

Morse v. Frederick and the Regulation of Student Cyberspeech

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I. Introduction

In 2002, before the start of that year's winter Olympics, Deborah Morse, the principal of Juneau-Douglas High School, decided to release students from school to watch the Olympic Torch Relay as it passed the school on its way to Salt Lake City.¹ Joseph Frederick, a senior at the high school, showed up late, but met his friends across the street from the school. When the torch passed, in full view of students on the other side of the street as well as camera crews, he unfurled a fourteen-foot banner that read, "BONG HITS 4 JESUS."²

Principal Morse saw the banner, too. She crossed the street and ordered him to take it down. When Frederick refused, she confiscated the banner and later suspended him for ten days for violating a school board policy prohibiting "any assembly or public expression that . . . advocates the use of substances that are illegal to minors"³

After the school superintendent upheld a reduced suspension on appeal, Frederick sued. Frederick lost in the district court, which

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1. *Morse v. Frederick*, 127 S. Ct. 2618, 2622 (2007).
2. *Id.*
3. *Id.* at 2623.

granted summary judgment for the school board; but won in the Ninth Circuit, which found that no disruption of school activities occurred or was threatened.⁴ Further, the appeals court denied Principal Morse qualified immunity, holding that “a reasonable principal in Morse’s position would have understood that her actions were unconstitutional”⁵

The Supreme Court reversed and upheld Morse’s decision to suspend Frederick. The *Morse* majority—in an apparent effort to confine the decision closely to its facts—held that “schools may take steps to safeguard students entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use.”⁶

Morse marks the Supreme Court’s first decision addressing the First Amendment rights of public school students in nearly twenty years. Part II of our article reviews, briefly, the holdings of prior cases and, more importantly, the questions spawned by those decisions with which lower courts have struggled over the years. Part III summarizes the opinions in *Morse* and discusses whether the case provided answers to the questions left by the Court’s prior cases, as well as *Morse*’s implications for future student speech cases generally. While much of the coverage of *Morse* stressed the speech-restrictive result,⁷ we think it important, as well, to emphasize the Court’s rejection of the expansive powers to regulate student speech that the school district sought.

The focus of our article, however, is on a particular subset of student speech: student speech and expression in cyberspace. *Morse* comes at a time when school officials are scrambling to fashion appropriate responses to student cyberspeech.⁸ Cyberbullying, inappropriate contact between adults and minors, inappropriate (sometimes illegal) activity posted for anyone to see on social

4. *Frederick v. Morse*, 439 F.3d 1114, 1118, 1121-23 (9th Cir. 2006).

5. *Id.* at 1123-25.

6. *Morse*, 127 S. Ct. at 2622. The majority did not reach the question of whether *Morse* had qualified immunity. Justice Breyer would have reversed on that ground alone. *See id.* at 2638 (Breyer, J., concurring in judgment in part and dissenting in part) (“I believe that [the Court] should simply hold that qualified immunity bars the student’s claim for money damages and say no more.”). The dissenters, too, would have reversed the lower court’s qualified immunity holding. *Id.* at 2643 (Stevens, J., dissenting).

7. *See, e.g.*, Robert Barnes, *A Rightward Turn and Dissension Define Court This Term*, WASH. POST, July 1, 2007, at A07; Linda Greenhouse, *Vote Against Banner Shows Divide on Speech in Schools*, N.Y. TIMES, June 26, 2007, at A18; Bill Mears, *‘Bong Hits 4 Jesus’ Case Limits Student Rights*, CNN.COM, June 26, 2007, <http://www.cnn.com/2007/LAW/06/25/free.speech/>; George Will, *Quandaries 4 Justices*, WASH. POST, July 1, 2007, at B07.

8. *See infra* Part IV.

networking sites like MySpace—all have outstripped existing school conduct codes. Since most material is produced off-campus, school officials are unsure how far their authority to regulate extends. On the other hand, given the fact that schools are awash in gadgets that permit students to access the Internet, text message or e-mail one another, and send pictures and video, the line between on-campus and off-campus speech is blurring. It is becoming difficult to keep speech out of schools, even if schools (and perhaps the speaker) want to. Part IV discusses both the challenges to school administrators posed by cyberspeech, as well as lower courts' treatments of these issues in reported cases. Not surprisingly, the court decisions often mirror the confusion present in student speech cases generally.

Though it did not involve Internet speech, *Morse's* peculiar facts offered the Court the opportunity to provide some guidance to school officials, and an opportunity for it to clarify the scope both of students' First Amendment rights and school officials' authority to regulate speech. Unfortunately, *Morse's* self-conscious minimalism raises more questions than it answers, especially for student cyberspeech. Nevertheless, reading between the lines, one can tease out hints suggestive of the Court's future direction. In Part V we offer some hypothetical situations, consider what is clear after *Morse*—such as the fact that mere offensiveness is not a legitimate ground for disciplining non-disruptive student speech—and what remains in question. We also propose standards for resolving the questions to which *Morse* provided no answers.

Specifically, we argue that though technology has blurred the line between on-campus and off-campus speech, a line must be maintained, lest school administrators claim the ability to regulate student speech with little or no actual connection to the school. In difficult cases involving cyberspeech, we would permit school jurisdiction even if the speech were produced elsewhere, if it was disruptive or otherwise included within a category of speech the school was entitled to regulate, and the student either publicized the speech at school or encouraged others to access the speech at school. A brief conclusion follows.

II. The First Amendment Rights of Public School Students:⁹ An Overview

In this section, we review the state of the law before *Morse*, with particular emphasis on the confusion, noted at oral argument,¹⁰ engendered by the few student speech cases the Court had decided. As will become clear, despite this small number of cases, lower courts have had difficulty synthesizing and applying them to the myriad fact situations they have encountered.

A. The *Tinker-Fraser-Kuhlmeier* Trilogy

While the Court had invoked the First Amendment to invalidate West Virginia's compulsory flag salute law (after initially upholding it),¹¹ *Tinker v. Des Moines Independent Community School District*¹² is the usual starting point for any analysis of student speech rights. There, the Court famously upheld the *Tinker* children's right to wear, in school, black armbands symbolizing their protest of American involvement in Vietnam.¹³ Writing for the Court, Justice Fortas insisted that neither students nor teachers "shed their constitutional rights to freedom of speech and expression at the schoolhouse gate"¹⁴ and that vindication of the rights of the *Tinker* children was necessary to ensure that "state-operated schools" did not become "enclaves of

9. One interesting antecedent question that is almost never explored in any depth in either the cases themselves or in the literature concerns is why we care whether students have their free speech rights protected in the first place. Numerous other constitutional rights are afforded little protection in public schools, yet most seem to agree that speech rights are different. We will bracket that interesting question for this paper however, hoping to return to it in the future. For some thoughts, see Richard W. Garnett, *Can There Really Be "Free Speech" in Public Schools?*, 12 LEWIS & CLARK L. REV. 45 (2008); Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1112789 (last visited April 6, 2008).

10. See Transcript of Oral Argument at 38, *Morse*, 127 S. Ct. 2618 (2007) (No. 06-278) (featuring an exchange between Justice Scalia and counsel for Frederick, with Justice Scalia stating that cases after *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), have "cut back" on *Tinker*, while Frederick's attorney argued that *Tinker* has "stood the test of time for 40, almost 30 years [sic]" in furnishing the rule for student speech cases); see also *id.* at 39 (highlighting the confusion surrounding the definition of "disruption").

11. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (overruling *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940)).

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

13. *Id.* at 504.

14. *Id.* at 506.

totalitarianism.”¹⁵ Therefore, as long as the speech (or, more accurately, symbolic speech) did not interfere with the operation of the school or with the rights of other students in the school,¹⁶ an “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.”¹⁷ Only if a student’s speech activities “materially and substantially”¹⁸ interfered with the operation of the school, “collid[ed] with the rights of others,” or was reasonably certain to do either, could the school restrict it.¹⁹

Nearly twenty years later, the Court set limits on student speech. In *Bethel School District No. 403 v. Fraser*, Matthew Fraser was suspended for giving a risqué nominating speech laced with double entendres to a high school assembly in Pierce County, Washington.²⁰ In reversing the Ninth Circuit Court of Appeals, the Court acknowledged that *Tinker* controlled, but credited evidence presented at trial that the speech had materially disrupted the school and perhaps collided with the rights of other students.²¹ In addition, the Court seemed inclined to distinguish between the *Tinkers*’ act of political protest and “the sexual content of [Fraser’s] speech,” suggesting that administrators and judges could make judgments about the relative importance of the speech when deciding whether it must be accorded constitutional protection.²² *Fraser* did not, however, explicitly hold that it was altering or adding to *Tinker*’s inquiry.

Two years after *Fraser*, in *Hazelwood School District v. Kuhlmeier*, the Court declined to apply *Tinker* to a principal’s decision to spike two stories slated to appear in the school newspaper.²³ As the Court saw it, “[t]he question whether the First Amendment requires a school to tolerate particular student speech—the question we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to

15. *Id.* at 511.

16. This point was made repeatedly. *See id.* at 508-09, 512-14.

17. *Id.* at 508.

18. *Id.* at 512-13 (quoting *Burnside v. Byers*, 363 F.2d 744, 749 (5th Cir. 1966)).

19. *Id.* at 512-13.

20. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 677-79 (1986). For the speech itself, which Chief Justice Burger’s majority opinion coyly omits, see *id.* at 687 (Brennan, J., concurring in the judgment).

21. *Id.* at 683-86. *But see id.* at 690 (Marshall, J., dissenting) (“I dissent from the Court’s decision . . . because in my view the School District failed to demonstrate that respondent’s remarks were indeed disruptive.”).

22. *See id.* at 680-81.

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

promote particular student speech.”²⁴ Instead, the Court concluded that the school newspaper was a non-public forum and that the decision to censor the articles (the principal concluded that one subject (teen pregnancy) was age inappropriate for many of the school’s students and that the other story (about divorce) was unfair to the father of the student interviewed about her parents’ divorce) was a “reasonable” regulation permissible under the Court’s public forum case law.²⁵

Commentators generally hailed *Tinker*, and deplored what they saw as a narrowing of it by *Fraser*²⁶ and *Kuhlmeier*.²⁷ How, exactly,

24. *Id.* at 270-71.

25. *Id.* at 267-70, 276. “Nonpublic forums are government properties that the government can close to all speech activities. The government may prohibit or restrict speech in nonpublic forums as long as the regulation is reasonable and viewpoint neutral.” ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* § 11.4.2.4, at 1139 (3d ed. 2006).

26. Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of Tinker?*, 48 *DRAKE L. REV.* 527, 539 (2000) (“[A]bsent from *Bethel* and *Hazelwood* are the three themes of the *Tinker* majority: the importance of protecting students’ free speech rights, the need for proof of significant disruption of school activities, and the role of the judiciary in monitoring schools’ decisions to ensure compliance with the Constitution.”); David L. Hudson & John E. Ferguson, *The Courts’ Inconsistent Treatment of Bethel v. Fraser and the Curtailment of Student Rights*, 36 *J. MARSHALL L. REV.* 181, 183 (2002) (explaining that *Fraser* “curtailed student rights recognized” in *Tinker*; advocating a return to *Tinker*’s principles); Robert Block, Note, *Students’ Shrinking First Amendment Rights in the Public Schools: Bethel School District No. 403 v. Fraser*, 35 *DEPAUL L. REV.* 739, 762 (1986) (characterizing *Fraser* as “confusing and alarming”); Traci B. Edwards, Comment, *First Amendment Rights in Public Schools: Bethel School District v. Fraser*, 12 *OKLA. CITY U. L. REV.* 907, 931 (1987) (“*Fraser* is an example of the Court’s willingness to stretch the Constitution past previous limits in order to achieve its goal of the proper inculcation of fundamental values, even at the expense of suppressing a student’s first amendment right of freedom of speech.”); Royal C. Gardner, III, Note, *Protecting a School’s Interest in Value Inculcation to the Detriment of Students’ Free Expression Rights: Bethel School District v. Fraser*, 28 *B.C. L. REV.* 595, 624 (1987) (“[*Fraser*] greatly expanded the *Tinker* exceptions to First Amendment protection.”); Shari Golub, Note, *Tinker to Fraser to Hazelwood—Supreme Court’s Double Play Combination Defeats High School Students’ Rally for First Amendment Rights: Hazelwood School District v. Kuhlmeier*, 38 *DEPAUL L. REV.* 487, 514 (1989) (explaining that *Tinker* held for “broad rights for personal expression” while *Fraser* and *Kuhlmeier* represent “obliteration of students’ first amendment rights”); Phoebe Graubard, Note, *The Expanded Role of School Administrators and Governing Boards in First Amendment Student Speech Disputes: Bethel School District No. 403 v. Fraser*, 17 *GOLDEN GATE U. L. REV.* 257, 257, 271 (1987) (describing *Fraser* as a “departure from a protective first amendment analysis”; arguing that it “differed sharply” from *Tinker*); Rita Morgan, Note, *Bethel School District v. Fraser and Student Free Speech*, 9 *GEO. MASON U. L. REV.* 369, 387 (1987) (characterizing *Fraser* as “poorly reasoned” and inconsistent with *Tinker*); Carol M. Schwetschenau, Note, *Constitutional Protections for Student Speech in Public High Schools: Bethel School District No. 403 v. Fraser*, 55 *U. CIN. L. REV.* 1349, 1364 (1987) (explaining that the *Fraser* Court “dramatically departed from the *Tinker* concept

the cases are to be read together was not clear; the Court did not revisit the question until *Morse*.

B. Unanswered Questions

At least five important questions are raised, but not resolved, by the foregoing cases. Four of these questions were implicated by the facts in *Morse*. In this part, we discuss these questions and their treatment in the lower courts. First, can schools regulate speech that takes place off-campus, if it has disruptive effects in the school, or is off-campus speech outside the *Tinker* trilogy altogether? Second, how “disruptive” must student speech be to trigger schools’ regulatory authority? Third, are schools entitled to punish “offensive” or otherwise “low value” speech absent any disruptive effects? Fourth, does the language in *Tinker* about punishing speech that “collid[ed] with the rights of others” furnish an independent basis for regulation, or is that simply a subset of “disruptive” speech discussed in the case? Finally, on what basis, precisely, was *Kuhlmeier* decided and how is it to be read with *Tinker* and *Fraser*?

1. Can Schools Regulate Off-Campus Speech?

One approach would be to hold that speech off-campus was beyond the reach of school officials. According to this approach, the school’s authority to punish speech would stop at the schoolhouse door, regardless of the disruption caused by the outside-the-

of the school as a public forum where the free market of ideas operated” (footnote omitted)); Sara Staff, Note, *Silencing Student Speech: Bethel School District No. 403 v. Fraser*, 37 AM. U. L. REV. 203, 205 (1987) (explaining that *Fraser* “narrowed” First Amendment rights); Therese Thibodeaux, Note, *Bethel School District No. 403 v. Fraser: The Supreme Court Supports School in Sanctioning Student for Sexual Innuendo in Speech*, 33 LOY. L. REV. 516, 525 (1987) (explaining that *Fraser* seems to represent an abandonment of the Court’s “progressive stance” and a reversion “to the pre-1960’s idea of deference to school authority and to the *in loco parentes* function of the schools”); Nina Zollo, Comment, *Constitutional Law: School Has Broad Discretion to Prohibit Offensive Student Speech*, 39 U. FLA. L. REV. 193, 203 (1987) (predicting *Fraser* would have “chilling effects” on student speech).

27. J. Marc Abrams & S. Mark Goodman, *End of an Era? The Decline of Student Press Rights in the Wake of Hazelwood School District v. Kuhlmeier*, 1988 DUKE L.J. 706, 707, 711 (1988) (claiming that *Kuhlmeier* “eviscerates” *Tinker* and that *Fraser* was an “anomaly”); Helen Bryks, Comment, *A Lesson in School Censorship*, 55 BROOK. L. REV. 291, 325 (1989) (“[*Kuhlmeier*] struck a new balance that favors inculcation [of community values] over students’ liberties.”); Christopher J. Palermo, Note, *Only the News That’s Fit to Print: Student Expressive Rights in Public School Communications Media After Hazelwood v. Kuhlmeier*, 11 HASTINGS COMM. & ENT. L.J. 35 (1988) (explaining that *Kuhlmeier* represented “a further decline in student free speech rights”).

schoolhouse speech. Such an approach could be seen as protecting the legitimate free speech rights of students while not in school. This approach could also be seen to have the additional advantage of being easy to apply—both by school administrators and by reviewing judges. The initial question would be whether student speech occurs within the four walls of the school. If the answer is no, then any content-based regulation of speech would have to survive strict scrutiny.²⁸

This location-centered approach also finds some support in the case law. For example, in his *Fraser* concurrence, Justice Brennan agreed with the majority that Fraser could be disciplined, but suggested that if Fraser had given his speech “outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate”²⁹ Some lower courts have agreed, holding that schools had no right to discipline students for off-campus expressive activity.³⁰ In a number of post-*Tinker* cases, many concerning “underground” high school newspapers, courts adopted a similar approach, expressing skepticism of school officials’ claims of authority over students’ activities when the allegedly disruptive activities took place off-campus.³¹

28. See CHEMERINSKY, *supra* note 25, at 932 (explaining content-based/content-neutral distinction).

29. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 688 (Brennan, J., concurring in the judgment).

30. See Mahaffey *ex rel.* Mahaffey v. Aldrich, 236 F. Supp. 2d 779, 786 (E.D. Mich. 2002) (“Defendants’ regulation of Plaintiff’s speech on the website without any proof of disruption to the school *or on campus activity in the creation of the website* was a violation of Plaintiff’s First Amendment rights.” (emphasis added)); see also Coy *ex rel.* Coy v. Bd. of Educ., 205 F. Supp. 2d 791, 799 (N.D. Ohio 2002) (reversing suspension and expulsion of student for content on student’s website; noting that student “simply accessed his own website, a website he created on his own time and with his own equipment”).

31. See, e.g., Thomas v. Bd. of Educ., 607 F.2d 1043, 1051 (2d Cir. 1979) (“We may not permit school administrators to seek approval of the community-at-large by punishing students for expression that took place off school property.”); Shanley v. Northeast Indep. Sch. Dist., 462 F.2d 960, 974-75 (5th Cir. 1972) (holding that students may not be punished for off-campus distribution of underground newspaper where distribution “was entirely off-campus and was effected only before and after school hours” and was “orderly and polite” with “no disruption actually occur[ing] or . . . reasonably foreseeable under the circumstances”); Klein v. Smith, 635 F. Supp. 1440, 1442 (D. Me. 1986) (holding that suspension of student for making an obscene gesture at teacher off-campus violated student’s First Amendment rights). In *Klein*, the court noted that “[t]he conduct in question occurred in a restaurant parking lot, far removed from any school premises or facilities at a time when teacher Clark was not associated with his duties as a teacher. The

On the other hand, what is *unsatisfying* about this approach is its formalism. *Tinker* was concerned with balancing the rights of student speakers against the right of their fellow students to attend school and receive education in a safe, orderly atmosphere. Activity that is disruptive of the educational function of the school or otherwise violative of the rights of others,³² *Tinker* held, was ineligible for First Amendment protection. Why, then, should it make a difference from where the disruptive influence originates? Some lower courts have concluded that it should not—that geography alone should not dictate whether school officials can regulate the speech. The actual impact, too, should be considered.³³ As we discuss below, this problem can be particularly acute now that advances in technology make it difficult to keep “off-campus” speech, well, *off-campus*.

Even when courts are inclined to think that location matters, they are often unwilling to say that it controls the outcome of particular cases. As Judge Newman put it, “[T]erritoriality is not necessarily a useful concept in determining the limit of [school administrators’] authority. Possibly the traditional standard of the law that holds a person responsible for the natural and reasonably foreseeable consequences of his action might have some pertinent applicability to this issue.”³⁴ In some cases, courts turn to the question of *impact* on the school, in some cases, as a way to avoid the more difficult on-campus/off-campus question. If the speech was not disruptive, then the location question need not be resolved. As we discuss below, this is true of student cyberspeech cases as well.

student was not engaged in any school activity or associated in any way with school premises or his role as a student.” *Klein*, 635 F. Supp. at 1441.

32. Assuming that language in *Tinker* has some independent, judicially enforceable content, which we discuss below.

33. See, e.g., *Boucher v. Sch. Bd. Of the Sch. Dist. of Greenfield*, 134 F.3d 821, 829 (7th Cir. 1998) (applying *Tinker* to determine whether off-campus student speech caused a substantial disruption on school property); *Thomas*, 607 at 1058 n.13 (Newman, C.J., concurring); *Shanley*, 462 F.2d at 974 (declining “to hold that any attempt by a school district to regulate conduct that takes place off the school ground and outside school hours can never pass constitutional muster”); *Baker v. Downey City Bd. Educ.*, 307 F. Supp. 517, 526 (C.D. Cal. 1969) (“[W]hen bounds of decency are violated in publications distributed to high school students, whether on campus or off campus, the offenders become subject to discipline.”).

34. *Thomas*, 607 F.2d at 1058 n.13 (Newman, J., concurring in the result).

2. *What Speech Poses a “Material and Substantial” Disruption to School Operations?*

Focusing on the degree of disruption as a way to avoid the location question, though, may not get a court very far. *Tinker* did not define a “material and substantial” disruption: must it be pervasive, or can it be concentrated within a small group? Can the impact on even one person be materially disruptive? Again the courts differ. The Pennsylvania Supreme Court has upheld the suspension of a student for posting cruel statements about and caricatures of a single teacher, who, as a result, was forced to take medical leave, necessitating the hiring of substitutes to take her classes.³⁵ Other cases have accepted evidence from a superintendent and a principal that the distribution of an underground newspaper caused a material disruption because students were reading and discussing the paper throughout the school day.³⁶ The *Fraser* Court, too, seemed inclined to defer a great deal to the judgment of administrators that Fraser’s speech had caused a material disruption.³⁷

The potential malleability of the material disruption standard renders an impact approach potentially less speech-protective than a geographic approach. How much less protective is hard to know—it depends on how aggressive school officials would be in establishing the threshold for disruption, and how deferential to administrators courts would be. Approving the suspension of a student for a website’s impact on a single teacher, however, as the Pennsylvania Supreme Court did, illustrates that some administrators would be quite willing to set that bar pretty low, and courts will defer to these judgments.

Further, it is not entirely clear that there is any logical stopping point to this power. Granting school authorities the right to control off-campus student expressive activity that caused or was likely to cause a material disruption at school would expand the power of schools. If the impact on a single teacher can be disruptive, then what

35. *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 869 (Pa. 2002) (explaining that the use of substitute teachers to replace the teacher on leave “unquestionably disrupted the delivery of instruction to the students and adversely impacted the education environment”).

36. *Bystrom v. Fridley High Sch.*, 686 F. Supp. 1387, 1392 (D. Minn. 1987), *aff’d* 855 F.2d 855 (8th Cir. 1988).

37. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 678 (1986) (describing reaction to the speech); *id.* at 687 (Brennan, J., concurring in the judgment) (noting that schools have discretion to regulate speech, in part, “to prevent disruption of school educational activities”).

about the impact on a single student? Could schools, for example, demand that students not gossip about one another off-campus if the effects of the gossip were disruptive at school? Could it order students not to read certain books or view certain programs if students are likely to come to school and discuss them, perhaps causing them to neglect their assignments or causing class disturbances?

3. *May Schools Regulate Non-Disruptive, “Low-Value” Speech?*

One way to guard against the possibility that school administrators would use their power to prevent disruption to convert schools into “enclaves of totalitarianism”³⁸ or aggrandize parental powers may lie in differentiating among types of speech. Were students punished for expressing opinions on matters of national import, schools might be held to a higher standard for demonstrating, say, material disruption or interference. Where “low value” speech was at issue, on the other hand, schools might be given more leeway. This might explain the difference in the Court’s attitude toward the Tinkers’ armbands on the one hand and Fraser’s speech on the other. Even Justice Brennan conceded that Fraser’s speech was inappropriate and could be punished by the school.³⁹

Thus, if a student is engaging in speech or expression that lies close to the core of the First Amendment—political speech is the obvious example—schools should be required to prove pervasive and serious disruption to the operation of school activities before being permitted to punish that speech. On the other hand, the farther the speech gets from the First Amendment’s core concerns, the less the school should have to tolerate it, and perhaps the less it must tolerate any attendant disruptions, however minor. Under such an approach, that speech which, like Fraser’s, is inappropriate, somewhat offensive, and that causes some degree of disturbance among the student body should be liable to regulation by administrators—especially given the essentially captive audience upon which the speech will be inflicted. Such low value speech might include, as the school argued in *Morse*, speech that is inconsistent with the school’s educational mission.⁴⁰

This distinction, however, would be difficult to apply prospectively and might offer little predictive value for administrators

38. *Tinker*, 393 U.S. at 511.

39. *Fraser*, 478 U.S. at 690 (Brennan, J., concurring).

40. Brief for Petitioner at 21-24, *Morse v. Frederick*, 127 S. Ct. 2618 (2007) (No. 06-278).

who are faced with a decision whether particular student speech implicates “core” First Amendment values—whatever those might be. The more narrowly defined the core, the less speech protective this approach becomes, and may, like the impact analysis described above, encourage overreaching on the part of administrators whose decisions will usually be given some deference by reviewing courts, even if the deference is not total. The danger of overreaching is especially worrisome if administrators are given the power to silence speech, including political or religious speech, which conflicts with broadly conceived educational missions, like tolerance, peaceful resolution of conflict, non-violence and the like.⁴¹

4. *What “Rights of Other Students” May Schools Protect Through Speech Regulation?*

In the words of one lower court, “[t]he precise scope of *Tinker*’s ‘interference with the rights of others’ language is unclear.”⁴² Although the *Tinker* Court stated that regulation of student speech requires that such speech “substantially interfere with the work of the school or impinge upon the rights of other students,”⁴³ the Court did

41. See, e.g., *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166 (9th Cir. 2006), *vacated*, 127 S. Ct. 1484 (2007) (stating that a school may prohibit a student from wearing an anti-homosexual T-shirt on school grounds). A rather quick look at the ways in which lower courts have manipulated *Fraser* in cases involving student speech on T-shirts provides a glimpse of the inherent difficulties in regulating “low-value” speech. Broadly interpreting the standard in *Fraser*, some lower courts have construed the “plainly offensive” language as justification for school administrators to regulate the offensive content of speech. See *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529-31 (9th Cir. 1992) (defining the *Fraser* standard broadly); see also *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 469 (6th Cir. 2000) (stretching *Fraser* to include not just vulgar and offensive language but also “plainly offensive” language). Other lower courts have narrowly interpreted *Fraser* to permit regulation of only *sexually* offensive language, thereby refusing to permit administrators to regulate student speech involving other types of offensive language. See *Nixon v. N. Local Sch. Dist. Bd. of Educ.*, 383 F. Supp. 2d 965, 971 (S.D. Ohio 2005) (finding that a T-shirt bearing anti-homosexual language is politically offensive, not sexually offensive, and therefore regulation must be analyzed under the *Tinker* rule, as opposed to the *Fraser* rule); see also *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001) (refusing to permit a school to regulate political and religious speech about contentious issues merely because it was offensive); *Castorina v. Madison County Sch. Bd.*, 246 F.3d 536, 540-42 (6th Cir. 2001) (finding *Fraser* factually distinct because it applied only to “lewd and indecent speech,” not speech involving viewpoint, such as a T-shirt bearing a Confederate flag symbol). What these student speech cases show is that while some lower courts continue to use *Fraser*’s “plainly offensive” language to justify broad regulation of student speech, many other lower courts focus on the presence or absence of disruptive impact.

42. *Saxe*, 240 F.3d at 217.

43. *Tinker*, 393 U.S. at 509.

not definitively create a two-prong standard or even state what rights of other students are protected. Lower courts have been left to interpret not only when student speech infringes upon the rights of other students, but also what those other rights include and even whether such an infringement is an independent ground for justifying school regulation.⁴⁴

For example, in *Nixon v. Northern Local School District Board of Education*, a district court ruled that school officials could not prohibit a student from wearing a T-shirt that stated, among other things, “Homosexuality is a sin! Islam is a lie! Abortion is murder!”⁴⁵ Interpreting the *Tinker* standard as a two-prong test and recognizing that “schools can regulate speech that invades the rights of others,”⁴⁶ the court found no authority interpreting what that language actually meant.⁴⁷ Using its own analysis, the district court held that “invading on the rights of other students entails invading on other students’ rights to be secure and to be let alone.”⁴⁸ Because the student speech at issue was, according to the court, a “silent, passive expression of opinion,” it did not threaten the security of other students or prevent them from being left alone.⁴⁹ Therefore, the court found no “collision with the rights of other students”⁵⁰ and refused to permit the school’s regulation of Nixon’s speech.⁵¹

In another case, *Harper v. Poway Unified School District*,⁵² the Ninth Circuit also attempted to define the scope and meaning of the

44. See *Nixon*, 383 F. Supp. 2d at 974 (finding “invading on other students’ rights” to require physical confrontation); see also *Harper*, 445 F.3d at 1177-78 (stating that *Tinker*’s “rights of others prong” includes psychological as well as physical security). In fact, it also appears that lower courts choose to avoid even engaging in deciphering the “rights of other students” language. See *Nixon*, 383 F. Supp. 2d at 974 (finding not one case which relied solely on an “invasion on the rights of others” as justification for regulating student speech).

45. *Nixon*, 383 F. Supp. 2d. at 967.

46. *Id.* at 974.

47. See *id.* (finding not one case which relied solely on an “invasion on the rights of others” as justification for regulating student speech).

48. *Id.*

49. *Id.*

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

51. See *id.*

52. *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166 (9th Cir. 2006), vacated 127 S. Ct. 1484 (2007). For a recent analysis of *Harper*, see Brian Pickard, *Tinkering with the Rights of Others: Harper v. Poway Unified School District*, 8 RUTGERS J.L. & RELIGION 7 (2006).

Tinker test when a student was disciplined for an anti-homosexual message on his T-shirt. In response to a “Day of Silence” held by a student group at the high school to promote tolerance, including tolerance of homosexuals, a student wore a T-shirt to school that read “Be ashamed, our school embraced what God has condemned . . . Homosexuality is shameful ‘Romans 1:27.’”⁵³ After refusing to remove the T-shirt at the request of both a teacher and the principal, Harper was not permitted to return to classes and spent the day doing homework in the school conference room.⁵⁴ Harper was not suspended and no disciplinary record was created, but he filed suit for, *inter alia*, violation of his right to free speech.⁵⁵

In its opinion, the court specifically stated that *Tinker* created two circumstances under which student speech could be curtailed: (1) if the speech “would ‘impinge upon the rights of other students’”⁵⁶ or (2) if the speech “would result in ‘substantial disruption of or material interference with school activities.’”⁵⁷ Upholding the school’s right to discipline Harper, the court focused on the effect Harper’s speech could have on other student’s rights, rather than any actual disruption it might cause to school activities.⁵⁸ Although the plaintiff argued for a narrow interpretation of the *Tinker* “rights of others” language, the Ninth Circuit held that even when a student speaker does not “directly accost individual students with his remarks,”⁵⁹ those remarks can still infringe upon the rights of those students.⁶⁰ According to the court, such infringement can especially occur where the verbal assaults include references to a person’s race, religion, or sexual orientation.⁶¹

53. *Harper*, 445 F.3d at 1171.

54. *Id.* at 1172 (stating that Harper twice requested to be suspended).

55. *Id.* at 1173.

56. *Id.* at 1177 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969)).

57. *Id.* (quoting *Tinker*, 393 U.S. at 514).

58. *See id.* at 1175 (rejecting the district court’s analysis pursuant to “substantial disruption”).

59. *Id.* at 1177-78.

60. *Id.* at 1177. Using similar reasoning to that employed in *Nixon*, the plaintiff in *Harper* argued that “*Tinker*’s reference to the ‘rights of other students’ should be construed narrowly to involve only circumstances in which a student’s right to be free from direct physical confrontation is infringed.” *Id.* According to the plaintiff, absent physical contact, the “rights of other students” standard does not come into play. *Id.* at 1177-78.

61. *See id.* at 1178 (stating that students have a right to freedom from “verbal assaults on the basis of a core identifying characteristic” while at school).

Unlike the “silent, passive”⁶² armbands at issue in *Tinker*, the court found that the anti-gay T-shirt “collid[ed] with the rights of other students’ in the most fundamental way”⁶³ because it targeted students of a minority group and could cause psychological damage, which could interfere with their right to learn.⁶⁴ Finding the scope of *Tinker*’s “interference with the rights of others”⁶⁵ standard to include a right to be secure from such “psychological attacks,”⁶⁶ the court upheld the school’s regulation of the anti-gay expression.⁶⁷

A vigorous dissent argued that the “rights of others” language only entitles students to protection against “assault, defamation, invasion of privacy, extortion, and blackmail.”⁶⁸ The dissent went so far as to accuse the majority of “judicial creation” with “no anchor anywhere in the record or in the law.”⁶⁹

While it is true that the majority opinion did create its own definition of what constitutes an interference with the rights of others,⁷⁰ the same can be said of the dissent—and really of any court attempting to interpret such language. The problem lies not with the lower courts’ varied interpretations, but rather with the lack of guidance that *Tinker* (and the later Court cases) provides on the subject. Until the Supreme Court clarifies what other rights students are entitled to (if any) and also whether an invasion of those rights is an independent justification for limiting student speech, courts will continue to be forced to interpret *Tinker*’s “rights of others” language, and school administrators will continue to be unsure of their ability to regulate student speech. The Supreme Court’s reaction to *Harper*—it granted the petition for certiorari, then

62. *Id.* at 1177 n.16 (citing *Tinker*, 393 U.S. at 508).

63. *Id.* at 1178 (quoting *Tinker*, 393 U.S. at 508).

64. *Id.* at 1178-79 (finding that such speech could be “detrimental not only to [students’] psychological health and well-being, but also to their educational development.”). The court specifically distinguished the armbands in *Tinker*, finding that they did not “collid[e] with the rights of other students to be secure and to be let alone.” *Id.* at 1177 (quoting *Tinker*, 393 U.S. at 508).

65. *Id.* at 1178.

66. *Id.*

67. *Id.* at 1183.

68. *Id.* at 1198 (Kozinski, J., dissenting).

69. *Id.* at 1201. The dissent was also dissatisfied with the lack of evidence of psychological damage and the majority’s classification of homosexuals as a minority group. *Id.* at 1199-1201.

70. *Tinker*, 393 U.S. at 514.

vacated judgment, depriving the case of precedential value—strongly suggested that it was in no hurry to provide that guidance.⁷¹

5. *What Does Kuhlmeier Mean for Student Speech Cases?*

In *Kuhlmeier*, the Court declined to apply *Tinker* to a principal's decision to spike two stories slated to appear in the school newspaper.⁷² As the Court saw it, "[t]he 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."⁷³ Justice White, writing for the Court, began with a characterization of the school newspaper as a non-public forum.⁷⁴ The question was whether "school authorities have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public' or by some segment of the public, such as student organizations."⁷⁵ If not, then there is no public forum "and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community."⁷⁶ After reviewing the context in which the newspaper was produced, i.e., as part of a journalism class at the school, as well as the process of editorial approval, Justice White concluded that there was no public forum created and that "school officials were entitled to regulate the contents of [the newspaper] in any reasonable manner."⁷⁷ The Court concluded that the spiking of the stories was reasonable under the circumstances.⁷⁸

The opinion repeatedly stressed the connection between the newspaper and the journalism class of which it was a part. The question here, Justice White wrote, "concern[ed] educators' authority over school-sponsored publications, theatrical productions, and other

71. See *Harper v. Poway Unified Sch. Dist.*, 127 S. Ct. 1484 (2007).

72. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). For a thorough treatment of *Kuhlmeier* and school-sponsored speech, see Emily Gold Waldman, *Returning to Hazelwood's Core: A New Approach to Restrictions on School-Sponsored Speech*, 60 FLA. L. REV. 63 (2008).

73. *Id.* at 270-71.

74. *Id.* at 270.

75. *Id.* at 267 (citing and quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 46 n.7, 47 (1983)).

76. *Id.* (citing *Perry*, 460 U.S. at 46 n.7).

77. *Id.* at 270.

78. See *id.* at 274-76.

expressive activities” that might be seen as school-sponsored.⁷⁹ The test seemed to be whether the expressive activities “may fairly be characterized as part of the school curriculum” and conceded that while they need not “occur in a traditional classroom setting,” they must be “supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.”⁸⁰

Educators may exercise more control over this expressive activity “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.”⁸¹ The school as publisher or producer, Justice White continued, may “disassociate itself” from disruptive speech, as well as “speech that is . . . ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences,”⁸² including refusal to “sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex,” and the like.⁸³ Schools are entitled to set high standards for “student speech . . . disseminated under its auspices” and those standards may be higher than that of the “real world,” according to Justice White.⁸⁴

Tinker, Justice White concluded, simply did not furnish the appropriate analytical framework “for determining when a school may refuse to lend its name and resources to the dissemination of student expression.”⁸⁵ Finally, warning against the dangers of judicialization of the area, Justice White ended by saying that “only when the decision to censor a school-sponsored publication, theatrical production, or other vehicle of student expression has no valid educational purpose” does the First Amendment require judicial intervention.⁸⁶

Kuhlmeier was the Court’s last word on student speech, and its most confusing. The school district’s argument in *Morse*

79. *Id.* at 271.

80. *Id.*

81. *Id.*

82. *Id.* (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986)).

83. *Id.* at 272.

84. *Id.*

85. *Id.* at 272-73.

86. *Id.* at 273.

demonstrated that a broad reading of *Kuhlmeier* would give administrators wide latitude to regulate speech that is at odds with or that undermines curricular goals of the school. There are two problems with that reading of *Kuhlmeier*. First, as the Court makes clear, what constitutes a school's curriculum is not circumscribed by physical location. School-sponsored activities need not take place in the classroom or even on school property, as long as there is some faculty supervision and the activity is designed to impart knowledge or skill to students.⁸⁷ Second, while the Court mentioned some fairly easy cases in which schools could regulate students' speech—athletic contests, publications, field trips, and theatrical productions—there are no clear criteria offered for distinguishing that expression which schools may regulate under this framework and that which fall outside it. It is possible that *Kuhlmeier* was written more broadly than necessary. If it truly was a public-forum case, then once it was established that the newspaper was a non-public forum and the spiking of the stories reasonable, there was nothing more to say.

But *Kuhlmeier*'s mischievous potential is illustrated by the school's argument in *Morse*. At bottom, the school's position was that Frederick's banner conflicted with its school-sponsored aim of discouraging illegal drug use among its students.⁸⁸ Frederick used the Olympic Relay, the argument runs, to display his banner precisely because he knew that the presence of a large crowd, facilitated by the school dismissal to watch the Relay, virtually guaranteed that the banner would garner publicity.⁸⁹ The school further argued that those seeing the banner might erroneously associate the message on the banner with the school itself, further hindering the school's anti-drug aims.⁹⁰ At least one commentator has endorsed a similar use of *Kuhlmeier*, arguing that it might do less damage to in-school student speech rights than, say, explicitly endorsing a *Fraser* "exception" to *Tinker* for low-value speech.⁹¹

87. *Id.* at 271.

88. See Brief for Petitioner, *supra* note 40, at 25-30.

89. *Id.* at 31-32.

90. *Id.* at 32-34.

91. Murad Hussain, *The "Bong" Show: Viewing Frederick's Publicity Stunt Through Kuhlmeier's Lens*, 116 YALE L.J. POCKET PART 292, 292 (2007) ("This Commentary suggests that the Court could endorse the power to punish students who turn school events into their personal public soapboxes without also letting schools suppress certain messages regardless of context.").

III. *Morse v. Frederick* and Its Implications for Student Speech

In this Part, we describe *Morse* and its likely impact on student speech. We first discuss the opinion itself and whether *Morse* answered any of the questions left open by the *Tinker* trilogy. We include some observations on what *Morse* might mean for student speech rights generally, before turning, in Part IV, to the specific question of school regulation of online student speech.

A. The Opinions

The majority opinion, written by Chief Justice Roberts, opened its analysis with an emphatic rejection of “Frederick’s argument that this is not a school speech case,” citing the facts that it was held during school hours, was sanctioned as a school-approved social event or trip, that teachers supervised students observing the Relay, and that “[t]he high school band and cheerleaders performed.”⁹² The Chief Justice characterized the Olympic Torch Relay as “a school-sanctioned and school-supervised event,” to which school conduct rules applied,⁹³ and thus avoided the “uncertainty at the outer boundaries as to when courts should apply school-speech precedents.”⁹⁴

Next, the Court endorsed the principal’s interpretation of Frederick’s banner, i.e., that it advocated or endorsed illegal drug use, contrary to school policies.⁹⁵ Advocacy could be inferred, Chief Justice Roberts wrote, either by “interpret[ing the banner] as an imperative: ‘Take bong hits,’” or by “view[ing the banner] as celebrating drug use—‘bong hits are a good thing,’ or ‘we take bong hits.’”⁹⁶ The Court saw no difference between “celebrating illegal drug use in the midst of fellow students and outright advocacy or

92. *Morse v. Frederick*, 127 S. Ct. 2618, 2624 (2007). For commentary on *Morse*, see generally Symposium, *Speech and the Public Schools After Morse v. Frederick*, 12 LEWIS & CLARK L. REV. 1 (2008); Joanna Nairn, Recent Development, *Free Speech 4 Students? Morse v. Frederick and the Inculcation of Values in Schools*, 43 HARV. C.R.-C.L. L. REV. 239 (2008).

93. *Id.* at 2622.

94. *Id.* at 2624.

95. *Id.* at 2624-25 (“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.”).

96. *Id.* at 2625 (internal brackets omitted).

promotion.”⁹⁷ Frederick’s (and the dissenting Justices’) subsequent characterization of the banner’s message as nonsensical or silly was dismissed: “Gibberish is surely a possible interpretation of the words on the banner, but it is not the only one, and dismissing the banner as meaningless ignores its undeniable reference to illegal drugs.”⁹⁸ In either case, however, the Court pointed out that the banner did not “convey[] any sort of political or religious message” nor was it part of a “political debate over the criminalization of drug use or possession.”⁹⁹

Having thus narrowed the question, the majority then turned to its student speech precedents. Not surprisingly, in light of Roberts’s professed interest in minimalism, there was no sweeping reinterpretation of them. Yes, the Court acknowledged, *Tinker* held that mere anticipation of disorder was not sufficient to ban student speech in school, at least where the speech was silent, passive, and not disruptive.¹⁰⁰ But, it added, “[t]he essential facts of *Tinker* are quite stark, implicating concerns at the heart of the First Amendment.”¹⁰¹

Further, the Court wrote that *Fraser* “established that the mode of analysis set forth in *Tinker* is not absolute,”¹⁰² though “[t]he mode of analysis employed in *Fraser* is not entirely clear.”¹⁰³ The *Fraser* Court did take into account the content of Fraser’s speech as well as the fact that it was made in a school assembly.¹⁰⁴ Without definitely reconciling the two cases, Chief Justice Roberts argued that two points could, at a minimum, be taken away from *Fraser*: (1) students do not have the same free speech rights as adults and can be punished for speech in school that the state could not lawfully punish elsewhere;¹⁰⁵ and (2) “disruption” was not the constitutional *sine qua non* for punishing student speech.¹⁰⁶ “Whatever approach *Fraser*

97. *Id.*

98. *Id.* It may be that Frederick just hoped to be shown on television, but, as the Court wrote, “[T]hat is a description of Frederick’s *motive* for displaying the banner; it is not an interpretation of what the banner says.” *Id.*

99. *Id.*

100. *See id.* at 2625-26.

101. *Id.* at 2626.

102. *Id.* at 2627.

103. *Id.* at 2626.

104. *Id.*

105. *Id.*

106. *Id.* at 2627.

employed, it certainly did not conduct the ‘substantial disruption’ analysis prescribed by *Tinker*”¹⁰⁷

Finally, while it “[did] not control this case,” the Court found *Kuhlmeier* “instructive” because it acknowledged “that schools may regulate some speech” the government would not be permitted to regulate outside of school.¹⁰⁸ “And, like *Fraser*, it confirms that the rule of *Tinker* is not the only basis for restricting student speech.”¹⁰⁹

Relying in part on its cases creating exceptions to the Fourth Amendment requirement of probable cause in public school search and seizure cases,¹¹⁰ the majority proceeded to recognize, in essence, a “special needs” exception permitting school officials to prohibit student speech that encouraged or celebrated illegal drug use.¹¹¹ Both the special circumstances of the public school environment as well as the “‘important—indeed, perhaps compelling’ interest” in “detering drug use by schoolchildren” supported such an exception.¹¹² Given the amount of resources devoted to discouraging drug use among teens and pre-teens, “[s]tudent 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.”¹¹³

But the majority refused to endorse the broader rule urged by the school district—that schools be allowed to punish student expression deemed “offensive.” The majority held that interpretation

107. *Id.* We think that this is debatable.

108. *Id.* (“*Kuhlmeier* does not control this case because no one would reasonably believe that Frederick’s banner bore the school’s imprimatur.”).

109. *Id.*

110. *See* Bd. of Educ. v. Earls, 536 U.S. 822 (2002) (permitting mandatory testing for all students participating in extracurricular activities); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (permitting mandatory drug testing of student athletes); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (easing search requirements for searches conducted of public school students on school grounds).

111. *Morse*, 127 S. Ct. at 2629 (“The ‘special characteristics of the school environment’ . . . and the governmental interest in stopping student drug abuse—reflected in the policies of Congress and myriad school boards, including [Juneau-Douglas High School]—allow schools to restrict student expression that they reasonably regard as promoting illegal drug use.”).

112. *Id.* at 2628 (quoting *Vernonia*, 515 U.S. at 661). The Court pointed out that drug use among students is still a problem, “Congress has declared that a part of a school’s job is educating students about the dangers of illegal drug use,” and that “[t]housands of school boards throughout the country . . . have adopted policies aimed at effectuating this message” to support its “compelling interest” claim. *Id.*

113. *Id.*

“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.”¹¹⁴ Frederick could be punished only because his speech “was reasonably viewed as promoting illegal drug use.”¹¹⁵

Justice Alito, with Justice Kennedy, joined the Court’s opinion, but wrote separately to emphasize the narrowness of the majority’s holding.¹¹⁶ Specifically, he read the majority opinion as “provid[ing] 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.”¹¹⁷ He went on to explain that, in his view, *Morse* should not be read as authorizing additional restrictions on student speech other than those the Court’s cases have already recognized,¹¹⁸ and certainly not as any warrant to censor student speech “that interferes with a school’s ‘educational mission.’”¹¹⁹

114. *Id.* at 2629.

115. *Id.*

116. *Id.* at 2636 (Alito, J., concurring). Justice Thomas concurred too, and wrote separately to air his view that *Tinker* was wrongly decided, should be overruled, and that history does not support granting public school students *any* First Amendment rights. *Id.* (Thomas, J., concurring). He wrote:

I join the Court’s opinion because it erodes *Tinker*’s hold in the realm of student speech, even though it does so by adding to the patchwork of exceptions to the *Tinker* standard. I think the better approach is to dispense with *Tinker* altogether, and given the opportunity, I would do so.

Id. at 2636.

117. *Id.* (Alito, J., concurring) (internal quotation marks omitted).

118. *Id.* at 2637.

119. *Id.* (citation omitted). Adopting a more libertarian tone than that of the majority’s opinion, Justice Alito pointed out how little meaningful opportunity parents have to influence the content of a public school’s educational mission, and how few meaningful alternatives parents have to public schools in general. *Id.* Thus, “[t]he ‘educational mission’ of the public schools” could include “the inculcation of whatever political and social views are held by [elected and appointed public officials].” *Id.* That could “give public school authorities a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed.” *Id.* “The argument, therefore, strikes at the very heart of the First Amendment.” *Id.* He added that “[i]t is a dangerous fiction to pretend that parents simply delegate their authority—including their authority to determine what their children may say and hear—to public school authorities” and that “[i]t is even more dangerous to assume that such a delegation of authority somehow strips public school authorities of their status as agents of the State.” *Id.*

Justice Alito justified altering free speech rules with regard to drugs by reference to the school's duty to protect students in its charge from physical harm, which he considered a "special characteristic of the school setting."¹²⁰ Because compulsory school attendance forces students into the custody of the state, away from their parents' ability to "monitor and exercise control over the persons with whom their children associate,"¹²¹ and potentially exposes children to "other students who may do them harm,"¹²² schools have a special responsibility (and ability) to restrict speech that "presents a threat of violence,"¹²³ despite restrictions on incitement present outside public schools.¹²⁴ "Speech advocating illegal drug use," he argued, "poses a threat to student safety that is just as serious, if not always as immediately obvious."¹²⁵ Schools may punish "speech advocating illegal drug use," but, he added, "I regard such regulation as standing at the far reaches of what the First Amendment permits."¹²⁶

Justice Stevens's dissent actually conceded a good deal to the majority, including the proposition that students' speech rights at school are not coextensive with adults' rights,¹²⁷ and that deterring drug use is important.¹²⁸ He even accepted *arguendo* that deterring drug use supported school restrictions "on any assembly or public expression that . . . advocates the use of any substances that are illegal to minors"¹²⁹ and was willing to relax both the First Amendment's usual hostility to viewpoint discrimination and its requirement of imminence to punish incitement in such cases.¹³⁰ In his opinion,

120. *Id.* at 2638.

121. *Id.*

122. *Id.*

123. *Id.*

124. *See, e.g.,* *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (*per curiam*).

125. *Morse*, 127 S. Ct. at 2638 (Alito, J., concurring).

126. *Id.*

127. *Id.* at 2643 (Stevens, J., dissenting). But, even though he conceded this point, Justice Stevens repeatedly cites non-school speech cases and criticizes what he saw as inconsistencies between the majority's opinion and the other cases.

128. *Id.*

129. *Id.* at 2646 (alteration in original) (internal quotation marks omitted).

130. *Id.*

however, Frederick's intent in displaying his banner should control the interpretation, not an observer's subjective understanding.¹³¹

Lacking evidence that the banner was disruptive or "infringed on anyone's rights,"¹³² Justice Stevens wrote that the school, at a minimum, should have been required to show "that Frederick's supposed advocacy stands a meaningful chance of making otherwise-abstemious students try marijuana."¹³³ He criticized the majority for either—he says it is not clear which it did—deferring to the interpretation of Principal Morse or for making an independent judgment about the banner's meaning. The first approach "would permit a listener's perceptions to determine which speech deserved constitutional protection," an approach he argued was "alien to our case law."¹³⁴ As for the Court's conclusion that the banner was objectively intended to celebrate or encourage drug use, that conclusion, he argued, "practically refutes itself."¹³⁵ Because Frederick had no intent to encourage anyone to do anything, it is impossible to impute to him an intention to endorse marijuana use among his peers.¹³⁶

Justice Stevens accused the majority of employing a "ham-handed, categorical approach" that was "deaf to the constitutional imperative to permit unfettered debate, even among high-school students."¹³⁷ He worried that the majority's decision would have a chilling effect on debate among students, who might reasonably worry that their words would be misunderstood by administrators.¹³⁸ He also wondered whether "illegal drugs" included alcohol, and whether "the First Amendment [must] 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."¹³⁹

131. *Id.* ("[I]t 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.")

132. *Id.* at 2647. Though he does not pursue it, Justice Stevens questioned whether this really was school speech. *Id.* at 2647 n.2.

133. *Id.*

134. *Id.* at 2647-48.

135. *Id.* at 2649.

136. *Id.* ("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.")

137. *Id.*

138. *Id.* at 2650.

139. *Id.*

B. Student Speech After *Morse*

In this section, we take up two questions. First, did *Morse* answer any of the questions left open by the *Tinker* trilogy? Second, what does *Morse* mean for the scope of students' free speech rights generally? In Part IV, we will begin to focus specifically on these questions as they relate to cyberspeech controversies.

1. Clarifying the *Tinker* Trilogy?

Unfortunately, *Morse* did not require the Court to answer the most vexing questions in this area. Specifically, the Court did not question whether releasing the students to watch the Torch Relay—a corporate-sponsored, private event—was a school activity akin to a field trip, so that the school's disciplinary rules applied.¹⁴⁰ Thus the Court had no occasion to clarify the limits of school administrators' authority to regulate off-campus speech.

Further, the Court's apparent creation of a categorical "advocacy of drug use" exception to the First Amendment for public school students obviated the need to address whether *Tinker* requires schools to demonstrate "widespread disruption" before punishing students for their speech. Instead, the majority made clear that *Fraser*, *Kuhlmeier*, and now *Morse* constitute "exceptions" to, not applications of, *Tinker*. This was clear as to *Kuhlmeier*, but it was not as clear as to *Fraser*, as we explain below.¹⁴¹

Finally, since it did not apply *Tinker*, there was no need to address whether the cryptic reference to speech that collides "with the rights of others"¹⁴² offered an alternative to the "widespread disruption" standard elsewhere discussed in the opinion. However, the speed with which the Court vacated the Ninth Circuit's decision in *Harper* at least suggests that the Court was not anxious to either take that question up itself or permit the broad language of the Ninth Circuit's opinion to serve as precedent for other courts.

So much for what *Morse* did not do. What it did clarify was the relationship between *Tinker* on the one hand, and cases like *Fraser*

140. *Id.* at 2622 (majority opinion). At oral argument there was much debate regarding whether the Torch Relay constituted a school-sponsored event. See Transcript of Oral Argument, *supra* note 10, at 45-58. However, the majority opinion acknowledged the debate and established early on that the Torch Relay was, in fact, a school-sponsored event, similar to a field trip. *Morse*, 127 S. Ct. at 2622.

141. Nairn, *supra* note 92, at 239 (agreeing that "the Court opted to fashion merely another exception to *Tinker*").

142. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512-13 (1969).

and *Kuhlmeier* on the other. It is now clear that, with *Morse*, these three cases form categorical exceptions to whatever free speech rights students have. *Kuhlmeier* did not apply, according to the majority, because no one would have thought Frederick's banner to have the imprimatur of the school.¹⁴³ As noted above, *Kuhlmeier* was self-conscious about its rejection of *Tinker*'s framework. It is less clear, however, that *Fraser* was conceived of as an exception, and the Court's characterization of it as an "alternative" mode of analysis is somewhat tendentious. The *Morse* majority's support for holding *Fraser* apart from *Tinker* is a footnote in *Kuhlmeier*, in which Justice White wrote, "The decision in *Fraser* rested on the 'vulgar,' 'lewd,' and 'plainly offensive' character of a speech delivered at an official school assembly rather than on any propensity of the speech to 'materially disrupt classwork or involv[e] substantial disorder or invasion of the rights of others.'"¹⁴⁴

But *Fraser* could easily be read as an application of *Tinker*¹⁴⁵ and there was evidence that is what the Court was doing, at least in part—why else would the Court have discussed the extent to which *Fraser*'s speech caused disruption both at the assembly and in classes afterward?¹⁴⁶ Justice Brennan referred to the school's legitimate interest in ensuring that the assembly proceeds in an "orderly manner."¹⁴⁷ Justice Marshall's dissent, moreover, was premised on the belief that there *was* no widespread disruption.¹⁴⁸ In any event,

143. *Morse*, 127 S. Ct. at 2627.

144. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 n.4 (1988) (alteration in original) (quoting *Tinker*, 393 U.S. at 513).

145. Lower courts have often interpreted the *Fraser* opinion as carving out a distinct realm of student speech over which schools have a broad authority to regulate. See, e.g., *Guiles ex rel. Guiles v. Marineau*, 461 F.3d 320, 325 (2d Cir. 2006) (stating that under *Fraser* "schools have wide discretion to prohibit speech that is less than obscene—to wit, vulgar, lewd, indecent, or plainly offensive"); *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 468 (6th Cir. 2000) (upholding the school's right to categorically prohibit "offensive speech" as stated in *Fraser*); *Baxter v. Vigo County Sch. Corp.*, 26 F.3d 728, 737-38 (7th Cir. 1994) (stating that *Fraser* gives school's "the authority to determine that vulgar and lewd speech . . . would undermine the school's basic educational mission"); *Smith v. Mount Pleasant Pub. Sch.*, 285 F. Supp. 2d 987, 994 (E.D. Mich. 2003) (finding that *Fraser* permits a school broad leeway to "prohibit lewd or vulgar, viewpoint neutral language when such language undermines the school's basic educational mission"). However, we argue that the *Fraser* Court actually applied the *Tinker* standard, providing an example of what constitutes a material disruption, justifying school regulation. See *Fraser*, 478 U.S. at 678.

146. See *Fraser*, 478 U.S. at 678 (discussing the disruption).

147. *Id.* at 689 (Brennan, J., concurring in the judgment).

148. *Id.* at 690 (Marshall, J., dissenting).

since *Kuhlmeier* declined to apply *Tinker* at all, the Court’s observations about the relationship of *Fraser* to *Tinker* are dicta. At the very least, they hardly represented thorough consideration of the question, and *Morse* should have justified its conclusion independently, instead of by rote citation.

Even as the Court clarified *Fraser’s* status as recognizing a categorical exception, the Court did not shed much light on its scope. The Court merely acknowledged that *Fraser* considered both the content and the fact *Fraser’s* speech was delivered at a school assembly,¹⁴⁹ but, later in the *Morse* opinion, refused to read *Fraser* as authorizing discipline for “offensive” speech, broadly conceived.¹⁵⁰ The majority’s description of *Fraser*, however, suggests that it might read *Fraser* as permitting schools to punish sexually suggestive or sexually explicit speech, at least in a classroom or a school assembly setting.¹⁵¹

In sum, after *Morse*, we think student speech rights can be pictured as follows:

Student Speech after *Morse v. Frederick*

Unprotected	Protected
<ul style="list-style-type: none"> • On-campus speech causing widespread disruption • Sexually suggestive or sexually explicit speech in classes or in school assemblies • Speech bearing the school’s imprimatur from which the school wishes to disassociate itself • On-campus speech advocating or celebrating the use of illegal drugs 	<ul style="list-style-type: none"> • Otherwise protected speech made off school grounds and not part of school activity or otherwise bearing the school’s imprimatur • Non-disruptive, on-campus speech not otherwise unprotected (including speech administrators merely find offensive)

149. *Morse v. Frederick*, 127 S. Ct. 2618, 2626-27 (2007).

150. *Id.* at 2629.

151. *Id.* at 2626 (quoting *Fraser’s* characterization of the speech as “an elaborate, graphic, and explicit sexual metaphor” and “offensively lewd and indecent,” then contrasting “the sexual content” of *Fraser’s* speech with the “political ‘message’ of the armbands in *Tinker*”).

2. *Further Observations on Morse*

More so than in previous student speech cases, the majority (and the dissent) are explicit that the rights of public school students at school are different than either those of adults or those of students not on school property.¹⁵² When coupled with many of the Justices' sympathy for the plight of teachers and administrators who must attempt to maintain a safe and orderly learning environment for students in their care,¹⁵³ the overall tone of the opinion is one of deference to those administrators "on the ground" who must make quick decisions when confronted with certain student expression.¹⁵⁴ This may encourage lower courts to be deferential as well; or at least signal approval to those who have deferred to administrators in close cases.

What might be called the "categorization" of student speech, confirmed in *Morse*, is an interesting development. As critics have noted, the process of excluding entire categories of speech from First Amendment protection because of their content sits uneasily beside the tendency of the Court to treat content-based restrictions of speech as presumptively unconstitutional, absent proof of a compelling governmental interest and narrow tailoring.¹⁵⁵ *Morse*

152. *Id.* at 2622, 2624. The majority opinion clearly states that a student's free speech rights are not "automatically coextensive" with adults' rights. *Id.* at 2622. In addition, although the Court finds the Torch Relay to constitute a school-sponsored event, the Court also recognizes that "[t]here is some uncertainty at the outer boundaries as to when courts should apply school-speech precedents" to speech occurring off-campus and at non-school-related activities. *Id.* at 2624. In a nod to the majority, the dissent also recognizes "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.'" *Id.* at 2646 (Stevens, J., dissenting) (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995)). The dissent also acknowledged the limits of a school to regulate student speech occurring off-campus; however, the dissent found the characterization of the Torch Relay as a school-sponsored event to be questionable at best. *See id.* at 2647 n.2.

153. *See id.* at 2629 (majority opinion) (holding that the principal had "to decide to act—or not act—on the spot" and that a failure to act could "send a powerful message to students in her charge" about the school's drug policy); *id.* at 2640 (Breyer, J., concurring in the judgment in part and dissenting in part) (stating that by their very nature, students will test the limits of school discipline and that administrators "need a degree of flexible authority to respond to [those] disciplinary challenges").

154. The only dissonant note is found in Justice Alito's opinion, which warns against forgetting that school administrators are not their students' biological parents and are, in fact, agents of the state. *Id.* at 2637-38 (Alito, J., concurring).

155. *See* Jerry C. Chiang, *Plainly Offensive Babel: An Analytical Framework for Regulating Plainly Offensive Speech in Public Schools*, 82 WASH. L. REV. 403, 409-10 (2007) (providing three factors by which to categorize student speech and determine whether or not it may be lawfully regulated by the school); Christopher M. Fairman, *Fuck*,

compounds the problem by creating a *viewpoint-based* exception, not merely a content-based one: Only speech that encourages or celebrates the use of illegal drugs is punished; speech that denigrates drug use (“BONG HiTS R 4 LOSERS”?) is presumably permissible.

Excluding entire categories of speech has been justified either by concluding the speech in question was remote from the real concerns of the First Amendment¹⁵⁶ or that the consequences of permitting such speech was inimical to the good order of society.¹⁵⁷ Admittedly, the Court has not exactly been thorough in its justifications of categorical exclusions, but it did feel compelled to make them. *Morse’s* explanation was equally cursory. Chief Justice Roberts seemed content to argue that schools and drugs are different, citing the Court’s readiness to create a similar exception to the Fourth Amendment in its drug search and drug testing jurisprudence, as well as the attention (and funds) that Congress has lavished on fighting

28 CARDOZO L. REV. 1711, 1762 (2007) (dividing school speech into three categories: “Tinker-type, Fraser-type, and Kuhlmeier-type”); O. Lee Reed, *Is Commercial Speech Really Less Valuable Than Political Speech? On Replacing Values and Categories in First Amendment Jurisprudence*, 34 AM. BUS. L.J. 1, 3-14 (1996) (providing historical analysis and reasoning surrounding free speech jurisprudence and its categorical exceptions); Jeffrey M. Shaman, *The Theory of Low-Value Speech*, 48 SMU L. REV. 297, 298 (1995) (discussing why the Supreme Court has held that “some kinds of speech have less value than others”); R. Scott Shieldes, Comment, *Suturing Discourses Within the First Amendment*, 34 HOUS. L. REV. 1531, 1533-51 (1998) (providing a road map of the current categorical exclusions in the First Amendment pertaining to speech). Compare Edward J. Eberle, *Hate Speech, Offensive Speech, and Public Discourse in America*, 29 WAKE FOREST L. REV. 1135, 1212-13 (1994) (concluding that the government should refrain from regulating categories of speech at all and instead focus on the conduct underlying the speech in order to find justification for punishment).

156. See *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982); *New York v. Ferber*, 458 U.S. 747 (1982); *Miller v. California*, 413 U.S. 15 (1973); *Cohen v. California*, 403 U.S. 15, 20 (1971); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); see also Fairman, *supra* note 155, at 1731-32 (discussing the history of regulating speech falling outside the protection of the First Amendment); Richard Salgado, *Protecting Student Speech Rights While Increasing School Safety: School Jurisdiction and the Search for Warning Signs in a Post-Columbine/Red Lake Environment*, 2005 BYU L. REV. 1371, 1385-86 (2005) (providing reasoning and support for the categories of speech unprotected by the First Amendment).

157. See *Virginia v. Black*, 538 U.S. 343, 359-60 (2003) (reaffirming that “true threats” do not receive free speech protection under the First Amendment); *Roth v. United States*, 354 U.S. 476, 484 (1957) (finding obscenity “utterly without redeeming social importance”); *Wisconsin v. Mitchell*, 508 U.S. 476, 487-88 (1993) (upholding sentence enhancements for “hate crimes”). See also *Schenck v. Pro-Choice Network of Western N.Y.*, 519 U.S. 357, 373 (1997); *Madsen v. Women’s Health Center, Inc.*, 512 U.S. 753, 774 (1994); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992).

drug abuse in schools.¹⁵⁸ Only Justice Alito seemed to feel that more was necessary. An exception was justified, according to him, because drugs posed a real, physical danger to students; and that prevention of physical harm to students in its charge was the prime directive of public schools.¹⁵⁹

Justice Alito's analogy seems to us more important than the portions of his opinion attempting to limit the majority's holding. As Justices Breyer and Stevens (as well as early commentators) noted,¹⁶⁰ the majority's exception is, by itself, not easily cabined. First, Juneau's policy encompassed "illegal substances," which would include, for minors, alcohol and tobacco. Whatever arguments there may be for treating *all* drugs equally, right off the bat the majority's opinion would sanction a school policy banning, for example, clothing with the brands of alcohol or tobacco manufacturers on them, if having such logos on clothing could be deemed "endorsement" or "celebration" of either alcohol or tobacco.¹⁶¹

158. Some would say that this is simply further evidence of the warping effect the "war on drugs" has had on constitutional doctrine. See *Gonzales v. Raich*, 545 U.S. 1 (2005) (concluding that application of Controlled Substance Act to local, non-commercial production and possession of marijuana pursuant to state law permitting production and possession for medicinal purposes did not exceed congressional power under the Commerce Clause); Jonathan H. Adler, *Is Morrison Dead? Assessing a Supreme Drug (Law) Overdose*, 9 LEWIS & CLARK L. REV. 751 (2005); Ilya Somin, *Gonzales v. Raich: Federalism as a Casualty of the War on Drugs*, 15 CORNELL J.L. & PUB. POL'Y 507, 508 (2006) (calling the *Raich* decision a "watershed moment in the development of judicial federalism").

159. *Morse*, 127 S. Ct. at 2638 (Alito, J., concurring). *But see* Nairn, *supra* note 92, at 252 (arguing that the Court "failed to sufficiently distinguish drug abuse from other purported dangers to students").

160. Justice Breyer finds holes in the majority's reasoning, stating that "it is unclear how far the Court's rule regarding drug advocacy extends." *Morse*, 127 S. Ct. at 2639 (Breyer, J., concurring in the judgment in part and dissenting in part) ("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 other, more expressly political, content?"). The dissent also finds fault with "the breathtaking sweep of [the majority's] opinion" and suggests that under the Court's reasoning, a student could be punished for "mentioning beer, or indeed anything else that might be deemed risky to teenagers." *Id.* at 2650 (Stevens, J., dissenting) (punctuation altered).

161. Denning's own high school, Apollo High School, in Owensboro, Kentucky, had such a policy banning "alcohol-themed" clothing, which worked a hardship on students during the heyday of Bud Lite's "Spuds McKenzie" marketing campaign. The irony was that Apollo High School itself used, as its mascot, the Anheuser-Busch "A" with an eagle. Denning distinctly remembers his second-grade class writing letters to Anheuser-Busch on behalf of AHS for permission to use its logo. The irony of this was lost on the Assistant Principal charged with enforcing the dress code.

Justice Alito's resort to analogy could further encourage a broad reading of *Morse*. If it is true that one of schools' primary functions is to keep students safe from physical harm while outside their parents' care, then all manner of speech encouraging or celebrating activities that are physically dangerous—from driving fast to having sex—is potentially the subject of a similar categorical exclusion. Justice Alito's concern with physical safety could ratify schools' overreactions—spurred by events at Columbine High School and Virginia Tech—to perceived threats of violence to other students or to the school in general. Currently, the Court has announced that to be excluded from First Amendment protection, a threat must be a “true” threat, made with the intent to put another in fear of being the subject of violence.¹⁶² One could easily imagine schools relaxing this requirement in light of Justice Alito's concurring opinion. As we note below, this has important consequences for the regulation of student Internet speech, given the rising concern over so-called “cyberbullying” among school-age children.

The gradual expansion of these categories is made all the more likely by *Morse*'s strong indications that school officials should be given the benefit of the doubt by courts.¹⁶³ Solicitude for administrators having to make split-second decisions on the spot is probably better expressed by granting them qualified immunity than by immunizing their decisions from First Amendment review altogether. But the deferential tone of the Court's opinion might encourage lower courts to do likewise, resulting in more room for administrators to suppress speech not to their liking.

While much of the above is speculation, we are certain of one thing: after *Morse*'s synthesis of the Court's school speech cases, school administrators will have multiple bites at the apple when it comes to suppressing student speech.¹⁶⁴ First, they can argue that

162. *Black*, 538 U.S. at 359 (“True threats’ encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”).

163. See *Morse*, 127 S. Ct. at 2629 (recognizing the difficult and important role that a principal plays and finding the principal's actions in this case “reasonable”); *id.* at 2639 (Breyer, J., concurring in the judgment in part and dissenting in part) (recognizing that a teacher or principal probably knows best “when a student has gone too far”); Nairn, *supra* note 92, at 255 (arguing that *Morse* will be difficult to limit because it “defers to school officials’ reasonable determinations of what constitutes prohibitable speech”).

164. For a similar assessment, see Nairn, *supra* note 92, at 239 (predicting that despite “the Court's apparent confidence in the limited scope of its ruling” *Morse* was “likely to significantly increase the ability of schools to impose content-based restrictions on student speech”).

student speech fits within one of the three excluded categories; failing that, they can fall back on *Tinker*'s "widespread disruption" justification. Further, though it has not yet born much fruit, suppressing speech to protect the "rights of other students" remains a wild card in this area.

IV. *Morse* and the Regulation of Student Cyberspeech

Morse may have the most significance for a subject that it did not even discuss, at least not directly: the ability of schools to monitor and discipline online speech. This Part describes the recent proliferation of controversies over student cyberspeech, schools' reactions to it, and includes a survey of the reported lower court cases on the subject. Here the pressing questions are whether schools may punish students for off-campus speech and whether cyberspeech having effects inside the school is subject to the school's jurisdiction. Finally, we ask what, if any, light *Morse* shines on issues particular to student cyberspeech cases.

A. Cyberspace: The New Frontier for Student Speech Cases

The technological savvy of school-age students (and some adults' corresponding lack thereof), the proliferation of social networking sites such as MySpace and Facebook, hardware like camera phones with web access and text messaging capabilities, and the peculiar features of online communication¹⁶⁵ have combined to produce an entirely new set of concerns for students, parents, and school administrators. The concern over child predators is not a new one, even online, although social networking sites have presented additional opportunities for inappropriate contact between adults and minors.¹⁶⁶ The new concern is protecting children from their peers. School districts across the country are having to address "cyberbullying," which can mean anything from rude comments left

165. See, e.g., Daniel Goleman, *Flame First, Think Later: New Clues to E-mail Misbehavior*, N.Y. TIMES, Feb. 20, 2007, at F5, available at <http://www.nytimes.com/2007/02/20/health/psychology/20essa.html> (describing "online disinhibition effect").

166. See Matt Apuzzo, *Teens at Risk on Web Sites, Experts Say*, ASSOCIATED PRESS, Feb. 19, 2006, available at http://www.colonialhts.net/internet_safety/Teens_at_risk_ABCNews_AP_2-19-2006.pdf (describing cases in Connecticut and New Jersey in which teens were harmed by adults met through social networking sites).

on MySpace pages, to harassment via e-mail, or the wide dissemination of private (sometimes embarrassing) information.¹⁶⁷

Other common cases involve students posting comments critical of school administrators and teachers to personal webpages or social networking sites, resulting in discipline. Since 2000, for example, the First Amendment Center has featured numerous stories on its website of students being disciplined for making critical comments about their school,¹⁶⁸ teachers and administrators,¹⁶⁹ and other students.¹⁷⁰

167. See Anne Marie Chaker, *Schools Act to Short-Circuit Spread of 'Cyberbullying,'* WALL ST. J., Jan. 24, 2007, at D1; Jeff Chu, *You Wanna Take This Online?*, TIME, Aug. 1, 2005, at 52; Amy Harmon, *Internet Gives Teenage Bullies Weapons to Wound from Afar*, N.Y. TIMES, Aug. 26, 2004, at A1; *States Stand Up to Cyberbullies*, CNN.COM (last visited Feb. 21, 2007); Kate Taylor, *You've Got Hate Mail: Cyberbullying, in Which Schoolkids Anonymously Spread Gossip Online, Is an Epidemic Authorities Find Hard to Stop*, OREGONIAN (Portland, OR), Mar. 22, 2005, at E01.

168. See Associated Press, *N.J. School Rapped for Punishing Student over Web Site*, FIRST AMENDMENT CENTER, Apr. 4, 2005, <http://www.firstamendmentcenter.org/news.aspx?id=15073> (student "had created a Web site where he wrote about hating his middle school"); Associated Press, *Student Suspended for MySpace Postings Returns to School*, FIRST AMENDMENT CENTER, Feb. 22, 2006, <http://www.firstamendmentcenter.org/news.aspx?id=16526> (student suspended for "satirical comment on the poor physical condition of the school, the behavior and demographics of students and staff, lack of resources and the perceived racial biases of teachers and administrators"); Associated Press, *Teen Webmaster Sues After N.J. District Punishes Him for Site*, FIRST AMENDMENT CENTER, Dec. 21, 2003, <http://www.firstamendmentcenter.org/news.aspx?id=12381>.

169. See Associated Press, *ACLU: Ohio Teen Wrongly Expelled for Exercising Free Speech*, FIRST AMENDMENT CENTER, May 9, 2004, <http://www.firstamendmentcenter.org/news.aspx?id=13317> (student expelled for site that "included images of teachers and a message board with posting aimed at the school and individual administrators"); Associated Press, *Oregon Teen Expelled over Off-Color Web Site Sues School District*, FIRST AMENDMENT CENTER, Jan. 25, 2003, <http://www.firstamendmentcenter.org/news.aspx?id=3033> (student website "contained obscenity-laden pokes at Canadians, lesbians, classmates and teachers"); Associated Press, *Pennsylvania High Court Upholds Student's Expulsion over Web Site*, FIRST AMENDMENT CENTER, Sept. 27, 2002, <http://www.firstamendmentcenter.org/news.aspx?id=3381> (student's "'Teacher Sux' Web site ridiculed algebra teacher Kathleen Fulmer's physical characteristics and teaching abilities and included a solicitation for money to pay for a hit man"); Associated Press, *School Violated Ex-Volleyball Player's Free-Speech Rights, Federal Judge Rules*, FIRST AMENDMENT CENTER, Feb. 28, 2003, <http://www.firstamendmentcenter.org/news.aspx?id=6403> (student was "thrown off the volleyball team for posting an Internet message critical of a teacher").

170. See Associated Press, *Court Sides with Teens Punished for Web Sites' Content*, FIRST AMENDMENT CENTER, Feb. 27, 2005, <http://www.firstamendmentcenter.org/news.aspx?id=14885> (students suspended for alleged hateful comments "after a parent complained about the way athletes and band members were portrayed on the Web sites"); Associated Press, *N.Y. District Attorney Won't Prosecute High Schoolers over Web Site*, FIRST AMENDMENT CENTER, June 16, 2001, <http://www.firstamendmentcenter.org/news.aspx?id=4952> (discussing decision not to prosecute "[t]wo Chappaqua high

The ability of students to criticize one another and teachers, and the ubiquity of means to do so—through computers, Blackberries, phones with text messaging capabilities—combined with the perceived severity of the threat to good order in the schools have left schools scrambling for responses.¹⁷¹ That no one knows quite where the limits to the school's authority lie only complicates decisions for teachers and administrators, as well as for students who are "caught off guard when they are punished" for things written on "their" websites.¹⁷² Private school administrators, since they are unaffected by the First Amendment, can simply ban students from, for example, using MySpace or Facebook.¹⁷³ Public school coaches can also use the continued ability to engage in extracurricular activities as leverage.¹⁷⁴ Devising policies to regulate the general student population of public schools, however, is a different (and more difficult) proposition.

One recent article described a principal's decision to ask parents and students "to sign an agreement that included a commitment to monitor their children's computer use at home to prevent cyberbullying, online gossip and the use of obscene and profane language."¹⁷⁵ But she worried that she probably "overstepped [her] bounds" in doing so.¹⁷⁶ Some school districts are either using existing student conduct codes to police online behavior having an effect at school, or specifically crafting new policies designed to put students on notice that off-campus expressive activity can have on-campus consequences.¹⁷⁷ Other districts have taken a more cautious

school boys who allegedly operated an Internet site that listed girls' sexual secrets" ; noting that the site was shut down and the boys were disciplined).

171. See Alan Gomez, *Students, Officials Locking Horns over Blogs; What Is Posted from Home Brings Punishment at School*, USA TODAY, Oct. 26, 2006, at 8D; Sherry Saavedra, *Student Use of MySpace Presents a Quandary; Schools Weigh Control vs. First Amendment*, UNION-TRIBUNE (San Diego, CA), June 4, 2006, at A1; Paula Reed Ward, *Free Speech Meets Internet; Schools Perceive Threat to Authority*, PITTSBURGH POST-GAZETTE, Feb. 5, 2006, at B1.

172. Gomez, *supra* note 171, at 8D.

173. Chaker, *supra* note 167, at D4 ("At Pope John XXIII High School in Sparta, N.J., principal Msgr. Kieran McHugh aims to keep it simple. He outright banned the use of MySpace last school year after hearing about students posting content he considered inappropriate.")

174. Saavedra, *supra* note 171, at A1 ("Many coaches at schools are upfront about patrolling the MySpace pages of players and have put student athletes on notice: Online evidence of drinking alcohol, using drugs or making vulgar gestures can lead to suspension from the team.")

175. *Id.*

176. *Id.*

177. Chaker, *supra* note 167, at A1; Saavedra, *supra* note 170, at A1.

approach, adopting the position that off-campus speech is outside their purview.¹⁷⁸ Still other school officials—citing First Amendment concerns—have even declined to notify parents of online content involving their children of which officials become aware, even if the school is not trying to punish the students.¹⁷⁹

B. Lower Court Cases Involving Regulation of Cyberspeech

Perhaps reflecting the fluid nature of school responses to student Internet speech, there are only a handful of reported cases involving students and the Internet.¹⁸⁰ The facts of these cases are substantially similar. In many cases students created websites at home that contained remarks about their school, their teachers, other students, or administrators that were found objectionable. School officials often disciplined these students with suspensions or expulsions (or both). In many cases, the reactions could charitably be termed overreactions, less charitably as punitive retaliation. Closer cases involved postings that were misconstrued or misperceived by others as threats.

In most cases, the students prevailed; in many cases the judge awarded injunctive relief, finding a substantial likelihood of success on the merits that the student's First Amendment rights were violated by school officials. In general, the courts grappled with the same questions posed in non-Internet student speech cases—how to reconcile *Tinker* with *Fraser* and *Kuhlmeier*, whether *Fraser* created an “exception” for low value speech,¹⁸¹ and the like.

178. See Cynthia L. Garza, *Discipline for Internet Threats Proves Difficult for School*, FLORIDA TIMES-UNION (Jacksonville, Fla), Sept. 26, 2003, at A1 (describing threat posted by one student on a social network site and decision of school not to punish because the school didn't “have jurisdiction over the Internet”).

179. Saavedra, *supra* note 171, at A1 (describing school board decision not to notify parents after officials became aware of online photographs taken by girls “off campus [displaying] themselves in provocative poses and in their underwear”; quoting the principal as questioning whether “it's the school's job to alert parents that are clearly outside the school province. . . . The last thing we want to do is infringe on somebody's First Amendment rights.”).

180. See *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 412 F. Supp. 2d 502 (W.D. Pa. 2006); *Latour v. Riverside Beaver Sch. Dist.*, No. Civ.A. 05-1076, 2005 WL 2106562 (W.D. Pa. Aug. 24, 2005); *Mahaffey v. Aldrich*, 236 F. Supp. 2d 779 (E.D. Mich. 2002); *Coy v. Bd. of Educ.*, 205 F. Supp. 2d 791 (N.D. Ohio 2002); *Emmett v. Kent Sch. Dist.* No. 415, 92 F. Supp. 2d 1088 (W.D. Wash. 2000); *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175 (E.D. Mo. 1998); *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847 (Pa. 2002).

181. Compare *Layshock*, 412 F. Supp. 2d at 507 (asserting that *Fraser* and *Kuhlmeier* constitute alternatives for regulation for low-value or school-sponsored speech, with

But the nature of the Internet does seem to pose special difficulties when attempting to ascertain whether speech occurred “in” school or “on” school property¹⁸² and how “disruptive” that speech had to be, assuming that it was subject to the regulation of school officials.¹⁸³ The courts’ resolutions of those questions will be the focus of this subsection. The following subsection will address whether *Morse* provides lower courts with guidance for future cases.

1. *Cyberspeech as “On-Campus” Speech*

Can a website created by a student at home, on his or her time, using his equipment, and likely saved to a non-school server ever be on-campus speech? This can be the most vexing problem for administrators. A number of courts have held that the answer is “no,” even if the website is accessed by the student *at school* and shown to other students.

In *Mahaffey v. Aldrich*,¹⁸⁴ for example, a high school student (Mahaffey) was disciplined for his contribution to a friend’s website entitled “Satan’s web page.” Mahaffey’s contribution included an apparently tongue-in-cheek “mission” from Satan to, inter alia, “Stab someone for no reason then set them on fire throw them off a cliff, watch them suffer and with their last breath, just before everything goes black, spit on their face.”¹⁸⁵ This mission was followed by a disclaimer that read in part, “PS: NOW THAT YOU’VE READ MY WEB PAGE PLEASE DON’T GO KILLING PEOPLE AND STUFF THEN AND BLAMING IT ON ME. OK?”¹⁸⁶ A student

Tinker’s “disruption” analysis being the default rule), with *Mahaffey*, 236 F. Supp. 2d at 783-84 (discussing *Tinker* only).

182. See *Layshock*, 412 F. Supp. 2d at 507 (“This case began with purely out-of-school conduct which subsequently carried over into the school setting.”); *Latour*, 2005 WL 2106562, at *1; *Mahaffey*, 236 F. Supp. 2d at 783 (beginning analysis with the question whether speech occurred on school property); *Coy*, 205 F. Supp. 2d at 799 (same); *J.S.*, 807 A.2d at 864 (“[A] threshold issue regarding the ‘location’ of the speech must be resolved to determine if the unique concerns regarding the school environment are even implicated, i.e., is it on campus speech or purely off-campus speech?”).

183. See *Layshock*, 412 F. Supp. 2d at 508 (addressing “disruptive” nature of speech); *Latour*, 2005 WL 2106562, at *2 (same); *Mahaffey*, 236 F. Supp. 2d at 785 (same); *Coy*, 205 F. Supp. 2d at 800 (same); *Beussink*, 30 F. Supp. 2d at 1178 (same); *J.S.*, 807 A.2d at 869 (same).

184. *Mahaffey v. Aldrich*, 236 F. Supp. 2d 779 (E.D. Mich. 2002).

185. *Id.* at 782.

186. *Id.*

notified police about the webpage and the school first suspended, then began proceedings to expel Mahaffey.¹⁸⁷

Despite an admission by the student that school computers “may have” been used to create the website,¹⁸⁸ the district court was extremely skeptical that the school had authority to discipline the speech. “The only evidence . . . in support of activity occurring on school property . . . is Plaintiff’s equivocal statement made to an investigating police officer [T]he evidence simply doesn’t establish that any of the complained of conduct occurred on [school] property.”¹⁸⁹

Similarly, in *Coy v. Board of Education*,¹⁹⁰ a student (Coy) was suspended, then expelled for 80 days after school officials became aware of a website Coy created that “purported to describe the exploits of a group of skate boarders who called themselves ‘NBP.’”¹⁹¹ The site also featured pictures of Coy and his friends making obscene gestures and rude remarks about “losers” who also attended the school.¹⁹² The site also contained “some profanity, and,” the judge ruefully noted, “a depressingly high number of spelling and grammatical errors.”¹⁹³

In deciding how to characterize the speech, the court noted that the website was created by Coy “on his home computer, and . . . on his own time. No part of his website was created using school equipment or during school hours.”¹⁹⁴ The evidence suggests that he did access it at school after administrators were aware of the site’s existence.¹⁹⁵ But, the judge continued, “they had no evidence that he had displayed the information contained in the website to any other student. Unlike *Fraser*, there was no evidence that he compelled 600 other students to view his website. . . . The extent of Jon Coy’s expressive activity was the private viewing of his own website.”¹⁹⁶

187. *Id.* at 782-83.

188. *Id.* at 782, 784.

189. *Id.* at 784.

190. *Coy v. Bd. of Educ.*, 205 F. Supp. 2d 791 (N.D. Ohio 2002).

191. *Id.* at 795.

192. *Id.*

193. *Id.*

194. *Id.* at 795.

195. *Id.* at 795-96.

196. *Id.* at 799. A footnote mentions that Coy did show one other student the website while at school, but school officials did not know that when they disciplined him. *Id.* n.3.

Finally, there is *Emmett v. Kent School District No. 415*,¹⁹⁷ where—in what can only be described as a terrible misunderstanding—a student (Emmett) was suspended after creating what was misreported by the local news as a “hit list,” in reality a site on which were posted mock “obituaries” of at least two of Emmett’s friends.¹⁹⁸ He was apparently inspired “by a creative writing class . . . in which students were assigned to write their own obituary.”¹⁹⁹ Emmett “allowed visitors to the web site to vote on who would ‘die’ next—that is, who would be the subject of the next mock obituary.”²⁰⁰ After the aforementioned local-news-inspired freak-out, Emmett took down the website, but not early enough to avoid discipline by school officials. He was told he was placed on “emergency expulsion for intimidation, harassment, disruption to the educational process, and violation of the Kent School District copyright.”²⁰¹ Cooler heads prevailed—to a degree—and his expulsion was reduced to a five-day suspension, which included a prohibition on practicing and playing with his basketball team, which had an upcoming playoff game.²⁰²

The student sought a preliminary injunction against the school, which the court granted. Addressing the likelihood of success on the merits, the court noted that “Plaintiff’s speech was not at a school assembly [nor was it] produced in connection with any class or school project” and “[a]lthough the intended audience was undoubtedly connected to [the school], the speech was entirely outside of the school’s supervision or control.”²⁰³ Given the fact that there was no “threat” to anyone, as well as the “out-of-school nature of the speech,” the judge concluded that it was quite likely the threatened discipline violated the student’s free speech rights.²⁰⁴

Other courts have regarded speech that finds its way into the school—however it happens—as “on-campus” speech. In a recent

197. *Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088 (W.D. Wash. 2000).

198. *Id.* at 1089. (“On Wednesday, February 16, an evening television news story characterized Plaintiff’s web site as featuring a ‘hit list’ of people to be killed, although the words ‘hit list’ appear nowhere on the web site.”).

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 1090.

204. *Id.*

case, *Layshock v. Hermitage School District*,²⁰⁵ a judge denied a temporary restraining order to a student (Layshock) subjected to fairly severe discipline²⁰⁶ for creating a MySpace parody site for his high school principal that was no doubt crude and likely embarrassing to the principal.²⁰⁷ Layshock “created the parody by using his grandmother’s computer during non-school hours; no school resources were used to create the parody,” except for a photo cropped from the school’s official website.²⁰⁸ Proud of his handiwork, Layshock informed a few friends “and eventually word of the parody (as well as a few other more vulgar parodies of unknown origin) soon reached most, if not all, of the student body”²⁰⁹ As the court put it, “[t]his case began with purely out-of-school conduct which subsequently carried over into the school setting.”²¹⁰ The judge declined to accept Layshock’s characterization of the speech as “purely off campus,” and concluded it was unlikely the student would prevail on the merits of his First Amendment claim.²¹¹

Similarly, in *J.S. ex rel. H.S. v. Bethlehem Area School District*,²¹² the fact that a student website was accessed (though not to the degree that Layshock’s was) at school, even though it was not created there, prompted the Pennsylvania Supreme Court to regard the site as on-campus speech.²¹³ In *J.S.*, a student (J.S.) had created a website devoted to ridiculing the student’s algebra teacher and his school’s principal.²¹⁴ The site, entitled “Teacher Sux,” was comprised,

205. *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 412 F. Supp. 2d 502 (W.D. Pa. 2006).

206. In addition to a ten-day out-of-school suspension, the school placed the student in the Alternative Curriculum Education program for the duration of the year, banned him from attending or participating in school-sponsored events, and prohibited him from participating in the graduation ceremony. *Id.* at 505.

207. The page “was created by using the website’s template for profiles, which allows website users to fill in background information and include answers to specific questions. Justin’s answers to the questions centered on the theme of ‘big.’ The answers range from nonsensical answers to silly questions, on the one hand, to crude juvenile language, on the other.” *Id.* at 504. “For example, in response to the question ‘in the past month have you smoked,’ the website says ‘big blunt.’ In response to a question regarding alcohol use, the parody says ‘big keg behind my desk.’” *Id.* at 504-05.

208. *Id.* at 505.

209. *Id.*

210. *Id.* at 507.

211. *Id.* at 508.

212. *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847 (Pa. 2002).

213. *Id.* at 865.

214. *Id.* at 851

according to the court, “of a number of web pages that made derogatory, profane, offensive and threatening comments”²¹⁵ While the website had numerous “disclaimers” purporting to ensure the site was not accessed by teachers or employees and “contracts” by which users promised not to disclose the site or its creator’s identity to school officials,²¹⁶ the student told other students about the site and showed it to one student at school. That student alerted school officials, but, curiously, J.S.’s troubles began only *after* the end of that school year, when the school announced its intention to suspend the student first for three, then ten days, and then initiated expulsion proceedings against him for threatening a teacher.²¹⁷

The Pennsylvania high court first recognized that “a threshold issue regarding the ‘location’ of the speech at issue must be resolved to determine if the unique concerns regarding the school environment are even implicated, i.e., is it on campus or purely off-campus speech?”²¹⁸ But the court’s use of the word “purely” was a giveaway; it concluded that “[w]hile there is no dispute that the web site was created off-campus, the record clearly reflects that the off-campus web site was accessed by [the student] and shown to a fellow student.”²¹⁹ Moreover, as noted above, he told others about the site, and faculty members and administrators accessed the site once they became aware of it.²²⁰ Since the web site was about specific teachers and, as the court concluded, “it was inevitable that the contents of the web site would pass from students to teachers, inspiring circulation of the web page on school property,” it was deemed on-campus speech.²²¹

The court concluded that “where speech [1] that is aimed at a specific school and/or its personnel is [2] brought onto the school campus or accessed at school by its originator, the speech will be considered on-campus speech.”²²² In a footnote, the court added that

215. *Id.*

216. *Id.*

217. *Id.* at 852.

218. *Id.* at 864. The first issue the court dealt with extensively was whether the material on the website was a “true threat” against Mrs. Fulmer, which would have placed it outside the protection of the First Amendment altogether. The court concluded that nothing on the website constituted a threat. *Id.* at 859-60.

219. *Id.* at 865.

220. *Id.*

221. *Id.*

222. *Id.*

while the fact that the speech was accessed personally by the student was “a strong factor in [its] assessment,” the court did not “discount that one who posts school-targeted material in a manner known to be freely accessible from school grounds may run the risk of being deemed to have engaged in on-campus speech, where actual accessing by others in fact occurs,” but left the final determination of such questions to “the totality of the circumstances involved.”²²³

2. “Disruptive” Cyberspeech

Even in cases in which a court seems disposed to limit schools’ authority over off-campus speech, an inquiry is made into the disruptive nature of the speech. Lacking guidance on the on-campus/off-campus question, a natural response is to look at whether the speech was actually disruptive to the school. If not, then even under *Tinker* it cannot be sanctioned. But here too, courts’ thresholds for the requisite disruptiveness vary.

The district court’s ruling on Josh Mahaffey’s contribution to “Satan’s web page,” is an example of such alternative reasoning.²²⁴ His speech was deemed beyond the control of school officials, even assuming it was on-campus speech, because there was “no evidence that the website interfered with the work of the school or that any other student’s rights were impinged.”²²⁵ The court concluded that “Defendants’ regulation of Plaintiff’s speech on the website *without any proof of disruption to the school or on campus activity in the creation of the website* was a violation of Plaintiff’s First Amendment rights.”²²⁶

In *Beussink v. Woodland R-IV School District*²²⁷—apparently the first reported case on the subject—a Missouri district court granted a preliminary injunction to a student suspended for creating a webpage

223. *Id.* n.12. The *J.S.* court, as well as the district court in *Layshock*, seemed to be influenced by *Killion v. Franklin Regional School District*, 136 F. Supp. 2d 446 (W.D. Pa. 2001), in which a court declined to apply a heightened standard of review to discipline of a student for a hard copy of an emailed “top 10” list containing vulgar statements about the high school athletic director that was circulated at the school. According to the court, “[t]he overwhelming weight of authority has analyzed student speech (whether on or off campus) in accordance with *Tinker*. Furthermore, because the . . . list was brought on campus, albeit by unknown persons, *Tinker* applies.” *Id.* at 455.

224. *Mahaffey v. Aldrich*, 236 F. Supp. 2d 779, 784 (E.D. Mich. 2002).

225. *Id.*; see also *id.* at 785 (“There is no . . . evidence of disruption on the record before this Court.”).

226. *Id.* at 786 (emphasis added).

227. *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175 (E.D. Mo. 1998).

containing “criticism of the high school” expressed in “crude and vulgar language.”²²⁸ The website was created by the student (Beussink) at home using his computer.²²⁹ It came to the attention of school officials after a falling out with a friend who told teachers about the website.²³⁰ Upon viewing the website, the principal testified that he “*immediately*” decided to discipline Beussink because of the site’s content.²³¹ There was conflicting testimony as to how many other students saw the site at school, but “there was no evidence that Beussink showed the homepage to other students.”²³² In any event, even the students that did see the website did not disrupt classes as a result, according to the court’s findings.²³³ In fact, it appeared to the court that the principal simply didn’t like what Beussink had posted on the webpage and disciplined him because of it.²³⁴ That, the court concluded, “is not an acceptable justification for limiting student speech under *Tinker*.”²³⁵

And in *Coy*, while the court denied summary judgment because of disputed facts surrounding the reason for Coy’s suspension, the judge noted that “[t]he extent of Jon Coy’s expressive activity was the private viewing of his own website.”²³⁶ Distinguishing cases like *Fraser* and *Kuhlmeier*, the court noted that Coy’s “activity was not even akin to putting up a poster in a school hallway.”²³⁷ The access of his website at school was, by design, furtive and concealed.²³⁸ Specifically, “no evidence suggests that Coy’s acts in accessing the website had any effect upon the school district’s ability to maintain discipline in the school.”²³⁹

228. *Id.* at 1177.

229. *Id.*

230. *Id.* at 1177-78.

231. *Id.* at 1178.

232. *Id.* at 1178-79. Some of the other students who viewed the webpage, in fact, did so because their teacher allowed them to look at it. *Id.* at 1179.

233. *Id.* at 1179.

234. *Id.* at 1180 (“Principal Poorman’s own testimony indicates he disciplined Beussink because he was upset by the content of the homepage.”).

235. *Id.*

236. *Coy v. Bd. of Educ.*, 205 F. Supp. 2d 791, 799 (N.D. Ohio 2002).

237. *Id.*

238. *Id.* at 800.

239. *Id.* at 801. Although not directly on point, the district court in *Killion v. Franklin Regional School District*, 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001), first looked at evidence regarding disruption, reasoning that, under *Tinker*, if the speech wasn’t disruptive, it couldn’t be punished, assuming it was “in school” speech. Even if he had produced similar

In the two cases, however, in which courts *did* uphold school discipline, courts also tended to sidestep the on-campus/off-campus speech question by either broadly defining on-campus speech, as the Pennsylvania Supreme Court did,²⁴⁰ or by assuming *arguendo* First Amendment protection, then looking at disruptive effects. The results reached by these courts indicate that substantial differences of opinion can exist with regard to what constitutes “disruption.”

In *J.S.*, for example, the webpage mocking the algebra teacher, Mrs. Fulmer, and Principal Kartotitis, was held to constitute substantial disruption because of its effects on Mrs. Fulmer. The principal informed Mrs. Fulmer of the contents of the site, which include a list of reasons why Mrs. Fulmer should die,²⁴¹ and a mock solicitation of donations for a hit man. Even though law enforcement officials concluded that no laws were broken and that Mrs. Fulmer was in no danger,

After viewing the site, Mrs. Fulmer testified that she was frightened, fearing someone would try to kill her. Mrs. Fulmer suffered stress, anxiety, loss of appetite, loss of sleep, loss of weight, and a general sense of loss of well-being as a result of viewing the web site. She suffered from short-term memory loss and an inability to go out of the house and mingle with crowds. Mrs. Fulmer suffered headaches and was required to take anti-anxiety/anti-depressant medication.

Furthermore, Mrs. Fulmer was unable to return to school to finish the school year. . . . As a result of Mrs. Fulmer’s inability to return to work, the school was forced to utilize three substitute teachers, which disrupted the educational process of the students.²⁴²

lists in the past, and was warned against bringing them to school, the court concluded that the defendants had not

presented any evidence that [the student’s] earlier lists had caused disruption which would have supported a belief that substantial disruption would follow from the [latest] list. At best, defendants . . . offered evidence that [the subject of the latest list] was upset and had a hard time doing his job and that the librarian (the subject of the [earlier] Book Nazi list) was almost in tears. . . . However, these do not rise to the level of substantial disruption.

Id. at 455-56.

240. See *supra* notes 212-223 and accompanying text (discussing *J.S. ex rel. H.S. v. Bethlehem Area School District*, 807 A.2d 847 (Pa. 2002)).

241. See *J.S.*, 807 A.2d at 851 (describing section of site entitled “Why Should She Die,” along with pages entitled “Mrs. Fulmer is a B[itch], In D Minor” and “F[uck] You Mrs. Fulmer. You Are A B[itch]. You Are A Stupid B[itch].”).

242. *Id.* at 852.

As if that weren't enough, the court found that "[t]he website also had a demoralizing impact on the school community."²⁴³ The principal compared the effect on student and staff morale "to the death of a student or staff member."²⁴⁴ At no time, however, did the school district request that the student take down the website or attempt to punish him until the following school year.²⁴⁵

While the court recognized that "there must be more than some mild distraction or curiosity created by the speech . . . complete chaos is not required for a school district to punish student speech."²⁴⁶ To the court, the need to hire multiple replacements, as well as the fact that the site "disrupted the entire school community—teachers, students and parents," the most direct example being "the direct and indirect impact of the emotional and physical injuries to Mrs. Fulmer," sufficed.²⁴⁷ The court also confidently concluded that the site "was specifically aimed at this particular school district and seemed designed to create precisely this sort of upheaval."²⁴⁸ Thus, it concluded *Tinker* permitted the punishment meted out to the site's creator.

In *Layshock*, the court assumed that the MySpace parody was expressive activity and was governed by *Tinker*, because the website was available to and was accessed by other students at school. The court there, too, found that it caused a substantial disruption. Both Layshock's parody and the other parodies he did not create (which were apparently more vulgar) "were accessed incessantly by students" at the high school, resulting in "the school [shutting] down its computer system to student use" for five days.²⁴⁹ "The lack of access . . . caused the cancellation of several classes and interfered with students' ability to use the computers for their school-intended purposes."²⁵⁰ Further, the school IT person spent a quarter of his time dealing with issues arising from attempts to block access to the parodies from school.²⁵¹

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.* at 868.

247. *Id.* at 869.

248. *Id.*

249. *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 412 F. Supp. 2d 502, 508 (W.D. Pa. 2006).

250. *Id.*

251. *Id.*

“It appears,” the court concluded, “as though the entire student body . . . was abuzz about the profiles, who created them, and how they could be accessed.”²⁵² Teachers were monitoring the comments of students and reporting students to the Principal’s office.”²⁵³ The co-principal “testified that he dedicated at least 25% to 30% of his time to dealing with the disruptions and the investigation into the source of the parodies.”²⁵⁴ The court held that Layshock’s actions “appear to have substantially disrupted school operations and interfered with the rights of others” and that he would not likely prevail on the merits of his First Amendment claim.²⁵⁵

V. Student Cyberspeech and the First Amendment: A Suggested Approach

In this Part, we combine both the lessons of *Morse* and of the lower courts addressing this issue to offer a suggested framework for courts facing student cyberspeech issues. It is our hope as well that such a framework would provide useful guidance for administrators. Because such a framework is difficult to articulate in the abstract, we have created, in Part B, some “test suites”²⁵⁶ containing fact situations covering a range of Internet-based expressive activity. Our examples are intended to run the gamut from activity school administrators could clearly suppress or discipline to that which is likely outside their ability to regulate, and includes several situations in which their authority is uncertain. The application of our suggested principles in Part C will be primarily concerned with these gray areas.

We begin, however, with the principles that inform the resolution of the test suits. Those we have derived from both the Court’s student speech cases, as well as the best approaches of the lower courts that have specifically ruled on student cyberspeech claims.

A. Guiding Principles

It is clear, both from the Supreme Court’s cases and from those that the lower courts have heard, that several factors bear on the

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. EUGENE VOLOKH, *ACADEMIC LEGAL WRITING: LAW REVIEW ARTICLES, STUDENT NOTES, SEMINAR PAPERS, AND GETTING ON LAW REVIEW* 21-31 (3d ed. 2007) (describing test suites).

ability of schools to regulate or punish the expressive activity of their students. Courts have considered *where* the speech occurred, the *content* of the speech, and the *impact* of the speech at the school. We think that these factors will continue to be relevant as more courts take up student cyberspeech cases. But while we too consider these factors to be the most relevant ones to deciding cases like those discussed above, we would assess the constitutionality of any cyberspeech regulations in light of the following principles:

1. *Minors Possess First Amendment Rights Outside School*

We begin with the proposition that whatever the limits on their expressive rights in school, public school students *outside* school have First Amendment rights, or at least enjoy as much First Amendment freedom as their parents will permit them. Limits on the school's ability to regulate student speech must exist somewhere, lest students be unable to escape the reach of school administrators while enrolled at the school.

2. *Technology Blurs On-Campus/Off-Campus Boundaries*

Technology makes it more difficult than it used to be to separate on-campus from off-campus speech; moreover, we think that any resort to formalism to aid in that line-drawing is likely to be unsatisfactory. Technology enables putatively off-campus speech to come into the school with little effort on the student's part. If the speech is of the sort that the Court has permitted the school to exclude entirely, or if it is the source of "material and substantial disruption," then it seems unduly formalistic to immunize a student from punishment simply because she produced the speech off-campus. At the same time, we emphasize that though technology blurs these lines, it cannot eliminate them altogether—*some* meaningful distinction between on- and off-campus speech must be made by administrators and courts.

3. *Begin With Assessment of Expressive Activity Itself*

As many courts already do, we see value in courts asking in student cyberspeech cases whether the speech is that which the school is entitled to prohibit, either categorically or because of its impact in the school. If the answer is "no"—that is, the speech is neither speech that fits within one of the exceptions in *Fraser*, *Kuhlmeier*, or *Morse*, nor is disruptive à la *Tinker*—then the inquiry ends. There is no need to resolve the more difficult question about the school's jurisdiction to regulate.

4. *Actions of the Student Are Important in Deciding Whether Cyberspeech Is "On-Campus" Speech*

The ability of the school to regulate student Internet speech ought to turn in part on the degree to which the student-creator sought to make others in the school aware of her off-campus speech by publicizing it at school or encouraging others to access it at school. While the correct answer will turn on the facts of particular cases, as a general matter we think that a court should take into account the extent and nature to which the expressive activity was done *at school*, or using school materials; and, if done outside of the school, a court should consider the nature and extent of the student-creator's efforts to make those at school aware of the activity, any encouragement to access the activity at school, etc.²⁵⁷

Thus, we think that the approach of courts in *Mahaffey*, *Coy*, and *Emmett* to the question of whether student cyberspeech is on-campus speech is preferable to that of *J.S.* and *Layshock*. In the former cases, even if the student accessed the website at school once or twice, or showed it to a fellow student at school, those actions did not automatically make the student's speech on-campus speech. In close cases, we think that courts would be entitled to consider the impact at the school when trying to decide whether de minimis access at school should render the expressive activity subject to administrators' regulations. This was arguably the approach of the *Layshock* court,

257. One might frame this as, as at least one judge has, whether the impact of the on-line expression at school was a reasonable foreseeable consequence of the student's actions. See *supra* note 31 and accompanying text. For a very recent example of this approach, see *Wisniewski v. Bd. Educ.*, 494 F.3d 34, 39 (2d Cir. 2007). In *Wisniewski*, a student was disciplined for creating an instant messaging icon that was "a small drawing of a pistol firing at a person's head, above which were dots representing spattered blood." *Id.* at 36 (footnote omitted). Beneath the icon were the words "Kill Mr. VanderMolen," who was the student's English teacher. *Id.* In upholding the student's suspension, the Court noted that "[t]he fact that [the student's] creation and transmission of the IM icon occurred away from school property does not necessarily insulate him from school discipline. We have recognized that off-campus conduct can create a foreseeable risk of substantial disruption within a school . . ." *Id.* at 39 (footnote omitted). Another possibility is to analogize to the standards employed by courts to assess whether jurisdiction may, consistent with the Due Process Clause, be exercised over a particular defendant. Cases involving websites created in one state or country, but accessible in others, might be particularly helpful. See, e.g., FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, CIVIL PROCEDURE §2.6, at 78 n.20 (5th ed. 2001) (discussing "purposeful availment" and Internet websites). We thank Beth Burch for suggesting this possibility. For a thorough elaboration of this point, see Kyle W. Brenton, Note, *BONGHiT\$JESUS.com? Tracing the Boundaries of Public School Authority Over Student Cyberspeech*, 92 MINN. L. REV. ___ (forthcoming 2008), available at <http://ssrn.com/abstract=1085911> (last visited April 9, 2008).

though we think the court erred on the issue of the impact attributable to Layshock's website.

However, we think that students should *not*, without more, be held responsible for speech or expressive activity engaged in off-campus, but which made its way to school inadvertently or through the actions of third persons. In *Layshock*, the court seemed to be holding the student primarily responsible for the actions of other students who, inspired by Layshock's parody site, created more vulgar parody sites themselves, which were accessed by the students and created disruption at the school.

Further, we reject the Pennsylvania Supreme Court's decision to treat speech that is "aimed at a specific school and/or its personnel" or is "brought onto the school campus or accessed at school" as on-campus speech in all circumstances.²⁵⁸ The Pennsylvania high court even went further, warning students who "post[] school-targeted material in a manner known to be freely accessible from school grounds" may be subject to regulation even if they don't access it themselves at school.²⁵⁹ Merely complaining about a school or about school personnel on a personal website or blog should not *ipso facto* mean that speech is no different from a speech made in a crowded lunchroom or at a school assembly. Defining on-campus speech so broadly, given the proliferation of means to access the Internet, would tend to erase completely any boundary between on-campus and off-campus speech. To make students liable for *others* accessing their websites, even when students may have stumbled across it accidentally might deter students from making any reference to school, teachers, or classmates.

5. *Morse Categorically Restricts School Officials' Ability to Punish "Offensive" Speech*

One of the bright spots in *Morse* for proponents of student speech was the majority's rejection of both the school board's request for a broad "educational mission" exception barring expression that undermined the mission of the school (as declared by administrators) and the rejection of a broad reading of *Fraser* to cover all speech or expression deemed (again, by administrators) "offensive." While the Court was not completely clear, rejecting those positions could also signal an implicit rejection of a reading of *Fraser* that would provide

258. J.S. *ex rel.* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 865 (Pa. 2002).

259. *Id.* at 865 n.12.

schools more leeway to prohibit all manner of “low value” speech. If, as the Court’s opinion suggested, what was most objectionable about Fraser’s speech was its sexual nature,²⁶⁰ and the fact it was delivered to a mixed-age group of students at a school assembly,²⁶¹ that would accord with the Court’s other decisions approving of restrictions on minors’ access to sexually-explicit material on the grounds that *parents* ought to decide whether, when, and to what extent to expose their children to those materials.²⁶² However, while speech that is merely offensive to administrators may not be categorically punished, presumably *Tinker*’s “widespread disruption” would provide an independent reason for punishing the speech, if such disruption were proven. There is nothing that would prevent a teacher from filing suit against students (and their parents) if students create and distribute online speech that is libelous.²⁶³ In most cases, the tort system—opposed to the school disciplinary system—is probably the more

260. *Morse v. Fredrick*, 127 S. Ct. 2618, 2626 (2007). The majority specifically states that *Fraser* “should not be read to encompass any speech that could fit under some definition of ‘offensive.’” *Id.* at 2629. Instead, the majority focuses on the “elaborate, graphic, and explicit sexual metaphor” and “offensively lewd and indecent speech” that gave rise to justified regulation by school officials. *Id.* at 2626.

261. *See id.* at 2626 (discussing the fact that school administrators can decide what manner of speech is appropriate for a student assembly); *see also* *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 677 (1986) (stating that the school assembly consisted of 600 high school students, some of whom were 14 years old).

262. *See* *Ginsberg v. New York*, 390 U.S. 629, 637 (1968) (restricting minors’ access to non-obscene pornography); *see also* John H. Garvey, *Children and the First Amendment*, 57 TEX. L. REV. 321, 334-37 (1979) (discussing *Ginsberg*).

263. In fact, such suits have already begun to be filed. In Texas, a high school assistant principal filed a civil lawsuit against two students (and their parents) who created a fake MySpace page featuring him. Chris Harris, *High School Official Sues Students over Fake MySpace Page*, MTV, Sept. 25, 2006, http://www.mtv.com/news/articles/1541646/20060925/id_0.jhtml; Ken Rodriguez, *Lewd Web Posting About Principal Leads to Lawsuit, School Options*, SAN ANTONIO EXPRESS-NEWS, Sept. 22, 2006, at A3, available at <http://www.mysanantonio.com/news/columnists/krodriguez/stories/MYSA092206.03A.Rodriguez.2eb29de.html> (citing the same lawsuit in Texas); accord Gil Kaufman, *Cops Investigating Fake MySpace Page That Defamed Minnesota Teacher*, MTV, Apr. 13, 2006, http://www.mtv.com/news/articles/1528629/20060413/id_0.jhtml (discussing a similar situation where students created a fake MySpace page for a teacher that included child pornography and slurs about religion and sexual orientation); Kelli Kennedy, *Not-So-MySpace Any More*, ASSOCIATED PRESS, Apr. 23, 2006, available at <http://www.theledger.com/apps/pbcs.dll/article?AID=/20060423/NEWS/604230392/1/NEWS0101> (discussing a teacher’s lawsuit against a student who posted “demeaning sexual comments” and her picture on a website). For a brief overview of similar teacher suits, see *Libel Lessons: What do students learn about free speech from teachers who sue them for defamation?*, STUDENT PRESS L. CENTER, Winter 2000-01, at 16, available at http://splc.org/report_detail.asp?id=615&edition=17.

appropriate forum for resolving severe cases of offensive student speech directed at a teacher.

6. *Do Not Dilute "Disruption"*

Courts have (correctly in our view) been reluctant to find "disruption" whenever students post or e-mail material school administrators find vulgar, offensive, or insulting.²⁶⁴ Most cases—*Beussink* and *Coy*, for example—make clear that unless the expressive activity had some fairly significant impact on the school as a whole, or at least within a particular *class*, then it is protected.

We think that the *Layshock* court erred in allowing the student Layshock to be punished not so much for the parody *he* posted, but for the more vulgar parodies that he inspired. These parodies, not Layshock's, were the ones that students accessed from school to such an extent that the school's computer system was shut down while officials blocked access to them. Layshock should be held responsible for his activities alone, not for what he may have inspired others to do. This principle, we think, has particular force when there is a close question of whether the student did anything to make students at school aware of what she created and how to access it from school. The more a student attempts to keep the off-campus speech off-campus, the less we think she should be punished if the actions of others result in its being brought on campus, with accompanying disruption.

Similarly, we think that courts should take care when considering whether speech directed at a single student or teacher could be "disruptive" enough to warrant discipline by the school. As the Ninth Circuit was, we suspect, some courts will be tempted by the enigmatic rights-of-other-students language from *Tinker*. Not only should the Supreme Court's decision to vacate *Harper* give courts pause, there are serious difficulties with using that test to regulate student speech. Specifically, what *are* the "rights" of public school students vis-à-vis the expressive activities of their classmates? A right not to be gossiped about? Criticized? Ridiculed? Federal law does obligate school to protect against certain types of harassment, but to convert that ambiguous language from *Tinker* into an anti-bullying exception stretches that language too far, and would offer administrators a

264. A case can be made that perceived threats of violence that perhaps fall short of "true threats" merit a different standard. We discuss this scenario below.

justification to punish student speech at least as broad as the “educational mission” argument rejected in *Morse*.

Whatever the appropriate resolution for students, we think that claims of widespread disruption occasioned by the effect of cyberspeech on *teachers* ought to be greeted with skepticism. Mrs. Fulmer, the teacher in *J.S.* was undoubtedly upset by the website. But her reaction was, to us, wholly out of proportion to the nature of the speech. To put it bluntly, adult teachers of adolescent or pre-teen students ought to be expected to develop a thicker skin than had Mrs. Fulmer. Unlike in the case of the “eggshell” victim in torts, a student’s discipline ought not turn on whether they happened to ridicule the most sensitive member of the faculty. Further, it is worth noting that Mrs. Fulmer became aware of the website only after the *assistant principal* showed it to her. That the school was affected by the absence of Mrs. Fulmer, moreover, says little about the extent to which the website disrupted school operations as a whole.

7. *A Different Standard for Possible Threats?*

In light of the Columbine and the Virginia Tech shootings, as well as a handful of other attacks planned but not carried out, school administrators are especially vigilant about threats made by students against the school, teachers, or other students. Further, there is mounting concern among administrators and parents over “cyberbullying,”²⁶⁵ which can involve threatening the sending or posting of threatening messages. Outside the public school setting, the Supreme Court has held that “true threats,” defined as speech or expressive activity directed at a person or group of persons that puts the hearer in fear of being subjected to violence, do not receive First Amendment protection.²⁶⁶ However, the Court has distinguished “political hyperbole” from threats against the President,²⁶⁷ and has held that the First Amendment presents formidable obstacles to those prosecuted for inciting others to violence generally, even when

265. A recent survey concluded that “[n]early a third of online teens say they have been harassed on the Internet,” including being sent “threatening or aggressive messages.” Associated Press, *One-Third of Online Teens Bullied, Study Finds*, CNN.COM, June 28, 2007.

266. *Virginia v. Black*, 538 U.S. 343, 359 (2003) (“‘True threats’ encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”).

267. *United States v. Watts*, 394 U.S. 705, 708 (1969).

violence eventually occurs.²⁶⁸ May schools punish expressive activity that falls short of a true threat, but which is perceived to advocate, incite, or celebrate violence against the school or members of its community, even if such activity does not meet the test set forth in *Brandenburg*? Must schools exempt “hyperbolic” speech or expressive activity urging violence from discipline? Given the Court’s justification of the drug-related speech exclusion on the “special circumstances” extant in schools²⁶⁹ and Justice Alito’s concurring opinion justifying the exclusion by analogizing drug use to physical harm,²⁷⁰ the answer to both questions appears to be “no.” Since few courts would, we wager, be willing to second-guess a school administrator’s taking action to address what she perceived as a credible or possible threat to the school, room for considerable overreaction exists. Still, given the gravity of the potential harm if schools may take no action, and the virtual monopoly the state has on education in most areas, we think that schools should not be bound by the strict requirements of *Claiborne Hardware* or *Brandenburg* when disciplining student speech that advocates—or reasonably seems to advocate—violence directed against the school, its students, or its employees. A different standard may be particularly appropriate for cyberspeech cases. The absence of contextual clues present in face-to-face speech and the anonymity of online speech can make it difficult to discern the speaker’s intent, and difficult to impute irony, humor, or lack of seriousness to the speaker. At the same time, we note that courts can, and have, served as a valuable check on administrators’ overreactions.

268. *NAACP v. Claiborne Hardware*, 458 U.S. 886, 933-34 (1982) (requiring violence allegedly incited to have occurred proximate in time to the alleged incitement); *Brandenburg v. Ohio*, 395 U.S. 444, 448-49 (1969) (requiring proof of intent to produce imminent lawless action, and likelihood that violence would, in fact, result). On the tension between *Black*, *Brandenburg*, and *Claiborne Hardware*, see Steve G. Gey, *A Few Questions About Cross Burning, Intimidation, and Free Speech*, 80 NOTRE DAME L. REV. 1287 (2005).

269. *Morse v. Frederick*, 127 S. Ct. 2618, 2629 (2007).

270. *Id.* at 2638 (Alito, J., concurring).

B. Harriet-the-spy.blogspot.com

Harriet Welsch²⁷¹ is a junior at Ben Franklin High School—a public high school—with a keen interest in using computers as a means for self-expression. Consider the following scenarios:

(1) Harriet creates a blog in a computer class she is taking at BFHS. Her blog consists mainly of her complaints about teachers and students at the school. Her computer science teacher instructs her to remove criticisms of teachers and students from the blog. When Harriet refuses, she is removed from the class and suspended from school.

(2) Using the school's e-mail system, Harriet sends the student body a profanity-laced tirade against the school and its administrators over her suspension. Specifically, her e-mail calls the computer science teacher a "bitch" and the assistant principal in charge of discipline "a stupid prick." While the e-mail produces little discernable reaction at school, the parents of several students complain about the language. Harriet is subjected to discipline for the e-mail.

(3) Harriet creates a website at home that encourages the use of illegal drugs. It contains testimonials from other students at BFHS about their drug use and includes pictures showing BFHS students using drugs. It mocks the school's anti-drug curriculum and ridicules students who do not use drugs. Though she creates it at home, on her computer, she e-mails the link using a school e-mail list and puts slips of paper with the website's address in students' lockers at school. When the principal uncovers the identity of the website's creator, he suspends Harriet.

(4) While at school, Harriet posts, on her blog, doctored pictures of the computer science teacher and the assistant principal making it appear that they have goat heads. She e-mails the student body a link. Students repeatedly access the pictures during the day, until the information technology specialist at BFHS can block access to Harriet's site. Teachers report to the assistant principal that their

271. Cf. LOUISE FITZHUGH, *HARRIET THE SPY* (Dell Yearling 2001) (1964) (detailing the travails of a sixth-grade girl whose diary containing frank and unflattering portraits of her friends falls into their hands).

classes were in an uproar over the picture and that it took longer than usual to settle their classes down.

(5) Upset by her suspension because of her refusal to take down her blog in (1), Harriet sends a friend, from home and using her Gmail account, a profanity-laced e-mail raging against the school and its administrators over her suspension. Her e-mail describes the computer science teacher as a “bitch” and the assistant principal in charge of discipline as “a stupid prick.” After Harriet and her friend have a falling out, the recipient forwards the e-mail to the teacher and assistant principal. Upset, the teacher complains to the assistant principal; when Harriet refuses to apologize, he adds to her suspension.

(6) At home, on her own computer, Harriet creates a blog whose posts consist mainly of her making fun of teachers and students at the school using vulgar and abusive language. She tells a few friends about it while at school, and makes occasional updates to it during study hall. Harriet’s friends access it, and forward the link to other students. A teacher becomes aware of the blog and reports it to the assistant principal, who orders Harriet to take it down. When she refuses, she is disciplined.

(7) At home, on her own computer, Harriet creates a blog complaining about preferential treatment received by athletes and cheerleaders by particular teachers at BFHS. She names names and cites examples of bad behavior or substandard academic performance that is given a pass by sympathetic teachers. She argues that the school emphasizes athletics to an unhealthy degree and at the expense of what she argues are other worthwhile extracurricular activities, like drama or quiz bowl. After a story about the blog appears in the school newspaper, it becomes a hit among many students, but the teachers named, as well as some of the athletes (and their parents), complain to the school about Harriet’s blog. The principal orders Harriet to remove her blog, because, he explains, the blog’s allegations have become a “distraction,” “harm school morale,” and are disruptive. He suspends her when she refuses.

(8) Upset by her suspension because of her refusal to take down her blog in (1), Harriet creates a new blog at home.

(a) Amid the complaints about high school life, adolescence, and her parents, she writes a post entitled: "PEOPLE WHO I HATE AND WISH WOULD DIE." She includes a survey inviting visitors to vote on how each person would die. Choices include "being eaten by a giant Burmese python," "being struck by lightning," and "mauled by a pack of starving dingos." Included on the list are the computer science teacher and the assistant principal who punished her, and a few classmates against whom Harriet harbors grudges. Harriet shows the entry to her friend, who e-mails the link to another student whose name is on Harriet's list. That student, in turn, e-mails the link to the assistant principal. Both the computer science teacher, to whom the principal shows the site, and the parents of several students listed on the site demand that Harriet be expelled, citing safety concerns. The computer science teacher is so fearful for her safety that she is unable to come to work; a substitute has to be hired for the last few weeks of the term. The school then initiates expulsion proceedings against Harriet as a result of the website.

(b) Assume that instead of the message in (a), she posts a picture of the Alfred P. Murrah Federal Building in Oklahoma City after it was destroyed by the truck bomb planted by Timothy McVeigh. Using Photoshop, she writes "Ben Franklin High School" on the front of the building; she titles her post, "BOOM." When another student discovers the post and her parents notify the school authorities, Harriet is immediately suspended and the school begins expulsion proceedings against her. She maintains it was a joke.

(c) Upset that her ex-friend forwarded her e-mail in (5) to the teacher who angered her by forcing her to take down her blog, Harriet e-mails her friend using her home e-mail account saying, among other things, that she "wouldn't be surprised if you have an accident at school and no one helped you, because nobody likes snitches." She adds, "I hope you die soon." Alarmed, the friend and her parents contact the school, seeking to have Harriet removed from school.

The school would encounter no difficulties disciplining Harriet for (1) under *Kuhlmeier*. The school may disassociate itself from messages it thinks improper, especially in "non-public fora" like classes. Similarly, following *Fraser*, (2) would probably present no First Amendment problem. Sending a mass e-mail using the school's e-mail addresses seems to us akin to addressing a school assembly.

Moreover, *Fraser* seemed to condone the school's requirement of civility and decency in communications to the student body. We assume this means that the school can prohibit profanity, at least when directed at the school population as a whole, though an argument could be made that *Morse* focused on the sexual nature of *Fraser's* speech. Further, *Morse* permits (3), especially, as we will argue, when Harriet takes actions to bring her "off-campus" speech on to campus. Finally, under *Tinker*, if sufficient evidence were available that "widespread disruption" accompanied students' viewing of the goat-headed teachers website in (4), she could be disciplined for that, as well. The scenarios described in (5)-(8), however, present more difficult questions, which we now consider in some detail, using the principles articulated above.

C. Applying the Framework

1. Example (5): Harriet's Poison Pixel E-mail

However unwise it might be to describe her teachers in such terms, we think that Harriet's speech is beyond the regulation of the school. The facts indicate that the speech was clearly "off-campus"—Harriet sent it from home on a private e-mail account to her friend's e-mail account—and since it was sent to no one else, it could not possibly be viewed as "disruptive." The only possible ground for discipline would be under *Fraser*, but, given the off-campus nature of the e-mail, the fact it was a private communication, the lack of sexually explicit language, and the rejection by the *Morse* Court of any reading of *Fraser* that permits discipline for "offensive" speech, all sap *Fraser* of much value.²⁷²

2. Example (6): Harriet Welsch and the Blog of Bile

Here the on-campus/off-campus question may be a bit closer, since Harriet is updating the blog at school, and even showing it to friends while at school. Again, however, the *content* of the blog does not appear to fall within one of the exceptions, nor has it appeared to

272. Cf. *Klein v. Smith*, 635 F. Supp. 1440, 1442 (D. Me. 1986) (refusing to permit regulation of off-campus student expression). In *Klein*, a student was suspended for ten days after he "flipped off" a teacher away from school grounds, in the parking lot of a restaurant. *Id.* at 1441. The court highlighted the fact that the conduct was "far removed from any school premises or facilities at a time when teacher Clark was not associated in any way with his duties as a teacher." *Id.* Finding any possible connection between the realm of the school and "giving the finger" to a teacher off-campus "far too attenuated," the court invalidated the school's attempt to discipline the student. *Id.* at 1441-42.

cause a disruption. Even if one were to adopt the position that Harriet's de minimis accessing and updating at school rendered it on-campus speech, the cases furnish no authority for disciplining her. That students to whom she showed the blog forwarded it to their friends would not, under our analysis, automatically mean that it became on-campus speech; but again, if a court took a different view, the facts here would not support a finding of widespread disruption.

3. *Example (7): Harriet the Muckraker*

Harriet clearly intends her blog to be read and discussed at school. She has not kept it private; indeed, she agreed to publicize it via the school newspaper. Therefore, we think that her speech is more clearly "on-campus" than in the other examples, even though she created the blog at home and, presumably, used no school resources. It is also clear that the subject matter of the blog does not fall within one of the categorical exceptions that the school is authorized to prohibit absolutely. The question, then, is whether the discomfort it has produced is sufficiently disruptive to warrant discipline.

While we suspect that some administrators may seek to prevent "distractions" and other speech or expressive activity that "hurts morale," we think that discipline of Harriet's speech here would be a clear violation of her First Amendment rights, even under a narrow conception of student rights that would protect only non-disruptive "political" speech said to lie at the core of the Amendment.

If, as Tip O'Neil once quipped, "all politics is local," then the speech here is closer to the "core" political speech of *Tinker* than to the adolescent antics of *Fraser* or *Morse*. In *Tinker*, the children were protesting what they saw to be an illegitimate and unwise military action undertaken by the United States in Vietnam. In the example above, Harriet is protesting what she sees as an unwise preference for athletics over academics that results in unfair distinctions made among students, with athletes receiving preferential treatment. She is protesting school politics, in other words. Moreover, if the principal in *Tinker* was unable to discipline the children for their armbands absent some disruption, and if nondisruptive speech thought "offensive" by teachers is not susceptible to regulation (as *Morse* holds), then censoring speech that is "distracting" or that harms morale is even less of a legitimate ground for discipline. If particular students or teachers feel as if Harriet's allegations are actionable, it is, in our opinion, better to use private law mechanisms (like libel) than resorting to state-sponsored censorship.

4. Example (8): “[Harriet] Spoke in Class Today”²⁷³

Our final example presents the most difficult issue of all: Dealing with student speech that may be a threat. True threats receive no First Amendment protection, wherever uttered. Before *Virginia v. Black*, commentators and judges debated whether the focus should be on the speaker or the listener.²⁷⁴ The Court in *Black* settled on the former, asking whether the speaker intended to put another in fear of physical violence?²⁷⁵ Under that definition, only our example in 8(c) would likely qualify.

Justice Alito’s concurring opinion in *Morse*, with its focus on the physical safety of students while at school, seems to invite a different analysis: If a recipient of a student’s message could reasonably understand the language to be threatening to another student, to school employees, or the school itself, then the school should be able to take action.²⁷⁶ Even ambiguous “threats”—call them “quasi-threats”—should be able to be disciplined by schools either on the theory that they possess *de minimis* value as speech, or in order to deter students making threats or quasi-threats against the school, its

273. Cf. PEARL JAM, *Jeremy*, on TEN (Epic Records 1991).

274. See Jennifer Elrod, *Expressive Activity, True Threats, and the First Amendment*, 36 CONN. L. REV. 541, 558-59 (2004) (discussing the history of First Amendment case law and recognizing that the Supreme Court does not consider “political hyperbole” or statements made in jest “true threats”); Frederick Schauer, *Intentions, Conventions, and the First Amendment: The Case of Cross-Burning*, 2003 SUP. CT. REV. 197, 216-17 (questioning the role of intent in First Amendment “true threat” cases); see also Nina Petraro, *Harmful Speech and True Threats: Virginia v. Black and the First Amendment in an Age of Terrorism*, 20 ST. JOHN’S J. LEGAL COMMENT. 531, 548 (2006) (discussing the rationale of judges and scholars in the history of the true threats doctrine).

275. *Virginia v. Black*, 538 U.S. 343, 357 (2003).

276. For an case illustrative of the approach described above, see *Boim v. Fulton Co. School Dist.*, 494 F.3d 978 (11th Cir. 2007). In *Boim* the court upheld suspension of a student for a story she wrote describing a fictional dream in which she shot a teacher. The court reasoned that if *Morse* supported a categorical exclusion for speech advocating illegal drug use because of the physical danger drug use posed to students, “[t]hat same rationale applies equally, if not more strongly, to speech reasonably construed as a threat of school violence.” *Id.* at 984. See also *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 771-72 (5th Cir. 2007) (“If school administrators are permitted to prohibit student speech that advocates illegal drug use because ‘illegal drug use presents a grave and in many ways unique threat to the physical safety of students,’ . . . then it defies logical extrapolation to hold school administrators to a stricter standard with respect to speech that gravely and uniquely threatens violence . . . to the school population as a whole.” (footnote omitted)).

students and employees, or both.²⁷⁷ (An analogy here might be to the punishment of jokes about hijacking or the carrying of weapons enforced in airports and on airplanes.²⁷⁸)

Each of the examples in (8), however, offers a further complication: none are clearly “on-campus” speech. Thus, we begin by asking which, if any, the school would be able to reach assuming all are examples of on-campus speech. We think that strongest case would be 8(c), while the weakest case would be 8(a). Example 8(b) is the least clear of the three. We regard 8(a) as the weakest case for discipline under our framework because while the comments might be insensitive, even offensive, no reasonable person should regard their presence on such a list as akin to a real promise by Harriet to do violence to their person (mauled by dingos?).²⁷⁹ By contrast, it would not be unreasonable for the recipient of the e-mail in 8(c) to interpret

277. Another reason for permitting administrators to punish this type of speech include the inherent disruptiveness that would accompany suspected threats, since administrators would likely take them seriously, investigate them, perhaps involve the police, etc. *See, e.g.*, In Re Douglas D., 626 N.W.2d 725, 762 (Wis. 2001) (Prosser, J., dissenting) (offering reasons for punishing even “joking” threats made by public school students against other students or school employees, including the need to take threats seriously, impairment of the learning atmosphere, tendency to produce panic among students and employees, and the lack of contribution to the exposition of ideas protected by the First Amendment).

278. *United States v. Irving*, 509 F.2d 1325, 1329, 1330-31 (5th Cir. 1979) (rejecting constitutional attack on statute prohibiting the making of false statements concerning an attempt to commit air piracy as applied to passenger who joked about hijacking a plane prior to takeoff; “[t]he legislative history makes clear that Congress was concerned with the prankster as well as with the individual acting out of malice, and has decreed that the conveyance of such false information is no joking matter.”) The Court found that the conviction did not violate the First Amendment because it closely approximated the false cry of “fire” in a crowded theater. *Id.* at 1330-31. *See also Boim*, 494 F.3d at 984 (“Just as there is no First Amendment right to falsely yell ‘fire’ in a crowded theater . . . or to knowingly make false comments regarding the possession of an explosive device while on board an aircraft . . . there is also no First Amendment right allowing a student to knowingly make comments, whether oral or written, that reasonably could be perceived as a threat of school violence”); Leigh Noffsinger, Comment, *Wanted Posters, Bulletproof Vests, and the First Amendment: Distinguishing True Threats from Coercive Advocacy*, 74 WASH. L. REV. 1209, 1233 (1999) (“Certain speech, because of its context, should be subject to a strict liability standard regardless of the speaker’s intent. For instance, making a joke about semiautomatic weapons would not be protected speech at an airport security checkpoint; even if intended as a political statement about international terrorism, security guards would understand the speech in context as a serious threat, which exempts the speech from First Amendment protection.”).

279. Winne Hu, *L.I. Teenagers Are Accused In Attack Plot On a School*, N.Y. TIMES, July 14, 2007, at B02. Long Island teenagers were arrested for plotting a terrorist attack on their school which included creating a “hit list” of students; however, other students merely took this as a way to blow off steam, rather than a serious threat. *Id.*

it as threatening given the e-mail's emphasis on the hope that harm soon come to the reader in an apparent attempt to arouse fear or dread in the reader.

Should the fact that it was almost certainly *not* on-campus speech affect the analysis? Here we are tempted to relax our on-campus/off-campus line. Where quasi-threats are involved, directing the speech or expressive activity at the school community or its members ought to render it on-campus speech and subject to discipline, given the fact that those issued outside school, the recipient might be reluctant to continue to attend school knowing that he or she would see Harriet every day.²⁸⁰ Since even ambiguous or "joking" threats take place against the contemporary reality of school violence, school personnel have to take such threats seriously, which entails disruption of the learning environment, in addition to the fear that such quasi-threats might engender among the students and employees. Balanced against such costs, the value of such expression is, for us, *de minimis* at best.

This leaves 8(b), which is difficult because we think that, in addition to the difficulty of the on-campus/off-campus issue, the message itself could be considered ambiguous. There is, after all, no overt threat. On the other hand, we do not think that it would be unreasonable to interpret it as some kind of threat that warrants investigation by administrators. One could easily interpret the picture of the ruined Murrah building with the name of the high school as some sort of threat to do the same to the school. Whether the expression warrants discipline is a tough question, but, again, there might be an argument for discipline based on the need to deter jokes about committing violence at school or against the school. The ready analogy might be to punishing students for calling in false bomb threats against the school, even as a joke.²⁸¹

Obviously, we can only scratch the surface here. The facts and circumstances of student speech cases will be limited only by the imagination of the students themselves. But these hypotheticals seem

280. Perhaps this is where the Pennsylvania Supreme Court was headed in *J.S.* The Court spent considerable time discussing whether the items posted about Mrs. Fulmer constituted a "true threat" before concluding that it was not, but that since it was directed against the school and its teachers, the speech was on-campus speech. *J.S.*, 807 A.2d at 856-60; see also *id.* at 870 (Zappala, C.J., concurring) (concluding that the "true threat" test was met).

281. See, e.g., *State ex rel. RT*, 781 So. 2d 1239, 1246 (La. 2001) (rejecting constitutional challenge to conviction of juvenile for making a false bomb threat against school).

to us to encompass a spectrum of likely scenarios. As we hope to have demonstrated, the correct answer is not always readily apparent. We have, however, attempted to construct, within the confines of the case law, principles that can guide judges and administrators, which balance students' First Amendment rights with administrators' need to maintain order and safety for students in their charge.

One final point ought to be made. The principles outlined here are not self-executing. We are confident that most school administrators faced with the forms of student expression discussed here would act reasonably most of the time. As the cases demonstrate, however, school administrators are as vulnerable to anger, irritation, fear, and overreaction as the rest of us. Courts should continue to serve as a forum for the sober second thought. While this function is not always an easy role to fulfill without seeming to second-guess those "on the ground," it is, we submit, a vital role. Deference should not slide into pusillanimity, particularly where the effects on students subject to suspension or to discipline can be dire.

VI. Conclusion

Whatever else *Morse* means for students' First Amendment rights in general, the Court's decision provided little guidance to teachers and administrators struggling with online student speech. By accepting uncritically the school's claim that the Olympic Relay was a school-related event, the Court was able to sidestep the difficult question of how far off-campus the school's jurisdiction reached—the issue on which school administrators are most in need of direction. On the other hand, *Morse* made clear that mere offensiveness, without more, is an insufficient reason to discipline student expression. This fact alone might help courts dispose of a number of cyberspeech cases, given that many such cases arise as a result of crude or vulgar comments directed at teachers and administrators by students.

In his efforts to narrow the scope of the *Morse* opinion, Justice Alito might have inadvertently encouraged administrators to make further analogies to activities akin to "physical harm" that would justify regulation. The majority's endorsement of the categorization of student speech will likely further encourage schools to argue for other content-based exceptions to *Tinker's* requirement of disruption.

Until the Court decides to speak again, however, school administrators will still be required to make decisions regarding

online student speech. We have offered a framework that respects students' First Amendment rights and places real—but not unduly formalistic—limits on the reach of school authority, while also accommodating the legitimate need to provide a safe and orderly learning environment for students and teachers alike.