# RECENT CASES

FIRST AMENDMENT — STUDENT SPEECH — SECOND CIRCUIT HOLDS THAT QUALIFIED IMMUNITY SHIELDS SCHOOL OFFICIALS WHO DISCIPLINE STUDENTS FOR THEIR ONLINE SPEECH. — *Doninger v. Niehoff*, 642 F.3d 334 (2d Cir. 2011), *cert. denied*, No. 11-113, 2011 WL 3204853 (U.S. Oct. 31, 2011).

The freedom of speech guaranteed by the First Amendment has a more limited reach in public schools than in other contexts.[1] In *Tinker v. Des Moines Independent Community School District*,[2] the Supreme Court established a test to determine when student speech may be restricted without violating the First Amendment.[3] However, the Supreme Court has never addressed how to apply *Tinker* to online student speech.[4] At the same time, in *Pearson v. Callahan*,[5] the Supreme Court gave lower courts a way to avoid deciding constitutional issues in qualified immunity cases, by allowing them discretion over which prong of the qualified immunity analysis to address first — (1) whether there was a constitutional violation or (2) whether the constitutional right at issue was clearly established at the time of the alleged violation.[6] Recently, in *Doninger v. Niehoff*,[7] the Second Circuit held that qualified immunity shielded school officials who disciplined a student for her online speech because there was no clearly established constitutional right to engage in the expressive activity of posting a blog.[8] The Second Circuit's failure to address the underlying First Amendment issues adds to the confusion in an emerging area of law that could benefit from clarification, illustrating the difficulties posed by constitutional avoidance under *Pearson*.

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[1] *See, e.g.*, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986) ("[T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." (citing New Jersey v. T.L.O., 469 U.S. 325, 340–42 (1985))).

[2] 393 U.S. 503 (1969).

[3] *Id.* at 509–11. *Tinker* established that student expression may be restricted only to avoid "material and substantial interference with schoolwork or discipline." *Id.* at 511. The Supreme Court has since carved out three types of student speech that may be restricted without resorting to the *Tinker* test. *See* Morse v. Frederick, 127 S. Ct. 2618, 2629 (2007) (advocacy of illegal drug use); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (school-sponsored speech); *Fraser*, 478 U.S. at 685 (lewd and indecent speech).

[4] The Court declined to venture into the implications of its precedents for online speech in *Morse v. Frederick*, 127 S. Ct. 2618 (2007), the only student speech case it has decided in the internet age. *See* Brannon P. Denning & Molly C. Taylor, Morse v. Frederick *and the Regulation of Student Cyberspeech*, 35 HASTINGS CONST. L.Q. 835, 866, 895 (2008).

[5] 129 S. Ct. 808 (2009).

[6] *See id.* at 815–16, 818.

[7] 642 F.3d 334 (2d Cir. 2011), *cert. denied*, No. 11-113, 2011 WL 3204853 (U.S. Oct. 31, 2011).

[8] *Id.* at 338.

In April 2007, Avery Doninger served as the junior class secretary and as a member of the Student Council at Lewis S. Mills High School (LSM), a public high school in Burlington, Connecticut.[9] School administrators determined that a Student Council–organized concert called "Jamfest" could not take place as scheduled.[10] Upset about the schedule change, Student Council members, including Doninger, sent a mass email from a school computer encouraging community members to complain to Principal Karissa Niehoff and to school district Superintendent Paula Schwartz.[11] Doninger later posted — from her home — on her publicly accessible blog, writing that "jamfest is cancelled due to douchebags in central office,"[12] and including a letter her mother sent to school officials so readers could "get an idea of what to write if you want to write something or call her to piss her off more."[13] Niehoff and Schwartz testified that the controversy forced them both to miss or be late to several school-related activities.[14]

About two weeks later, Niehoff discovered the blog post, but she did not confront Doninger about her discovery for over a week.[15] Niehoff then forbade Doninger from running for senior class secretary because the blog post "failed to demonstrate good citizenship" and "violated the principles governing student officers set out in the student handbook that Doninger had signed."[16] Nevertheless, on student election day, several students, including Doninger, intended to wear "Team Avery" T-shirts into the school assembly where the candidates for student office would give their speeches.[17] Niehoff stood outside the auditorium and told several students to remove "Team Avery" T-shirts before entering the assembly.[18] Doninger garnered a plurality of the votes as part of a write-in campaign, despite having been disqualified from running and consequently from giving a speech at the assembly.[19] In the end, Niehoff awarded the senior class secretary position to the student who placed second.[20]

Subsequently, Doninger's mother brought an action on behalf of Doninger against Niehoff and Schwartz under 42 U.S.C. § 1983, alleg-

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[9] *Id.* at 339.

[10] *Id.*

[11] *Id.* at 338–40.

[12] *Id.* at 340.

[13] *Id.* at 341.

[14] *Id.*

[15] *Id.* at 342.

[16] *Id.*

[17] *Id.* at 343. The T-shirts said "Team Avery" on the front and "Support LSM Freedom of Speech" on the back. *Id.*

[18] *Id.* Doninger herself ended up not wearing her "Team Avery" T-shirt, instead wearing an "RIP Democracy" T-shirt, without objection from Niehoff. *Id.*

[19] *Id.*

[20] *Id.*

ing, inter alia, violations of Doninger's First Amendment rights.[21] Regarding Doninger's first claim, that disqualifying her from running for student office because of her blog post violated her free speech rights, District Judge Kravitz granted the defendants summary judgment on qualified immunity grounds.[22] Judge Kravitz noted that qualified immunity is warranted unless both (1) a violation of the constitutional right occurred and (2) the constitutional right was clearly established.[23] First, Judge Kravitz held that *Bethel School District No. 403 v. Fraser*,[24] in which the Supreme Court held that schools could restrict lewd and indecent speech even if the *Tinker* test was not satisfied,[25] applied to off-campus speech and that the school could thus discipline Doninger for her offensive blog post.[26] Second, Judge Kravitz concluded that a "right not to be prohibited from participating in a voluntary, extracurricular activity because of offensive off-campus speech when it was reasonably foreseeable that the speech would come on to campus" was not clearly established.[27] He reasoned that it was unclear whether participation in extracurricular activities had ever been considered a constitutional right.[28] Regarding Doninger's second claim, that her First Amendment rights were violated because she was not allowed to wear a "Team Avery" T-shirt, Judge Kravitz denied summary judgment to both parties.[29] He did so because there were still disputed issues of material fact[30] and because the right to wear the T-shirt *was* clearly established by *Tinker* itself, which allowed the silent wearing of armbands in protest of the Vietnam War.[31]

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[21] *Id.* at 338, 343–44. The action also included a claim for violations of Doninger's equal protection rights and claims under the Connecticut Constitution. *Id.* at 357. Doninger first unsuccessfully pursued a preliminary injunction requiring the school to take several actions, including holding a new election. Doninger *ex rel.* Doninger v. Niehoff, 514 F. Supp. 2d 199, 202 (D. Conn. 2007). Doninger then appealed the preliminary injunction denial. Doninger *ex rel.* Doninger v. Niehoff, 527 F.3d 41, 43 (2d Cir. 2008). Judge Livingston, joined by then-Judge Sotomayor and Judge Preska, sitting by designation, affirmed the district court's finding that Doninger had "failed to demonstrate a sufficient likelihood of success on her First Amendment claim." *Id.* at 53.

[22] Doninger v. Niehoff, 594 F. Supp. 2d 211, 221 (D. Conn. 2009).

[23] *See id.* at 220. Judge Kravitz addressed the two prongs of the qualified immunity test sequentially, as then required by *Saucier v. Katz*, 533 U.S. 194, 201 (2001), *overruled by* Pearson v. Callahan, 129 S. Ct. 808 (2009).

[24] 478 U.S. 675 (1986).

[25] *Id.* at 685.

[26] *Doninger*, 594 F. Supp. 2d at 221.

[27] *Id.* at 222.

[28] *Id.*

[29] *Id.* at 226–27.

[30] Disputed issues included whether Doninger's speech had been chilled. *Id.* at 226.

[31] *Id.* at 226–27.

The Second Circuit affirmed in part and reversed in part.[32] Writing for a unanimous panel, Judge Livingston[33] held that Doninger's asserted constitutional rights were not clearly established and that qualified immunity was thus warranted regarding all claims.[34] However, she applied only the second qualified immunity prong, declining to decide whether a First Amendment violation had in fact occurred.[35]

Regarding the blog post issue, Judge Livingston affirmed the district court's decision.[36] She first rejected Doninger's claim that *Thomas v. Board of Education*,[37] which held that students could not be disciplined for their off-campus distribution of a satirical publication,[38] meant that schools could never discipline off-campus speech.[39] She then justified her decision to affirm the lower court on two alternative grounds: First, she stated that the right to engage in off-campus lewd and indecent speech was not clearly established because it was uncertain whether *Fraser* applied to off-campus speech.[40] Alternatively, she relied on *Wisniewski v. Board of Education*,[41] which held that a school could discipline a student for transmitting via online instant messaging a picture labeled "Kill Mr. VanderMolen" and depicting a teacher being shot.[42] Judge Livingston read *Wisniewski* as having established that off-campus speech could be disciplined in accordance with *Tinker*.[43] She then found that the defendants were "objectively reasonable"[44] in concluding that the blog post "might reasonably portend disruption."[45] She emphasized that it was reasonably foreseeable that the speech would end up on campus because it pertained to school events and encouraged people to contact school administrators.[46] Finally, regarding the T-shirt issue, Judge Livingston reversed the district court's decision,[47] holding that the confusing state of the law and the resulting "hazy border" between material and substantial disruption and lesser

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[32] *Doninger*, 642 F.3d at 358.

[33] Judges Kearse and Cabranes joined Judge Livingston's opinion.

[34] *See Doninger*, 642 F.3d at 338.

[35] *Id.* at 346, 353.

[36] *Id.* at 338.

[37] 607 F.2d 1043 (2d Cir. 1979).

[38] *Id.* at 1045.

[39] *Doninger*, 642 F.3d at 346–47.

[40] *Id.* at 348. Notably, the Second Circuit had also declined to decide whether *Fraser* in fact applies to off-campus speech in its previous encounter with this case. *See* Doninger *ex rel.* Doninger v. Niehoff, 527 F.3d 41, 49–50 (2d Cir. 2008).

[41] 494 F.3d 34 (2d Cir. 2007).

[42] *Id.* at 36, 38–39.

[43] *Doninger*, 642 F.3d at 347.

[44] *Id.* at 350.

[45] *Id.* (quoting *Doninger*, 527 F.3d at 51) (internal quotation mark omitted).

[46] *Id.*

[47] *Id.* at 355. Judge Livingston affirmed the district court's grant of summary judgment to the defendant on the equal protection and state constitutional issues. *Id.* at 357.

degrees of disruption meant that there was no clearly established right here either.[48]

In light of the lack of precedential guidance in the emerging area of online student speech,[49] the Second Circuit should have reached the constitutional issues to help guide lower courts. However, as allowed under *Pearson*, the court addressed only the second prong of the qualified immunity analysis and extensively discussed — but did not decide — the First Amendment issues to find that the rights asserted by Doninger were not clearly established. Such an approach would have been impermissible before *Pearson*, as *Saucier v. Katz*[50] previously required courts to address the first prong before the second — and thus to decide the constitutional issues.[51] By focusing only on the second prong, the court created further confusion in student speech doctrine.

As the Second Circuit noted, student speech doctrine is confusing.[52] This is even truer about *online* student speech doctrine, which emerged only with teenagers' widespread use of the internet.[53] To decide the qualified immunity question of whether the constitutional right with respect to the blog post was clearly established, the court needed only to note that no Supreme Court or Second Circuit cases were close to being on point.[54] Therefore, the law was not clearly es-

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[48] *Id.* at 355 (quoting Saucier v. Katz, 533 U.S. 194, 206 (2001), *overruled by* Pearson v. Callahan, 129 S. Ct. 808 (2009)) (internal quotation marks omitted).

[49] *See* Denning & Taylor, *supra* note 4, at 837 (criticizing the Supreme Court for its "self-conscious[ly] minimalis[t]" approach in *Morse* that "raises more questions than it answers, especially for student cyberspeech"). Further, significant ambiguity regarding what constitutes "material and substantial" disruption made the court's task more difficult. In fact, the Supreme Court has not focused on the "material and substantial" qualification since *Tinker*, where it "gave short shrift to elaborating on what will constitute a material disruption [and] what will suffice as substantial disorder." Abby Marie Mollen, Comment, *In Defense of the "Hazardous Freedom" of Controversial Student Speech*, 102 NW. U. L. REV. 1501, 1507 n.37 (2008). This lack of guidance has led to numerous factual disputes in student speech cases, including between Justices. *Compare* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969) ("There is no indication that the work of the schools or any class was disrupted."), *with id.* at 518 (Black, J., dissenting) ("[T]he armbands . . . took the students' minds off their classwork . . . .").

[50] 533 U.S. 194.

[51] *Id.* at 201.

[52] *Doninger*, 642 F.3d at 353.

[53] *See* AMANDA LENHART ET AL., PEW INTERNET & AM. LIFE PROJECT, TEENS AND SOCIAL MEDIA 2 (2007), *available at* http://www.pewinternet.org/~/media//Files/Reports/2007/PIP_Teens_Social_Media_Final.pdf.pdf (noting the increase in online "content creat[ing]" teenagers, from fifty percent of all teenagers in 2004 to fifty-nine percent in 2007). The earliest online student speech decisions date back to the late 1990s. *See* Wisniewski v. Bd. of Educ., 494 F.3d 34 (2d Cir. 2007) (first federal appellate decision); Beussink *ex rel.* Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175 (E.D. Mo. 1998) (first published decision); J.S. *ex rel.* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847 (Pa. 2002) (first state supreme court decision); J.S. *ex rel.* H.S. v. Bethlehem Area Sch. Dist., 757 A.2d 412 (Pa. Commw. Ct. 2000) (first state appellate decision).

[54] Indeed, the Second Circuit's own student speech precedents cited in *Doninger* involved significantly different facts from those in *Doninger*. *See* DeFabio v. E. Hampton Union Free Sch. Dist., 623 F.3d 71, 74 (2d Cir. 2010) (holding that school could keep student out of school for utter-

tablished.[55] Under the second prong of the *Pearson* qualified immunity analysis, that reasoning would have been sufficient. The court's opinion regarding the blog post thus need not have been more than a few lines long.

However, the Second Circuit waded into a detailed discussion of First Amendment doctrine that will only confuse courts in the future. First, the Second Circuit suggested that *Fraser* might apply off campus.[56] The court thus created unnecessary tension with the Supreme Court's statement that "[h]ad Fraser delivered the same [offensively lewd and indecent] speech in a public forum outside the school context, he would have been protected."[57] Further, courts dealing with online student speech cases and following the reasoning of *Doninger* are now faced with the difficult task of determining when it is reasonably foreseeable that online student speech will end up on campus.[58] Both the tension with the Supreme Court and the "reasonable foreseeability" analysis add doctrinal layers of complexity that future courts will have to resolve, thus making student speech doctrine less clear than before *Doninger*. Instead of engaging in this unnecessary doctrinal muddling, the court could have relied solely on *Tinker*'s off-campus applicability, as established by *Wisniewski*, and on the lack of clear and controlling precedent on online student speech falling short of violent expression like that involved in *Wisniewski*.[59]

Second, the Second Circuit suggested that student speech that was "potentially disruptive of efforts to resolve [an] ongoing controversy"[60] or of "student government functions"[61] might qualify as materially and substantially disruptive under *Tinker*. This suggestion is unnecessary because Second Circuit and Supreme Court precedent has left a very

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ing a racial slur that put him at risk of being assaulted); *Wisniewski*, 494 F.3d at 38–39; Guiles *ex rel.* Guiles v. Marineau, 461 F.3d 320, 330–31 (2d Cir. 2006) (holding that school censorship of a student's anti–George W. Bush T-shirt did not satisfy the *Tinker* test); Thomas v. Bd. of Educ., 607 F.2d 1043, 1050–52 (2d Cir. 1979).

[55] And it was thus "objectively reasonable for Niehoff and Schwartz to believe they could" punish Doninger for her speech. *Doninger*, 642 F.3d at 351.

[56] *Id.* at 348 (noting that "the applicability of *Fraser* to plainly offensive off-campus student speech is uncertain").

[57] Morse v. Frederick, 127 S. Ct. 2618, 2621 (2007).

[58] *See Doninger*, 642 F.3d at 350 (citing Doninger v. Niehoff, 594 F. Supp. 2d 211, 222 (D. Conn. 2009)). Note that in the context of *Wisniewski*'s holding that *Tinker* may apply to off-campus speech — which the Second Circuit also relied on in *Doninger*, 642 F.3d at 347 — such "reasonable foreseeability" would have been found with ease. For *Tinker* to apply, the speech must cause or threaten to cause substantial and material disruption at school. *See, e.g.*, *Doninger*, 642 F.3d at 354. If speech has or might have such a disruptive effect at school, it is almost certainly reasonable for a court to find that such speech would foreseeably reach school.

[59] *See Wisniewski*, 494 F.3d at 36, 38–39.

[60] *Doninger*, 642 F.3d at 348 (quoting Doninger *ex rel.* Doninger v. Niehoff, 527 F.3d 41, 50–51 (2d Cir. 2008)) (internal quotation marks omitted).

[61] *Id.* at 351.

significant gray area between speech that is clearly materially and substantially disruptive — such as threatening violence[62] — and speech that is clearly not — such as silently wearing protest armbands[63] or political T-shirts.[64] Instead of discussing the specific disruption in this case, the court should simply have noted that the speech at issue did not amount to threats of violence, but constituted more than silent protest, thereby falling in the gray area where students' free speech rights are not clearly established. By doing more, the court in effect suggested that student speech is not protected when it causes or perpetuates a controversy at school or when it disrupts student government.

To clarify student speech doctrine, it would have been advisable for the Second Circuit to engage fully with the constitutional issues under the *first* prong of *Pearson*. The court could then have considered whether the civic republican values underlying the First Amendment would be served by the court's doctrinal suggestions.[65] Civic republicanism emphasizes free and open deliberation and political participation as a way of achieving our fullest potential.[66] These values form the core of our political system, and the state must ensure that they are passed on to the next generation.[67] Public schools thus fulfill a key role: teaching the value of deliberation and participation in political life. However, teaching values cannot be accomplished in the abstract: students need concrete examples from which to learn.[68] The example set by Niehoff is that controversy is to be avoided at all costs; however, political debate and controversy often go hand in hand.[69] Because the blog post urged people to take action by contacting school authorities,

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[62] *See Wisniewski*, 494 F.3d at 36.

[63] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 510 (1969).

[64] *See* Guiles *ex rel.* Guiles v. Marineau, 461 F.3d 320, 330–31 (2d Cir. 2006).

[65] Justice Brandeis established civic republican values as one of the major justifications for the First Amendment in his concurrence in *Whitney v. California*, 274 U.S. 357 (1927). *See id.* at 374–78 (Brandeis, J., concurring). Commentators have called this concurrence one of the most important defenses of the First Amendment. *See, e.g.*, HAIG BOSMAJIAN, ANITA WHITNEY, LOUIS BRANDEIS, AND THE FIRST AMENDMENT 125 (2010) ("[T]he Brandeis opinion has been praised over the years as 'classic,' 'masterful,' 'remarkable,' and 'eloquent.'").

[66] *See, e.g.*, Frank I. Michelman, *The Supreme Court, 1985 Term — Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 19 (1986) ("Republicanism favors a highly participatory form of politics, involving citizens directly in dialogue and discussion, partly for the sake of nourishing civic virtue. Thus republican politics consists of self-rule.").

[67] *Cf.* Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781 (1987) (arguing that the state has an active role to play in furthering free speech values).

[68] *See* Wiel Veugelers, *Different Ways of Teaching Values*, 52 EDUC. REV. 37, 40 (2000) ("Teachers stimulate . . . values via subject matter, chosen examples and reactions to their students. A teacher tries to influence this process of signification of meaning by providing a content and, in particular, by his/her interaction with the students. . . . [T]eachers cannot directly transfer values to their students . . . .").

[69] *Cf.* RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE? 21–22 (2006) (discussing how American political debates are controversial even though both sides reason from the same basic principles).

it was of a political nature.[70] Even with rude and potentially misleading content, the blog post was still political speech, which lies at the core of the First Amendment,[71] and was thus deserving of strong protection.[72] And because student government is likely students' first exposure to politics, allowing the banning of the "Team Avery" T-shirts further compromised civic republican values.[73] Advocating for a candidate may be the most important expressive conduct in which a person can engage.[74] For the next generation to be politically engaged, schools must ensure that they pass on the civic republican values underlying the First Amendment. These concerns are heightened when off-campus speech is involved because such speech is subject to school authority only if it has some connection to school.[75] The Second Circuit's decision to limit itself to the second prong of *Pearson* was thus ill advised: by doing so, it failed to take into account important civic republican values.

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[70] *Cf.* Stacey D. Schesser, Comment, *A New Domain for Public Speech: Opening Public Spaces Online*, 94 CALIF. L. REV. 1791, 1797 (2006) ("In the Internet context, mass emails have become the modern-day version of leafleting . . . .").

[71] *See* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 232 (1993). The rude and even offensive nature of core political speech is irrelevant because "[t]he mere fact that an expressive act produces anger or resentment cannot be a sufficient reason for regulation." *Id.* at 247. The speech's misleading nature is also irrelevant because "[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'" N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279 n.19 (1964) (quoting JOHN STUART MILL, ON LIBERTY 15 (B. Blackwell 1946) (1859)).

[72] In *Morse*, the dissent emphasized the importance of political speech, and the majority countered that no political speech was involved but did not take issue with the dissent's premise, perhaps implying that the Court might have found in favor of student speech had political speech — for example, advocacy of drug decriminalization — been involved. *See* Morse v. Frederick, 127 S. Ct. 2618, 2625 (2007).

[73] *See* Lauren Feldman et al., *Identifying Best Practices in Civic Education: Lessons from the Student Voices Program*, 114 AM. J. EDUC. 75, 78 (2007) (summarizing a recent report that identified "student participation in school governance" and the "simulation of procedures and the democratic process" as promising approaches for facilitating students' future political involvement).

[74] The great importance of campaign speech arises because "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." Buckley v. Valeo, 424 U.S. 1, 14 (1976) (per curiam).

[75] In light of this heightened concern about restricting off-campus speech resulting from civic republicanism, the Second Circuit could have considered being more protective of student speech. Because the Second Circuit had never before found speech falling short of threats of violence to constitute "material and substantial" disruption, it may be that only speech that might reasonably prompt a school-goer to forgo attending school qualifies as materially and substantially disruptive. Such a permissive standard would address the most troubling forms of online student speech (falling short of threats of violence), such as cyberbullying. *See* Denning & Taylor, *supra* note 4, at 866–67 & n.167. At the same time, this standard would be broad enough to cover presumptively categorical exceptions under *Fraser* and *Morse*. For example, reasonable parents might worry so much about their child's exposure to lewd and indecent language in school — as in *Fraser* — or to advocacy of illegal drug use — as in *Morse* — that they are prompted to take their child out of school.