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**NEITHER *TINKER*, NOR *HAZELWOOD*, NOR *FRASER*, NOR
MORSE: WHY VIOLENT STUDENT ASSIGNMENTS
REPRESENT A UNIQUE FIRST AMENDMENT CHALLENGE**

William C. Nevin*

In the first year after the April 20, 1999, shooting at Columbine High School in Littleton, Colorado, scholars were quick to note the rush to censorship across the country, including discipline for a high school newspaper columnist who suggested satirically that assassinating the president would be a good stress reliever;¹ the efforts in Colorado, Georgia, New Mexico, and Tennessee to ban the style of trench coats worn by the Columbine shooters;² and—ironically enough—cases in Louisiana and Texas involving administrators who attempted to prevent students from wearing black armbands.³ It was simply, as Professor Clay Calvert wrote, “a story of censorship.”⁴ Two years after the shooting, the story was much the same as scholars noted “a drastic increase in expulsions and suspensions for behavior or speech . . . neither criminal nor violent.”⁵ The legal principles underlying this “constrict[ion]” of First Amendment rights were not entirely apparent, as lawyer Edward T. Ramey wrote, but it was expression that bore the brunt of “many of the emotional aftershocks” of the Columbine attack⁶ because the fear of violence on a tragic scale gave administrators

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¹ Clay Calvert, *Free Speech and Public Schools in a Post-Columbine World: Check Your Speech Rights at the Schoolhouse Metal Detector*, 77 DENV. U. L. REV. 739, 742 (2000) [hereinafter Calvert, *Free Speech and Public Schools*].

² Richard C. Demerle, Note, *The New Scylla and Charybdis: Student Speech vs. Student Safety After Columbine*, 10 B.U. PUB. INT. L.J. 428, 430 (2001).

³ David L. Hudson, Jr., *Fear of Violence in Our Schools: Is “Undifferentiated Fear” in the Age of Columbine Leading to a Suppression of Student Speech?*, 42 WASHBURN L.J. 79, 79–80 (2002); see also Calvert, *Free Speech and Public Schools*, supra note 1, at 739 (detailing the story of a Dallas, Texas high school student who wore an armband to mourn the students killed at Columbine and later had to sue her school to protect her expressive rights and prevent a three-day suspension from being noted in her transcript).

⁴ Calvert, *Free Speech and Public Schools*, supra note 1, at 740.

⁵ Kathryn E. McIntyre, Note, *Hysteria Trumps First Amendment: Balancing Student Speech with School Safety*, 7 SUFFOLK J. TRIAL & APP. ADVOC. 39, 41 (2002).

⁶ Edward T. Ramey, *Student Expression: The Legacy of Tinker in the Wake of Columbine*, 77 DENV. U. L. REV. 699, 709 (2000).

“all the reasons—legitimate or illegitimate—they needed to trounce the First Amendment rights of public school students,” according to Professors Robert D. Richards and Clay Calvert.⁷

After Columbine was followed by a 2005 school shooting in Red Lake, Minnesota, that killed five students, a teacher, and a security guard; the 2007 Virginia Tech massacre that killed thirty-two people; the 2012 shooting at Sandy Hook Elementary School in Newtown, Connecticut, that killed twenty elementary school children and six adults; and many other lower-profile school-related incidents (in addition to the shootings in Tucson, Arizona, and Aurora, Colorado),⁸ the resulting media coverage made it difficult for any fears of school violence to subside—even if schools themselves were getting safer.⁹ In short, much like the terror attacks of September 11, 2001,

⁷ Robert D. Richards & Clay Calvert, *Columbine Fallout: The Long-Term Effects on Free Expression Take Hold in Public Schools*, 83 B.U.L. REV. 1089, 1091 (2003); see, e.g., Kyle W. Brenton, Note, *BONGHiTS4JESUS.COM? Scrutinizing Public School Authority over Student Cyberspeech through the Lens of Personal Jurisdiction*, 92 MINN. L. REV. 1206, 1206 (2008) (“[S]chool administrators lack a strong incentive to protect the free speech rights of their students—they are more concerned with preserving the integrity of the educational process against perceived threats.”); McIntyre, *supra* note 5, at 52 (“School shootings have generated a climate of fear, but that fear does not provide a rational basis for curtailing a student’s First Amendment rights or excluding them from education.”).

⁸ *Timeline of Worldwide School and Mass Shootings: Gun-related Tragedies in the U.S. and Around the World*, INFOPLEASE.COM, <http://www.infoplease.com/ipa/A0777958.html> (last visited Mar. 11, 2015).

⁹ See, e.g., Hudson, *supra* note 3, at 103–04 (“School advocates may well cite their earnest desire to prevent another Columbine. . . . [B]ecause of Columbine, Springfield, and other incidents, school safety concerns trump free-speech rights. There are several problems with this phenomenon. First, it is not at all clear that there has been a marked increase in school violence. Some studies have shown the opposite—that school violence is on the decline. . . . Just because the media reports on a subject does not necessarily mean that there is an increase in that phenomenon. Oftentimes, our society—and particularly the media—seize on certain anomalous events and incorrectly report a disturbing trend.”); Richard Salgado, Comment, *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, 1393–94 (“[S]tatistically speaking, schools are among the safest places for children to be. In any given year, a student is three to four times more likely to be hit by lightning than to be the victim of violence in school. Yet an atmosphere of fear has become pervasive in the nation’s schools. Fueled by media hype, fear of the unthinkable and, perhaps, a bit of guilt, more parents are demanding that school boards implement strict policies to deal with kids who step out of line.” (footnotes omitted) (internal quotation marks omitted)); W. David Watkins & John S. Hooks, *The Legal Aspects of School Violence: Balancing School Safety with Students’ Rights*, 69 MISS. L.J. 641, 644–45 (1999) (“[T]he number of twelfth graders who reported being injured by a weapon while at school did not increase significantly between 1976 and 1996. In fact, a recent study measuring trends in nonfatal violent behaviors among adolescents in the United States between 1991 and 1997 indicates ‘significant linear decreases’ in aggressive behaviors such as fighting and carrying guns onto school property. A survey of principals of

changed the way Americans view terrorism, Columbine and subsequent violent attacks changed the way administrators and courts evaluate school safety and the freedoms allotted to students—especially those students who express themselves with violent imagery.¹⁰

Presumably under the guise of preventing future attacks, episodes of school violence can also prompt administrators to target student speech that expresses violent themes.¹¹ The 2007 Virginia Tech shooting, according to one expert in the area of student speech, prompted a revival of a more aggressive stance toward violent student speech as “[s]chools are looking for and making up things out of statements that, in the past, would have been passed over as foolish kid talk.”¹² Broadly speaking, cases dealing with violent student speech can be separated into three categories: violent expression related to pedagogy and classroom activities, violent expression unrelated to pedagogy, and student speech that truly threatens others. This Article will focus on the first of those categories: violent expression incorporated into a child’s education.

There is perhaps no better example of both violent expression related to pedagogy and the rush to punish violent student speech than the facts highlighted in *Cuff ex rel. B.C. v. Valley Central School District*.¹³ In *Cuff*, a ten-year-old fifth-grade student identified in court documents as “B.C.” was completing an assignment in science class wherein he was to both color a drawing of an astronaut and write a wish of anything he wanted on the spaceman’s leg.¹⁴ After a slew of questions prompted the teacher to offer, “When I mean anything you want, anything. You can

schools with seventy-five percent or more of the student population living in poverty, showed significant reductions in the number of conflicts among students, in the use of drugs and alcohol among students, and in physical or verbal abuse of teachers. Data from the National Crime Victimization Survey for 1996 indicate that incidences of violent victimization among adolescents are at their lowest levels since the survey instrument was revised in 1992. Despite recent tragedies, homicides in school are extremely rare events.” (footnotes omitted)); Angie Fox, Note and Comment, *Waiting to Exhale: How “Bong Hits 4 Jesus” Reduces Breathing Space for Student Speakers & Alters the Constitutional Limits on Schools’ Disciplinary Actions Against Student Threats in the Light of Morse v. Frederick*, 25 GA. ST. U. L. REV. 435, 435 (“[R]esearch demonstrates that school violence in this country has steadily declined since the early 1990s, when it peaked alongside other forms of juvenile crime.”).

¹⁰ Clay Calvert, *Misuse and Abuse of Morse v. Frederick by Lower Courts: Stretching the High Court’s Ruling Too Far to Censor Student Expression*, 32 SEATTLE U. L. REV. 1, 21 (2008) [hereinafter Calvert, *Misuse and Abuse*].

¹¹ Judy Wang, *Sensitive Speech: High Schools React to Violent Expression After Virginia Tech Massacre*, STUDENT PRESS L. CTR. (Aug. 1, 2007, 12:00 AM), http://www.splc.org/news/report_detail.asp?id=1365&edition=43.

¹² *Id.* (quoting an interview with Mike Hiestand, a legal consultant for the Student Press Law Center).

¹³ 677 F.3d 109 (2d Cir. 2012).

¹⁴ *Id.* at 111.

write about missiles,”¹⁵ B.C. decided to write his wish: “Blow up the school with the teachers in it.”¹⁶

Many of his classmates laughed at B.C.’s scribblings, but another was so concerned that she told the science teacher what B.C. had written.¹⁷ The teacher found little humor in the elementary student’s wish and sent him to the principal’s office.¹⁸ After meeting first with B.C. and then his parents, the principal decided to suspend the student for a total of six days.¹⁹ B.C.’s parents objected to his punishment and sued the school district, alleging a violation of the child’s First Amendment rights.²⁰ The plaintiffs, however, found little redress as the school district was granted summary judgment in federal district court, a decision upheld by the United States Court of Appeals for the Second Circuit.

In its decision, the Second Circuit made it clear courts should defer to school administrators where violent speech is concerned: “[I]n the context of student speech favoring violent conduct, it is not for courts to determine how school officials should respond. School administrators are in the best position to assess the potential for harm and act accordingly.”²¹ In deciding the case, the court focused on the *Tinker*²² standard, applying it as “whether school officials might reasonably portend disruption from the student expression at issue.”²³ The court also stressed that the standard was objective, “focusing on the reasonableness of the school administration’s response.”²⁴ Yet in ultimately concluding that the administration’s response was reasonable, the court showed just how unreasonable and reactionary it was. The court noted that the astronaut drawing caused one student to become “very worried,” but that was not enough to meet the *Tinker* standard and justify the silencing of B.C.’s expression.²⁵ To do that, the court engaged in extended and elaborate speculation:

School administrators might reasonably fear that, if permitted, other students might well be tempted to copy, or escalate, B.C.’s conduct. This might then have led to a substantial decrease in

¹⁵ *Id.* at 116 (Pooler, J., dissenting).

¹⁶ *Id.* at 111. B.C. had been “disciplined by teachers and school administrators for misbehavior in and around school” before his drawing. *Id.* His previous misbehavior included two similar incidents: a drawing depicting someone firing a gun and a story he wrote in fourth grade about a natural disaster in America that demolished all the schools and killed all the teachers. *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 112 (noting that the student’s punishment included five days of off-campus suspension and another day of in-school suspension).

²⁰ *Id.*

²¹ *Id.* at 113.

²² *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

²³ *Cuff*, 677 F.3d at 113 (quoting *Doninger v. Niehoff*, 527 F.3d 41, 51 (2d Cir. 2008)).

²⁴ *Id.*

²⁵ *Id.* at 114.

discipline, an increase in behavior distracting students and teachers from the educational mission, and tendencies to violent acts. Such a chain of events would be difficult to control because the failure to discipline B.C. would give other students engaging in such behavior an Equal Protection argument to add to their First Amendment contentions. . . . A failure of the appellees to respond forcefully to the “wish” might have led to a decline of parental confidence in school safety with many negative effects, including, e.g., the need to hire security personnel and even a decline in enrollment.

Thus, appellees could reasonably have concluded that B.C.’s astronaut drawing would substantially disrupt the school environment, and their resulting decision to suspend B.C. was constitutional.²⁶

According to the court’s argument, if B.C.’s drawing was not punished, other students might copy his expression to such an extent that the student body would be both distracted and prone to violent acts. Then, teachers and administrators would be unable to control the school to such a degree that parents would lose faith in their abilities, thereby resulting in decreased enrollment. The Second Circuit’s claims are so speculative and so exaggerated that it might have gotten the same mileage out of simply trying to pin the potential downfall of Western civilization on B.C.’s crayon drawing.

This Article contends that violent student assignments represent a challenge not adequately addressed in current case law. Under current Supreme Court student speech jurisprudence, *Tinker*²⁷ governs extracurricular student speech when it encroaches upon the grounds of the school, *Fraser*²⁸ addresses sexually explicit student speech, *Hazelwood*²⁹ controls where the student speech implicates pedagogical concerns and bears the sign of sponsorship from the school, and *Morse*³⁰ enables a school to act against a student speaker advocating the use of illegal drugs.³¹ There is, however, a clear gap in the current framework when student speech is part of the school curriculum yet it lacks any sign of the school’s “imprimatur.”³² This speech is exemplified by student assignments such as the crayon wish in *Cuff*³³ where student expression is integrated into the curriculum but it lacks any real possibility of being mistaken for official school speech. Without the school’s imprimatur, such speech

²⁶ *Id.* at 114–15 (footnote omitted).

²⁷ *Tinker*, 393 U.S. 503.

²⁸ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

²⁹ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

³⁰ *Morse v. Frederick*, 551 U.S. 393 (2007).

³¹ See *infra* Part I for a full discussion of the Supreme Court’s student speech jurisprudence.

³² *Hazelwood*, 478 U.S. at 271.

³³ *Cuff ex rel. B.C. v. Valley Cent. Sch. Dist.*, 677 F.3d 109, 112 (2d Cir. 2012).

falls outside of the realm of *Hazelwood*, and yet it is still connected to curriculum, therefore making it inappropriate to decide using *Tinker*'s material and substantial disruption analysis.

Thus this Article will both (1) explore a subset of violent student speech cases that could rightly be considered under *Hazelwood* if only the student expression bore the sign of official school sponsorship and (2) argue for the creation of a new standard based on *Hazelwood* to govern non-sponsored curricular speech. Furthermore, this new standard would operate much like the current *Hazelwood* analysis with one key distinction: where student speech is curricular and non-sponsored in nature, the only options available to school administrators would be those representing pedagogical counter-speech. Punitive discipline, such as the suspension seen in *Cuff*, would not be allowed under this new standard because it represents a corruption of the education process and a fundamental unfairness to students whose only transgression was to simply turn in an assignment or otherwise attempt to further their education.

Part I will detail Supreme Court student speech jurisprudence. Part II will examine several violent non-sponsored curricular student speech cases, identifying common fact patterns and tracing favored modes of analysis in lower courts. Part III will address why current Supreme Court jurisprudence fails to adequately address these cases. Part IV establishes the non-sponsored curricular speech standard by detailing its operation and examining the administrative options under the standard. The conclusion applies this standard to a selection of applicable cases.

I. SUPREME COURT STUDENT SPEECH JURISPRUDENCE

A. *Tinker v. Des Moines Independent Community School District*

The Supreme Court began its substantive exploration in student speech with its 1969 decision in *Tinker v. Des Moines Independent Community School District*.³⁴ In *Tinker*, school administrators learned of a plan formulated by students and local adults to wear black armbands to school to protest the Vietnam War.³⁵ To prevent students from doing so, area principals met and decided to institute a policy so that any student with an armband would be first asked to remove it before being suspended.³⁶ Three students wore armbands in violation of the policy, refused to remove them, and were subsequently suspended.³⁷ The fathers of the students then sued, seeking both an injunction against further discipline and nominal damages.³⁸ They found no relief

³⁴ 393 U.S. 503 (1969).

³⁵ *Id.* at 504.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

at the district court level, however, as the court upheld the actions of the administrators as constitutional in light of their responsibilities to maintain school discipline.³⁹ The United States Court of Appeals for the Eighth Circuit split equally in an en banc decision, thereby affirming the lower court's decision in favor of the school district.⁴⁰

Simply stated, the issue before the Supreme Court in *Tinker* was a matter of determining who wins when the free expression rights of students collide with the rules of school officials.⁴¹ In finding for the students, the Court established a new standard by which to evaluate the question of expression versus school discipline:

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained.⁴²

The Court found the school administrators' arguments of possible school disruption unconvincing.⁴³ As the majority opinion concluded, there was "no evidence whatever of petitioners' interference, actual or nascent, with the schools' work" and the armbands in no way interfered with the rights of other students.⁴⁴ Simply fearing negative repercussions resulting from the armbands was not sufficient to punish students because, as the Court argued, the "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."⁴⁵

Writing for the majority, Justice Abe Fortas established early in the Court's opinion the thinking that would underlie his analysis when he wrote, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"⁴⁶ a line cited in some form in almost every subsequent student speech case. To emphasize the broad nature of child First Amendment rights, Justice Fortas also explained that the free expression rights belonging to students were not temporally, physically, or scholastically limited:

³⁹ *Id.* at 504–05.

⁴⁰ *Id.* at 505.

⁴¹ *Id.* at 507.

⁴² *Id.* at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

⁴³ *See id.* at 508.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 506.

The principle of these cases is not confined to the supervised and ordained discussion which takes place in the classroom. The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others.⁴⁷

Thus, according to the majority, the free speech rights of students are not to be limited to the confines of the classroom or even to administration-approved discussion topics. As the Court would later characterize *Tinker*, the decision shows that while children are subject to more state authority than adults, the state "may not arbitrarily deprive [children] of their freedom of action altogether."⁴⁸

Justice Hugo Black, however, wrote a scathing dissent⁴⁹ in *Tinker*, arguing the majority's decision represented a shift of the "power to control pupils" from school administrators to the Court.⁵⁰ By the time the case was decided, Justice Black was nearing the end of his tenure on the Court, and, according to biographer Roger K. Newman, it was a period notable for an increasing number of dissents⁵¹ and the loss of "the marked sense of knowing when not to write."⁵² The Justice took his *Tinker* dissent both seriously and personally, as it began with a set of handwritten notes that were typed, retyped, and even edited shortly before he read his dissent from the bench.⁵³ Before

⁴⁷ *Id.* at 512–13 (alteration in original) (footnote omitted) (quoting *Burnside*, 363 F.2d at 749).

⁴⁸ *Bellotti v. Baird*, 443 U.S. 622, 637 n.15 (1979) (plurality opinion).

⁴⁹ *Tinker*, 393 U.S. at 515 (Black, J., dissenting).

⁵⁰ *Id.*

⁵¹ ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 588 (1994); see also JOHN W. JOHNSON, THE STRUGGLE FOR STUDENT RIGHTS: *TINKER V. DES MOINES* AND THE 1960S 176 (1997) (finding that Justice Black dissented on eighteen occasions during the term *Tinker* was decided, the most of any Justice on the Court).

⁵² NEWMAN, *supra* note 51, at 588. Newman noted that, as early as 1966, friends and family noticed a change in Justice Black's demeanor, and the Justice himself confided in 1967 that "Court work is harder now" and "my mind isn't as quick." *Id.* at 589. In the spring of 1968, Justice Black also suffered "transitory (or 'mini') strokes." *Id.*

⁵³ JOHNSON, *supra* note 51, at 176.

he began reading, Justice Black took the opportunity to deliver extemporaneous remarks, beginning them in part with his declaration that “‘I want it thoroughly known that I disclaim any sentence, any word, any part of what the Court does today.’”⁵⁴

Justice Black, a self-professed First Amendment absolutist,⁵⁵ viewed the case primarily as one deciding the proper time and place of speech instead of an administrative ban on the speech of students; as he plainly stated in his dissent, “I have never believed that any person has a right to give speeches or engage in demonstrations where he pleases and when he pleases.”⁵⁶ Justice Black also suggested the majority opinion revived the *Lochner*⁵⁷-era practice of acting as a super legislature⁵⁸ before concluding that “taxpayers send children to school on the premise that at their age they need to learn, not teach.”⁵⁹ Arguments for judicial restraint and time, place, and manner restrictions aside, the Justice also framed speech rights for students as turning over control of the nation’s schools to the children who attend them, writing:

⁵⁴ *Id.*

⁵⁵ See Hugo L. Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865, 867 (1960) (“It is my belief that there *are* ‘absolutes’ in our Bill of Rights, and that they were put there on purpose by men who knew what words meant, and meant their prohibitions to be ‘absolutes.’ The whole history and background of the Constitution and Bill of Rights, as I understand it, belies the assumption or conclusion that our ultimate constitutional freedoms are no more than our English ancestors had when they came to this new land to get new freedoms. The historical and practical purposes of a Bill of Rights, the very use of a written constitution, indigenous to America, the language the Framers used, the kind of three-department government they took pains to set up, all point to the creation of a government which was denied all power to do some things under any and all circumstances, and all power to do other things except precisely in the manner prescribed.”).

⁵⁶ *Tinker*, 393 U.S. at 517 (Black, J., dissenting); see also *id.* at 521–22 (“The truth is that a teacher of kindergarten, grammar school, or high school pupils no more carries into a school with him a complete right to freedom of speech and expression than an anti-Catholic or anti-Semite carries with him a complete freedom of speech and religion into a Catholic church or Jewish synagogue. Nor does a person carry with him into the United States Senate or House, or into the Supreme Court, or any other court, a complete constitutional right to go into those places contrary to their rules and speak his mind on any subject he pleases. It is a myth to say that any person has a constitutional right to say what he pleases, where he pleases, and when he pleases.”).

⁵⁷ *Lochner v. New York*, 198 U.S. 45 (1905). The Court’s decision invalidated a New York state law setting maximum hours for bakers. *Id.* at 45–46 & n.1, 64. The majority in *Lochner* found that the law violated a “liberty of contract,” *id.* at 61, a theory later used to find many otherwise lawful economic regulations unconstitutional. See generally David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373 (2003) (explaining why *Lochner* was one of “the most widely reviled decision[s] of the last hundred years”).

⁵⁸ *Tinker*, 393 U.S. at 518–21 (Black, J., dissenting).

⁵⁹ *Id.* at 522; see also NEWMAN, *supra* note 51, at 591–92 (detailing Justice Black’s comments to his wife that he might begin his *Tinker* dissent by writing: “It is a fine thing America is going to the moon because the Supreme Court will have extended jurisdiction”).

[I]f the time has come when pupils of state-supported schools, kindergartens, grammar schools, or high schools, can defy and flout orders of school officials to keep their minds on their own schoolwork, it is the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary.⁶⁰

While Justice Black did not win the argument in *Tinker*, he certainly established a reoccurring frame of speech for debate: speech rights for public school students versus control for school administrators and judicial deference to their decision making authority. Following the spirit of Justice Black's dissent, later Court decisions would erode the student right to expression established in *Tinker*. *Tinker*, heralded by scholars as "the most important Supreme Court case in history protecting the constitutional rights of students,"⁶¹ served as the sole Court case in the area of student speech rights for less than twenty years before two cases decided in the 1980s began to erode the principles established in the iconic 1969 ruling. Those subsequent decisions, *Bethel School District No. 403 v. Fraser*⁶² and *Hazelwood School District v. Kuhlmeier*,⁶³ were followed in 2007 by *Morse v. Frederick*,⁶⁴ another Court decision that limited free speech rights for students.

B. Bethel School District v. Fraser

In *Fraser*, a Pierce County, Washington, high school senior stood before an assembly of 600 students to give a student government nominating speech⁶⁵ that veered into the patently sexual:

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

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

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

⁶⁰ *Tinker*, 393 U.S. at 518 (Black, J., dissenting).

⁶¹ Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of Tinker?*, 48 DRAKE L. REV. 527, 527 (2000).

⁶² 478 U.S. 675 (1986).

⁶³ 484 U.S. 260 (1988).

⁶⁴ 551 U.S. 393 (2007).

⁶⁵ *Fraser*, 478 U.S. at 677.

So vote for Jeff for A. S. B. vice-president—he'll never come between you and the best our high school can be.⁶⁶

Some students yelled and lewdly gestured during Fraser's speech, while others seemed to be confused and embarrassed, according to a school counselor who attended the assembly.⁶⁷ The day after he gave his speech, Fraser was summoned to the assistant principal's office and informed of his punishment: a three-day suspension and the removal from a list of students being considered to speak at graduation.⁶⁸ Upon appealing his discipline, Fraser won in federal district court, as the court found that the school violated his First Amendment rights.⁶⁹ The United States Court of Appeals for the Ninth Circuit subsequently upheld the district court's decision, finding Fraser's sexually themed speech was "indistinguishable" from the armband protest in *Tinker*.⁷⁰ Furthermore, the Ninth Circuit concluded that allowing administrators to censor student speech that appeared to be lewd or indecent would only "increase the risk of cementing white, middle-class standards for determining what is acceptable and proper speech and behavior in our public schools."⁷¹

The Supreme Court, however, in a majority opinion written by Chief Justice Warren Burger, reversed the Ninth Circuit's decision and found Fraser's punishment to be constitutional, holding that "[t]he First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission."⁷² While the Court did not expressly state the decision was a break from precedent, Chief Justice Burger distinguished the case from *Tinker*, citing the "marked distinction" between Fraser's speech and the "nondisruptive, passive expression" of Mary Beth Tinker's armband.⁷³ Chief Justice Burger also noted that the discipline imposed on Fraser was "unrelated to any political viewpoint" unlike the punishment levied in *Tinker*.⁷⁴ So while *Fraser* would become an exception to the *Tinker* analysis, the Court was somewhat less than explicit in explaining how the two decisions would interact.⁷⁵

In evaluating the merits of Fraser's speech, the Chief Justice made a few points in examining the fundamental nature of both schools and student expression. First, after

⁶⁶ *Id.* at 687 (Brennan, J., concurring) (alteration in original).

⁶⁷ *Id.* at 678.

⁶⁸ *Id.*

⁶⁹ *Id.* at 679.

⁷⁰ *Id.*

⁷¹ *Id.* at 680 (quoting *Fraser v. Bethel Sch. Dist. No. 403*, 755 F.2d 1356, 1363 (9th Cir. 1985)).

⁷² *Id.* at 685.

⁷³ *Id.* at 680.

⁷⁴ *Id.* at 685.

⁷⁵ See *Morse v. Frederick*, 551 U.S. 393, 404 (2007) ("The mode of analysis employed in *Fraser* is not entirely clear.").

noting that public schools function in part to train students for participation in democracy, Chief Justice Burger cited the notion that “[t]he undoubted freedom to advocate unpopular and controversial views in schools” must be weighed against “society’s countervailing interest in teaching students the boundaries of socially appropriate behavior.”⁷⁶ This “socially appropriate behavior” that schools should instill in their students includes consideration for all sensibilities in “[e]ven the most heated political discourse,” according to Chief Justice Burger, who cited a litany of various House and Senate rules governing member decorum to support his proposition.⁷⁷

Second, after citing *Cohen v. California*⁷⁸ and its protection of possibly offensive expression in the public square, the Chief Justice noted that speech rights are not always the same between adults and students: “It does not follow . . . that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school.”⁷⁹ Thus, according to the Court, “the First Amendment gives a high school student the classroom right to wear Tinker’s armband, but not Cohen’s jacket.”⁸⁰

Finally, Chief Justice Burger concluded the majority opinion by focusing extensively on a paternalistic need to protect students from the subject matter in Fraser’s speech.⁸¹ The majority derided Fraser as a “confused boy” as it again endorsed a school’s right to determine whether “essential lessons of civil, mature conduct” can be conveyed in an environment permissive to lewd and indecent speech.⁸² The Chief Justice also wrote that Fraser’s speech was “acutely insulting to teenage girl students” and could be “seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality.”⁸³ Finally, he cited approvingly *Ginsberg v. New York*⁸⁴ and *FCC v. Pacifica Foundation*⁸⁵ as cases representing “limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may

⁷⁶ *Fraser*, 478 U.S. at 681.

⁷⁷ *Id.* at 681–82. As the Chief Justice concluded, “Can it be that what is proscribed in the halls of Congress is beyond the reach of school officials to regulate?” *Id.* at 682. This assertion fails to take into account that the rules governing conduct in Congress are determined by the membership and subject to amendment. No such situation exists in public schools.

⁷⁸ 403 U.S. 15 (1971) (finding a jacket bearing the words “Fuck the Draft” to be protected speech under the First Amendment).

⁷⁹ *Fraser*, 478 U.S. at 682.

⁸⁰ *Id.* (quoting *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring)).

⁸¹ *See id.* at 683–86 (“The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy.”).

⁸² *Id.* at 683.

⁸³ *Id.*

⁸⁴ 390 U.S. 629 (1968).

⁸⁵ 438 U.S. 726 (1978).

include children” and an endorsement of the state’s interest in “protecting minors from exposure to vulgar and offensive spoken language.”⁸⁶

Ultimately, *Fraser* stands for the proposition that school administrators can move to censor student speech they find to be lewd or offensive and that, furthermore, this censorship need not be premised on the presence or threat of a disruption. Often, lower courts have interpreted this authority to act against vulgar or offensive speech broadly in giving schools the ability to censor any student speech found to be objectionable; other courts have interpreted *Fraser* more narrowly, upholding the constitutionality of school discipline only where student speech was sponsored by the school in some way.⁸⁷ The lack of disruption in *Fraser*⁸⁸ and the subsequent constitutionality of the school’s actions makes the case an exception to the *Tinker* standard; whether *Fraser* was truly an exception would be a matter of debate as the Court carved yet another way out of the *Tinker* analysis in its next student speech case.

C. Hazelwood School District v. Kuhlmeier

School administrative authority to censor student speech would broaden with the Court’s 1988 decision in *Hazelwood*.⁸⁹ The facts in the case center on a dispute between a principal and student journalists working for Hazelwood East High School’s *Spectrum*, a newspaper that was produced as a part of the Missouri school’s journalism curriculum.⁹⁰ Before each issue was published, standard procedure dictated that the paper’s faculty advisor submit page proofs to the high school’s principal for prior approval.⁹¹ Three days before the publication of the final issue of the school year, the

⁸⁶ See *id.* at 684–85.

⁸⁷ See David L. Hudson, Jr. & John E. Ferguson, Jr., *The Courts’ Inconsistent Treatment of Bethel v. Fraser and the Curtailment of Student Rights*, 36 J. MARSHALL L. REV. 181, 191 (2002) (“However, recent developments in the lower courts show the *Fraser* decision may do more to curtail the rights *Tinker* recognized than *Hazelwood*. The problem originates in the way *Fraser* is interpreted by some lower courts. The issue that has caused a split in the First Amendment’s application is whether *Fraser* allows schools to censor any speech deemed vulgar or offensive (broad reading), or whether *Fraser* only allows the regulation of speech that is sponsored by the school (narrow reading).”).

⁸⁸ In the majority opinion, scant evidence is cited for the proposition that the speech disrupted the operation of the school. During the speech, some in the audience “hooted and yelled” while others “simulated” the acts Fraser referenced, and the day after the speech, one teacher felt compelled to discuss the speech with her class. *Fraser*, 478 U.S. at 678. Still, there is no sign the speech was disruptive in a way that would satisfy the *Tinker* standard, even though Justice William Brennan argued in his concurring opinion the case was easily decided under *Tinker*. See *id.* at 687–90 (Brennan, J., concurring); see also *supra* notes 66–75 and accompanying text. Perhaps this point was best addressed by a rule in the Bethel High School disciplinary code: “Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures.” *Fraser*, 478 U.S. at 678. For the majority, Fraser’s speech was disruptive simply as a matter of course.

⁸⁹ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

⁹⁰ *Id.* at 262.

⁹¹ *Id.* at 263.

principal found fault with two stories: one on students and teenage pregnancy and another on students dealing with divorced parents.⁹² In the principal's judgment, the students in the pregnancy story might have found their privacy compromised, even with the paper's decision to use pseudonyms; while in the story dealing with divorce, the principal thought that the parents written about were not given the opportunity to respond to unflattering comments.⁹³ After considering the time frame and with the end of the year nearing, the principal decided to simply withhold from publication the two pages containing the stories rather than seek changes to their content.⁹⁴

Student editors unhappy with the principal's decision then sued, arguing that their First Amendment rights had been violated.⁹⁵ The district court, however, concluded the principal's actions were justified in light of the school's educational function.⁹⁶ The Eighth Circuit reversed, finding *Spectrum* to be a public forum that could be censored only under *Tinker*'s material and substantial interference standard.⁹⁷ The Supreme Court, however, reversed the Eighth Circuit and upheld the principal's censorship, choosing to make a distinction between *Tinker* and situations where a school is called to sponsor student expression in some way.⁹⁸

In writing for the majority, Justice Byron White first considered the legacy of *Tinker*—that “[s]tudents in the public schools do not ‘shed their constitutional rights to freedom of speech or expression at the schoolhouse gate’⁹⁹—in light of the Court’s decision in *Fraser*, citing from that case both the idea that student speech rights can be limited and that courts should defer to school administrative decisions.¹⁰⁰

In concluding the censorship was constitutionally permissible, Justice White quickly dismissed the Eighth Circuit’s public forum determination. As he found, “[t]he public schools do not possess all of the attributes of streets, parks, and other traditional public forums that ‘time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.’¹⁰¹ Instead of a square, park, or other type of historically recognizable public forum, Justice White argued, *Spectrum* was a tightly controlled environment where the advisor picked the paper’s editors, picked publication dates, assigned stories to those taking the

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 263–64.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 265.

⁹⁸ *Id.* at 272–73.

⁹⁹ *Id.* at 266 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

¹⁰⁰ *See id.* at 266–67.

¹⁰¹ *Id.* at 267 (quoting *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939)); *see also* Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1220–21 (1984) (explaining differences in traditional, designated, and nonpublic forums).

school's Journalism II class, edited stories, and worked with the printing company.¹⁰² That level of control evidenced a purpose to create a "supervised learning experience for journalism students," rather than a public forum, according to Justice White.¹⁰³

Justice White then distinguished *Hazelwood* from *Tinker*, with the former being a question of whether a school must "affirmatively . . . promote particular student speech" and the latter simply being a matter of whether a school must "tolerate particular student speech."¹⁰⁴ This first category is exempt from the material and substantial disruption standard because, as Justice White concluded, what was "articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression."¹⁰⁵

Thus, the school's level of control over the newspaper and its integration with the curriculum both set the facts of *Hazelwood* outside the realm of *Tinker* and allowed school officials a greater degree of control over a particular subset of student speech. In defining what is to be considered part of a school's curriculum, Justice White cited "school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school" that must be "supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences."¹⁰⁶ Control over this form of curriculum-based, sponsored student expression is easily justifiable, according to Justice White:

Educators are entitled to exercise greater control over this second form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.¹⁰⁷

Under the *Hazelwood* standard, administrators can silence all sponsored speech that would fall under the *Tinker* rubric as well as "speech that is . . . ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences."¹⁰⁸ Given the facts of the case, Justice White focused on the "immature audiences" issue as he cautioned that schools "must be able to take into account the emotional maturity of the intended audience" where student

¹⁰² *Hazelwood*, 484 U.S. at 268.

¹⁰³ *Id.* at 270.

¹⁰⁴ *Id.* at 270–71.

¹⁰⁵ *Id.* at 272–73.

¹⁰⁶ *Id.* at 271.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

speech on sensitive topics like divorce and teen pregnancy is concerned.¹⁰⁹ *Hazelwood*'s holding, though, is premised on the educational and supervisory nature of the relationship between the school and the newspaper in addition to giving schools the ability to distance themselves from student speech that might be unfairly attributed to the administration.¹¹⁰

Overall, the Court's holding is broad and grants a great deal of latitude where administrators and teachers act in the interest of "legitimate pedagogical concerns,"¹¹¹ and that leeway only increases when courts defer to administrators in determining what is a valid pedagogical purpose.¹¹² Still, this authority must be read in light of the requirement that speech subject to *Hazelwood* oversight must bear the school's imprimatur in addition to being supervised by faculty with some attached learning component.

D. *Morse v. Frederick*

Morse,¹¹³ the Court's most recent student speech decision, came in 2007 after a nearly two-decade silence on the issue. In *Morse*, high school students were dismissed from class in order to watch the 2002 Olympic torch relay as it passed through Juneau,

¹⁰⁹ *Id.* at 272.

¹¹⁰ See Samuel P. Jordan, Comment, *Viewpoint Restrictions and School-Sponsored Student Speech: Avenues for Heightened Protection*, 70 U. CHI. L. REV. 1555, 1560–61 (2003) ("The Court cited two primary justifications for the heightened interest of school authorities when student speech is school-sponsored. First, the educational context of the speech—including involvement of faculty members and the pursuit of educational objectives in the sponsored activity—implicates the school's custodial and tutelary responsibilities more directly. Second, a school's promotion of speech introduces the possibility that the expression will be attributed to the school itself. Speech that bears the imprimatur of the school resembles official speech, leaving the school free to employ reasonable measures to guard against misattribution. Because of the educational context and the perception of imprimatur, *Hazelwood* authorizes regulation of school-sponsored speech so long as the regulation is 'reasonably related to legitimate pedagogical concerns.'" (footnotes omitted) (quoting *Hazelwood*, 484 U.S. at 273)). But see Adam Hoising, "School Sponsorship" and *Hazelwood*'s Protection of Student Speech: *Appropriate for All Curriculum Contexts?*, NEB. L. REV. BULL. (July 24, 2012), http://lawreview.bulletin.unl.edu/?p=989#foot_src_o ("But the Court did not emphasize the teacher's control. Instead, the Court focused on how the speech affected the public perception, i.e., whether the public could reasonably believe the school supported or ratified the speech." (footnote omitted)).

¹¹¹ See *Hazelwood*, 484 U.S. at 273 ("[E]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.").

¹¹² Jordan, *supra* note 110, at 1555; see also Bruce C. Hafen & Jonathan O. Hafen, *The Hazelwood Progeny: Autonomy and Student Expression in the 1990's*, 69 ST. JOHN'S L. REV. 379, 396 (1995) ("These courts accept the Supreme Court's recognition that school officials must have broad discretion to pursue their primary educational mission of preparing children for adulthood and full integration into society.").

¹¹³ *Morse v. Frederick*, 551 U.S. 393 (2007).

Alaska.¹¹⁴ One student, a senior named Joseph Frederick, was late to school that day but on arrival met his friends on property across the street from Juneau-Douglas High School to watch the torch relay.¹¹⁵ As torchbearers and the cameras passed the students, Frederick and his friends unveiled their surprise for the day: a fourteen-foot banner reading “BONG HiTS 4 JESUS.”¹¹⁶ Principal Deborah Morse crossed the street to demand the students take down their banner, and all but Frederick complied.¹¹⁷ Following the incident, Frederick was suspended for ten days—a punishment that was eventually reduced to eight days.¹¹⁸ Upon appealing his suspension on First Amendment grounds, Frederick’s claim was rejected by the district court, which held that the school had “the authority, if not the obligation” to silence Frederick’s pro-drug speech at a gathering of students.¹¹⁹ The Ninth Circuit, however, reversed, applying *Tinker* and reasoning that administrators had failed to show Frederick’s speech would cause a substantial disruption in the operation of the school.¹²⁰

At the Supreme Court, the exact message of Frederick’s banner became a key issue in the case, as the majority settled on two possible meanings: either an imperative to use illegal drugs or a celebration of illegal drug use.¹²¹ The precise meaning of the two, however, was ultimately irrelevant to the majority since it found Frederick’s banner to be implicitly pro-drug and upheld his punishment on those grounds.¹²²

In writing for the majority, Chief Justice John Roberts attempted to bring order to the Court’s student speech jurisprudence by explaining the applicable principles from both *Fraser* and *Hazelwood*.¹²³ *Fraser*, Chief Justice Roberts wrote, was notable for establishing both that student First Amendment rights are not “automatically coextensive with the rights of adults in other settings” and that *Tinker* does not control all student speech situations.¹²⁴ According to the Chief Justice, *Hazelwood* was instructive in deciding *Morse* as it confirmed both of the underlying principles from *Fraser*. Despite their usefulness, neither *Fraser* nor *Hazelwood* would become the basis for the majority’s holding as Chief Justice Roberts expressly declined to extend *Fraser*’s prohibition of indecent speech to cover pro-drug expression¹²⁵ and found

¹¹⁴ *Id.* at 397.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 398.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 399.

¹²⁰ *Id.*

¹²¹ *Id.* at 402.

¹²² *Id.* at 403.

¹²³ *See id.* at 404–06.

¹²⁴ *Id.* at 404–05 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986)).

¹²⁵ *See id.* at 409 (“Petitioners urge us to adopt the broader rule that Frederick’s speech is proscribable because it is plainly ‘offensive’ as that term is used in *Fraser*. We think this stretches *Fraser* too far; that case should not be read to encompass any speech that could fit under some definition of ‘offensive.’ After all, much political and religious speech might be perceived as

that *Hazelwood* was similarly inapplicable as no reasonable observer would believe Frederick's banner bore the school's imprimatur.¹²⁶

In holding for Principal Morse, the Court focused on the dangers posed by illegal drug use; Chief Justice Roberts cited survey statistics showing that many middle and high school students have either used or sold drugs.¹²⁷ The danger posed by illicit substances, in addition to a school's obligation to protect students, thus took the facts in *Morse* out of the *Tinker* framework, as the majority concluded:

Tinker warned that schools may not prohibit student speech because of "undifferentiated fear or apprehension of disturbance" or "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." The danger here is far more serious and palpable. The particular concern to prevent student drug abuse at issue here, embodied in established school policy, extends well beyond an abstract desire to avoid controversy.¹²⁸

Justice Samuel Alito, joined by Justice Anthony Kennedy, authored a concurring opinion to state explicitly his belief that the majority's holding in *Morse* "goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and . . . provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue."¹²⁹ Justice Alito explained that he was wary of any interpretation of the majority opinion that would allow for the censorship of student speech contrary to a school's educational mission, and he disclaimed any such interpretation as "dangerous" and an abuse.¹³⁰ Yet with a single paragraph, he encouraged lower courts to enable school administrators to act with broad authority to censor student speech in regard to school safety:

[A]ny argument for altering the usual free speech rules in the public schools cannot rest on a theory of delegation but must instead be based on *some special characteristic of the school setting. The special characteristic that is relevant in this case is the threat to the physical safety of students.* School attendance can expose students to threats to their physical safety that they would not otherwise face. Outside of school, parents can attempt

offensive to some. The concern here is not that Frederick's speech was offensive, but that it was reasonably viewed as promoting illegal drug use." (citation omitted)).

¹²⁶ *Id.* at 405.

¹²⁷ *Id.* at 407.

¹²⁸ *Id.* at 408–09 (citations omitted).

¹²⁹ *Id.* at 422 (Alito, J., concurring).

¹³⁰ *Id.* at 423.

to protect their children in many ways and may take steps to monitor and exercise control over the persons with whom their children associate. Similarly, students, when not in school, may be able to avoid threatening individuals and situations. During school hours, however, parents are not present to provide protection and guidance, and students' movements and their ability to choose the persons with whom they spend time are severely restricted. Students may be compelled on a daily basis to spend time at close quarters with other students who may do them harm. *Experience shows that schools can be places of special danger.*¹³¹

While Justice Alito's opinion was only a concurrence and any point he had to make in regard to school violence was certainly dicta, those inherent limitations have not stopped lower courts from using the Justice's opinion in violent student speech cases. Despite the language of the majority opinion that attempted to limit the decision's scope, lower courts have begun to use the opinion "to censor speech that has absolutely nothing to do with illegal drug use but that has everything to do with subjects such as violence and homophobic expression."¹³² As one scholar argued, in the wake of lower court interpretation, "there is widespread disagreement on what *Morse* means and how it should be applied, or even to which school speech cases it should be applied."¹³³ The expansion of *Morse* beyond what was perhaps its intended scope can be blamed primarily on the language and assortment of opinions generally, Justice Alito's concurring opinion specifically, and the lingering concerns regarding school safety after Columbine and other acts of school violence.¹³⁴

¹³¹ *Id.* at 424 (emphasis added).

¹³² Calvert, *Misuse and Abuse*, *supra* note 10, at 3; *see, e.g., id.* at 24 ("[S]ome judges are willing to expansively view the Supreme Court's ruling in *Morse* beyond its factual underpinnings and, in doing so, to extend its logic and reasoning to support the censorship of speech threatening physical violence and expression causing emotional injury. Thus, the issue arises whether there are any limits on just how far these or other courts may go in stretching *Morse* beyond the realm of speech advocating the use of illegal drugs."); Caroline B. Newcombe, *Morse v. Frederick One Year Later: New Limitations on Student Speech and the "Columbine Factor,"* 42 SUFFOLK U. L. REV. 427, 438 (2009) ("[*Morse*] has been stretched far beyond the original exception based on speech about illegal drugs to exceptions based on illegal *conduct*, school safety, and perhaps even a so called psychological exception."); Ronald C. Schoedel III, Comment, *Morse v. Frederick: Tinkering with School Speech: Can Five Years of Inconsistent Interpretation Yield a Hybrid Content-Effects-Based Approach to School Speech as a Tool for the Prevention of School Violence?*, 2012 BYU L. REV. 1633, 1635 (2012) (questioning whether the central holding of *Morse* can spread outside of drug-related speech after lower courts interpreted the cases broadly); *id.* at 1645 ("Lower courts are sharply divided over the breadth of the *Morse* holding, with much of the confusion ensuing shortly after the issuance of the *Morse* opinion.").

¹³³ Schoedel, *supra* note 132, at 1645.

¹³⁴ *See, e.g.,* Newcombe, *supra* note 132, at 427 (arguing that the expansion of *Morse* has two chief causes: the Court's opinion and the "Columbine factor"); Emily Gold Waldman, *A Post-Morse Framework for Students' Potentially Hurtful Speech (Religious and Otherwise)*, 37 J.L.

As members of the Court “came to divergent viewpoints regarding the scope and effect of the majority’s decision” even as the justices were in the process of handing down the decision in *Morse*, “it is not surprising that the federal courts of appeals . . . have reached varying interpretations of the *Morse* holding and its impact on school administrators’ authority.”¹³⁵ Chief Justice John Roberts commanded a thin five-vote majority of himself and Justices Antonin Scalia, Clarence Thomas, Anthony Kennedy, and Samuel Alito.¹³⁶ However, Justice Thomas agreed in the result only to weaken *Tinker*,¹³⁷ and Justices Alito and Kennedy wrote to say they only supported the majority decision so far as it enabled the censorship of apolitical pro-drug speech.¹³⁸ Thus with the fractured Court, the majority opinion was robbed of much of its clarity and intellectual force as it failed to “either overturn or strongly reaffirm the *Tinker* principle.”¹³⁹ Furthermore, the seeds for student censorship were planted clearly on the face of the Court’s decision as it embraced four propositions that could be used to argue for narrowed student speech rights: a new exception for student speech rather than an existing standard (meaning that additional exceptions could be created), student safety as a compelling reason for censorship, political speech as an important factor in the constitutional analysis of censorship, and viewpoint-based restrictions on speech.¹⁴⁰

Another key factor in the expansion of *Morse* is Justice Alito’s concurring opinion. Justice Alito likely thought his opinion would make it clear *Morse* was limited to the censorship of speech about illegal drugs and nothing more.¹⁴¹ Yet in writing his opinion, “he stressed that schools’ disciplinary authority must be tied to the special characteristics of the school environment—citing the physical safety of students as specifically

& EDUC. 463, 489–91 (2008) (contending that the *Morse* opinion set the stage for an expansive interpretation).

¹³⁵ Richard Howell, Note and Comment, *After Morse v. Frederick: The United States Court of Appeals for the Fifth Circuit Takes Another Step Toward Abrogating the Tinker Standard for Student Speech By Permitting Restrictions on Speech Which Poses a “Special Danger” to the School Environment*, 60 BAYLOR L. REV. 1046, 1058 (2008).

¹³⁶ Justice Stephen Breyer concurred in the result, as he believed the case should have been decided in favor of *Morse* on the question of qualified immunity alone. See Clay Calvert, *Qualified Immunity and the Trials and Tribulations of Online Student Speech: A Review of Cases and Controversies from 2009*, 8 FIRST AMEND. L. REV. 86, 90–92 (2009) (explaining Justice Breyer’s argument that qualified immunity protects principals who discipline students for online speech).

¹³⁷ *Morse v. Frederick*, 551 U.S. 349, 410 (2007) (Thomas, J., concurring) (“I write separately to state my view that the standard set forth in *Tinker* . . . is without basis in the Constitution.”).

¹³⁸ *Id.* at 422 (Alito, J., concurring).

¹³⁹ Jay Braiman, Note, *A New Case, an Old Problem, a Teacher’s Perspective: The Constitutional Rights of Public School Students*, 74 BROOK. L. REV. 439, 441 (2009). As Braiman argued, “[t]he case, disappointingly, brings us no closer to understanding what the difference is, or what it should be, between the free speech rights of students in school and those of everyone else, everywhere else, in America.” *Id.*

¹⁴⁰ Waldman, *supra* note 134, at 489–91.

¹⁴¹ Newcombe, *supra* note 132, at 438.

relevant;¹⁴² his mere mention of school safety as an issue for consideration resulted in the United States Courts of Appeals for the Eleventh, Second, and Fifth Circuits broadly interpreting *Morse* to support censorship when safety might be a concern.¹⁴³ These courts, with help from Justice Alito's opinion, have construed *Morse* as providing a "new type of exigent-circumstances exception from the stringent strictures of *Tinker*"¹⁴⁴ in effect, "ripp[ing] the narrow concurring opinion of Justices Alito and Kennedy from its factual moorings."¹⁴⁵ The broadest interpretation of *Morse*—one that sees the case about safety and danger broadly¹⁴⁶ and grants school administrators a great deal of deference¹⁴⁷—has five logical steps according to Professor Clay Calvert:

1. Schools, ideally, should be safe havens from physical dangers, yet in reality they can be, as Justice Alito wrote, "places of special danger."
2. Illegal drugs pose one such special danger; as Justice Alito reasoned, "illegal drug use presents a grave and in many ways unique threat to the physical safety of students."
3. Drugs are not, however, the only threat to the physical safety of students in public school settings.
4. After "the deadliest school massacre in the nation's history" at Columbine High School near Littleton, Colorado, and subsequent school shootings like the one in March 2001 in Santee, California, there is a palpable danger to the physical safety of students posed by the violent conduct of fellow classmates.
5. Thus, if speech advocating illegal drug use can be squelched under *Morse* without having to jump through the legal hoops of *Tinker*, then speech that appears to advocate or threaten violence against other students can similarly be stifled under *Morse*.¹⁴⁸

Since it "inadvertently provided the foundation for new limitations on student speech," Justice Alito's opinion has possibly become as important as the majority's carefully crafted and narrow holding.¹⁴⁹ Despite the importance it has attained in lower courts, some scholars fault the opinion for failing to clearly state when a safety and

¹⁴² Fox, *supra* note 9, at 454.

¹⁴³ *Id.* at 453.

¹⁴⁴ Calvert, *Misuse and Abuse*, *supra* note 10, at 7.

¹⁴⁵ *Id.* at 5 (footnote omitted).

¹⁴⁶ *Id.* at 7.

¹⁴⁷ Fox, *supra* note 9, at 469; *see also* Schoedel, *supra* note 132, at 1645 ("Courts since *Morse* have determined that deference to school authorities can now be given based on something wider—but how much wider varies from court to court.").

¹⁴⁸ Calvert, *Misuse and Abuse*, *supra* note 10, at 7 (footnotes omitted).

¹⁴⁹ Newcombe, *supra* note 132, at 439 (emphasis omitted).

security exigency mandates an exemption from the *Tinker* standard,¹⁵⁰ while others simply label Justice Alito's talk of school safety as dicta.¹⁵¹ Ultimately, if Justice Alito had truly intended both for *Morse* to be a narrow holding and for his opinion to thusly confine the majority opinion to the facts of the case, he "might not have written so much," as Professor Calvert succinctly opined.¹⁵²

One final reason for the expansion of *Morse*—and perhaps the underpinning of Justice Alito's fears in his concurring opinion—is the continued apprehension of school violence in the aftermath of Columbine and other acts of school violence. Where student speech is concerned, as Caroline Newcombe argued, Columbine introduced the "possibility that expression will become action," thereby necessitating a broad interpretation of *Morse* that allows for administrators to effectively address student safety issues.¹⁵³ Indeed, as Professor Calvert resignedly concluded, "[W]hen courts in the near future grapple with student speech referencing violence and violent conduct, the early indications from post-*Morse* cases . . . are that judges will read *Morse* in the lugubriously long shadows cast by the tragedy at Columbine High School."¹⁵⁴

For those in favor of curbing speech rights, post-*Morse* student speech has become "a trap for the unwary school administrator" as they "cannot fashion the sort of comprehensive school speech policy that will best meet the needs of their school without quite possibly running afoul of one of the various limits imposed on the reading of *Morse*."¹⁵⁵ Jay Braiman argued even more strongly against *Morse* and what he saw as its inherent permissiveness, stating the decision "enables students to continue flouting and defying school authority by characterizing conduct, which would be

¹⁵⁰ Howell, *supra* note 135, at 1062 (describing the current state of the law as "ambiguous" as to when *Tinker* can be "skipped" in favor of *Morse*).

¹⁵¹ See Calvert, *Misuse and Abuse*, *supra* note 10, at 6 ("Justice Alito suggested in dicta in *Morse* that *Tinker* still controlled in situations involving the potential for in-school violence, as he wrote that 'school officials must have greater authority to intervene before speech leads to violence. And, in most cases, *Tinker*'s "substantial disruption" standard permits school officials to step in before actual violence erupts."); see also *id.* at 10 (arguing that Justice Alito did not "draft or craft" a standard for those cases not covered by *Tinker* where violent expression is concerned, and if he had, it would have been dicta as "*Morse* had nothing to do with violent expression"). But see Fox, *supra* note 9, at 470 (suggesting a legal framework for the *Morse* exigency standard where "once the school initiates emergency action and has time to adequately assess the threat, any additional action must arise from a determination that: (1) the speech may still reasonably be regarded as posing a threat of physical harm, and thus, disciplinary action is in furtherance of a compelling interest per *Morse*; or (2) such facts exist allowing the school to reasonably forecast substantial disruption within the school under *Tinker*").

¹⁵² Calvert, *Misuse and Abuse*, *supra* note 10, at 9. As Professor Calvert continued, "[h]ad Justice Alito simply stated his conclusion in the case and left it at that, rather than attempting to explain it, there would be little legal ground for . . . appellate courts . . . to assert and claim that his opinion supports school efforts to punish students for violent-themed writings." *Id.*

¹⁵³ Newcombe, *supra* note 132, at 453; see also *id.* ("It is this contextual factor [of school violence] that should be acknowledged and put into a principled framework of analysis.").

¹⁵⁴ Calvert, *Misuse and Abuse*, *supra* note 10, at 34.

¹⁵⁵ Schoedel, *supra* note 132, at 1663.

unacceptable and unjustifiable in any other context, as protected expression.”¹⁵⁶ Yet for scholars supportive of student expression, the decision “might well provide the legal tool that school administrators need to squelch all manners, modes and varieties of student speech that portend harm, be it physical . . . or psychological”¹⁵⁷ even as the central thesis key to the majority’s holding—that Frederick’s banner would have encouraged drug use among students—remains a questionable proposition.¹⁵⁸ To the further dismay of pro-speech scholars is the simple reality that “[a]s courts expand the scope and power of *Morse*, they contract and reduce the force of *Tinker*.”¹⁵⁹

Few, it seems, are content with the Supreme Court’s most recent student speech decision. Ultimately, *Morse* represents something of a failure for clarity in the development of the law as it “has done little to clarify free-speech jurisprudence in the realm of public schools”¹⁶⁰ and neither affirmed nor rejected *Tinker* as a continuing and relevant standard.¹⁶¹ Whether the Court will take up student speech again certainly remains to be seen, but one thing is clear: If the Court chooses to address the bounds of student expression, it will be stepping back into a murky area of the law, and its decision will likely leave all parties unhappy.

II. SURVEY OF VIOLENT NON-SPONSORED CURRICULAR STUDENT SPEECH CASES

This Part will survey both the factual background and current legal analysis of violent non-sponsored curricular student speech cases. Generally speaking, these cases involve student speech that is deeply curricular in nature—meaning that it is engrained into the learning process and therefore outside the proper boundaries of *Tinker*—but the expression does not bear the official seal of school sponsorship, which places these cases outside of *Hazelwood* as well.¹⁶² Thus these cases represent a distinct subset of student speech requiring its own, specific analysis.

¹⁵⁶ Braiman, *supra* note 139, at 442. *But cf.* Jonathan Pyle, Comment, *Speech in Public Schools: Different Context or Different Rights?*, 4 U. PA. J. CONST. L. 586, 593 (2002) (“Just as it protects the rights of criminals against a powerful government and an unsympathetic popular majority, the Constitution protects parents and children from a government that forces children to attend school and from a popular majority that might not respect the way some students and parents choose to live.”).

¹⁵⁷ Calvert, *Misuse and Abuse*, *supra* note 10, at 28.

¹⁵⁸ See Erwin Chemerinsky, *The Hazelwooding of the First Amendment: The Deference to Authority*, 11 FIRST AMEND. L. REV. 291, 295 (2013) (“[I]t is hard to believe that any student in the school, the smartest or the slowest, would be more likely to use illegal drugs just because of the banner that Frederick held up.”).

¹⁵⁹ Clay Calvert, *Tinker’s Midlife Crisis: Tattered and Transgressed but Still Standing*, 58 AM. U. L. REV. 1167, 1171 (2009) [hereinafter Calvert, *Tinker’s Midlife Crisis*]; see also *id.* at 1169 (arguing that *Tinker* faces a “new problem” of being “overshadowed” by *Morse* and being used only in situations where cases “mirror or closely parallel its facts”).

¹⁶⁰ Calvert, *Misuse and Abuse*, *supra* note 10, at 33.

¹⁶¹ Braiman, *supra* note 139, at 441.

¹⁶² See *infra* Part II.B for discussion of why current Supreme Court jurisprudence fails to address the category of non-sponsored curricular student speech.

A. Common Factual Situations in Violent Non-Sponsored Curricular Speech Cases

The majority of violent non-sponsored curricular student speech cases arose after a student turned in a class assignment with violent themes or content. These assignments, in turn, were either some form of artistic expression¹⁶³ or fictional stories.¹⁶⁴ Artistic expression in these cases include the painted portrayal of a police officer being shot,¹⁶⁵ a drawing of a school surrounded by explosives in addition to the school district's superintendent shown with a gun to his head,¹⁶⁶ an experimental art project focusing on the fictional need to take vengeance on a dog killer,¹⁶⁷ and fifth-grader Cuff's wish to "[b]low up the school with the teachers in it" as depicted as a crayon-scrawled wish written on a drawing of an astronaut.¹⁶⁸ Fictional stories in these cases include graphic and fanciful depictions of violence and sex,¹⁶⁹ an essay on a student's last twenty-four hours of life,¹⁷⁰ and a story detailing a teacher's decapitation.¹⁷¹ The commonality between the seven, however, is that they were all created either during regular coursework or they were produced at the behest of a teacher, as in *Demers v. Leominster School Department*,¹⁷² a case in which a student was told to draw his feelings and was subsequently disciplined for his creation that depicted the school surrounded by explosives.¹⁷³

The category of non-sponsored curricular speech is broader than class assignments. In *Emmett v. Kent School District*,¹⁷⁴ a student was suspended for a website created off-campus that contained mock obituaries of his classmates.¹⁷⁵ The pedagogical implication in *Emmett* is that the student was inspired to create the obituaries on his

¹⁶³ See, e.g., *Cuff ex rel. B.C. v. Valley Cent. Sch. Dist.*, 677 F.3d 109, 111 (2d Cir. 2012) (crayon drawing of an astronaut with a written wish to blow up the school); *Demers ex rel. Demers v. Leominster Sch. Dep't*, 263 F. Supp. 2d 195, 198–99 (D. Mass. 2003) (drawing of a school building with explosives); *Boman v. Bluestem Unified Sch. Dist. No. 205*, No. 00-1034-WEB, 2000 U.S. Dist. LEXIS 5389, at *2 (D. Kan. Jan. 28, 2000) (poster making threats to whomever had killed the student's dog); *In re Ryan D.*, 123 Cal. Rptr. 2d 193, 195 (Cal. Ct. App. 2002) (painting of a child shooting a police officer).

¹⁶⁴ See, e.g., *Cox v. Warwick Valley Cent. Sch. Dist.*, 654 F.3d 267, 270 (2d Cir. 2011) (fictional essay about drug abuse and suicide); *D.F. ex rel. Finkle v. Bd. of Educ.*, 386 F. Supp. 2d 119, 123 (E.D.N.Y. 2005) (fictional story about a student who stabs and decapitates his fellow students); *In re Douglas D.*, 626 N.W.2d 725, 730–31 (Wis. 2001) (fictional story about a student who decapitates his teacher).

¹⁶⁵ *In re Ryan D.*, 123 Cal. Rptr. 2d at 196–97.

¹⁶⁶ *Demers*, 263 F. Supp. 2d at 198–99.

¹⁶⁷ *Boman*, 2000 U.S. Dist. LEXIS 5389, at *2.

¹⁶⁸ *Cuff*, 677 F.3d at 111.

¹⁶⁹ *D.F.*, 386 F. Supp. 2d at 123.

¹⁷⁰ *Cox v. Warwick Valley Cent. Sch. Dist.*, 654 F.3d 267, 270 (2d Cir. 2011).

¹⁷¹ *In re Douglas D.*, 626 N.W.2d 725, 730–31 (Wis. 2001).

¹⁷² 263 F. Supp. 2d 195 (D. Mass. 2003).

¹⁷³ *Id.* at 198–99.

¹⁷⁴ 92 F. Supp. 2d 1088 (W.D. Wash. 2000).

¹⁷⁵ *Id.* at 1089.

website after a creative writing class.¹⁷⁶ While the connection to coursework is not as strong as the previously mentioned examples, it still implies a serious tie to education and represents expression that should be fostered as part of the learning process.

The best example of student speech that should be encouraged as part of the educational process—and therefore representing non-sponsored curricular speech—was seen in *LaVine v. Blaine School District*.¹⁷⁷ In *LaVine*, a student presented his English teacher with a poem describing a school shooting.¹⁷⁸ This poem was not given to the teacher as a threat or for a grade; rather, the student simply wanted feedback from his teacher in order to improve his writing.¹⁷⁹ This type of speech ties directly to the heart of a school's educational mission and represents all of the learning interests implicated in *Hazelwood*. Therefore, such speech should be considered part of a school's curriculum no matter who commissioned it or whether it was turned in to an instructor.

While there are clear factual similarities among these cases, there is also one key distinction: Although many students and guardians seek redress in the courts for school discipline in these cases, some students, such as those in *In re Ryan D.* and *In re Douglas D.*, were appealing adverse decisions in criminal juvenile proceedings. The student speech at issue in these juvenile proceedings was still similar, but, as Part II.B will detail, the legal analysis tended to be different, focusing less on student speech jurisprudence and more on an examination of whether the student's speech represented a true threat.

B. Common Legal Analysis of Violent Non-Sponsored Curricular Speech Cases

While the facts are remarkably similar in these cases, the legal analysis employed by courts to determine the constitutionality of disciplinary action taken by schools or other state actors against students varies greatly. Several courts turned to *Tinker* to address the issue, but it has not been the exclusive means of analysis. Some courts rely on true threat analysis and state case law while others use a means of analysis that is simply unclear.

1. Cases Using *Tinker* Analysis

For example, in *LaVine*, the Ninth Circuit eliminated both *Fraser* and *Hazelwood* before settling on *Tinker* as controlling law¹⁸⁰ when an eleventh-grade student was suspended a total of seventeen days for his poem titled "Last Words."¹⁸¹ As the court

¹⁷⁶ *Id.*

¹⁷⁷ 257 F.3d 981 (9th Cir. 2001).

¹⁷⁸ *Id.* at 983–84.

¹⁷⁹ *Id.* at 984.

¹⁸⁰ *Id.* at 988–89.

¹⁸¹ *Id.* at 983. The most relevant part of the poem described the narrator's actions as follows: "As I appro[a]ched, the classroom door, I drew my gun and, threw open the door, Bang, Bang, Bang-Bang. When it all was over, 28 were, dead, and all I remember, was not fe[e]ling, any remor[s]je, for I felt, I was cle[a]nsing my soul. . . ." *Id.*

reasoned in a decision six years prior to the Supreme Court's ruling in *Morse*, the poem was "not vulgar, lewd, obscene or plainly offensive," therefore placing it outside the boundaries of *Fraser*.¹⁸² Likewise, it was not suited to be decided under *Hazelwood* as no members of the public could have reasonably believed that the poem bore the imprimatur of the school as the poem was only shown to the student's teacher and friends, it was not published in a school publication, and "[i]t was not an assignment."¹⁸³ *Tinker* was appropriate, as the Ninth Circuit determined, because it simply covered "all other speech" not governed by *Fraser* or *Hazelwood*.¹⁸⁴ This conclusion, however, ignores the facts of *Tinker*¹⁸⁵ and arbitrarily characterizes it as a default means of addressing student speech cases, thereby foreclosing any serious inquiry into the educational issues in *LaVine*.

The *LaVine* court's reasoning did not improve as it applied *Tinker*'s material and substantial disruption standard. After first noting the school "had a duty to prevent any potential violence on campus" to either the student poet or others, the Ninth Circuit found the school had a "reasonable basis" for its decision to suspend the student based on his troubled home environment, stalking allegations in regard to his girlfriend, school absences, and past disciplinary issues.¹⁸⁶ And that was all before getting to the analysis of the poem:

Last, and maybe most importantly, there was the poem itself. "Last Words" is filled with imagery of violent death and suicide. At its extreme it can be interpreted as a portent of future violence, of the shooting of James' fellow students. Even in its most mild interpretation, the poem appears to be a "cry for help" from a troubled teenager contemplating suicide. Taken together and given the backdrop of actual school shootings, we hold that these circumstances were sufficient to have led school authorities reasonably to forecast substantial disruption of or material interference with

¹⁸² *Id.* at 989.

¹⁸³ *Id.* This suggests the Ninth Circuit may have at least considered an argument for the case being decided under *Hazelwood* if the poem had been a class assignment rather than something undertaken by a student on his own initiative. This conclusion, however, ignores what the educational process should be and risks a chilling effect on students seeking advice on their own creations outside of the classroom.

¹⁸⁴ *Id.*

¹⁸⁵ *Tinker*, at its core, addresses independent student speech that simply happens to take place on the grounds of a public school. The anti-war armbands worn by the students in the case had nothing to do with coursework or the mission of the school. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969) (noting that the decision to wear black armbands was made by community members and students in a house meeting). Instead, this expression was distinctly apart from anything associated with the school or the learning environment. Assuming that *Tinker* is a broad catch-all for anything not covered by *Fraser*, *Hazelwood*, or *Morse* is simply incorrect.

¹⁸⁶ *LaVine*, 257 F.3d at 989–90.

school activities—specifically, that James was intending to inflict injury upon himself or others.¹⁸⁷

Thus for the Ninth Circuit the possible disruption that made the student's suspension constitutional was not any fear or unease caused by the poem in the student body; rather, it was the idea that the student was going to come to class and harm himself or others as portrayed in the poem. *Tinker*, however, was not intended to operate in such a way as it allows schools to act only where a substantial disruption results from the speech *itself* and not any action possibly predicted in the speech.¹⁸⁸ In short, since the poem could not cause a school shooting or any other incident of violence, the Ninth Circuit's analysis failed to truly account for how the *Tinker* standard should operate.

Furthermore, in referencing the student's issues at home and his various disciplinary transgressions, the Ninth Circuit conflated *Tinker* with an examination of whether the student was a threat to the student body instead of an evaluation of the poem's potential to cause a disruption at the school. In inquiring as to the nature of the student's behavior, the Ninth Circuit was conducting something more akin to a true threat analysis, something the court itself had determined was not germane given the finding that the school's actions were justified.¹⁸⁹

In *Cuff*, the Second Circuit did not undertake a lengthy determination of what standard to apply when a student wrote of a wish that his school and all of its teachers be blown up; rather, it simply stated general principles from *Tinker*¹⁹⁰ in light of *Hazelwood*'s subsequent narrowing of student speech rights without mentioning *Fraser* or *Morse*.¹⁹¹ In applying *Tinker*, the court cautioned that the test does not require administrators to prove an actual disruption or that "substantial disruption was inevitable."¹⁹² Instead, as the Second Circuit determined, the test in *Tinker* is an objective standard based on the reasonableness of the school's determination that a disruption was likely to occur as a result of student expression.¹⁹³ Finally, the Second

¹⁸⁷ *Id.* at 990.

¹⁸⁸ See *Cuff ex rel. B.C. v. Valley Cent. Sch. Dist.*, 677 F.3d 109, 122 (2d Cir. 2012) (Pooler, J., dissenting).

¹⁸⁹ See *LaVine*, 257 F.3d at 989 n.5 ("The school argues that James' poem was a 'true threat' and not protected by the First Amendment at all. Because we conclude that even if the poem was protected speech, the school's actions were justified, we need not resolve this issue." (citation omitted)).

¹⁹⁰ The relevant principles from *Tinker*, according to the Second Circuit, include the oft-repeated line that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate;" that schools cannot censor speech solely on the basis of an "undifferentiated fear or apprehension of disturbance;" and that administrators must show their actions were based on "something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Cuff*, 677 F.3d at 112–13 (quoting *Tinker*, 393 U.S. at 506, 508–09).

¹⁹¹ *Id.* at 112–13.

¹⁹² *Id.* at 113.

¹⁹³ *Id.*

Circuit singled out expression “in the context of student speech favoring violent conduct” as an area where courts should not attempt to “determine how school officials should respond.”¹⁹⁴ These administrators, as the court contended, “are in the best position to assess the potential for harm and act accordingly” and should be afforded deference where violent speech is concerned.¹⁹⁵

In applying *Tinker* to the facts of the case and concluding that “it was reasonably foreseeable that the astronaut drawing could create a substantial disruption at the school,” the *Cuff* court—much like the Ninth Circuit in *LaVine*—noted that the student involved had a history of disciplinary issues.¹⁹⁶ The court also pointed out that other students had seen B.C.’s astronaut drawing and that one student was “very worried” about the drawing.¹⁹⁷ Additionally, the court wrote that B.C.’s lack of capacity or intention to carry out his wish was irrelevant¹⁹⁸—thus similarly conflating *Tinker* with a threat analysis as the Ninth Circuit did in *LaVine*. The Second Circuit also noted that “[c]ourts have allowed wide leeway to school administrators disciplining students for writings or other conduct threatening violence” as it cited to *LaVine* and several other violent student expression cases.¹⁹⁹

The *Cuff* court, however, broke from the analysis as seen in *LaVine* to discuss exactly how the astronaut drawing—rather than any violent act—could disrupt the school community.²⁰⁰ Sharing the drawing with other students “aggravated” the threat of substantial disruption, according to the Second Circuit, and was therefore “an act reasonably perceived as an attention-grabbing device.”²⁰¹ If students decided to copy B.C.’s actions, the court reasoned such reproduction “might then have led to a substantial decrease in discipline, an increase in behavior distracting students and teachers from the educational mission, and tendencies to violent acts.”²⁰² Furthermore, once parents became aware of the astronaut drawing and the school’s hypothetical lack of a response this could have resulted in a “decline of parental confidence in school safety with many negative effects” such as “the need to hire security personnel and even a decline in

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* On the matter of deference, the *Cuff* court cited *Fraser* approvingly, quoting specifically the Supreme Court’s argument that “[t]he determination of what manner of speech in the classroom . . . is inappropriate properly rests with the school board.” *Id.* (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986)).

¹⁹⁶ *Id.* at 113–14.

¹⁹⁷ *Id.* at 114.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *See id.* at 114–15; *see also id.* at 122 (Pooler, J., dissenting) (“[T]he question under *Tinker* is whether this boy’s speech itself had the potential to cause a disruption at school, not whether the drawing might have predicted that B.C. was planning an attack. . . . *Tinker* requires a causal link between the speech that school officials want to suppress and the substantial disruption that they wish to avoid.”).

²⁰¹ *Id.* at 114.

²⁰² *Id.* at 114–15.

enrollment.”²⁰³ Thus, as the Second Circuit found, the school “could reasonably have concluded” that the astronaut drawing would disrupt the school environment, making B.C.’s suspension constitutional.²⁰⁴

So while the *Cuff* court did not make the same mistake of confusing a school shooting or other violence with the possible disruption resulting from student speech as the Ninth Circuit did in *LaVine*, the errors in the court’s reasoning are still readily apparent. By speculating as to what might happen if the school did not act to punish the astronaut drawing or by aggregating the effects of many similar drawings, the court sanctioned the very “undifferentiated fear or apprehension of disturbance” that the Supreme Court cautioned against in *Tinker*.²⁰⁵ Admittedly, the *Tinker* test does not require proof of an actual disturbance or that the feared disturbance was a certainty in the absence of school action.²⁰⁶ But to hold that the *Tinker* test is satisfied by the mere possibility that students in the aggregate may cause the slow demise of school discipline is to reduce the standard to nothingness, and Des Moines, Iowa, school administrators would likely have made the same argument in *Tinker*. As Circuit Judge Rosemary Pooler rightly pointed out in her dissenting opinion in *Cuff*, “[S]ome disruptions—and perhaps some far more substantial than the one at issue in this case—must no doubt be tolerated, lest the slightest flicker of frustration or fear in a classmate could justify sanctioning a student’s speech.”²⁰⁷ In short, the *Tinker* test does not require the moral certainty of a disruption for administrators to act, but it requires more than what was deemed acceptable by the Second Circuit in *Cuff*.

Other courts have also applied *Tinker* in cases of violent non-sponsored curricular speech. In *Demers*, the federal district court of Massachusetts used *Tinker* and a true threat analysis to uphold the suspension of an eighth-grade student who drew both his school surrounded by explosives and the superintendent with a gun pointed to his head.²⁰⁸ In applying *Tinker* to the facts, the court was quick to distinguish the violent drawing from the anti-war armbands stating that the former was not “‘silent, passive expression of opinion, unaccompanied by any disorder or disturbance.’”²⁰⁹ When the drawing was considered along with the student writing “I want to die” and “I hate life” repeatedly on a piece of paper, the court concluded simply that “a reasonable interpretation of the law would allow a school official to prevent potential disorder or disruption to school safety, particularly in the wake of increased school violence across the country.”²¹⁰ This conclusion, however, was reached without any

²⁰³ *Id.* at 115.

²⁰⁴ *Id.*

²⁰⁵ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969).

²⁰⁶ *See Cuff*, 677 F.3d at 113.

²⁰⁷ *Id.* at 120 (Pooler, J., dissenting).

²⁰⁸ *Demers ex rel. Demers v. Leominster Sch. Dep’t*, 263 F. Supp. 2d 195, 198 (D. Mass. 2003). The student was asked by a teacher to draw his feelings, therefore placing his speech in the category of non-sponsored curricular speech.

²⁰⁹ *Id.* at 202 (quoting *Tinker*, 393 U.S. at 508).

²¹⁰ *Id.* at 202–03.

proof as to the potential for disturbance at the school. Again, this determination conflated the potential disruption caused by speech with the potential harm that would be incurred as a result of actual school violence. Yet as the court found in *Demers*, it would have been “unthinkable” for school officials not to act.²¹¹

Despite the outcomes in *LaVine*, *Cuff*, and *Demers*, the mere judicial determination that *Tinker* applies in a given case does not always foretell defeat for students in violent non-sponsored curricular speech cases. In *Boman v. Bluestem Unified School District*,²¹² the Federal District Court of Kansas granted a permanent injunction preventing school administrators from disciplining a student who created an abstract art poster in class and then displayed it in a school hallway.²¹³ The poster, unsigned by the student, was a study on word repetition focusing on the death of a dog and a promise of vengeance against the dog’s killer;²¹⁴ however, the dog, its death, and the student’s violent thoughts were entirely fictional.²¹⁵ Still, the student was suspended for the rest of the school year pending a psychological exam.²¹⁶

In issuing a permanent injunction against the student’s suspension, the federal district judge alluded to *Tinker* when he wrote that “once the circumstances surrounding the making of Ms. Boman’s poster were understood by school officials, there was no factual basis for believing that Ms. Boman had willfully violated any school rule, caused a substantial disruption in the operation of the school, or invaded the rights of other students.”²¹⁷ In assessing the potential disruption (or lack thereof) caused by the poster, the judge cited the school principal’s quick reaction to the poster as he first found out who created the artwork and then moved to determine whether the student was a threat.²¹⁸ No evidence was presented by the school to show

²¹¹ *Id.* at 203.

²¹² No. 00-1034-WEB, 2000 U.S. Dist. LEXIS 5297, at *11 (D. Kan. Feb. 14, 2000).

²¹³ *Id.*

²¹⁴ The student’s poster contained the following text:

Please tell me who killed my dog. I miss him very much. He was my best friend. I do miss him terribly. Did you do it? Did you kill my dog? Do you know who did it? You do know, don’t you? I know you know who did it. You know who killed my dog. I’ll kill you if you don’t tell me who killed my dog. Tell me who did it. Tell me. Tell me. Tell me. Please tell me now. How could anyone kill a dog. My dog was the best. Man’s best friend. Who could shoot their best friend? Who? Dammit, Who? Who killed my dog? Who killed him? Who killed my dog? I’ll kill you all! You all killed my dog. You all hated him. Who? Who are you that you could kill my best friend? Who killed my dog?

Boman v. Bluestem Unified Sch. Dist. No. 205, No. 00-1034-WEB, 2000 U.S. Dist. LEXIS 5389, at *2 n.1 (D. Kan. Jan. 28, 2000) (decision issuing preliminary injunction). The text was written in a spiral that made it “fairly difficult to read” unless the poster was rotated. *Id.* at *2.

²¹⁵ *Id.* at *4.

²¹⁶ *Id.* at *7.

²¹⁷ *Boman*, 2000 U.S. Dist. LEXIS 5297, at *3–4 (D. Kan. Feb. 14, 2000) (decision issuing permanent injunction).

²¹⁸ *Id.* at *6.

that any students believed the poster to be a real threat, and, as the judge concluded, there was a similar lack of evidence to show a disruption in the school.²¹⁹ The judge also noted that the ancillary distractions caused by the student's decision to file a lawsuit—namely upset parties in the community and her disgruntled friends—could not serve as the factual evidence for a disruption under *Tinker*.²²⁰ Therefore, without any proof of a disturbance, the student's suspension was unconstitutional.

In finding for the student, however, the *Boman* court was careful to both limit the applicability of its ruling and reaffirm the authority of school administrators.²²¹ As the judge wrote, the ruling did not “in any way diminish the authority of school administrators to suspend students who willfully violate school rules” or to punish those students who cause a substantial disruption.²²² Furthermore, the judge clarified that his ruling applied only to the student's poster and that it did not prevent future disciplinary action against any student—including the student plaintiff in the case—guilty of violating a school rule.²²³ Finally, the judge offered that the permanent injunction against the school did not prevent administrators “from adopting appropriate rules or policies concerning the posting of items on school property (including reasonable restraints on the location and manner of posting items), nor [did] it prohibit the school from punishing students who willfully violate such rules.”²²⁴ Thus, the judge carefully crafted the ruling to both demonstrate a rigorous application of the *Tinker* test and to point out possible alternatives to school administrators unhappy with the result in the case.

In assessing how courts apply *Tinker* in cases of violent non-sponsored student speech, a few points are clear. First, courts like the Ninth Circuit in *LaVine* may choose to use *Tinker* in such instances simply because it appears reasonable as a default option.²²⁵ Second, courts are likely to entertain the possibility of school violence as a disruption fulfilling the requirements of the *Tinker* standard even as this violates the essence of the Supreme Court's holding in the case.²²⁶ Finally, even though some courts, such as the district court in *Boman*, will conduct a serious inquiry into whether there was an actual disruption or serious cause to fear one, many courts will likely engage in only a perfunctory or entirely speculative *Tinker* examination en route to upholding school discipline.²²⁷

²¹⁹ *Id.*

²²⁰ *See id.* at *7 n.2 (“Although these things undoubtedly make operation of the school more difficult, they do not constitute the type of disruption that would justify plaintiff's suspension because they result from factors other than plaintiff's conduct in putting up her poster.”).

²²¹ *See id.* at *10–11.

²²² *Id.* at *10.

²²³ *Id.*

²²⁴ *Id.* at *10–11.

²²⁵ *See supra* notes 180–84 and accompanying text.

²²⁶ *See supra* notes 186–89, 208–11 and accompanying text.

²²⁷ *See supra* notes 190–205 and accompanying text (discussing the speculative nature of the *Cuff* court's analysis and the factual nature of the *Boman* court's analysis).

2. Cases Using True Threat, State Case Law, and Other Means of Analysis

While *Tinker* tends to be a dominant lens through which to examine the issue of violent non-sponsored curricular student speech, it is not the exclusive means of analysis for courts as they also rely on true threat examination, state case law, and other doctrines. For example, in *Demers*, the federal district court of Massachusetts used both *Tinker* and the true threat doctrine to uphold the school's disciplinary action "[w]ithout deciding which standard [was] appropriate."²²⁸

In *Demers*, the district court judge first established the basics of the true threat analysis as "an objective test that focuses on whether a reasonable person would interpret the alleged threat as a serious expression of an intent to cause a present or future harm."²²⁹ He then observed the current circuit split regarding the true threat analysis and the "viewpoint of the statement."²³⁰ Some circuit courts have adopted a test that examines whether speech should be interpreted as a threat by a reasonable speaker while others use a reasonable listener standard.²³¹ Controlling precedent in the First Circuit suggested that the judge in *Demers* was required to apply a reasonable speaker test, meaning that the focus of the true threat inquiry was whether the student "reasonably should have foreseen" that the drawing of his school surrounded by explosives would cause others to fear harm.²³² Under this standard, as the judge noted, there is "no requirement that the speaker had the ability or actually intended to carry out the threat."²³³ Yet after laying out the basics of true threat analysis, the judge simply concluded with his determination that the student should have known "that his drawing and note would be considered a threat to the school and to himself."²³⁴ While it might have been the case that a fifteen-year-old eighth grader²³⁵ could have taken national concerns regarding school violence into account while drawing his picture and thus conclude that others would be frightened, to simply pronounce—with no further analysis—that the student should have understood the entirety of what he was doing is nothing more than an *ipse dixit*.

While *Demers* involved the dual application of *Tinker* and the true threat doctrine, juvenile court proceedings involving violent non-sponsored student speech turned almost exclusively on state statutory and case law. In the case of *In re Ryan D.*, a

²²⁸ *Demers ex rel. Demers v. Leominster Sch. Dep't*, 263 F. Supp. 2d 195, 202 (D. Mass. 2003). While seriously analyzing both *Tinker* and the true threat doctrine is more fundamentally sound than simply using the former to both uphold school discipline and avoid discussion of the latter, not "deciding which standard is appropriate" seems like an abrogation of the judge's central responsibility. *Id.*

²²⁹ *Id.* at 202.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.* (quoting *United States v. Fulmer*, 108 F.3d 1486, 1491–92 (1st Cir. 1997)).

²³³ *Id.* (citing *Fulmer*, 108 F.3d at 1494).

²³⁴ *Id.*

²³⁵ *Id.* at 198.

California Court of Appeal overturned a juvenile court's determination that a student's painting of a police officer being shot constituted a criminal threat.²³⁶ While the court found that the painting—created as a response to an arrest for marijuana possession and submitted as an assignment for an art class—was “intemperate and demonstrated extremely poor judgment,” it “did not convey a gravity of purpose and immediate prospect of the execution of a threat to commit a crime that would result in death or great bodily injury to the officer.”²³⁷ In interpreting Section 422 of the California Penal Code,²³⁸ the court noted that the statute required that potential threats be analyzed in the greater context of how and where they were made.²³⁹ The court also made it clear that, to be criminally proscribable under Section 422, the threat need not be personally communicated to the intended victim, but, as the court cautioned, the defendant must still at least intend for the threat to be conveyed to the victim.²⁴⁰ To meet the statutory definition of a criminal threat under state law, the court made it clear that the process required the judicial system to “balance the facts against each other to determine whether, viewed in their totality, the circumstances are sufficient to meet the requirement that the communication convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat.”²⁴¹

In applying the law to the facts at hand, the court concluded that the painting failed to “convey a gravity of purpose” along with the “immediate prospect” of a crime that would result in death or great harm to the police officer depicted in the student's work.²⁴² First, the court agreed that any painting as an expression of intention to do harm—“even a graphically violent painting,” as the court pointed out—is “necessarily ambiguous.”²⁴³ Alone, therefore, the court found that the painting could not represent a criminal threat.²⁴⁴ In examining the painting along with the totality of the

²³⁶ 123 Cal. Rptr. 2d 193, 195 (Cal. Ct. App. 2002).

²³⁷ *Id.* at 196.

²³⁸ Section 422 of the California Penal Code punished any individual:

who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety

Id. at 197–98 n.2.

²³⁹ *Id.* at 198.

²⁴⁰ *Id.*

²⁴¹ *Id.* at 199 (internal quotation marks omitted).

²⁴² *Id.*

²⁴³ *Id.* at 200.

²⁴⁴ *Id.*

circumstances surrounding its creation, the court determined that the context of the painting resolved the inherent ambiguity in favor of the student and against a finding of an actual threat.²⁴⁵ The court then discussed several facts that served to mitigate the presence of a criminal threat: the painting was turned in for a grade,²⁴⁶ a month passed between the student's arrest and his submission of the painting, and the painting lacked any notice of an intent to do harm with words such as "'this will be you,' 'I do have a gun, you know,' or 'watch out.'"²⁴⁷ Furthermore, the court found that the actions of school administrators suggested the painting was not a threat, as the student's art teacher found it to be "disturbing" and "scary" but she and an assistant principal who also saw the painting did not call police.²⁴⁸

Most importantly for the student's innocence, however, was the lack of any evidence that he had the specific intent that the painting be shown to the officer depicted in it.²⁴⁹ As the court concluded, the evidence suggested that the student "could have, and perhaps even should have foreseen the possibility" that the officer would learn of the painting and see it.²⁵⁰ This mere possibility, though, was insufficient to establish the specific intent necessary for criminal liability.

In concluding its opinion, the court noted the difficulty of balancing safety concerns with the constitutional guarantee of free speech:

We certainly find no fault with the school authorities and the police treating the matter seriously. The painting was a graphic, if mythical, depiction of the brutal murder of [a police officer]. Without question, it was intemperate and demonstrated extremely poor judgment. But the criminal law does not, and can not, implement a zero-tolerance policy concerning the expressive depiction of violence.²⁵¹

Thus, the California Court of Appeal concluded that at least the state's criminal code must allow for the creative depiction of violence in a school setting, but it did not speculate on whether school administrators could have disciplined the student for the painting. With *In re Douglas D.*, the Wisconsin Supreme Court provided some measure of insight into the boundaries of criminal law and the application of

²⁴⁵ *Id.*

²⁴⁶ *Id.* As the court noted, simply turning in an assignment "would be a rather unconventional and odd means of communicating a threat," as "[o]rdinarily, a person wishing to threaten another would not do so by communicating with someone in a position of authority over the person making the threat." *Id.*

²⁴⁷ *See id.* at 200–01.

²⁴⁸ *Id.* at 201.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.* at 201–02.

school discipline as it applied a state disorderly conduct statute and the true threat doctrine to decide a case involving violent non-sponsored curricular speech.²⁵²

In the Wisconsin case, an eighth-grade English student was given a creative writing assignment with “no limit regarding the topic” on which he was to write, and other students would finish the assignment.²⁵³ Instead of beginning the assignment, however, the student talked with friends and disrupted the class, upon which his teacher sent him into the hall outside of the classroom to begin working.²⁵⁴ At the end of the class period, the student handed in the following short story:

There one lived an old ugly woman her name was Mrs. C that stood for crab. She was a mean old woman that would beat children sencless. I guess that’s why she became a teacher.

Well one day she kick a student out of her class & he din’t like it. That student was named Dick.

The next morning Dick came to class & in his coat he con-seled a machedy. When the teacher told him to shut up he whiped it out & cut her head off.

When the sub came 2 days later she needed a paperclipp so she opened the droor. Ahh she screamed as she found Mrs. C.’s head in the droor.²⁵⁵

The teacher—who often referred to herself as “Mrs. C”²⁵⁶—believed the story to be a threat against her if she again disciplined the student.²⁵⁷ After the class was dismissed, she informed the school principal, and the student was then called to the assistant principal’s office, where he apologized and insisted the story was not a threat.²⁵⁸ Despite his assertion, the student was given an in-school suspension and moved to a different English class.²⁵⁹ Even with this school punishment already handed down and no sign that the student was a continuing behavioral problem, police filed a delinquency petition a month after the story was turned in alleging that the student had “engaged in abusive conduct under circumstances in which the conduct tends to cause a disturbance,” which was a violation of the Wisconsin state disorderly conduct statute.²⁶⁰

²⁵² 626 N.W.2d 725, 730 (Wis. 2001).

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 730–31 (all errors in original).

²⁵⁶ *Id.* at 730.

²⁵⁷ *Id.* at 731.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.* (internal quotation marks omitted).

In applying the disorderly conduct statute²⁶¹ to the short story in the case, the Wisconsin Supreme Court made some important preliminary determinations: pure speech could be punished under the law,²⁶² threatening speech in the school environment can cause a disruption irrelevant of the specific content,²⁶³ and that the lack of an actual disruption was not dispositive to the outcome of the case.²⁶⁴ After the initial findings, the only issue before the court was whether the student's story was protected speech under the First Amendment, since the court determined that Wisconsin's disorderly conduct statute could only criminalize speech that was wholly without constitutional protection.²⁶⁵

In concluding that the story was indeed protected speech under the First Amendment—and that subsequently the student's disorderly conduct adjudication could not stand—the court noted the distinction between a “threat” and a “true threat.”²⁶⁶ “A threat,” the court reasoned, is a nebulous concept describing anything from “an expression of an intention to inflict pain, injury, evil, or punishment” to a generalized menacing,²⁶⁷ while a “true threat,” as the court defined it, is “a constitutional term of art used to describe a specific category of unprotected speech” and subject to a complete ban by the state—thus true threats were subject to proscription under the disorderly conduct statute.²⁶⁸

In determining whether expression is a true threat, the Wisconsin Supreme Court, like the court in *Demers*, employed a “reasonable speaker” analysis.²⁶⁹ In applying the

²⁶¹ The Wisconsin law specified that “[w]hoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor.” *Id.* at 732.

²⁶² *See id.* at 735 (“[T]he First Amendment does not inherently bar the State from applying [the disorderly conduct statute] to unprotected speech, even if the unprotected speech is purely written speech.”).

²⁶³ *See id.* at 737–38 (“However, we cannot agree with Douglas’s contention that threatening a public school teacher while in school is not the type of conduct that tends to cause or provoke a disturbance. . . . [T]he public has become increasingly concerned with serious student threats of violence. With this in mind, we cannot imagine how a student threatening a teacher could not be deemed conduct that tends to menace, disrupt, or destroy public order.” (citations omitted)).

²⁶⁴ *See id.* at 738 (“Simply because a listener exhibits fortitude in the face of a threat is no reason to allow the threat to go unpunished. Accordingly, we conclude that the fact that Douglas’s story did not cause an actual disturbance is irrelevant to the present inquiry. It is enough that Douglas conveyed his story to Mrs. C under circumstances where such conduct tends to cause or provoke a disturbance.”).

²⁶⁵ *Id.* at 738–39.

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 739 (quoting THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1868 (3d ed. 1992)).

²⁶⁸ *Id.* at 739 (citing *State v. Perkins*, 626 N.W.2d 762 (Wis. 2011)).

²⁶⁹ *See id.* at 739–40 (describing the test as whether “a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as

“reasonable speaker” test, the court found that the juvenile defendant “could have expected another student to end his grisly tale as a dream or otherwise imagined event” just as the class assignment had called for, meaning that his story was indeed not a true threat despite his teacher feeling threatened and his direct communication of the story to her.²⁷⁰ The court cited several factors in determining that the story was not “a serious expression of a purpose to inflict harm,”²⁷¹ including that it was written in the third person, it contained hyperbole and “attempts at jest,” and that the student was merely completing a class assignment within its given parameters.²⁷² The fact that the story was written for class was important to the court’s analysis as it argued that “[h]ad [the student] penned the same story in a math class, for example, where such a tale likely would be grossly outside the scope of his assigned work, we would have a different case before us.”²⁷³

While the Wisconsin Supreme Court’s analysis using the true threat doctrine is far superior to the application as seen in the *Demers* opinion, it still leaves something to be desired as it fails to truly consider whether the student speaker should have “reasonably” foreseen whether others would take the short story as a true threat. The court did mention that the student “could have expected another student to end his grisly tale as a dream or otherwise imagined event”—thus attempting to analyze what the student should have understood at the time he wrote his story—but all other relevant facts cited by the court in its analysis speak to how a reader would understand the story.²⁷⁴ While an argument could be made that the writer was a careful student of English and clearly understood how a change in narrative perspective could affect the threatening tone of a violent short story, this seems unlikely at best.²⁷⁵ Similarly,

distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat” (footnote omitted).

²⁷⁰ *Id.* at 741.

²⁷¹ *Id.* at 739 (defining true threat for purposes of the “reasonable speaker” test).

²⁷² *Id.* at 741.

²⁷³ *Id.*

²⁷⁴ *See id.* at 741. As the court argued:

[I]n the context of a creative writing class, [the student’s] story does not amount to a true threat. First, the story does not contain any language directly addressed from [the student] to Mrs. C. Rather, it is written in the third person, with no mention of [the student]. Second, [the student’s] story contains hyperbole and attempts at jest. It jokes that the “C” in “Mrs. C” is short for “crab.” In addition, it suggests that Mrs. C is so mean that she beats children and speculates that, for this reason, she became a teacher. Third, Mrs. C explained to [the student] that in this particular assignment, he merely was to begin writing a story that other children would complete. Thus, [the student] could have expected another student to end his grisly tale as a dream or otherwise imagined event.

Id.

²⁷⁵ *See id.* But *see id.* at 756 (Prosser, J., dissenting) (noting that “in third-person fiction, the writer is not an actor; the writer stands apart manipulating the characters such as ‘Dick’ and

the court does not clarify how the student should have understood what it meant to include his “attempts at jest.”²⁷⁶

Admittedly, the court’s true threat test does cite both “a speaker [who] would reasonably foresee” and “a listener [who] would reasonably interpret,” but by the court’s own definition, the analysis begins with what the speaker knows and understands.²⁷⁷ Therefore, more attention should have been given to precisely what a reasonable student would have understood in the writer’s situation.²⁷⁸

Despite finding for the student, the Wisconsin Supreme Court was careful to frame its decision as providing protection only against criminal charges, as the court maintained the school took “appropriate disciplinary action” against the student²⁷⁹ and that “[b]y no means should schools interpret this holding as undermining their authority to utilize their internal disciplinary procedures to punish speech.”²⁸⁰ In coming to the conclusion that the decision to impose an in-school suspension²⁸¹ against the student was justified, the court engaged in a discussion of the relevant Supreme Court cases, noting *Tinker*’s admonishment that “educators may not punish students merely for expressing unpopular viewpoints”²⁸² and contrasting that with the language from *Fraser* suggesting that schools must “inculcate in our children ‘the habits and manners

‘Mrs. C.’ to do his bidding” and thus the student was “capable of conveying a threat through the words and actions of his characters”).

²⁷⁶ See *id.* at 741.

²⁷⁷ See *id.* at 739.

²⁷⁸ The dissent, somewhat mockingly, actually phrases this line of analysis well: [L]ooking backward, the question the circuit court faced was whether a speaker or writer in Douglas’s position (a 13-year-old boy, already an adjudicated delinquent, who had clashed with his teacher about discipline matters in the past and who was angry because his teacher had sent him out into the hall during an English class) would reasonably foresee that a listener or reader in the teacher’s position (a new teacher, beginning her first full year of teaching in a public school, in a national environment of apprehension about school violence, who is handed a crude piece of fiction that insults teachers, names and criticizes her thinly-veiled [sic] fictional equivalent, draws a parallel to a disciplinary incident in which the teacher was involved moments before, and then implies that the student will cut off her head with a machete because he is angry at her discipline) would reasonably interpret the writing as a serious expression of a purpose to inflict harm (actual injury, intimidation, or fear of injury, thereby disrupting her emotional tranquility and her ability to teach in the classroom), as opposed to hyperbole and exaggeration or jest that would make a person smile at the student’s imagination and cleverness.

Id. at 755 (Prosser, J., dissenting).

²⁷⁹ *Id.* at 741.

²⁸⁰ *Id.* at 742.

²⁸¹ See *id.* at 731. The length of suspension, however, was unclear.

²⁸² *Id.* at 742 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969)).

of civility.”²⁸³ The court then implied that *Fraser* was particularly applicable as it found that the school “had more than enough reason to discipline [the student] for the content of his story” as it represented “an offensive, crass insult” to the teacher.²⁸⁴ Thus, as the court concluded, “[s]chools need not tolerate this type of assault to the sensibilities of their educators or students.”²⁸⁵

There are at least three relevant observations to make regarding the court’s discussion of the use of school discipline in *In re Douglas D.* First, there is no suggestion that the court’s conclusion as to the constitutionality of school discipline is anything other than dicta as the student was not appealing his suspension.²⁸⁶ Second, while the precise analysis is unclear, the court’s decision to focus on the “offensive, crass” nature of the story rather than its pedagogical implications suggests the court would find *Fraser* to be controlling where possibly threatening and graphically violent student speech is concerned.²⁸⁷ The court does not specify why *Fraser*, with its focus on sexually explicit speech, is applicable and *Hazelwood* is not, but the lack of any discussion of the latter is somewhat telling as a broader failure to consider the educational implications of violent non-sponsored curricular speech.

Finally, the discussion of school discipline is notable for the court’s declaration that “schools may discipline conduct even where law enforcement officials may not.”²⁸⁸ That conclusion may be an obvious one considering that the court found that the story was both protected by the First Amendment—in that it was not a true threat²⁸⁹—and subject to school discipline, a somewhat contradictory position noted by a dissenting

²⁸³ *Id.* at 742 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986)).

²⁸⁴ *Id.* at 743.

²⁸⁵ *Id.*

²⁸⁶ While it is unclear why the court decided to address whether the suspension was constitutional, the court was likely sensitive to various public perceptions of its decision. *See id.* at 742 n.16 (“We recognize that public opinion regarding protected freedoms may wax and wane over time. However, courts should not easily be swayed by public opinion, particularly in matters of constitutional rights. . . . Ever conscious of the principles undergirding the Constitution, this court must not succumb to public pressure when deciding the law. Headlines may be appropriate support for policy arguments on the floor of the legislature, but they cannot support an abandonment in our courthouses of the constitutional principles that the judiciary is charged to uphold.”). By both reversing the student’s juvenile adjudication and finding his suspension constitutional, the court in essence could have it both ways: upholding what it found to be its constitutional obligations in the face of a potentially unpopular decision and giving critics of the result some measure of a victory.

²⁸⁷ *See id.* at 743 (“[W]e also recognize that ‘it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse.’”) (quoting *Fraser*, 478 U.S. at 683). *But see id.* at 748 (Crooks, J., concurring) (suggesting that “[a] school can, and should, discipline a student for speech and conduct that is inappropriate and disruptive, and in no way adds to the school’s educational mission,” and thus tacitly implying that *Tinker* would control the analysis of whether the discipline was constitutional).

²⁸⁸ *Id.* at 743.

²⁸⁹ *Id.* at 741.

justice.²⁹⁰ The specifics of the student's school discipline are unclear from the court's opinion,²⁹¹ but at some point, the punitive authority of the school approaches that of the criminal justice system regarding what exactly a school can do to a student and what impact adverse disciplinary decisions might have.²⁹² Therefore, the seriousness of school discipline in all situations should be at least considered before summarily dismissing its consequences by implication.

While the Wisconsin Supreme Court's majority opinion attempted to balance concerns regarding school violence and the rights guaranteed under the Constitution, one dissenting justice struck a decidedly reactionary tone as he began his opinion by listing school shooting deaths from 1993 to 1999.²⁹³ The dissent found the student to be "a troubled young man"²⁹⁴ and would have upheld his juvenile adjudication, arguing that his colleagues misapplied the true threat doctrine²⁹⁵ and inappropriately cherry-picked through the facts to find that the story was protected speech.²⁹⁶

In addition to calling for deference to school administrators,²⁹⁷ the dissent also argued for placing threatening and violent student speech outside of the boundaries of the First Amendment as "incendiary *per se*," much like shouting "fire" in a crowded

²⁹⁰ *See id.* at 759–60 (Prosser, J., dissenting) ("The majority opinion asserts that some speech in public schools is protected from criminal prosecution but may be suppressed by rules and punished through internal school discipline. When? Are school officials expected to know the answer by instinct? The majority's untested thesis deserves authority and additional discussion."); *see also id.* at 758–59 ("The proposition that speech uttered in the exact same context—same speaker, same words, same time, same place—is fully protected by the First Amendment against some state action but not against other state action, is less established. To give speech a dual character (protected/unprotected) depending upon who is seeking to punish it or how severe the punishment may be, will eliminate certainty in the law and create a chilling effect upon both speech and discipline.").

²⁹¹ The majority opinion cites only an "in-school suspension" of an indeterminate length. *Id.* at 731. While this is certainly nothing to scoff at, it clearly does not rise to the level of an expulsion as seen in other violent student expression cases.

²⁹² In this case, the student was adjudicated delinquent and ordered to be placed under "formal supervision" for a year. *Id.* This contrasts with his in-school suspension. *Id.* If the school had formally expelled the student or suspended him for an extended period, this school discipline might have rivaled the juvenile court's punishment in terms of adverse effects.

²⁹³ *See id.* at 749–50 (Prosser, J., dissenting).

²⁹⁴ *Id.* at 751 (Prosser, J., dissenting).

²⁹⁵ *Id.* at 754 (Prosser, J., dissenting) ("The majority's analysis is confusing. As a result, it is not clear what impact the court's decision will have on safety and discipline in Wisconsin schools.").

²⁹⁶ *See id.* at 755 (Prosser, J., dissenting) ("It is quite wrong for this court to sift through the factual circumstances, minimizing the factors that are present and emphasizing factors that are not there.").

²⁹⁷ *Id.* at 758 (Prosser, J., dissenting) ("Macabre writings may reflect a harmless fantasy life. Then again, they may be a true threat. The facts are best determined by fact-finders on the scene, not appellate judges.").

theatre or making a joke about terrorism at an airport.²⁹⁸ The dissenting justice tied his belief in this categorical exemption to First Amendment protection to the popular conception of widespread school violence as he argued that “[t]oday our country is consumed by the outbreak of violence in public schools” and that therefore “[t]hreats of violence in schools must be taken seriously.”²⁹⁹ As the dissent contended, the nature of the contemporary school environment coupled with, as the justice saw it, the relatively low value of violent student speech³⁰⁰ meant that schools should have *carte blanche* authority to punish and otherwise censor such student expression.³⁰¹ However, this belief that violent student speech should be categorically exempt from First Amendment protection goes against current Supreme Court trends to limit expression automatically excluded from constitutional protection.³⁰²

In addition to using state law and the true threat doctrine, at least one court has addressed a somewhat novel approach in the context of student expression and violent non-sponsored curricular speech. In *Cox v. Warwick Valley Central School District*,³⁰³ the Second Circuit decided a case in which a middle school student wrote a story for class that detailed what he would do if he only had twenty-four hours to live.³⁰⁴ The story the student eventually turned in imagined his escapades in “getting drunk, smoking, doing drugs, and breaking the law” and concluded with the student “taking cyanide and shooting himself in the head in front of his friends at the end of the 24 hours.”³⁰⁵ After the story was handed in, the student’s teacher gave it to the school’s principal who “immediately” took the student out of class to discuss the contents of the story.³⁰⁶ The student, after assuring the principal the story was merely fiction and that he had no intentions to harm himself or others, was then given an in-school

²⁹⁸ *Id.* at 761–62 (Prosser, J., dissenting). The dissent similarly noted that “[i]ntentional bomb scares also fall outside protected speech.” *Id.*

²⁹⁹ *Id.* at 761 (Prosser, J., dissenting); *see also id.* (“Almost inevitably these threats produce fear among students and teachers. They inflict harm and impair the atmosphere for learning.”).

³⁰⁰ *See id.* (Prosser, J., dissenting) (“Threats of violence against students, teachers, or administrators in schools are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. They materially disrupt classwork, and therefore are not immunized by the constitutional guarantee of freedom of speech.” (citations omitted) (internal quotation marks omitted)).

³⁰¹ *See id.* at 767–72 (Prosser, J., dissenting) (arguing that “threats against students, teachers, and administrators in a school setting should not be afforded First Amendment protection”).

³⁰² *See, e.g.,* *United States v. Stevens*, 559 U.S. 460, 468–72 (2010) (noting that depictions of animal cruelty might be protected by the First Amendment); *Snyder v. Phelps*, 131 S. Ct. 1207, 1220–21 (2011) (finding that the First Amendment shielded Westboro Baptist Church funeral protestors from civil liability).

³⁰³ 654 F.3d 267 (2d Cir. 2011).

³⁰⁴ *Id.* at 270.

³⁰⁵ *Id.*

³⁰⁶ *Id.*

suspension as the principal evaluated the situation.³⁰⁷ Concluding that there was no immediate threat to the school, the principal sent the student home, and no further discipline was imposed.³⁰⁸

School officials, however, decided to report the student's parents to New York Child and Family Services, alleging that the student's parents were neglectful due to their lack of concern over both the story and their son's other assorted behavioral issues.³⁰⁹ The state agency, in turn, suggested that the student receive a psychiatric evaluation or the parents might otherwise lose custody of their son.³¹⁰ The parents complied with the agency's request, but they decided to homeschool their son for the rest of the year after the agency's investigation concluded the original report by the principal was "unfounded."³¹¹ The parents then sued the principal and the school district, claiming the student's First Amendment rights were violated specifically by the principal acting in retaliation for the student's story.³¹²

In reviewing the district court's summary judgment decision for the principal and the school district, the Second Circuit stated that to prove a First Amendment retaliation claim, a plaintiff must show that: "(1) his speech or conduct was protected by the First Amendment; (2) the defendant took an adverse action against him; and (3) there was a causal connection between this adverse action and the protected speech."³¹³ Naturally, the student's parents argued his story was protected by the First Amendment.³¹⁴ The adverse action connected to that speech, they argued, was the decision to both place the student in in-school suspension and make the report to Child and Family

³⁰⁷ *Id.* at 270–71.

³⁰⁸ *Id.* at 271.

³⁰⁹ *Id.* The principal's phone call to Child and Family Services was summarized and included in the court's opinion:

13 yr old [student] has been repeatedly writing in his journal violent homicidal and suicidal imagery while in school. He has also participated in acts of vandalism and brought dangerous objects into school such as fireworks and pieces of metal. [Student] recently expressed suicidal thoughts and had a very descriptive plan for doing it in that he would take his favorite weapon, a ruger place it in his mouth with a cyanide pill and shoot himself and everyone would party for a week. The school recommended to the parents that they seek a psychiatric evaluation for their son but they have refused to do so. The parents are minimizing the child's thoughts and behaviors and state that this is just fiction and all a misunderstanding. It is believed the child is a danger to himself and other[s] at this point. The parents are failing to provide a minimal degree of care to their son.

Id. (last alteration in original).

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.*

³¹³ *Id.* at 272.

³¹⁴ *Id.*

Services.³¹⁵ These arguments were unsuccessful, however, as the Second Circuit upheld the district court's grant of summary judgment.³¹⁶

In coming to its conclusion, the court sidestepped the issue of whether the student's story was protected by the First Amendment to find simply that none of the principal's actions constituted retaliation.³¹⁷ While admitting there was "no clear definition of 'adverse action' in the school context,"³¹⁸ the court applied an objective standard focused on determining whether a defendant's actions would deter others from exercising constitutionally protected rights.³¹⁹ The court also noted that this test for an adverse action was a "highly context-specific" examination and was therefore to be applied "in light of the special characteristics of the school environment."³²⁰ In applying an adverse action standard, the court noted the difficult position of teachers and administrators as they "have multiple responsibilities: teaching, maintaining order, and protecting troubled and neglected students."³²¹ Furthermore, "[i]n their various roles, school administrators must distinguish empty boasts from serious threats, rough-housing from bullying, and an active imagination from a dangerous impulse."³²² To sort through those possible threats, the court contended that school administrators must be allowed to conduct an investigation, even when that inquiry results in a student who "is separated, interviewed, or temporarily sequestered to defuse a potentially volatile or dangerous situation."³²³ Thus, as the court determined, "the temporary removal of a student from regular school activities in response to speech exhibiting violent, disruptive, lewd, or otherwise harmful ideations is not an adverse action for purposes of the First Amendment absent a clear showing of intent to chill speech or punish it."³²⁴ Without this ability to temporarily remove a student to assess a situation, the court argued simply that "[a] school cannot function."³²⁵

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.* at 273.

³¹⁸ *Id.* (noting also that "First Amendment student speech cases ordinarily involve explicit censorship or avowedly disciplinary action by school administrators" and retaliation was therefore a somewhat unusual issue in the student speech setting).

³¹⁹ *See id.* (defining an adverse action as "conduct that would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights" (quoting *Zelnik v. Fashion Inst. of Tech.*, 464 F.3d 217, 225 (2d Cir. 2006))).

³²⁰ *Id.* (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

³²¹ *Id.* (also noting the mandatory reporting requirement imposed on teachers and other school officials).

³²² *Id.* at 274.

³²³ *Id.*

³²⁴ *Id.*

³²⁵ *See id.* ("Although a student and his parents might perceive such removal as 'disciplinary' or 'retaliatory,' its objective purpose is protective. It affords the administrators time to make an inquiry, to figure out if there is danger, and to determine the proper response: discipline, a benign intervention, or something else. A school cannot function without affording teachers and administrators fair latitude to make these inquiries.").

With those principles established, the court concluded that there was no adverse action, as the principal's decision to remove the student to in-school suspension was only "a precautionary measure to ensure that ambiguous student expression did not portend disruption or violence."³²⁶ Similarly, the principal's decision to call Child and Family Services "was a protective—not disciplinary—act" and could not serve as the basis for a retaliation claim.³²⁷ Therefore, in *Cox*, the Second Circuit made it clear that investigatory efforts in violent non-sponsored curricular speech were due "unusual deference" and could not be considered adverse action without "a clear showing of retaliatory or punitive intent."³²⁸

Collectively, these cases—*Demers*, *In re Ryan D.*, *In re Douglas D.*, and *Cox*—stand for the proposition that student speech jurisprudence is not the exclusive means of analysis in cases concerning violent non-sponsored curricular student speech. While the true threat doctrine appears to be a focus in juvenile adjudications, *Demers* demonstrates that it can be used in school discipline cases as well, even as the judge in the case declined to state whether student speech jurisprudence or the true threat doctrine was appropriate for the case.³²⁹ *In re Ryan D.* and *In re Douglas D.* additionally show the state's difficult burden in building a true threat argument where a student willingly turns in an assignment as a part of regular coursework. Finally, *Cox* is important as it distinguishes between appropriate measures designed to enable school safety and those actions intended to punish speech, as the Second Circuit gave schools a wide latitude for the former and suggested a prohibition on the latter.

These cases employed a distinctly different form of analysis as compared to the previously discussed court decisions using the *Tinker* standard.³³⁰ Yet the *Tinker* cases and the true threat and other doctrine cases used a legal framework that was clearly established and explained in the text of the various court opinions. This clarity, however, is not a constant in the area of violent non-sponsored curricular speech as Part II.B.3 will show.

3. Cases Using Unclear or Incomplete Means of Analysis

Although most cases involving violent non-sponsored curricular student speech are clear in their legal analysis, two cases decided in the federal district courts—*Emmett*

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ *Demers ex rel. Demers v. Leominster Sch. Dep't*, 263 F. Supp. 2d 195, 202–03 (D. Mass. 2003) (describing both the true threat doctrine and the *Tinker* standard before generically concluding that, on the facts of the case, "a reasonable interpretation of the law would allow a school official to prevent potential disorder or disruption"); *see also supra* note 208 (questioning the appropriateness of the *Demers* court's refusal to decide which case law was suited to the case).

³³⁰ *See supra* Part II.B.1.

*v. Kent School District No. 415*³³¹ and *D.F. v. Board of Education of Syosset Central School District*³³²—employed a legal framework that was less explicit as compared to previously discussed cases. However, *Emmett* and *D.F.* demonstrate that while the facts are often similar in violent non-sponsored curricular speech cases, the legal analysis employed can be vastly different and unfortunately unclear or incomplete.

In *Emmett*, a federal district court in Washington State was tasked with deciding the fate of a student who had been disciplined by his school after creating a website that featured mock obituaries of his friends and asked website visitors to vote on the subject of the next obituary.³³³ The website, though, was inspired by a creative writing assignment for class in which students were to write similarly fictional obituaries.³³⁴ After the website was sensationalized on local television news as a “hit list,” the student was given an emergency expulsion that was later modified to a five-day suspension.³³⁵ The district court, however, enjoined the school from enforcing the suspension as the student won on a motion for a preliminary injunction.³³⁶

In evaluating the student’s likelihood of succeeding on the merits at trial, the district court noted first that “[t]he First Amendment provides some, but not complete, protection for students in a school setting.”³³⁷ The court then discussed the relevant student speech jurisprudence, beginning with *Tinker* before moving on to *Fraser* and *Hazelwood*.³³⁸ Especially relevant to *Emmett*, the court noted that in *Fraser*, Justice William Brennan suggested in a concurring opinion that the student could not have been punished for his sexually explicit speech had it been given off-campus instead of delivered in a school assembly.³³⁹ Applying the Supreme Court’s student speech precedents, the district court found that the student’s website “was not at a school assembly, as in *Fraser*, and was not in a school-sponsored newspaper, as in [*Hazelwood*].”³⁴⁰ Yet despite these references to *Fraser* and *Hazelwood*, a serious discussion of *Tinker* and its application in *Emmett* was nowhere to be found in the court’s opinion.³⁴¹

³³¹ 92 F. Supp. 2d 1088 (W.D. Wash. 2000).

³³² 386 F. Supp. 2d 119 (E.D.N.Y. 2005).

³³³ *Emmett*, 92 F. Supp. 2d at 1089.

³³⁴ *Id.*; see also *infra* notes 340–44 and accompanying text (explaining why the website in *Emmett* should be considered non-sponsored curricular speech).

³³⁵ *Emmett*, 92 F. Supp. 2d at 1089.

³³⁶ *Id.* at 1090.

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ *Id.* (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 688 (1986) (Brennan, J., concurring)).

³⁴⁰ *Id.*

³⁴¹ The court mentioned *Tinker* only to state the general holding (that “students do not abandon their right to expression at the schoolhouse gates, but that prohibition of expressive conduct is justifiable if the conduct would materially and substantially interfere with the requirements of

Rather than applying *Tinker*, the court appeared to focus on its notion that the website “was not produced in connection with any class or school project”³⁴²—thereby failing to recognize the website’s origins in a class assignment. The court observed that while “the intended audience was undoubtedly connected” to the school, the website was “entirely outside of the school’s supervision or control,”³⁴³ and, as the court concluded, it represented “out-of-school” speech not subject to school discipline.³⁴⁴

In addition to finding the website was “out-of-school” speech, the court also noted, without further discussion, the school’s lack of evidence that “the mock obituaries and voting on this website were intended to threaten anyone, did actually threaten anyone, or manifested any violent tendencies whatsoever.”³⁴⁵ Without any evidence as to the threatening nature of the website, the court determined that the student’s suspension could not be sustained based on the violent content of the website despite the “acutely difficult position” of administrators following incidents of school violence.³⁴⁶ The absence of evidence as to any true threat represented by the website, when “combined with the . . . out-of-school nature of the speech,” gave the student a substantial likelihood of succeeding on the merits of his case at trial, thereby resulting in the court’s decision to grant an injunction in his favor.³⁴⁷

While the court’s eventual determination in *Emmett* is easy enough to understand, the decision still lacks a complete discussion of the true threat doctrine in addition to the absence of an explanation as to why *Tinker* does not apply. Limiting the application of *Tinker* is necessary—especially where online speech is concerned—but the opinion should have explained *exactly* why *Tinker* did not apply despite the audience’s connection to the school. The *Emmett* court’s outcome was ultimately preferable, but given the tie to the student’s education, the reasoning should have been different.³⁴⁸ If nothing else, the court could have done more to establish a clear procedure for determining when *Tinker* does and does not apply in instances of online student speech.

Where *Emmett* was merely incomplete, the analysis by the federal district court in *D.F.* was unfortunately unclear. In that case, a twelve-year-old sixth-grade student wrote for a class journal a story fashioned in the style of a horror movie.³⁴⁹ The story featured a protagonist who stabbed “bad kids,” decapitated others, and observed characters kissing and having sex.³⁵⁰ The student first read his story without permission

appropriate discipline in the operation of the school”) and to note that *Fraser* and *Hazelwood* “defined the limits” of *Tinker*. *Id.* (internal quotation omitted).

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ See *infra* Part IV for discussion of a proposed standard for non-sponsored curricular speech.

³⁴⁹ *D.F. v. Bd. of Educ.*, 386 F. Supp. 2d 119, 123 (E.D.N.Y. 2005).

³⁵⁰ *Id.* (also noting that “[s]ome” of the characters were named after actual students).

to others in his class, but when he asked his teacher for permission to read aloud to his classmates, the teacher wanted to read the story first.³⁵¹ Upon reading the story, the teacher brought it to the attention of the principal, who decided to suspend the student for five days.³⁵² After a disciplinary hearing in which the presiding officer determined the “story was designed to place individuals in fear of bodily harm,” the suspension was increased to thirty days.³⁵³ The student, however, appealed the school’s decision in federal court, alleging violations of his constitutional rights.³⁵⁴

In granting the school’s motion to dismiss the case and therefore uphold the thirty-day suspension, the court explained first that “[f]reedom of speech . . . is not an unfettered right for any U.S. citizen.”³⁵⁵ The court then noted that true threats—that speech serving as a “serious expression of an intent to cause present or future harm” as the court defined it—may be properly prohibited.³⁵⁶ Additionally, the court observed that student speech rights are limited, consistent with *Tinker*, where such expression “materially or substantially interferes with the requirements of appropriate discipline in the operation of the school” or “would substantially interfere with the work of the school or impinge upon the rights of other students.”³⁵⁷ The court also summarized the holdings of *Fraser* and *Hazelwood* as allowing administrators to censor student speech that is “inconsistent with [the school]’s basic educational mission,” vulgar, or school-sponsored.³⁵⁸

Applying these relevant principles, the court concluded that the student’s story was unprotected speech because the plaintiff, as “a minor and a student, [was] not entitled to unbridled First Amendment protection in the school setting.”³⁵⁹ Exclusively applying student speech jurisprudence, the court found that:

[t]he story, with its graphic depictions of the murder of specifically named students and sex between named students, may materially interfere with the work of the school by disturbing the students and teachers. For example, at one point in the story, the murderer kicks a girl named “Shanna” in the mouth and Shanna responds by kissing the murderer while blood is “pouring out of her mouth.”³⁶⁰

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ *Id.* at 124 (internal quotation marks omitted).

³⁵⁴ *Id.*

³⁵⁵ *Id.* at 125.

³⁵⁶ *Id.* (quoting *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 616 (5th Cir. 2004)).

³⁵⁷ *Id.* (quoting *Smith v. Mount Pleasant Pub. Sch.*, 285 F. Supp. 2d 987, 993 (E.D. Mich. 2003)).

³⁵⁸ *Id.* (internal quotation marks omitted).

³⁵⁹ *Id.*

³⁶⁰ *Id.* at 125–26.

Here the court's analysis is unclear. By referencing a possible disturbance in the school, the court implicates *Tinker*, but by focusing on the graphic and sexual nature of the story, the court's discussion implies a *Fraser*-based reasoning. This distinction is important as school discipline need not be premised on an actual or potential disruption under *Fraser*, whereas *Tinker* requires something more than "undifferentiated fear or apprehension of disturbance."³⁶¹ Therefore, the court's decision very well could have been premised upon *Tinker* (assuming there was relevant evidence of a disruption or a reasonable fear thereof) or *Fraser* (if the sexual content of the story was objectionable enough), but logically, it cannot be based on both decisions.

While the student speech analysis was unclear at best, the court's use of the true threat doctrine was remarkably incomplete. In analyzing the story under the true threat framework, the court determined that "the story constitutes a true threat of violence as it *describes* a student killing other real-life students."³⁶² The court went on to frame the problem with the story in light of school violence, writing that the court was "well aware of the legacy of fear and panic that recent acts of devastating school violence have wrought in this country" and that "[s]chools must be able to protect their student bodies against such acts and be able to provide a modicum of security for their parents and students."³⁶³

Any discussion of the specifics of the true threat doctrine was startlingly absent as the court simply concluded, much as the *Demers* court did,³⁶⁴ that the story was a true threat without undertaking any real analysis or offering any explanation of its reasoning aside from the general observations regarding school violence. Compounding this problem was the fact that the court was particularly unskilled in its word choice as it stated that the story "describes" a violent incident.³⁶⁵ A true threat, by its very definition, must amount to more than a simple description of violence, or otherwise many fiction writers would be subject to criminal prosecution.³⁶⁶ Tying a description of violence to "the legacy of fear and panic" generated by acts of school violence does not meet the legal threshold necessary to exclude the student's story from First Amendment protections. Thus, the *D.F.* court failed to adequately address whether the student's story was indeed a true threat.

³⁶¹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969).

³⁶² *D.F.*, 386 F. Supp. 2d at 126 (emphasis added).

³⁶³ *Id.*

³⁶⁴ See *supra* notes 208–11 and accompanying text.

³⁶⁵ *D.F.*, 386 F. Supp. 2d at 126.

³⁶⁶ See *Virginia v. Black*, 538 U.S. 343, 359–60 (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. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protect[s] individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur. Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." (citations and internal quotation marks omitted)).

Yet this failure is merely symptomatic of a larger concern in many of the cases that address violent non-sponsored curricular student speech in that the analysis is simply incorrect. Some courts that apply *Tinker* incorrectly consider the potential harm resulting from a school shooting (instead of the specific disruption caused by violent student speech),³⁶⁷ while other courts using *Tinker* engage in elaborate speculation to uphold school discipline.³⁶⁸ Analysis under the true threat doctrine is similarly poor, as courts either fail to truly consider the objective perspective of a student speaker,³⁶⁹ or simply find that violent student speech represents a true threat without any support for that conclusion.³⁷⁰ However, the most notable omission from the legal analysis in most of these cases is a consideration of the educational issues implicated when a school or the state punishes a student speaking in furtherance of education.

Therefore, a critical analysis of these cases reveals that courts apply vastly different standards even when the facts—in that they are examples of violent student speech integrally related to education—are remarkably similar. Furthermore, these cases have not been identified by courts as a discrete class of cases deserving of a specialized analysis; rather, these cases are firmly planted in the post-Columbine, post-Virginia Tech, post-Newtown mindset of heightened deference to school administrators and an understandable preoccupation with school safety.

This Part of the Article has focused on describing how these cases *are* decided, including some examination of the perceived shortcomings of current legal analysis. Looking at how these examples of violent non-sponsored curricular student speech have been analyzed under current case law, it is clear that neither *Tinker* nor the true threat doctrine are adequate solutions to the unique issues involved with this type of expression not sponsored by schools but still integral to education. In an effort to remedy this doctrinal problem, Part III begins this Article's examination of the normative ideal in trying to answer how these cases *should* be decided.

III. ELIMINATING CURRENT CASE LAW OPTIONS FOR ADDRESSING VIOLENT NON-SPONSORED CURRICULAR SPEECH

As Part II detailed, this Article seeks to define and clarify the proper regulation of violent non-sponsored curricular student speech, a subset of student speech that has yet to be substantively identified and addressed by the Supreme Court. Part III will specifically explain why current case law as applied fails to address this area of student speech, identifying, in turn, deficiencies with the true threat doctrine, *Morse*

³⁶⁷ See, e.g., *supra* notes 186–89 and accompanying text (discussing *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981 (9th Cir. 2001), and *Demers v. Leominster Sch. Dep't*, 263 F. Supp. 2d 195 (D. Mass. 2003)).

³⁶⁸ See *supra* notes 21–26, 200–07 and accompanying text (discussing *Cuff ex rel. B.C. v. Valley Cent. Sch. Dist.*, 677 F.3d 109 (2d Cir. 2012)).

³⁶⁹ See *supra* notes 269–78 and accompanying text (discussing *In re Douglas D.*, 626 N.W.2d 725 (Wis. 2001)).

³⁷⁰ See *supra* notes 229–35 and accompanying text (discussing *Demers*, 263 F. Supp. 2d 195).

and *Fraser*, *Tinker*, and *Hazelwood*. By eliminating all of these possible doctrinal solutions, only then is it clear that a new standard for non-sponsored curricular student speech is necessary.

A. Why the True Threat Doctrine Is Not an Appropriate Approach

As demonstrated with *In re Douglas D.*, *Demers, D.F.*, and *In re Ryan D.*, the true threat doctrine has been used by courts to analyze cases of violent non-sponsored curricular student speech. However, each of the decisions demonstrated either a difficulty in proving the presence of a true threat where a student is turning in a class assignment, as in *In re Ryan D.* and *In re Douglas D.*, or simply poor analysis on the part of the court, such as the *Demers* court deciding without further explanation that the student “should have concluded that his drawing and note would be considered a threat to the school”³⁷¹ and the *D.F.* court concluding the story in that case was a true threat only because “it describes a student killing other real-life students.”³⁷² The distinction between the four cases is seen not only in the outcome—with *In re Ryan D.*³⁷³ and *In re Douglas D.*³⁷⁴ overturning juvenile adjudications, and *Demers*³⁷⁵ and *D.F.*³⁷⁶ upholding school discipline—but also in the seriousness and thoroughness of the true threat analysis. When courts seriously consider the issues involved in applying the true threat doctrine in the area of non-sponsored curricular student speech, the natural outcome should be to find for the student and establish the absence of a true threat.

A common sense examination of threats, creativity, and education led the *In re Ryan D.* and *In re Douglas D.* courts to their respective determinations regarding the absence of a true threat. As the California Court of Appeal noted in *In re Ryan D.*, a “criminal threat . . . is a specific and narrow class of communication” and “[o]rdinarily, a person wishing to threaten another would not do so by communicating with someone in a position of authority over the person making the threat.”³⁷⁷ Therefore, for a student to turn in a painting both for a grade and with the intention of threatening someone else in the school community—as the state alleged in *In re Ryan D.*—it “would be a rather unconventional and odd means of communicating a threat.”³⁷⁸

Rather than relying on the nature of threats, the Wisconsin Supreme Court based its decision in *In re Douglas D.* more on the specific elements of the story and the

³⁷¹ *Demers ex rel. Demers v. Leominster Sch. Dep't*, 263 F. Supp. 2d 195, 202 (D. Mass. 2003).

³⁷² *D.F. v. Bd. of Educ.*, 386 F. Supp. 2d 119, 126 (E.D.N.Y. 2005).

³⁷³ *In re Ryan D.*, 123 Cal. Rptr. 2d 193, 202 (Cal. Ct. App. 2002).

³⁷⁴ *In re Douglas D.*, 626 N.W.2d 725, 742 (Wis. 2001).

³⁷⁵ *Demers*, 263 F. Supp. 2d at 203.

³⁷⁶ *D.F.*, 386 F. Supp. 2d at 126.

³⁷⁷ *In re Ryan D.*, 123 Cal. Rptr. 2d at 200.

³⁷⁸ *Id.*

class assignment.³⁷⁹ In coming to its decision, the court noted that the story was written in the third person, contained “hyperbole and attempts at jest,” and attempted to conform to the parameters of the teacher’s assignment.³⁸⁰ More generally, however, the story was written in the context of a creative writing class—a class in which, as the court observed, “teachers and students alike should expect and allow more creative license—be it for better or, as in this case, for worse—than in other circumstances.”³⁸¹

In fully applying the true threat doctrine, the California Court of Appeal and the Wisconsin Supreme Court essentially came to the same conclusion: Logically, it makes little sense to find a true threat where a student turns in a creative work that is a part of the school curriculum—either because that does not satisfy the typical norms of a true threat or because creativity demands some leeway when it comes to student expression.

However, that is not to assert that a student assignment can *never* be a true threat. As Florida State University neared a berth in the 2013 national college football championship game with star quarterback Jameis Winston implicated in a sexual assault, sports website Deadspin published an essay from an FSU English instructor that examined the relationship between academics and major college athletics.³⁸² For the purposes of a discussion on violent non-sponsored curricular speech, the essay contained a cogent example of what could be a true threat in the context of a class assignment:

Before Jameis, there was the gay-basher. His teacher, Robert, was also one of Florida State’s superstars, a professor in training with a pile of prestigious awards and grants. He is also gay, a fact that “any of my students are gonna figure out pretty quickly,” he says. The defensive back took his required writing class a few summers back, and they met early in the course for a one-on-one conference to discuss an assigned essay exploring a significant personal moment in the students’ lives.

“It was just me and him in my windowless office on the fourth floor of an empty campus building,” Robert says. The player submitted his essay and went down the hall for a drink, while Robert read it and promptly “freaked out.”

The paper was “a very graphic, very detailed, very proud telling of how he basically got his high school classmates together to

³⁷⁹ *In re Douglas D.*, 626 N.W.2d at 741.

³⁸⁰ *Id.*

³⁸¹ *Id.*

³⁸² Adam Weinstein, *Jameis Winston Isn’t the Only Problem Here: An FSU Teacher’s Lament*, DEADSPIN (Nov. 21, 2013, 2:43 PM), <http://deadspin.com/jameis-winston-isnt-the-only-problem-here-an-fsu-teac-1467707410>.

beat the shit out of this ‘fag’”—a word used often in the work—“and literally kick him in the teeth to teach him a lesson.” They were sick of their mark “acting like a girl,” Robert recalls, and so they went about punching him in the face, emptying his gumline. The tone of the player’s essay was that “he was very proud of himself. He had taken the initiative to organize this beating.”

Robert panicked. The essay’s victim “talked sexually, had tight clothes, and had feminine features—some of which could be [sic] certainly be said of me,” he says. “Why would he give that to me? I took it in the moment as a personal threat.”

When the player returned, Robert faked getting an important text and begged out of the conference, then ran down to a mentor’s office to report the paper. The situation was handled well, he said: He never had to see that student again. Still, he had no clue as to the player’s motives—or his rehabilitation.³⁸³

This example shares some definite commonalities with *In re Douglas D.*, the Wisconsin case regarding a student who wrote a short story about a student who “came to class & in his coat he conseled [sic] a machedy [sic]” and cut off his teacher’s head.³⁸⁴ Both the FSU assignment and the assignment in *In re Douglas D.* were completed as part of a class assignment, and they were given directly to the person they purportedly threatened. Both stories also employed identifiable characteristics of the individual arguably targeted, with the story in *In re Douglas D.* referencing a teacher by the name of “Mrs. C.”³⁸⁵ and the FSU essay describing the beating of a homosexual.³⁸⁶

A key difference, however, is the specific context: the story in *In re Douglas D.* was a work of fiction³⁸⁷ as compared to the personal essay describing a purportedly real event in the FSU example.³⁸⁸ In addition to being fiction, the story in *In re Douglas D.* was less believable as a threat because it contained elements of hyperbole and humor.³⁸⁹ The essay detailed in the Deadspin post is different because it purportedly described something that happened, so it can necessarily transmit an implied message of “this might happen to you as well.” While such a threat may have been present in *In re Douglas D.*,³⁹⁰ in the FSU story it is stark, real, and much closer

³⁸³ *Id.*

³⁸⁴ *In re Douglas D.*, 626 N.W.2d at 731.

³⁸⁵ *Id.* at 730–31 (noting that the student’s English teacher “commonly referred to herself as ‘Mrs. C.’” in class).

³⁸⁶ Weinstein, *supra* note 382.

³⁸⁷ See *In re Douglas D.*, 626 N.W.2d at 730 (establishing the rules of the assignment).

³⁸⁸ Weinstein, *supra* note 382.

³⁸⁹ See *In re Douglas D.*, 626 N.W.2d at 730–31 (quoting the student’s story); see also *id.* at 741 (explaining the court’s reasoning in determining the story was not a true threat).

³⁹⁰ The state argued that the student’s “threat to Mrs. C [was] direct and clear: If she discipline[d] him again, he intend[ed] to injure her.” *Id.* at 740. Additionally, the Wisconsin

to a legal consideration of what a threat should be: “[a] communicated intent to inflict harm or loss on another or on another’s property, especially one that might diminish a person’s freedom to act voluntarily or with lawful consent.”³⁹¹ Still, without knowing more about the specific situation that was described at FSU or the student’s intentions in writing the story, it is hard to label the student’s essay a true threat. It does, however, come a great deal closer to the legal, objective standard of what a true threat should be than any of the stories or artistic creations described in *In re Douglas D.*, *Demers, D.F.*, and *In re Ryan D.*

The true threat doctrine is simply a poor methodological fit for the area of violent non-sponsored curricular speech. As the California Court of Appeal noted, the notion of a student turning in an assignment both to threaten and to gain normal academic credit is hard to reconcile with traditional ideas of threatening and menacing communication.³⁹² Furthermore, as the Wisconsin Supreme Court concluded, curricular speech requires “more creative license,” and a “boy’s impetuous writings do not necessarily fall from First Amendment protection due to their offensive nature.”³⁹³ These determinations serve as a sharp contrast to the *D.F.* court’s decision that a student’s story represented a true threat simply because it described violence against other students.³⁹⁴ Additionally, while courts applying the true threat doctrine in juvenile adjudications may appear to be dissimilar from courts applying the true threat doctrine in examining school discipline, for the purposes of true threat analysis they are the same because the legal context should be irrelevant when considering whether communication is a true threat. In other words, the determination of a true threat for school discipline is the same as the determination of a true threat for criminal punishment.³⁹⁵

The true threat doctrine, therefore, is usually inappropriate where violent non-sponsored curricular speech is concerned. The application of this test—in which a positive result renders speech unprotected both inside and outside of school grounds—should properly be limited to instances where either an intent to threaten is obvious on the face of the creative work or the communication more closely resembles a traditional threat.

Supreme Court concluded: “We do not doubt that the story was a result of [the student’s] anger at having been removed from class.” *Id.* at 741. The court, however, did not address the conditional nature of the alleged threat.

³⁹¹ BLACK’S LAW DICTIONARY 1703 (10th ed. 2014).

³⁹² See *In re Ryan D.*, 123 Cal. Rptr. 2d 193, 200 (Cal. Ct. App. 2002) (“This would be a rather unconventional and odd means of communicating a threat.”).

³⁹³ *In re Douglas D.*, 626 N.W.2d at 741.

³⁹⁴ *D.F. v. Bd. of Educ.*, 386 F. Supp. 2d 119, 126 (E.D.N.Y. 2005).

³⁹⁵ To phrase the point yet another way, expression cannot be both a true threat for the purposes of school discipline and not a true threat for criminal prosecution. See *In re Douglas D.*, 626 N.W.2d at 743 (suggesting, in a case where a student’s story was not a true threat for the purposes of a juvenile adjudication, that school discipline was justified by the “offensive, crass insult” posed by the student’s story, and hinting at *Fraser* analysis).

B. Why Morse and Fraser Should Not Apply

In evaluating whether *Morse* and *Fraser*, two decisions arguably more narrow than *Tinker* and *Hazelwood*, should apply in instances of violent non-sponsored curricular speech, the major issues to be resolved are whether the permissible prohibition of sexually explicit speech on school grounds in *Fraser* extends to violent speech in the classroom and whether *Morse* articulates a new standard of constitutional censorship premised on school safety. To be consistent with the principles of the First Amendment, however, the answer to both of these questions must be no—the doctrinal solution to violent non-sponsored curricular speech cannot come from either *Fraser* or *Morse*.

In addressing how *Fraser* and *Morse* could be applicable where violent speech is concerned, it is important to first note that—despite the twenty years separating the decisions—*Fraser* and *Morse* are operationally quite similar. Both involve deciphering speech with vague or multiple interpretations and “rummaging through message content for an impermissible meaning,” as Professor Clay Calvert phrased it.³⁹⁶ The two decisions, therefore, embrace a “meanings-based” approach to censorship and represent a break from the methodology seen in *Tinker*, a decision that was premised on the actual effects of speech.³⁹⁷

Continuing the commonalities, both decisions have also seen lower courts broadly interpret the principles contained in them. Where the decisions differ, however, is exactly where the expansive interpretation comes into play as lower courts have broadened what is offensive for the purposes of *Fraser* while other decisions have held that *Morse* enables school administrators to act where speech poses a harm to the well-being of students.³⁹⁸

Turning first to the proper application of *Fraser*, it is important to understand how the decision mechanically works. As Professor Calvert explained, the “*Fraser* formula” is an examination of “[w]hether student message X conveys a disfavored and inappropriate meaning Y that conflicts with educational mission Z.”³⁹⁹ This inquiry is a two-step process that first requires an inquiry into what the meaning of

³⁹⁶ Clay Calvert, *Mixed Messages, Muddled Meanings, Drunk Dicks, and Boobies Bracelets: Sexually Suggestive Student Speech and the Need to Overrule or Radically Refashion Fraser*, 90 DENV. U. L. REV. 131, 133 (2012) [hereinafter Calvert, *Mixed Messages*].

³⁹⁷ See *id.* (“*Fraser* and *Morse* embrace a meanings-based methodology that permits censorship based purely upon the resolution of the meaning of a message—regardless of its likely or actual disruptive effect among students—and whether, in turn, that meaning contradicts some aspect of a school’s educational mission.”).

³⁹⁸ See, e.g., Calvert, *Misuse and Abuse*, *supra* note 10, at 3 (describing the interpretation of *Morse* that allows for the censorship of speech that “‘threatens a Columbine-style attack on a school’” (quoting *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 766 (5th Cir. 2007))); Christopher Cavaliere, Note, *Category Shopping: Cracking the Student Speech Categories*, 40 STETSON L. REV. 877, 882 (2011) (explaining the expansive interpretation of *Fraser* that creates a “nebulous category” of speech subject to censorship).

³⁹⁹ Calvert, *Mixed Messages*, *supra* note 396, at 134.

a given student message may be and then a determination of “whether that meaning conflicts with some aspect of a school’s educational mission.”⁴⁰⁰ If strictly interpreted and limited to its facts, *Fraser* would apply only to on-campus, spoken speech before a captive audience at a school assembly where such speech conveys “a sexually vulgar, lewd, or indecent connotation that allegedly overwhelms any political meaning, while simultaneously glorifying male sexuality in such a way that ‘could well be seriously damaging to its less mature audience.’”⁴⁰¹

Yet, where courts find in *Fraser* “an underlying theme around the issue of well-being that goes beyond a mere Victorian sensibility of offensiveness,”⁴⁰² the scope of *Fraser* is thus broadened to cover other types of speech that might not be compatible with a school’s mission. Under such an interpretation, “*Fraser* permits stifling any manner and any mode, spoken or printed, of any plainly offensive expression, sexual or otherwise, that conflicts with society’s ‘interest in teaching students the boundaries of socially appropriate behavior.’”⁴⁰³ This broader view of the holding from *Fraser* enables censorship of almost any disfavored speech, and such speech need not be sexually explicit to fall under an expanded interpretation, as the Sixth Circuit found when it determined a ban on religiously offensive Marilyn Manson T-shirts on school grounds to be constitutional under *Fraser*.⁴⁰⁴

For the purposes of analyzing violent non-sponsored curricular student speech, the question is whether this broad interpretation of *Fraser* could cover violence as well. As previously discussed, courts have hinted that *Fraser* may apply where students produce violent expression in the classroom, as the Wisconsin Supreme Court stated that a student’s story depicting his teacher’s decapitation represented “an offensive, crass insult” and that “[s]chools need not tolerate this type of assault to the sensibilities of their educators or students.”⁴⁰⁵ Similarly, the *D.F.* court referenced the “graphic depictions of the murder of specifically named students” and the “sex between named students” while suggesting a hybrid *Tinker-Fraser* analysis.⁴⁰⁶

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.* at 146 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986)).

⁴⁰² Francisco M. Negrón, Jr., *A Foot in the Door? The Unwitting Move Towards a “New” Student Welfare Standard in Student Speech After Morse v. Frederick*, 58 AM. U. L. REV. 1221, 1233 (2009).

⁴⁰³ Calvert, *Mixed Messages*, *supra* note 396, at 147 (emphasis added) (footnotes omitted).

⁴⁰⁴ *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465 (6th Cir. 2000). School administrators in *Boroff* found a student’s T-shirts celebrating rock group Marilyn Manson to be offensive “because the band promotes destructive conduct and demoralizing values that are contrary to the educational mission of the school.” *Id.* at 469. As per one example cited by the Sixth Circuit in its discussion and subsequent affirmation that *Fraser* was controlling, one shirt included a depiction of a “three-headed Jesus” alongside the words “See No Truth. Hear No Truth. Speak No Truth.” *Id.* *Fraser*, therefore, was interpreted by the Sixth Circuit to cover not only sexually offensive speech but religiously offensive speech as well.

⁴⁰⁵ *In re Douglas D.*, 626 N.W.2d 726, 743 (Wis. 2001).

⁴⁰⁶ *D.F. v. Bd. of Educ.*, 386 F. Supp. 2d 119, 125–26 (E.D.N.Y. 2005); *see also supra* notes 349–66 and accompanying text (explaining why the court’s approach was logically inconsistent).

Despite this limited embrace of the reasoning shown in *Fraser* to address violent non-sponsored curricular speech, it is important to note two key limitations on extending *Fraser*'s application into the realm of violent classroom speech. First, in *Morse*, the Supreme Court expressly limited the application of *Fraser*, as Chief Justice John Roberts wrote that the earlier decision "should not be read to encompass any speech that could fit under some definition of 'offensive.'"⁴⁰⁷ Second, in considering the original facts of *Fraser*, it is worth noting that the speech at issue in the case was determined to be "an elaborate, graphic, and explicit sexual metaphor" by the Court,⁴⁰⁸ a metaphor that caused the *Fraser* majority to fear for those students who were only "on the threshold of awareness of human sexuality."⁴⁰⁹ Therefore, *Fraser* should properly be considered as a case regarding only sexually explicit speech and thus falling in line with other Supreme Court decisions that simply treat sexual speech differently when compared to other types of speech.⁴¹⁰ Together, these two points suggest that the proper application of *Fraser* is limited only to sexually explicit speech and not other speech, such as violent student expression, that might otherwise be offensive in the school setting.

However, even as the *Morse* Court attempted to limit the application of *Fraser*, the opinion in *Morse* has been subjected to its own expansive interpretation. Despite the initial assessments that suggested *Morse* would be limited to speech advocating drug use and therefore limited to the facts of the case,⁴¹¹ language in both the Court's

⁴⁰⁷ *Morse v. Frederick*, 551 U.S. 393, 409 (2007). As the Chief Justice continued: "After all, much political and religious speech might be perceived as offensive to some. The concern here is not that Frederick's speech was offensive, but that it was reasonably viewed as promoting illegal drug use." *Id.*; see also Calvert, *Mixed Messages*, *supra* note 396, at 146 ("The Supreme Court's ruling in *Morse* began to rein in the potential reach of *Fraser*, at least as applied to 'offensive' expression.").

⁴⁰⁸ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 677–78 (1986).

⁴⁰⁹ *Id.* at 683.

⁴¹⁰ Compare *Fraser*, 478 U.S. at 675 (finding sexually explicit student speech unprotected in the school setting), and *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (upholding FCC indecency regulations under theory of broadcast communication pervasiveness and need to protect children from age-inappropriate speech), and *Ginsberg v. New York*, 390 U.S. 629 (1968) (creating a variable definition of obscenity as to minors and allowing states to further insulate them from age-inappropriate sexual speech), with *Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729 (2011) (finding violent video games to be protected speech under the First Amendment and that California law banning their sale to minors was not sufficiently tailored to pass strict scrutiny), and *Winters v. New York*, 333 U.S. 507 (1948) (finding violent books and magazines to be protected expression).

⁴¹¹ See Calvert, *Misuse and Abuse*, *supra* note 10, at 2 (explaining the initial belief that *Morse* was a limited opinion, noting that "[f]or instance, John W. Whitehead, president of the Rutherford Institute, told the *Washington Post* that 'the decision should have a limited effect because it applies only to student speech that promotes illegal drug use.' Similarly, Susan Goldammer, an attorney for the Missouri School Boards' Association, observed that '[t]he court explains this decision is narrowly tailored toward illegal drugs.' In fact, the author of this law journal article, along with a colleague, opined in an August 2007 commentary that 'the case may be considered

opinion and especially language in a concurring opinion written by Justice Samuel Alito paved the way for a broad interpretation of the Court's decision that lower courts have used in instances of violent student speech.⁴¹²

However, just because some courts have used *Morse* to decide cases of violent student expression,⁴¹³ it does not necessarily mean this expansion of the decision is appropriate. As Professor Calvert argues, the harm posed by the use of illegal drugs is simply different than the harm posed by school violence and makes for a poor analogy.⁴¹⁴ Yet the strongest argument against using Justice Alito's concurrence in applying *Morse* to violent speech is the simple observation by Professor Calvert that even if the justice "had articulated a new standard for regulating violent expression in public schools, such a test would have constituted mere *dicta* because the case in *Morse* had nothing to do with violent expression."⁴¹⁵

The application of *Morse* has been limited in the area of violent non-sponsored curricular speech primarily because most of the cases discussed in Part II predate the Supreme Court's most recent student speech decision. However, two post-*Morse* cases cite the decision only for general principles,⁴¹⁶ as *Cuff* was analyzed under *Tinker*⁴¹⁷ and the *Cox* court did not use student speech jurisprudence to decide its case.⁴¹⁸

a minor victory for schools—limited to the narrow circumstances of curtailing decidedly pro-drug messages that lack a political component.' In a nutshell, the *Morse* ruling appeared relatively inconsequential for future student expression battles, cabined by its peculiar facts.'" (footnotes omitted)).

⁴¹² See, e.g., *id.* at 6–7 (explaining how Justice Alito's concurring opinion is used to broadly interpret *Morse*); Negrón, *supra* note 402, at 1223–24 (pointing out how language in the majority's opinion can be used to argue for a broader interpretation of the decision); see also *supra* note 117 and accompanying text.

⁴¹³ See Calvert, *Misuse and Abuse*, *supra* note 10, at 12–21 (discussing courts that have used *Morse* to decide cases of violent, and even merely insulting, student expression).

⁴¹⁴ See *id.* at 16 ("But such an extrapolation from *Morse* of a new censorship rule centering on 'physical safety' and 'danger' is off-base and misguided. Why? Because the locus of the harm is very different with illegal drug use than it is with violence. In a nutshell, the problem with illegal drug use by a high school student involves *harm to self*—harm to the student who engages in the illegal conduct. In contrast, the problem with illegal violence committed by a high school student involves *harm to others*—the students who fall victim to the actor that engages in the violent conduct. Put differently, the use of illegal drugs threatens the physical safety of the individual students who engage in the dangerous conduct themselves: drugs are dangerous to those who use them.").

⁴¹⁵ *Id.* at 10.

⁴¹⁶ See, e.g., *Cuff ex rel. B.C. v. Valley Cent. Sch. Dist.*, 677 F.3d 109, 114 (2d Cir. 2012) (citing other lower-court decisions under *Morse* that "have allowed wide leeway to school administrators disciplining students for writings or other conduct threatening violence"); *Cox v. Warwick Valley Cent. Sch. Dist.*, 654 F.3d 267, 272–73 (2d Cir. 2011) (citing *Morse* for general student speech principles such as "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings").

⁴¹⁷ See *Cuff*, 677 F.3d at 113 (establishing *Tinker* as controlling).

⁴¹⁸ See *Cox*, 654 F.3d at 273 (concluding case should be decided based on First Amendment retaliation claim).

Therefore, at least in the examples of violent non-sponsored curricular speech, there does not appear to be an embrace of an expanded interpretation of *Morse*.

In conclusion, *Fraser*—and by extension *Morse*—represent a danger to the First Amendment because they do not rely on the actual harms caused by speech in determining whether speech should be censored, and therefore, these decisions should be carefully limited in their application in lower courts.⁴¹⁹ The standard in *Fraser* should be left to govern only sexual expression, an area that has been distinguished from other types of speech by the Supreme Court. And finally, the opinion in *Morse* should be read as addressing only that student speech which can reasonably be understood as advocating the use of illegal drugs. Neither standard is controlling nor appropriate in the area of violent non-sponsored curricular speech.

C. *Why Tinker Is Not Controlling*

As discussed in Part II, courts have used *Tinker* to decide cases of violent non-sponsored curricular speech, but the application in these cases has often left something to be desired intellectually, with some courts using the harm from a possible incident of school violence to satisfy the rigors of the *Tinker* test instead of considering the actual or hypothetical harm from student speech.⁴²⁰ In considering whether *Tinker* should apply in these cases, it is important to first note that the iconic decision has been somewhat marginalized by the Supreme Court cases that followed it.⁴²¹ With *Tinker* well on its way to being confined to its facts, perhaps the best way forward is to make another exception to the decision and find that, once again, a new standard is needed to address a particular problem in student speech.

After the Court elected to create fact-based exceptions to *Tinker* in *Fraser*, *Hazelwood*, and *Morse*, it is clear the decision is waning in importance.⁴²² What is not so clear, however, is exactly how *Tinker* should be applied in the post-*Morse* student speech landscape. As Christopher Cavaliere notes, courts generally take one of three views of *Tinker*: looking at the decision as “just another category of unprotected speech,” “a general rule that protects student speech unless one of the other three

⁴¹⁹ See Calvert, *Mixed Messages*, *supra* note 396, at 172 (“Viewed at a macro-level, *Fraser*’s embrace of the principle that the meaning of a message, standing alone and without proof of any harm caused by it, can lead to its censorship directly conflicts with the heart of modern First Amendment theory, which holds that society must tolerate some level of demonstrable harm.”).

⁴²⁰ See *supra* Part II.B.

⁴²¹ See, e.g., Calvert, *Tinker’s Midlife Crisis*, *supra* note 159, at 1169 (arguing that *Tinker* is “overshadowed” by *Morse* and currently being “relegated for use only in those cases that mirror or closely parallel its facts”); Perry A. Zirkel, *The Rocket’s Red Glare: The Largely Errant and Deflected Flight of Tinker*, 38 J.L. & EDUC. 593, 597 (2009) (calling *Tinker* “practically revers[ed] or, at least, effectively compartmentaliz[ed]”).

⁴²² See Calvert, *Tinker’s Midlife Crisis*, *supra* note 159, at 1173 (“The most obvious indicator of *Tinker*’s decline is that, in each of the three subsequent Supreme Court decisions involving student expression rights, the Court chose: (1) not to apply *Tinker*; (2) to carve out fact-specific exceptions to *Tinker*; and (3) to rule in favor of school officials and against students.”).

categories apply,” or a view “that *Tinker* may specifically protect political speech.”⁴²³ Thus the first two categories operate by positioning *Tinker* as either one of four possible options in a court’s arsenal or the default rule if *Fraser*, *Hazelwood*, or *Morse* do not apply due to the factual circumstances of the case.⁴²⁴ Leaving *Tinker* as a default rule seems unsatisfactory in a world where the Supreme Court has so thoroughly chipped away at the decision. In other words, *Tinker* would be a fine default rule where it was the *only* rule. Framing *Tinker* as a rule protecting only political speech seems needlessly narrow and fraught with the additional problem of deciding what is and what is not political speech. The best answer for *Tinker* is Cavaliere’s first category.⁴²⁵ *Tinker*, therefore, should have situations where it does apply and situations where it distinctly *does not* apply.

In answering the question of when *Tinker* should apply, it is important to consider the facts of the case. *Tinker*, fundamentally, was about taking an external issue—a protest over the Vietnam War—and bringing it into the school environment by having students wear the now famous black armbands.⁴²⁶ The protest at issue in *Tinker* did not have its genesis on campus; rather, it was first imagined by a group of parents and students in an off-campus meeting.⁴²⁷ Therefore presumably, the Vietnam War had nothing to do with any of the ongoing studies at the Des Moines high school, making the armbands noncurricular speech. The Court, however, did not make this distinction, choosing instead to broadly affirm the First Amendment right of students after discussing the foundational cases that made such a right possible:

The principle of these cases is not confined to the supervised and ordained discussion which takes place in the classroom. The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student’s rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the

⁴²³ Cavaliere, *supra* note 398, at 886; *see also* Matthew Sheffield, Note, *Stop with the Exceptions: A Narrow Interpretation of Tinker for All Student Speech Claims*, 10 CARDOZO PUB. L. POL’Y & ETHICS J. 175, 177 (2011) (arguing that *Tinker* was meant to apply only where a “student was expressing an opinion on an issue of political significance” or “when the school was discriminating against the student solely based upon disagreement with the student’s viewpoint”).

⁴²⁴ *See* Cavaliere, *supra* note 398, at 887–91.

⁴²⁵ *See id.* at 887–88 (“*Tinker*’s disruptive speech is merely one among the four different types of speech that a school may permissibly regulate.”). Deciding that this is the proper interpretation of *Tinker*, however, requires more subtlety than leaving the decision to govern only “disruptive speech.”

⁴²⁶ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969).

⁴²⁷ *Id.*

playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without “materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school” and without colliding with the rights of others.⁴²⁸

So with the Court not making a distinction in the origin of the message or its connection to the school’s curriculum, a distinction made today is therefore somewhat artificial. Yet this distinction is critical in determining *Tinker*’s true place after the trifecta of cases that followed in its wake. *Tinker*, at its core, permits a student to express noncurricular speech so long as that speech does not interfere with the workings of the school. It thus allows for the black armband on the playground, the lunchroom, and even the classroom. What *Tinker* does not specifically consider, however, is what happens when the black armband is worn or discussed in the context of a history or current events course.

In his *Hazelwood* dissent, Justice William Brennan attempted to reconcile the *Tinker* standard with allowing schools to control student speech in the course of a school’s curriculum. Arguing that the decision in *Hazelwood* was unnecessary and that *Tinker* could have easily resolved the problem at issue, Justice Brennan wrote:

Under *Tinker*, school officials may censor only such student speech as would “materially disrupt[t]” a legitimate curricular function. Manifestly, *student speech is more likely to disrupt a curricular function when it arises in the context of a curricular activity—one that “is designed to teach” something—than when it arises in the context of a noncurricular activity.* Thus, under *Tinker*, the school may constitutionally punish the budding political orator if he disrupts calculus class but not if he holds his tongue for the cafeteria. That is not because some more stringent standard applies in the curricular context. . . . It is because student speech in the non-curricular context is less likely to disrupt materially any legitimate pedagogical purpose.⁴²⁹

When Justice Brennan noted that “student speech is more likely to disrupt a curricular function when it arises in the context of a curricular activity,”⁴³⁰ he was undoubtedly correct, but his reasoning fails to account for student speech *related* to the

⁴²⁸ *Id.* at 512–13 (alteration in original) (footnote omitted) (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

⁴²⁹ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 283 (1988) (Brennan, J., dissenting) (alteration in original) (emphasis added) (citation omitted).

⁴³⁰ *Id.* (Brennan, J., dissenting).

curricular activity. Indeed, as Justice Abe Fortas wrote for the majority in *Tinker*, “Any departure from absolute regimentation may cause trouble. . . . Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance.”⁴³¹ But, to borrow Justice Brennan’s calculus example, how do we account for the disturbance that comes when a student accurately notes that his teacher made an error when finding a derivative? Or, to return to *Tinker*, how do we analyze the disturbance that arises when a student voices opposition to the Vietnam War during a 1965 lesson on current events? Furthermore, what happens when a student’s violent short story, poem, or other creation that follows all prescribed elements of an assignment emotionally disturbs an English class or its teacher? *Tinker* views the presence of a disruption in the school setting as a binary question—either there is a disruption (meaning the student’s speech can be censored) or there is not a disruption (meaning the student is allowed to speak). Yet the standard does not consider that in some instances, a disturbance is simply the natural result of the educational process.

Ultimately, the applicability of *Tinker* to non-sponsored curricular speech should be decided by two important points: that (1) *Tinker* is fundamentally a question of noncurricular speech and (2) the standard’s failure to adequately account for what amounts to a positive disturbance in the learning process. Again, *Tinker* would be a wonderful standard in a world where it could be interpreted fairly and consistently,⁴³² and where it existed as the only word from the Supreme Court on the matter of student speech. But since it has been so eroded by *Fraser*, *Hazelwood*, and *Morse*, it must now be limited in its application to instances where it is fundamentally appropriate—namely situations of noncurricular speech. Therefore, *Tinker* should not be the standard by which cases of violent non-sponsored curricular speech cases are decided.

⁴³¹ *Tinker*, 393 U.S. at 508.

⁴³² See, e.g., Calvert, *Tinker’s Midlife Crisis*, *supra* note 159, at 1188 (“The *Tinker* test itself has multiple flaws that harm its effectiveness and, concomitantly, has led to its misuse and abuse. As aptly recognized by Professor Mark Yudof, current president of the University of California: ‘When I was a law professor, I used to ask my students the following questions: What counts as a disruption? How much disruption will outweigh the assertion of the right? How are these interests balanced? Is this rule, with its emphasis on identifying disruption in schools, a rule at all, or is it just an invitation to judges to assert their personal ideologies and persuasions?’” (footnote omitted)); R. George Wright, *Post-Tinker*, 10 STAN. J. C.R. & C.L. 1, 12 (2014) (“A final, largely recently developed limitation on *Tinker* is the sensible desire to broadly interpret, if not expand, the *Tinker* ‘disruption’ prong. While the *Tinker* standard in general has been and remains somewhat unclear, the ‘disruption’ prong does tend to conjure up mental images of something like an angry hallway confrontation, if not a physical altercation, or threat thereof.” (footnote omitted)); see also *id.* at 25 (suggesting that “at this point in our history, it is implausible that *Tinker*, along with its refinements, qualifications, and limitations, amounts to the only constitutionally permissible approach to student speech, as the public schools seek to better and more cost-effectively discharge their vital and multi-faceted basic mission”).

D. Why Hazelwood Is Not Controlling

As discussed in the introduction to this Article, *Hazelwood* would be a logical fit for these cases aside from its requirement that speech falling under the scope of the decision be both curricular in nature and sponsored by a school.⁴³³ For the cases discussed in Part II, the ties to curriculum and education are fairly evident in stories written for class,⁴³⁴ artwork either created for class or commissioned by a teacher,⁴³⁵ a poem submitted to a teacher for critique,⁴³⁶ and a website that had its start with an in-class writing assignment.⁴³⁷ All of these examples are deeply integrated in the instructional duty of the school and are therefore types of speech schools should nurture and guide as part of their educational mission—thus making this speech inherently curricular. The question of sponsorship, however, is more difficult to answer, but the most logical solution, after examining *Hazelwood*, is that sponsorship requires more than a mere connection to the school. This conclusion, when combined with the observation that *Hazelwood* fails to make an adequate distinction between educational and punitive measures, suggests that *Hazelwood* cannot properly address the issues surrounding violent non-sponsored student speech.

In *Hazelwood*, the Court distinguished student speech that a school must “tolerate” from student speech that a school must “affirmatively . . . promote,” with the former category of speech being governed by *Tinker* and the latter falling under *Hazelwood*.⁴³⁸ Speech falling under *Hazelwood* was further defined as “school-sponsored publications, theatrical productions, and other expressive activities that students, parents,

⁴³³ See *Hazelwood*, 484 U.S. at 270–71 (“The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators’ ability to silence a student’s personal expression that happens to occur on the school premises. The latter question concerns educators’ authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.”); see also *id.* at 273 (“[W]e hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”).

⁴³⁴ E.g., *Cox v. Warwick Valley Cent. Sch. Dist.*, 654 F.3d 267 (2d Cir. 2011); *D.F. v. Bd. of Educ.*, 386 F. Supp. 2d 119 (E.D.N.Y. 2005); *In re Douglas D.*, 626 N.W.2d 725 (Wis. 2001).

⁴³⁵ E.g., *Cuff ex rel. B.C. v. Valley Cent. Sch. Dist.*, 677 F.3d 109 (2d Cir. 2012); *Demers v. Leominster Sch. Dept.*, 263 F. Supp. 2d 195 (D. Mass. 2003); *Boman v. Bluestem Unified Sch. Dist.*, No. 00-1034-WEB, 200 U.S. Dist. LEXIS 5389 (D. Kan. Feb. 14, 2000); *In re Ryan D.*, 100 Cal. App. 4th 854 (2002).

⁴³⁶ E.g., *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981 (9th Cir. 2001).

⁴³⁷ E.g., *Emmett v. Kent Sch. Dist.*, 92 F. Supp. 2d 1088 (W.D. Wash. 2000).

⁴³⁸ *Hazelwood*, 484 U.S. at 270–71.

and members of the public might reasonably perceive to bear the imprimatur of the school.”⁴³⁹ As the Court argued, teachers and administrators had greater authority to exercise control over this *Hazelwood* category of curricular speech “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.”⁴⁴⁰ But a mere connection to education and learning was not enough to trigger *Hazelwood* for the Court, which held that the speech in question must also be reasonably perceived as bearing the “imprimatur” of the school.⁴⁴¹

“Imprimatur,” from the Latin for “let it be printed,” was originally a license required for publication, and today, it is also defined as “[a] general grant of approval.”⁴⁴² Thus the inquiry into whether speech bears the “imprimatur” of the school seeks to answer, in essence, whether the student speech at issue might reasonably be perceived as carrying the official banner of the school.⁴⁴³ With the examples given by the Court in *Hazelwood*, the issue of imprimatur seems intuitive, as the Court cites school publications and theatrical productions as two expressive activities that would naturally bear the seal of the school.⁴⁴⁴ Lower courts have also found art installations⁴⁴⁵ and commencement speeches⁴⁴⁶ to be types of student expression that generally bear the school’s imprimatur—installations because of their fixation to school walls and speeches because of the vetting and approval process of most commencement speakers. As the Tenth Circuit concluded in *Fleming v. Jefferson County School District*, “[e]xpressive activities that do not bear the imprimatur of the school could include a variety of activities conducted by outside groups that take place on school facilities after-school, such as club meetings” where “expressive activities that the school allows to be integrated permanently into the school environment and that students pass by during the school day come much closer to reasonably bearing the imprimatur of the school.”⁴⁴⁷

⁴³⁹ *Id.* at 271.

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.*

⁴⁴² BLACK’S LAW DICTIONARY 825 (10th ed. 2014).

⁴⁴³ See *Jordan*, *supra* note 110, at 1560–61 (2003) (“[A] school’s promotion of speech introduces the possibility that the expression will be attributed to the school itself. Speech that bears the imprimatur of the school resembles official speech, leaving the school free to employ reasonable measures to guard against misattribution.” (footnote omitted)).

⁴⁴⁴ See *Hazelwood*, 484 U.S. at 271.

⁴⁴⁵ See, e.g., *Bannon v. Sch. Dist.*, 387 F.3d 1208 (11th Cir. 2004); *Fleming v. Jefferson Cnty. Sch. Dist.*, 298 F.3d 918 (10th Cir. 2002).

⁴⁴⁶ See, e.g., *A.M. ex rel. McKay v. Taconic Hills Cent. Sch. Dist.*, 510 F. App’x 3 (2d Cir. 2013); *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219 (10th Cir. 2009).

⁴⁴⁷ *Fleming*, 298 F.3d at 925. *Fleming* is somewhat notable in the context of a discussion of student speech and the surrounding anxiety regarding school violence as the case stems from an art project at Columbine High School after the 1999 shooting. *Id.* at 920–21. The project allowed students and community members to paint tiles that would then be installed as part of the “reconstruction” process. *Id.* at 921.

But where does this leave in-class assignments as far as bearing the imprimatur of the school? In *Settle v. Dickson County School Board*,⁴⁴⁸ the Sixth Circuit upheld a summary judgment decision in favor of a school district where a student complained that her First Amendment rights were violated when she was not allowed to write a research paper on “The Life of Jesus Christ.”⁴⁴⁹ The majority easily brushed aside the student’s claim in favor of broadly affirming a teacher’s right to assign grades,⁴⁵⁰ but in her concurring opinion, Judge Alice M. Batchelder took a more nuanced view of the student’s First Amendment claim.⁴⁵¹ As the judge argued, the facts in *Settle* could not “be made to fit within the framework of cases such as *Hazelwood* and *Tinker*,” suggesting that the question of a student’s speech rights in a curricular assignment without school sponsorship were a distinctly different issue not answered by Supreme Court jurisprudence.⁴⁵² *Tinker* did not apply, the judge reasoned, because “[a] research paper is not an expression of opinion, and the restriction of choice of topic is not readily analogous to the kind of pure expression of student opinion, that happened to take place in the classroom, that the Supreme Court addressed there.”⁴⁵³ Similarly, the facts in *Settle* were different from *Hazelwood* because there was “no way to make a colorable claim that this paper is speech which might be viewed by the community as bearing the imprimatur of the school,” a determination that Judge Batchelder argued “was central to the Supreme Court’s holding in *Hazelwood*.”⁴⁵⁴ As she further concluded: “Certainly not all student speech in the classroom bears the imprimatur of the school.”⁴⁵⁵

Aside from the questionable proposition that student assignments can even carry the implicit sign of approval from a school, student speech in such cases is much easier for a school to disassociate itself from, a point that then-Judge Samuel Alito made in

⁴⁴⁸ 53 F.3d 152 (6th Cir. 1995).

⁴⁴⁹ *Id.* at 153. The case was framed as a matter of student speech instead of a religious claim, as the court explained: “Although this paper topic concerns religious subject matter, the plaintiff does not bring her case under the Free Exercise Clause or the Establishment Clause of the First Amendment. Instead, she has chosen to challenge [the teacher’s] rejection of her topic as restricting her rights of free speech under the First Amendment.” *Id.*

⁴⁵⁰ *See id.* at 155–56 (“Teachers may frequently make mistakes in grading and otherwise, just as we do sometimes in deciding cases, but it is the essence of the teacher’s responsibility in the classroom to draw lines and make distinctions—in a word to encourage speech germane to the topic at hand and discourage speech unlikely to shed light on the subject. Teachers therefore must be given broad discretion to give grades and conduct class discussion based on the content of speech. Learning is more vital in the classroom than free speech.”); *see also id.* at 155 (“Grades are given as incentives for study, and they are the currency by which school work is measured.”).

⁴⁵¹ *See id.* at 156–59 (Batchelder, J., concurring).

⁴⁵² *Id.* at 158.

⁴⁵³ *Id.*

⁴⁵⁴ *Id.*

⁴⁵⁵ *Id.*

his dissent in *C.H. v. Oliva*.⁴⁵⁶ In *Oliva*, an *en banc* Third Circuit split and thereby affirmed a district court decision dismissing a student's First Amendment claim after his Thanksgiving poster was removed from a hall display due to a religious theme.⁴⁵⁷ In his dissent, Judge Alito argued that "nothing in *Hazelwood* suggests that its standard applies when a student is called upon to express his or her personal views in class or in an assignment,"⁴⁵⁸ an observation that again emphasizes the importance of the imprimatur requirement. Additionally in the case of a student assignment, the danger to the school of having a student's speech misattributed to the administration is much less because if "anyone might have reasonably interpreted the display of [the student's] poster in the hall as an effort by the school to endorse Christianity or religion, the school could have posted a sign explaining that the children themselves had decided what to draw."⁴⁵⁹

Thus, using Alito's logic and the examples cited in *Hazelwood*, a student's assignment is different from a school newspaper or a school play because (1) the assignment does not carry the imprimatur of the school and (2) even if the assignment was attributable to the school, the administration could easily distance itself from a student's speech. *Hazelwood*, therefore, would be inapplicable where a student was expressing a personal opinion during the course of an assignment.⁴⁶⁰

Still, however, some courts broadly interpret or ignore the imprimatur requirement or otherwise fail to apply *Hazelwood* correctly, resulting in a departure from the text of the decision and an expansion in its application.⁴⁶¹ As just one example of this misapplication, the Sixth Circuit stated in *Curry v. Hensiner*⁴⁶² that *Hazelwood* grants schools "greater latitude to restrict . . . speech" where student expression is "school-sponsored speech, such as a newspaper, or speech made as part of a school's curriculum."⁴⁶³ That either-or proposition is clearly incorrect where the Supreme Court specified that for *Hazelwood* to apply, student speech must be both sponsored—in terms of bearing the school's imprimatur—and connected to the school's curriculum.⁴⁶⁴

If more courts followed a similar interpretation to *Hazelwood*, then the question of violent non-sponsored curricular speech would at least have a clear (albeit incorrect) answer as the curricular nature of the cases discussed in Part I would automatically bring them under *Hazelwood* even though the speech in question lacked the imprimatur of the school. However, as Judge Batchelder astutely noted in *Settle*, student

⁴⁵⁶ 226 F.3d 198 (3d Cir. 2000).

⁴⁵⁷ *Id.* at 200–01. The poster indicated the student was "thankful for Jesus." *Id.* at 201.

⁴⁵⁸ *Id.* at 213 (Alito, J., dissenting).

⁴⁵⁹ *Id.* at 212–13.

⁴⁶⁰ *See id.* at 213.

⁴⁶¹ *See Jordan, supra* note 110, at 1569 (arguing that faulty analysis leads to an increase in the application of *Hazelwood* to the detriment of student speech rights).

⁴⁶² 513 F.3d 570 (6th Cir. 2008).

⁴⁶³ *Id.* at 577 (emphasis added).

⁴⁶⁴ *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270–71 (1988) (explaining the elements of school-promoted student speech).

speech as communicated in assignments “fall(s) somewhere in between *Hazelwood* and *Tinker* as a form of student expression *allowed* under the school curriculum but *not* sponsored or endorsed by the school.”⁴⁶⁵ But this positioning of non-sponsored curricular expression as somewhere between *Hazelwood* and *Tinker* presupposes a neat and orderly spectrum of protection for student rights where that is not entirely accurate.

At its inception, the *Tinker* standard was deployed to address the intersection of noncurricular speech and noncurricular punishments, meaning responses by school administrators to student speech that are generally punitive and unrelated to curriculum or education.⁴⁶⁶ *Hazelwood*, conversely, examines curricular speech and the curricular response from a school.⁴⁶⁷ However, most of the violent non-sponsored student speech cases examined in this Article represent curricular speech that was met with a noncurricular response in the form of a punitive suspension or even criminal charges against a student. Specifically examining the typical response levied against a student in cases of violent non-sponsored curricular speech, it is therefore difficult to say that *Tinker* offers more protection than *Hazelwood*, especially where the general application of *Tinker* results in perfunctory analysis cloaked in the worries of school violence and deference to school administrators. But that is not to say that an expansion of *Hazelwood* would cure all ills in this area. Where courts have found a “legitimate pedagogical concern in avoiding the disruption to the school’s learning environment” to justify *Hazelwood* censorship,⁴⁶⁸ it is not hard to envision a student suspension upheld under an expanded *Hazelwood* as a writer of violent fiction or an artist creating violent compositions would simply be a distraction and subsequent disruption in the learning environment. An expansion of *Hazelwood*, therefore, is unsuitable for the purposes of addressing the problem of violent non-sponsored student expression because it does not expressly protect students against punitive disciplinary measures.

Thus *Hazelwood* joins the true threat doctrine, *Fraser*, *Morse*, and, finally, *Tinker* as doctrinal approaches to violent non-sponsored curricular speech as possible solutions that fail to adequately address the First Amendment issues that arise when a student is disciplined for violent speech that is associated with a school’s curriculum but not reasonably interpreted as coming from the school itself. A new standard, therefore,

⁴⁶⁵ *Settle v. Dickinson Cnty. Sch. Bd.*, 53 F.3d 152, 158 (6th Cir. 1995) (Batchelder, J., concurring).

⁴⁶⁶ *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969). The students were not allowed to attend school so long as they were wearing the protest armbands. *Id.* It is doubtful this response was designed to teach anything to the students.

⁴⁶⁷ *See Hazelwood*, 484 U.S. at 263–64. The First Amendment rights of the students in *Hazelwood* may have been violated, but their punishment (in that two pages were removed from the school newspaper) was designed in some way, perhaps, to teach. *See id.* at 271 (explaining that a school may censor sponsored, curricular speech where it is “ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences”).

⁴⁶⁸ *Bannon v. Sch. Dist.*, 387 F.3d 1208, 1217 (2004) (citing *Fleming v. Jefferson Cnty. Sch. Dist.*, 298 F.3d 918, 934 (10th Cir. 2002)).

is needed to govern this particular subset of student speech—a standard that will be explained in Part IV.

IV. A STANDARD FOR NON-SPONSORED CURRICULAR SPEECH

This Article proposes the following standard for violent non-sponsored curricular speech: In instances where non-true threat violent student speech is curricular in nature and not sponsored by the school, the First Amendment forbids punitive discipline by school administrators. Rather, the only remedies for teachers and administrators in these cases should be pedagogical and therapeutic counter speech from school officials designed to teach and counsel—rather than punish—students. This Part will explain the operation of this new standard and examine the many options left to school administrators when their ability to punitively suspend or even expel students is no longer constitutional.

As Judge Batchelder speculated in her concurrence in *Settle*, the First Amendment protection for a student's assignment would necessarily fall between *Tinker* and *Hazelwood*.⁴⁶⁹ Following this line of analysis, Adam Hoelsing argued that such a standard “must fall somewhere between *Tinker*'s full protection and *Hazelwood*'s rational-basis protection. Thus, some form of intermediate protection, perhaps?”⁴⁷⁰ Again, however, the best possible solution does not necessarily have to fall between those two decisions in a straight line. Therefore, the proposed standard for violent non-sponsored curricular speech borrows elements from both decisions. From *Tinker*, the standard takes a relatively pro-student approach to school speech as it is built on the assumption that student First Amendment rights are critical to education⁴⁷¹ and the fostering of a new generation of citizens. Conversely, the standard takes from *Hazelwood* the implicit understanding that schools are a place for education and that administrators must be in charge of the curriculum and learning.

The operation of the standard is designed to be straightforward. If a school administrator is presented with a piece of violent non-sponsored curricular student speech—as discussed, this will generally be an assignment in the form of a story, poem, or other creative work—the administrator may first ascertain whether the work, and by extension the student, represents a threat. This investigation should be guided by common sense principles regarding threats: Was the speech communicated directly to the target of the perceived threat? Was it a conditional threat designed to motivate the recipient? How specific was the threat? Were there any mitigating elements (such as parody, hyperbole or sarcasm) to suggest there was no intent to threaten? In short, this is a highly factual examination designed only as a preliminary step; if it appears to truly represent a threat, it may be examined using the true threat analysis and then subsequently the *Tinker* doctrine if the speech is constitutionally protected. Either the

⁴⁶⁹ *Settle*, 53 F.3d at 158 (Batchelder, J., concurring).

⁴⁷⁰ Hoelsing, *supra* note 110, at Part IV.

⁴⁷¹ *But cf. Settle*, 53 F.3d at 156 (“Learning is more vital in the classroom than free speech.”).

substantive appearance of a true threat⁴⁷² or the lack of a connection to education removes the speech in question from this admittedly permissive standard and again places it in the realm of true threat analysis and *Tinker*.

If the violent non-sponsored curricular student speech at issue is not a threat, then the school may deal with it as it sees fit, consistent with the educational principles contained in *Hazelwood*. The only limitation on this authority is that the school must confront curricular speech with a curricular response—i.e., some type of pedagogical counter speech rather than a strictly disciplinary measure.

This proscription on a disciplinary response is premised on two points. First, the state should be unable to punish speech that it, in effect, commissioned, as a matter of fundamental fairness. Second, granting schools *Hazelwood* authority over speech not covered by the decision should come with the implied (but not expressed) restriction to a curricular response contained in the decision. The Wisconsin Supreme Court illustrated the natural tension in using *Hazelwood* to discipline students:

[S]chools may discipline student speech that is, for example, ungrammatical, poorly written, or inadequately researched. While few people likely question this authority, it is important to note that even this type of discipline—be it correcting a typographical error, having a student rewrite a particular assignment, or the like—infringes to some extent upon otherwise protected speech. Nevertheless, when examined in light of the special characteristics of the school environment, this speech, like speech that more dramatically interferes with a school's educational mission, may be disciplined without contravening the First Amendment.⁴⁷³

Correcting student speech that is “ungrammatical, poorly written, or inadequately researched” is simply a function of teaching; it is not *discipline* as the court framed it. Discipline is punitive, and there is little punitive intent behind a teacher's red ink. As Jonathan Pyle noted: “Detention and suspension are unusual repercussions for failure to recite the Gettysburg Address correctly. The educational process would not seriously be harmed if teachers were constrained to teach subject matter with grades and maintain order with the discipline code.”⁴⁷⁴ *Hazelwood* is premised on the notion of education rather than punitive discipline, and therefore, any similar curricular speech standard must reflect this fundamental reality.

⁴⁷² The natural inclination of many in the school setting will be to read true threats into expression where they may not be present. However, a student's intent should be at the forefront of this consideration. See *supra* notes 382–91 (explaining a plausible situation where a student assignment may be a true threat).

⁴⁷³ *In re Douglas D.*, 626 N.W.2d 725, 743 n.17 (Wis. 2001) (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988)).

⁴⁷⁴ Pyle, *supra* note 156, at 610.

So if a school cannot suspend, expel, or otherwise punitively react to violent non-sponsored curricular speech, what can it do? In short, a school can engage in any pedagogical or therapeutic counter speech that it finds necessary to address the situation. Generally, counter speech is the idea that whenever speech is feared for its potential negative effects, the proper solution is not to silence the speech but to respond to it with more speech.⁴⁷⁵ In the school setting, if violent student speech is feared, then the proper constitutional response is to reply to that speech with the best pedagogical counter speech tool available: a grade. As the Sixth Circuit stated in *Settle*, “[g]rades are given as incentives for study, and they are the currency by which school work is measured.”⁴⁷⁶ Therefore, if teachers and administrators find a student’s assignment to be impermissibly violent, then the school should simply assign a grade that reflects that displeasure. Under such an outcome, the school is allowed to voice its opinion of the impropriety of violent expression in the school setting, and the student is given an opportunity to learn that expression often has consequences.

However, in some instances a school may not wish to reflect its displeasure with a grade or it may be unable to do so in those situations where the student expression at issue is not a formalized assignment.⁴⁷⁷ In those cases, a school can still counsel a student without the formal structure of the grading process. In *LaVine*, for example, a student’s violent poem was given to his teacher for evaluation outside of the formal curriculum of the school.⁴⁷⁸ Instead of punishing the student with an “emergency expulsion,”⁴⁷⁹ the teacher and other school officials could have told the student that, while violence is often commonplace in poetry and art, the inclusion of a school shooting fantasy into a poem is inappropriate where students, teachers, and other members of the school community are generally afraid of school violence. Furthermore, the school administrators could have prompted the student to seek counseling or other help for his emotional state. In essence, they could have acted as educators and leaders and taught the students they sought to punish.

⁴⁷⁵ See Clay Calvert, *Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground*, 7 B.U. J. SCI. & TECH. L. 243, 285–86 (2001) (discussing the doctrine of counter speech).

⁴⁷⁶ *Settle*, 53 F.3d at 155.

⁴⁷⁷ See, e.g., *Emmett v. Kent Sch. Dist.*, 92 F. Supp. 2d 1088 (W.D. Wash. 2000) (where the student speech was a website inspired by course assignments); *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981 (9th Cir. 2001) (where the student speech was a poem given to a teacher for evaluation).

⁴⁷⁸ *LaVine*, 257 F.3d at 984.

⁴⁷⁹ See *id.* at 983 (“Although this is a close case in retrospect, we conclude that when the school officials expelled [the student] they acted with sufficient justification and within constitutional limits, not to punish [the student] for the content of his poem, but to avert perceived potential harm.”). As per this exigency, the student missed a total of seventeen days of class. *Id.* at 986. It is difficult to say for certain how long it takes to determine whether a student is a threat, but a seventeen-day suspension is presumptively punitive rather than precautionary. Cf. *Cox v. Warwick Valley Cent. Sch. Dist.*, 654 F.3d 267, 274 (2d Cir. 2011) (where a student was determined to not be a threat in a single day).

Violent student speech may indeed be inherently unsettling in the school environment, but the answer to this dilemma should never be a punitive response. Where violent student speech is curricular in nature, both its ties to education and the First Amendment should insulate that speech from a purely disciplinary response. There is no constitutional right implicated, however, where a school responds to violent curricular student speech with a failing grade. Indeed, if schools are to “teach by example the shared values of a civilized social order”⁴⁸⁰ by instructing students that violent imagery has no place in the post-Columbine American school, then grades are the most effective and appropriate tool with which to truly teach such a lesson.

CONCLUSION

If Part IV’s standard for violent non-sponsored curricular speech was applied to the previously discussed cases, many of the decisions would see a reversal in favor of student plaintiffs. *LaVine* would certainly be such a reversal as it is difficult to argue how a seventeen-day “emergency expulsion” is anything but a punitive response to student curricular speech.⁴⁸¹ Similarly in *Cuff*, a five-day suspension was certainly punitive where the school did not attempt to ascertain whether the student’s astronaut drawing represented a threat, as such a failure to investigate represents a tacit acknowledgement that the student’s speech was mere creative expression in the course of a school assignment.⁴⁸²

Cox, however, represents a course of action taken by school administrators that would be fully upheld under the new standard. When a teacher was concerned about a student’s “casual description of illegal activity, violence, and suicide” in an assignment for class, the teacher passed her concerns along to the principal, who then took the student into an in-school suspension room while the principal “considered whether [the student] posed an imminent threat to himself or others, and whether he should be disciplined for his essay.”⁴⁸³ After the principal decided the student was not a threat, he was returned to class, and the matter was over.⁴⁸⁴

The Supreme Court has recognized that the First Amendment includes both protections for speech and “the right to refrain from speaking at all.”⁴⁸⁵ But that insulation from the dangers of compelled speech does not translate well to a classroom setting where students are required to complete assignments, resulting in a fundamental unfairness when students are disciplined as a result of their coursework. Using disciplinary

⁴⁸⁰ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986).

⁴⁸¹ *See supra* notes 477–79 and accompanying text (discussing *LaVine*, 257 F.3d 981).

⁴⁸² *See Cuff ex rel. B.C. v. Cent. Valley Sch. Dist.*, 677 F.3d 109, 111–12 (2d Cir. 2012).

⁴⁸³ *Cox*, 654 F.3d at 270–71.

⁴⁸⁴ *Id.* at 271. The school additionally placed a call to the New York Department of Child and Family Services. *Id.* This decision, while perhaps unnecessary, represented true care and concern for the student.

⁴⁸⁵ *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

measures to punish violent student speech is not only inconsistent with some of the fundamental principles of education, but it is also incompatible with the logical reality of the school setting. If the student suspensions discussed in this Article were premised on protecting members of the school community, there are two important faults with that reasoning. The first is that discipline applied in this setting could have a chilling effect on other students who might seek to express themselves using violent imagery. If the concept of leakage—meaning that students who seek to harm others often detail their plans before an episode of violence—is to be believed, then chilling violent student speech would only suppress potential warnings of an attack. The second logical problem with this application of discipline is that, as Richard Salgado wrote, “[e]xpelling or suspending a student does not preclude the student from returning to campus with a loaded gun.”⁴⁸⁶ School discipline in these cases is simply not making any school any safer.

The cases discussed in this Article may represent examples of speech with marginal independent value, but that value becomes magnified when violent speech is used by a student in the process of education. These cases, in essence, matter, and they matter despite our squeamishness with the idea of school violence; they matter because education and the First Amendment matter. As a dissenting Circuit Court judge in *Cuff* argued,

While the concept of irony may seem well beyond the ken of an average ten-year-old, young children routinely experiment with the seeds of satire. They learn by fumbling their way to finding the boundaries between socially permissible, and even encouraged, forms of expression that employ exaggeration for rhetorical effect, and impermissible and offensive remarks that merely threaten and alienate those around them.

This young boy’s drawing was clearly not some subtle, ironic jab at his school or broader commentary about education. It was a crude joke. But the First Amendment should make us hesitate before silencing students who experiment with hyperbole for comic effect, however unknowing and unskillful that experimentation may be.⁴⁸⁷

⁴⁸⁶ Salgado, *supra* note 9, at 1412.

⁴⁸⁷ *Cuff*, 677 F.3d at 124 (Pooler, J., dissenting).

