and, therefore, adopt its analysis. Because of the existence of both binding and nonbinding precedent, there may be a conflict in the precedent with some cases deciding the issue one way and other cases another way. In that circumstance, a court that is not bound by any of the earlier cases can choose among the conflicting precedents or carve out yet a different justification for its decision.

When an issue is resolved by a large number of courts who are not bound by each other's rulings, as frequently happens among the U.S. Courts of Appeals for the various federal circuits, the opinions present a dialogue on the issue with each new decision commenting on the earlier decisions and agreeing or disagreeing with various parts of the analysis presented. Often, if the issue is one that falls within the jurisdiction of the U.S. Supreme Court, the Court will wait to resolve the issue until a number of circuits have ruled on the issue in order to get the benefit of that ongoing dialogue.

In addition to case law altering the common law over time, the common law can be

superseded by the adoption of statutes. Statutes can convert a common law principle into statutory law, modify the common law principle or replace the common law principle entirely. A common law rule can also be changed by an amendment to the state constitution or found to be unconstitutional under either the state or federal constitution.

D. Tools of Legal Reasoning: Analogy and Precedent

One of the major forms of reasoning used in legal analysis is reasoning by analogy. As described above in discussing precedent, the process of deciding whether to apply a particular precedent utilizes analogical reasoning to compare the similarities and differences between the current case and past cases to decide if an earlier case should or should not govern a case before the court.

In addition to using reasoning by analogy to resolve the specific question of which precedent to apply, analogical reasoning is also used more generally in legal analysis. The legal system is constantly required to decide how to treat something new, a new technology or invention, new social norms, or other forms of behavior. Sometimes the legal response comes through legislation. For example, the legislature may decide to enact rules to control the use of new technology such as drones, hoverboards or self-driving cars to protect public safety. Even in the absence of new legislation, however, the issue is likely to come before the courts for resolution. For example, if a drone damages someone's property, that person may sue claiming the owner of the drone was negligent. A court will then have to decide how the law should treat a drone for purposes of liability. In reaching a decision, the court will have to compare drones to technology that the law has already dealt with to find the best comparison. This process of using existing law to deal with new issues can be described as "new wine in old bottles." The legal system's capacity to deal with new issues without starting from scratch is important to its functioning. The next case, *Adams v. New Jersey Steamboat Co.*, is an example of such a use of reasoning by analogy.

Adams v. New Jersey Steamboat Co.
151 N.Y. 163 (1896)

O'BRIEN, J.

On the night of the 17th of June, 1889, the plaintiff was a cabin passenger from New York to Albany on the defendant's steamer Drew, and for the usual and regular charge was assigned to a stateroom on the boat. The plaintiff's ultimate destination was St. Paul, in the state of Minnesota, and he had upon his person the sum of $160 in money for the purpose of defraying his expenses of the journey. The plaintiff, on retiring for the night, left this money in his clothing in the stateroom, having locked the door and fastened the windows. During the night it was stolen by some person, who apparently reached it through the window of the room. The plaintiff's relations to the defendant as a passenger, the loss without negligence on his part, and the other fact that the sum lost was reasonable and proper for him to carry upon his person to defray the expenses of the journey, have all been found by the verdict of the jury in favor of the plaintiff. The appeal presents, therefore, but a single question, and that is whether the defendant is, in law, liable for

this loss without any proof of negligence on its part. The learned trial judge instructed the jury that it was, and the jury, after passing upon the other questions of fact in the case, rendered a verdict in favor of the plaintiff for the amount of money so stolen. The judgment entered upon the verdict was affirmed at general term, and that court has allowed an appeal to this court.

The defendant has, therefore, been held liable as an insurer against the loss which one of its passengers sustained under the circumstances stated. The principle upon which innkeepers are charged by the common law as insurers of the money or personal effects of their guests originated in public policy. It was deemed to be a sound and necessary rule that this class of persons should be subjected to a high degree of responsibility in cases where an extraordinary confidence is necessarily reposed in them, and where great temptation to fraud and danger of plunder exists by reason of the peculiar relations of the parties. The relations that exist between a steamboat company and its passengers, who have procured staterooms for their comfort during the journey, differ in no essential respect from those that exist between the innkeeper and his guests. The passenger procures and pays for his room for the same reasons that a guest at an inn does. There are the same opportunities for fraud and plunder on the part of the carrier that was originally supposed to furnish a temptation to the landlord to violate his duty to the guest. A steamer carrying passengers upon the water, and furnishing them with rooms and entertainment, is, for all practical purposes, a floating inn, and hence the duties which the proprietors owe to the passengers in their charge ought to be the same. No good reason is apparent for relaxing the rigid rule of the common law which applies as between innkeeper and guest, since the same considerations of public policy apply to both relations. The defendant, as a common carrier, would have been liable for the personal baggage of the plaintiff, unless the loss was caused by the act of God or the public enemies; and a reasonable sum of money for the payment of his expenses, if carried by the passenger in his trunk, would be included in the liability for loss of baggage. Carr. § 24; Ang. Carr. § 80. Since all questions of negligence on the part of the plaintiff, as well as those growing out of the claim that some notice was posted in the room regarding the carrier's liability for the money, have been disposed of by the verdict, it is difficult to give any good reason why the measure of liability should be less for the loss of the money, under the circumstances, than for the loss of what might be strictly called baggage.

It was held in *Carpenter v. Railroad Co.*, 124 N. Y. 53, 26 N. E. 277 (1891), that a railroad running sleeping coaches on its road was not liable for the loss of money taken from a passenger while in his berth, during the night, without some proof of negligence on its part. That case does not, we think, control the question now under consideration. Sleeping-car companies are neither innkeepers nor carriers. A berth in a sleeping car is a convenience of modern origin, and the rules of the common law in regard to carriers or innkeepers have not been extended to this new relation. This class of conveyances are attached to the regular trains upon railroads for the purpose of furnishing extra accommodations, not to the public at large, nor to all the passengers, but to that limited number who wish to pay for them. The contract for transportation, and liability for loss of baggage, is with the railroad, the real carrier. All the relations of passenger and carrier are established by the contract implied in the purchase of the regular railroad ticket, and the sleeping car is but an adjunct to it only for such of the passengers as wish to pay an additional charge for the comfort and luxury of a special apartment in a special car. The relations of the carrier to a passenger occupying one of these berths are quite different, with respect to his

personal effects, from those which exist at common law between the innkeeper and his guest, or a steamboat company that has taken entire charge of the traveler by assigning to him a stateroom. While the company running sleeping cars is held to a high degree of care in such cases, it is not liable for a loss of this character, without some proof of negligence. The liability as insurers which the common law imposed upon carriers and innkeepers has not been extended to these modern appliances for personal comfort, for reasons that are stated quite fully in the adjudged cases, and that do not apply in the case at bar.

But, aside from authority, it is quite obvious that the passenger has no right to expect, and in fact does not expect, the same degree of security from thieves while in an open berth in a car on a railroad as in a stateroom of a steamboat, securely locked, and otherwise guarded from intrusion. In the latter case, when he retires for the night he ought to be able to rely upon the company for his protection with the same faith that the guest can rely upon the protection of the innkeeper, since the two relations are quite analogous. In the former the contract and the relations of the parties differ at least to such an extent as to justify some modification of the common-law rule of responsibility. The use of sleeping cars by passengers in modern times created relations between the parties to the contract that were unknown to the common law, and to which the rule of absolute responsibility could not be applied without great injustice in many cases. But in the case at bar no good reason is perceived for relaxing the ancient rule, and none can be deduced from the authorities. The relations that exist between the carrier and the passenger who secures a berth in a sleeping car or in a drawing-room car upon a railroad are exceptional and peculiar. The contract which gives the passenger the right to occupy a berth or a seat does not alone secure to him the right of transportation. It simply gives him the right to enjoy special accommodations at a specified place in the train. The carrier by railroad does not undertake to insure the personal effects of the passenger which are carried upon his person against depredation by thieves. It is bound, no doubt, to use due care to protect the passenger in this respect; and it might well be held to a higher degree of care when it assigns sleeping berths to passengers for an extra compensation than in cases where they remain in the ordinary coaches, in a condition to protect themselves. But it is only upon the ground of negligence that the railroad company can be held liable to the passenger for money stolen from his person during the journey. The ground of the responsibility is the same as to all the passengers, whether they use sleeping berths or not, though the degree of care required may be different. Some proof must be given that the carrier failed to perform the duty of protection to the passenger that is implied in the contract, before the question of responsibility can arise, whether the passenger be in one of the sleeping berths, or in a seat in the ordinary car. The principle upon which the responsibility rests is the same in either case, though the degree of care to which the carrier is held may be different. That must be measured by the danger to which the passenger is exposed from thieves, and with reference to all the circumstances of the case. The carrier of passengers by railroad, whether the passenger be assigned to the ordinary coaches or to a berth in a special car, has never been held to that high degree of responsibility that governs the relations of innkeeper and guest; and it would perhaps be unjust to so extend the liability, when the nature and character of the duties which it assumes are considered. But the traveler who pays for his passage, and engages a room, in one of the modern floating palaces that cross the sea or navigate the interior waters of the country, establishes legal relations with the carrier that cannot well be distinguished from those that exist

between the hotel keeper and his guests. The carrier in that case undertakes to provide for all his wants, including a private room for his exclusive use, which is to be as free from all intrusion as that assigned to the guest at an hotel. The two relations, if not identical, bear such close analogy to each other that the same rule of responsibility should govern. We are of the opinion, therefore, that the defendant was properly held liable in this case for the money stolen from the plaintiff, without any proof of negligence.

CHAPTER III: FREE SPEECH RIGHTS OF K-12 PUBLIC SCHOOL STUDENTS

Introduction

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." Despite the fact that the text of the Amendment refers to a limit on the actions of the U.S. Congress, the First Amendment is applicable to the federal government generally and not just to actions by Congress. It is also applicable to the states. This is because freedom of speech and the other individual rights mentioned in the First Amendment are fundamental liberties protected by the Due Process Clause of the Fourteenth Amendment.

While the text of the First Amendment states that "no law" can infringe the right of free speech, the U.S. Supreme Court has interpreted the First Amendment to allow the government to regulate speech in a variety of circumstances and for a variety of reasons. Therefore, the Court has devised a set of doctrines to answer the question of whether a particular form of government regulation of speech is or is not constitutionally permissible.

The U.S. Constitution does not mention public education or educators. However, since the public schools are operations of the government and public school administrators, teachers, and staff are agents of the government, the U.S. Constitution applies to public schools and imposes constitutional limits on their actions. Since 1969, those limitations have included student free speech rights. The Supreme Court first recognized that students have rights of freedom of expression while at school in that year in *Tinker v. Des Moines Independent Community School District* and since that time it has decided three additional cases that address various limits on those rights. This year the Court will add a fifth case to that group when it decides *Mahanoy Area School District v. B.L.*

A. Tinker v. Des Moines Independent Community School District No. 21

393 U.S. 503 (1969)

JUSTICE FORTAS delivered the opinion of the Court.

Petitioner John F. Tinker, 15 years old, and petitioner Christopher Eckhardt, 16 years old,

attended high schools in Des Moines, Iowa. Petitioner Mary Beth Tinker, John's sister, was a 13-year-old student in junior high school. In December 1965, a group of adults and students held a meeting at the Eckhardt home. The group determined to publicize their objections to the hostilities in Vietnam and their support for a truce by wearing black armbands during the holiday season and fasting on December 16 and New Year's Eve. Petitioners and their parents had previously engaged in similar activities, and they decided to participate in the program.

The principals of the Des Moines schools became aware of the plan to wear armbands. On December 14, 1965, they met and adopted a policy that any student wearing an armband to school would be asked to remove it, and if he refused he would be suspended until he returned without the armband. Petitioners were aware of the regulation that the school authorities adopted.

On December 16, Mary Beth and Christopher wore black armbands to their schools. John Tinker wore his armband the next day. They were all sent home and suspended from school until they would come back without their armbands. They did not return to school until after the planned period for wearing armbands had expired—that is, until after New Year's Day.

This complaint was filed in the United States District Court by petitioners, through their fathers, under § 1983 of Title 42 of the United States Code.[2] It prayed for an injunction restraining the respondent school officials and members of the board of directors of the school district from disciplining the petitioners, and it sought nominal damages.

I

The District Court recognized that the wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amendment. As we shall discuss, the wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it.

First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years.

In *West Virginia v. Barnette*, 319 U. S. 624 (1943), this Court held that under the First Amendment, the student in public school may not be compelled to salute the flag. Speaking through Mr. Justice Jackson, the Court said:

> The Fourteenth Amendment, as now applied to the States, 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

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[2] Instructor's Note: Section 1983 was originally enacted as part of the Civil Rights Act of 1871. It allows someone whose constitutional rights or statutory civil rights have been violated by state action to bring a lawsuit and recover money damages and/or enjoin the government defendants from engaging in the unconstitutional conduct. It also allows the successful plaintiff to recover attorney's fees paid for by the defendant.

> 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 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. *Id.* at 637.

On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools. Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities.

II

The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment. It does not concern aggressive, disruptive action or even group demonstrations. Our problem involves direct, primary First Amendment rights akin to "pure speech." The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.

Only a few of the 18,000 students in the school system wore the black armbands. Only five students were suspended for wearing them. There is no indication that the work of the schools or any class was disrupted. Outside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises.

The District Court concluded that the action of the school authorities was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands. But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk; and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966), the prohibition cannot be sustained.

In the present case, the District Court made no such finding, and our independent examination of the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students. Even an official memorandum prepared after the suspension that listed the reasons for the ban on wearing the armbands made no reference to the anticipation of such disruption.

On the contrary, the action of the school authorities appears to have been based upon an urgent wish to avoid the controversy which might result from the expression, even by the silent symbol of armbands, of opposition to this Nation's part in the conflagration in Vietnam. It is revealing, in this respect, that the meeting at which the school principals decided to issue the contested regulation was called in response to a student's statement to the journalism teacher in one of the schools that he wanted to write an article on Vietnam and have it published in the school paper.

It is also relevant that the school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance. The record shows that students in some of the schools wore buttons relating to national political campaigns, and some even wore the Iron Cross, traditionally a symbol of Nazism. The order prohibiting the wearing of armbands did not extend to these. Instead, a particular symbol—black armbands worn to exhibit opposition to this Nation's involvement in Vietnam—was singled out. Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.

In *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923), Mr. Justice McReynolds expressed this Nation's repudiation of the principle that a State might so conduct its schools as to "foster a homogeneous people." This principle has been repeated by this Court on numerous occasions during the intervening years. In *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967), Mr. Justice Brennan, speaking for the Court, said:

> 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'

The principle of these cases is not confined to the supervised and ordained discussion which

takes place in the classroom. The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others. But conduct by the student, in class or out of it, which for any reason materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.

If a regulation were adopted by school officials forbidding discussion of the Vietnam conflict, or the expression by any student of opposition to it anywhere on school property except as part of a prescribed classroom exercise, it would be obvious that the regulation would violate the constitutional rights of students, at least if it could not be justified by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school. In the circumstances of the present case, the prohibition of the silent, passive "witness of the armbands," as one of the children called it, is no less offensive to the Constitution's guarantees.

As we have discussed, the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred. These petitioners merely went about their ordained rounds in school. Their deviation consisted only in wearing on their sleeve a band of black cloth, not more than two inches wide. They wore it to exhibit their disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them. They neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder. In the circumstances, our Constitution does not permit the State to deny their form of expression.

JUSTICE BLACK, dissenting.

The Court's holding in this case ushers in what I deem to be an entirely new era in which the power to control pupils by the elected "officials of state supported public schools . . ." in the United States is in ultimate effect transferred to the Supreme Court. The Court arrogates to itself, rather than to the State's elected officials charged with running the schools, the decision as to which school disciplinary regulations are "reasonable."

While the record does not show that any of these armband students shouted, used profane language, or were violent in any manner, detailed testimony by some of them shows their armbands caused comments, warnings by other students, the poking of fun at them, and a warning by an older football player that other, nonprotesting students had better let them alone. There is also evidence that a teacher of mathematics had his lesson period practically "wrecked" chiefly by disputes with Mary Beth Tinker, who wore her armband for her "demonstration." Even

a casual reading of the record shows that this armband did divert students' minds from their regular lessons, and that talk, comments, etc., made John Tinker "self-conscious" in attending school with his armband. While the absence of obscene remarks or boisterous and loud disorder perhaps justifies the Court's statement that the few armband students did not actually "disrupt" the classwork, I think the record overwhelmingly shows that the armbands did exactly what school officials and principals foresaw they would, that is, took the students' minds off their classwork and diverted them to thoughts about the highly emotional subject of the Vietnam war. If the time has come when pupils of state-supported schools can defy orders of school officials to keep their minds on their own schoolwork, it is the beginning of a new revolutionary era of permissiveness fostered by the judiciary.

School discipline, like parental discipline, is an integral and important part of training our children to be good citizens. Here a very small number of students have refused to obey a school order designed to give pupils who want to learn the opportunity to do so. After the Court's holding today some students will be ready, able, and willing to defy their teachers on practically all orders. It is nothing but wishful thinking to imagine that young, immature students will not soon believe it is their right to control the schools rather than the right of the States. This case, therefore, wholly without constitutional reasons in my judgment, subjects all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students. I, for one, am not fully persuaded that school pupils are wise enough, even with this Court's expert help, to run the 23,390 public school systems in our 50 States. I wish, therefore, wholly to disclaim any purpose on my part to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students. I dissent.

JUSTICE HARLAN, dissenting.

School officials should be accorded the widest authority in maintaining discipline and good order in their institutions. I would cast upon those complaining the burden of showing that a particular school measure was motivated by other than legitimate school concerns—for example, a desire to prohibit the expression of an unpopular point of view, while permitting expression of the dominant opinion. Finding nothing in this record which impugns the good faith of respondents in promulgating the armband regulation, I would affirm the judgment below.

B. Bethel School District No. 403 v. Fraser
478 U.S. 675 (1986)

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether the First Amendment prevents a school district from disciplining a high school student for giving a lewd speech at a school assembly.

On April 26, 1983, respondent Matthew N. Fraser, a student at Bethel High School in Pierce County, Washington, delivered a speech nominating a fellow student for student elective office. Approximately 600 high school students, many of whom were 14-year-olds, attended the assembly. The assembly was part of a school-sponsored educational program in self-government.

Students who elected not to attend the assembly were required to report to study hall. During the entire speech, Fraser referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor.[1] Two of Fraser's teachers, with whom he discussed the contents of his speech in advance, informed him that the speech was "inappropriate and that he probably should not deliver it," and that his delivery of the speech might have "severe consequences."

During Fraser's delivery of the speech, a school counselor observed the reaction of students to the speech. Some students hooted and yelled; some by gestures graphically simulated the sexual activities pointedly alluded to in respondent's speech. Other students appeared to be bewildered and embarrassed by the speech. One teacher reported that on the day following the speech, she found it necessary to forgo a portion of the scheduled class lesson in order to discuss the speech.

A Bethel High School disciplinary rule prohibiting the use of obscene language in the school provides: "Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures."

The morning after the assembly, the Assistant Principal called Fraser into her office and notified him that the school considered his speech to have been a violation of this rule. Fraser admitted to having given the speech described and that he deliberately used sexual innuendo in the speech. Fraser was then informed that he would be suspended for three days, and that his name would be removed from the list of candidates for graduation speaker at the school's commencement exercises.

Respondent, by his father as guardian ad litem, then brought this action. Respondent alleged a violation of his First Amendment right to freedom of speech and sought both injunctive relief and monetary damages under 42 U.S.C. § 1983.

This Court acknowledged in *Tinker v. Des Moines Independent Community School Dist.* that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." The Court of Appeals read that case as precluding any discipline of Fraser. The marked distinction between the political "message" of the armbands in *Tinker* and the sexual content of respondent's speech in this case seems to have been given little weight by the Court of Appeals. In upholding the students' right to engage in a nondisruptive, passive expression of a political viewpoint in *Tinker*, this Court was careful to note that the case did "not concern speech

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[1] Professor's note: Below is the text of Fraser's speech:

" 'I know a man who is firm - he's firm in his pants, he's firm in his shirt, his character is firm- but most . . . of all, his belief in you, the students of Bethel, is firm.

" 'Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts - he drives hard, pushing and pushing until finally - he succeeds.

" 'Jeff is a man who will go to the very end - even the climax, for each and every one of you.

" 'So vote for Jeff for A. S. B. vice-president - he'll never come between you and the best our high school can be.' "

or action that intrudes upon the work of the schools or the rights of other students." It is against this background that we turn to consider the level of First Amendment protection accorded to Fraser's utterances and actions before an official high school assembly attended by 600 students.

The role and purpose of the American public school system were well described by two historians, who stated: "[P]ublic education must prepare pupils for citizenship in the Republic. . . . It must 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." In *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979), we echoed the essence of this statement of the objectives of public education as the "inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system."

These fundamental values of "habits and manners of civility" essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views may be unpopular. But these "fundamental values" must also take into account the sensibilities of others, and, in the case of a school, the sensibilities of fellow students. 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. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences.

The First Amendment guarantees wide freedom in matters of adult public discourse. It does not follow, however, that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school. Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the "work of the schools." The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.

The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers - and indeed the older students - demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models. The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy.

The pervasive sexual innuendo in Fraser's speech was plainly offensive to both teachers and students. By glorifying male sexuality, and in its verbal content, the speech was acutely insulting to teenage girl students. The speech could well be damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality. Some students were reported as bewildered by the speech and the reaction of mimicry it provoked.

We hold that petitioner School District acted within its authority in imposing sanctions upon

Fraser in response to his offensively lewd and indecent speech. Unlike the sanctions imposed on the students in *Tinker*, the penalties in this case were unrelated to any political viewpoint. The First Amendment does not prevent school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission. A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students. Accordingly, it was appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the "fundamental values" of public school education.

C. Hazelwood School District v. Kuhlmeier
484 U.S. 260 (1988)

JUSTICE WHITE delivered the opinion of the Court.

This case concerns the extent to which educators may exercise editorial control over the contents of a high school newspaper produced as part of the school's journalism curriculum.

I

Petitioners are the Hazelwood School District in St. Louis County, Missouri; various school officials; Robert Eugene Reynolds, the principal of Hazelwood East High School; and Howard Emerson, a teacher in the school district. Respondents are three former Hazelwood East students who were staff members of Spectrum, the school newspaper. They contend that school officials violated their First Amendment rights by deleting two pages of articles from the May 13, 1983, issue of Spectrum.

Spectrum was written and edited by the Journalism II class at Hazelwood East. The newspaper was published every three weeks or so during the 1982-1983 school year. More than 4,500 copies of the newspaper were distributed during that year to students, school personnel, and members of the community. The Board of Education allocated funds for the printing of Spectrum. These funds were supplemented by proceeds from sales of the newspaper.

The Journalism II course was taught by Robert Stergos for most of the 1982-1983 academic year. Stergos left Hazelwood East to take a job in private industry on April 29, 1983, when the May 13 edition of Spectrum was nearing completion, and petitioner Emerson took his place as newspaper adviser for the remaining weeks of the term.

The practice at Hazelwood East during the spring 1983 semester was for the journalism teacher to submit page proofs of each Spectrum issue to Principal Reynolds for his review prior to publication. On May 10, Emerson delivered the proofs of the May 13 edition to Reynolds, who objected to two of the articles scheduled to appear in that edition. One of the stories described three Hazelwood East students' experiences with pregnancy; the other discussed the impact of divorce on students at the school.

Reynolds was concerned that, although the pregnancy story used false names "to keep the identity of these girls a secret," the pregnant students still might be identifiable from the text. He also believed that the article's references to sexual activity and birth control were inappropriate

for some of the younger students at the school. In addition, Reynolds was concerned that a student identified by name in the divorce story had complained that her father "wasn't spending enough time with my mom, my sister and I" prior to the divorce, "was always out of town on business or out late playing cards with the guys," and "always argued about everything" with her mother. Reynolds believed that the student's parents should have been given an opportunity to respond to these remarks or to consent to their publication. He was unaware that Emerson had deleted the student's name from the final version of the article.

Reynolds believed that there was no time to make the necessary changes before the scheduled press run and that the newspaper would not appear before the end of the school year if printing were delayed to any significant extent. He concluded that his only options were to publish a four-page newspaper instead of the planned six-page newspaper, eliminating the two pages on which the offending stories appeared, or to publish no newspaper at all. Accordingly, he directed Emerson to withhold from publication the two pages containing the stories on pregnancy and divorce. He informed his superiors of the decision, and they concurred.

Respondents subsequently commenced this action in the United States District Court for the Eastern District of Missouri seeking a declaration that their First Amendment rights had been violated, injunctive relief, and monetary damages.

II

Students in the public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker,* 393 U.S. 503, 506 (1969). They cannot be punished merely for expressing their personal views on the school premises unless school authorities have reason to believe that such expression will "substantially interfere with the work of the school or impinge upon the rights of other students."

We have nonetheless recognized that the First Amendment rights of students in the public schools "are not automatically coextensive with the rights of adults in other settings," *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 682 (1986), and must be "applied in light of the special characteristics of the school environment." A school need not tolerate student speech that is inconsistent with its "basic educational mission," even though the government could not censor similar speech outside the school.

We deal first with the question whether Spectrum may appropriately be characterized as a forum for public expression. The public schools do not possess all of the attributes of streets, parks, and other traditional public forums. Hence, school facilities may be deemed to be public forums only if school authorities have "by policy or by practice" opened those facilities "for indiscriminate use by the general public," *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U. S. 37, 47 (1983), or by some segment of the public, such as student organizations. If the facilities have instead been reserved for other intended purposes, "communicative or otherwise," then no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community.

The policy of school officials toward Spectrum was reflected in Hazelwood School Board Policy and the Hazelwood East Curriculum Guide. Board Policy provided that "[s]chool

sponsored publications are developed within the adopted curriculum and its educational implications in regular classroom activities." The Hazelwood East Curriculum Guide described the Journalism II course as a "laboratory situation in which the students publish the school newspaper applying skills they have learned in Journalism I." The lessons that were to be learned from the Journalism II course, according to the Curriculum Guide, included development of journalistic skills under deadline pressure, "the legal, moral, and ethical restrictions imposed upon journalists within the school community," and "responsibility and acceptance of criticism for articles of opinion." Journalism II was taught by a faculty member during regular class hours. Students received grades and academic credit for their performance in the course.

School officials did not deviate in practice from their policy that production of Spectrum was to be part of the educational curriculum and a "regular classroom activit[y]." The District Court found that Robert Stergos, the journalism teacher during most of the 1982-1983 school year, "was the final authority with respect to almost every aspect of the production and publication of Spectrum, including its content." Moreover, after each issue had been approved by Stergos or his successor, the issue still had to be reviewed by Principal Reynolds prior to publication.

The evidence relied upon by the Court of Appeals in finding Spectrum to be a public forum is equivocal at best. Although the Statement of Policy published in the September 14, 1982, issue of Spectrum declared that "Spectrum, as a student-press publication, accepts all rights implied by the First Amendment," this statement, understood in the context of the paper's role in the school's curriculum, suggests at most that the administration will not interfere with the students' exercise of those First Amendment rights that attend the publication of a school-sponsored newspaper. It does not reflect an intent to expand those rights by converting a curricular newspaper into a public forum. Instead, they "reserve[d] the forum for its intended purpos[e]" as a supervised learning experience for journalism students. Accordingly, school officials were entitled to regulate the contents of Spectrum in any reasonable manner. It is this standard, rather than our decision in *Tinker*, that governs this case.

The question whether the First Amendment requires a school to tolerate particular student speech - the question that we addressed in *Tinker* - is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns 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. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.

Educators are entitled to exercise greater control over this second form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school. Hence, a school may in its capacity as publisher of a school newspaper or producer of a school play "disassociate

itself," not only from speech that would "substantially interfere with [its] work . . . or impinge upon the rights of other students," but also from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences. In addition, a school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting. A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with "the shared values of a civilized social order" or to associate the school with any position other than neutrality on matters of political controversy.

Accordingly, we conclude that the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression. Instead, we hold 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.

This standard is consistent with our 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. It is only when the decision to censor a school-sponsored publication, theatrical production, or other vehicle of student expression has no valid educational purpose that the First Amendment is so "directly and sharply implicate[d]" as to require judicial intervention to protect students' constitutional rights.

III

We also conclude that Principal Reynolds acted reasonably in requiring the deletion from the May 13 issue of Spectrum of the pregnancy article, the divorce article, and the remaining articles that were to appear on the same pages of the newspaper.

The initial paragraph of the pregnancy article declared that "[a]ll names have been changed to keep the identity of these girls a secret." The principal concluded that the students' anonymity was not adequately protected given the other identifying information in the article and the small number of pregnant students at the school. Reynolds therefore could reasonably have feared that the article violated whatever pledge of anonymity had been given to the pregnant students. In addition, he could reasonably have been concerned that the article was not sufficiently sensitive to the privacy interests of the students' boyfriends and parents, who were discussed in the article but who were given no opportunity to consent to its publication or to offer a response. The article did not contain graphic accounts of sexual activity. The girls did comment in the article, however, concerning their sexual histories and their use or nonuse of birth control. It was not unreasonable for the principal to have concluded that such frank talk was inappropriate in a school-sponsored publication distributed to 14-year-old freshmen and presumably taken home to be read by students' even younger brothers and sisters.

The student who was quoted by name in the version of the divorce article seen by Principal

Reynolds made comments sharply critical of her father. The principal could reasonably have concluded that an individual publicly identified as an inattentive parent was entitled to an opportunity to defend himself as a matter of journalistic fairness.

Principal Reynolds testified credibly at trial that, at the time that he reviewed the proofs of the May 13 issue, he believed that there was no time to make any changes in the articles, and that the newspaper had to be printed immediately or not at all. We agree with the District Court that the decision to excise the two pages containing the problematic articles was reasonable given the particular circumstances of this case.

In sum, we cannot reject as unreasonable Principal Reynolds' conclusion that neither the pregnancy article nor the divorce article was suitable for publication. Reynolds could reasonably have concluded that the students who had written and edited these articles had not sufficiently mastered portions of the Journalism II curriculum that pertained to the treatment of controversial issues and personal attacks, the need to protect the privacy of individuals whose intimate concerns are to be revealed, and "the legal, moral, and ethical restrictions imposed upon journalists within [a] school community" that includes adolescent subjects and readers. Finally, the principal's decision to delete two pages of Spectrum, rather than to delete only the offending articles or require that they be modified, was reasonable under the circumstances as he understood them. Accordingly, no violation of First Amendment rights occurred.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, dissenting.

Free student expression undoubtedly sometimes interferes with the effectiveness of the school's pedagogical functions. Some brands of student expression do so by directly preventing the school from pursuing its pedagogical mission: The young polemic who stands on a soapbox during calculus class to deliver an eloquent political diatribe interferes with the legitimate teaching of calculus. And the student who delivers a lewd endorsement of a student-government candidate might so extremely distract an impressionable high school audience as to interfere with the orderly operation of the school. Other student speech, however, frustrates the school's legitimate pedagogical purposes merely by expressing a message that conflicts with the school's, without directly interfering with the school's expression of its message: A student who responds to a political science teacher's question with the retort, "socialism is good," subverts the school's inculcation of the message that capitalism is better. Even the maverick who sits in class passively sporting a symbol of protest against a government policy, or the gossip who sits in the student commons swapping stories of sexual escapade could readily muddle a clear official message condoning the government policy or condemning teenage sex. Likewise, the student newspaper that, like Spectrum, conveys a moral position at odds with the school's official stance might subvert the administration's legitimate inculcation of its own perception of community values.

If mere incompatibility with the school's pedagogical message were a constitutionally sufficient justification for the suppression of student speech, school officials could censor each of the students or student organizations in the foregoing hypotheticals, converting our public schools into "enclaves of totalitarianism," that "strangle the free mind at its source." The First Amendment permits no such blanket censorship authority. Public educators must accommodate

some student expression even if it offends them or offers views or values that contradict those the school wishes to inculcate.

In *Tinker*, this Court struck the balance. We held that official censorship of student expression is unconstitutional unless the speech "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." The "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," or an unsavory subject, does not justify official suppression of student speech in the high school.

The Court today casts no doubt on *Tinker*'s vitality. Instead it erects a taxonomy of school censorship, concluding that *Tinker* applies to one category and not another. On the one hand is censorship "to silence a student's personal expression that happens to occur on the school premises." On the other hand is censorship of expression that arises in the context of "school-sponsored . . . expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."

The Court does not, for it cannot, purport to discern from our precedents the distinction it creates. Nor has this Court ever intimated a distinction between personal and school-sponsored speech in any other context. Even if we were writing on a clean slate, I would reject the Court's rationale for abandoning *Tinker* in this case. The Court offers no more than an obscure tangle of three excuses to afford educators "greater control" over school-sponsored speech than the *Tinker* test would permit: the public educator's prerogative to control curriculum; the pedagogical interest in shielding the high school audience from objectionable viewpoints and sensitive topics; and the school's need to dissociate itself from student expression. None of the excuses supports the distinction that the Court draws. *Tinker* fully addresses the first concern; the second is illegitimate; and the third is readily achievable through less oppressive means.

Tinker teaches us that the state educator's undeniable, and undeniably vital, mandate to inculcate moral and political values is not a general warrant to act as "thought police" stifling discussion of all but state-approved topics and advocacy of all but the official position. Otherwise educators could transform students into "closed-circuit recipients of only that which the State chooses to communicate," and cast a perverse "pall of orthodoxy over the classroom." The mere fact of school sponsorship does not license such thought control in the high school, whether through school suppression of disfavored viewpoints or through official assessment of topic sensitivity. The former would constitute unconstitutional viewpoint discrimination.

Official censorship of student speech on the ground that it addresses "potentially sensitive topics" is, for related reasons, equally impermissible. I would not begrudge an educator the authority to limit the substantive scope of a school-sponsored publication to a certain, objectively definable topic, such as literary criticism, school sports, or an overview of the school year. Unlike those determinate limitations, "potential topic sensitivity" is a vaporous nonstandard that invites manipulation to achieve ends that cannot permissibly be achieved through blatant viewpoint discrimination and chills student speech to which school officials might not object.

The case before us illustrates how readily school officials (and courts) can camouflage viewpoint discrimination as the "mere" protection of students from sensitive topics. Among the grounds that the Court advances to uphold the principal's censorship of one of the articles was

the potential sensitivity of "teenage sexual activity." Yet the District Court found that the principal "did not oppose discussion of said topi[c] in Spectrum." It is much more likely that the article was objectionable because of the viewpoint it expressed: It might have been read (as the majority apparently does) to advocate "irresponsible sex."

The sole concomitant of school sponsorship that might conceivably justify the distinction that the Court draws between sponsored and nonsponsored student expression is the risk "that the views of the individual speaker [might be] erroneously attributed to the school." But " 'that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' " Dissociative means short of censorship are available to the school. It could, for example, require the student activity to publish a disclaimer, such as the "Statement of Policy" that Spectrum published each school year announcing that "[a]ll . . . editorials appearing in this newspaper reflect the opinions of the Spectrum staff, which are not necessarily shared by the administrators or faculty of Hazelwood East."

Since the censorship served no legitimate pedagogical purpose, it cannot by any stretch of the imagination have been designed to prevent "materia[l] disrup[tion of] classwork." "Any yardstick less exacting than [that] could result in school officials curtailing speech at the slightest fear of disturbance," a prospect that would be completely at odds with this Court's pronouncement that the "undifferentiated fear or apprehension of disturbance is not enough [even in the public school context] to overcome the right to freedom of expression."

D. Morse v. Frederick
551 U.S. 393 (2007)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

At a school-sanctioned and school-supervised event, a high school principal saw some of her students unfurl a large banner conveying a message she reasonably regarded as promoting illegal drug use. Consistent with established school policy prohibiting such messages at school events, the principal directed the students to take down the banner. One student refused to do so. The principal confiscated the banner and later suspended the student.

Our cases make clear that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Independent Community School Dist.* (1969). At the same time, we have held that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings," *Bethel School Dist. No. 403 v. Fraser* (1986), and that the rights of students "must be 'applied in light of the special characteristics of the school environment.' " *Hazelwood School Dist. v. Kuhlmeier* (1988). Consistent with these principles, we hold that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use. We conclude that the school officials in this case did not violate the First Amendment by confiscating the pro-drug banner and suspending the student responsible for it.

I

On January 24, 2002, the Olympic Torch Relay passed through Juneau, Alaska, on its way to

the winter games in Salt Lake City, Utah. The torchbearers were to proceed along a street in front of Juneau-Douglas High School (JDHS) while school was in session. Petitioner Deborah Morse, the school principal, decided to permit staff and students to participate in the Torch Relay as an approved social event or class trip. Students were allowed to leave class to observe the relay from either side of the street. Teachers and administrative officials monitored the students' actions.

Respondent Joseph Frederick, a JDHS senior, was late to school that day. When he arrived, he joined his friends across the street from the school to watch the event. As the torchbearers and camera crews passed by, Frederick and his friends unfurled a 14-foot banner bearing the phrase: "BONG HiTS 4 JESUS." The large banner was easily readable by the students on the other side of the street.

Principal Morse immediately crossed the street and demanded that the banner be taken down. Everyone but Frederick complied. Morse confiscated the banner and told Frederick to report to her office, where she suspended him for 10 days. Morse later explained that she told Frederick to take the banner down because she thought it encouraged illegal drug use, in violation of established school policy. Juneau School Board Policy No. 5520 states: "The Board specifically prohibits any assembly or public expression that … advocates the use of substances that are illegal to minors … ." In addition, Juneau School Board Policy No. 5850 subjects "[p]upils who participate in approved social events and class trips" to the same student conduct rules that apply during the regular school program.

Frederick administratively appealed his suspension, but the Juneau School District Superintendent upheld it. In a memorandum setting forth his reasons, the superintendent explained that Frederick "was not disciplined because the principal of the school 'disagreed' with his message, but because his speech appeared to advocate the use of illegal drugs."

The superintendent continued:

> The common-sense understanding of the phrase 'bong hits' is that it is a reference to a means of smoking marijuana. Given [Frederick's] inability or unwillingness to express any other credible meaning for the phrase, I can only agree with the principal and countless others who saw the banner as advocating the use of illegal drugs. [Frederick's] speech was not political. He was not advocating the legalization of marijuana or promoting a religious belief. He was displaying a fairly silly message promoting illegal drug usage in the midst of a school activity, for the benefit of television cameras covering the Torch Relay. [Frederick's] speech was potentially disruptive to the event and clearly disruptive of and inconsistent with the school's educational mission to educate students about the dangers of illegal drugs and to discourage their use.

The Juneau School District Board of Education upheld the suspension. Frederick then filed suit alleging that the school board and Morse had violated his First Amendment rights.

II

At the outset, we reject Frederick's argument that this is not a school speech case. The event occurred during normal school hours. It was sanctioned by Principal Morse "as an approved

social event or class trip," and the school district's rules expressly provide that pupils in "approved social events and class trips are subject to district rules for student conduct." Teachers and administrators were interspersed among the students and charged with supervising them. The high school band and cheerleaders performed. Frederick, standing among other JDHS students across the street from the school, directed his banner toward the school, making it plainly visible to most students. Under these circumstances, we agree with the superintendent that Frederick cannot "stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school." There is some uncertainty at the outer boundaries as to when courts should apply school-speech precedents, but not on these facts.

III

The message on Frederick's banner is cryptic. It is no doubt offensive to some, perhaps amusing to others. To still others, it probably means nothing at all. Frederick himself claimed "that the words were just nonsense meant to attract television cameras." But Principal Morse thought the banner would be interpreted by those viewing it as promoting illegal drug use, and that interpretation is plainly a reasonable one.

As Morse later explained, when she saw the sign, she thought that "the reference to a 'bong hit' would be widely understood as referring to smoking marijuana." She further believed that "display of the banner would be construed by students, District personnel, parents and others witnessing the banner, as advocating illegal drug use"—in violation of school policy.

We agree with Morse. At least two interpretations of the banner demonstrate that the sign advocated the use of illegal drugs. First, the phrase could be interpreted as an imperative: "[Take] bong hits"—a message equivalent to "smoke marijuana" or "use an illegal drug." Alternatively, the phrase could be viewed as celebrating drug use—"bong hits [are a good thing]," or "[we take] bong hits"—and we discern no meaningful distinction between celebrating illegal drug use in the midst of fellow students and outright advocacy or promotion. The pro-drug interpretation gains further plausibility given the paucity of alternative meanings the banner might bear. The best Frederick can come up with is that the banner is "meaningless and funny." Dismissing the banner as meaningless ignores its reference to illegal drugs.

IV

The question thus becomes whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use. We hold that she may.

In *Tinker*, this Court held that student expression may not be suppressed unless school officials reasonably conclude that it will "materially and substantially disrupt the work and discipline of the school." The essential facts of *Tinker* are quite stark, implicating concerns at the heart of the First Amendment. The students sought to engage in political speech. Political speech, of course, is "at the core of what the First Amendment is designed to protect." The only interest the Court discerned underlying the school's actions was the "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," or "an urgent wish to avoid the controversy which might result from the expression." That interest was not enough to justify

banning "a silent, passive expression of opinion, unaccompanied by any disorder or disturbance."

This Court's next student speech case was *Fraser*. The mode of analysis employed in *Fraser* is not entirely clear. The Court was plainly attuned to the content of Fraser's speech, citing the "marked distinction between the political 'message' of the armbands in *Tinker* and the sexual content of [Fraser's] speech." But the Court also reasoned that school boards have the authority to determine "what manner of speech in the classroom or in school assembly is inappropriate."

We need not resolve this debate to decide this case. For present purposes, it is enough to distill from *Fraser* two basic principles. First, Fraser's First Amendment rights were circumscribed "in light of the special characteristics of the school environment." Second, *Fraser* established that the mode of analysis in *Tinker* is not absolute. Whatever approach *Fraser* employed, it did not conduct the "substantial disruption" analysis prescribed by *Tinker*.

Our most recent student speech case, *Kuhlmeier*, concerned "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." *Kuhlmeier* does not control this case because no one would reasonably believe that Frederick's banner bore the school's imprimatur. The case is nevertheless instructive because it confirms that the rule of *Tinker* is not the only basis for restricting student speech.

Drawing on the principles applied in our student speech cases, we have held in the Fourth Amendment context that deterring drug use by schoolchildren is an "important—indeed, perhaps compelling" interest. Drug abuse can cause severe and permanent damage to the health and well-being of young people. Congress has declared that part of a school's job is educating students about the dangers of illegal drug use. Thousands of school boards throughout the country—including JDHS—have adopted policies aimed at effectuating this message. Those school boards know that peer pressure is perhaps "the single most important factor leading schoolchildren to take drugs," and that students are more likely to use drugs when the norms in school appear to tolerate such behavior. Student speech celebrating illegal drug use at a school event, in the presence of school administrators and teachers, thus poses a particular challenge for school officials working to protect those entrusted to their care from the dangers of drug abuse.

The "special characteristics of the school environment" and the governmental interest in stopping student drug abuse allow schools to restrict student expression that they reasonably regard as promoting illegal drug use. *Tinker* warned that schools may not prohibit student speech because of "undifferentiated fear or apprehension of disturbance" or "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." The danger here is far more serious and palpable. The particular concern to prevent student drug abuse at issue here, embodied in school policy, extends well beyond an abstract desire to avoid controversy.

Petitioners urge us to adopt the broader rule that Frederick's speech is proscribable because it is plainly "offensive" as that term is used in *Fraser*. We think this stretches *Fraser* too far; that case should not be read to encompass any speech that could fit under some definition of "offensive." After all, much political and religious speech might be perceived as offensive to some.

School principals have a difficult job, and a vitally important one. When Frederick suddenly

unfurled his banner, Morse had to decide to act—or not act—on the spot. It was reasonable for her to conclude that the banner promoted illegal drug use—in violation of established school policy—and that failing to act would send a powerful message to the students in her charge about how serious the school was about the dangers of illegal drug use. The First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers.

JUSTICE THOMAS, concurring.

The Court today decides that a public school may prohibit speech advocating illegal drug use. I agree and therefore join its opinion in full. I write separately to state my view that the standard set forth in *Tinker* is without basis in the Constitution.

In light of the history of American public education, it cannot seriously be suggested that the First Amendment "freedom of speech" encompasses a student's right to speak in public schools. Early public schools gave total control to teachers, who expected obedience and respect from students. And courts routinely deferred to schools' authority to make rules and to discipline students for violating those rules.

And because *Tinker* ignored the history of public education, courts (including this one) find it necessary to create ad hoc exceptions to its central premise. This doctrine of exceptions creates confusion without fixing the underlying problem by returning to first principles.

JUSTICE ALITO, with whom JUSTICE KENNEDY joins, concurring.

I join the opinion of the Court on the understanding that (a) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (b) it 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."

The opinion of the Court does not endorse the broad argument advanced by petitioners that the First Amendment permits public school officials to censor any student speech that interferes with a school's "educational mission." This argument can easily be manipulated in dangerous ways, and I would reject it before such abuse occurs. The "educational mission" of the public schools is defined by the elected and appointed public officials with authority over the schools and by the school administrators and faculty. As a result, some public schools have defined their educational missions as including the inculcation of whatever political and social views are held by the members of these groups.

During the *Tinker* era, a public school could have defined its educational mission to include solidarity with our soldiers and their families and thus could have attempted to outlaw the wearing of black armbands on the ground that they undermined this mission. Alternatively, a school could have defined its educational mission to include the promotion of world peace and could have sought to ban the wearing of buttons expressing support for the troops. The "educational mission" argument would give public school authorities a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed. The argument, therefore, strikes at the very heart of the First Amendment.

As we have recognized in the past, illegal drug use presents a grave and in many ways unique threat to the physical safety of students. I therefore conclude that the public schools may ban speech advocating illegal drug use. But I regard such regulation as standing at the far reaches of what the First Amendment permits. I join the opinion of the Court with the understanding that the opinion does not endorse any further extension.

JUSTICE BREYER, concurring in the judgment in part and dissenting in part.

To hold, as the Court does, that "schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use," based as it is on viewpoint restrictions, raises a host of serious concerns. One concern is that, while the holding is theoretically limited to speech promoting the use of illegal drugs, it could in fact authorize further viewpoint-based restrictions. Illegal drugs, after all, are not the only illegal substances. What about encouraging the underage consumption of alcohol? Moreover, it is unclear how far the Court's rule regarding drug advocacy extends. What about a conversation during the lunch period where one student suggests that glaucoma sufferers should smoke marijuana to relieve the pain? What about deprecating commentary about an antidrug film shown in school? And what about drug messages mixed with more expressly political, content? If, for example, Frederick's banner had read "LEGALIZE BONG HiTS," he might be thought to receive protection from the majority's rule, which goes to speech "encouraging *illegal* drug use." But speech advocating change in drug laws might also be perceived of as promoting the disregard of existing drug laws.

Legal principles must treat like instances alike. Those principles do not permit treating "drug use" separately without a satisfying explanation of why drug use is *sui generis*. To say that illegal drug use is harmful to students, while surely true, does not itself constitute a satisfying explanation because there are many such harms. During a real war, one less metaphorical than the war on drugs, the Court declined an opportunity to draw narrow subject-matter-based lines. Cf. *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624 (1943) (holding students cannot be compelled to recite the Pledge of Allegiance). We should decline this opportunity today.

JUSTICE STEVENS, with whom JUSTICE SOUTER and JUSTICE GINSBURG join, dissenting.

In my judgment, the First Amendment protects student speech if the message itself neither violates a permissible rule nor expressly advocates conduct that is illegal and harmful to students. This nonsense banner does neither, and the Court does serious violence to the First Amendment in upholding—indeed, lauding—a school's decision to punish Frederick for expressing a view with which it disagreed.

Two cardinal First Amendment principles animate both the Court's opinion in *Tinker* and Justice Harlan's dissent. First, censorship based on the content of speech, particularly censorship that depends on the viewpoint of the speaker, is subject to the most rigorous burden of justification. Second, punishing someone for advocating illegal conduct is constitutional only when the advocacy is likely to provoke the harm that the government seeks to avoid. See *Brandenburg v. Ohio,* 395 U.S. 444, 449 (1969) (distinguishing "mere advocacy" of illegal

conduct from "incitement to imminent lawless action").

However necessary it may be to modify those principles in the school setting, *Tinker* affirmed their continuing vitality. Yet today the Court fashions a test that trivializes the two cardinal principles upon which *Tinker* rests. The Court's test invites stark viewpoint discrimination. In this case, for example, the principal has unabashedly acknowledged that she disciplined Frederick because she disagreed with the pro-drug viewpoint she ascribed to the message on the banner.

It is also perfectly clear that "promoting illegal drug use" comes nowhere close to proscribable "incitement to imminent lawless action." Encouraging drug use might well increase the likelihood that a listener will try an illegal drug, but that hardly justifies censorship. No one seriously maintains that drug advocacy (much less Frederick's ridiculous sign) comes within the vanishingly small category of speech that can be prohibited because of its feared consequences.

The Court rejects outright these twin foundations of *Tinker* because, in its view, the unusual importance of protecting children from the scourge of drugs supports a ban on all speech in the school environment that promotes drug use. Carving out pro-drug speech for uniquely harsh treatment is inimical to the values protected by the First Amendment.

I will nevertheless assume for the sake of argument that the school's concededly powerful interest in protecting its students adequately supports its restriction on "any assembly or public expression that . . . advocates the use of substances that are illegal to minors . . . ." Given that the relationship between schools and students "is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults," it might well be appropriate to tolerate some targeted viewpoint discrimination in this unique setting. And while conventional speech may be restricted only when likely to "incite imminent lawless action," it is possible that our rigid imminence requirement ought to be relaxed at schools.

But it is one thing to restrict speech that *advocates* drug use. It is another thing entirely to prohibit an obscure message with a drug theme that a third party subjectively—and not very reasonably—thinks is tantamount to express advocacy. Therefore, just as we insisted in *Tinker* that the school establish some likely connection between the armbands and their feared consequences, so too JDHS must show that Frederick's supposed advocacy stands a meaningful chance of making otherwise-abstemious students try marijuana.

But instead of demanding that the school make such a showing, the Court punts. Figuring out just *how* it punts is tricky. On occasion, the Court suggests it is deferring to the principal's "reasonable" judgment that Frederick's sign qualified as drug advocacy. At other times, the Court seems to say that *it* thinks the banner's message constitutes express advocacy. Either way, its approach is indefensible.

To the extent the Court defers to the principal's ostensibly reasonable judgment, it abdicates its constitutional responsibility. The beliefs of third parties have never dictated which messages amount to proscribable advocacy. To the extent the Court independently finds that "BONG HiTS 4 JESUS" *objectively* amounts to the advocacy of illegal drug use—that it can *most* reasonably be interpreted as such—that conclusion practically refutes itself. This is a nonsense message, not

advocacy. Frederick's credible and uncontradicted explanation for the message—he just wanted to get on television—is also relevant because a speaker who does not intend to persuade his audience can hardly be said to be advocating anything. But most importantly, it takes real imagination to read a "cryptic" message with a slanting drug reference as an incitement to drug use. The notion that the message on this banner would actually persuade either the average student or even the dumbest one to change his or her behavior is most implausible. That the Court believes such a silly message can be proscribed as advocacy underscores the novelty of its position, and suggests that the principle it articulates has no stopping point.

Even if advocacy could somehow be wedged into Frederick's obtuse reference to marijuana, that advocacy was at best subtle and ambiguous. There is abundant precedent for the proposition that when the "First Amendment is implicated, the tie goes to the speaker," and "we give the benefit of the doubt to speech, not censorship." If this were a close case, the tie would have to go to Frederick's speech, not to the principal's strained reading of his quixotic message.

Among other things, the Court's ham-handed, categorical approach is deaf to the constitutional imperative to permit unfettered debate, even among high-school students, about the wisdom of the war on drugs or of legalizing marijuana for medicinal use. Consider, too, that the school district's rule draws no distinction between alcohol and marijuana, but applies evenhandedly to all "substances that are illegal to minors." Given the tragic consequences of teenage alcohol consumption—drinking causes far more fatal accidents than the misuse of marijuana—the school district's interest in deterring teenage alcohol use is at least comparable to its interest in preventing marijuana use. Under the Court's reasoning, must the First Amendment give way whenever a school seeks to punish a student for any speech mentioning beer, or indeed anything else that might be deemed risky to teenagers? While I find it hard to believe the Court would support punishing Frederick for flying a "WINE SiPS 4 JESUS" banner—which could quite reasonably be construed either as a protected religious message or as a pro-alcohol message—the breathtaking sweep of its opinion suggests it would.

Although this case began with a silly, nonsensical banner, it ends with the Court inventing out of whole cloth a special First Amendment rule permitting the censorship of any student speech that mentions drugs, at least so long as someone could perceive that speech to contain a latent pro-drug message. Even in high school, a rule that permits only one point of view to be expressed is less likely to produce correct answers than the open discussion of countervailing views. In the national debate about a serious issue, it is the expression of the minority's viewpoint that most demands the protection of the First Amendment. Whatever the better policy may be, a full and frank discussion of the costs and benefits of the attempt to prohibit the use of marijuana is far wiser than suppression of speech because it is unpopular.