NOTE

THE NEW SCYLLA AND CHARYBDIS: STUDENT SPEECH VS. STUDENT SAFETY AFTER COLUMBINE*

I. INTRODUCTION

Since February 1996, American students have killed 39 of their fellow classmates and school faculty members, while wounding another 93.[1] The names of the crime scenes – Moses Lake, Wash.; Bethel, Alaska; Pearl, Miss.; West Paducah, Ky.; Stamps, Ark.; Jonesboro, Ark.; Edinboro, Pa.; Fayetteville, Tenn.; Springfield, Or.; Littleton, Colo.; Conyers, Ga.; Deming, N.M.; Fort Gibson, Okla.; Mount Morris Township, Mich.; Lake Worth, Fla.; Santee, Cal.; El Cajon, Cal. – offer no simple or ready explanation. The survivors look for a reason. The rest of the country looks for a common thread, a way to recognize the danger in advance.[2] As one New Hampshire resident said after a bomb threat at his town's public school, "Had this been a bomb, Nottingham would no longer be the name of a town. It would be the name of an incident."[3]

Across the nation, state lawmakers and state educators – already wrestling with student test scores and aging school buildings – now face a much more basic task: keeping their students safe from student violence. In addition to metal detectors, violence-prevention hotlines and school-based police drills,[4] school districts have also begun implementing regulations limiting or prohibiting student behavior. Dress codes and speech codes have gained renewed popularity.[5] Some lawmakers

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* The author extends his thanks to Boston University School of Law Professor Tracey Maclin.

[1] *See School Shootings List*, AP, Sept. 24, 1999, *available at* Westlaw, ALLNEWSPLUS database; *Children Arrive for Classes for First Time Since Michigan's Fatal Shooting*, AP, Mar. 8, 2000 *available at* http://www.cnn.com/200/US/03/06/school.ap/; *Recent Shootings at U.S. Schools*, AP, May 16, 2001, *available at* Westlaw, ALLNEWSPLUS database.

[2] *See Psychologist Details a Troubling Similarity in Recent School Shootings*, BUSINESS WIRE, Sept. 24, 1999, *available at* Westlaw, ALLNEWSPLUS database.

[3] Marcella Bombardieri, *N.H. Principal Assailed for Response to Bomb Note*, THE BOSTON GLOBE, Apr. 8, 2000, at B1.

[4] *See* Michael Booth, *Methods Differ, Aim Same: Making U.S. Kids Safe*, DENVER POST, Aug. 15, 1999.

[5] *See* Mark C. Goulet, *Big Teacher Is Watching: Columbine and Other School Tragedies Lead to Fewer Students' Rights*, 15 TEX. LAW. 22 (1999).

have even used the school shootings to argue for allowing religious symbols and activities back into the public schools.[6]

The state of Louisiana has gone even further. State lawmakers – who had seen five of the school shootings occur in states within a six-hour drive of Louisiana's borders – passed the 1999 "respect bill." The law requires elementary students from kindergarten through Grade 5 to address any school employee as "sir" or "ma'am."[7] While other states sought to limit what their students said, Louisiana decided to mandate that its students speak certain words.

Part I of this Note examines some of the more common state restrictions on student dress and student speech in light of current First Amendment case law. Part II examines the Louisiana "respect" law from the standpoint of First Amendment case law regarding compelled speech. This Note concludes that, while public schools are given some discretion to limit student First Amendment rights, those same schools have no discretion to compel students to mouth ideas which they do not believe in.

II. THE FIRST AMENDMENT AND THE RIGHT TO FREE SPEECH

A. How Do You Bullet-Proof a Child?

Educators and lawmakers across the United States face the same dilemma: freedom versus safety, the Scylla versus the Charybdis.[8] Steer towards safety – metal detectors, armed police and behavior codes – and students' freedoms become freedoms in name only. Steer towards freedom and worry that you have left your students vulnerable to a Columbine-style attack. "Reading, writing and arithmetic" must now make room for phrases like "threat assessment approach"[9] and "school-wide lock down."[10] As if worrying about student safety was not enough, educators and lawmakers also must worry about legal liability. One estimate suggests the Jefferson County School Board – which overseas Columbine High School – may have to pay $50 million for building repair, counseling, lawsuits and future requirements as a result of the April 1999 attack.[11]

Not surprisingly, the states have responded to Columbine by steering towards safety, typically in the forms of more money and more regulations. In Pennsylvania, the state House of Representatives unanimously approved $80

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[6] *See* Joan Delfattore, *Columbine Tragedy Heats Up Debate on Putting God Back in Public Schools,* 2 DEL. L. WKLY. 27 (1999).

[7] LA. REV. STAT. ANN. § 17:416.12(B) (West 1999).

[8] The Scylla and the Charybdis are monsters in Greek mythology which lived on opposite sides of a river bank and destroyed ships which did not sail exactly between them. *See* HOMER, THE ODYSSEY (E.V. Rieu trans., Penguin Classics 1946).

[9] *See School Shootings List, supra* note 1.

[10] *See* Booth, *supra* note 4.

[11] *See* Gregory Potts, *Insights on a Vital Concern,* THE JOURNAL RECORD, May 26, 1999.

million for safety measures ranging from metal detectors to staff training.[12] In Washington, Gov. Gary Locke urged the State Legislature to approve $9 million for similar measures.[13] Schools in the Metro Detroit area opened the 1999-2000 school year with new security cameras, intruder safety drills and, for the first time, armed policemen patrolling some campuses.[14] "Things aren't the way they used to be," Supt. William Kimball of Port Huron said. "It's a new day, and we have to be ready for anything."[15] Detroit's actions came on the heels of an incident in May 1999 when teachers uncovered an alleged plot by four students to copycat the Columbine massacre in one of Detroit's middle schools.[16]

School districts nationwide have also placed greater restrictions on student behavior, in the form of dress codes and prosecution of violent speech. Before Columbine, lawmakers and educators had supported dress codes as a way of discouraging gang activity.[17] After the Columbine massacre, initial news reports indicated that the murderers—Eric Harris and Dylan Klebold—favored long black coats because they belonged to the so-called "Trench Coat Mafia." Even though subsequent reports indicated the killers' attire had little to do with any gang affiliation,[18] several school districts including districts in Colorado,[19] Georgia,[20] New Mexico,[21] and Tennessee[22] specifically banned or are considering banning the coats. Some districts are using the trench coat issue as a vehicle to carry other dress code revisions such as Tennessee's ban on baggy or sagging pants[23] as well as New Mexico's prohibition against the "Gothic" style which emphasizes black clothing.[24]

In the aftermath of Columbine, some school districts have moved decisively against students who have either talked about violence or even talked about Columbine. In California, the Elk Grove Unified School District adopted a "zero

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[12] *See* Michael Race, *School Violence Bills Top Pa. Agenda; Colo. Shootings Spur Efforts by Lawmakers,* ALLENTOWN MORNING CALL, Apr. 22, 1999.

[13] *See Virus of Violence Needs Our Attention,* THE SPOKESMAN REVIEW, May 17, 1999.

[14] *See* George Hunter and Janet Naylor, *School's in, So Is Security,* THE DETROIT NEWS, Aug. 23, 1999.

[15] *Id.*

[16] *See id.*

[17] *See* Goulet, *supra* note 5.

[18] *See* Booth, *supra* note 4.

[19] *See* Evan Dreyer & Peggy Lowe, *Columbine: Cheers and Echoes Football's Triumphs Evoke Darker Issues,* THE DENVER POST, Dec. 3, 1999.

[20] *See* Ralph Ellis, *School Trench Coat Ban Pushed,* THE ATLANTA JOURNAL AND CONSTITUTION, July 17, 1999.

[21] *See* Andrea Schoellkopf, *Teen Chafes at School's Coat Ban,* ALBUQUERQUE JOURNAL, Oct. 21, 1999.

[22] *See* David Klem, *Learning the Code; Parents, Students Divided over Rules for Dress,* THE KNOXVILLE NEWS-SENTINEL, July 20, 1999.

[23] *See id.*

[24] *See* Booth, *supra* note 4.

tolerance" policy towards teasing, taunting or bullying for any reason.[25] In Pennsylvania, a state Court of Appeals upheld the conviction of a 13-year-old for making terroristic threats, a first-degree misdemeanor.[26] In the presence of a teacher, the boy talked to a friend about bringing a gun to school on the last day of classes and shooting teachers.[27] In another case, the Associated Press reported an unidentified school district suspended a 14-year-old girl for remarks she made about Columbine.[28] Allegedly, the school district suspended the young woman because she said she could understand how endless teasing could cause a student to snap.

Apparently, lawmakers and school districts are reacting to one fact which still haunts the Columbine survivors: the killers reportedly put menacing statements and bomb diagrams on a Web site for anyone to see.[29] A Pacific University study of nine of the more recent school shooters (not including the six-year-old in Mount Morris Township in Michigan) found that the shooters' clearly communicated their violent intentions to others but no one took those communications seriously.[30] As the Pennsylvania Court of Appeals wrote in the case of the 13-year-old convicted of making terroristic threats, the recent school shootings have demonstrated that "a threat by a student to bring a gun to school can in no way be treated as [a] joking statement which can be casually disregarded."[31]

B. The Right to Free Speech in Society – Adults vs. Students.

The First Amendment reads in part, "Congress shall make no law . . . abridging the freedom of speech."[32] Why protect free speech at all? The Founding Fathers may have written the First Amendment to prevent the resurrection of an English practice, abandoned 100 years before the Bill of Rights, of licensing printers – allowing government officials to examine documents and decide whether or not they would be published.[33] Another possible motive was to eliminate the crime of sedition – criticizing the government.[34] Against that uncertain historical background, the philosophy of the First Amendment appears to serve three principal values: advancing knowledge and "truth" in the "marketplace of ideas," facilitating representative democracy and self-government, and promoting

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[25] *See id.*

[26] *See* Danielle N. Rodier, *School Violence Threats Hit Superior Court: Student's Comments about Shooting Teachers Not Just 'Jokes,'* 22 PENN. L. WKLY. 21 (1999).

[27] *See id.*

[28] *See* Goulet, *supra* note 5.

[29] *See* Elizabeth Amon, *School Shootings Raise Liability Issue,* NAT'L L. J., May 3, 1999.

[30] *See* Business Wire, *supra* note 2.

[31] Rodier, *supra* note 26.

[32] U.S. Const. amend. I.

[33] *See* GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW, 1023 (13th ed. 1997).

[34] *Id.* at 1024.

individual autonomy, self-expression and self-fulfillment.[35]

Litigants have repeatedly asked the federal courts to draw the boundary lines between acceptable and impermissible speech.[36] Within the last 40 years alone, the Supreme Court has written landmark decisions which have brought the free speech landscape into focus. The Court has ruled that public officials cannot sue for defamation unless they can prove actual malice,[37] that the First Amendment protects burning the American flag as free speech[38] and that the government can limit contributions to political campaigns but cannot limit campaign expenditures.[39] Members of Congress have introduced numerous Constitutional Amendments on these subjects even in just the 1999-2000 Congressional session, with no success to date.[40]

The Supreme Court, however, has never held the First Amendment Free Speech clause to be an absolute right.[41] For public school students, the Free Speech clause offers even fewer protections than it does for adults simply because the students' speech occurs within public schools. Two Vietnam-era Supreme Court cases demonstrate the different amount of weight the Court has placed on the free speech rights of adults as opposed to the rights of public school students.

In 1969, a lower California court convicted appellant Paul Robert Cohen for breach of the peace after he walked through a courthouse corridor wearing a jacket bearing the words "F— the Draft."[42] In reversing the conviction, the Supreme Court held that the state of California could not punish Cohen for his speech so long as Cohen did not show an intent to incite disobedience to or disruption of the draft.[43] The Court went on to hold that California could convict Cohen only if his

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[35] *Id.* at 1025.

[36] School prayer has received substantial attention as a First Amendment case. However, the legal battleground there involves the First Amendment's clause prohibiting Congress from passing a law which would establish a religion, otherwise known as the Establishment Clause. The Supreme Court's initial ruling on this subject came in Engel v. Vitale, 370 U.S. 421 (1962).

[37] N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

[38] Texas v. Johnson, 491 U.S. 397 (1989).

[39] Buckley v. Valeo, 424 U.S. 1 (1976).

[40] In the 106th Congress, members have introduced more than 50 proposed Constitutional Amendments. Four proposed Constitutional Amendments focus on campaign contributions, three proposed amendments would prohibit desecration of the flag and three more would alter Supreme Court rulings on school prayer. Search of Westlaw, US-BILLTRK database, Oct. 17, 1999. On Mar. 29, 2000, the U.S. Senate voted 63-37 in favor of an anti-flag desecration amendment. The Senate's vote fell four votes short of the necessary two-thirds majority necessary to send the amendment to the states for ratification. *See* Helen Dewar, *Flag Amendment Falls 4 Votes Short,* THE WASHINGTON POST, Mar. 30, 2000.

[41] *See* Leonard M. Niehoff, *The Student's Right to Freedom of Speech: How Much Is Left at the Schoolhouse Gate?,* 75 MICH. B.J. 1150 (1996).

[42] Cohen v. California, 403 U.S. 15, 16 (1971).

[43] *See id.* at 18.

manner of speech, rather than the content, was unlawful.[44] The Court then examined all the means by which a person could speak unlawfully – using indecorous language in a public area that features signs giving notice that use of such language is prohibited,[45] using obscenities deemed "erotic" under previous court decisions,[46] using "fighting words" directed at a particular person,[47] thrusting words upon unwilling or unsuspecting viewers[48] – and the Court held none of those circumstances applied.

Two years earlier, in *Tinker v. Des Moines Indep. Community Sch. Dist.*,[49] the Court established a balancing test which weighed more heavily against the public school student speaker. In December 1965, three Des Moines students wore black armbands to school to publicize their objections to the hostilities in Vietnam, in violation of school policy.[50] The Court reiterated its position that students do not "shed their constitutional rights at the schoolhouse gate."[51] However, the Court held that First Amendment protection does not extend to student speech which "materially disrupts class work or involves substantial disorder or invasion of the rights of others."[52] The Court found no indication the armbands would cause disruption and, thus, held the school's regulation against armbands violated the students' right to free speech.

After recognizing an area of protected student speech in *Tinker*, the Court went on to draw a circle around it in *Bethel Sch. Dist. No. 403 v. Fraser*.[53] In that case, a school district suspended one of its students for giving a sexually-colored nominating speech for a fellow student seeking elective office.[54] The lower courts held the school district had violated the student's First Amendment rights because his comments involved politics. The Supreme Court reversed, however, holding a student's right to speech "must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."[55]

C. *Less to Wear, Less to Say*

In light of these cases and the move towards more regulation in public schools, students likely will have fewer choices about clothes and will have to be more careful about what they say. The federal courts have upheld school dress

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[44] *See id.* at 18.
[45] *Id.* at 19.
[46] *See id.* at 19-20.
[47] *Id.* at 20.
[48] *See* 403 U.S. 15, 21 (1971).
[49] Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969).
[50] *See id.* at 504.
[51] *Id.* at 505.
[52] *Id.* at 513.
[53] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).
[54] *See id.* at 677.
[55] *Id.* at 681.

regulations designed to discourage gang activity.[56] Consequently, school districts have succeeded in prohibiting earrings, sagging pants, bandanas, baseball caps worn a certain way, and clothing bearing the logos of professional or college sports teams.[57] School districts which perceive a connection between black trench coats and potential school violence will likely be able to ban the coats without fear of a First Amendment challenge.[58] To paraphrase Judge Newman, public school students can wear Tinker's armband but they cannot wear "the Mafia's" trench coat.[59]

Regarding speech, the *Tinker-Fraser* cases have established a fence which divides public school student speech into two camps: speech which does not materially disrupt school (*Tinker*) and speech which conflicts with society's interest in teaching socially appropriate behavior (*Fraser*). So, when an unknown person scrawled "Trench coat Mafia 5/26/99" on the bathroom wall of the Groton-Dunstable High School, the school committee was within its rights to make punishable such a threat to commit violence.[60] But what about the school district which suspended the 14-year-old girl for saying she could understand how people like the Columbine High School killers could become violent under relentless taunting?[61] What about a student who offers an enthusiastic book report on *Basketball Diaries*, a book-turned-movie in which actor Leonardo DiCaprio gunned down teachers and students?[62] The case law is, as yet, unclear.

III. LOUISIANA, RESPECT AND THE RIGHT NOT TO SPEAK YOUR MIND

In 1999, the state of Louisiana added a new dimension to the public school free speech debate by passing the nation's first "respect" law. Introduced by Sen. Donald Cravins, D-Arnaudville, the law requires that students in grades K-5 refer to school faculty as "sir" or "ma'am" where appropriate.[63] Each year the law expands to include the next highest grade,[64] essentially tracking the 1999-2000 5th grade class as that class moves through the Louisiana school system. Local school districts decide what penalty a student will get for failing to address a teacher

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[56] *See* Goulet, *supra* note 5.

[57] *See id.*

[58] The 14th Amendment might provide students with a stronger foundation to challenge dress codes. In Kelley v. Johnson, 425 U.S. 238 (1976), the Court held the state could regulate a policeman's hair length and not violate the person's 14th Amendment "liberty" right. The majority used a rational relation test. A student could argue – as some New Mexico students have – that they must wear coats when the weather turns cold and the only coats they have are long, black coats. *See* Schoellkopf, *supra* note 21.

[59] Thomas v. Bd. of Educ., Granville Cent. Sch. Dist., 607 F. 2d 1043, 1057 (2nd Cir., 1979).

[60] *See* Booth, *supra* note 4.

[61] *See* Goulet, *supra* note 5.

[62] *See* Amon, *supra* note 29.

[63] LA. REV. STAT. ANN. § 17:416.12(B) (West 1999).

[64] LA. REV. STAT. ANN. § 17:416.12(E)(1-7) (West 1999).

properly but the law expressly prohibits either expulsion or out-of-school suspension as a penalty.[65]

Sen. Cravins said he came up with the idea behind the law before the killings at Columbine.[66] However, Sen. Cravins said the shootings in Littleton influenced the timing of the bill's introduction and his spokesperson said the Columbine killings likely expanded the bill's margin of passage.[67] The bill passed 34-5 in the Senate, 81-19 in the House[68] before Gov. Foster signed it into law.

The Louisiana law has drawn national attention, not all of it flattering. "I've taken some licks," Sen. Cravins said. "To the critics I just say, 'What's your solution? I haven't heard you offer anything.' "[69] Joe Cook, executive director of the Louisiana chapter of the American Civil Liberties Union, said the law offends the First Amendment.[70] According to Mr. Cook, the ACLU is considering whether or not to challenge the law in court.[71] Whoever decides to challenge the law, this much is clear: the First Amendment and its accompanying case law would likely kill the Louisiana "respect" law.

A. Compelled Speech – What the Government Can Make You Say.

The federal government has little power to silence citizens and has even less power to force people to speak. One of the most recognized government powers to compel speech is court-ordered testimony under a subpoena, that power arising under Congress' police powers in the "necessary and proper" clause.[72] Even there, the Fifth Amendment limits the government's power, stating "no person shall be compelled in any criminal case to be a witness against himself."[73] The federal government also has the power to draft people into the armed services and, once there, force them to perform any number of tasks including addressing senior officers as "sir."[74] Since the states adopted the Bill of Rights in 1791, the federal

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[65] LA. REV. STAT. ANN. § 17:416.12(D) (West 1999).

[66] *See* Kevin Sack, *School Officials Scramble to Boost Security Privacy, Constitutional Rights Give Way to Frantic Atmosphere,* N.Y. TIMES, May 24, 1999.

[67] *See id.*

[68] *See* Stacey MacGlashan, *Courtesy Law Gets Mixed Reactions Enforcement Tricky, School Officials Say,* NEW ORLEANS TIMES-PICAYUNE, June 27, 1999, at A1.

[69] Deborah Sharp, *Elementary School Kids Keep La. Law on Their Lips But The 'Yes, Sir' Law Gets No Respect from Critics,* USA TODAY, Oct. 4, 1999, at 3A.

[70] *See* Erik Sanzenbach, *New Respect Law Gets Mixed Reviews,* L'OBSERVATEUR, July 7, 1999.

[71] *See* Sharp, *supra* note 69, at 3A.

[72] U.S. Const. art. I § 8.

[73] U.S. Const. amend. V.

[74] U.S. Const. art. I § 8. *See also* Arver v. U.S., 245 U.S. 366 (1918) where the Court held Congress has the power to not only raise an army but also to pass law regulating the conduct of those in that army. That decision, in turn, drew from an earlier case, Jacobson v. Massachusetts, 197 U.S. 11, where the Court held a Cambridge, Mass. citizen had to be immunized against smallpox because his individual constitutional rights gave way to the

government has ordered civilians to serve in the Armed Forces four times – the Civil War, World War I, World War II and Vietnam.[75]

Two cases the Supreme Court decided in the 20th century show how quickly government-compelled speech can run aground on the rock of the First Amendment. In *West Virginia State Bd. of Ed. v. Barnette*,[76] Jehovah's Witnesses brought suit because the Board of Education required public school students to salute the flag and recite the Pledge of Allegiance.[77] While the plaintiffs based their action on First Amendment freedom of religion grounds, the Court held that the law "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[78] The Court first noted that the government can censor speech only when it presents a "clear and present danger of action"[79] the government is supposed to prevent. The Court went on to hold "that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence."[80] As a result, *Barnette* holds that the government must demonstrate an even more substantial reason to compel speech than to censor speech.[81]

In *Wooley v. Maynard*,[82] the Court extended the First Amendment protection against compelled speech, prohibiting the state from forcing citizens to become mobile billboards. Again, a Jehovah's Witness brought suit. George Maynard of New Hampshire objected to the state requiring him to display the New Hampshire state motto – "Live Free or Die" – on his license plate.[83] Maynard snipped the motto off his license plate, received two citations in late 1974, refused to pay the fines and spent 15 days in jail as a result.[84] The Supreme Court set out a two-part balancing test: identify the individual's interest and then weigh it against the state's

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rights of the citizens in general.

[75] THE ENCYCLOPEDIA AMERICANA INTERNATIONAL (7th ed. 1999).

[76] West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624 (1943).

[77] This issue most recently arose in the 2000 presidential campaign. Before dropping out of the race for the Republican nomination, candidate Gary Bauer argued public school students – if they could not pray in school—should recite the Declaration of Independence every day. *See Bauer: If Not Prayer, Recite Declaration,* THE BOSTON GLOBE, Nov. 25, 1999, at A20.

[78] *Id.* at 642.

[79] Schenck v. U.S., 249 U.S. 47, 52 (1919), *quoted in* West Virginia State Board of Ed. v. Barnette, 319 U.S. 624, 633 (1943).

[80] *Barnette*, 319 U.S. at 633.

[81] In reaching its decision, the Supreme Court overruled its prior decision in Minersville District v. Gobitis, 310 U.S. 586 (1940). It should also be noted the Court reached its decision during the height of World War II when the U.S. and its allies were fighting both Germany and Japan. In fact, the Court wrote part of its decision on the similarities between the flag salute and the Nazi-fascist salute favored by Hitler's Nazi Party. *See Barnette*, 319 U.S. at 627-28.

[82] Wooley v. Maynard, 430 U.S. 705 (1977).

[83] *Id.* at 707.

[84] *See id.* at 708.

comparable interest.[85] In this case, the individual's interest is "the right of individuals to hold a point of view different from the majority."[86] Meanwhile, the state's interest is facilitating the identification of passenger vehicles and promoting an appreciation of state history, individualism and state pride.[87] The Court held that a citizen's First Amendment rights outweigh the state's interests.

So how would someone challenge the Louisiana "respect" law? The Fourteenth Amendment forbids states from depriving "any person of life, liberty, or property without due process of law."[88] As the Supreme Court held in Barnette, the Fourteenth Amendment restricts the State but "it is the more specific limiting principles of the First Amendment that finally govern this case."[89] The issue then becomes whether compelling a student to use respectful words violates that student's liberty as embodied in the First Amendment.

B. Why Louisiana's Law Fails the Constitutional Test: The Barnette Wall

The *Barnette* flag-salute case casts the Louisiana's respect law in an unflattering Constitutional light. For the Court in *Barnette*, the principle issue was whether any political organization had the power to impose "such a ceremony so touching matters of opinion and political attitude."[90] In examining the issue, the Court decided to take an opportunity it had passed up earlier in *Minersville Sch. Dist. v. Gobitis*.[91] There, the Court had simply assumed the states had the power to require students to salute the flag and, thus, found the law constitutional.[92]

In *Gobitis*, the Minersville School District argued that "[n]ational unity is the basis of national security" and that the authorities have "the right to select appropriate means for its attainment."[93] Three years later, the *Barnette* court saw the flag salute law colliding with the First Amendment through the Fourteenth Amendment's Due Process clause. The Court no longer saw the issue as merely whether certain, state-approved methods of fostering national unity were constitutional. The Court found West Virginia's law had encroached upon the First Amendment Free Speech clause. In order for the law to survive constitutional scrutiny, West Virginia had to show its law prevented "grave and immediate danger to interests which the state may lawfully protect."[94] West Virginia could not carry that burden and the Court struck the law down.

Louisiana would face a similarly daunting task in arguing its respect law meets

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[85] *See id.* at 715-16.
[86] *Id.* at 715.
[87] *See id.* at 716.
[88] U.S. Const. amend. XIV.
[89] *Barnette*, 319 U.S. at 639.
[90] *Id.* at 635.
[91] Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940).
[92] *Barnette*, 319 U.S. at 635.
[93] *Gobitis*, 310 U.S. at 595.
[94] *Barnette*, 319 U.S. at 639.

the "grave and immediate danger" standard. Supreme Court decisions alone indicate even the *Schenck* "clear and present danger" standard – which the *Barnette* standard exceeds – is a high one. In *Schenck v. U.S.*[95], the Court held the First Amendment does not protect pamphlets encouraging military draftees to oppose the draft during time of war. Thirty-two years later in *Dennis v. U.S.*[96], the Court held that federal law can prohibit willful advocacy of overthrow of the Government without violating the First Amendment. The towering height of the *Schenck* standard is evident in the cases where the Court has turned away censorship advocates in favor of the First Amendment. For example, in *N.Y. Times v. U.S.*,[97] the Court found that the newspaper could publish a classified historical study on Vietnam policy over the Government's objection that such publication would compromise national security. In *Thomas v. Collins*[98], the Court struck down a Texas law requiring paid labor union organizers to register with state before soliciting members because the law violated the First Amendment. In effect, Louisiana would have to argue its law was on par with federal laws which prohibit interference with the military during wartime or federal laws which prohibit advocating the overthrow of the government. The legislative history of Louisiana's law suggests state legislators were simply interested in turning students into good citizens. Gov. Mike Foster said the law would help children "learn good manners (if they weren't taught at home) and practice them so they will be successful in school and in the workplace."[99]

C. *Louisiana and the Two Lines of Defense*

The state is not without arguments. Appeals traditionally offer two strategies: show how you fit within the law or, in the alternative, show how the law does not apply to you. Louisiana can argue both.

1. Does Anyone See a Flag Here?

The first argument Louisiana could make is the most obvious argument regarding *Barnette*. Simply, *Barnette* only reaches compulsory flag-saluting and does not include within its ambit something so non-ideological as mandatory manners. Some of the Court's language in *Barnette* supports this proposition. Justice Jackson, author of the *Barnette* majority opinion, wrote about the particular compelled speech of saluting the United States' flag as "touching matters of opinion and political attitude,"[100] requiring "the individual to communicate by word

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[95] Schenck v. U.S., 249 U.S. 47 (1919).
[96] Dennis v. U.S., 341 U.S. 494 (1951).
[97] N.Y. Times v. U.S., 403 U.S. 713 (1971).
[98] Thomas v. Collins, 323 U.S. 516 (1945).
[99] Gov. Mike Foster, Statement on the 1999 Regular Session, 3 (June 21, 1999).
[100] *Barnette*, 319 U.S. at 636.

and sign his acceptance of the political ideas it thus bespeaks."[101] If *Barnette* could be limited to political ideology, Louisiana could at least get out from under the *stare decisis* of *Barnette* and make its case on a clean slate.

However, *Barnette* suggests a much broader application than political ideology. Justice Jackson concluded the opinion in *Barnette* thus:

> [B]ut freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order. If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.[102]

The breadth of *Barnette* is visible in *Wooley*, the New Hampshire "Live Free or Die" license plate case. There, the Court held that the First Amendment allows individuals "to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable."[103] One might spend a lot of time trying to find someone who considered saying "Yes, ma'am" or "No, sir" morally objectionable. However, our history is replete with examples of people who saw great value in having a choice – whether to act[104] or not[105] to act.[106]

2. The Importance of Being Polite

In the alternative, Louisiana could try to climb over the *Barnette* wall. The hypothetical argument would be this: after the law went into effect, incidents of behavioral problems in the public schools declined. The *Tinker-Fraser* cases demonstrate schools have the power to regulate student speech when it threatens to disrupt class work,[107] its political nature notwithstanding. In this alternative moral world – where Louisiana is trying to improve its school environment by forcing students to speak certain words rather than outlawing certain words – Louisiana

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[101] *Id.* at 633.

[102] *Id.* at 642.

[103] *Wooley*, 430 U.S. at 715.

[104] *See* Roe v. Wade, 410 U.S. 113 (1973).

[105] *See* Harper v. Herman, 499 N.W.2d 472 (1993) (holding that a boat owner owed no duty of care to warn guest on his boat that the water was too shallow for diving).

[106] The continuing vitality of *Barnette* is also unquestionable. In August 1998, the Seventh Circuit – relying in part on *Barnette* – held the University of Wisconsin violated its students' First Amendment rights when the university used mandatory student activity fees to fund political and ideological activities the students did not support. However, the Supreme Court found the *Barnette* analysis misplaced. Justice Souter, in a concurring opinion, wrote that the government involvement in the Southworth case was much more indirect than in *Barnette*. *See* Bd. of Regents of Univ. Of Wis. Sys. v. Southworth, 2000 WL 293217, at *12 (Mar. 22, 2000).

[107] *See Tinker*, 393 U.S. at 513; *see also Fraser*, 478 U.S. at 685.

could argue that *not* mandating respect for school faculty threatens to disrupt class work. Why? Because, without requiring students to address staff members as "sir" or "ma'am," some students are more likely to misbehave, disrupt class work and otherwise invade the rights of other students.

Nebraska attempted a version of this argument. In 1919, the state passed a law criminalizing the teaching of a foreign language in any school – public, private, parochial – to students at or beneath eighth grade. An instructor was convicted under the statute for teaching German to a 10-year-old parochial student. In the Supreme Court case which resulted, *Meyer v. Nebraska*,[108] Nebraska argued the law was a valid exercise of its police power.[109] The Court struck the law down, holding that the law violated the teacher's 14th Amendment liberty interest.

However, some of the Court's language in these pro-First Amendment decisions refers to a power the state possesses to improve its citizens. In *Meyer*, the Court wrote, "That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear."[110] In *Fraser*, the majority wrote "schools must teach by example the shared values of a civilized social order."[111] The language in both cases could give Louisiana the positive grant of power it was looking for to defend the "respect" law against a First Amendment attack. The language in *Fraser* could also limit *Barnette* First Amendment protection to student's political and ideological speech; even there, *Fraser* further restricts that protection to instances where the speech does not threaten to disrupt the classroom.

Thus, the *Tinker-Fraser* line of cases grants school districts broad power to regulate non-political student speech in the name of teaching students the boundaries of socially appropriate behavior.[112] Louisiana could argue that its respect law achieves this goal in a positive manner. Rather than simply focusing on what students should *not* do, the schools are actively promoting what students *should* do. Louisiana could argue that not only should schools require students to perform well on exams and perform well in home economics, art and shop but also students should perform well with their social behavior.

D. The Statute of Liberty Play

For a law which affects all public school students in Louisiana and which enjoyed enthusiastic backing from state officials, the "respect" law has a remarkably weak penalty section. The law gives local school districts the authority to set the penalty but, at the same time, takes expulsion and suspension off the table as possible penalties.[113] The reason the law has few teeth may simply have to do

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[108] Meyer v. Nebraska, 262 U.S. 390 (1922).
[109] *See id.* at 397.
[110] Meyer, 262 U.S. at 401.
[111] Fraser, 478 U.S. at 683.
[112] *See id.*
[113] LA. REV. STAT. ANN. § 17:416.12(D) (West 1999).

with keeping the law alive. Perhaps the "respect" law's drafters were already looking ahead to the Constitutional arguments when they drafted the penalty section.

One of the reasons the Supreme Court found the *Barnette* flag-salute law so abhorrent was that West Virginia put in a sizeable penalty for failure to salute: expulsion. But the punishment did not end there. Officials threatened to send the Jehovah's Witnesses "to reformatories maintained for criminally inclined juveniles. Parents of such children have been prosecuted and are threatened with prosecutions for causing delinquency."[114] In *Wooley*, the penalty for George Maynard not displaying the New Hampshire state motto on his license plate was only a $25 fine. However, he refused to pay the fine and went to jail as a result.[115] With the "respect" law, the drafters seem to have avoided imposing any penalty which would turn a violator into a conscientious objector and, possibly, into a martyr.

Upon closer examination, there is not even a hint that any prescribed penalty could seriously *inconvenience* a student violator or her parents. The Supreme Court overturned the flag-salute law in *Barnette* because West Virginia had violated the students' First Amendment right to free speech, thus depriving the students of liberty in violation of the Fourteenth Amendment.[116] The situation is different with Louisiana where the punishments available to state school systems are few and moderate. The St. Tammany Parish public school system decided to punish violators of the "respect" law with parent-teacher conferences or in-school suspensions (as opposed to out-of-school suspensions which the law prohibits).[117] The law's prohibition against substantial penalties begs the question: Where is the deprivation of liberty? By passing a law with no substantial penalty, Louisiana may have avoided the Fourteenth Amendment issue altogether.

Legality aside, there is also a practical issue working in Louisiana's favor: who is going to challenge this law? In *Barnette*, the students were expelled from school, the parents fined for their children's delinquency and some parents even went to jail.[118] In *Wooley*, New Hampshire imprisoned George Maynard because he would not obey a law he felt violated his religious beliefs.[119] In *Tinker*, the school district suspended the students who wore armbands to protest the Vietnam war until they agreed to return without the armbands.[120] The Louisiana "respect" law seems unlikely to stir up similar passions, be they religious or political. As an example, St. Tammany Parish school system has placed violation of the "respect" law in

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[114] *Barnette*, 319 U.S. at 630. The punishment for parents of "delinquent" children included fines not more than $50 and jail time not exceeding thirty days.

[115] *See Wooley*, 430 U.S. at 708.

[116] *See Barnette*, 319 U.S. at 642.

[117] *See* Stacey MacGlashan, *Penalties Set for Flouting Respect: Law School Codes Cover 'Sir,' 'Ma'am,'* NEW ORLEANS TIMES-PICAYUNE, Aug. 12, 1999.

[118] *See Barnette*, 319 U.S. at 630.

[119] *See Wooley*, 430 U.S. at 707.

[120] *See Tinker*, 393 U.S. at 504.

among its Group 2 misbehaviors.[121] The school system's discipline handbook defines such infractions as "those student behaviors that disrupt the orderly educational process in the school or on the school grounds."[122] Those misbehaviors include leaving school grounds without permission, failing to abide by school rules and regulations (the "respect" law is included here), using profane or immoral language, possession of tobacco products, defying authority and lying to school personnel.[123] A lawsuit only gets to court if a party with standing feels motivated to bring it. Because the "respect" law allows only moderate penalties, the motivations for bringing suit found in *Barnette*[124] (expulsion, jail time, freedom of religion) and in *Wooley*[125] (fines, jail time, freedom of religion) appear to be absent here. If this reasoning is correct, the drafters apparently decided to create a law with very little penalty "bite" in exchange for a long life span rather than create a sharp-toothed law which would, in turn, draw First Amendment challengers who would quickly challenge and invalidate the law in federal court.

IV. CONCLUSION

People have debated the role of schools as *in loco parentis* for decades. The debate over "character education" has taken on a new urgency, however, since a handful of students turned their own schools into deadly shooting galleries. State-mandated dress codes and speech codes are likely to withstand judicial scrutiny unless challengers can show the codes are not rationally related to the intended objectives. On the other hand, Louisiana's mandatory "respect" law is at once unconstitutional and unlikely to challenged in court. The law clearly runs in the face of Supreme Court decisions requiring the most compelling justification for compelled speech. However, because the law prohibits school districts from using the most severe punishments available against its violators, the law apparently does little to deprive public school students of their Fourteenth Amendment right to due process. And, thus, Louisiana legislators may very well have found their own safe passage between the Scylla of student First Amendment rights and the Charybdis of student safety/behavior. Eager civil liberties' lawyers may wait a long time before finding a plaintiff willing to go through the trouble of challenging a law with virtually no penalty.

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[121] *See MacGlashan*, *supra* note 117.

[122] *Id.*

[123] *See id.*

[124] *See Barnette*, 319 U.S. at 629-30.

[125] *See Wooley*, 430 at 707-08.