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## 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*

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# **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***

## **INTRODUCTION**

Since 1996, thirty-nine school shootings have occurred in the United States, resulting in over one hundred deaths.<sup>1</sup> Due in part to the large number of casualties involved in several of these shootings, media coverage has been as intense as it has been ubiquitous.<sup>2</sup> As alarmingly tragic as these calamities have been, research demonstrates that school violence in this country has steadily declined since the early 1990s, when it peaked alongside other forms of juvenile crime.<sup>3</sup> According to experts, "the actual occurrence of violent death in schools is much lower than the media portrays."<sup>4</sup> For instance, the Centers for Disease Control and Prevention has observed that "[a]lthough high-profile school shootings have increased public concern for student safety, school-associated violent deaths account for less than 1% of homicides among school-aged children and youth."<sup>5</sup>

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1. See A Timeline of Recent Worldwide Shootings, <http://www.infoplease.com/ipa/A0777958.html> (last visited Jan. 7, 2009).

2. See, e.g., Joe Volz, *Media Distorts the Truth About Violence in School*, 30 AM. PSYCHOL. ASS'N MONITOR 9 (Oct. 1999), available at <http://www.apa.org/monitor/oct99/cf2.html> (stating that "the sheer number of media accounts about violence suggests the problem of school crime is much worse than it is.").

3. DEWEY G. CORNELL, *SCHOOL VIOLENCE: FEARS VERSUS FACTS* 11, 29–31 (2006).

4. The National Center for Children Exposed to Violence, <http://www.ncccev.org/violence/school.html> (last visited Jan. 7, 2009).

5. CDC, Youth Violence Fact Sheet, <http://www.cdc.gov/ncipc/factsheets/yvfacts.htm> (last visited Jan. 7, 2009); See also CORNELL, *supra* note 3, at 16 (noting that news reports on school shootings "seemed to confirm a radical change in the safety of all schools"; for example, "the cover of *Newsweek* magazine (March 9, 1992) brazenly presented 'A report from America's classroom killing grounds.' The use of hyperbole such as 'killing grounds' is an obvious attempt to reach a sensational conclusion.").

In the wake of high-profile shootings, (such as Columbine, and more recently Virginia Tech), and the accompanying perception of increased school violence, educators, administrators, and policymakers have been re-assessing the scope of schools' disciplinary authority to respond to students' conduct, writings, and speech before they erupt in tragedy.<sup>6</sup> For instance, following the Virginia Tech shootings in April 2007, educators "across the country have been wondering what they would [or could] have done if the gunman, Seung-Hui Cho, had been writing troubling stories in their classrooms."<sup>7</sup> Concomitantly, "[s]ome members of Congress want to . . . [rewrite existing laws to] absolve college officials of liability if they contact parents to discuss concerns about a dependent student, as long as they consult[] first with a licensed mental-health professional."<sup>8</sup> Similarly, some state policymakers would like to bolster educators' abilities to intervene by lessening the possibility that such intervention would precipitate litigation by students.<sup>9</sup> Most relevantly, these concerns are not lost on courts, recognizing that "[a]fter Columbine . . . and other school shootings, questions have been asked about how teachers or administrators could have missed telltale 'warning signs,' why something was not done earlier and what should be done to prevent such tragedies from happening again."<sup>10</sup>

To be sure, preventing school violence through proactive and disciplinary measures is a legitimate and necessary enterprise for school officials.<sup>11</sup> Educational experts, however, have questioned the efficacy of some of the preventative programs that have been

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6. E.g., Joseph Berger, *Deciding When Student Writing Crosses the Line*, N.Y. TIMES, May 2, 2007, at B7; Elizabeth Bernstein, *Delicate Balance: Colleges' Culture of Privacy Often Overshadows Safety – Laws Allow Disclosure of Troubling Behavior But Many Schools Resist*, WALL ST. J., Apr. 27, 2007, at A1; Michael Luo, *Senators Discuss Preventing College Attacks*, N.Y. TIMES, Apr. 24, 2007, at A17.

7. Berger, *supra* note 6, at B7.

8. Bernstein, *supra* note 6, at A1.

9. Alan Gaithright, *Measure Would Protect School Staff*, ROCKY MOUNTAIN NEWS, Apr. 25, 2007, at 24.

10. *Lavine v. Blaine Sch. Dist.*, 257 F.3d 981, 987 (9th Cir. 2001).

11. See generally ROBERT A. FEIN ET AL., *THREAT ASSESSMENT IN SCHOOLS: A GUIDE TO MANAGING THREATENING SITUATIONS AND TO CREATING SAFE SCHOOL CLIMATES* 64 (2002).

proposed and enacted in recent years.<sup>12</sup> For example, researchers in the field of education as well as policy groups have challenged as ineffective (or at least over inclusive) "get tough" or "zero tolerance" school policies that automatically punish a student, often quite severely, for any infraction, regardless of ambient circumstances, such as the student's intent.<sup>13</sup>

In addition to arousing skepticism among education researchers, new disciplinary measures have piqued the scrutiny of courts and constitutional scholars because they raise important constitutional questions.<sup>14</sup> In particular, those policies aimed at strengthening schools' disciplinary abilities to preempt violence by punishing violent speech lie in direct tension with students' First Amendment free speech rights.<sup>15</sup>

Examined broadly, this constitutional tension is not new. Commentators have substantially chronicled federal courts' approaches to the constitutional concerns over school disciplinary policies as they interact with the First Amendment.<sup>16</sup> For instance, the much heralded professor-practitioner Erwin Chemerinsky has traced the manner in which First Amendment school discipline cases have grappled with, followed, and generally chipped away at the seminal case of *Tinker v. Des Moines Independent Community School District*,<sup>17</sup> upon its thirtieth anniversary.<sup>18</sup> Others, perhaps more forward looking, have questioned the extent to which the First Amendment permits schools to discipline students for speech created off-campus—in cyberspace, for instance.<sup>19</sup>

12. E.g., CORNELL, *supra* note 3, at 164–65 (collecting criticism of "zero tolerance" policies in schools for threat-related behavior including possessing a firearm on school property).

13. *Id.*

14. See generally David L. Hudson, Jr., *Student Expression in the Age of Columbine: Securing Safety and Protecting First Amendment Rights*, 6 FIRST REP. 2, Sept. 2005, available at <http://www.firstamendmentcenter.org/PDF/First.Report.student.speech.pdf>.

15. *Id.* at 25–26.

16. See generally, e.g., Edward T. Ramey, *Student Expression: The Legacy of Tinker in the Wake of Columbine*, 77 DENVER U. L. REV. 699 (2000).

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

18. See generally Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of Tinker?*, 48 Drake L. Rev. 527 (2000).

19. E.g., Rita J. Verga, *Policing Their Space: The First Amendment Parameters of School Discipline of Student Cyberspeech*, 23 SANTA CLARA COMPUTER & HIGH TECH. L.J. 727, 728–29 (2007).

This Comment picks up where these commentaries (and others similar to them) left off. Specifically, it seeks to provide a framework of the legal principals at play in determining the constitutionality of school disciplinary policies and actions.<sup>20</sup> This Comment is made timely not only by the most recent tragedy at Virginia Tech and the disciplinary proposals it and other similar catastrophes have generated, but also by the Supreme Court's most recent decision in the student-speech area, *Morse v. Frederick*.<sup>21</sup>

In *Morse*, the much-discussed "BONG HiTS 4 JESUS" case, the United States Supreme Court held that school officials may discipline students for speech reasonably interpreted as advocating illegal drug use.<sup>22</sup> Although *Morse* did not concern student speech contemplating violence, it augments schools' disciplinary authority, and in this regard, *Morse* raises new questions about the outer limits of such authority in other contexts.<sup>23</sup> The constitutional confines with respect to student threats are particularly implicated by *Morse*'s holding due to similar concerns for protecting the health and safety of schoolchildren.<sup>24</sup> Indeed, *Morse* has already been applied to such cases in three Federal Circuit Courts of Appeal.<sup>25</sup> In *Boim v. Fulton County School District*, the Eleventh Circuit upheld a Georgia high school student's ten-day suspension for a fictional story about a girl's "dream" of shooting her teacher.<sup>26</sup> Also faced with a perceived threat of violence, the Second Circuit, in *Wisniewski v. Board of Education of the Weedsport Central School District*, upheld a New York high school student's one-semester suspension for creating an AOL Instant Message ("IM") icon of his teacher being shot.<sup>27</sup> And most recently, in *Ponce v. Socorro Independent School District* the Fifth Circuit upheld a Texas high school student's three-day suspension and

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20. See *infra* Parts I–IV.

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

22. *Id.* at 2620, 2622.

23. See generally *id.*

24. See *id.* at 2638 (Alito, J., concurring).

25. *Boim v. Fulton County Sch. Dist.*, 494 F.3d 978 (11th Cir. 2007); *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765 (5th Cir. 2007); *Wisniewski v. Bd. of Educ. of the Weedsport Central Sch. Dist.*, 494 F.3d 34 (2d Cir. 2007).

26. *Boim*, 494 F.3d at 985.

27. *Wisniewski*, 494 F.3d at 36–37.

transference to an alternative education program for a fictional story describing, *inter alia*, a mass school-shooting at his school.<sup>28</sup>

While achieving similar results, the circuit courts' divergent applications of *Morse* indicate that the Supreme Court fell short of providing much-needed guidance to educators and student speakers to navigate the uncertain waters of its school speech jurisprudence.<sup>29</sup> While this Comment does not purport to still these waters, it attempts to provide an up-to-date map of the operative legal principles that would inform any school speech analysis.<sup>30</sup> Additionally, this Comment examines these principles in the context of student threats, with any eye toward decision-makers drafting school policies, litigants briefing courts, and judges adjudicating the constitutional calculus involved therein.<sup>31</sup>

Toward these ends, Part I of this Comment reviews the relevant contextual history of school speech jurisprudence as it relates to violent speech or threats of violence.<sup>32</sup> Part II provides a comprehensive discussion of *Morse*—including its facts, reasoning, holding, concurrences, and dissent—and the ways in which *Morse* further morphed the First Amendment standard for evaluating the protectability of student speech in the context of threats of violence.<sup>33</sup> Part III traces *Morse*'s already robust impact on the circuit courts' analyses of student speech concerning threats of violence.<sup>34</sup> In particular the Eleventh, Second, and Fifth Circuits' decisions in *Boim*, *Wisniewski*, and *Ponce* are carefully explored for their somewhat divergent applications of *Morse* and its relevance to student speech in this context.<sup>35</sup> Part IV concludes by examining the ways in which *Morse* suggests a two-step analysis of student free

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28. *Ponce*, 508 F.3d at 766.

29. Compare *Boim*, 494 F.3d at 984 (extending *Morse* to speech reasonably interpreted as school violence) and *Ponce*, 508 F.3d at 770 (extending *Morse* to threats of grave harm, deriving the gravity from characteristics of the school environment), with *Wisniewski*, 494 F.3d at 38–39 (2d Cir. 2007) (not directly applying *Morse* but expanding *Tinker* in the wake of *Morse*).

30. See *infra* text accompanying notes 37–138.

31. See *infra* text accompanying notes 155–241.

32. See *infra* Part I.

33. See *infra* Part II.

34. See *infra* Part III.

35. See *infra* Part III.

speech claims in the context of apparent threats of violence, thereby reconfiguring the balance between students' constitutional rights and schools' needs for preventing school violence.<sup>36</sup>

## I. HISTORICAL BACKGROUND

To appreciate *Morse*, one must place it in the context of the Court's student-speech jurisprudence. This Part provides a review of this body of law beginning with *Tinker v. Des Moines Independent Community School District*,<sup>37</sup> the "high-water mark of constitutional protection for [students],"<sup>38</sup> to *Bethel School District No. 403 v. Fraser*<sup>39</sup> and *Hazelwood School District v. Kuhlmeier*<sup>40</sup> where the Court somewhat retracted these protections in deference to the schools' prerogatives.<sup>41</sup> While these cases, like *Morse*, do not specifically address violent speech, they represent the legal framework courts use to determine whether such student-speech warrants constitutional protection.<sup>42</sup> And although the details are beyond the scope of this Comment, courts may also analyze student threats under its "true threat" jurisprudence, first articulated in *Watts v. United States*.<sup>43</sup> A "true threat," as defined in the school context, is a "serious expression of an intent to cause a present or future harm."<sup>44</sup> But because schools are given broader authority to punish

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36. See *infra* Part IV.

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

38. DANIEL A. FARBER, *THE FIRST AMENDMENT* 193 (Foundation Press 2003) (1998).

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

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

41. FARBER, *supra* note 38, at 194.

42. See Hudson, *supra* note 14, at 3–8.

43. *Watts v. United States*, 394 U.S. 705 (1969). In *Watts*, an eighteen-year-old who had received a draft card insisted at a public rally that he would not go and "if they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* at 707. Distinguishing the speaker's statement as political hyperbole when considered in context, the Supreme Court established that nevertheless "true threats" against the President do not enjoy First Amendment Protection. *Id.* For a comprehensive review of the true speech doctrine in the school context, see Andrew P. Stanner, Note, *Toward an Improved True Threat Doctrine for Student Speakers*, 81 N.Y.U. L. REV. 385 (2006).

44. *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 616 (5th Cir. 2004) (quoting *Doe v. Pulaski County Special Sch. Dist.*, 306 F.3d 616, 622 (8th Cir. 2002) (internal quotations omitted); see also *United States v. Fulmer*, 108 F.3d 1486, 1490–91 (1st Cir. 1997) (collecting and discussing the differences among the circuits for determining a true threat).

under student-speech precedent, many courts employ one of these relevant standards rather than the *Watts* standard.<sup>45</sup>

*A. Announcing Student Speech Rights at School: Tinker v. Des Moines Independent Community School District*

In mid-December 1965, several grade-school students wore black armbands to school to peaceably protest the Vietnam War.<sup>46</sup> School officials heard about the students' intentions days before the scheduled demonstration.<sup>47</sup> Fearing classroom disturbance would ensue, they promulgated a regulation banning armbands.<sup>48</sup> In knowing violation, the plaintiff students wore the armbands, but no disruption occurred other than a few unfriendly remarks outside the classroom.<sup>49</sup> Pursuant to the new regulation, the school officials suspended the students; and their fathers subsequently filed a complaint under 42 U.S.C. § 1983 seeking injunctive relief and nominal damages.<sup>50</sup>

The school officials successfully argued to the lower courts that the punishment was reasonable because it was rooted in their fear that the armbands would lead to classroom disturbance.<sup>51</sup> In reversing, the Supreme Court found that the school's "undifferentiated fear or apprehension of disturbance [was] not enough to overcome the right to freedom of expression."<sup>52</sup> Instead, the school had the burden of showing "something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular

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45. See, e.g., *Wisniewski v. Bd. of Educ. of the Weedsport Central Sch. Dist.*, 494 F.3d 34, 38 (2d Cir. 2007). See Andrew P. Stanner, Note, *Toward An Improved True Threat Doctrine for Student Speakers*, 81 N.Y.U. L. REV. 385 (2006) for a thorough discussion of the true threat doctrine in the school context.

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

47. *Id.*

48. *Id.* The court noted that there had been great civil unrest and draft card burning incidents sweeping occurring across the country. Because there were strong feelings both for and against the war, the court believed the school's concerns and subsequent actions were reasonable. *Id.* at 504–05.

49. *Id.* at 508.

50. *Id.* at 504.

51. *Id.* at 504–05.

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



viewpoint.”<sup>53</sup> According to the *Tinker* Court, that “something more” was the requirement that schools provide concrete evidence that the student speech would “substantially interfere with the work of the school or impinge upon the rights of other students.”<sup>54</sup>

Justice Fortas, writing for the majority, articulated student-speech rights for the first time by announcing that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>55</sup> The *Tinker* Court, however, implied that these rights could be somewhat limited because they must be “applied in light of the special characteristics of the school environment . . . .”<sup>56</sup>

Since *Tinker*, the Supreme Court has attempted to further define the limitations of student speech given schools’ special characteristics.<sup>57</sup> While no Supreme Court case has specifically addressed student threats under the First Amendment, *Fraser*, *Hazelwood*, and most recently *Morse* have redefined the boundaries of student speech, such that they now form the jurisprudential backdrop for any school-threat analysis.<sup>58</sup>

## *B. The Supreme Court Reins in Student Speech Protections.*

### *1. Vulgar and Offensive Speech Is Deemed Not Protected Under Bethel School District No. 403 v. Fraser.*

Almost twenty years after *Tinker*, the Supreme Court reexamined the limits of student-speech rights in the context of a sophomoric sexual innuendo.<sup>59</sup> On April 26, 1983, seventeen-year-old senior

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53. *Id.* at 509. A regulation that only punishes one side of an issue is considered viewpoint discrimination and is the most disfavored in the eyes of the Court. *See, e.g.,* FARBER, *supra* note 38, at 21. Here, the Court was particularly sensitive to the likelihood of viewpoint discrimination because the regulation was passed in response to learning about the protest, *see Tinker*, 393 U.S. at 504, and the school’s regulation did not prohibit students from wearing political campaign buttons and Iron Crosses associated with Nazism. *Id.* at 510.

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

55. *Id.* at 506.

56. *Id.*

57. *See infra* text accompanying notes 61–134. *See* Edgar Bittle, *The Tinker Case: Reflections Thirty Years Later*, 48 DRAKE L. REV. 491 (2000) for a more thorough discussion of the underlying facts and arguments proffered by both the school district and plaintiff students.

58. *See* Hudson, *supra* note 14, at 3–8.

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

Matthew Fraser delivered a speech before a school assembly to nominate his friend for a student-government position.<sup>60</sup> Fraser's speech, in its entirety quipped:

I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most of all, his belief in you, the students of Bethel is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds. Jeff is a man who will go to the very end—even the climax, for each and every one of you. So vote for Jeff for ASB vice-president—he'll never come between you and the best our high school can be.<sup>61</sup>

The speech evoked a boisterous response from some students and a select few made sexually explicit gestures; but, there were no reported incidents of disruption other than one teacher devoting ten minutes of her class time to discuss the speech.<sup>62</sup> Therefore, both the District Court and Ninth Circuit, applying *Tinker*, held that the school officials had abridged Fraser's constitutional rights by "fail[ing] to carry its burden of demonstrating that Fraser's use of sexual innuendo in the nominating speech substantially disrupted or materially interfered in any way with the educational process."<sup>63</sup> The Supreme Court, reversed.<sup>64</sup>

In an opinion by Chief Justice Burger, the Court found Fraser's sexually explicit speech distinguishable from the political speech in *Tinker*.<sup>65</sup> The Court preserved *Tinker*'s protections, however, *Fraser* announced that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."<sup>66</sup> Rather, the Court found that students' rights must be

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60. *Fraser v. Bethel Sch. Dist. No. 403*, 755 F.2d 1356, 1357 (9th Cir. 1985).

61. *Id.*

62. *Id.* at 1359–60.

63. *Id.* at 1359.

64. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 687 (1986).

65. *Id.* at 680.

66. *Id.* at 682.

balanced against a school's need to "inculcate" students with fundamental values of civility.<sup>67</sup>

Accordingly, the Court reasoned that Bethel School District permissibly disciplined Fraser because it "was entitled to 'disassociate itself' from the speech" in an effort to demonstrate that such vulgarity is socially inappropriate.<sup>68</sup> To reach this holding, the Court emphasized that school officials, rather than judges, are best positioned to determine what manner of speech is inappropriate.<sup>69</sup>

While *Fraser* specifically addressed vulgar and lewd speech, some lower courts have upheld school punishment of threatening speech under *Fraser* by finding that a school "need not tolerate student speech that is inconsistent with its 'basic educational mission.'"<sup>70</sup> The educators in *Morse* successfully advanced a similar argument before the district court that drug-promoting speech undermined the school's anti-drug policy.<sup>71</sup> However, Justice Alito's concurring opinion in *Morse*'s 5-4 decision made clear that "[t]he [controlling] opinion of the court does not endorse . . . school officials to censor any student speech that interferes with a school's 'educational mission.'"<sup>72</sup>

## 2. School-Sponsored Speech Is Deemed Not Protected Under Hazelwood School District v. Kuhlmeier.

In *Hazelwood*, the Supreme Court further limited *Tinker*'s scope by supplying a separate constitutional standard for school-sponsored, student speech.<sup>73</sup> The case arose in St. Louis County, Missouri, when the principal of Hazelwood School District withheld from publication two pages of the school newspaper due to his concerns about two articles.<sup>74</sup> The principal objected to an article about teenage

67. *Id.* at 681.

68. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988) (quoting *Fraser*, 478 U.S. at 685-86 (1986)).

69. *Fraser*, 478 U.S. at 683.

70. 70 *See, e.g., Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 470 (6th Cir. 2000) (quoting *Kuhlmeier*, 484 U.S. at 266 (citation omitted)).

71. *Frederick v. Morse*, No. J 02-008 CV(JWS), 2003 WL 25274689, at \*5 (D. Alaska May 29, 2003).

72. *Morse v. Frederick*, 127 S. Ct. 2618, 2637 (2007) (Alito, J., concurring).

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

74. *Id.* at 262-63.

pregnancy because he believed the authors had insufficiently protected the anonymity of the featured students.<sup>75</sup> And due to concerns of fairness, the principal disapproved of an article about parental divorce because an identified father was not given an opportunity to respond to disparaging remarks made by his daughter.<sup>76</sup>

The Supreme Court, in a 5–3 decision, upheld the school's judgment to censor material from the school newspaper.<sup>77</sup> The Court distinguished *Tinker* which addressed a "student's personal expression that happens to occur on the school premises" from speech that "students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."<sup>78</sup> The newspaper in question could be perceived as bearing the official approval of the school because it was published in conjunction with a journalism course and routinely submitted to the principal for approval.<sup>79</sup> To ensure that the "views of the individual speaker are not erroneously attributed to the school," the Court found that educators must be given greater control over such school-sponsored speech.<sup>80</sup>

Accordingly, the Court held 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."<sup>81</sup> Applying this standard, the Court held that the principal for the Hazelwood School District acted reasonably because his concerns for protecting a source's anonymity and affording a person the opportunity to respond to accusations were certainly legitimate journalistic concerns.<sup>82</sup>

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75. *Id.* at 263.

76. *Id.*

77. *Id.* at 272–73.

78. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

79. *Id.* at 268–69.

80. *Id.* at 271.

81. *Id.* at 273.

82. *Id.* at 274–75.

## II. "TOKE" FOUR: THE SUPREME COURT DECIDES ITS FOURTH DECISION ON STUDENT SPEECH IN *MORSE V. FREDERICK*

In *Morse v. Frederick*, the Supreme Court held that a high school principal did not violate the First Amendment when she censored and punished a student for speech she reasonably interpreted as promoting illegal drug use and which occurred during a school-supervised event.<sup>83</sup> Chief Justice Roberts, writing for the 5–4 majority, stated that placing such pro-drug speech outside the ambit of constitutional protection is consistent with the principles articulated in the Court's three-part, student-speech jurisprudence—*Tinker*, *Fraser*, and *Hazelwood*.<sup>84</sup> Specifically, the court reaffirmed that, while "students do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"<sup>85</sup> such rights "are not automatically coextensive with the rights of adults in other settings"<sup>86</sup> and "must be applied in light of the special characteristics of the school environment."<sup>87</sup>

### A. *Facts and Procedural History*

The opinion's references to the serious dangers of illegal drug use by schoolchildren provide a sobering juxtaposition to the somewhat amusing facts giving rise to the case. High school senior Joseph Frederick ("Frederick") was seeking fifteen minutes of fame when he hatched a plan to get on national television.<sup>88</sup> It worked.

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83. *Morse v. Frederick*, 127 S. Ct. 2618, 2622 (2007). This case is the most important student-speech case to reach the Supreme Court in almost twenty years and is "the first time the court has said that schools can prohibit a student expression that was neither obscene nor published under the school's auspices." Charles Lane, *Court Backs School on Speech Curbs: A 5-4 Majority Cites Perils of Illegal Drugs In Case of the 'Bong Hits 4 Jesus' Banner*, WASH. POST, June 26, 2007, at A06.

84. *Morse*, 127 S. Ct. at 2622.

85. *Id.* (quoting *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 506 (1969) (internal quotations omitted)).

86. *Morse*, 127 S. Ct. at 2622 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986) (internal quotations omitted)).

87. *Morse*, 127 S. Ct. at 2622 (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (internal quotations omitted)).

88. *Morse v. Frederick*, 127 S. Ct. 2618, 2624 (2007).

It was January 24, 2002, and Juneau-Douglas High School ("JDHS") principal Deborah Morse ("Morse") had decided to release students from class to watch the Olympic Torch pass through Juneau, Alaska en route to the winter games in Salt Lake City, Utah.<sup>89</sup> Students and teachers gathered on either side of the street while the cheerleaders and marching band performed.<sup>90</sup> Frederick had not arrived at school that morning because his car was stuck in the snow, but he dug it out in time to meet his friends on the public sidewalk across from JDHS.<sup>91</sup> As the torchbearers and national television cameras passed by, Frederick and his friends unfurled a 14-foot banner reading "BONG HiTS 4 JESUS."<sup>92</sup>

Immediately upon seeing the banner, Morse crossed the street and demanded the students take down the banner.<sup>93</sup> Frederick refused and asked, "What about the Bill of Rights and freedom of speech?"<sup>94</sup> Morse responded that the banner violated the school policy against displaying material promoting illegal drug use, confiscated the banner, and sent Frederick to her office where she suspended him for ten days.<sup>95</sup>

At trial, Morse successfully argued that under *Fraser*, she had the authority to censor Frederick's pro-drug message because it "undermine[d] the school's basic educational mission" to teach drug abstention and it exceeded the boundaries of socially appropriate behavior.<sup>96</sup> The Ninth Circuit reversed, finding that *Tinker* controlled, not *Fraser*.<sup>97</sup> The Court reasoned that broadening educators'

89. *Id.* at 2622.

90. *Id.* at 2624.

91. *Frederick v. Morse*, 439 F.3d 1114, 1115 (9th Cir. 2006).

92. *Morse*, 127 S. Ct. at 2622.

93. *Id.*

94. *Morse*, 439 F.3d at 1116.

95. *Morse v. Frederick*, 127 S. Ct. 2618, 2622-23 (2007). Frederick claims Morse increased his suspension from five to ten days for quoting "Thomas Jefferson on freedom of expression." *Frederick v. Morse*, No. J:02-008 CV, 2003 WL 25274689, at \*1 (D. Alaska May 27, 2003). However, Principal Morse disputes hearing the Jefferson quote and denies this was the reason for the ten-day suspension. *Frederick v. Morse*, 439 F.3d 1114, 1116 (9th Cir. 2006); see also Robert Barnes, *Justices to Hear Landmark Free-Speech Case: Defiant Message Spurs Most Significant Student 1st Amendment Test in Decades*, WASH. POST, Mar. 13, 2007, at A03.

96. *Frederick v. Morse*, No. J:02-008 CV(JWS), 2003 WL 25274689, at \*5 (D. Alaska May 29, 2003) (slip copy).

97. *Frederick v. Morse*, 439 F.3d 1114, 1121 (9th Cir. 2006).

authority to punish any message deemed inconsistent with its self-defined mission would eviscerate *Tinker*'s bedrock principle that students do not shed their speech rights at school.<sup>98</sup> Applying *Tinker* and finding no substantial disruption, the Ninth Circuit held that the school's punishment violated Frederick's free speech rights.<sup>99</sup>

### *B. The Majority Opinion*

On June 24, 2007, the Supreme Court upheld Frederick's suspension, reversing the Ninth Circuit and creating another exception to the student-speech protections announced under *Tinker*.<sup>100</sup> But before deciding what constitutional standard would apply, the Court had to first resolve two issues: the meaning of the banner and whether it constituted student speech.<sup>101</sup>

Acknowledging the existence of "uncertainty at the outer boundaries as to when courts should apply school-speech precedents," the Court nevertheless found that the facts of the case fell well within those bounds.<sup>102</sup> Although Frederick was on public property and at a public event, Chief Justice Roberts agreed with the superintendent that Frederick could not "stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school."<sup>103</sup>

Finding the message properly analyzed under school-speech precedent was rather uncontroversial;<sup>104</sup> however, the Court was

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98. *Id.* at 1120. The Ninth Circuit expressly declined to follow the Sixth Circuit's recent interpretation of *Fraser* as giving schools broad authority to punish any speech deemed inappropriate by the school. *Id.* at 1122.

99. *Id.* at 1123.

100. *Morse v. Frederick*, 127 S. Ct. 2618 (2007). Chief Justice Roberts wrote the opinion of the court, and was joined by Justices Scalia, Kennedy, Thomas, and Alito. Additionally, Justice Alito wrote a concurring opinion joined by Justice Kennedy; Justice Thomas wrote a concurring opinion; Justice Breyer concurred in the judgment in part and dissented in part; and Justice Stevens wrote a dissenting opinion and was joined by Justices Souter and Ginsburg. *Id.* at 2621.

101. *Id.* at 2624–25.

102. *Id.* at 2624. Chief Justice Roberts cited *Porter v. Ascension Parish School Board* as an example of a case improperly analyzed as school speech. *Id.* In *Porter*, the Fifth Circuit declined to analyze a drawing "completed in [student's] home, stored for two years" and inadvertently brought to school by his younger brother as school speech. 393 F.3d 608, 615 (5th Cir. 2004).

103. *Morse*, 127 S. Ct. at 2624 (internal citation and quotation omitted).

104. *Id.* (noting that every authority addressing the issue —superintendent, school board, District Court, and Ninth Circuit—found that Frederick's speech was properly analyzed as school-speech).

sharply divided over the proper interpretation of "BONG HiTS 4 JESUS."<sup>105</sup> The dissent found the banner to be "an obscure message with a drug theme" that was unreasonably interpreted as advocating drug use.<sup>106</sup> The majority found that although Frederick's proffered explanation of the phrase as simply "meaningless and funny" was certainly a possible interpretation, it was not the only one.<sup>107</sup> And it was not the relevant one in the eyes of the majority. The Court, instead, deferred to Principal Morse's interpretation that the message was "advocating or promoting illegal drug use" because it was "plainly a reasonable one."<sup>108</sup> The Court adjudged the reasonableness of Morse's interpretation by finding at least two readings that the sign advocated illegal drug use: either commanding "[Take] bong hits ..." or celebrating "bong hits [are a good thing]."<sup>109</sup> Additionally, the majority emphasized "this is plainly not a case about political debate over the criminalization of drug use or possession," contrary to the suggestions of both the dissent and the Ninth Circuit.<sup>110</sup>

It was against this backdrop that the Court held 5–4 that Morse's actions did not violate the First Amendment.<sup>111</sup> The Court, in its analysis, laid a foundation for another *Tinker* exception by first

105. See *Morse v. Frederick*, 127 S. Ct. 2618, 2625, 2646 (2007); see also *Frederick v. Morse*, No. J:02-008 CV(JWS), 2003 WL 25274689, at \*5 (D. Alaska May 29, 2003) (District Court finding the banner promoted drug use and was properly analyzed under *Fraser*); *Frederick v. Morse*, 439 F.3d 1114, 1121 (9th Cir. 2006) (in reversing the District Court, the Ninth Circuit found the banner to communicate a political message and therefore was properly analyzed under *Tinker*'s more protective standard).

106. *Morse*, 127 S. Ct. at 2646.

107. *Id.* at 2625.

108. *Id.* at 2624–25 (internal citations and quotations omitted).

109. *Id.* at 2625 (alterations in the original); see Dahlia Lithwick, *The Breakfast Table: An E-mail Conversation About the News of the Day*, SLATE, June 25, 2007, <http://www.slate.com/id/2168856/entry/2169029/> ("Roberts goes to great lengths to insert meaning into the silliness of the words on the student banner. . . . When did we enter into the era of constitutional interpretation through inserting pretend words?").

110. *Morse v. Frederick*, 127 S. Ct. 2618, 2625 (2007). The Ninth Circuit found "it is not so easy to distinguish speech about marijuana from political speech in the context of a state where referenda regarding marijuana legalization repeatedly occur and a controversial state court decision on the topic had recently issued." *Frederick v. Morse*, 439 F.3d 1114, 1119 (9th Cir. 2006). In her online column, Julie Hilden argued that the court contradicts itself by finding both that the banner advocated illegal drug use and that the banner fell outside political debate. Julie Hilden, *The Supreme Court's "Bong Hits 4 Jesus" First Amendment Decision: How Its Betrayal of Free Speech Principles May Have Influenced A Recent Federal Appellate Decision*, FINDLAW, Jul. 9, 2007, <http://writ.lp.findlaw.com/hilden/20070709.html>.

111. *Morse*, 127 S. Ct. at 2625.



underscoring two principles derived from *Fraser* and *Hazelwood*: (1) students do not enjoy the same rights at school as they do elsewhere; (2) and, the *Tinker* standard is not the sole means for restricting student speech.<sup>112</sup> The Court then advanced the argument that deterring drug use among schoolchildren is a compelling governmental interest, evinced by Congressional policies tying school funding to drug prevention programs.<sup>113</sup> Thus, given the “special characteristics of the school environment,” including peer pressure, and the special dangers of drug abuse extending beyond an “undifferentiated fear or apprehension of disturbance,” Morse permissibly punished Frederick for speech she reasonably believed to advocate drug use.<sup>114</sup> In support of its analysis, the Court cited its recent decisions in the Fourth Amendment context where it upheld mandatory drug testing in schools due to a compelling interest in deterring drug use by schoolchildren.<sup>115</sup>

Chief Justice Roberts expressly declined to expand *Fraser*’s “plainly offensive” standard to encompass speech that the school deemed violative of their educational mission.<sup>116</sup> The Court, however, proceeded to parrot the *Fraser* rationale—that schools must disassociate from lewd speech to teach civility—by concluding that educators may punish pro-drug speech because “failing to act would send a powerful message to the students . . . about how serious the school was about the dangers of illegal drug use.”<sup>117</sup>

### C. *The Concurring Opinions*

The concurring opinion authored by Justice Alito, and joined by Justice Kennedy, is the most important because it aimed to limit the

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112. *Id.* at 2626–27.

113. *Id.* at 2628.

114. *Id.* at 2629 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506, 508 (1969) (internal quotations omitted)).

115. *Morse*, 127 S. Ct. at 2627–28 (citing *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655–56 (1995)).

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

117. *Id.*

reach of the Court's holding.<sup>118</sup> Justice Alito emphasized that educators may punish speech reasonably interpreted as advocating illegal drug use so long as the speech cannot "plausibly be interpreted as commenting on any political or social issue."<sup>119</sup> Paradoxically, the dissenting Justices did, in fact, suggest that Frederick's banner could plausibly be interpreted as advocating the legalization of marijuana—a pertinent political issue in Alaska.<sup>120</sup> It appears that the thread supporting Alito's limitations is the fact that Frederick claimed that his banner was "meaningless and funny" rather than political in nature.<sup>121</sup>

Justice Thomas wrote separately to articulate his view that *Tinker* should be overturned.<sup>122</sup> Looking to the history of public education and the courts, Thomas claimed that the First Amendment was not originally understood to encompass student speech.<sup>123</sup> Therefore, Morse could rightfully punish Frederick's banner simply because he does not have a constitutionally protected right of free speech at school.<sup>124</sup>

Justice Breyer, concurring in the judgment in part and dissenting in part, would have foregone deciding the constitutional issue on the merits.<sup>125</sup> Instead, he would have simply found that Frederick's claim against Morse for monetary damages was barred by qualified immunity.<sup>126</sup> Qualified immunity is a defense mandating a judgment in favor of a government employee absent a clear violation of another's rights.<sup>127</sup> Due to the complexity of student-speech jurisprudence, evinced by the Court's own division on the issue, Breyer contended that Morse did not clearly violate Frederick's rights

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118. See Tim Hoffine, *Experts Say Alito Key Factor in 'Bong Hits' Decision*, STUDENT PRESS L. CENTER, June 26, 2007, [www.splc.org/newsflash.asp?id=1559](http://www.splc.org/newsflash.asp?id=1559).

119. *Morse v. Frederick*, 127 S. Ct. 2618, 2636 (2007) (Alito, J., concurring).

120. *Id.* at 2650 n.8 (Stevens, J., dissenting).

121. *Id.* at 2625.

122. *Id.* at 2630 (Thomas, J., concurring).

123. *Id.*

124. *Morse v. Frederick*, 127 S. Ct. 2618, 2634 (2007) (Thomas, J., concurring).

125. *Id.* at 2638 (Breyer, J., concurring).

126. *Id.*

127. *Id.* at 2640 (Breyer, J., concurring).

when she confiscated his banner.<sup>128</sup> Justice Breyer then suggested that the Court could have disposed of Frederick's non-monetary claims on non-speech-related grounds.<sup>129</sup> However, Chief Justice Roberts in his majority opinion, found this approach beyond the Court's reach because it was not raised by the parties nor considered by the lower courts.<sup>130</sup>

#### *D. Justice Stevens' Dissenting Opinion*

Although Justice Stevens expressed concerns about the majority's trivialization of First Amendment principles, he was most concerned about the interpretation of the speech.<sup>131</sup> As for constitutional principles, the dissent found that the majority invites "viewpoint discrimination" and falls short of the Court's "imminent lawless action" jurisprudence.<sup>132</sup> Indeed, Morse admitted punishing Frederick because she disagreed with the message's viewpoint, which she ascribed as promoting illegal drug use, and there was no showing that the banner would have incited immediate unlawful conduct.<sup>133</sup>

Conceding that these principles may need to be modified to suit the school environment, the dissent expressed a willingness to tolerate limited viewpoint discrimination for illegal drug advocacy and a relaxing of the imminence requirements.<sup>134</sup> The dissent, however, was not willing to accept the majority's characterization of "BONG HiTS 4 JESUS" as reasonably advocating illegal drug use.<sup>135</sup> The dissent admonished that "to the extent the Court defers to the principal's ostensibly reasonable judgment [in interpreting the speech], it abdicates its constitutional responsibility" because speech protections have never depended on the listener's interpretation.<sup>136</sup> The dissent also insisted that the majority had no objective basis for

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128. *Id.* at 2641 (Breyer, J., concurring).

129. *Morse v. Frederick*, 127 S. Ct. 2618, 2643 (2007) (Breyer, J., concurring).

130. *Id.* at 2624.

131. *Id.* at 2643–50 (Stevens, J., dissenting).

132. *Id.* at 2644–45 (Stevens, J., dissenting).

133. *Id.* at 2645 (Stevens, J., dissenting).

134. *Morse v. Frederick*, 127 S. Ct. 2618, 2646 (2007) (Stevens, J., dissenting).

135. *Id.* at 2649 (Stevens, J., dissenting).

136. *Id.* at 2647 (Stevens, J., dissenting).

construing "BONG HiTS 4 JESUS" as an advocacy for illegal drug use.<sup>137</sup> Because the message was ambiguous at best, the dissent would have abided the Court's "abundant precedent . . . that when the 'First Amendment is implicated, the tie goes to the speaker.'"<sup>138</sup>

### III. CIRCUIT COURTS ANALYZE STUDENT THREATS IN THE WAKE OF *MORSE V. FREDERICK*

It remains to be seen, on the whole, whether the Supreme Court's re-*Tinker*-ing with its school-speech jurisprudence will provide much needed clarification and guidance to lower courts, school officials, and student speakers. With respect to student threats, circuit courts are seemingly bereft of such clarification after *Morse*.<sup>139</sup> At the writing of this Comment, the Eleventh, Second, and Fifth Circuits have decided student threat cases by employing *Morse* somewhat differently.<sup>140</sup> The Eleventh Circuit found that *Morse*'s standard governs speech reasonably interpreted as threatening violence.<sup>141</sup> The Second Circuit found that *Tinker* applied; however, citing *Morse*, the court evinced a departure from its speech-protectionist stance in favor of a more diluted *Tinker* standard.<sup>142</sup> The Fifth Circuit applied *Morse* to perceived threats of violence holding that schools may restrict speech advocating a certain harmful activity, the prevention of which is a compelling governmental interest.<sup>143</sup>

The likely impact of *Morse* on student threat cases in sister circuits can be gleaned from Justice Alito's concurrence.<sup>144</sup> Justice Alito wrote separately to cabin *Morse*'s effect on free speech by qualifying

137. *Id.* at 2649 (Stevens, J., dissenting).

138. *Id.* (citing Federal Election Comm'n v. Wis. Right to Life, Inc., 127 S. Ct. 2652, 2674 (2007)).

139. See generally *Wisniewski v. Bd. of Educ. of the Weedsport Central Sch. Dist.*, 494 F.3d 34 (2d Cir. 2007); *Boim v. Fulton County Sch. Dist.*, 494 F.3d 978 (11th Cir. 2007); *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765 (5th Cir. 2007).

140. *Wisniewski v. Bd. of Educ. of the Weedsport Central Sch. Dist.*, 494 F.3d 34 (2d Cir. 2007); *Boim v. Fulton County Sch. Dist.*, 494 F.3d 978 (11th Cir. 2007); *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765 (5th Cir. 2007).

141. *Boim*, 494 F.3d at 984.

142. *Wisniewski*, 494 F.3d at 39.

143. *Ponce*, 508 F.3d at 769.

144. *Morse v. Frederick*, 127 S. Ct. 2618, 2636–38 (2007) (Alito, J., concurring).

his joining the majority “on the understanding that the opinion does not hold that the special characteristics of the public schools necessarily justify any other speech restrictions.”<sup>145</sup> He was concerned that a broad reading of *Morse* would allow schools to punish any speech that interfered with the school’s educational mission.<sup>146</sup> Therefore, 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 relevant.<sup>147</sup> Justice Alito acknowledged that, generally, the government has limited authority to punish speech when it presents a threat of violence.<sup>148</sup> When, however, students are compelled to attend school with others capable of inflicting harm, “school officials must have greater authority to intervene before speech leads to violence.”<sup>149</sup>

Justice Alito opined that *Tinker* would sufficiently thwart violence in most cases, but he left open the possibility that *Morse* would apply in limited circumstances where student safety is implicated.<sup>150</sup> In light of the highly publicized shootings in recent years, lower courts are less willing to wait for signs forecasting a “material and substantial” disruption before permitting school action under *Tinker*.<sup>151</sup> Instead, courts may likely read *Morse* to sanction disciplinary action at an earlier stage than *Tinker* citing the need to allow schools to “step in before actual violence erupts.”<sup>152</sup> Alito’s “limiting” opinion hinted that school violence may be an area where *Morse* could extend; therefore, lower courts may opt for *Morse*’s more deferential standard rather than require schools to show evidence of a disruption under *Tinker*.<sup>153</sup> In what follows, this

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145. *Id.* at 2637 (Alito, J., concurring).

146. *Id.* (Alito, J., concurring).

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

148. *Id.* (citing *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam)).

149. *Morse v. Frederick*, 127 S. Ct. 2618, 2638 (2007) (Alito, J., concurring).

150. *Id.*

151. See, e.g., *Boim v. Fulton County Sch. Dist.*, 494 F.3d 978, 984 (2007) (citing the need to act quickly as made apparent in highly publicized school shootings and applying *Morse* rather than *Tinker*).

152. *Morse*, 127 S. Ct. at 2638 (Alito, J., concurring); see *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 769 (5th Cir. 2007).

153. See *Morse*, 127 S. Ct. at 2638 (Alito, J., concurring); *Ponce*, 508 F.3d 765.

Comment examines three Circuit Court cases that have tested the uncharted waters of student speech under *Morse*.<sup>154</sup>

*A. The Second Circuit Backs Away From Its Protectionist Stance in Wisniewski v. Board of Education of the Weedsport Central School District.*

On July 5, 2007, ten days after the Supreme Court announced its decision in *Morse*, the Second Circuit cited, but did not rely upon, *Morse* in upholding a school's suspension of eighth-grader Aaron Wisniewski ("Aaron") for an instant message (IM) icon he created at home on his parents' computer.<sup>155</sup> The icon depicted a crude drawing of a gun aimed at a person's head, a bullet firing, and dots suggesting splattered blood.<sup>156</sup> The image also included the message "Kill Mr. VanderMolen"—Aaron's English teacher at the time.<sup>157</sup>

Aaron used this icon as his IM identifier for three weeks to communicate from his parents' computer with about fifteen friends, including some classmates.<sup>158</sup> The IM icon came onto school property only because another classmate happened to see the icon and reported it to Mr. VanderMolen, later supplying him with a copy.<sup>159</sup> Mr. VanderMolen reported the drawing to the school principals who then forwarded it to the local police, school superintendent, and Aaron's parents.<sup>160</sup>

Aaron expressed remorse for creating the image, and claimed it was intended as a joke—he had created the icon shortly after his class was informed of the school's zero tolerance policy regarding threats.<sup>161</sup> The principal suspended Aaron for five days pending a

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154. See *supra* text accompanying notes 155–241.

155. *Wisniewski v. Bd. of Educ. of the Weedsport Central Sch. Dist.*, 494 F.3d 34 (2d Cir. 2007).

156. *Id.* at 36.

157. *Id.*

158. *Id.* AOL IM software permits a message sender to create a screen icon to appear alongside the sender's name, thus serving as an identifier during communications with the sender. *Id.* at 35.

159. *Id.* at 36. A feature of the IM software allows any party receiving a message from one with a picture icon to copy that icon and transmit it to any other party conversing during an IM exchange. *Id.* at 35.

160. *Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 36 (2d Cir. 2007).

161. *Id.*

hearing regarding further action.<sup>162</sup> Despite both a police investigator and psychiatrist concluding that Aaron intended the icon as a joke and posed no actual threat, the district's Board of Education suspended Aaron one semester for threatening a teacher in violation of school policy.<sup>163</sup> Aaron's parents filed suit on his behalf, claiming a violation of his First Amendment rights and seeking damages under 42 U.S.C. § 1983.<sup>164</sup> The District Court upheld the school's actions, finding Aaron's speech constituted a "true threat" under *Watts*, therefore falling outside First Amendment protections.<sup>165</sup>

The day after the Virginia Tech shootings, the Second Circuit heard oral arguments for Aaron's case on appeal.<sup>166</sup> The Court declined to address whether the icon posed a true threat, finding *Tinker* gives "school officials . . . significantly broader authority to sanction student speech than the *Watts* standard allows."<sup>167</sup> Although mirroring the phrasing of *Morse*'s holding,<sup>168</sup> the Court applied the *Tinker* "substantial disruption" standard to what it deemed "a student's expression reasonably understood as urging violent conduct."<sup>169</sup>

Judge Newman writing for the Second Circuit held that it was reasonably foreseeable that Aaron's off-campus conduct would be discovered by school officials and would "materially and substantially disrupt the work and discipline of the school."<sup>170</sup> To reach its holding, the Court had to reconcile *Thomas v. Board of Education, Granville Central School District* where it previously held

162. *Id.*

163. *Id.* at 36–37.

164. *Id.* at 37. Aaron's family ultimately moved away from Weedsport due to the continuing hostility surrounding the facts of this case. *Id.*

165. *Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist.*, No. 5:02CV1403, 2006 WL 1741023, at \*5 (N.D.N.Y. June 20, 2006).

166. Allison Torres Burtka, *Student's IM Threat is Not Protected Speech, Second Circuit Says*, 43 TRIAL 68, 69 (2007).

167. *Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 38 (2d Cir. 2007).

168. *Morse v. Frederick* held that schools may restrict "student expression that they reasonably regard as promoting illegal drug use." 127 S. Ct. 2618, 2629 (2007).

169. *Wisniewski*, 494 F.3d at 38.

170. *Id.* at 38–39 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969)).

that "the arm of [school] authority does not reach beyond the schoolhouse gate."<sup>171</sup>

In *Thomas*, school officials suspended four students for publishing an underground satirical paper emulating *National Lampoon* after officials confiscated a copy within the school.<sup>172</sup> The students had used school typewriters to transcribe articles, received occasional teacher feedback on grammar and content, and stored the copies of the publication in a teacher's closet.<sup>173</sup> However, the *Thomas* Court found that "any activity within the school itself was *de minimis*" because the publication "was conceived, executed, and distributed outside the school."<sup>174</sup> The same Judge Newman writing in *Wisniewski*<sup>175</sup> found in *Thomas* that "school discipline was improperly imposed upon the students for their *essentially off-campus activity*."<sup>176</sup>

The *Wisniewski* Court attempted to square these two cases by citing dicta from a footnote in *Thomas* as indicating its "recogni[tion] that off-campus conduct can create a foreseeable risk of substantial disruption within a school."<sup>177</sup> The Court found that the IM icon could foreseeably incite substantial disruption within the school from off-campus because of its "threatening content" and "extensive distribution . . . [to] 15 recipients, including some of Aaron's classmates, during a three-week circulation period."<sup>178</sup> However, the allegedly offensive publication in *Thomas*, which included articles on masturbation and prostitution and was sold to nearly one hundred students over the course of a week could just as foreseeably incite disruption within the school.<sup>179</sup> Thus, this case illustrates a shift in the Second Circuit's thinking that may likely have

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171. *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1044-45 (2d Cir. 1979); Hilden, *supra* note 110.

172. *Id.* at 1045.

173. *Id.* at 1045, 1050.

174. *Id.* at 1050.

175. Judge Newman is cited by the Supreme Court in *Fraser* for his articulation in *Thomas* that "the First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket." *Id.* at 1057 (Newman J., concurring).

176. *Id.* at 1053 (Newman J., concurring) (emphasis added).

177. *Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 39 (2d Cir. 2007) (citing *Thomas*, 607 F.2d at 1052 n.17).

178. *Wisniewski*, 494 F.3d at 39-40.

179. *See Thomas*, 607 F.2d at 1045.



resulted from *Morse*'s recent grant of additional authority to school officials.<sup>180</sup>

Additional evidence of *Morse*'s impact may be deduced from the Court's interpretation of the icon as "reasonably . . . urging violent conduct."<sup>181</sup> In doing so the Second Circuit affirmed that a school official's interpretation of the icon as a threat of violence warranted preclusive effect.<sup>182</sup> While certainly a possible interpretation, Wisniewski claimed and the police and psychologist agreed, that the icon was just a poor attempt at a joke.<sup>183</sup> Thus, just as in *Morse* where the Supreme Court dismissed the student's interpretation as possible and deferred to the school's reasonable interpretation, the Second Circuit based its constitutional analysis on an educator's reasonable interpretation of the message.<sup>184</sup>

The national mood surrounding the day-before Virginia Tech shootings likely influenced the Court's finding that the educator's interpretation of the off-campus icon was reasonable.<sup>185</sup> However, the Court's deferential posture stands in sharp contrast to its insistence in *Thomas* that off-campus conduct must be evaluated by an impartial, independent decision-maker because:

[When] a school official acts as both prosecutor and judge . . . [h]is intimate association with the school itself and his understandable desire to preserve institutional decorum give him a vested interest in suppressing controversy. Accordingly, "under the guise of beneficent concern for the welfare of school children, school authorities, albeit unwittingly, might permit prejudices of the community to prevail."<sup>186</sup>

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180. See Hilden, *supra* note 110.

181. *Wisniewski*, 494 F.3d at 38.

182. *Id.* at 37.

183. *Id.* at 36.

184. *Id.* at 38.

185. See Allison Torres Burtka, *Student's IM Threat is Not Protected Speech, Second Circuit Says*, 43 TRIAL 68, 69 (2007).

186. *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1051 (2d Cir. 1979) (quoting *James v. Bd. of Educ.*, 461 F.2d 566, 575 (2d Cir. 1972)).

The *Thomas* Court also explained that strict judicial impartiality is necessary to preserve breathing space for student speakers because the brevity of most school sanctions thwarts effective review and the high cost of litigation conscribes most students, even those whose rights are clearly violated, "to suffer in silence."<sup>187</sup>

The *Wisniewski* Court's departure from its protectionist stance suggests that, although decided under *Tinker*, the effect of *Morse* is more than first meets the eye.<sup>188</sup> But for *Morse*'s expansion of school authority, the *Wisniewski* Court may have been more willing to adhere to its principled stand for student-speech protections expressed in *Thomas*.<sup>189</sup> While *Morse*'s impact on the Second Circuit holding is implied, the Eleventh Circuit directly applied *Morse* to uphold disciplinary action against student speech reasonably perceived as threatening school violence.<sup>190</sup>

*B. The Eleventh Circuit Upholds Disciplinary Action of Student Speech Reasonably Construed As A Threat of Violence in Boim v. Fulton County School District.*

On July 31, 2007, in *Boim*, the Eleventh Circuit adopted the Supreme Court's rationale, as articulated in *Morse*, to create a *per se* exception for speech reasonably perceived to threaten school violence.<sup>191</sup> Comparing the governmental interest in preventing student drug abuse in *Morse* with that of preventing school violence, the Eleventh Circuit found that the "[*Morse*]" rationale applies equally, if not more strongly" when considered in light of "the special characteristics of the school environment."<sup>192</sup>

This case arose in October 2003 at Roswell High School in Fulton County, Georgia, when then-freshman Rachel Boim ("Rachel") was suspended ten days and later expelled for a fictional story she wrote at home in her personal journal about "a girl who falls asleep in class, dreams she kills her math teacher, then wakes up and nothing

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187. *Id.* at 1052.

188. See *supra* text accompanying notes 168–187; *infra* text accompanying notes 189–90.

189. See Hilden, *supra* note 110.

190. *Boim v. Fulton County Sch. Dist.*, 494 F.3d 978, 984 (11th Cir. 2007).

191. *Id.*

192. *Id.*

happens.”<sup>193</sup> The story was discovered by an art teacher who confiscated the journal when Rachel’s friend was caught writing in it during class.<sup>194</sup> The day after finding the story, the art teacher notified school officials, who in turn notified the school’s police officer, all of whom were concerned by the story’s violent nature and that both the story narrator and Rachel had math for sixth period.<sup>195</sup> The story, in its entirety, reads as follows:

As I walk to school from my sisters [sic] car my stomach ties itself in knots. [sic] I have nervousness tingeling [sic] up and down my spine and my heart races. No one knows what is going to happen. I have the gun hidden in my pocket. I cross the lawn and head [sic] to my locker on A hall. Smiling sweetly to my friends hoping they dont [sic] notice the cold sweat that has developed on my forehead [sic]. Im [sic] walking up to the front office when the bell rings for class to start. So afraid that I think I might pass out. I ask if my mother dropped off a book I need. No. My first to [sic] classes pass by my heart thumping so hard Im [sic] afraid every one can hear it. Constantly I can feel the gun in my pocket. 3rd period [sic], 4th, 5th then 6th period [sic] my time is coming [sic]. I enter the class room my face pale. My stomach has tied itself in so many knots its [sic] doubtful I will ever be able to untie them. Then he starts taking role [sic]. Yes, my math teacher. I loathe [sic] him with every bone in my body. Why? I dont [sic] know. This is it. I stand up and pull the gun from my pocket. BANG the force blows him back and every one in the class sits there in shock. BANG he falls to the floor and some one [sic] lets out an ear piercing scream. Shaking I put the gun in my pocket and run from the room. By now the school

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193. Rachel Boim describes the content of her story for an online interview. *Girl Expelled for Writing Story About Killing Teacher*, CNN.COM, October 25, 2003, <http://www.cnn.com/2003/EDUCATION/10/24/boim.diary/index.html>. Rachel, who lived outside of Denver during the Columbine shootings, thought her exposure to violence may have influenced her story ideas, and she insisted “it was strictly a work of fiction.” *Id.*; see also Interview by Soledad O’Brien with Rachel and David Boim, for CNN (Oct. 25, 2003), transcript available at <http://www.cnn.com/2003/EDUCATION/10/24/cnna.boim>.

194. *Boim v. Fulton County Sch. Dist.*, 494 F.3d 978, 980 (11th Cir. 2007).

195. *Id.* at 981.

police officer is running after me. Easy I can out run him. Out the doors, almost to the car. I can get away. BANG this time a shot was fired at me. I turn just in time to see the bullet rushing at me, almost like its [sic] in slow motion. Then, the bell rings, I pick my head off my desk, shake my head and gather up my books off to my next class.<sup>196</sup>

In suspending Rachel, school officials determined that Rachel's story violated three school rules.<sup>197</sup> The County Board of Education reversed the expulsion but upheld the suspension.<sup>198</sup> Rachel, through her parents, brought suit against the school district, superintendent, and principal seeking nominal damages and an injunction to expunge the suspension from Rachel's record.<sup>199</sup> The District Court awarded summary judgment to the school officials, finding sufficient facts to meet *Tinker's* standard.<sup>200</sup> Specifically, the District Court found "facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities" because the school could have reasonably feared Rachel would commit an act of violence or that school activities would be disrupted if read by other students.<sup>201</sup>

Eleven days prior to oral arguments before the Eleventh Circuit on April 27, 2007, the Virginia Tech massacre horrified the nation, sparking ubiquitous media coverage.<sup>202</sup> Then, on June 25, 2007, the Supreme Court handed down *Morse v. Frederick*.<sup>203</sup> In *Boim's* July 31, 2007 decision, the Eleventh Circuit held there "is no First

196. *Id.* at 980–81.

197. The school determined that Rachel violated the following rules: Rule JD 4(iii) (threatening bodily harm); Rule JD 10 (failure to obey school commands), and Rule JD 17 (displaying disrespectful conduct). Rule JD 4(iii), which is of greatest relevance, states in relevant part: "a student shall not attempt to cause physical injury, threaten bodily harm, or behave in such a way as could reasonably cause physical injury to a school employee." *Id.* at 981.

198. *Id.* at 982.

199. *Id.*

200. *Boim v. Fulton County Sch. Dist.*, No. Civ.A.1:05CV2836MHS, 2006 WL 2189733 at \*3 (N.D. Ga. Aug. 1, 2006) (slip copy).

201. *Id.* at \*3–4 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969)).

202. *E.g.*, Alyson M. Palmer, *School Case Will Test Threats, Free Speech: Judges to Hear of Student Suspended for Story About Shooting a Teacher*, 4 DAILY REPORT 24 (April 24, 2007).

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

Amendment right allowing a student to knowingly make comments . . . that reasonably could be perceived as a threat of school violence . . . while on school property during the school day.”<sup>204</sup> Without much discussion, the Court found Rachel’s story “without doubt” was reasonably construed as a threat of violence.<sup>205</sup> The Court also found it inconsequential that Rachel did not intend for others to see the story, because by taking it to school she “increased the likelihood to the point of certainty that [it] would be seen.”<sup>206</sup>

The Eleventh Circuit relied on *Morse*’s holding that schools may restrict speech reasonably interpreted as advocating illegal drug use to also allow the restriction of speech reasonably interpreted as a threat of school violence.<sup>207</sup> In doing so, the *Boim* Court characterized *Morse*’s holding as “broad” and its rationale as directly analogous.<sup>208</sup> Specifically, a compelling governmental interest in preventing school violence is comparable to the interest in preventing student drug abuse, and “special characteristics” of the school environment render students equally vulnerable to both drugs and violence.<sup>209</sup> In reaching its holding, the Court also mirrored *Morse* by citing a Congressional mandate tying funds to school safety as evidence of a compelling interest.<sup>210</sup>

Judge Black, concurring in the result, opined that the Court should have limited its holding by applying the *Tinker* standard to find that the school reasonably anticipated a material disruption in discovering Rachel’s story.<sup>211</sup> In something of a Freudian slip, the Fifth Circuit agreed with Justice Black that *Tinker* properly governed Rachel’s poem, not *Morse*, because the violence depicted therein was “discrete in scope and directed at adults” rather than a mass school shooting.<sup>212</sup>

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204. *Boim v. Fulton County Sch. Dist.*, 494 F.3d 978, 984 (11th Cir. 2007).

205. *Id.* at 985.

206. *Id.*

207. *Id.* at 984.

208. *Id.*

209. *Boim v. Fulton County Sch. Dist.*, 494 F.3d 978, 984 (11th Cir. 2007).

210. *Id.*

211. *Id.* at 985.

212. In *Ponce*, the Fifth Circuit characterized *Boim* as upholding the school’s suspension under *Tinker*, when in fact it did so under *Morse*. *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 771 n.2 (5th Cir. 2007).

In the following section, this Comment further addresses this discrepancy.<sup>213</sup>

*C. The Fifth Circuit Upholds Punishment of Student Speech Perceived to Threaten "Columbine-esque" Violence in Ponce v. Socorro Indep. Sch. Dist.*

Strangely, the Fifth Circuit recently mischaracterized *Boim* as being properly analyzed under *Tinker* to uphold a student's suspension.<sup>214</sup> But, as previously mentioned, it was analyzed under *Morse*.<sup>215</sup> This gaffe is particularly curious given the similarities between the poem in *Boim* and that of *Ponce*, its recent student-speech decision upholding the school's disciplinary action under *Morse*.<sup>216</sup> In misreading *Boim*, it forewent the opportunity to apply the Second Circuit's case as persuasive authority, and instead distinguished its facts on rather tenuous grounds.<sup>217</sup> This confusion perhaps underscores the lack of clarification *Morse* provides to reviewing courts.

On November 20, 2007, as I put the finishing touches on this Comment, the Fifth Circuit decided *Ponce*, which applied a *Morse* analysis to hold that "speech pos[ing] a direct threat to the physical safety of the school population" is not protected by the First Amendment.<sup>218</sup> The case arose in August 2005 when then-sophomore E.P. was suspended for three days and relegated to an alternative education program for a fictional story he wrote in a notebook diary.<sup>219</sup> In this story told in the first-person, the "author" orders a pseudo-Nazi group to exact brutal violence against "two homosexuals and seven colored people," and another student's dog.<sup>220</sup> Additionally, the story described the pseudo-Nazi group's plan to

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213. See *infra* text accompanying notes 214–240.

214. *Ponce*, 508 F.3d at 771 n.2.

215. *Boim v. Fulton County Sch. Dist.*, 494 F.3d 978, 984 (11th Cir. 2007).

216. Compare *Boim*, 494 F.3d at 980–81, with *Ponce*, 508 F.3d at 766.

217. See *infra* text accompanying notes 234–241.

218. *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 766 (5th Cir. 2007).

219. *Id.* at 766–67.

220. *Id.* at 766.

carry out a Columbine-like attack on Montwood High School—which was also the name of E.P.’s school.<sup>221</sup>

The story was brought to the attention of Assistant Principal Aguirre (“Aguirre”) through the following chain of events: E.P. told another student about the notebook; the informing student told a teacher; and after delaying a day the teacher told Aguirre.<sup>222</sup> When questioned about the threats, E.P. steadfastly maintained that he was merely creating a work of fiction.<sup>223</sup> E.P.’s mother, also a creative writer, avowed the notebook was fiction.<sup>224</sup> Aguirre allowed E.P. to resume his classes and announced he would make an administrative decision the following day.<sup>225</sup> After several reads, Aguirre decided that a few of the lines amounted to a “terroristic threat” against the school in violation of the Student Code of Conduct.<sup>226</sup> Aguirre subsequently suspended E.P. for three days, recommended his transfer to the alternative school (which was later upheld by the school board), and had E.P. arrested.<sup>227</sup> The county attorney’s office, however, declined to prosecute.<sup>228</sup>

E.P.’s parents, concerned about their son’s ability to gain college acceptance, filed a 42 U.S.C. §1983 action and moved to enjoin the school district from, among other things, placing him in an alternative school and referencing the incident on his permanent record.<sup>229</sup> The District Court granted E.P.’s injunction under *Tinker*, finding insufficient evidence of disruption.<sup>230</sup>

The Fifth Circuit, on appeal, reversed the preliminary injunction finding E.P. had no substantial likelihood of prevailing on the merits because *Morse* foreclosed his First Amendment protection.<sup>231</sup> The *Ponce* Court read *Morse*’s controlling and Justice Alito’s concurring

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221. *Id.*

222. *Id.*

223. *Ponce*, 508 F.3d at 767.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.* at 767.

228. *Id.* at n.1.

229. *Ponce*, 508 F.3d at 767.

230. *Id.*

231. *Id.* at 768.

opinions concomitantly to provide that "[t]o the extent that preventing a harmful activity may be classified as an 'important—indeed, perhaps compelling interest,' speech advocating that activity may be prohibited by school administrators with little further inquiry."<sup>232</sup>

Whether the harm ascribed to a student's speech is sufficiently compelling to trigger a *Morse* analysis depends on the extent to which it advocates a "demonstrably grave harm and that derives that gravity from the 'special danger' to the physical safety of students arising from the school environment."<sup>233</sup>

The Fifth Circuit found that E.P.'s speech warranted content-based restriction because it advocated a grave harm and that it derived its gravity from the special dangers attributable to schools—namely a "captive group of persons protected only by the limited personnel of the school."<sup>234</sup> The Court distinguished threats of mass shootings, invoking *Morse* analysis, from threats aimed at individual teachers that are properly analyzed under *Tinker*.<sup>235</sup> Specifically, in a footnote, the Court averred that *Boim*'s fictional story about a girl dreaming of shooting her teacher was properly decided under *Tinker*.<sup>236</sup> Thus, while the Fifth Circuit wrested this distinction from *Boim* in an effort to justify extending *Morse* to student threats, it did so in vain.<sup>237</sup> Indeed, *Boim* had already extended *Morse* to speech reasonably construed as a threat of school violence—including a sole threat against a teacher.<sup>238</sup> Thus, within four months of *Morse*, two circuits had somewhat inconsistently extended its holding to restrict student threats of violence.<sup>239</sup> The Fifth Circuit sets a high threshold, triggered only by Columbine-esque threats,<sup>240</sup> but the Eleventh

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232. *Id.* at 769 (quoting *Morse*, 127 S. Ct. at 2628 (quoting *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661 (1995))).

233. *Ponce*, 508 F.3d at 770.

234. *Id.* at 771.

235. *Id.* at 771 n.2.

236. *Id.*

237. *See Boim v. Fulton County Sch. Dist.*, 494 F.3d 978, 984 (11th Cir. 2007).

238. *Id.*

239. *See supra* text accompanying notes 234–38; *infra* text accompanying notes 240–41.

240. *See Ponce*, 508 F.3d at 771.



Circuit's lower threshold sweeps up all threats involving school violence.<sup>241</sup>

#### IV. ANALYSIS: GOING FORWARD

Given that the Fifth and Eleventh Circuits have applied *Morse* to school threat contexts, and the Second Circuit's discussion of *Morse* in the same, what follows is an examination of how the principles from these circuit-court opinions and the Supreme Court's student-speech jurisprudence can be read together to suggest a two-step analysis of student free speech claims in the context of apparent threats of violence.<sup>242</sup> Consistent not only with *Morse*'s own terms, and the previous precedents of *Tinker*, *Hazelwood*, and *Fraser*, this approach holds the additional benefit of resonating with social science insights into the nature of violence in schools and the effect of school speech policies thereon.<sup>243</sup> To unfold these two steps, let us return, briefly, to *Morse* and its holding.

*Morse* held that schools may take disciplinary action to protect its students from speech reasonably regarded as advocating illegal drug use.<sup>244</sup> Specifically, in *Morse*, the principal did not violate the First Amendment when she confiscated the banner and suspended Frederick who was responsible for the banner.<sup>245</sup> In light of the limiting language included in concurring opinions of this 5–4 decision, *Morse* implicitly provides a school with a scalpel, not an ax, to restrict speech in furtherance of student safety while refraining from unfairly punishing those who do not pose a safety threat.<sup>246</sup> This

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241. See *Boim*, 494 F.3d at 984 (expanding *Morse* to conclude “there also is no First Amendment right allowing a student to knowingly make comments, whether oral or written that reasonably could be perceived as a threat of school violence, whether general or specific, while on school property during the school day”).

242. See *supra* Parts II–III.

243. See *infra* text accompanying notes 262, 286–89.

244. *Morse v. Frederick*, 127 S. Ct. 2618, 2622 (2007).

245. *Id.*

246. The concurring opinions indicate that *Morse* should be applied only insofar as absolutely necessary because it authorizes a viewpoint-based restriction on speech—the most abhorred abridgment of speech. Cf. *Morse*, 127 S. Ct. at 2637–38 (Alito, J., concurring) (Justice Alito discussed, on the one hand, the need to give schools adequate authority “to intervene before speech leads to violence,” but he also insisted that *Morse* provided only a limited expansion of school authority “standing at the far

subtlety of *Morse*'s holding heralds not-so-subtle effects in the school threat context by allowing schools a safe harbor to take immediate action in the face of an unknown risk.<sup>247</sup> But this safe harbor is lifted once the school has an opportunity to assess the risk and any subsequent restriction on speech would need separate justification under *Morse*'s rationale.<sup>248</sup>

*Morse*'s rationale implies that each school disciplinary action must be adjudged separately.<sup>249</sup> The Fifth Circuit correctly adduced that *Morse*'s controlling and Justice Alito's concurring opinions read in tandem allow content-based restriction of violent speech *only insofar as the disciplinary act prevents a sufficiently compelling harmful activity*.<sup>250</sup> In other words, the only justification for abandoning a *Tinker* analysis would be to prevent the type of grave harm that is typically unheralded by disruption—that which does not “permit[] school officials to step in before actual violence erupts.”<sup>251</sup> *Morse* applies only to this “compelling interest” authorizing school officials to take any reasonable necessary steps to quell threats reasonably perceived.<sup>252</sup> But beyond the realm of this compelling interest, the broad deference accorded school officials becomes more constricted, such that *Tinker* and its progeny apply.<sup>253</sup> That is, as a school's actions move from ensuring safety to punishing a student accused of disruption, the school must justify the latter actions under the less deferential standards of *Tinker*, *Hazelwood*, and *Fraser*.<sup>254</sup>

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reaches of what the First Amendment permits” and that *Tinker*'s speech-protective standard should apply in most cases); *Id.* at 2638–39 (Breyer, J., concurring in the judgment in part and dissenting in part) (finding the Court should not reach the constitutional question due to the concerns regarding viewpoint restrictions and instead should bar the claim under qualified immunity grounds).

247. See *infra* text accompanying notes 257–64.

248. See *infra* text accompanying notes 265–300.

249. In *Morse*, the Court discussed each school action separately in its elaboration of the holding, and provided contextual justification for each. *Morse v. Frederick*, 127 S. Ct. 2618, 2622, 2629. First, the principal permissibly confiscated Frederick's banner in the immediacy because she “had to decide to act—or not to act—on the spot.” *Id.* at 2629. Then the Court found that the principal permissibly suspended Frederick because she later reasonably concluded that it violated established school policy by promoting illegal drug use. *Id.*

250. *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 772 (5th Cir. 2007).

251. *Id.* at 770 (quoting *Morse*, 127 S. Ct. at 2638 (Alito, J., concurring)).

252. *Id.* at 769–70.

253. See *Morse*, 127 S. Ct. at 2637–38.

254. See *infra* text accompanying notes 273–300.

### A. A "Safe Harbor" to Ensure School Safety and Assess the Threat

Consistent with *Morse*, school officials may act upon speech reasonably construed as a threat of school violence.<sup>255</sup> Moreover, the reasonableness of this interpretation is necessarily adjudged in context of the exigencies of school threats where "the difficulty of identifying warning signs . . . is intrinsic to the harm itself."<sup>256</sup> In *Morse*, the principal's "on the spot" action against Frederick was deemed necessary in the face of his sudden and unexpected conduct.<sup>257</sup> That is, the principal permissibly confiscated Frederick's banner because she "had to decide to act—or not to act—on the spot" against a message that upon first impression appears to advocate drug use.<sup>258</sup> As such, it is reasonable for educators to interpret speech as advocating violence when such speech facially portrays a threat, and the school must act "on the spot."<sup>259</sup>

In *Ponce*, the Fifth Circuit affirmed that "[s]chool administrators must be permitted to react quickly and decisively to address a threat of physical violence against their students, without worrying that they will have to face years of litigation second-guessing their judgment as to whether the threat posed a real risk of substantial disturbance."<sup>260</sup> Similarly, in *Boim*, the Eleventh Circuit recognized an "undisputably compelling interest in acting quickly to prevent violence on school property, especially during regular school hours."<sup>261</sup>

Consistent with this jurisprudence, recent social science research indicates that important clues preceding a violent act may be revealed in, *inter alia*, poems, drawings, and diary entries.<sup>262</sup> Therefore, schools need some authority to take immediate action, often before careful reflection, without fear of litigation.<sup>263</sup> Having had the benefit

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255. *Boim v. Fulton County Sch. Dist.*, 494 F.3d 978, 984 (2007).

256. *Ponce*, 508 F.3d at 771.

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

258. *Id.*

259. *Id.*

260. *Ponce*, 508 F.3d at 772.

261. *Boim v. Fulton County Sch. Dist.*, 494 F.3d 978, 984 (11th Cir. 2007).

262. MARY ELLEN O'TOOLE, THE SCHOOL SHOOTER: A THREAT ASSESSMENT PERSPECTIVE 16 (2000), available at <http://www.fbi.gov/publications/school/school2.pdf>.

263. See *Ponce*, 508 F.3d at 772.

of hindsight and time for a thorough assessment, however, schools do not reasonably interpret speech as advocating violence where a student does not pose a real threat to other students.<sup>264</sup>

*B. Exiting the "Safe Harbor" in Moving from Protection to Punishment*

A *Morse* analysis is triggered only by the presence of a sufficiently compelling interest outweighing the student's constitutional protection.<sup>265</sup> When schools act pursuant to a sufficiently compelling interest, *Morse* affords schools a tremendous amount of deference.<sup>266</sup> For example, in *Morse*, the sufficiently compelling interest was deterring drug use by students.<sup>267</sup> When the principal punished an ambiguous banner she interpreted as advocating drug use—acting in furtherance of the compelling interest—the Court gave great deference to her interpretation of the message.<sup>268</sup>

The Eleventh and Fifth Circuits have expanded *Morse* to threats of school violence, finding a sufficiently compelling interest in protecting the physical safety of students. In the furtherance of such an interest, under *Morse*, schools are given broad authority to act swiftly to restore order and safety.<sup>269</sup> Consistent with this, *Boim* applied *Morse* only to the ten-day suspension of a student who wrote a poem describing a girl's dream of shooting her teacher.<sup>270</sup> The student's expulsion was not an issue before the court because the County Board of Education had overturned it.<sup>271</sup> However, the *Boim* Court would not likely have upheld the expulsion under *Morse* because it clearly articulated the compelling interest as "acting quickly to prevent violence."<sup>272</sup>

264. See ROBERT A. FEIN ET AL., THREAT ASSESSMENT IN SCHOOLS: A GUIDE TO MANAGING THREATENING SITUATIONS AND TO CREATING SAFE SCHOOL CLIMATES 63–66 (2002).

265. *Ponce*, 508 F.3d at 769 (citing *Morse v. Frederick*, 127 S. Ct. 2618, 2638 (Alito, J., concurring)).

266. *Id.* at 772.

267. *Morse v. Frederick*, 127 S. Ct. 2618, 2628 (2007).

268. *Id.* at 2625 (internal citation and quotation omitted).

269. See *Ponce*, 508 F.3d at 772; *Boim v. Fulton County Sch. Dist.*, 494 F.3d at 984 (11th Cir. 2007).

270. *Boim*, 494 F.3d at 981, 984.

271. *Id.* at 982.

272. See *Id.* at 984.

However, once school officials step beyond furthering a sufficiently compelling interest in protecting students and into punishing the speaker, the *Morse* trigger no longer exists.<sup>273</sup> Restated, schools have “broader authority” when they act “‘not to punish . . . but to avert perceived potential harm.’”<sup>274</sup> The broad discretion afforded schools in acting to protect student safety is narrowed once student safety is ensured and a school has time to evaluate the true nature of the perceived threat.<sup>275</sup> Indeed, Justice Alito labored to make clear that *Morse* applies to a very narrow category of speech—only that which both threatens a grave harm to students and that could not be adequately addressed by *Tinker*, which “in most cases . . . permits school officials to step in before actual violence erupts.”<sup>276</sup> Further, it is important to note that, although both *Boim* and *Ponce* found that protecting students was a sufficiently compelling interest, neither court held that punishing students was.<sup>277</sup>

Once in the realm of punishing, which is beyond a sufficiently compelling interest, the school must justify its actions under *Tinker* by showing “facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities.”<sup>278</sup> Therefore, 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*.<sup>279</sup> Justice Alito correctly opined that most threats are adequately addressed under the *Tinker* standard.<sup>280</sup>

273. See generally *Morse v. Frederick*, 127 S. Ct. 2618 (2007).

274. *Frederick v. Morse*, 439 F.3d 1114, 1121 (9th Cir. 2006) (quoting *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 983 (9th Cir. 2001)).

275. See *Morse*, 127 S. Ct. at 2638 (Alito, J., concurring); see also *Ponce*, 508 F.3d at 770.

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

277. See *Ponce*, 508 F.3d at 769; *Boim v. Fulton County Sch. Dist.*, 494 F.3d at 984 (11th Cir. 2007).

278. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

279. See *Morse v. Frederick*, 127 S. Ct. 2618, 2637–38 (2007) (Alito, J., concurring).

280. See *id.* Further, although it would not have changed the outcome, Judge Black’s concurrence in *Boim* urged that the Court should have applied *Tinker* to find that the school reasonably anticipated a

This second-step is consistent with *Morse* because the principal's later decision to suspend Frederick for displaying "BONG HiTS 4 JESUS" was also in furtherance of the compelling interest—not merely to punish.<sup>281</sup> In *Morse*, the "important—indeed, perhaps compelling" interest was deterring drug use among schoolchildren.<sup>282</sup> The *Morse* Court further explained that the gravity of this harm is derived in large part from the appearance of tolerance or leniency on the school's part.<sup>283</sup> Therefore, even though the suspension may have had a punitive effect, the Court found that it was necessary for the school to separate itself from the message and that "failing to act would send a powerful message to the students" that the school was not serious about the dangers of illegal drug use.<sup>284</sup>

In the school threat context, however, action that is strictly punitive does not further the compelling interest of protecting students from school violence.<sup>285</sup> Rather, research indicates that such punishment is indeed likely to undermine the prevention of school violence.<sup>286</sup> Although school administrators may feel the need to exact punitive action against a threatening student to "set an example," in fact "suspension or expulsion of a student can create the risk of triggering either an immediate or a delayed violent response."<sup>287</sup> Moreover, research indicates that schools must carefully assess the potential threat to determine its credibility and likelihood of occurrence before fashioning an additional response.<sup>288</sup> Otherwise, treating all threats the same could be "dangerous, leading to potential underestimation of serious threats, overreaction to less serious ones, and unfairly punishing or stigmatizing students who are in fact not dangerous."<sup>289</sup>

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material disruption in discovering her fictional story about a girl dreaming of shooting her teacher. The description of the teacher in the student's story matched that of her actual teacher and thus could be said to reasonably forecast disruption in the classroom. *Boim*, 494 F.3d at 985 (Black, J., concurring).

281. See generally *Morse*, 127 S. Ct. 2618.

282. *Id.* at 2628.

283. *Id.* (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661 (1995)).

284. *Morse*, 127 S. Ct. at 2629.

285. See FEIN ET AL., *supra* note 264, at 64. ("The response with the greatest punitive power may or may not have the greatest preventive power.")

286. *Id.*

287. *Id.*

288. See O'TOOLE, *supra* note 262, at 5.

289. *Id.*

A Ninth Circuit case provides an illustration of how a court should conduct an analysis under this second step in the school threat context.<sup>290</sup> In *LaVine v. Blaine Sch. Dist.*, eleventh-grader James asked his teacher her opinion of a poem he wrote, in which the narrator describes shooting twenty-eight students and committing suicide.<sup>291</sup> The teacher, concerned that the poem was a cry for help, consulted with the school psychologist and school officials.<sup>292</sup> Ultimately, the school “emergency expelled” James based on their assessment that he, *inter alia*, had expressed suicidal tendencies, experienced domestic troubles, and broken up with a girlfriend—all in addition to writing the poem.<sup>293</sup> The school also maintained documentation of the expulsion in James’ permanent file.<sup>294</sup> Later the school rescinded its expulsion and allowed James to resume classes once he was evaluated by a psychiatrist, at the school district’s expense, and deemed to not pose a threat to himself or others.<sup>295</sup>

James and his father initiated an action claiming a violation of his First Amendment rights and sought, *inter alia*, to permanently enjoin the school from maintaining documentation of the expulsion in his file.<sup>296</sup> The District Court granted partial summary judgment in favor of James and enjoined the school from placing negative documentation in James’ file.<sup>297</sup> On appeal, the Ninth Circuit reversed partial summary judgment with respect to the emergency expulsion, finding sufficient facts that the school could have reasonably anticipated substantial disruption under *Tinker*.<sup>298</sup> However, the court affirmed the injunction requiring the school to remove the negative documentation because the letter was filed “after the perceived threat had subsided . . . and thus went beyond the school’s legitimate documentation needs.”<sup>299</sup> The Ninth Circuit

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290. See *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981 (9th Cir. 2001).

291. *Id.* at 983–84.

292. *Id.* at 984.

293. *Id.* at 984–85.

294. *Id.* at 986.

295. *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 986 (9th Cir. 2001).

296. *Id.* at 986.

297. *Id.* at 986–87.

298. *Id.* at 989–90.

299. *Id.* at 992.

explained that the school had no legitimate interest in permanently staining James' record and impeding his ability to secure future education or employment.<sup>300</sup>

### CONCLUSION

After more than twenty years of silence, the Supreme Court in *Morse* has reinvigorated the debate regarding the outer limits of schools' disciplinary authority with respect to student speech.<sup>301</sup> As such, lower courts currently have four Supreme Court decisions forming the jurisprudential backdrop for their rulings.<sup>302</sup> As *Tinker* first announced, the First Amendment *does* apply to schools such that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>303</sup> Under *Fraser*, however, schools may take action against "vulgar and lewd speech" because such speech undermines the school's need to teach the fundamental values of civility.<sup>304</sup> *Hazelwood* next distinguished speech merely occurring at school from speech bearing the imprimatur of the school, allowing schools to censor such "school-sponsored" speech to ensure that the "views of the individual speaker are not erroneously attributed to the school."<sup>305</sup> In July 2007, *Morse* announced that schools may punish speech reasonably interpreted as promoting illegal drug use where doing so serves an "important—indeed perhaps compelling" interest in preventing student drug use.<sup>306</sup>

It is important to emphasize that *Tinker* is still good law.<sup>307</sup> In each subsequent student-speech case, the Supreme Court reaffirmed the *Tinker* principle that students do not "shed their constitutional rights

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300. *Id.*

301. See *supra* text accompanying notes 141–300.

302. See *supra* text accompanying notes 46–140.

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

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

305. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

306. *Morse v. Frederick*, 127 S. Ct. 2618, 2628 (2007) (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661 (1995)).

307. See *Morse*, 127 S. Ct. at 2622 (reaffirming the *Tinker* principle that students retain their constitutional rights at school).



to freedom of speech or expression at the schoolhouse gate.”<sup>308</sup> Given the extent to which the Court has chipped away at *Tinker* over the past twenty years, it is important to remember what it held—students retain their First Amendment rights at schools.<sup>309</sup> As such, the default is that a student’s speech is protected. Indeed, *Tinker* left open the possibility that punishment might have been permissible had there been evidence of substantial disruption—focusing on the result of speech rather than its content.<sup>310</sup> It did not, however, hold “that suppression of speech in some circumstances is permitted, but rather that in the circumstance before the Court it was *not* constitutionally permitted.”<sup>311</sup> Therefore, it is from this protectionist posture that lower courts should apply *Tinker*.<sup>312</sup>

Additionally, it is important to note that if the Supreme Court had wanted to use *Morse* as an opportunity to give schools complete discretion in disciplinary matters, it could have done so. But it did not.<sup>313</sup> Instead, *Morse*, as further elucidated by Justice Alito’s concurrence, “goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use.”<sup>314</sup> Further, Justice Alito hints that the outermost reach of *Morse* applies only to a narrow category of speech which both: (1) threatens a grave harm to students’ physical safety and derives that harm from the special circumstances of the school environment, and; (2) could not be adequately addressed by *Tinker* which “in most cases . . . permits school officials to step in before actual violence erupts.”<sup>315</sup>

In just a few short months since its decision, the Circuit Courts have grappled with *Morse*’s implication in the context of student threats.<sup>316</sup> The Eleventh and Fifth Circuits have applied *Morse*, albeit

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308. *Id.*; *Hazelwood*, 484 U.S. at 266; *Fraser*, 478 U.S. at 680 (internal quotations omitted).

309. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

310. *Id.* at 509.

311. *LaVine v. Blaine Sch. Dist.*, 279 F.3d 719, 726 (2002) (Kleinfeld, J., dissenting from denial of rehearing en banc) (emphasis in original).

312. *See id.*

313. *See Morse v. Frederick*, 127 S. Ct. 2618, 2622 (2007).

314. *Morse*, 127 S. Ct. at 2636 (Alito, J., concurring).

315. *Id.* at 2638; *see Ponce*, 508 F.3d at 770.

316. *See supra* text accompanying notes 155–241.

slightly differently, to allow punishment of perceived threats of school violence.<sup>317</sup> The Second Circuit, while not directly applying *Morse*, constricted its once protectionist interpretation of *Tinker* to encompass student threats.<sup>318</sup> Unless and until the Supreme Court grants *certiorari* to clarify the constitutionality of schools' action against perceived threats, lower courts must search for a balance between augmenting schools' disciplinary authority and guarding students' free speech rights.<sup>319</sup>

In a related context, Justice O'Connor dissented in the Court's decision upholding suspicionless drug testing of all student athletes in light of a compelling interest to prevent student drug abuse.<sup>320</sup> Recognizing the need to strike a balance between keeping schools safe and protecting students' constitutional rights, she articulated the following:

It cannot be too often stated that the greatest threats to our constitutional freedoms come in times of crises. But we must also stay mindful that not all government responses to such times are hysterical overreactions; some crises are quite real, and when they are, they serve precisely as the compelling state interest that we have said may justify a measured intrusion on constitutional rights.<sup>321</sup>

Justice O'Connor opined that suspicionless testing swept "too broadly and too imprecisely" and as such did not adequately serve the compelling interest to justify curtailing students' Fourth Amendment rights.<sup>322</sup> So too, a balance must be struck between protecting students from physical violence while respecting their First Amendment rights. Strictly applied, *Morse* may provide such a

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317. See *supra* text accompanying notes 234–41.

318. See *supra* text accompanying notes 155–90.

319. See Anne Dunton Lam, *Student Threats and the First Amendment*, 33 SCH. LAW BULL. 1, 10 (2002).

320. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

321. *Id.* at 686 (O'Connor, J., dissenting).

322. *Id.*

balance when read to allow schools to act “not to punish . . . but to avert perceived potential harm.”<sup>323</sup>

Of course, schools have not only a right and a compelling interest, but also the obligation to protect the safety of its students.<sup>324</sup> Therefore, disciplinary action narrowly tailored to avert grave harm “serve[s] precisely as the compelling state interest that . . . may justify a measured intrusion on constitutional rights.”<sup>325</sup> At the same time, however, schools do not have the right or legitimate interest to stop a young Stephen King or Cormac McCarthy from writing the next critically acclaimed, albeit graphically violent and disturbing, novel.<sup>326</sup> Therefore, schools must respect student-speech rights and avoid disciplinary action that merely punishes rather than protects. In other words, whereupon a proper assessment reveals that a student’s speech does not pose a threat, schools must respect student expression even if it may likely “inspire fear . . . or cause a disturbance . . . [because] our Constitution says we must take this risk.”<sup>327</sup>

Angie Fox<sup>328</sup>

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323. *Frederick v. Morse*, 49 F.3d 1114, 1121 (9th Cir. 2006) (quoting *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 983 (9th Cir. 2001)).

324. See *Morse v. Frederick*, 127 S. Ct. 2618, 2628 (2007).

325. *Vernonia*, 515 U.S. at 686 (O’Connor, J., dissenting).

326. Stephen King is a best-selling author of “horror” novels whose works include *The Shining* and *Carrie*—a story about a troubled girl who eventually kills all of her classmates. Cormac McCarthy is an award-winning and critically acclaimed author whose works include *Blood Meridian* and *All the Pretty Horses*.

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

328. The author would like to acknowledge the Urban Fellows Program, which held a year-long discussion series on education, thus providing the germination for this topic, and would also like to thank her husband, Charles Hooker, for his unwavering support and constant source of inspiration.