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**An Imminent Substantial Disruption: Towards a
Uniform Standard For Balancing the Rights of
Students to Speak and the Rights of
Administrators to Discipline.**

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AN IMMINENT SUBSTANTIAL DISRUPTION:
TOWARDS A UNIFORM STANDARD FOR BALANCING
THE RIGHTS OF STUDENTS TO SPEAK AND THE RIGHTS
OF ADMINISTRATORS TO DISCIPLINE.

*Allison G. Kort**

INTRODUCTION

The primary function of the public school is education.¹ Twenty-five years before *Tinker*, the Supreme Court cautioned against placing too much discretion in the hands of school boards.² In the realm of school speech, however, courts have returned to school boards the power to invade the sphere of intellect and spirit in public schools.³ In 1969, the Supreme Court first protected public school students' First Amendment rights to free speech and expression, with the heralded statement: "it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."⁴ In *Tinker*, Iowa high school students voiced opposition to the Vietnam War by wearing black armbands to school, which violated school policy.⁵ The students were suspended from school until they returned without the armbands.⁶ The Supreme Court determined that student speech may not be censored when the record "does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with

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¹ Richard Berkman, Students in Court: Free Speech and the Functions of Schooling in America, 40 *Harvard Educ. Rev.* 4 (1970); *Brown v. Bd. of Ed.*, 347 U.S. 483, 493 (1954) (recognizing education as "the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.").

² Compelling students to salute the flag "transcends constitutional limitations on [the school authorities'] power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *Barnette*, 319 U.S. at 637.

³ Clay Calvert, Mixed Messages, Muddled Meanings, Drunk Dicks, and Boobies Bracelets: Sexually Suggestive Student Speech and the Need to Overrule or Radically Refashion Fraser, 90 *Denv. U. L. Rev.* 131, 155-56 (2012) (noting the broad deference given school officials for their decisions to censor student speech).

⁴ 393 U.S. 503, 504 (1969).

⁵ 393 U.S. at 504.

⁶ *Id.*

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school activities, and no disturbances or disorders on the school premises in fact occurred.”⁷ The student armbands caused discussion outside of class, but did not interfere with work or cause any disorder in school.⁸ Therefore, the school’s discipline of the students for wearing black armbands was unconstitutional.⁹

Today, *Tinker* on paper still provides public school students with the greatest protection from discipline for their expression. However, in the 44 years following *Tinker*, Supreme Court decisions and lower court opinions have chipped away at students’ rights by widening the standards for speech that causes or forecasts a substantial disruption or material interference. Courts frequently make an end run around *Tinker* by deferring to the school board on the “reasonableness” of the school’s action, or deciding these cases on the basis of the speech’s content. The resulting outcomes fail to provide uniform applicable standards by which new cases may be decided.¹⁰ Neither students nor school officials enjoy clear awareness of students’ rights to free speech and expression, and students are subject to personal opinions of the school boards, with whom rests “the determination of what manner of speech in the classroom or in school assembly is inappropriate. . .”¹¹

This Article argues that *Tinker* should be universally applied in school speech cases, with less deference to school administrators. Part I discusses Supreme Court school speech jurisprudence following *Tinker*, and the viewpoint-based exceptions to *Tinker*. Part II illustrates how lower courts have applied the *Tinker* standard inconsistently, producing viewpoint based decisions. Part III proposes universal definitions of the terms in *Tinker*, so that administrators may understand how to craft school policies, and students may be aware of their rights. The inquiry into whether certain speech “might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities” should involve an analysis of several terms. First, the “reasonably forecast” language should be narrowed so that only speech that meets the “incitement to

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ See Calvert, *supra* n. 3 at 155 (noting the difficulties of determining what speech is “offensive,” and cautioning that “creating and imposing bright-line legal doctrines around message meanings is an extremely problematic task”).

¹¹ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986).

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imminent” disruption of legitimate state interests may be restricted.¹² Second, some uniform standards for what expression constitutes a “material and substantial disruption” must be articulated if school administrators are to apply the standard. Finally, administrators must justify the protection of the regulation in order to protect the “work and discipline of the school.” Rather than a separate test by which to measure speech given to captive audiences inside the school building, *Fraser* should be considered as having defined part of the work of the school as teaching students the “boundaries of socially appropriate behavior.”¹³ School administrators may then, without engaging in viewpoint discrimination, inculcate manners and habits of civility in the public schools, while maintaining the classroom as “peculiarly the ‘marketplace of ideas.’”

I. THE SUPREME COURT’S VIEWPOINT-BASED EXCEPTIONS TO TINKER: SEX
AND DRUGS.

The second Supreme Court opinion on student speech provided a new restriction, allegedly based not on the content of the speech, but on the vulgar, lewd, or plainly offensive nature of the words used.¹⁴ High school student Matthew Fraser was suspended after at a required assembly, he “referred to his candidate in terms of an elaborate, graphic, and explicit

¹²*Brandenburg v. Ohio*, U.S. 444, 448-49 (1969).624, 639.

¹³ *Id.*at

¹⁴ 478 U.S. at 676. Although the majority frequently referred to the content and effects of the speech, the actual text does not appear anywhere in the majority opinion. Reprinted only in Justice Brennan’s concurrence, the speech provided:

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

*Id.*at 687 (Brennan, J., concurring).

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sexual metaphor.”¹⁵ The school district properly sanctioned Fraser because the First Amendment did not prevent school officials from prohibiting a speech that “would undermine the school’s basic educational mission.”¹⁶

First, public schools are responsible for “inculcating fundamental values necessary to the maintenance of a democratic political system. . . .”¹⁷ In teaching those values, including the “habits and manners of civility” administrators must take into account the sensibilities of other students, and balance students’ “freedom to advocate unpopular and controversial views” against the “interest in teaching students the boundaries of socially appropriate behavior.”¹⁸ The majority noted that just as abusive and offensive language may be proscribed in Congress, the work of the schools involves preventing language that is “highly offensive or highly threatening to others.”¹⁹

The Court then jumped from stating that schools must promote civil debate, to announcing administrators’ rights to prohibit “lewd, indecent, or offensive speech and conduct,” with no analysis of a school’s need to determine whether that lewd, indecent, or offensive speech was reasonably likely to cause a material and substantial disruption to the work of the school in promoting civil debate.²⁰ Because Fraser’s speech glorified male sexuality, was acutely insulting to teenage girls, and could have damaged the younger students who were “on the threshold of awareness of human sexuality,”²¹ it was “plainly offensive to both teachers and students—indeed to any mature person.”²² The only evidence of disruption mentioned in the majority opinion was some students being “bewildered by the speech and the reaction of mimicry it provoked.”²³

Justice Brennan forecast the difficulties courts would have in applying the *Fraser* standard.²⁴ Although he concurred with the majority’s decision

¹⁵ *Id.* at 677-78.

¹⁶ *Id.* at 686.

¹⁷ *Id.* at 686. See also *Ambach v. Norwick*, 441 U.S. 68, (1979) (upholding a requirement that public schoolteachers must be United States citizens as rationally related to the legitimate government interest in furthering education).

¹⁸ *Id.* at 681.

¹⁹ *Id.* at 683 (quoting *Tinker*, 393 U.S. at 508).

²⁰ *Id.* at 683.

²¹ *Id.* at 683.

²² *Id.* at 684.

²³ *Id.* at 684.

²⁴ *Id.* at 683 (Brennan, J., concurring).

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because Fraser's remarks "exceeded the limits of acceptable speech"²⁵ he stated that the language itself was not obscene,²⁶ and no evidence showed that the students found it upsetting.²⁷ Had the majority simply adopted Brennan's reasoning that the speech disrupted the school's educational mission of inculcating habits and manners of civility at a mandatory school assembly, rather than introduce a standard for bypassing *Tinker* and engaging in viewpoint-based discrimination by characterizing the expression as lewd or plainly offensive, the educational mission of the school would have remained at the forefront of judicial analysis of student discipline cases. With the advent of the lewd, vulgar, and plainly offensive exception to *Tinker*, courts began to focus on whether certain words used

²⁵ *Id.* at 687-88 (Brennan, J., concurring).

²⁶ *Id.* at 684-85. In addition to obscene speech, sexually-explicit speech, broadcast at a time when the audience may include children, is prohibited. In 1978, the Court addressed the question of whether an afternoon broadcast of George Carlin's 1 "Filthy Words" monologue was "indecent" and therefore proscribable. Carlin had described the monologue as containing "words you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say, ever." *Id.* at 729. The FCC characterized Carlin's language as "'patently offensive,' though not necessarily obscene," and explained that "[t]he concept of 'indecent' is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs at times of the day when there is a reasonable risk that children may be in the audience." *Id.* at 731-32 (quoting 56 F.C.C 2d, 94, 98 (1975)). The Supreme Court agreed with the Commission, holding that "[p]atently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *Id.* at 749.

In *Fraser*, the Court compared Matthew Fraser's speech at a mandatory school assembly with the "obscene, indecent, or profane" broadcast of Carlin's monologue in *Pacifica*:

These words offend for the same reasons that obscenity offends. Their place in the hierarchy of First Amendment values was aptly sketched by Mr. Justice Murphy when he said: "Such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

478 U.S. at 685 (quoting *Pacifica*, 438 U.S. at 745).

²⁷ *Id.* at 689, n. 2.

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inside the school contained sexual innuendo and were therefore proscribable, rather than focusing on the disruptive effect the speech was reasonably likely to have on the school's mission.²⁸

Twice more the Court deviated from the *Tinker* standard. A school may regulate the content and format of school-sponsored speech,²⁹ and speech that could be reasonably regarded as promoting illegal drug use, even at an off-campus school-sponsored activity.³⁰ The Court in *Hazelwood* rationalized that because speech that could be seen as school sponsored would be viewed as emanating from the school curriculum, educators could exercise more editorial authority over its content.³¹ Thus, prior to *Morse*, school speech cases fell into one of three categories:

Under *Fraser*, a school may categorically prohibit lewd, vulgar or profane language. Under *Hazelwood*, a school may regulate school-sponsored speech (that is, speech that a reasonable observer would view as the school's own speech) on the basis of any legitimate pedagogical concern. Speech falling outside of these categories is subject to *Tinker's* general rule: it may be regulated only if it would substantially disrupt school operations or interference with the rights of others.³²

Morse added to the trilogy by permitting school officials to restrict Frederick's "BONG HiTS 4 JESUS" banner without engaging in a *Tinker* analysis.³³ The special characteristics of the school environment and the government interest in stopping student drug abuse permitted the departure

²⁸ See Calvert, *supra* n. XXX at 134 ("Under *Fraser*, a message determined to possess a sexual connotation can be permissibly punished despite the absence of any evidence suggesting it will have even the slightest disruptive effect among the student body.").

²⁹ *Hazelwood School District v. Kuhlmeier* 84 U.S. 260 (1988).

³⁰ *Morse v. Frederick*, 551 U.S. 393, 396 (2007).

³¹ *Id.* at 271. Brennan's dissent criticized the majority for failing to apply *Tinker's* material interference and substantial disruption standard to the facts. The school principal "broke more than just a promise. He violated the First Amendment's prohibitions against any censorship of any student expression that neither disrupts classwork nor invades the rights of others, and against any censorship that is not narrowly tailored to serve its purpose."³¹ *Id.* at 277 (Brennan, J., dissenting) (noting that each year, student journalists published the school paper's Statement of Policy, which provided that speech may only be prohibited if it "materially and substantially interferes with the requirements of appropriate discipline")(quoting *Tinker*, 393 U.S. at 513)).

³² *Saxe v. State College Area Sch. Dist.*, 240 F. 3d 200, 214 (3d Cir. 2001) (citations omitted).

³³ *Id.* at 408.

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from *Tinker*.³⁴ Justice Thomas took the opportunity to explain his view that student speech is not constitutionally protected and that *Tinker* should be overturned.³⁵ Justice Breyer was concerned that the majority's holding failed to guide schools as to which "steps" other than prohibiting the unfurling of banners at school outings schools may take to safeguard students from speech regarding illegal drug use.³⁶ This lack of guidance would allow school administrators to establish further viewpoint-based restrictions:³⁷

Illegal drugs, after all, are not the only illegal substances. What about encouraging the underage consumption of alcohol? . . . What about a conversation during the lunch period where one student suggests that glaucoma sufferers should smoke marijuana to relieve the pain? What about deprecating commentary about an antidrug film shown in school? And what about drug messages mixed with other, more expressly political, content? If, for example, Frederick's banner had read "LEGALIZE BONG HiTS," he might be thought to receive protection from the majority's rule, which goes to speech "encouraging illegal drug

³⁴ *Morse*, 551 at 397XXX.

³⁵ *Id.* at 410 (Thomas, J., concurring). Thomas described the advent of public schools during the colonial era as a mechanism for the States to educate students whose families were too poor to afford private school, and that "no one doubted the government's ability to educate and discipline children as private schools did." *Id.* at 412. Public schools were places where "[t]eachers commanded, and students obeyed. Teachers did not rely solely on the power of ideas to persuade; they relied on discipline to maintain order." *Id.* Teachers instilled a "core of common values" by presenting ideas, demanding obedience, punishing students for disrespectful behavior, enforcing rules of etiquette, and requiring courtesy. *Id.* In the 1800s, schools could discipline students and maintain order through *in loco parentis*, which set little restriction on the school's ability to set rules, including those restricting student speech. But "*Tinker* effected a sea of change in students' speech rights, extending them well beyond traditional bounds."³⁵ Thomas reasoned that because *Tinker's* rationale conflicted with the traditional role of the judiciary concerning public school discipline, "the Court has since scaled back *Tinker's* standard, or rather set the standard aside on an ad hoc basis." *Id.*

³⁶ *Id.* at 428. (Breyer, J., concurring in part and dissenting in part). While disagreeing with the Court's application of First Amendment law, Justice Breyer concurred with the judgment because *Morse* was protected by qualified immunity from Frederick's claim for monetary damages.

³⁷ *Id.* at 426.

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use.” . . . But speech advocating change in drug laws might also be perceived of as promoting the disregard of existing drug laws.³⁸

Justice Stevens dissented, because the banner was designed to attract the attention of camera crews, and “was never meant to persuade anyone to do anything.”³⁹ In all, a case about a “silly, nonsensical banner” ended with the invention of a rule permitting censorship of any student speech that mentions drugs, as long as an administrator could perceive that speech to contain a “latent pro-drug message.”⁴⁰ Further, no evidence showed that the banner infringed on the rights of students or interfered with the school’s educational mission.⁴¹

Application of these four seminal cases has permitted lower courts to pick and choose which standard to apply, and make inconsistent, viewpoint-based determinations, which continuously steer away from *Tinker*’s central premise that “it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.”⁴² Even when they apply *Tinker*, courts are more likely to defer to the school board, because *Tinker* did not “lay down some guidelines for how to arrive at a calculation of which interests are substantial and what constitutes sufficient evidence of

³⁸ *Id.* (citations omitted). Justice Breyer was also concerned that school officials would no longer have the necessary authority to discipline students. More student-teacher disputes would likely end up in court, “[y]et no one wishes to substitute courts for school boards, or to turn the judge’s chambers into the principal’s office.”

³⁹ *Id.* at 425 (Stevens, J., dissenting). Justice Stevens warned that the majority opinion “does serious violence to the First Amendment in upholding—indeed—lauding—a school’s decision to punish Frederick for expressing a view with which it disagreed.”³⁹ While the school certainly had an interest in protecting its students from exposure to speech reasonably regarded as promoting illegal drug use, it could not justify disciplining Frederick for his attempt to make “an ambiguous statement to a television audience simply because it contained an oblique reference to drugs.”³⁹ There is a difference between speech that advocates illegal drug use, and “an obscure message with a drug theme that a third party subjectively—and not very reasonably—thinks is tantamount to express advocacy.” *Id.* at 439.

⁴⁰ *Id.* at 446.

⁴¹ *Id.* at 440. As Stevens noted, the majority’s excising pro-drug speech from *Tinker*’s protections “for uniquely harsh treatment finds no support in our case law and is inimical to the values protected by the First Amendment.”

⁴² *Tinker*, 393 U.S. at 508-09.

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substantial interference with them.”⁴³

II. LOWER COURT APPLICATIONS OF *TINKER* AFTER *FRASER*, *HAZELWOOD*, AND
MORSE.

Student speech cases are frequently litigated in lower courts, particularly with the advent of social media and online communication.⁴⁴ *Tinker* is almost universally applied to speech created off-campus.⁴⁵ *Fraser* is dismissed outright in Internet speech cases, with reference to Justice Brennan’s dissent: “[i]f respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate.”⁴⁶

Application of these standards has led to inconsistent results based on different views of several terms in the two standards: a) reasonably portend; b) material and substantial disruption; c) lewd, vulgar, and plainly offensive; and c) the work and discipline of the school.⁴⁷ The reasons given

⁴³ Bowman, *supra*. n. 51N. XXX at 1160 (quoting Memorandum from Martha Field to Justice Fortas 4-5 (Nov. 27, 1968), in Abe Fortas Papers, Group 858, Series I, Box 79, Folder 1666, Yale University Library Manuscript Collections).

⁴⁴ Frederick Schauer, Abandoning the Guidance Function: *Morse v. Frederick*, 2007 Sup. Ct. Rev. 205, 208-09 (2007) (“In the thirty-eight years since *Tinker v. Des Moines Independent Community School District*, there have been only three Supreme Court cases dealing directly with the issue of student speech. . . . Yet during this same period there has been immensely more litigation in the lower courts on this subject than on most of the seemingly more familiar items in the free speech canon. . . . [O]ne might suppose that the frequency with which issues involving speech in the schools arise in the lower courts and in the daily practices of school teachers and administrators would suggest to the Court that this is an area in which there is a particular need to give assistance to the courts below, as well as to provide guidance for school administrators, teachers, and students.”).

⁴⁵ See e.g., *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 216 (3d Cir. 2011). The dichotomy of “on campus” and “off campus” speech is not the focus of this Article. However, the distinction becomes irrelevant when the material and substantial disruption is further defined, and if courts were to stop employing a *Fraser* analysis of “lewd,” “vulgar” and “plainly offensive.”

⁴⁶ *Fraser*, 478 U.S. at 688 (Brennan, J., dissenting).

⁴⁷ Analysis of *Tinker*’s second prong, that student expression which invades the rights of other students is not “immunized by the constitutional guarantee of freedom of speech,” *Tinker*, 393 U.S. at 513, is beyond the scope of this Article. The invasion of the rights of others prong emanates from the principle that an individual may exercise his freedom up

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for upholding discipline in these cases frequently surround exactly what the *Tinker* Court cautioned against: an “undifferentiated fear or apprehension of disturbance,” rather than facts which “might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities.”⁴⁸ Generally, these cases “effectively deconstitutionalize the First Amendment in the context of schools by declaring there will be great judicial deference to school administrator’s decisions.”⁴⁹

A. “Reasonably Portend”

The *Tinker* Court arrived at the “reasonable likelihood” standard by incorporating the “actual disruption” test from two Fifth Circuit decisions into its opinion.⁵⁰ Without explanation, the Court broadened the test announced in *Burnside* and *Blackwell* from actual disruption, to speech that was reasonably anticipated to cause a disruption.⁵¹ The Court itself used several phrases interchangeably to articulate the “risk of disruption” standard: a restriction on speech is unconstitutional without evidence that “it is necessary to avoid material and substantial interference”;⁵² without a “showing that the students’ activities would materially and substantially disrupt the work and discipline of the school”;⁵³ without a demonstration of “any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities”;⁵⁴ or without evidence that “the school authorities had reason to anticipate that the [expression] would substantially interfere with”⁵⁵ Since *Tinker*, courts have addressed the “reasonably foreseeable” language in several circumstances: speech advocating violence, critical speech, including internet parodies, of teachers and administrators, and “hate speech” or speech that violates anti-harassment policies.

until the point of “collision with rights asserted by any other individual,” which the State must often determine. *W. Va. State Bd. Of Educ. v. Barnette*, 319 U.S. 624, 630 (1943).

⁴⁸ *Tinker*, 393 U.S. at 508, 514.

⁴⁹ Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111,127 (2004).

⁵⁰ *Tinker*, 393 U.S. at 505, n.1 (citing *Blackwell v. Issaquena Cnty. Bd. of Educ.*, 363 F.2d 749 (5th Cir. 1966), and *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966)).

⁵¹ Bowman, *supra* n. 43, at 1150.

⁵² *Tinker*, 393 U.S. at 511.

⁵³ *Id.* at 513.

⁵⁴ *Id.* at 514.

⁵⁵ *Id.* at 509.

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The issue of whether students could be punished for their expression advocating violence or other illegal behavior came about in 1987,⁵⁶ before the advent of the Internet and before the school shooting episodes beginning with Columbine in 1999. In *Bystrom*, the district court addressed the issue of speech advocating violence after first holding that a genuine issue of material fact existed as to whether a substantial disruption of school activities resulted from some students' distribution of a satirical paper. An article entitled "Trash & Slash '86," did not rise to the level of inciting imminent lawless action, when other students read, passed around, and reacted to the paper, and teachers had to interrupt their classes to address the disturbances.⁵⁷

Following the beginning of school shooting episodes, courts became more restrictive of speech encouraging violence. An eighth-grader's expression met the *Tinker* test when the student shared an AOL Instant Messaging icon depicting a pistol firing a bullet at a person's head, splattered blood, and the words "Kill Mr. VanderMolen," referencing the student's English teacher.⁵⁸ Although a psychologist and the police believed that the student meant no actual harm and posed no real threat to the teacher,⁵⁹ the speech disrupted school operations "by requiring special attention from school officials, replacement of the threatened teacher, and interviewing pupils during class time."⁶⁰ Nor did *Tinker* protect a student who sent instant messages to another student about obtaining a gun and shooting classmates, in response to being rejected by a potential romantic

⁵⁶ *Bystrom v. Fridley High School*, 686 F. Supp. 1387, 1393 (D. Minn. 1987).

⁵⁷ *Id.*

⁵⁸ *Wisniewski ex rel. Wisniewski v. Bd. of Ed.*, 494 F.3d 34 (2d Cir. 2007).

⁵⁹ *Id.* at 36-37.

⁶⁰ *Id.* at 37. Although the distinction between "on campus" speech, usually analyzed under *Fraser*, and "off-campus speech," analyzed under *Tinker*, is not the focus of this paper, the *Wisniewski* court's analysis of when internet speech made off-campus can be subject to censorship under *Tinker* is useful. *Wisniewski*'s transmission of the IM icon away from school property did not preclude school discipline because it was reasonably foreseeable that the IM icon would come to the attention of the school and VanderMolen, and would "foreseeably create a risk of substantial disruption within the school environment." *Id.* at 40. Aaron's transmission of the Icon urging the killing of his teacher "cross[ed] the boundary of protected speech and constitut[ed] student conduct that poses a reasonably foreseeable risk that the icon would come to the attention of school authorities." *Id.* at 38.

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interest.⁶¹ The principal received phone calls from concerned parents, increased security at the school, and limited access to the school.⁶² Despite the student's claims that his messages about shooting students were intended as a joke, the court held that the comments were reasonably likely to come "to the attention of school authorities and create a risk of substantial disruption" in school.⁶³

Similarly, a sixth grader was appropriately disciplined when he circulated a fictional story about a student engaging in several acts of violence, including: (1) stabbing a boy in the head; (2) going on a killing spree and stabbing other "bad kids"; and (3) chopping off a female classmate's head while she was having sex with another student.⁶⁴ Because the story *might* have caused disruption, it could be censored: "[t]he story, with its graphic depictions of the murder of specifically named students and sex between named students, may materially interfere with the work of the school by disturbing the students and teachers."⁶⁵ In an Oregon Court of Appeals case, a student circulated a petition declaring that a particular teacher was "the devil," and provided that students who did not sign the petition would be "subjected to be beaten till you turn blue and black."⁶⁶ While the court held that a question of fact existed as to whether the student's speech was disruptive or capable of causing disruption,⁶⁷ the dissent would have upheld summary judgment on the First Amendment claim because the expression could have disrupted the educational mission of the school.⁶⁸ The school officials had reason to believe, based on the expression "aimed at encouraging other students to express hatred for an authority figure in the school and to declare her to be the 'devil,'" and informing students that they could be "beaten till you turn black and blue"

⁶¹ *D.J.M. v. Hannibal Pub. Sch. Dist. # 60*, 647 F.3d 754 (8th Cir. 2011).

⁶² *Id.* at 759.

⁶³ *Id.* at 766.

⁶⁴ *D.F. ex rel. Finkle v. Bd. of Educ. Of Syosset Cent. Sch. Dist.*, 386 F. Supp. 2d 119, 124 (E.D. N.Y. 2005)

⁶⁵ *Id.* at 125-26. The story also constituted a true threat because it described a student killing other "real-life" students. *Id.* at 126. Although no students testified at the hearing to being threatened or harassed by D.F., the hearing officer concluded that the story was designed to cause fear of bodily harm, and that D.F. had "threatened use and/or contemplated use of a weapon in violation of the Code of Conduct." *Id.* at 124.

⁶⁶ *Jamshidnejan v. Cent. Curry Sch. Dist.*, 108 P.3d 671, 680 (Or. Ct. App. 2005)

⁶⁷ *Id.* at 678-79.

⁶⁸ *Id.* at 679 (Edmonds, J., concurring in part and dissenting in part).

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would cause a potential disruptive effect.⁶⁹

Speech critical of school teachers and administrators may be reasonably likely to cause a material and substantial disruption if teachers and administrators are diverted from their primary duties because of the speech. Courts have determined that a risk of substantial disruption may occur if school administrators are diverted from their work in order to deal with the speech.⁷⁰ A student was properly disciplined when after posting a message on her blog about the cancellation of an annual battle-of-the-bands concert, school administrators received phone calls and emails from members of the school community, which diverted their attention away from their normal duties in the school.⁷¹ The student called administrators “douchebags” and used the phrase “piss [] off.”⁷² As a result of the email, the superintendent and the school principal received many telephone calls and emails, and students were called out of class as administrators dealt with the dispute.⁷³ Disruption was reasonably likely because the post posed a “substantial risk” that administrators and teachers “would be further diverted from their core educational responsibilities by the need to dissipate misguided anger or confusion over Jamfest’s purported cancellation.”⁷⁴

In *J.S. v. Bethlehem Area School District*,⁷⁵ the Pennsylvania Supreme Court decided that a student’s creation of an Internet website containing “derogatory, profane, offensive and threatening statements directed toward one of the student’s teachers and his principal”⁷⁶ that caused “actual harm to the health, safety and welfare of the school community”⁷⁷ was protected by neither *Fraser* nor *Tinker*. Eighth-grader J.S. created a website called “Teacher Sux.”⁷⁸ The school principal believed the website to contain

⁶⁹ *Id.* at 680-81.

⁷⁰ *Doninger v. Niehoff*, 527 F.3d 41, 45 (2d Cir. 2008).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 51-52.

⁷⁵ 807 A. 2d 847 (Pa. 2002).

⁷⁶ *Id.* at 850.

⁷⁷ *Id.* at 852.

⁷⁸ *Id.* at 851. The site consisted of a several web pages, including one page called “Welcome to Kartotis Sux,” referencing the school principal, and several webpages about Kathleen Fulmer, J.S.’s algebra teacher, entitled, “Why Fulmer Should be Fired,” “Mrs. Fulmer Is a B___,” and “Why Should She Die?” *Id.* J.S. told other students about the

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serious threats, and contacted local police and the FBI, both of which declined to file charges against J.S.⁷⁹ The teacher who was the subject of the website

testified that she was frightened, fearing someone would try to kill her. [She] suffered stress, anxiety, loss of appetite, loss of sleep, loss of weight, and a general sense of loss of well-being as a result of viewing the web site. She suffered from short-term memory loss and an inability to go out of the house and mingle with crowds. [She] suffered headaches and was required to take anti-anxiety/anti-depressant medication. Furthermore, Mrs. Fulmer was unable to return to school to finish the school year.⁸⁰

J.S. was ultimately expelled from school.⁸¹ Once the court decided that the website was “on-campus” speech,⁸² it analyzed protection of the website under both *Tinker* and *Fraser*.⁸³ Under *Tinker*, the website caused an actual and substantial disruption of the school environment.⁸⁴ “[T]he entire school community” was disrupted, with the most significant disruption being the “emotional and physical injuries to Mrs. Fulmer,” who was unable to

website and showed it to another student at school; other students viewed the website; and a teacher learned of the site and reported it to Principal Kartsotis.

⁷⁹ *Id.* at 852.

⁸⁰ *Id.*

⁸¹ *Id.* at 853.

⁸² The issue of whether internet speech occurs on- or off-campus is the subject of many articles. This paper addresses the issue only to the extent that some internet speech created off-campus is considered to have a sufficient nexus to the school, and therefore falls under the *Tinker* analysis. However, it is interesting to note that the Pennsylvania Supreme Court established a new rule regarding the “on-campus” nature of internet speech: “where speech that is aimed at a specific school and/or its personnel is brought onto the school campus or accessed at school by its originator, the speech will be considered on-campus speech.” *Id.* at 865. Although J.S.’s website was created off school grounds, it became “on-campus” speech because it was accessed by J.S. at school and shown to a fellow student at school; accessed by other students, faculty members, and members of the administration; and “aimed not at a random audience, but at the specific audience of students and others connected with this particular School District.” *Id.*

⁸³ *Id.* at 867-68.

⁸⁴ *Id.* at 869. Before addressing the issue under *Tinker*, the court decided that the use of “lewd, vulgar and plainly offensive language, including the personal attacks on Mrs. Fulmer and Principal Kartsotis,” fit within the *Fraser* requirements. *Id.* at 869. The court did not reach the issue of whether a foreseeable risk of substantial disruption occurred.

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complete the year. To handle Fulmer's absence, the district hired three different substitute teachers, a process that "unquestionably disrupted the delivery of instruction to the students and adversely impacted the education environment."⁸⁵ Students expressed anxiety about their safety; the website was a "hot" topic of conversation around the school; and low morale permeated the school environment.⁸⁶ Parents expressed concern for their children's safety and about the use of substitute teachers.⁸⁷ In a similar instance, derogatory and sexually suggestive behavior aimed at a teacher in the classroom materially and substantially disrupted the work of the school.⁸⁸

Non-violent internet parodies of administrators and teachers may be censored, depending on the facts. Without a uniform standard for what language causes a material disruption or permits school administrators to reasonably portend disruption, similar fact patterns result in differing analyses. The twin Third Circuit cases of *Layshock v. Hermitage School District*⁸⁹ and *J.S. v. Blue Mountain School District*⁹⁰ involved internet

⁸⁵ *Id.*

⁸⁶ *Id.* ("The atmosphere of the entire school community was described as that as if a student had died.")

⁸⁷ *Id.*

⁸⁸ *Requa v. Kent Sch. Dist. No. 415*, 492 F. Supp. 2d 1272, 1280 (W.D. Wash. 2007). The plaintiff was involved in filming a student standing behind an unknowing teacher and making faces, rabbit ears, and pelvic thrusts towards the teacher. *Id.* The film included a section of the teacher's buttocks as she bent over, and a rap song accompanying the video. *Id.* at 1274. The plaintiff posted a link on his MySpace page to the YouTube video. *Id.*

⁸⁹ 650 F.3d 205 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012). Senior Justin Layshock, while at his grandmother's house and using her computer, created a parody of his school principal on "MySpace," which included "bogus answers to survey questions." *Id.* at 208. The School District argued that the speech should be treated as occurring on campus and analyzed under *Fraser's* lewd, vulgar, and plainly offensive standard. *Id.* On appeal, the Third Circuit first held that the speech occurred off campus and therefore the question of whether it was lewd, vulgar, or plainly offensive was irrelevant. *Id.* at 219. Because the school district rested its arguments on *Fraser* and did not challenge the district court's finding that the School District failed to establish a disruption of the school environment, Layshock could not be disciplined. *Id.* The website included:

Birthday: too drunk to remember
Are you a health freak: big steroid freak
In the past month have you been on pills: big pills

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parodies of school administrators that did not meet the substantial disruption standard. In *Layshock*, the school district relied only on *Fraser*, when *Tinker* should have been applied because the speech occurred outside of school. The district therefore failed to establish a reasonable likelihood of a material and substantial disruption.⁹¹ In *Blue Mountain*, J.S. created a fake profile of her middle school principal, which contained his official photograph from the School District’s website, and “contained crude content and vulgar language, ranging from nonsense and juvenile humor to profanity and shameful personal attacks aimed at the principal and his family.”⁹² The School District claimed that several problems resulted which might reasonably have led officials to forecast substantial disruption, including: “general rumblings,” a math teacher stopped class to address students who were discussing the profile, a group of girls approached another teacher to discuss the fake profile during independent study time, and Debra Frain, the guidance counselor referred to in the posting, had to reschedule several student meetings.⁹³ The Third Circuit held that no reasonable forecast of substantial disruption was present.

In the past month have you gone Skinny Dipping: big lake, not big dick
 In the past month have you Stolen Anything: big keg
 Ever been drunk: big number of times
 Ever been called a Tease: big whore
 Ever been Beaten up: big fag
 Ever Shoplifted: big bag of kmart
 Number of Drugs I have taken: big

Id. at 208.

⁹⁰ 650 F.3d 915 (3d Cir. 2011), cert. denied, 132 S. Ct. 1097 (2012).

⁹¹ *Layshock*, 650 F.3d at 219.

⁹² 650 F.3d at 920. The “General Interests” section of the profile listed “M-Hoe’s” interests as “detention, being a tight ass, riding the fraintain, spending time with my child (who looks like a gorilla), baseball, my golden pen, fucking in my office, hitting on students and their parents.” *Id.* Further, in the “About Me” section, the profile stated:

HELLO CHILDREN[.] yes. it’s your oh so wonderful, hairy, expressionless, sex addict, fagass, put on this world with a small dick PRINCIPAL[.] I have come to myspace so i can pervert the minds of other principal’s [sic] to be just like me. I know, I know, you’re all thrilled[.] Another reason I came to myspace is because—I am keeping an eye on you students (who[m] I care for so much)[.] For those who want to be my friend, and aren’t in my school[,] I love children, sex (any kind), dogs, long walks on the beach, tv, being a dick head, and last but not least my darling wife who looks like a man (who satisfies my needs) MY FRAINTRAIN....*Id.* at 921.

⁹³ *Id.* at 922-23.

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On the issue of anti-harassment, hate speech, and dress code policies, courts will examine whether the language of the policy is overbroad in determining whether it addresses speech that is reasonably likely to result in disruption. For instance, in *Saxe v. State College Area School District*, the Third Circuit held that a public school district's anti-harassment policy was overbroad, where it prohibited language or conduct "based on specified characteristics and which has the effect of substantially interfering with a student's educational performance or which creates a hostile educational atmosphere"⁹⁴ The policy punished

not only speech that actually causes disruption, but also speech that merely intends to do so: by its terms, it covers speech "which has the purpose or effect of" interfering with educational performance or creating a hostile environment. This ignores *Tinker's* requirement that a school must reasonably believe that speech will cause actual, material disruption before prohibiting it.⁹⁵

The *Saxe* court cited *West v. Derby Unified School District* for the proposition that a "reasonable likelihood" requires "specificity and concreteness."⁹⁶ In *West*, the school district enacted a racial harassment policy that prohibited students possessing "any item that denotes . . . Confederate flags or articles," after the district had experienced several racial confrontations related to the Confederate flag, including "a hostile confrontation between a group of white and black students at school and at least one fight at a high school football game."⁹⁷ These "substantial facts"

⁹⁴ 240 F.3d at 200, 204 (3d Cir. 2001) () (internal quotations omitted).

⁹⁵ *Id.* at 216-217.

⁹⁶ *Saxe*, 240 F.3d at 212 (citing *West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1366 (10th10th Cir. 2000), (adopting the lower court's analysis in *West v. Derby Unified Sch. Dist. No. 260*, 23 F. Supp. 2d 1223 (D. Kan. 1998)).

⁹⁷ *West v. Derby Unified Sch. Dist. No. 260*, 23 F. Supp. 2d 1223, 12331-32 (D. Kan. 1998). The *West* court referred to another Confederate flag case in South Carolina, where a student was suspended for wearing a jacket depicting the Confederate flag, which violated a dress code which prohibited attire that would "interfere with classroom instruction." *Phillips v. Anderson Cnty. Sch. Dist. Five*, 987 F. Supp. 488, 490 (D.S.C. 1997). Five prior incidents of racial tension had previously been directly caused by students wearing clothing depicting the confederate flag, and the school therefore satisfied the reasonably foreseeable test. *Id.* at 490.

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reasonably supported a forecast of disruption, and “the fact that a full-fledged brawl had not yet broken out over the Confederate flag does not mean that the district was required to sit and wait for one.”⁹⁸

B. Material Interference or Substantial Disruption

Justice Fortas’ law clerk, Martha Field, forecast the difficulties that later courts would have in defining a “substantial disruption.” In her notes to Justice Fortas, Ms. Field wrote:

If there were a showing that the wearing of armbands would cause disorder because of the hostile reaction of other students, First Amendment problems would exist from suppressing the petitioners’ exercise of speech because of adverse reaction on the part of others. . . . I do not think that the Court can lay down any definitive rule in this opinion: the “substantial interference” etc. standards that the Fifth and Eighth circuits were disagreeing about are meaningless, because their meaning changes with their application. It seems to me that the best that can be done is to show that the same basic tests apply for regulation of the First Am in the schools as anywhere else [regulation must be justified by a substantial state interest), though different interests are of importance in the schools (greater importance of order) so that the application of the broad standard may lead to different results.⁹⁹

Prior to *Tinker*, several courts dealing with student violations of “Good Grooming” rules suppressed student speech under synonyms for “disruption”: interruption, disturbance, distraction, injury to the educational process,¹⁰⁰ and disturbing influence.¹⁰¹ Since the Supreme Court’s

⁹⁸ *West*, 23 F. Supp. 2d at 1232-33.

⁹⁹ *Abe Fortas Papers*, MS 858, Series Nol. I, Box 79, Folder 166, at Yale University Library Manuscripts and Archives.

¹⁰⁰ *Akin v. Bd. of Educ. of Riverside Unif. Sch. Dist.*, 262 Cal. App.2d 161, 168-69 (Ca. Ct. App. 1968) (holding that a student’s right to wear a beard was outweighed by the rights of the public to have its children educated in an environment “devoid of disruptive influences,” “with a minimum of interruption, and “free of disturbances and distractions”).

¹⁰¹ *Davis v. Firmont*, 269 F. Supp. 524, 528 (E.D. La. 1967) (holding that a “Beatles”-style haircut was proscribable where rules concerning hair length were directly related to disciplinary considerations, and “gross deviation from the norm does cause a disruption of the learning atmosphere”); *Ferrell v. Dallas Indep. Sch. Dist.*, 393 F.2d 697, 699 (5th Cir.

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inclusion of the *Burnside* and *Blackwell* language regarding disruption;¹⁰²

conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech,¹⁰³

courts have taken viewpoint-based, inconsistent approaches to the definitions of “disruption” or “interference.”¹⁰⁴ While administrators may meet the *Tinker* burden by showing that disruptions occurred in the past, “administrators can also meet their burden by establishing that they had a reasonable expectation, grounded in fact, that the proscribed speech would probably result in disruption.”¹⁰⁵

1968), *aff'd by Ferrell v. Dallas Indep. Sch. Dist.*, 392 F.2d 697, 704 (5th Cir. 1968). *Cf. Berryman v. Hein*, 329 F. Supp. 616, 619-20 (1971) (holding that students wearing their hair long in direct disregard of a rule was not “inherently distracting”).

¹⁰² In *Burnside*, students were suspended for wearing freedom buttons on school property. *Burnside*, 363 F.2d at 745. The buttons caused no interference with education, no commotion, and no indication that they “tended to distract the minds of the students away from their teachers.” *Id.* at 748. The Fifth Circuit noted that some speech could be prohibited inside the school if it would “inherently distract students and break down the regimentation of the classroom.” *Id.* The “mild curiosity” exhibited by other school children did not prevent the school from carrying on its normal activities. In *Blackwell*, however, students at a different high school were prohibited from wearing freedom buttons after some students distributed buttons to other students in the school, and even “accosted other students by pinning the buttons on them even though they did not ask for one.” 363 F. 2d at 751. The student expression “created a state of confusion, disrupted class instruction, and resulted in a general breakdown of orderly discipline,” which gave school administrators the authority to punish and prohibit the expression. *Id.*

¹⁰³ *Tinker*, 393 U.S. at 513.

¹⁰⁴ Few courts have considered whether certain words are in and of themselves “inherently disruptive.” *Chandler v. McMinnville Sch. Dist.*, 978 F. 3d 524, 530 (9th Cir. 1992). The majority in *Chandler* held that buttons with the word “scab,” worn by students during a teacher’s strike, were not inherently disruptive.¹⁰⁴ *Id.* at 526. The concurring judge cautioned that no subcategory of “inherently disruptive” words exists within the *Tinker* class of prohibited speech.¹⁰⁴ *Id.* at 533 (Goodwin, J., concurring)

¹⁰⁵ *A.M. ex rel. McAllum v. Cash*, 585 F.3d 214, 224 (5th Cir. 2009) (holding that racial tension and hostility at the school caused by the display of the Confederate flag, while not an actual disruption, gave administrators a reasonable expectation that the flag’s

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However, in *Saxe*, the definition of harassment did not rise to the level of substantial disruption, where the policy prohibited speech that created an “intimidating, hostile or offensive environment.”¹⁰⁶ The policy did not require any showing of pervasiveness or severity, and therefore it could be applied to restrict any speech about “some enumerated personal characteristics the content of which offends someone.”¹⁰⁷ Thus, some showing of “severity” or “pervasiveness” must be required to constitute a “material interference” or “substantial disruption.”

More recently, the Fifth Circuit discussed whether there must be a connection between the speech and past disruptions.¹⁰⁸ *McAllum* dealt only with the issue of Confederate flag display, recounting decisions over the course of nearly 40 years, where the Confederate flag either caused racial tension or actual disruptions. While administrators may meet the *Tinker* burden by showing that disruptions occurred in the past, “administrators can also meet their burden by establishing that they had a reasonable expectation, grounded in fact, that the proscribed speech would probably result in disruption.”¹⁰⁹

The Seventh Circuit has taken a more expansive approach.¹¹⁰ In *Nuxoll*, a student wore a T-shirt that said “Be Happy, Not Gay” during the school’s “Day of Silence” to advocate tolerance for homosexuals.¹¹¹ Based on a school rule forbidding “derogatory comments that refer to race, ethnicity, religion, gender, sexual orientation, or disability,” the T-shirt was forbidden.¹¹² The court gave some substance to the material and substantial disruption standard, gleaned from *Fraser* and *Morse* that if “a particular type of student speech will lead to a decline in students’ test scores, an upsurge in truancy, or other symptoms of a sick school—symptoms therefore of substantial disruption—the school can forbid the speech.”¹¹³ Although the phrase “Be Happy, Not Gay” was “tepidly negative,” but not

display was likely to result in disruption).

¹⁰⁶ *Saxe*, 240 F.3d at 217.

¹⁰⁷ *Id.*

¹⁰⁸ *McAllum*, 585 F.3d at 224.

¹⁰⁹ *Id.*, 585 F.3d at 224 (holding that racial tension and hostility at the school caused by the display of the Confederate flag, while not an actual disruption, gave administrators a reasonable expectation that the flag’s display was likely to result in disruption).

¹¹⁰ *Nuxoll v. Indian Prairie Sch. Dist.*, 523 F.3d 668, 674 (7th Cir. 2008).

¹¹¹ *Id.* at 670.

¹¹² *Id.*

¹¹³ *Id.* at 674.

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derogatory,¹¹⁴ speculation that the T-shirt would lead to incidents of harassment of homosexual students was “too thin a reed on which to hang a prohibition of the exercise of a student’s free speech.”¹¹⁵

Judge Rovner concurred, noting that the phrase “Be Happy, Not Gay” was disparaging both because it criticizes homosexuals and because the word “gay” is a generic term of disparagement.¹¹⁶ However, “disparaging” was insufficient to meet the standard of materially and substantially interfering, because “there is a significant difference between expressing one’s religiously-based disapproval of homosexuality and targeting LGBT students for harassment.”¹¹⁷ Professor Emily Waldman, in discussing applying Title IX analysis to speech that is potentially harmful to other students, defines material disruption in line with the *Nuxoll* court as “tangibly interfering with [the] ability to learn and succeed at school.”¹¹⁸ That “tangible interference” would be measured by “school attendance, grades, test scores, or similar indicia.”¹¹⁹ Ultimately, Waldman advocates that school administrators may prohibit certain speech, if it is not personally directed, if “a real likelihood” that the speech would “sufficiently interfere” with even one other student’s educational performance.¹²⁰

R. George Wright opined that the substantial disruption analysis in the

¹¹⁴ *Id.* at 676.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 678-79 (Rovner, J., concurring). Judge Rovner noted that the word “gay” is used as a general insult in teenage jargon, such that the statement “that sweater is so gay” is a way of insulting the sweater. *Id.* at 679.

¹¹⁷ *Id.* at 679. Judge Rovner referenced *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996), where students “called a gay classmate a ‘faggot,’ struck him, spit on him, threw him into a urinal, beat him to such a degree that he suffered internal bleeding, and subjected him to a mock rape in a classroom while a few dozen people looked on and laughed,” and the student subsequently attempted suicide. *Id.*

¹¹⁸ Emily Gold Waldman, A Post-Morse Framework for Students’ Potentially Hurtful Speech (Religious and Otherwise), 37 J.L. & EDUC. 463, 469 (2008). According to Waldman, the most stringent definition of “substantial disruption” would borrow from Title IX jurisprudence, and would state “that schools can restrict non-personally-directed student speech only when that speech is ‘so severe, pervasive, and objectively offensive that it can be said to deprive [other students] of access to the educational opportunities or benefits provided by the school.’” *Id.* at 499 (quoting *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999)).

¹¹⁹ Waldman, *supra* n. 118 at 501.

¹²⁰ Waldman, *supra* n. 118 at 501.

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context of “doubtful threats,” where the threat is unlikely to be carried out and lacks imminence, addresses the wrong question.¹²¹ According to Wright, where courts have affirmed administrative decisions to suspend students who make “doubtful threats,” they have implicitly adopted a substantial distraction rationale, which investigates not whether the speech makes reasonably foreseeable a material and substantial disruption of the work and order of the school, but whether suspension of that student will reduce distraction.¹²² He states that “a certain degree of distraction may justify infringement of student speech even if it does not arise to physical disruption, disorder, indiscipline, or disturbance.”¹²³ Courts should focus on distraction, because it “gets closer to explaining the real nature of the educational harms that doubtful threats pose in modern American public schools.”¹²⁴

C. Work and Discipline of the School

Although the language of *Fraser* supports the school’s duty to teach patriotism and political responsibility, the standard is generally interpreted as having nothing to do with the school’s duty to teach political responsibility, but as prohibiting speech that is sexually explicit, profane, or contains sexual innuendo.¹²⁵ While “[t]he First Amendment protection of freedom of expression may not be made a casualty of the effort to force-feed good manners to the ruffians among us,”¹²⁶ *Fraser* permitted school

¹²¹ R. George Wright, *Doubtful Threats and the Limits of Student Speech Rights*, 42 U.C. DAVIS L. REV. 679, 695 (2009).

¹²² *Id.* at 698.

¹²³ *Id.* at 701.

¹²⁴ *Id.* at 716.

¹²⁵ *Guiles v. Marineau*, 461 F.3d 320, 329 (2d Cir. 2006). *But see Denno v. Sch. Bd. of Volusia Cnty.*, 218 F.3d 1267 (11th Cir. 2000) (holding that a school official could have reasonably believed that a display of the Confederate flag during school hours, on school premises, would run afoul of the school’s duty to teach the “habits and manners of civility” (quoting *Fraser*, 478 U.S. at 681)).

¹²⁶ *Klein v. Smith*, 635 F. Supp. 1440, 1442 (D. Me. 1986). In this pre-*Fraser* case, the court analyzed whether one student giving a teacher “the finger” off school grounds could be disciplined for engaging in “vulgar or extremely inappropriate language or conduct directed to a staff member.” *Id.* at 1441. First, because the student was not engaged in any school activity or on school premises, there could be no substantial disruption of the “proper and orderly operation of the school’s activities . . .” *Id.* Although teachers had complained that the off-campus “incident . . . had sapped their resolve to enforce . . . discipline [on Klein] and other students during school hours,” the connection between “the finger” given off-campus and the operation of the school was too attenuated to punish

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administrators to sacrifice students' freedom to speak in favor of teaching good manners. The *Fraser* opinion provided that those "fundamental values of 'habits and manners of civility' essential to a democratic society" include tolerance of different and unpopular political and religious views, and consideration of the personal sensibilities of others.¹²⁷ While the Court seemingly heralded "the undoubted freedom to advocate unpopular and controversial views in schools and classrooms,"¹²⁸ the opinion went from proposing that speakers in the school setting should consider the personal sensibilities of others, to broadly holding that public schools could prohibit the use of non-profane speech that included sexual innuendo, because those "fundamental values" disfavor the use of "terms of debate highly offensive or highly threatening to others."¹²⁹

1. Pre-Tinker ideas about the mission of the school: from mandating uniformity to encouraging individuality.

Prior to the 1960s, uniformity was valued above individual thought.¹³⁰ The idea of schools acting as *in loco parentis* gave school administrators the authority to maintain safety through discipline and uniformity.¹³¹ "[T]hose who saw the establishment of a uniform national character as a precondition to the development of a stable citizenry gave to the schools the additional tasks of removing ethnic differences, fostering social equality, and eliminating highly individualistic conduct."¹³² For instance, long-haired

Klein. *Id.* at 1441-42 n.4. The court would not "do these sixty-two mature and responsible professionals the disservice of believing that collectively their professional integrity, personal mental resolve, and individual character are going to dissolve, willy-nilly, in the face of the digital posturing of this splenetic, bad-mannered little boy." *Id.* Second, giving a teacher the finger was not the equivalent of "fighting words," because it was not likely to provoke a violent response. *Id.* at 1442, n.3.

¹²⁷ *Fraser*, 478 U.S. at 681.

¹²⁸ *Id.*

¹²⁹ *Id.* at 683.

¹³⁰ *See Morse*, 551 U.S. at 410-17 (Thomas, J., concurring).

¹³¹ Berkman, *supra* n. 1 at 569 (noting that where education was seen as a means of "taming and civilizing the anarchic instincts of the populace," schools included discipline and moral instruction in the curriculum). *See also Morse*, 551 U.S. at 410-17 (Thomas, J., concurring).

¹³² Berkman, *supra* n. 11 at 569.

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students were denied admission for the school year, and the court upheld the decision by heckler's veto, noting several past problems that resulted from male students with "Beatles" haircuts:

On one occasion a group of boys in this school had decided that a classmate's hair was too long and that they were going to take the matter into their own hands and trim it themselves. . . . [B]oys with long hair were subjected to substantial harassment. Obscene language had been used by some students in reference to others with long hair and girls had come into his office complaining about the language being used. The long hair boys had also been challenged to a fight by other boys who did not like long hair. Also, long hair boys had been told by others that the girl's restroom was right down the hall.¹³³

Another common goal of the school was instilling patriotism and civil duty in young people.¹³⁴ *Fraser's* often-quoted language that the role of the American public school system is to "inculcate the habits and manners of civility as values in themselves" was originally published by two historians in the 1968 edition of *THE BEARDS' NEW BASIC HISTORY OF THE UNITED STATES*.¹³⁵ Two pages in the *New Basic History* discussed the "educational philosophy befitting the spirit of the democratic age," as formulated by public school advocates. Free schools were necessary to "advance civilization in all its phases" because

[t]he vote had been given to nearly all white men, . . . factories using technology were demanding greater knowledge and skill on the part of workers in industry[; p]overty was a blight on American civilization[; people were commonly lacking in knowledge of the simplest rules for health and healthful living[; and i]lliteracy barred the way to that knowledge as well as to the treasures of the world's best thought.¹³⁶

As Justice Thomas stated in his concurrence in *Morse*, "early public schools were not places for freewheeling debates or exploration of competing

¹³³ *Ferrell v. Dallas Indep. Sch. Dist.*, 392 F.2d 697, 701 (5th Cir. 1968).

¹³⁴ Berkman, *supra* n.1 at 574-75.

¹³⁵ CHARLES A. BEARD & MARY R. BEARD, *NEW BASIC HISTORY OF THE UNITED STATES* 228 (1968).

¹³⁶ *Id.*

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ideas.”¹³⁷ The NEW BASIC HISTORY referenced Horace Mann, “indefatigable leader in the public-school movement,” as believing that although students should be taught respect for property, law, and order, this respect was not “settled for all time.”¹³⁸

In 1968, the *Scoville* court articulated the state’s interest in producing “well-trained intellects with constructive critical stances. . . .”¹³⁹ Moreover, the court recognized that student criticism of school authorities was “a worthwhile influence in school administration.”¹⁴⁰ *Tinker* recognized the principle that First Amendment rights in the classroom are “actually essential to an effective educational process in a democracy rather than a source of disruption of that process.”¹⁴¹ The *Tinker* majority did not intend to extricate discipline as a goal of the public school system. Rather, *Tinker* differentiated between two needs of public schools: freedom to disagree, and school discipline.¹⁴²

2. *From Tinker to Fraser: Inculcating manners and habits of civility.*

The *Fraser* opinion bolstered its definition of the work and discipline of the school as including the “inculcate[ion of] fundamental values necessary to the maintenance of a democratic political system,” by referencing a 1979 case challenging a law which prevented non-citizens from being certified as school teachers.¹⁴³ In analyzing whether teaching in public schools constituted a government function requiring citizenship, the Court discussed the importance of the public schools in preparing children to be participatory citizens, and in preserving “the values on which our society rests.”¹⁴⁴ Quoting *Brown v. Board of Education*, the *Ambach* Court stated that education is the foundation of good citizenship, and serves as “a

¹³⁷ *Morse*, 551 U.S. at 411 (2007) (Thomas, J., concurring).

¹³⁸ *Id.*

¹³⁹ *Scoville*, 425 F.2d at 14.

¹⁴⁰ *Id.*

¹⁴¹ Berkman, *supra* n.1 at 581.

¹⁴² Berkman, *supra* n.1 at 583.

¹⁴³ *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979) (challenging the constitutionality of New York’s public school teacher certification requirement that an applicant be a citizen of the United States).

¹⁴⁴ *Id.* at 76.

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principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.”¹⁴⁵ In that context of defining the public school as the “‘assimilative force,’ by which diverse and conflicting elements in our society are brought together on a broad but common ground,”¹⁴⁶ the Court then stated that social scientists had confirmed “[t]hese perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system. . . .”¹⁴⁷

3. *Off-track*: Fraser’s focus on sexual innuendo.

Following its discussion of the public school’s responsibility to schools promote civil debate, the *Fraser* majority announced school administrators’ rights to prohibit “lewd, indecent, or offensive speech and conduct,” without discussing whether that speech was reasonably likely to cause a material and substantial disruption to the work of the school.¹⁴⁸ Subsequently, lower courts had to analyze what speech was plainly offensive, lewd, or vulgar; rather than what speech affected the “work and discipline of the school.”

a) Pre-*Guiles v. Marineau*: “Plainly Offensive” Means something other than Lewd and Vulgar.

Prior to the Second Circuit’s opinion in *Guiles v. Marineau*, courts

¹⁴⁵ *Id.* (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

¹⁴⁶ *Id.* at 77.

¹⁴⁷ *Id.* at 77-78. See e.g. ROBERT D. HESS & JUDITH V. TORNEY, THE DEVELOPMENT OF POLITICAL ATTITUDES IN CHILDREN 114, 217-20 (2005) (observing that although the school system more than the family teachers attitudes, conceptions, and beliefs about the political system, schools tend to underemphasize the rights and obligations of citizenship, and “much of what is called citizenship training in the public schools does not teach the child about the city, state, or national government, but is an attempt to teach regard for the rules and standards of conduct of the school”); V.O. KEY, JR., PUBLIC OPINION AND AMERICAN DEMOCRACY 323 (1961) (noting that education affects a student’s attitude “about his place in the social system and his outlook toward participation in politics”); RICHARD E. DAWSON & KENNETH PREWITT, POLITICAL SOCIALIZATION 167 (1969) (“The classroom in a number of different ways serves as a very important agent of political learning, one that is often employed consciously and deliberately by society’s leaders to ensure political support and knowledge.”).

¹⁴⁸ *Fraser*, 478 U.S. at 683.

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distinguished somewhat between speech that was lewd or vulgar, and speech that was offensive. In 1991, a middle school student was properly disciplined for wearing a vulgar T-shirt to school, despite the anti-drug message that the shirt proclaimed, “Drugs Suck!”¹⁴⁹ After testimony on the origin and meaning of the word “suck,” the court held that the middle school administrators could reasonably find that the word may be interpreted to have a sexual connotation:

This is not to say that the phrase “Drugs Suck!” is reasonably interpreted to mean that drugs were engaging in sexual activity or that the shirt advocates sexual activity of any form. Rather, the meaning of “disapproval” in the use of the phrase “X sucks” derives from a sexual connotation of oral-genital contact. Although the anti-drug message itself admittedly makes no sexual statement, the use of the word “suck,” and its likely derivation from a sexual meaning, is objectionable.¹⁵⁰

In 1997, a school district interpreted Marilyn Manson t-shirts as plainly offensive, not because the t-shirts contained profanity or sexual innuendo, but because the band “promotes destructive conduct and demoralizing values that are contrary to the educational mission of the school.”¹⁵¹ The shirts were properly prohibited because they contained symbols and words promoting values “patently contrary” to the educational mission of the school.¹⁵²

¹⁴⁹ *Broussard v. Sch. Bd. of City of Norfolk*, 801 F. Supp. 1526, 1527 (E.D. Va. 1992).

¹⁵⁰ *Id.* at 1534.

¹⁵¹ *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 469 (6th Cir. 2000). High school student Nicholas Boroff was prohibited from attending school when he wore Marilyn Manson t-shirts, one of which “depicted a three-faced Jesus, accompanied by the words ‘See No Truth. Heart No Truth. Speak No Truth.’ On the back of the shirt, the word ‘BELIEVE’ was spelled out in capital letters, with the letters ‘LIE’ highlighted.” *Id.*

¹⁵² *Id.* at 470. The dissent took issue with the offensiveness analysis, noting that the *Fraser* Court intended the term “offensive” to be interpreted in line with “lewd” and “vulgar.” *Id.* at 473 (Gilman, J., dissenting). In the context of school speech cases, “vulgar” and “offensive” words are “themselves coarse and crude,” not words that convey an unpopular opinion. *Id.* Yet, Boroff’s t-shirt failed the *Fraser* test because it expressed an idea that many people found repulsive, not because it was lewd and vulgar. *Id.* at 474.

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b. *Guiles and after*: “Plainly Offensive” Means Sexually-Charged Speech.

The Second Circuit, in the process of determining the meaning of “plainly offensive,” provided some guidance to the *Fraser* standard as a whole.¹⁵³ A seventh grader wore a t-shirt to school that was critical of George W. Bush.¹⁵⁴ The Second Circuit held that the district court had incorrectly determined that the speech was properly censored under *Fraser* because “the images of drugs and alcohol are *offensive* or *inappropriate*.”¹⁵⁵ Although the court applied *Tinker*, it alluded to the *Fraser* standard as prohibiting words connoting sexual innuendo or profanity, rather than prohibiting both sexual words and those meeting the dictionary definition of “offensive,” as causing “displeasure or resentment or is repugnant to accepted decency.”¹⁵⁶ Plainly offensive speech was related to obscenity, because all the cases cited in *Fraser* concerned vulgarity, obscenity, and profanity, and the *Fraser* Court was interested in protecting minors from exposure to vulgar and offensive language.¹⁵⁷ Otherwise, the school administrators in *Tinker* could have properly censored the armbands because they were “offensive and repugnant to their sense of patriotism and decency.”¹⁵⁸ Because they were not sexually charged, the images on the George W. Bush T-shirt were “not offensive, let alone plainly so, under *Fraser*.”¹⁵⁹

In post-*Guiles* cases decided under *Fraser*, speech that is not sexually charged will generally not be curtailed unless it interrupts the

¹⁵³ 461 F.3d 320 (2d Cir. 2006).

¹⁵⁴ *Id.* at 322. The t-shirt read “George W. Bush, . . . Chicken-Hawk-In-Chief,” and below those words was a picture of the President’s face superimposed on the body of a chicken and surrounded by oil rigs and dollar signs. Near the president were cocaine, a razor blade, a straw, and a martini glass. *Id.* The district court found that the images were “plainly offensive or inappropriate” under *Fraser*, and that the school properly censored the images. *Id.* at 323.

¹⁵⁵ *Id.* at 327 (emphasis in original).

¹⁵⁶ *Id.* at 327-28 (citing Merriam-Webster’s Third New Int’l Dictionary 1156 (1st ed. 1981); Black’s Law Dictionary 1110 (7th ed. 1999)).

¹⁵⁷ *Id.* at 328-29.

¹⁵⁸ *Id.* at 328.

¹⁵⁹ *Id.* at 330. The Supreme Court in *Morse* reiterated that *Fraser* did not include the broader definition of “offensive,” and declined to adopt a rule that the Bong HiTS for Jesus banner was proscribable because it was plainly offensive under *Fraser*, noting that *Fraser* “should not be read to encompass any speech that could fit under some definition of ‘offensive.’” 551 U.S. at 409.

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“maintenance of a civil and respectful atmosphere toward teachers and students alike.”¹⁶⁰ Images of Hitler Youth on buttons were not lewd, vulgar, or plainly offensive because they did not contain sexual innuendo.¹⁶¹ Even bracelets with the word “boobies,” used in the context of a national breast cancer awareness campaign were not lewd or vulgar under *Fraser*.¹⁶²

4. *More recent interpretations of the “work and discipline of the school.”*

Most recently, school speech will be censored if it could be interpreted as leading to school violence. Courts have addressed cases dealing with speech advocating violence by applying *Morse’s* holding that school administrators need not apply *Tinker* to speech advocating illegal drug use. In 2007, the Fifth Circuit applied *Morse’s* standard regarding speech advocating illegal drug use to speech referencing a Columbine-type shooting.¹⁶³ A high school student kept a diary describing an allegedly fictional story about a Nazi group harming homosexual and minority students, setting another student’s house on fire and murdering his dog, and planning to commit a Columbine-style shooting at the school.¹⁶⁴

The Fifth Circuit reiterated *Morse’s* interpretation that “prevention of the ‘serious and palpable’ danger that drug abuse presents to the health and well-being of students” was a compelling interest, sufficient to bypass an

¹⁶⁰ *Requa v. Kent Sch. Dist. No. 415*, 492 F. Supp. 2d 1272, 1280 (2007).

¹⁶¹ *DePinto v. Bayonne Bd. of Educ.*, 514 F. Supp. 2d 633, 644 (D.N.J. 2007). The buttons said “No School Uniforms” and portrayed a group of Hitler Youth dressed in the same uniforms and facing the same direction. *Id.* at 636. Because the defendants asserted only that the images on the buttons were offensive, they failed to show that the buttons caused a disruption or a “specific and significant fear of disruption.” *Id.* at 645 (quoting *Saxe*, 240 F.3d at 211).

¹⁶² *H. v. Easton Area Sch. Dist.*, 827 F. Supp. 2d 392, 393-94, 405-08 (E.D. Pa. 2011) (holding that bracelets with the slogan “I (heart) Boobies (Keep A Breast)” were not vulgar or lewd because not all uses of the word “boobies” are vulgar; the word was used in the context of a national breast cancer awareness campaign and chosen to enhance the effectiveness of the breast cancer awareness campaign to middle-school aged girls; and the school did not have the authority to determine “what is appropriate and inappropriate for student dress”).

¹⁶³ *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 771 (5th Cir. 2007).

¹⁶⁴ *Id.* at 766.

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evaluation of the speech's potential for school disruption.¹⁶⁵ While the majority opinion in *Morse* failed to define the harms that trigger an interest compelling enough to forego *Tinker*, Alito's concurrence provided that the special characteristic of "the threat to the physical safety of the students" warranted the restriction on students' free speech rights.¹⁶⁶ If school administrators were permitted to prohibit student speech advocating illegal drug use because "illegal drug use presents a grave and in many ways unique threat to the physical safety of students,' . . . then it defies logical extrapolation to hold school administrators to a stricter standard with respect to speech that gravely and uniquely threatens violence, including massive deaths, to the school population as a whole."¹⁶⁷

The Eastern District of Pennsylvania also equated the impact of violence in schools with the issue of illegal drug use in schools, and permitted speech regarding violence to be restricted in the same manner as the drug-related speech in *Morse*.¹⁶⁸ A student wore a T-shirt that displayed images of an automatic handgun, the words "Volunteer Homeland Security" printed on the front of the T-shirt, and "Special Issue-Resident-Lifetime License, United States Terrorist Hunting Permit, Permit No. 91101, Gun Owner-No Bag Limit" on the back of the shirt.¹⁶⁹ Under *Morse*, the court noted, speech that promotes illegal behavior may be restricted.¹⁷⁰ The T-shirt encouraged illegal conduct, because it advocated citizens taking the law into their own hands, thereby advocating "the use of force, violence, and violation of law in the form of illegal vigilante behavior and the hunting and killing of human beings."¹⁷¹ Therefore, the school district did not have to demonstrate a material and substantial disruption of school discipline.¹⁷²

Ironically, recent Confederate flag cases have applied the *Fraser* balancing test. But rather than encouraging the "undoubted freedom to advocate unpopular views," these cases have been decided against the speaker, favoring the need to "take into account consideration of the sensibilities of others."¹⁷³ At the district court level, a policy prohibiting the

¹⁶⁵ *Id.* at 769 (quoting *Morse*, 551 U.S. at 408).

¹⁶⁶ *Id.* at 770.

¹⁶⁷ *Id.* at 771-72 (quoting *Morse*, 551 U.S. at 425 (Alito, J., concurring)).

¹⁶⁸ *Miller v. Penn Manor Sch. Dist.*, 588 F. Supp. 2d 606, 617 (E.D. Pa. 2008).

¹⁶⁹ *Id.* at 611.

¹⁷⁰ *Id.* at 623.

¹⁷¹ *Id.* at 625.

¹⁷² *Id.*

¹⁷³ *Fraser*, 478 U.S. at 682.

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wearing of clothing depicting the confederate flag was supported by *Fraser* as well as *Tinker*.¹⁷⁴ Where the district concluded that the display of the confederate flag was associated with racial prejudice and was so likely to provoke “feelings of hatred and ill will in others” that it was inappropriate in school, the district’s “insistence upon more civil terms of debate” was within its lawful authority.¹⁷⁵

Further, the Eleventh Circuit directly suggested that the principles of *Fraser* should be considered in conjunction with the *Tinker* standard.¹⁷⁶ In *Denno*, a student was suspended for displaying a Confederate Flag during the school lunch break, while he was discussing “historical issues of Southern heritage” with other students.¹⁷⁷ The court decided that the school board should have been held to the standard of a “reasonable school official in the same circumstances.”¹⁷⁸ Therefore, the court evaluated the suspension in terms of whether the administrator’s actions “were . . . so obviously wrong, in light of the preexisting law, that only a plainly incompetent school official or one who was knowingly violating the law would have done such a thing,” ultimately determining that the prohibition on displaying the Confederate flag violated the First Amendment.¹⁷⁹ “The fact that reasonable jurists have applied *Fraser’s* more flexible standard in cases similar to the instant case is a strong indication that a reasonable school official might see the *Tinker-Fraser* legal landscape as *including* the more flexible *Fraser* standard.”¹⁸⁰ Interestingly, the dissent disagreed that *Fraser* involved a balancing of student’s right to speak, with administrators’ right to discipline in order to promote the work and discipline of the school at all. Judge Forrester stated that *Fraser* did not require the court to weigh

¹⁷⁴ 23 F. Supp. 2d at 1233. The *Fraser* analysis was not mentioned in the 10th Circuit opinion.

¹⁷⁵ *Id.* at 1234.

¹⁷⁶ *Denno v. Sch. Bd. of Volusia Cnty.*, 218 F.3d 1267, 1274 (11th Cir. 2000). While the court included the *Fraser* principles within the *Tinker* standard, it never went on to apply *Tinker* to the facts.

¹⁷⁷ *Id.* at 1270.

¹⁷⁸ *Id.* at 1272.

¹⁷⁹ *Id.* Had the court gone on to evaluate the second question posed, of whether the speech did cause a risk of a substantial disruption or interference with school activities, it likely would have found that the display of a Confederate flag to a group of friends during a lunch break did not violate the *Tinker* standard.

¹⁸⁰ *Id.* (emphasis added).

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the student's right to speak against the administrator's right to enforce the boundaries of acceptable behavior, but stood for three principles: "a student may be suspended for materially and substantially interfering with the educational process; . . . a student may be suspended for insubordination with reference to an established school rule which is reasonable; and . . . a public school has the right to disassociate itself from certain speech." The rest of the opinion, according to Judge Forrester, is dicta, because a) the statements regarding the mission of public education are "written so broadly as to be considered an aside lacking the authority of binding precedent;" and the student was punished because his speech was disruptive and interfered with the orderly environment of the school, not because it did not promote civility and moral values.¹⁸¹

III. UNIFORM STANDARDS FOR REASONABLE LIKELIHOOD OF MATERIAL AND SUBSTANTIAL DISRUPTION OF THE WORK AND DISCIPLINE OF THE SCHOOL.

More than forty years and three Supreme Court cases later, courts continue to defer to school boards by making an end run around *Tinker*. Rather than universally apply *Tinker*, and analyze whether the speech at issue is actually reasonably likely to cause a material interference with the work and discipline of the school, courts follow the unwritten rule: the student will prevail under *Tinker*; the school board will prevail under *Fraser*, *Hazelwood*, and *Morse*. Because courts are likely to defer to the judgment of school administrators on student speech, courts are reluctant to apply *Tinker* at all. School administrators and reviewing courts may revive and strengthen *Tinker* by reading some guiding principles into the material and substantial disruption standard, and engaging in an analysis of the competing interests at stake in a particular case.

A. *Reasonable likelihood of a substantial disruption: imminent danger that a compelling state interest will be violated.*

"The possibilities for emasculation of the *Tinker* holding lie first in the traditional willingness of courts to define broadly 'interference with discipline' in cases dealing with student criticism of school policy and

¹⁸¹ *Id.* at 1283 (Forrester, J., dissenting)

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personnel.”¹⁸² To breathe life back into *Tinker* courts may both combine the “reasonable likelihood” standard with the “incitement to imminent lawless action” standard articulated in *Brandenburg v. Ohio*,¹⁸³ and require school administrators to justify burdens imposed on student speech rights.¹⁸⁴ By reading *Brandenburg* in conjunction with *Tinker*, school administrators will be required to justify burdens on student speech, and provide clearer guidelines for when expression will rise to the level of creating a reasonable anticipation of a material and substantial disruption.

In the First Amendment realm outside of the schoolhouse gates, standards for political criticism are refined, tangible, and analogous to the school speech cases. In the early part of the 20th Century, it was only necessary to show that a critical speech created a “clear and present danger” of the substantive evil which the legislature had the right to prevent.¹⁸⁵ The

¹⁸² Berkman, *supra* n.1, at 586.

¹⁸³ 395 U.S. 444, 447 (1969) (“[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”).

¹⁸⁴ *Id.* at 589. A rationale permitting censorship whenever speech caused diversion would circumvent the absolute rule in *Tinker* that the school officials “must show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” *Id.* In his dissent in *Tinker*, Justice Black stated that the students wore armbands for the purpose of distracting other students, and that the armbands had the effect of distracting students from learning. *Id.* at 517-18 (Black, J., dissenting). Justice Black sought to expand the reach of school boards beyond what the majority determined, so that school administrators could punish expression that was distracting as well as disruptive. *Id.* Black noted that the students were not violent or profane, but the armbands caused one math class to be “practically wrecked,” and also caused “comments, warnings by other students, the poking of fun at [the students wearing the armbands], and a warning by an older football player that other, nonprotesting students had better let them alone.” *Id.* at 518. Although the lack of profanity perhaps justified the majority’s decision that the students wearing the armbands did not “disrupt” the school, “the record overwhelmingly shows that the armbands did exactly what the elected school officials and principals foresaw they would, that is, took the students’ minds off their classwork and diverted them to thoughts about the highly emotional subject of the Vietnam war.” *Id.* “[P]ublic protest in the school classes against the Vietnam war distracted from that singleness of purpose which the state . . . desired to exist in its public educational institutions.” *Id.* Yet, the *Tinker* majority sought to permit censorship of speech that was potentially disruptive, rather than merely distracting.

¹⁸⁵ *Schenck v. United States*, 249 U.S. 47, 52 (1919)

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issue of a “reasonable likelihood” of the harm became law in *Dennis v. United States*.¹⁸⁶ In 1969, *Brandenburg’s* “incitement”¹⁸⁷ test replaced *Schenck’s* “clear and present danger” test.¹⁸⁸ Mere advocacy of “lawless action could no longer be punished; the speech had to cause incitement to imminent, or immediate lawless action.”¹⁸⁹

Prior to *Tinker*, the Supreme Court in *West Virginia v. Barnette*, as well as several lower courts addressing student speech issues, incorporated some iteration of the imminent lawless action standard in the school speech setting. In addition to the famous statements in *Barnette* regarding the voluntariness of the flag salute, the ideological principles of free public education, and the Bill of Rights withdrawing “certain subjects from the vicissitudes of political controversy,”¹⁹⁰ the opinion provided that freedom of speech is susceptible to restriction only “to prevent grave and immediate danger to interests which the state may lawfully protect.”¹⁹¹

In *Scoville v. Board of Education*, the Northern District of Illinois applied the incitement standard in the public school setting.¹⁹² High School students had distributed copies of an underground school publication entitled “Grass High,” which urged students to destroy or refuse to accept a previously-distributed Principal’s Report to parents.¹⁹³ The publication contained an editorial, which, among other things,

criticize[d] school attendance regulations as “utterly idiotic and asinine,” and concluded that “our whole system of education with all its arbitrary rules and schedules seems dedicated to nothing but wasting

¹⁸⁶ 341 U.S. 494, 509-10 (1951) (“Obviously, the words cannot mean that before the Government may act, it must wait until the putsch is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required”).

¹⁸⁷ *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (holding unconstitutional the Ohio Criminal Syndicalism Act, which criminally punished advocacy of violence rather than “incitement to imminent lawless action”).

¹⁸⁸ *Schenck*, 249 U.S. at 52 (“The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent”).

¹⁸⁹ *Brandenburg*, 395 U.S. at 448.

¹⁹⁰ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639. (1943).

¹⁹¹ 319 U.S.

¹⁹² *Scoville v. Bd. of Ed. of Educ. of Joliet Twp. High Sch. Dist.*, 286 F. Supp. 988, 990 (N.D. Ill. 1968).

¹⁹³ *Id.* at 989.

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time.” Elsewhere, the editorial accused the senior dean of the school of having a “sick mind.”¹⁹⁴

Citing *Barnette* and the *Schenck* “clear and present danger” test¹⁹⁵ the district court held that the students’ speech was an “immediate advocacy of, and incitement to, disregard” of school rules.¹⁹⁶ On appeal, the Seventh Circuit reversed,¹⁹⁷ despite applying a substantial disruption standard, which would seemingly have been more speech-restrictive than the “clear and present danger” test applied by the district court.¹⁹⁸ Although the editorial imputing a “sick mind” to the dean reflected a “disrespectful and tasteless attitude toward authority,” it did not reasonably forecast a substantial disruption of school policies. Although the dean was “undoubtedly offended and displeased,” the expression did not meet the *Tinker* test.¹⁹⁹

Berkman cited two college-campus speech opinions discussing the application of the clear and present danger standard in the school speech context.²⁰⁰ In *Norton*, state university students distributed pamphlets calling administrators “despots and “problem children,” and calling attention to civil rights disturbances going on around the country at universities such as Columbia, Harvard, and Ohio State.²⁰¹ The pamphlets urged students to “stand up and fight,” and the Sixth Circuit, citing *Tinker* and the clear and present danger test, held that the administrators “had the right to nip such action in the bud and prevent it in its inception.”²⁰² In his dissent, Judge Celebrezze noted that although the language of the pamphlets distributed on the campus was “abrasive, abrupt, rude, possibly even false and

¹⁹⁴ *Id.*

¹⁹⁵ *Schenck v. United States*, 249 U.S. 47, 52 (1919).

¹⁹⁶ *Scoville*, 286 F. Supp. at 991-92.

¹⁹⁷ *Scoville v. Bd. of Ed. of Joliet Twp. High Sch. Dist.* 204, 425 F.3d 10, 12 (1970).

¹⁹⁸ *Id.* at 14.

¹⁹⁹ *Id.*

²⁰⁰ Berkman, *supra* n. 1 at 588-89 (citing *Norton v. Discipline Comm. of E. Tenn. State Univ.*, 419 F.2d 195, 204 (1969) (Celebrezze, J., dissenting)); *Jones v. State Bd. of Educ.*, 279 F. Supp. 190 (M.D. Tenn. 1968), *aff’d*, 407 F.2d 864 (6th Cir. 1969), *cert. denied*, 396 U.S. 817 (1969)).

²⁰¹ *Norton*, 419 F.2d at 198.

²⁰² *Norton*, 419 F.2d at 199.

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inflammatory” no evidence showed that the documents would incite or cause a breach of the peace by provoking the students addressed to violence.²⁰³ He reiterated that merely advocating the use of force, is insufficient to constitute a clear and present danger.²⁰⁴ Only where “such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action” can school authorities justify curtailment of speech.²⁰⁵

By contrast, in *Jones*, evidence of actual disruption was present.²⁰⁶ One of the students said to the University president, “[m]an, we didn’t come here to listen to your lies and empty promises. We came here to eliminate you and tear this joint down,” when he was leading several other students in “completely disrupting a grievance meeting held at the university . . . in the aftermath of three days of rioting at or near the University campus.”²⁰⁷

Incorporation of the “imminent disruption of compelling state interests” standard finds support in *Tinker* itself. Although the move from the “actual disruption” to a “reasonable likelihood of a substantial disruption” standard was announced in *Tinker*, it was never explained in the opinion itself. Its meaning may be derived from law clerk Martha Field’s notes to Justice Fortas. Field recommended that the Court “lay down some guidelines for how to arrive at a calculation which interests are substantial and what constitutes sufficient evidence of substantial interference with them.”²⁰⁸ She noted that courts have consistently emphasized that if speech is to be regulated, two requirements must be met. First, the danger that the state is trying to avert must be a “substantial danger.”²⁰⁹ Second, that danger must be likely to result absent the challenged regulation.²¹⁰ Citing *Barnette*²¹¹ and explaining that the school board could not enjoy unlimited deference, Field noted that “[a]lthough school boards have a wide discretion as to how the schools should be run, they do not have discretion to violate the Bill of

²⁰³ *Id.* at 207 (Celebrezze, J., dissenting) (“The record reveals no grounds from which any neutral body could reasonably determine that there existed at any time on the East Tennessee campus an actual or probable danger of eruption so as to breach the standard of *Schenck* and its progeny”).

²⁰⁴ *Id.* at 209.

²⁰⁵ *Id.* (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

²⁰⁶ *Jones v. State Bd. of Educ.*, 279 F. Supp. 190, 204 (M.D. Tenn. 1968).

²⁰⁷ *Id.*

²⁰⁸ Fortas papers, *supra* n.99, at x.

²⁰⁹ Fortas papers, *supra* n. 99. ,

²¹⁰ Fortas papers, *supra* n. 99.

²¹¹ Fortas papers, *supra* n. 9; *Barnette*, 319 U.S. 624, 637 (1943).

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Rights.”²¹² In the facts of *Tinker*, the purpose of the armbands was not to create a disorder, and there was no threat that disorder would occur.²¹³ A rule that prohibited speech without any showing that disorder was substantially likely to occur would permit school officials to hypothesize “the requisite likelihood of disorder for anything that they don’t like, for whatever reason including reasons that violate the First Amendment, and administer a highly discriminatory system.”²¹⁴ While the school board could not be deprived of all power to regulate speech,

[T]he same test of validity under the First Amendment applies in the school as anywhere else. In schools, however, unlike other places, the State does have a compelling interest in the orderly operation of the classroom. Schools can therefore regulate exercise of First Amendment rights to preserve order, in situations where other organizations could not.²¹⁵

Because there was no showing of any danger that the armbands would “interfere with the orderly conduct of school activities,” the regulation did not serve a compelling state interest.²¹⁶

True application of the *Tinker* standard should not only incorporate an analysis of imminent interference with a compelling state interest, but require a balancing of the interests in each case. In her notes, Field cautioned that regulations may be justified if schools can show that they fulfill a compelling state interest, but not if the “evil” that the school officials are trying to guard against in promulgating this regulation is the exercise of free speech itself.²¹⁷ Yet, courts are too quick to defer to the authorities of the school board, because the constitutional rights of the dissenter²¹⁸ may stir people to anger or create “inconvenience, annoyance,

²¹² Fortas papers, *supra* n. 99.

²¹³ Fortas papers, *supra* n. 99.

²¹⁴ Fortas papers, *supra* n. 99.

²¹⁵ Fortas papers, *supra* n. note 99.

²¹⁶ Fortas papers, *supra* n. 99. note 99 (comparing Learned Hand’s formula: “In each case courts must ask whether the gravity of the evil; discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.”).

²¹⁷ Fortas papers, *supra* n. note 99.

²¹⁸ *Ferrell v. Dallas Indep. Sch. Dist.*, 392 F.3d 697, 705-06. (1968).

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or unrest.”²¹⁹

“Actual government interests that motivate regulation of the speech in question and the evidence supporting the need for the restriction are to be judicially examined. This heavy burden of justification at least approximates the methodology mandated by the free speech principle.”²²⁰ Rather than formalistic judicial decision making, where courts defer to the school board and do not actually analyze the competing interests in each case, courts should employ more of an “ad hoc” balancing approach, whereby they actually identify the competing interests. “If formalism emphasizes predictability of outcome and objectivity, balancing stresses flexibility and fairness in dealing with the competing interests actually at stake in the dispute.”²²¹

B. Work and Discipline of the School

Within this balancing test, a court evaluating a student’s speech and a school speech regulation must identify the interests of the school. The concept of the “work and discipline” of the school is not stagnant, and cannot be viewed as simply maintenance of order, or at the other end of the spectrum, acceptance of all expression. In drafting regulations and policies, school administrators themselves must balance the right of the student to speak with the rights of school administrators to maintain order.²²² As Berkman noted, the majority in *Tinker* recognized that “the process of education can be more important than its content in achieving educational aims.”²²³

²¹⁹ *Id.* (citing *Dennis v. United States*, 341 U.S. 494, 509-10 (1951)).

²²⁰ C. Thomas Dienes & Annemargaret Connolly, *When Students Speak: Judicial Review in the Academic Marketplace*, 7 *YALE L. & POL’Y REV.* 343, 359 (1989) 228.

²²¹ Dienes & Connolly., *supra* n. 228note 221, at 390.

²²² *Fraser* may be taken to permit additional limits on those few classes of speech considered outside of the protection of the First Amendment: “the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words –those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” Obviously, the classes of speech outside the protection of the First Amendment entirely, are outside the protection of the First Amendment within the schoolhouse gate. However, the analysis behind the *Fraser* opinion is more relevant than a mere application of the lewd, vulgar, or plainly offensive standard.

²²³ Berkman, *supra* n. 1, at 581 (“The thesis of the *Tinker* opinion is that First Amendment rights in the classroom are actually essential to an effective educational process in a democracy rather than a source of disruption of that process”).

TOWARD A UNIFORM STANDARD FOR BALANCING
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As early as 1925, the Supreme Court held that the state has the power to regulate schools, and to require that “certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.”²²⁴ At different times in this country’s history, different purposes of the public school have been articulated. Under the umbrella of “education,” schools have been charged with not only instruction in the arts and sciences, but with instilling and maintaining obedience to authority, patriotism, civic duty, moral character, tolerance of different political and religious viewpoints, and consideration of the sensibilities of others. Justice Black’s dissent in *Tinker* revealed his view of the school as an instrument for teaching students about “discipline and disciplinary rules, and about the authority structure within that school.”²²⁵

On the other hand, for Justice Fortas, the work of the school was defined as schoolwork in addition to order.²²⁶ School administrators may protect student speech while still accomplishing the schools’ central purpose of “preparing students to function as self-governing individuals and free citizens.”²²⁷ Although *Fraser* spawned a line of cases permitting schools to ignore the speech rights of students by focusing on whether the speech contained sexual innuendo, it was that decision that broadened the parameters of the role of the school with the majority opinion’s “inculcate manners and habits of civility” language.²²⁸

²²⁴ *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534 (1925).

²²⁵ Mark Yudof, *Tinker Tailored: Good Faith, Civility, and Student Expression*, 69 St. John’s L. Rev. 365, 367 (1995). Yudof, *infra* note 227, at 367.

²²⁶ *Tinker.*, 393 U.S. at 512. See Fortas papers, *supra* n. 99, at 3 (“Finally at least in this case, I don’t think the state had any legitimate interest in prohibiting the arm bands. Of course it is true that school authorities must maintain decorum and discipline. But I think that the school authorities must bear a heavy burden before they outlaw a kind of expression which, in itself, is not at all disruptive”). See also *Tinker*, 393 U.S. at 512; Yudof, *supra* n. 226 at 367) (“School authorities fail to satisfy the substantial disruption test when: (1) the student’s speech does not interfere with, or is unlikely to interfere with, the school’s direct teaching activities; the communication from the teacher to the students or from the students back to the teacher is in a structured setting; and (3) there is no violence or threat of violence.”).

²²⁷ Dienes & Connolly, *supra* n. 220 at 345.

²²⁸ *Fraser*, 478 U.S. at 686. See also Mark Yudof, *Tinker Tailored: Good Faith*,

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School speech jurisprudence seeks to encourage students' freedom to advocate unpopular and controversial views, and maintain the state's interest in teaching students the boundaries of socially appropriate behavior.²²⁹ Students should be exposed to a variety of ideas:

The most viable approach to reconciling the problem posed by competing educational values is to assure that voices other than that of the school official will be heard. . . . What the State cannot do is censor, suppress, or exclude competing ideas, beliefs, and values, unless it can establish an overriding justification.²³⁰

CONCLUSION

Free speech is not a right that it exists in principle rather than in fact. "Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots."²³¹ Speech restrictions after *Tinker* not only prohibit speech outside of areas designated as safe havens for crackpots, but prohibit types of speech within the safety zone of the school based on that speech's content. To keep in line with the principles announced in both *Tinker* and *Fraser*, courts should require school boards to justify regulations of student speech, and weigh whether the speech at issue is in fact "reasonably likely to substantially disrupt" the work and discipline of the school.

Civility, and Student Expression, 69 St. John's L. Rev. 365, 371 (1995) ("In other words, the educational mission encompasses community and civility of discourse.").

²²⁹Yudof, *supra* n. 227 at 371, at371 (1995) ("In other words, the educational mission encompasses community and civility of discourse.").

²³⁰Dienes & Connolly, *supra* n. 220 at 384.

²³¹*Tinker*, 393 U.S. at 513.