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# A New Case, an Old Problem, a Teacher's Perspective: the Constitutional Rights of Public School Students

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# NOTES

## A New Case, an Old Problem, a Teacher's Perspective

### THE CONSTITUTIONAL RIGHTS OF PUBLIC SCHOOL STUDENTS

#### INTRODUCTION

It goes without saying that there is a great deal wrong with America's public schools. Having taught English in both urban and suburban high schools in and near the City of New York for over a decade, I have witnessed, studied, discussed, and contemplated many of these problems first-hand. In addition, having embarked upon the study of law in the fall of 2005, I have gained a whole new perspective on the operation of public schools by seeing them through the lens of legal reasoning and policy. I have come to understand why, in general, they do not function as efficiently or effectively as they should, and I have written a great deal about what is wrong and how and why the system needs to be fixed.<sup>1</sup>

One of the major drawbacks of America's high schools is that they tend to be populated by teenagers. I make that statement only half in jest; anyone who remembers his teenage years with enough distance and detachment to be objective, and anyone who has worked with teenagers in recent years, knows precisely what I mean. Teenagers may resent being called "children," but while they may look like adults and sound like adults, they neither behave nor think like adults. Typically, the law acts upon teenagers and children differently than it does upon adults because youths lack the typical adult's capacity to, for example, understand the risks and appreciate the consequences of their actions. As such, society and the law generally afford lesser rights to minors than to

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<sup>1</sup> See generally Education: In Search of Reason, <http://educationsanity.blogspot.com> (examining various current educational issues, problems, and experiences and focusing on real-world, day-to-day occurrences in schools and classrooms, viewed through the prism of legal reasoning, policy, and analysis).

adults, the most obvious examples being the right to vote, to purchase alcohol or tobacco products, or to obtain a driver's license.

I have found in my experience that teenagers have a great deal of difficulty understanding what their rights are, or more to the point, what they are not. It may perhaps be more accurate to suggest that adolescents have difficulty distinguishing that to which they have a right from that which they merely desire.<sup>2</sup> As children have garnered more and more freedom and autonomy at home, particularly in this age of single-parent households and families in which both parents are working professionals, they hear the word "No" a good deal less often than I did when I was growing up in the 1970s and 1980s. Young people who act without restraints or limitations, and without consequences, will tend to blur the distinction between what they want and what they are entitled to have or to do. Further, those who lack such restraints and limitations at home will have great difficulty accepting them in school.

When it comes to the rights of schoolchildren under the U.S. Constitution and the law, two things are clear: (1) the rights of minors are not the same as those of adults; and (2) the rights of minors while they are in school, with respect to teachers and other school officials, are not the same as the rights of minors outside of the school context.<sup>3</sup> Beyond that, very little is clear. Despite the preponderance of litigation against schools in recent decades, it is a rare event when a lawsuit filed by a student or parent against a school or a school official reaches the Supreme Court of the United States. In fact, it has happened only a handful of times since 1969, when the court famously granted First Amendment rights to public school students in *Tinker v. Des Moines Independent Community School District*.<sup>4</sup> The most recent public school free speech case to reach the High Court, *Morse v. Frederick*,<sup>5</sup> better known as the "BONG HiTS 4 JESUS case," was the first such case in nearly twenty years.<sup>6</sup> However, given the options available to the Court,<sup>7</sup> the outcome proved anticlimactic. Rather than provide a sweeping change, or even a sweeping statement, regarding the constitutional rights of public school students with respect to their schools, the Court instead

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<sup>2</sup> See *infra* Parts I.C & III.B.

<sup>3</sup> See *infra* Part I.A.

<sup>4</sup> 393 U.S. 503, 506, 514 (1969) (holding that public school students have a protected right to free expression under the First Amendment, and school officials cannot infringe upon this right without showing a reasonable forecast of substantial, material disruption); see *infra* Part I.A.; see also U.S. CONST. amend. I. ("Congress shall make no law. . . abridging the freedom of speech . . .").

<sup>5</sup> 127 S. Ct. 2618 (2007).

<sup>6</sup> When *Frederick* was decided, the last Supreme Court case on student speech rights was *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

<sup>7</sup> See generally Martha McCarthy, *Student Expression Rights: Is a New Standard on the Horizon?*, 216 ED. LAW REP. 15, 25-33 (2007) (published prior to the *Frederick* decision; speculating on several possible outcomes, including broad reinterpretation of precedent).

drew a very thick line around a very small box within the broad canvasses of First Amendment jurisprudence in general and student speech rights in particular.<sup>8</sup> The Court's limited holding permitted schools to proscribe student speech promoting the use or enjoyment of illegal drugs, but the majority declined to either overturn or strongly reaffirm the *Tinker* principle.<sup>9</sup> The case, disappointingly, brings us no closer to understanding what the difference is, or what it should be, between the free speech rights of students in school and those of everyone else, everywhere else, in America.<sup>10</sup>

This Note will argue that it is time to overturn *Tinker* and adopt a new standard for determining the rights and obligations of minor students and adult educators with respect to one another while they are in school. A constitutional standard for students' rights as against school authority is too great a burden for teachers and principals to bear and encourages young people to act recklessly instead of reasonably. As students interact directly and personally with teachers and other school personnel on an everyday basis, the principles of tort law, which typically govern private relationships and encourage socially reasonable behavior and appreciation of risk, would be a more appropriate guide.<sup>11</sup> Part I will review the Supreme Court's jurisprudence concerning the First Amendment rights of students in public schools, examine *Morse v. Frederick* to determine what effect, if any, it may have on the existing law, and propose an alternate interpretation of its facts. Part II will compare Justice Thomas' concurring opinion in *Frederick* with Justice Black's dissent in *Tinker*, in order to show that the Court should overturn *Tinker* because it upset the balance of student rights and school authority to the detriment of both. Part III will describe a class project involving the Sixth Circuit's opinion in *Blau v. Fort Thomas Public School District*<sup>12</sup> in order to further explore the issue of students' rights and school-related jurisprudence from a teacher's perspective. Part IV will briefly review three cases, decided since *Frederick*, that address school discipline for students' expression posted on the Internet. Part V will summarize and propose that the courts apply to the public schools the legal principles of private civil relationships so that all parties involved,

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<sup>8</sup> See *infra* Parts I.C & I.D.

<sup>9</sup> See *infra* Part I.B.

<sup>10</sup> See *infra* note 103 and accompanying text.

<sup>11</sup> See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 1 (5th ed. 1984). The law of tort imposes liability on individuals for their actions and forbearances which deviate from a generally accepted standard of reasonable care, resulting in harm to others. Hence, individuals in a lawful society have an obligation to act reasonably and to recognize and bear the risks that accompany their conduct. See *id.* § 31 at 169 ("The standard of conduct imposed by the law is an external one, based upon what society demands generally of its members, rather than upon the actor's personal morality or individual sense of right and wrong." An actor will be liable for negligence if he "acts unreasonably in failing to guard against a risk which he should appreciate.").

<sup>12</sup> 401 F.3d 381 (6th Cir. 2005).

students as well as teachers and principals, have incentives to act with reasonable care while they are in school.

### I. *MORSE V. FREDERICK* AND “BONG HITS 4 JESUS”

The *Frederick* case arrived at a Supreme Court that had scant jurisprudence on the topic of public-school students’ free speech rights. Despite such a rare and potentially historic opportunity, the Court merely declared that the school principal in this case had a legally valid reason to proscribe this particular student’s expression, while upholding the general principle that student expression is protected by the First Amendment.<sup>13</sup> However, a careful examination of the facts reveals that the Court, with respect to the First Amendment at least, had little choice but to hand down such a narrow ruling. Had the Court regarded the challenged action by the principal as the proscription of *conduct* rather than *expression*,<sup>14</sup> a more comprehensive, and certainly more helpful, rule might have emerged. Instead, analyzing the case under a free speech framework forced the Court to define a very specific, narrow category of expression, which it then decided not to protect. The case thus left intact the tension and confusion surrounding the balance of students’ rights and school authority which continues to handicap America’s public schools. It enables students to continue flouting and defying school authority by characterizing conduct, which would be unacceptable and unjustifiable in any other context, as protected expression.

#### A. *The “Tinker Trilogy”—A Long Time Ago in a Supreme Court Far, Far Away . . .*

The Supreme Court’s struggle with how to balance the free speech rights of public-school students with the authority of their teachers and principals began nearly forty years ago. However, only three times between 1969 and 2006 did the Court visit the issue. No discussion of a new Supreme Court decision concerning public school students’ free speech rights could begin or be complete without a brief summary and review of the so-called “*Tinker* trilogy.”<sup>15</sup> Together they

<sup>13</sup> *Morse v. Frederick*, 127 S. Ct. 2618, 2622 (2007).

<sup>14</sup> See *Spence v. Washington*, 418 U.S. 405, 410-11 (1974) (Expression implies “[a]n intent to convey a particularized message . . . , and [that] in the surrounding circumstances the likelihood [is] great that the message [will] be understood by those who view[] it.”); *United States v. O’Brien*, 391 U.S. 367, 376 (1968) (“We cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea. . . . [W]hen ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.”); see also *infra* note 158.

<sup>15</sup> See, e.g., Jerry C. Chiang, Comment, *Plainly Offensive Babel: An Analytical Framework for Regulating Plainly Offensive Speech in Public Schools*, 82 WASH. L. REV. 403, 407-14 (2007); Jonathan Pyle, Comment, *Speech in Public Schools: Different Context or Different*

have formed the framework which, until and including the *Frederick* decision, has guided lower federal courts in their decisions concerning the constitutional free speech rights of public school children when they are in school vis-à-vis their teachers, school administrators, and school boards.

The seminal case is *Tinker v. Des Moines Independent Community School District*.<sup>16</sup> This case established that public-school students do enjoy constitutional protection of their right to free speech and expression in school, as against teachers and other school personnel.<sup>17</sup> As the Court noted, only a “substantial disruption” of the school environment could justify a school’s curtailing students’ free speech rights by rulemaking or disciplinary action.<sup>18</sup> In his majority opinion, Justice Fortas famously commented, “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>19</sup> He went on to add, “[s]chool officials do not possess absolute authority over their students . . . . In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.”<sup>20</sup> Therefore, absent a showing that a substantial, material disruption had occurred or would occur, school officials could no longer prevent students from, or punish students for, expressing their opinions in school.<sup>21</sup> This standard has been the guidepost for determining public school students’ free speech rights for nearly four decades.

Seventeen years later the next case in the trilogy, *Bethel School District No. 403 v. Fraser*,<sup>22</sup> created an exception to the *Tinker* rule:

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*Rights?*, 4 U. PA. J. CONST. L. 586, 595-97 (2002); Katherine Say, Comment, *Differing Viewpoints Under the First Amendment: Students Versus School Authorities*, 28 OKLA. CITY U. L. REV. 905, 909-12 (2003); Brett Thompson, Comment, *Student Speech Rights in the Modern Era*, 57 MERCER L. REV. 857, 859 (2006).

<sup>16</sup> 393 U.S. 503 (1969). In 1965, a group of students attending high school in Des Moines, Iowa were suspended for wearing black armbands to school in an expression of protest against the Vietnam War, and in defiance of a school policy forbidding such action. *Tinker*, 393 U.S. at 504. The school wanted to avoid the controversy and potential disruption that accompanied the U.S.’s rapidly-increasing involvement in that escalating conflict. *Id.* at 510.

<sup>17</sup> *Tinker*, 393 U.S. at 511. The Court described the wearing of the armbands as involving “direct, primary First Amendment rights akin to ‘pure speech’ . . . unaccompanied by any disorder or disturbance on the part of petitioners.” *Id.* at 508.

<sup>18</sup> *Id.* at 514. As the protest was “a silent, passive expression of opinion,” *id.* at 508, and there was no “substantial disruption” of or interference with the operation of the school, the school’s interest could not outweigh the students’ First Amendment rights to free expression of this particular political opinion. *Id.* at 514.

<sup>19</sup> *Id.* at 506.

<sup>20</sup> *Id.* at 511.

<sup>21</sup> *Id.* at 514. The Court did not clearly define what a “substantial disruption” would be, but noted the absence of “disturbances or disorders on the school premises,” “interference with work,” or “interrupt[ion of] school activities” in the instant case. *Id.*

<sup>22</sup> 478 U.S. 675 (1986). In April 1983, a student got up in front of the assembled student body at Bethel High School in Pierce County, Washington, to give a speech supporting the election of a fellow student to a student-government office. *Id.* at 677. The speech, which the student delivered despite being warned by two of his teachers not to do so because of its content, contained a

speech that is “plainly offensive” is not protected.<sup>23</sup> According to Chief Justice Burger, “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.”<sup>24</sup> The school in this case was justified in punishing the plaintiff student’s highly inappropriate expression after the fact.<sup>25</sup> Then, eighteen months after *Fraser* and nineteen years after *Tinker*, the Supreme Court in *Hazelwood School District v. Kuhlmeier*<sup>26</sup> discovered one more “constitutionally valid reason[.]”<sup>27</sup> to suppress student speech: when it constitutes “school-sponsored” speech and suppression thereof is consistent with “legitimate pedagogical concerns.”<sup>28</sup> By virtue of its publication in a school-sponsored forum, the expression in question was directly attributable to the school itself; the school thus had the right, indeed the prerogative, to control its content.<sup>29</sup>

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series of “elaborate, graphic, and explicit sexual metaphor[s].” *Id.* at 678. The speech described the student-candidate as

a man who is firm—he’s firm in his pants, he’s firm in his shirt, his character is firm . . . a man who takes his point and pounds it in . . . he’ll take an issue and nail it to the wall . . . he drives hard, pushing and pushing until finally—he succeeds . . . a man who will go to the very end—even the climax . . . he’ll never come between you and the best our high school can be.

*Id.* at 687 (Brennan, J., concurring). The speaker was suspended for three days and removed from consideration for graduation speaker. *Id.* at 678.

<sup>23</sup> *Fraser*, 478 U.S. at 683. In this case, the Court upheld the school’s decision: “[I]t was perfectly appropriate for the school . . . to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the fundamental values of public education.” *Id.* at 686-87 (internal quotation marks omitted).

<sup>24</sup> *Id.* at 682 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 340-42 (1985)) (“It does not follow . . . that simply because the use of an offensive form of expression may not be prohibited to adults making . . . a political point, the same latitude must be permitted to children in a public school.”).

<sup>25</sup> Burger called *Fraser*’s speech “plainly offensive to both teachers and students—indeed to any mature person.” *Id.* at 683. “The First Amendment does not prevent the school officials from determining that to permit [such speech] would undermine the school’s basic educational mission.” *Id.* at 685.

<sup>26</sup> 484 U.S. 260 (1988). Robert Eugene Reynolds, principal of Hazelwood East High School, unilaterally removed two articles from the May 13, 1983 issue of the school’s newspaper, *Spectrum*. *Id.* at 263-64. The articles contained interviews with unnamed students on the issues of teen pregnancy and divorce. Mr. Reynolds was concerned that students referenced in the former article could nonetheless be identified, and that the parents of the unnamed student referenced in the latter should have an opportunity to respond to its content or withhold consent to its publication. *Id.* at 263. With no time to make the changes he felt were needed, and the only other option being to produce no newspaper at all, Reynolds decided to publish the abbreviated version without the two pages containing the controversial articles. *Id.* at 263-64.

<sup>27</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

<sup>28</sup> *Kuhlmeier*, 484 U.S. at 273. The Court found that *Spectrum*, being the school’s official newspaper, was something that “members of the public might reasonably perceive to bear the imprimatur of the school.” *Id.* at 271. Therefore, the *Tinker* standard did not apply. *Id.* at 272-73 (“[T]he standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression.”).

<sup>29</sup> *Id.* at 272-73. Writing for the majority, Justice White opined that “educators do not offend the First Amendment by exercising editorial control over . . . school-sponsored expressive

Thus, when the Supreme Court granted certiorari to the U.S. Court of Appeals for the Ninth Circuit in *Frederick v. Morse* on December 1, 2006,<sup>30</sup> the state of the law was that students enjoyed strong First Amendment protection in school with respect to their adult educators, except in a few specific, limited types of circumstances. Those adults still bore the burden of proving a “substantial disruption” in order to justify any limits upon, or disciplinary sanctions for, student expression.

*B. The Frederick Case—Olympic Dream Becomes School Nightmare*

*Morse v. Frederick* added another small exception to the *Tinker* rule but, like *Fraser* and *Kuhlmeier*, it did not undermine or repudiate its central premise. On January 24, 2002, Principal Deborah Morse of Juneau-Douglas High School in Juneau, Alaska, knowing that the Olympic torch relay would be passing by the school building, arranged to have a number of students gather by the road to watch.<sup>31</sup> The event took place under the supervision of Principal Morse and her teachers and was recorded by television cameras.<sup>32</sup> Meanwhile, 18-year-old Joseph Frederick, arriving late to school that day, stood across the road from the school with a group of friends and, in anticipation of the media coverage, unfurled a 14-foot banner reading “BONG HiTS 4 JESUS” where the TV cameras and the assembled student body could plainly see it.<sup>33</sup> Finding the message rather inappropriate for the occasion, Ms. Morse instructed the students to take the banner down.<sup>34</sup> All but Mr. Frederick complied.<sup>35</sup> As a result, Ms. Morse suspended Mr. Frederick from school for ten days.<sup>36</sup> An administrative appeal upheld the suspension but reduced it to the eight days he had already served.<sup>37</sup> Mr. Frederick then took the matter to federal court in the District of Alaska, claiming a violation of his First Amendment right to free speech and seeking damages.<sup>38</sup> The District Court found in favor of the principal, but the Ninth Circuit Court of Appeals reversed.<sup>39</sup> The U.S. Supreme Court granted certiorari on two questions: (1) whether Mr. Frederick’s display

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activities, so long as their actions are reasonably related to legitimate pedagogical concerns.” *Id.* at 273.

<sup>30</sup> *Frederick v. Morse*, 439 F.3d 1114 (9th Cir. 2006), *cert. granted*, 127 S. Ct. 722 (2006).

<sup>31</sup> *Morse v. Frederick*, 127 S. Ct. 2618, 2622 (2007).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 2623.

<sup>38</sup> *Id.*; *see also* U.S. CONST. amend. I; 42 U.S.C. § 1983 (1996) (creating a private right of action for constitutional and civil rights violations by government actors).

<sup>39</sup> *Frederick*, 127 S. Ct. at 2623.



of the banner was worthy of First Amendment protection; and (2) whether Ms. Morse was liable for damages for infringing upon that right.<sup>40</sup>

The case represented the Supreme Court's first opportunity since *Kuhlmeier* in 1988, and only its third since *Tinker* in 1969, to define the scope of free speech rights for public school students in the school context.<sup>41</sup> Such rights are limited by the fact that these are *children in school*, subject to school rules made by school officials for school purposes, not citizens at large subject to general statutory laws passed by duly-elected legislators for the general welfare.<sup>42</sup> While this distinction is important, the paradigm as described here, and as established in the "*Tinker* trilogy," is somewhat vague and unhelpful in defining the precise distinction between the rights of the former and those of the latter.<sup>43</sup> Indeed, neither *Fraser* nor *Kuhlmeier* significantly altered the law of *Tinker*; those cases merely carved out exceptions to the general rule.<sup>44</sup>

The Court in a very narrowly-drawn and hardly momentous decision held for the principal and the school district.<sup>45</sup> The banner was not, according to Chief Justice Roberts' majority opinion, worthy of First Amendment protection; therefore, the Court did not reach the questions of damages or qualified immunity.<sup>46</sup> Rejecting the student's claim that he was off campus and not actually "in school," and therefore not subject to the principal's instructions or disciplinary measures, the Court found that this event was clearly a school function.<sup>47</sup> Although not directly analogous to the school-sponsored newspaper in *Kuhlmeier*, the event was nonetheless within the authority of the principal to monitor and control.<sup>48</sup> The Court further ruled that the message "BONG HiTS 4 JESUS" could be reasonably interpreted as promoting and/or celebrating illegal drug use,<sup>49</sup> in contravention of the school's anti-drug policy message as well as Congress' mandate that schools educate children on the dangers of illegal drugs.<sup>50</sup> In short, Mr. Frederick did not have a

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<sup>40</sup> *Id.* at 2624.

<sup>41</sup> See McCarthy, *supra* note 7, at 15.

<sup>42</sup> See *infra* Part I.D.

<sup>43</sup> See Chiang, *supra* note 15, at 404; Pyle, *supra* note 15, at 589.

<sup>44</sup> See *supra* Part I.A.

<sup>45</sup> *Frederick*, 127 S. Ct. at 2629.

<sup>46</sup> *Id.* at 2624.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 2627 (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988)).

<sup>49</sup> This despite the student's contention that the message was naught but meaningless gibberish, intended only to attract the attention of television cameras. *Frederick*, 127 S. Ct. at 2624-25. This seems not only dubious but foolishly self-defeating; how, after all, could young Mr. Frederick be claiming his free speech rights were suppressed when, according to him, he wasn't saying anything at all? See *infra* Part I.C.

<sup>50</sup> See 20 U.S.C. § 7114(d)(6) (Supp. V 2005) (requiring drug prevention programs in public schools receiving federal funds to "convey a clear and consistent message that acts of violence and the illegal use of drugs are wrong and harmful").

constitutional right to display the banner at a school event, nor to refuse to comply with Ms. Morse's instruction to take it down.

Instead of a comprehensive and objective definition of the free speech rights of students, or a meaningful distinction with those of citizens at large, the Court merely carved out a new, particularized exception to *Tinker*. The Court and lower federal courts have consistently held that while students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,”<sup>51</sup> “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings,”<sup>52</sup> and they “must be ‘applied in light of the special characteristics of the school environment.’”<sup>53</sup> These basic principles, repeated over and over in judicial and scholarly writings on the subject,<sup>54</sup> and dutifully recited by Chief Justice Roberts in the majority opinion in *Frederick*,<sup>55</sup> provide very little constructive or practical guidance in establishing a clear legal standard for students' rights in schools. Neither, ultimately, does the *Frederick* decision. The case did not strongly reaffirm nor overturn nor challenge any of the Court's prior holdings on this topic; indeed, it falls well within the boundaries of the principles quoted above.

The “*Tinker* trilogy” established three essential tests for the regulation of student speech by public schools: the “substantial disruption” test of *Tinker*;<sup>56</sup> the “plainly offensive” test of *Fraser*;<sup>57</sup> and the “school-sponsored speech” test of *Kuhlmeier*.<sup>58</sup> While the “BONG HiTS 4 JESUS” banner was not held to be “plainly offensive,” it was nonetheless not protected because it suggested or promoted illegal drug activity. The Court thus appears to have carved out a new, specific category of non-protected student speech within *Fraser*'s broader principle that students' constitutional rights are not analogous to those of adults<sup>59</sup> and the “special characteristics of the school environment” pointed out by *Tinker*.<sup>60</sup> The case also brings the off-campus “school function” within the authority of school officials, adding to the *Kuhlmeier* principle of “school-sponsored speech.”<sup>61</sup> Arguably, the *Frederick* rule is that a school may prohibit student expression at a

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<sup>51</sup> *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969).

<sup>52</sup> *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986).

<sup>53</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (quoting *Tinker*, 393 U.S. at 506).

<sup>54</sup> See *supra* note 15.

<sup>55</sup> *Morse v. Frederick*, 127 S. Ct. 2618, 2622 (2007).

<sup>56</sup> *Tinker*, 393 U.S. at 514.

<sup>57</sup> *Fraser*, 478 U.S. at 683.

<sup>58</sup> *Kuhlmeier*, 484 U.S. at 273.

<sup>59</sup> *Frederick*, 127 S. Ct. at 2626-27 (quoting *Fraser*, 478 U.S. at 682).

<sup>60</sup> *Id.* (quoting *Tinker*, 393 U.S. at 506).

<sup>61</sup> *Id.* at 2627.

school function if that expression promotes the use and/or enjoyment of illegal drugs.<sup>62</sup>

C. *Examining Frederick's Claim from a Teacher's Perspective: Freedom of Speech, or Something Else?*

Although Mr. Frederick sued Ms. Morse on free speech grounds, the facts of the case indicate that he was actually sanctioned for conduct, not expression. Conduct in and of itself is not protected by the First Amendment; even expressive conduct enjoys less protection than pure speech.<sup>63</sup> Mr. Frederick sought the heightened protection of free speech but paradoxically claimed that his banner had no communicative or expressive meaning. Even if free speech was merely a post-hoc justification manufactured by Mr. Frederick or his lawyers, it is important to consider just what his original intentions were, why he did it, and whether he considered the risks beforehand.

At first glance, the question of whether the phrase “BONG HiTS 4 JESUS” is worthy of First Amendment protection necessarily raises the question: What is it supposed to mean? Since the First Amendment prohibits the government from making it illegal to say any particular thing or express any particular idea,<sup>64</sup> with certain exceptions, what is the thing that “BONG HiTS 4 JESUS” *says*? Ms. Morse believed, and the Court agreed, that the phrase “BONG HiTS” was a reference to a particular and well-known method of smoking marijuana.<sup>65</sup> As the school’s policy was and remains to discourage and condemn recreational, illegal drug use among students, Morse wanted neither the students nor the television cameras to see this message, which could be taken to imply that the school (and, for that matter, the community) condoned such drug use.<sup>66</sup> As the Court pointed out, there is essentially no alternative meaning of the phrase “BONG HiTS;” it cannot reasonably be construed to refer to anything else.<sup>67</sup> The drug reference was, in short, “undeniable.”<sup>68</sup>

Mr. Frederick, for his part, claimed that the words had *no meaning at all*; that he merely intended to draw attention to himself and

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<sup>62</sup> *Id.* at 2629.

<sup>63</sup> See *Texas v. Johnson*, 491 U.S. 397, 406 (1989) (citing *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Dallas v. Stanglin*, 490 U.S. 19, 25 (1989)) (“The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word.”); see also *supra* note 14.

<sup>64</sup> “Congress shall make no law . . . abridging the freedom of speech . . .” U.S. CONST. amend. I.

<sup>65</sup> *Frederick*, 127 S. Ct. at 2624-25.

<sup>66</sup> *Id.* at 2622-23.

<sup>67</sup> *Id.* at 2625.

<sup>68</sup> *Id.*

get on television.<sup>69</sup> This contention is curious, as it only weakens his First Amendment argument. How can speech or the expression of an idea be worthy of constitutional protection if it does not actually say or express anything at all?<sup>70</sup> Had the banner been intended to express a political position, such as one advocating the legalization of marijuana,<sup>71</sup> or a religious affiliation,<sup>72</sup> or even an unfavorable opinion of his school,<sup>73</sup> it would certainly have fallen within the type of speech which the First Amendment protects and would have been much more difficult to suppress, even for school officials.<sup>74</sup> The fact that Frederick did not make any such claim, and instead claimed to have been saying *absolutely nothing*, suggests that his complaint, and this case, was not actually about free speech. It is not what he was prevented from *saying*, but rather what he was prevented from (and punished for) *doing*, which appears to be the real issue.<sup>75</sup>

Even though Mr. Frederick was the complaining party in this case, it would be instructive to look at his own conduct to illustrate the implications of his claim. Assuming he is sincere in his contention that he only wanted to draw the attention of television cameras and had no intention to express any opinion or idea about cannabis use, he could have attracted the cameras' view in any number of ways, or with any number of messages inscribed on a fourteen-foot banner. In creating this supposedly nonsensical gibberish phrase, he managed to conjure up not one but *two* socio-political issues: drugs and religion. These issues are not only highly topical and controversial, they are also both inextricably tied in some way to public schools. Apparently, Mr. Frederick hoped to get on television by unveiling a message, which could reasonably be interpreted as both pro-drug and pro-religion, at a *public school*, which is

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<sup>69</sup> *Id.* at 2624 (quoting *Frederick v. Morse*, 439 F.3d 1114, 1117-18 (9th Cir. 2006)).

<sup>70</sup> *See infra* Part III.B.

<sup>71</sup> The Court did not bother to draw a line between speech advocating the use and/or enjoyment of marijuana on the one hand, and the legalization or decriminalization of it on the other. Both *Morse* and the Court imputed the former meaning to the phrase, and since Frederick did not claim the latter, there is no discussion in the majority opinion of whether such an expression would be protected. *See Frederick*, 127 S. Ct. at 2624-25. Justice Breyer suggested that it would: "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 use." *Id.* at 2639 (Breyer, J., concurring in part and dissenting in part) (emphasis in original).

<sup>72</sup> The Court never addressed the meaning, or any constitutional implications, of the "4 JESUS" portion of the banner. Only Justice Stevens in his dissent contended that the majority's rule would sweep the phrase within its ambit despite its potential construction as a "protected religious message" if "BONG HiTS" were replaced with, for example, "WINE SiPS." *Id.* at 2650 (Stevens, J., dissenting).

<sup>73</sup> *Cf. Baxter v. Vigo County Sch. Corp.*, 26 F.3d 728, 737-38 (7th Cir. 1994) (wearing a t-shirt bearing the slogan "I Hate Lost Creek" (the school's name) *could* be protected by the First Amendment, but the speech was not protected in this case because the complainant was in grammar school and no such right respecting elementary school students had been clearly established), *superseded by statute on other grounds*, Property Tax Levy for County Welfare and Welfare Administration Funds Prohibited, IND. CODE § 12-19-1-21 (2000).

<sup>74</sup> *Frederick*, 127 S. Ct. at 2649-50 (Stevens, J., dissenting).

<sup>75</sup> *See infra* note 158 and accompanying text.

required by law to be against illegal drug use and irreligious.<sup>76</sup> When this desire was thwarted by the school principal, and he was punished for refusing to obey her instruction, he took this reprimand, as many teenagers do, as the violation of a right. But this was not an assertion of his right to express a pro-drug or religious viewpoint, or even to “express” meaningless gibberish. It was an assertion of his right to *do* whatever he wanted to *do*; his right to *refuse* to follow the instructions and respect the authority of his high school principal. In short, this dispute was about *conduct*, not *expression*.<sup>77</sup>

It is difficult to believe that Mr. Frederick made the sign without knowing what “BONG HiTS” meant. It is equally difficult to believe that he would choose that phrase for any reason other than that meaning, or that he would not expect it to upset Ms. Morse or other school officials present. In other words, he must have known that the banner would possibly, if not probably, get him into trouble. That means he should have recognized the *risk* he would have to take by inscribing “BONG HiTS” on the banner, bringing it to the event and displaying it as he did. He may very well have felt that the chance to be seen on television was worth the risk.<sup>78</sup> Unfortunately for him, he lost, but instead of accepting the outcome as a natural result of having taken such a calculated risk, he complained of it as a violation of his rights. This result does not mean that students cannot or should not ever challenge school officials for violations of constitutional or civil rights,<sup>79</sup> but Mr. Frederick’s case is not one in which there is a valid constitutional or civil rights claim.

Notably, neither the words themselves, nor Mr. Frederick’s display thereof actually led to his suspension. Rather, his refusal to follow Ms. Morse’s instruction to take it down led to the disciplinary action.<sup>80</sup> In creating the banner, Mr. Frederick did something which he must have known had at least the potential to get him into trouble with school officials; then, when it did, he compounded the risk by refusing to

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<sup>76</sup> See 20 U.S.C. § 7114(d)(6) (Supp. V 2005); *Engel v. Vitale*, 370 U.S. 421 (1962) (mandatory prayer in public schools is unconstitutional); see also U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion . . .”).

<sup>77</sup> See *infra* Part III.B.

<sup>78</sup> An additional variable in his calculation may have been a sincere belief that he was indeed off-campus and not subject to the authority of school officials. This rationale was rejected by every authority which reviewed this case, from the Juneau School District Superintendent all the way up to the Supreme Court. See *Frederick*, 127 S. Ct. at 2623-24. Not even the dissenting opinions in *Frederick* argued that Mr. Frederick’s actions were beyond the scope of Ms. Morse’s authority because he was technically not in school. See *id.* at 2638-43 (Breyer, J., dissenting); *id.* at 2643-51 (Stevens, J., dissenting). Regardless, as a practical matter this should be taken as part of Frederick’s calculus of risk rather than a holistic justification for his actions.

<sup>79</sup> See Pyle, *supra* note 15, at 591 (“[S]tudents deserve to be taken seriously when they assert rights against school authority.”).

<sup>80</sup> *Frederick*, 127 S. Ct. at 2642-43 (Breyer, J., dissenting) (noting school superintendent’s determination that Mr. Frederick’s acts “independent of [his] speech,” including “disregard of a school official’s instruction,” as well as “defiant [and] disruptive behavior” and “belligerent attitude,” would by themselves justify the suspension).

comply with their instructions.<sup>81</sup> The fact that he could not accept the consequences indicates that he could not have accepted nor appreciated, nor perhaps even perceived, the risk.<sup>82</sup> The implication, therefore, is that Mr. Frederick believed, whether consciously or unconsciously, that his actions carried *no risk at all*. They were at best pointless, at worst offensive,<sup>83</sup> at best *negligent*, at worst *reckless*.<sup>84</sup>

#### D. *Why Is This Even a Constitutional Question?*

All this discussion of risk, negligence, and recklessness may seem to turn what began as a constitutional analysis into a tort analysis, which reinforces this Note's contention that the facts in this case do not, for practical purposes, raise a First Amendment issue. As pointed out by Justice Alito in his concurrence, the constitutional question only arises because public schools are state agencies, and school officials therefore stand in the shoes of the government; they are not "private, nongovernmental actors standing *in loco parentis*."<sup>85</sup> In no other context would Mr. Frederick have had a valid cause of action against Ms. Morse under these facts. If Ms. Morse had been, for example, Mr. Frederick's employer instead of his high school principal, or the owner of private property on which he displayed the banner, her authority would not have been in question.<sup>86</sup> Yet public school students are not treated as private

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<sup>81</sup> *Frederick*, 127 S. Ct. at 2622.

<sup>82</sup> See KEETON, *supra* note 11, § 31 at 169 ("In negligence, the actor does not desire to bring about the consequences which follow, nor does he know that they are substantially certain to occur, or believe that they will. There is merely a risk of such consequences, sufficiently great to lead a reasonable person in his position to anticipate them, and to guard against them.")

<sup>83</sup> Even the dissenting justices in *Frederick* were less than charitable with respect to Mr. Frederick's alleged "expression." Justice Breyer, who argued that the court should decide the case based on qualified immunity and not reach the First Amendment question, characterized it as either "irrelevant or inappropriate." *Frederick*, 127 S. Ct. at 2639 (Breyer, J., dissenting). Justice Stevens, who disagreed with the majority's First Amendment analysis but agreed that the principal should not be held liable, nonetheless referred to the message in words ranging from "nonsense," *Frederick*, 127 S. Ct. at 2644 (Stevens, J., dissenting), to "ridiculous," *id.* at 2646, and "stupid." *Id.* at 2650.

<sup>84</sup> See KEETON, *supra* note 11, § 34 at 213 (Conduct may be considered reckless when "the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences.") (internal citations omitted).

<sup>85</sup> *Frederick*, 127 S. Ct. at 2637-38 (Alito, J., concurring). *In loco parentis* is Latin for "in place of the parent." BLACK'S LAW DICTIONARY 803 (8th ed. 2004). It means essentially that teachers and other school officials act in the parents' stead when children are in their care and the parents are absent. See *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995). Educational institutions and officials are generally authorized to act in the best interests of students as they see fit, although the Court's jurisprudence in *Tinker et seq.* has limited that authority. See *supra* Part I.A; see also *infra* Part II.A.

<sup>86</sup> Neither, of course, would Mr. Frederick's right to display the banner have been in question had he unveiled it in any public place other than his school. See *Frederick*, 127 S. Ct. at 2643 (Stevens, J., dissenting) ("[T]he message on Frederick's banner . . . unquestionably would have

employees, or even government employees, in the school setting.<sup>87</sup> Even though the law has clearly established that students' rights in school are not the same as those of adults in other settings and has acknowledged the need for schools to have rules and exercise their authority to enforce them, it still essentially treats students as private citizens and school officials as government actors. As a result, students like Mr. Frederick can, and often do, use the First Amendment not as a shield against government overreach into free expression, but as a sword to justify conduct which would not be justifiable in any other context.

In any challenge to a school rule or disciplinary action, there will always be tension between students' rights and school authority.<sup>88</sup> The ultimate determination is a fact-specific inquiry; which side prevails will necessarily depend on which interest is more important in that particular context. However, the disconnect between on the one hand Ms. Morse's interpretation of the message and her reasons for ordering the banner taken down and, on the other hand, Mr. Frederick's intentions with respect to the phrase itself and the act of displaying it, is inescapable.<sup>89</sup> Ms. Morse took it as a pro-drug message, which she felt was inappropriate for a school event. Had Mr. Frederick intended it as such, this would have been a clear-cut case of a school official punishing a student for expressing his views. However, he denied that he intended to express a pro-drug message, or for that matter any other communicable idea. Therefore his reasons for displaying it are unconnected to Ms. Morse's reasons for suppressing it. It is difficult to balance interests where the two sides of the scale are so incongruous. If this is not truly a free speech claim, but rather has been characterized as one by a claimant attempting to justify otherwise unjustifiable conduct, then any First Amendment analysis must necessarily have only a narrow, limited result. Therefore, the facts in *Frederick* are ultimately unhelpful in developing a clear standard for what effect the "special characteristics of the school setting" will have on students' First Amendment rights, or other constitutional rights, as a general matter.

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been [protected] had the banner been unfurled elsewhere."). *But see supra* note 78 and accompanying text.

<sup>87</sup> In many ways, it seems reasonable to treat high school students as government employees for the purposes of defining their obligations with respect to school rules, regulations, and standards, as well as the constitutional limitations thereon. Students are required to attend school and are subject to agency regulations just as employees are. They have supervisors who give them assignments and responsibilities and then evaluate their performance. The "salary" they earn for their work takes the form of academic grades, awards, and promotion. As the school-student interaction is *sui generis* among legal relationships, the closest and most practical analogue seems to be that of employer-employee. However, the courts cannot treat them that way due to the schools' inalterable status as government actors. *See also* Education: In Search of Reason, <http://educationsanity.blogspot.com/2007/06/whos-who-in-public-schools.html> (June 3, 2007, 10:23 EST).

<sup>88</sup> *See Say, supra* note 15, at 905-06.

<sup>89</sup> *See supra* Part I.C.

The “special characteristics of the school setting” must include the fact that the exercise of school authority by teachers and principals upon students while they are in school is not analogous to the exercise of government authority by legislators, elected officials, and law enforcement agents upon citizens at large. Schools can make rules with respect to students in school that governments cannot make with respect to citizens generally.<sup>90</sup> Neither can school rules apply to the citizenry at large, students included, beyond the walls and context of school. Most importantly, however, students interact directly and personally with teachers and other school officials, and vice-versa, on an everyday basis. This interaction forms an entirely unique societal and legal relationship, *sui generis*, in that it is a public interaction which functions, for all practical purposes, like a private one. The application of a constitutional test, therefore, places an unreasonable burden on teachers and other adults who work with students in public schools. The standard shifts the entire burden, all of the legal duties, and obligations, to school personnel, and concomitantly shifts all of the legal rights and entitlements to students. No legal relationship, where there exists substantial personal interaction between the parties, can function efficiently where one party bears all of the duties and the other party bears all of the rights. Legal relationships between private individuals are typically governed by tort and contract law, which distribute duties and entitlements in such a way as to encourage reasonable, efficient behavior on all sides.<sup>91</sup>

## II. THE CASE AGAINST *TINKER*

The idea that public-school students have the right to freely express themselves in school in defiance of school authority is not without its detractors, and not just among teachers. In fact, had Justice Thomas had his way, the *Frederick* case would have eliminated those rights altogether. Even in *Tinker*, a case decided in 1969 under very different social conditions, the dissenting Justices expressed grave reservations about upsetting the balance of school authority and the rights of students to weigh so heavily in favor of the latter. If we may observe that adolescents like Mr. Frederick tend not to appreciate the risks associated with exercising their “rights,” whether real or perceived, holding the schools to a constitutional standard does not help us to teach

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<sup>90</sup> For example, a state government could not criminalize chewing gum nor the wearing of baseball caps indoors. Unlike bans on smoking in public gathering places, cell phone use while driving, and cooking with trans fats by restaurants, all of which concern public health and/or safety, it would be difficult to show a rational basis, let alone a compelling government interest, in banning chewing gum or baseball caps. Yet these are ubiquitous, standard regulations in almost every school.

<sup>91</sup> See *supra* note 11; see also KEETON, *supra* note 11, § 53 at 356 (defining duty as “an obligation . . . to conform to a particular standard of conduct toward another”), § 92 at 655-56 (distinguishing tort obligations, which are “obligations . . . imposed by law,” from contract obligations which are created by an exchange of promises between individual parties).



or encourage young people to act *reasonably*. The dissenting justices in *Tinker* presciently recognized the perils of empowering minor students to defy their teachers' authority in the name of free speech. The Court in *Frederick* should have heeded their advice.

A. *Justice Thomas: Freedom of Speech Does Not Apply to Schoolchildren*

While his brethren, both concurring and dissenting, struggled with the First Amendment question raised by the facts in *Frederick*, Justice Thomas in his concurring opinion cast aside the need for a First Amendment analysis altogether.<sup>92</sup> He contended that students do not have free speech rights in school at all because the Constitution never intended such a thing.<sup>93</sup> Pointing to the traditions of American public education, in which “teachers taught, and students listened,”<sup>94</sup> as well as the court’s pre-*Tinker* jurisprudence upholding the schools’ authority to regulate student conduct (including speech) and effect discipline, Thomas embraced the *in loco parentis* doctrine rejected by Justice Alito.<sup>95</sup> He also criticized *Tinker* not only for “ignor[ing] the history of public education,” but in doing so for leaving subsequent courts to merely “create ad hoc exceptions to its central premise.”<sup>96</sup> Characterizing *Frederick*’s conduct as mere “impertinence,” he asserted that constitutional protection for such conduct would be “farcical.”<sup>97</sup> Given the opportunity, Thomas wrote, he would overturn *Tinker*.<sup>98</sup>

Thomas relied heavily, and essentially based his concept of the “special characteristics of the school setting,” on the rise and development of public education and related jurisprudence in the nineteenth century.<sup>99</sup> At that time, schools stood *in loco parentis*, substituting themselves for the parents in their duty to raise their children to become “useful and virtuous members of society[, a] duty [that] cannot be effectually performed without the ability to command

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<sup>92</sup> *Frederick*, 127 S. Ct. at 2630 (Thomas, J., concurring).

<sup>93</sup> *Id.* (“The standard set forth in *Tinker* . . . is without basis in the Constitution.”) (internal citation omitted). Further, Thomas argues, “it cannot seriously be suggested that the First Amendment ‘freedom of speech’ encompasses a student’s right to speak in public schools.” *Id.* at 2634.

<sup>94</sup> *Id.* at 2631.

<sup>95</sup> *Id.* at 2632-33; *see supra* note 85 and accompanying text.

<sup>96</sup> *Frederick*, 127 S. Ct. at 2636 (Thomas, J., concurring).

<sup>97</sup> *Id.* As a teacher, I might add the word “reckless” to Justice Thomas’ characterization of Mr. *Frederick*’s conduct. As noted above, Mr. *Frederick* apparently acted either without regard to the risks attendant to his actions, or lacking a perception that there was any risk at all. *See supra* note 84. I might also find it “farcical” that the courts, the schools, or anyone else would want to encourage teenagers to act recklessly.

<sup>98</sup> *Id.*; *see also* Stanley Fish, *Clarence Thomas is Right*, N.Y. TIMES, July 8, 2007, available at <http://fish.blogs.nytimes.com/2007/07/08/clarence-thomas-is-right/>.

<sup>99</sup> *Frederick*, 127 S. Ct. at 2630 (Thomas, J., concurring).

obedience, to control stubbornness, to quicken diligence, and to reform bad habits . . . .”<sup>100</sup> School rules, regulations, and disciplinary sanctions, including those pertaining to student speech, were nearly always upheld, except in isolated cases of excessive physical punishment or other excessively harsh sanctions, and in such cases only the punishment was struck down, not the underlying rule or restriction.<sup>101</sup> Given this history, Thomas wrote, the decision in *Tinker* represented a wholesale change in the judiciary’s approach to public schools, one wholly inconsistent with both the traditional understanding of the role and function of schools in American society and that of the courts in relation thereto.<sup>102</sup> He noted that subsequent cases distanced themselves from *Tinker*, perhaps in tacit acknowledgment of its historical inconsistency and impracticability, but that neither those cases nor the one at bar managed to “overrule it nor offer an explanation of when it operates and when it does not.”<sup>103</sup>

Despite his seemingly radical position, Justice Thomas did not seem to advocate totalitarian schools, nor did he mean to suggest that students should be forbidden from expressing their views and ideas in school. Certainly, modern education has evolved beyond the nineteenth century paradigm.<sup>104</sup> As a teacher of English Language Arts, my entire curriculum revolves around encouraging students to explore, express, share, and develop original ideas about the literature they read and its relation to the world around them; the rote-learning model of the 1800s would be both impractical and unpalatable to me.<sup>105</sup> Thomas merely suggested that the issue of students’ First Amendment rights should be moot; to inquire into such rights is simply to ask the wrong question.<sup>106</sup> Accordingly, the legal presumption should be not that the student has a *right* to free speech in schools, subject to ad hoc exceptions. It should rather be that he has an *obligation* to follow school rules and abide by school policy, with a rebuttable presumption that those rules and policies are reasonable.<sup>107</sup> School rules, regulations, policies, and procedures are not arbitrary. They are the result of a lengthy democratic process

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<sup>100</sup> *Id.* at 2631-32 (quoting *State v. Pendergrass*, 19 N.C. 365, 365-66 (1837)).

<sup>101</sup> *Id.* at 2631-33.

<sup>102</sup> *Id.* at 2633-34.

<sup>103</sup> *Id.* at 2634.

<sup>104</sup> “To be sure, our educational system faces administrative and pedagogical challenges different from those faced by nineteenth century schools.” *Id.* at 2635. Even Justice Black, in his dissenting opinion to *Tinker*, discussed at length in Part II.C, *infra*, rejected the old axiom “children are to be seen and not heard.” *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 522 (1969) (Black, J., dissenting).

<sup>105</sup> See generally RANDY BOMER, *TIME FOR MEANING* (1995) (describing a progressive method of teaching English Language Arts on the secondary level, with emphasis on process-oriented writing, responsive reading, using literature and literacy to create meaning and build literate lives for students beyond school). This book has been my primary resource for teaching methodology and philosophy throughout my career.

<sup>106</sup> See Fish, *supra* note 98.

<sup>107</sup> See *infra* Part II.C.

whereby the people elect legislators who vest the schools and school officials with statutory authority to set rules and policies.<sup>108</sup> School officials, such as board members, principals, and teachers, are either elected, appointed by elected officials, or hired through administratively-established interviewing and screening processes. They develop rules and policies over time and based on experience to address the needs and circumstances of the school, the student body, and the community.<sup>109</sup> Redress, according to Justice Thomas, should be available through institutional disciplinary and academic review procedures and the political process, not the courts.<sup>110</sup>

In sum, Thomas would overrule *Tinker* not because he truly believes that schoolchildren do not or should not have any rights at all. He would do so because, by itself, the *Tinker* standard undermines the purpose and function of public education. Its deficiencies unacceptably outweigh its benefits, and the Court's subsequent decisions on the topic have failed to adequately address the negative consequences foreseen by Justice Hugo Black, writing in dissent to *Tinker* in 1969.<sup>111</sup> As the facts in *Frederick* availed to the Court only one more ad hoc exception to the *Tinker* standard, rather than a means of comprehensively reexamining and defining the boundaries of protected student speech, Thomas supposed that the only way to address the issue would be to dispense with that standard altogether and examine such cases from a different legal viewpoint.<sup>112</sup>

#### B. *Reexamining Tinker in the Wake of Frederick: Time to Start Over?*

Assume, for the moment, that we accept Justice Thomas' proposition that *Tinker* went too far, and that subsequent Supreme Court cases including *Frederick* failed to correct the legal and/or practical deficiencies of that decision. Thomas' historical musings notwithstanding,

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<sup>108</sup> For example, public schools in the state of New York are created and regulated by statute under the New York Education Law. *See, e.g.*, N.Y. Educ. Law § 101 ("There shall continue to be in the state government an education department. The department is charged with the general management and supervision of all public schools and all of the educational work of the state, including the operations of The University of the State of New York and the exercise of all the functions of the education department, of The University of the State of New York, of the regents of the university of the commissioner of education and the performance of all their powers and duties . . .").

<sup>109</sup> *See infra* note 117 and accompanying text.

<sup>110</sup> *Frederick*, 127 S. Ct. at 2636 (Thomas, J., concurring).

<sup>111</sup> *See infra* Part II.C.

<sup>112</sup> *Frederick*, 127 S. Ct. at 2636 (Thomas, J., concurring); *see also* Michael C. Jacobson, *Chaos in Public Schools: Federal Courts Yield to Students While Administrators and Teachers Struggle to Control the Increasingly Violent and Disorderly Scholastic Environment*, 3 *CARDOZO PUB. L. POL'Y & ETHICS J.* 909, 939 (2006) ("[I]f the current standard will allow for the continued erosion of whatever limited respect students still have for their teachers and school officials, perhaps the Supreme Court should disregard the entire standard it established (starting with *Tinker*) and start from scratch.").

it seems indisputable that public-school students, particularly those in high school, should have the right and indeed be encouraged to express themselves in school. Institutions of learning should be forums for the exploration, exchange, and discussion of ideas, as well as the impartation of knowledge, the development of skills, and the fostering of meaningful social and personal growth within students. However, schools also need to control their environments. School officials need the authority to determine what is and is not appropriate for children to say, do, see, and hear in the classroom and at school functions, and to have disciplinary procedures and remedies in place to address misconduct. Part and parcel of any secondary school's mission is to educate students about not only the content of academic curricula, the requirements of standardized testing, and the underlying skills needed for success in college and beyond, but to produce responsible citizens who are able to function as productive members of a civilized, entrepreneurial society.

In *Tinker*, the school's mere desire to avoid political controversy, however urgent, was held insufficient to justify the suppression of the students' expression.<sup>113</sup> Yet the *Tinker* case did *not* hold that schools may not limit or regulate student expression at all.<sup>114</sup> However, in offering very little guidance as to what such limitations and regulations might be permissible, the case opened the door to practically unlimited rights for students. Not only could students now claim the right to express their political and social views in school, they could feel empowered to essentially say and do whatever they desired to say and do, and to characterize any associated repercussions as a violation of their right to self-expression. In other words, they could use the First Amendment as a sword rather than as a shield against teachers and administrators. That is essentially what happened in *Fraser*, in *Kuhlmeier*, and ultimately in *Frederick*.<sup>115</sup>

C. *Dissenting Opinions in Tinker: Handing Over the Asylum to the Inmates*

Justice Black wrote in his dissent that *Tinker* "usher[ed] in . . . an entirely new era" of the Court's usurping and undermining school authority by granting constitutional free speech rights to students, i.e., minor children, while they are in school.<sup>116</sup> The dissent made much of the fact that schools are run and school rules are made and enforced by *elected* school officials, and Black objected to the Court's apparent

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<sup>113</sup> *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 509 (1969). The Court described the expression as "direct, primary First Amendment rights akin to 'pure speech.'" *Id.* at 508.

<sup>114</sup> *Id.* at 513 ("We properly read [the First Amendment] to permit reasonable regulation of speech-connected activities in carefully restricted circumstances.").

<sup>115</sup> See *supra* Parts I.A-C.

<sup>116</sup> *Tinker*, 393 U.S. at 515 (Black, J., dissenting).

arrogation to itself the determination of whether school rules, regulations, and administrative outcomes are “reasonable.”<sup>117</sup> He considered it absurd to think that any person of any age may go into any public building and “contrary to [the agency’s] rules . . . speak his mind on any subject he pleases.”<sup>118</sup> The plaintiffs in *Tinker* had worn black armbands to school in protest of the war in Vietnam, despite the school district’s policy prohibiting same.<sup>119</sup> While the armbands caused no “substantial disruption,” they quite clearly in Black’s view caused distraction and diversion, which was precisely what school officials had hoped to avoid.<sup>120</sup> As Black maintained, “[I]f the time has come when pupils of state-supported schools . . . can defy and flout orders of school officials to keep their minds on their own schoolwork, it is the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary.”<sup>121</sup>

Although not a proponent of complete school autonomy and student subservience, Black pointed out that schooling is based at least in part on the idea that “children [have] *not yet reached the point of experience and wisdom* which enabled them to teach all of their elders.”<sup>122</sup> He forecast a future wherein schoolchildren, possessed of these rights but lacking the capacity to appreciate the obligations, risks, and consequences that may go with them, become empowered to defy school authorities, say and do whatever they please while they are in school, and hale teachers and school officials into court when they do not get their way.<sup>123</sup> The outcome of the case, Black speculated, would “subject[] all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students.”<sup>124</sup> He feared that these young, immature, inexperienced children and adolescents would claim the right to control the schools themselves, to

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<sup>117</sup> *Id.* at 517.

<sup>118</sup> *Id.* at 522. “It is a myth to say that any person has a constitutional right to say what he pleases, where he pleases, and when he pleases.” *Id.* Again, this was not strictly the holding in *Tinker*; Black merely pointed out that the holding, and the right being granted, was much too broad. The court did eventually narrow it somewhat in *Fraser*, holding that schoolchildren’s rights were not coequal with those of adults. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986). Although this has become an important guiding principle of school-related jurisprudence, the courts have used it only to carve out individual exceptions to the broader protection of *Tinker*, as appears to have been the case in *Frederick*. See *Morse v. Frederick*, 127 S. Ct. 2618, 2636 (2007) (Thomas, J., concurring). In other words, the Court has yet to fully and comprehensively explain, define, or articulate the precise distinction between the free speech rights of students in school and those of citizens at large.

<sup>119</sup> See *supra* note 16.

<sup>120</sup> *Tinker*, 393 U.S. at 518 (Black, J., dissenting).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 522 (emphasis added). Justice Black went on to state that “taxpayers send children to school on the premise that at their age they need to *learn*, not teach.” *Id.* (emphasis added).

<sup>123</sup> *Id.* at 524-26.

<sup>124</sup> *Id.* at 525.

substitute their as-yet-undeveloped and unenlightened judgment for that of the governments and individual adults who have been charged with their education and who have acquired the expertise to facilitate that education.<sup>125</sup>

Although Justice Black's slippery slope may slide the observer to someplace close to an apocalyptic nightmare of *Lord of the Flies*-style anarchy,<sup>126</sup> my own experience has shown that Justice Black's concerns about the diminished capacity of minor children, coupled with an expanded concept of their "rights," were significantly more prescient, and problematic, than he may have realized.<sup>127</sup> Year after year I find myself confronted with, not to mention frustrated by, the astounding inability of high-school students to appreciate risk and make intelligent, efficient choices about what to do and how to behave from day to day and from moment to moment. Students who do not do their schoolwork, who do not submit assignments on time and who misbehave in school do so in part because they do not perceive a *risk* attendant to such acts or forbearances.<sup>128</sup> Based on my experiences, Justice Black's dire prediction has largely come true.<sup>129</sup>

The exercise of certain rights must always be balanced by an appreciation of the risks that go with them.<sup>130</sup> Even constitutionally-

<sup>125</sup> *Id.*

<sup>126</sup> As an English teacher, I cannot help but be amused by the fact that each of the two "slippery slopes" of this issue leads to one of my favorite novels: *Lord of the Flies*-style anarchy on one side, and 1984-style thought control on the other. See generally WILLIAM GOLDING, *LORD OF THE FLIES* (Paragon Books 1954); GEORGE ORWELL, 1984 (Harcourt Brace Jovanovich 1949).

<sup>127</sup> See Jacobson, *supra* note 112, at 937-39 (arguing that the proliferation of violence and insubordination in schools in recent years renders the *Tinker* standard obsolete and inadequate).

<sup>128</sup> This is not to suggest that other factors, such as personal hardships and external influences such as peers and pop culture, etc., do not also influence these choices. However, given that most people engage in some form of risk-benefit analysis, whether consciously or unconsciously, when they act, it must follow that a lack of motivation to do a particular thing or behave in a particular way must to some degree necessitate either a lack of perception or conscious disregard of any risks taken by not doing so. See KEETON, *supra* note 11, § 31 at 171 ("Against [the] probability, and gravity, of the risk, must be balanced in every case the utility of the type of conduct in question.").

<sup>129</sup> In September 2007, when I admonished a student that I hoped she understood the risk she was taking by misbehaving, she replied sneeringly, "They ain't no risk!" The student had essentially decided for herself that she had finished her work for the day, with fifteen minutes remaining in the class period, and was wandering about the classroom socializing with other students, sending text messages on her cell phone, and eating snack food. When I explained to her that the assignment, a written response to a short-story reading, was an inherently open-ended task, she insisted that I was wrong and, again, that she was "done" with her response. My admonitions to her about the snacks and cell phone, which are forbidden by school rules and Chancellor's Regulations respectively, were met with annoyance and an insistence that these behaviors were "no big deal." I asked the student if she was now making her own rules, and she replied emphatically, "For myself and my life, yes." This anecdote, which I am sad to say is hardly atypical, reveals the sort of handing-over of control that Justice Black feared; i.e., students decide for themselves not only whether to obey school and classroom rules, but what those rules *are* in the first instance. By extension, not only do such students not *appreciate* risk, they do not even *perceive* risk.

<sup>130</sup> "Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations . . ." *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392 (1937) (quoting *Chicago, B. & Q. R. Co. v. McGuire*, 219 U.S. 549, 567 (1911)).

protected behaviors have risks.<sup>131</sup> In today's educational climate, adults (particularly parents) are prone to *excuse* students' misbehavior purely on the basis of their minority status and immaturity ("They're just kids, they don't know any better."), but are resistant to the idea that minors should have lesser rights than adults because of that same incapacity.<sup>132</sup> It is this mindset that leads to lawsuits in cases like *Frederick*.<sup>133</sup> As a result, children think and act as if their behavior poses no risk at all, and they thus become even less capable of assessing and appreciating risk than they ought to be as members of a civilized society.

While Justice Black expressed strong feelings in opposition to the majority's holding in *Tinker*, he did not propose an alternative rule to balance the constitutional rights of students with the authority of schools to regulate their environment. However, Justice John Marshall Harlan in a brief, one-paragraph dissent, wrote:

I am reluctant to believe that there is any disagreement between the majority and myself on the proposition that school officials should be accorded the widest authority in maintaining discipline and good order in their institutions. To translate that proposition into a workable constitutional rule, I would, in cases like this, cast upon those complaining the burden of showing that a particular school measure was motivated by other than legitimate school concerns . . . .<sup>134</sup>

This proposal seems to be in line with that discussed in Part II.A, as implied (although not specifically articulated) by Justice Thomas in his *Frederick* concurrence.<sup>135</sup> Justice Harlan agrees that schools must act within constitutional limitations but argues that such action should be

<sup>131</sup> See *infra* notes 214-215.

<sup>132</sup> In other words, adults often grant children adult *autonomy* but not adult *accountability*. Children demand, and often receive, the same rights as adults even though they do not assume the same risks nor expect to be held to the same standards. For example, cell phones are banned in New York City public schools; students demand the right to carry cell phones in school but cannot accept the disciplinary consequences of using them or having them ring in the middle of a class. Their solution, though, is to complain, stage protests, actively defy the rule, and have their parents file lawsuits to demand the "right," rather than do the proper thing in the first place and keep the phones silent and out of sight during classes, thereby obviating the ban. See, e.g., Peter Kadushin & Tanyanika Samuels, *Your Bra Is Ringing: Students Defy Ban*, N.Y. DAILY NEWS, Nov. 16, 2006, at 4; Anemona Hartocollis, *School Cellphone Ban Violates Rights of Parents, Lawsuit Says*, N.Y. TIMES, Jul. 14, 2006, at B3. The cell phone ban was upheld by the Supreme Court of New York, New York County in *Price v. New York City Bd. of Educ.*, 837 N.Y.S.2d 507, 530 (Sup. Ct. 2007). The Appellate Division subsequently affirmed the decision. *Price v. New York City Bd. of Educ.*, 855 N.Y.S.2d 530, 543 (1st Dept. 2008).

<sup>133</sup> Pyle claims that "schools have no reason to fear lawsuits challenging everyday exercises of school discipline." Pyle, *supra* note 15, at 634-35. This is simply false. It is precisely the fear of lawsuits and negative publicity that motivates school officials to forbear or mitigate disciplinary action, subjectivize academic standards, overturn teachers' assessments of student performance, and otherwise placate students and parents in unreasonable and counterintuitive ways. The proliferation of lawsuits against schools, like *Frederick*, *Price* and *Blau* (discussed at length in Part III.B, *infra*), regardless of their outcome, also belies Pyle's contention. See, e.g., Kelley R. Taylor, *Dear Teacher: Have You Met My Lawyer?*, PRINCIPAL LEADERSHIP, Dec. 2002.

<sup>134</sup> *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 526 (Harlan, J., dissenting).

<sup>135</sup> See *supra* Part II.A.

*presumed* reasonable and constitutional.<sup>136</sup> Shifting the burden from school personnel, who under *Tinker* would have to prove a “substantial disruption” to the learning process, to the complaining student, who under Harlan’s proposed rule would have to show that the teacher or school official’s action was arbitrary or unreasonable, renders the student’s behavior a matter of risk rather than a matter of right.<sup>137</sup> It would essentially be the same as if the student had sued the teacher or school official as a private actor in tort or contract. Under Harlan’s approach, the student must now analyze the risks and internalize the costs associated with his choices concerning what he will and will not do while he is in school.<sup>138</sup> Essentially, he would have a *duty* to be aware and respectful of school rules and policies.<sup>139</sup> While *risk*, *duty*, and *cost* are terms associated with tort principles, not constitutional ones, they help strike a more appropriate balance between students’ rights and school authority than that provided by *Tinker* and its progeny.<sup>140</sup> This is especially true when student conduct, not expression, is at issue.

Of course, the abstract world of constitutional law is far removed from the real day-to-day functioning and management of the many thousands of public school classrooms throughout the United States. The Supreme Court has provided some guidance as to what teachers and administrators may and may not do with respect to the pupils in their

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<sup>136</sup> See Jacobson, *supra* note 112, at 939 (“[T]he current standard in use requires school officials to demonstrate that a [particular] material and substantial disruption will occur . . . in the future. The burden of proof is simply insurmountable . . .”).

<sup>137</sup> *But cf.* Pyle, *supra* note 15, at 592 (“Legal standards in the realm of student free speech ought not to reduce immediately to reasonableness and balancing . . .”). Pyle was himself a plaintiff in a First Amendment lawsuit against a school. See generally *Pyle v. S. Hadley Sch. Comm.*, 667 N.E.2d 869 (Mass. 1996). Thus, he writes from a *student’s* perspective rather than that of a *teacher*, as I do, and is therefore more willing than I am to give teenagers the benefit of the doubt. Pyle’s case, which he won, involved a school rule forbidding t-shirts bearing certain categories of slogans and other expressive messages. *Id.* at 871. The rule was invalidated under a *statutory* limitation, MASS. GEN. LAWS ch. 71, § 82 (1994), which essentially granted unlimited free speech rights to public-school students subject *only* to the *Tinker* “substantial disruption” standard. *Id.* at 871-72. In other words, the court could not construe an exception under the statute for what would amount to *Fraser’s* “plainly offensive” standard. *Id.* at 872.

<sup>138</sup> “Costs,” in this context, refers to the typical consequences one would associate with scholastic misbehavior and forbearance, *e.g.*, lower grades, disciplinary action, suspension, loss of privileges such as participation in athletics or extracurricular activities, etc., not actual pecuniary losses. The point is that the student must consider these possibilities *before* he acts, and measure the benefit of the act or forbearance against the risk of an undesirable result.

<sup>139</sup> The presumption that school rules and disciplinary determinations are valid and constitutional is a *rebuttable* presumption. Yet even the majority opinion in *Tinker* acknowledged the existence of students’ *obligations* with respect to school: “[Students in school] are possessed of fundamental rights which the State must respect, *just as they themselves must respect their obligations to the State.*” *Tinker*, 393 U.S. at 511 (emphasis added).

<sup>140</sup> *But cf.* Thompson, *supra* note 15, at 899 (“*Tinker* is adequate for meeting the disciplinary needs of today’s schools.”); Pyle, *supra* note 15, at 633 (“[T]he *Tinker* disruption standard, and nothing more, should govern the school’s regulation of independent student speech.”). *But see* Jacobson, *supra* note 112, at 937 (“[T]he [*Tinker*] standard . . . no longer serves the purpose of ensuring that schools are safe and effective while preserving the appropriate constitutional rights of minors.”).



charge, but in each individual classroom in each individual school, the grand principles of the Constitution can seem like a distant ideal to the needs of the moment. How those principles apply in theory might bear little resemblance to what teachers actually face in practice.

### III. THE DRESS CODE—A REAL-WORLD LOOK AT STUDENTS’ RIGHTS AND OBLIGATIONS

My own experience as a public school teacher, which began in 1997, has presented more than a few real-world tests of school authority versus student autonomy. One of the clearest has been my current school’s adoption of a dress code for all students. To examine this issue, I conducted a writing project with my tenth-grade students which required them to examine both their own legal rights and the school’s legal authority. The results of the project revealed that these young people had significant difficulty seeing past their own personal feelings and biases to recognize the objective arguments on either side. The judiciary has, even if the public has not, recognized to some extent that students walk into school each morning with duties and obligations, as well as rights. Further, while the Supreme Court in *Frederick* neglected to distinguish conduct from expression, other courts have done so in cases where students claimed First Amendment protection for behavior which could not be justified any other way.

#### A. *The Project*

I have taught English at Brooklyn High School of the Arts (BHSA) since 2003.<sup>141</sup> Since its founding in 2000, the school has had a dress code which requires “business casual” dress for students.<sup>142</sup> The purpose of the dress code, like most dress codes in urban public schools, is to “minimize economic and competitive differences among students.”<sup>143</sup> Specifically and most notably, students must wear collared

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<sup>141</sup> See generally NYC DOE School Portal: Brooklyn High School of the Arts (K656), <http://schools.nyc.gov/SchoolPortals/15/K656/default.htm> (follow “Faculty” hyperlink under “Educational Support”; then follow “The Humanities Department” [sic] hyperlink) (last visited Sept. 19, 2008). Brooklyn High School of the Arts, hereinafter BHSA, located at 345 Dean St. in the Boerum Hill section of Brooklyn, is a specialized high school for which students must apply and audition to be admitted; it is not a “zoned school” which would serve all of the children in a particular geographic area. Auditions, which are open to all residents of Brooklyn, are for the school’s five arts studio programs: Dance, Vocal Music, Orchestra, Fine/Visual Arts, and a unique program in Preservation Arts. The school was created by Principal Robert Finley in 2000 in the former Sarah J. Hale High School building. See generally NYC DOE SCHOOL PORTAL: BROOKLYN HIGH SCHOOL OF THE ARTS (K656), <http://schools.nyc.gov/SchoolPortals/15/K656/default.htm>.

<sup>142</sup> See Brooklyn High School of the Arts: General Code of Conduct, <http://schools.nyc.gov/SchoolPortals/15/K656/Students/StudentSupport/GeneralCodeofConduct.htm> [hereinafter BHSA Dress Code] (last visited Sept. 19, 2008).

<sup>143</sup> *Id.*

shirts and underclassmen are not permitted to wear denim blue jeans.<sup>144</sup> Although the regulations and enforcement thereof have been relaxed somewhat in the years I have taught at BHSA, the essential business-casual standard and prohibition of blue jeans for underclassmen remains.<sup>145</sup> Needless to say, the students are none too fond of these regulations. They complain bitterly about them and actively seek out ways not to comply. Many students wear slacks or black warm-ups over their jeans, even in oppressively hot weather; others simply disregard the rule and wear their jeans to school, hoping not to get caught. I have often observed students in my class clandestinely putting on and removing their outer sets of trousers underneath the tables. In addition, the enforcement of the dress code can have not only disciplinary consequences, but academic ones as well. I have had students miss exams, assignments, and important classroom instruction due to their having been either detained or sent home to change when they arrived at school wearing blue jeans.

Seizing upon the situation's potential as a teaching tool for English Language Arts, ranging from the art of rhetorical persuasion to a practical understanding of reasonability, not to mention invoking my own experience as a law student, I decided in the spring of 2007 to make a writing project out of the dress code for my tenth-grade students. I did some research on federal jurisprudence concerning public school dress codes and wrote a fact pattern for the students to work with.<sup>146</sup> Dividing each class into Appellant and Respondent sides, I distributed the fact pattern along with a copy of the BHSA dress code and the heavily-edited text of two federal court opinions to the students.<sup>147</sup> Their task: read the cases, develop an argument supporting your client's position, and

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<sup>144</sup> Freshmen's shirts must be white; sophomores' and juniors' may be any solid color. Seniors may wear crew neck shirts instead of collared ones but may not wear jerseys, i.e., licensed sports team apparel. *Id.*

<sup>145</sup> Seniors at BHSA have been permitted to wear blue jeans regularly since 2005. In addition, dress shoes are now merely "preferred" for all classes, where until 2005 they were required. *Id.* Further, sophomores and juniors now have a regular "dress down day" each Friday, upon which, for practical purposes, the senior dress code applies to them (jeans and t-shirts permitted). *Id.* However, no student at BHSA is ever permitted to wear revealing clothing, exposed underwear, spaghetti straps, bare midriffs, halter tops, torn clothing, lycra, spandex, shorts, or halter tops. *Id.* The BHSA dress code also prohibits "clothing with writing or pictures on it." *Id.*

<sup>146</sup> Jay Braiman, Problem 1: Turner vs. Brooklyn High School of the Arts, <http://mrbraiman.home.att.net/problem.pdf> (last visited Sept. 19, 2008).

<sup>147</sup> The first case was *Bannister v. Paradis*, the only case I could find which upheld a student's challenge to a school dress code, specifically the prohibition against blue jeans. 316 F. Supp. 185, 189 (D.N.H. 1970). The District of New Hampshire found that clothing was akin to "control of [one's] own person" and therefore the wearing of blue jeans in school, albeit not a terribly important right in itself, could not be constitutionally proscribed absent a showing of a meaningful inhibition of the educational process. *Id.* at 188. The second case was *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381 (6th Cir. 2005), discussed at length in Part III.B, *infra*, which directly criticized the *Bannister* decision. See *Blau*, 401 F.3d at 394-95; see also *infra* note 163 and accompanying text. To date, no District or Circuit court has followed *Bannister*.

produce a written brief explaining why the Supreme Court should uphold or invalidate the dress code at Brooklyn High School of the Arts.<sup>148</sup>

The project seemed to be an excellent opportunity to teach students not only what their rights are and what they are not, but *why* certain things are a matter of right and other things are not. The idea was, in part, to show that unpleasant or inconvenient rules and regulations, and the consequences that go with violating them, do not necessarily constitute the infringement of rights and liberty. *Both* sides would have to reach an understanding of these principles, and both sides would have to acknowledge the reasons and purposes behind the dress code. The challenge for those students on the respondent's side was to set aside their personal feelings about the dress code and argue intelligently in its favor. The challenge for those arguing for the appellant, which I thought was even greater, was to find a reasonable and objective argument outside of their personal feelings, because the law was plainly not on their side.

*B. Case Uncannily on Point: Blau v. Fort Thomas Public School District*

In researching school dress code cases for this school project, I happened upon a case which is not only directly in line with my students' primary complaint about the BHSA dress code, but one which set forth a thorough, reasonable, and practical analysis of students' constitutional rights in the school setting. Compared to the Supreme Court's analysis in *Frederick*, the Sixth Circuit in *Blau v. Fort Thomas Public School District* successfully and pointedly distinguished the conduct at issue in the school rule from the expression for which the student claimed protection, properly analyzed the rule as a regulation of conduct rather than expression, and acknowledged the student's obligation to act in accordance with school rules and policy.

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<sup>148</sup> Needless to say, this was a challenging assignment, and needless to say the brief writing requirements were substantially scaled down from what a first-year law student would be expected to do. Obviously, students were not expected to perform any outside research nor use any citations and had only to write the Statement of Facts and Argument sections. Substantively, we discussed the issue and the case law in class at great length, but many students still struggled with it, although I suspect that a number of them never attempted to read the cases. I had hoped that the students would individually and collectively be able to come up with their own arguments, but this too was more challenging than I had anticipated. I ended up writing their points and sub-headings for them, focusing instruction on creating arguments using objective reasoning instead of personal opinion, and constructing them according to the issue-rule-analysis-conclusion mnemonic taught in Legal Writing. The template document files I prepared for their use are also still on my website. See Problem 1: Turner vs. Brooklyn High School of the Arts: Appellant Brief, [http://mrbraiman.home.att.net/brief\\_a.doc](http://mrbraiman.home.att.net/brief_a.doc) (last visited Sept. 19, 2008); Problem 1: Turner vs. Brooklyn High School of the Arts: Respondent Brief, [http://mrbraiman.home.att.net/brief\\_r.doc](http://mrbraiman.home.att.net/brief_r.doc) (last visited Sept. 19, 2008).

In the fall of 2001, Amanda Blau was a sixth-grader at Highlands Middle School in Fort Thomas, Kentucky, who felt like wearing blue jeans to school in contravention of the school's dress code.<sup>149</sup> The child and her father sued the school district based on three alleged constitutional violations. The first claim was for an infringement of Amanda's First Amendment right to express her personality and individuality through her choice of clothing.<sup>150</sup> Amanda did not claim that her wearing blue jeans conveyed any particular message, nor that they were related to any religious beliefs, nor any other articulable ideas; she objected to the dress code because it prevented her from wearing "clothes that 'look[] nice on [her],' that she 'feel[s] good in' and that express her individuality."<sup>151</sup> Her father's objection to the dress code was also that it "inhibits her 'ability to wear clothing that she likes.'"<sup>152</sup> The Blaus also characterized the dress code as violations of their respective substantive due process rights under the Fourteenth Amendment,<sup>153</sup> namely Amanda's right to wear what she wants to school (the second claim), and her father's right to control his child's dress and direct her education (the third claim).<sup>154</sup>

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<sup>149</sup> See *Blau*, 401 F.3d at 385-86. Unlike the cases discussed in Parts I and II, *supra*, Amanda was apparently never sanctioned for wearing blue jeans to school. Her father Robert Blau, a lawyer, preemptively challenged the dress code itself and sought a declaratory judgment to invalidate it on its face. *Id.*

<sup>150</sup> *Id.* at 386.

<sup>151</sup> *Id.* (alteration in original) (quoting plaintiff Amanda Blau); see *supra* note 14.

<sup>152</sup> *Id.* (quoting plaintiff's father, Robert Blau).

<sup>153</sup> "Substantive due process" refers to the legal doctrine of establishing precisely what rights are held by citizens, which the government may not proscribe, under the Fourteenth Amendment. See U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."). The doctrine essentially attempts to define "liberty," the meaning of which is less clear than that of "life" and "property," in order to specify what rights citizens enjoy which are not explicitly granted by the Constitution. See U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding that marriage is a fundamental liberty interest, and that a state law proscribing inter-racial marriage would "deprive all the State's citizens of liberty without due process of law"); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (holding that a right to privacy, while not specifically enumerated in the Constitution, nonetheless exists within the "penumbra" of other, enumerated rights). Unenumerated rights, in order to enjoy constitutional protection, must be "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). In the modern Court, unenumerated rights claimed by plaintiffs are construed *very* narrowly; the court is reluctant to create or recognize new fundamental rights. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989) (finding that, although parental rights are fundamental as a general matter, there is no fundamental constitutional right to visitation or paternity for the biological father of a child born to a woman married to another man who was listed as the father on the child's birth certificate and had raised her as his own); see also *Price v. New York City Bd. of Educ.*, 837 N.Y.S.2d 507, 525 (Sup. Ct. 2007) ("[T]he doctrine of Substantive Due Process no longer exists as a principle of Federal constitutional law.").

<sup>154</sup> *Blau*, 401 F.3d at 385. The Highlands Middle School dress code, reproduced in Appendix B of the opinion, goes even farther than the BHSA dress code does in explaining its rationale, addressing itself to the parents: "The objective of this dress code is to provide an appropriate educational environment while allowing students to dress comfortably within limits to facilitate learning. We expect students to maintain the type of appearance that is not distracting to

Justice Sutton of the Sixth Circuit wasted little time dispensing with Amanda's First Amendment claim.<sup>155</sup> The court then proceeded to address itself to an even more pertinent question: whether the wearing of blue jeans or similar conduct, in and of itself, implicates the First Amendment in the first instance.<sup>156</sup> The court drew a sharp distinction between Amanda's "generalized and vague desire to express her middle-school individuality"<sup>157</sup> and the "direct, primary First Amendment right[] akin to 'pure speech'" protected by *Tinker*.<sup>158</sup> While the court acknowledged the importance of clothing choices which twelve-year-old schoolchildren make, the thought and effort they put into it, and the expressions of "individuality" associated therewith, such factors do not bring the wearing of blue jeans to school within the protection of the First Amendment.<sup>159</sup> In other words, the Blaus were seeking protection for Amanda's *conduct*, not any particular *expression*.<sup>160</sup> As in Mr. Frederick's case, the Blaus invoked the First Amendment in an attempt to justify conduct which could not otherwise be justified.

With respect to Amanda's Fourteenth Amendment claim, the court seemed almost taken aback by the idea that wearing blue jeans to school comes anywhere close to being a *fundamental* right, something "deeply rooted in this Nation's history and tradition, or so implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed . . ."<sup>161</sup> The claim therefore did not warrant

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students, teachers, or the educational process of the school. Parents and children are equally responsible for the appearance of their child. There is appropriate and inappropriate attire for all of life's activities. Keeping these ideas in mind, please help your student adhere to these guidelines." *Id.* at 399.

<sup>155</sup> *Id.* at 388 ("The difficult question under these circumstances is not whether Amanda Blau's [First Amendment] claim can succeed; it cannot.").

<sup>156</sup> *Id.* ("The difficult question . . . is whether the First Amendment covers this kind of claim at all.").

<sup>157</sup> *Id.* at 389.

<sup>158</sup> *Id.* (quoting *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 508 (1969)). The court basically characterized the wearing of blue jeans, absent any particularized message, as *conduct* rather than *speech* or *expression*, "actions rather than words," and noted that "[t]he protections of the First Amendment do not generally apply to conduct in and of itself." *Blau*, 401 F.3d at 388. Recall the discussion in Part I.C, *supra*, concerning Joseph Frederick's conduct in the *Frederick* case. Although Principal Morse and the Court imputed a pro-drug message to the phrase "BONG HiTS 4 JESUS," Frederick's claim as to its meaning was analogous to that of Amanda Blau, i.e., that it meant nothing other than to express a "generalized and vague desire," which in Frederick's case was the desire to bring attention to himself and be seen on television.

<sup>159</sup> *Blau*, 401 F.3d at 389-90.

<sup>160</sup> The court also pointed out that students may "express" themselves however they like through the sundry permissible types of clothing, as well as other expressive scholastic activities such as school newspapers, assignments, and extra-curricular activities, not to mention the patently obvious fact that they may dress however they please when they are not in school. *Id.* at 392. These factors, taken in consideration with the "important governmental interests" associated with the dress code, would cause any extant First Amendment claim to fail as a matter of law. *Id.* at 392-93.

<sup>161</sup> *Blau*, 401 F.3d at 394 (internal citations and quotation marks omitted); *see also supra* note 153 and accompanying text.

strict scrutiny<sup>162</sup> and was easily discarded given its rational basis.<sup>163</sup> The father's Fourteenth Amendment claim was rejected as well. As the court pointedly explained, "[w]hile parents may have a fundamental right to decide *whether* to send their child to a public school, they do not have a fundamental right generally to direct *how* a public school teaches their child."<sup>164</sup> The court cited a whole series of cases wherein parents had claimed rights with respect to directing their children's education and been denied, including assertions of control over dress codes, academic curricula, class selections/programs, the hiring of school personnel, school hours and calendars, community service requirements, and regulations prohibiting attendance at summer athletic camps.<sup>165</sup> At the end of the day, Mr. Blau had no right to unilaterally *exempt* his daughter from school rules, including the dress code.<sup>166</sup>

The case reveals that both students and parents have a duty to respect and follow reasonable, duly-enacted school rules and regulations. More importantly, it placed the burden on the Blaus to show that there was something wrong with the rule, echoing Justice Harlan's dissent to *Tinker*.<sup>167</sup> The tone of the opinion makes it clear that the student's obligations are just as important, if not more so, than her rights with respect to her school. The Blaus could not have brought, let alone won, a tort case against anyone in any other context under these facts, hence the constitutional claims. The court, however, made it clear that those claims were inappropriate, not to mention unavailing. In addition, the case addressed one of the root causes of student misbehavior and of the

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<sup>162</sup> Where fundamental rights are at stake, the court will subject the state action or law in question to *strict scrutiny*: the limitation must be justified by a compelling state interest, and the law or regulation must be narrowly tailored to serve only that specific interest. *See, e.g.,* *Roe v. Wade*, 410 U.S. 113, 155 (1973); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). Where there is no fundamental right at issue, the level of scrutiny is one of *rational basis*, i.e., the law or regulation is acceptable as long as there is a legitimate public-policy reason for its enactment and it is reasonably related to that end. *See, e.g.,* *Michael H. v. Gerald D.*, 491 U.S. 110, 131 (1989); *see also* *Williamson v. Lee Optical*, 348 U.S. 483, 488 (1955) ("It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.").

<sup>163</sup> *Blau*, 401 F.3d at 395. The court did not explore whether the right to wear what one chooses generally, versus the right to wear blue jeans in school specifically, would merit strict scrutiny. However, the court rejected the "control of [one's] own person" rationale employed by the *Bannister* court as having been taken out of its original context, wherein the plaintiff was required to strip for a medical exam and the court had in any event rejected the claim. *Id.* at 394-95 (citing *Bannister v. Paradis*, 316 F. Supp. 185, 188 (D.N.H. 1970)); *see also supra* note 147 and accompanying text.

<sup>164</sup> *Blau*, 401 F.3d at 395 (emphasis in original).

<sup>165</sup> *Id.* at 395-96 (citing *Leebaert v. Harrington*, 332 F.3d 134, 142 (2d Cir. 2003); *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 291 (5th Cir. 2001); *Swanson v. Guthrie Indep. Sch. Dist.*, 135 F.3d 694, 699 (10th Cir. 1998); *Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 89 F.3d 174, 176 (4th Cir. 1996); *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 462 (2d Cir. 1996); *Brown v. Hot, Sexy and Safer Prods., Inc.*, 68 F.3d 525, 533 (1st Cir. 1995); *Kite v. Marshall*, 661 F.2d 1027, 1029 (5th Cir. 1981)).

<sup>166</sup> *Id.* at 396.

<sup>167</sup> *See supra* note 134 and accompanying text.

difficulties schools have in controlling their environments and fostering good citizenship among students: the enabling behavior of parents. The fact that parents actually encourage students to violate school rules (i.e., to act selfishly and recklessly instead of reasonably), and support them by either threatening or filing lawsuits as Robert Blau did, merely exacerbates young people's inability to perceive risk with respect to their behavior and performance in school.<sup>168</sup>

C. *Interpreting Blau: Is This Where We Are Going?*

In rejecting all of the Blaus' claims and finding in favor of the school district, in effect holding that neither Amanda nor her father possessed *any* of the rights they had claimed, the Sixth Circuit laid out what could be the most comprehensive argument yet to emerge from an American court for a more appropriate balance of students' (and parents') rights with public schools' regulatory and disciplinary authority. While it may have been the result of the almost insultingly insubstantial nature of the rights Amanda Blau and her father were claiming, the lack of any more compelling interest at stake than Amanda's personal comfort and subjective taste in clothing, the court ruled against them at every turn, often using emphatic and forceful language. The decision reads almost as an admonition to parents to stop suing the schools whenever their children feel inconvenienced by a teacher, a principal, or a school rule.

The *Blau* standard has since been adopted by the Ninth Circuit,<sup>169</sup> and the case has been followed by district courts in the Second,<sup>170</sup> Seventh,<sup>171</sup> Eighth,<sup>172</sup> and Eleventh<sup>173</sup> Circuits. Given the range and magnitude of the claims made by the Blaus, and the court's resoundingly negative treatment thereof, the *Blau* case appears to move the federal courts farther away from *Tinker* and closer to a more practical approach to students' rights and obligations, centered around conduct. Indeed, the decision approaches what Justice Thomas implied in his desire to overturn *Tinker*,<sup>174</sup> and the burden shift advocated by Justice Harlan in his dissent to *Tinker*.<sup>175</sup> While the Sixth Circuit did not go nearly so far as Justice Thomas did in rejecting the notion that students have any

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<sup>168</sup> See *supra* note 132 and accompanying text; see also *infra* note 216 and accompanying text.

<sup>169</sup> *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1206 (9th Cir. 2005).

<sup>170</sup> *Inturri v. City of Hartford*, 365 F. Supp. 2d 240, 249 (D. Conn. 2005).

<sup>171</sup> *Bell v. Anderson Cmty. Sch.*, No. 1:07-cv-00936-JDT-WTL, 2007 U.S. Dist. LEXIS 57428, at \*20-23 (S.D. Ind. Aug. 6, 2007).

<sup>172</sup> *Lowry v. Watson Chapel Sch. Dist.*, 508 F. Supp. 2d 713, 720 (E.D. Ark. 2007).

<sup>173</sup> *Bar-Navon v. Sch. Bd. of Brevard County*, No. 6:06-cv-1434-Orl-19KRS, 2007 U.S. Dist. LEXIS 2365, at \*15-16 (M.D. Fla. Jan. 11, 2007).

<sup>174</sup> See *Morse v. Frederick*, 127 S. Ct. 2618, 2636 (2007) (Thomas, J., concurring).

<sup>175</sup> *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 526 (1969) (Harlan, J., dissenting).

constitutional rights at all, the *Blau* decision seems to suggest a workable standard based on several basic principles: (1) it is incumbent upon students to know and abide by school rules; (2) those rules are presumptively reasonable and the burden is upon the complaining student to prove otherwise; (3) students may not break school rules nor defy school authority because they decide for themselves that they have the “right;” (4) parents may not exercise control over school matters nor exempt their children from school rules by determining for themselves what their children’s rights are; and (5) the courts are not an appropriate forum to complain about school policies and determinations<sup>176</sup>—all essentially what Justices Black, Harlan, and Thomas suggested.<sup>177</sup>

What this framework provides is a reasonable, reciprocal arrangement of rights and obligations as between students and parents on one side, and schools and school officials on the other. One consequence of treating students as private at-large citizens with respect to schools, who are unquestionably governmental actors, is that the traditional tort principles of reasonable care and risk-benefit analysis, which typically govern private relationships and are designed to encourage people on all sides to act reasonably and minimize risk, generally do not apply.<sup>178</sup> The student carries *all* of the rights and entitlements with respect to the school, while the school carries *all* of the duties and obligations with respect to the student. No legal relationship of any kind can function if one party carries all of the rights and the other carries all of the duties; the former has an incentive to act recklessly, while the latter must be so cautious as to render it practically inert.

The relationship of the student, in school, to the school and school officials is *sui generis* among legal relationships in terms of how the law operates upon each actor.<sup>179</sup> As mentioned above, it is a public relationship that functions, for all practical purposes, like a private one. The Supreme Court’s jurisprudence on this topic appears to have lost sight of the fact that students must have actual duties and obligations with respect to their teachers if they are to actually learn anything, let alone develop into informed, conscientious, responsible citizens. This development cannot happen if students carry with them rights but not obligations into school. Where students have a duty to respect school policy and follow school rules, and therefore flout and defy them at their own risk, they will surely be better prepared to meet their responsibilities as citizens, such as paying taxes, registering to vote, obeying traffic laws and paying fines for violating them, making efficient choices based on

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<sup>176</sup> See *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 394-96 (6th Cir. 2005).

<sup>177</sup> See *supra* Part II.

<sup>178</sup> See *supra* notes 85-87 and accompanying text.

<sup>179</sup> See Education: In Search of Reason, <http://educationsanity.blogspot.com/2007/06/whos-who-in-public-schools.html> (June 3, 2007, 10:23 EST).



thoughtful calculations of risk, and generally being able to distinguish that which they *want* from that to which they are entitled.

#### IV. STUDENT SPEECH IN CYBERSPACE—WHERE *FREDERICK* SHALL LEAD

The discussion of *Frederick's* impact on the law invites speculation about present and future cases decided in its wake, as well as how the Supreme Court might decide its next student-speech case. In the twenty-first century, school-related expression by students has moved beyond the walls of the school and onto the Internet, and courts have only begun to address the attendant legal problems. In many ways, the Internet is an even riskier place than the real world, but ironically young people seem to perceive even *less* risk online than they do in school. It would therefore seem prudent for the courts to recognize these risks and fashion rules which compel schoolchildren to do the same. To that end, the courts should regard students' online behavior as conduct rather than speech. Although the Internet is unavoidably communicative and expressive in nature, the act of placing content online is one that can create real danger and real harm. It should therefore be approached by the actor with caution, reasonable care, and an appreciation of risk.

##### A. *An Adolescent Free-For-All*

Recent years have seen an explosion of teenagers' use of blogs, instant messaging, social networking sites, and other online services, and as school takes up a substantial portion of their lives and attention in the real world, it also occupies much of their expression in cyberspace.<sup>180</sup> In many cases, students' use of the Internet to "express themselves" can be of great concern to schools, school officials, and teachers.<sup>181</sup> For example, in 2002 a website appeared which enabled secondary-school students to post anonymous, unsubstantiated "ratings" of and comments about their teachers.<sup>182</sup> Students have goaded teachers into anger in order to record the resulting diatribes on camera phones and post them on YouTube.<sup>183</sup> "Cyberbullying," i.e., harassment over the Internet, typically against students

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<sup>180</sup> See Rita J. Verga, *Policing Their Space: The First Amendment Parameters of School Discipline of Student Cyberspeech*, 23 SANTA CLARA COMPUTER & HIGH TECH. L.J. 727, 728 (2007).

<sup>181</sup> See *id.* at 728-29.

<sup>182</sup> See generally RateMyTeachers—K-12 Teacher Ratings by Students and Parents, <http://www.ratemyteachers.com> (last visited Sept. 17, 2008).

<sup>183</sup> See, e.g., Nancy Cordes, *Hidden Camera: Kids Film Teachers for YouTube*, ABC NEWS, Feb. 8, 2007, <http://abcnews.go.com/WNT/story?id=2861082&page=1>; Greg Sandoval, *Video of Teacher Rant Gets Students in Trouble*, CNET NEWS, Nov. 24, 2006, [http://www.news.com/2100-1025\\_3-6138172.html](http://www.news.com/2100-1025_3-6138172.html).

by students, has proliferated.<sup>184</sup> For many students, the Internet provides anonymity and, they believe, impunity. In other words, students who use the Internet in this fashion seem to perceive little, if any, risk in doing so. Thus, they proceed in disseminating their thoughts to anyone and everyone with a connection to this seemingly limitless forum for intellectual and linguistic detritus.<sup>185</sup> It therefore seems increasingly likely that the next round of Supreme Court jurisprudence on students' speech rights, if there is to be one, will probably originate from the bedroom of a bored, angst-ridden teenager with an ax to grind against his school or someone in it.

Three federal cases were decided after *Frederick* in the summer months of 2007 involving schools' attempts to sanction students for online statements and expressions directed at, or referring to, school officials. The first was *Wisniewski ex rel. Wisniewski v. Board of Education*.<sup>186</sup> In April 2001, an eighth-grader created and disseminated to his friends an AOL Instant Messenger (AIM) icon depicting a pistol firing a bullet at a person's head, with dots indicating spattered blood and the words "Kill Mr. VanderMolen," referring to the boy's English teacher.<sup>187</sup> Although he claimed it was intended as "a joke," the hearing officer found that it was threatening and that it had disrupted school operations.<sup>188</sup> The boy was suspended for a full semester.<sup>189</sup> More than six years later, and less than two weeks after *Frederick*, the Second Circuit upheld the suspension and dismissed the First Amendment claim.<sup>190</sup> Following *Frederick's* formulation of the *Tinker* substantial-disruption standard, the court found that the boy's expression "crosse[d] the boundary of protected speech and constitute[d] student conduct that poses a reasonably foreseeable risk that the icon would come to the attention of school authorities."<sup>191</sup>

Decided five days after *Wisniewski* and just over two weeks after *Frederick*, *Layshock ex rel. Layshock v. Hermitage School District*<sup>192</sup> involved a First Amendment claim by a high school student who had been suspended for creating and posting a distasteful "parody profile" of his high school principal on MySpace.<sup>193</sup> As in *Wisniewski*, the material

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<sup>184</sup> See, e.g., Parry Aftab, *Parry Aftab's Guide for Schools on Cyberbullying*, STOP CYBERBULLYING, [http://www.stopcyberbullying.org/educators/guide\\_for\\_schools.html](http://www.stopcyberbullying.org/educators/guide_for_schools.html) (last visited Sept. 17, 2008).

<sup>185</sup> See Thomas E. Wheeler, *Lessons from the Lord of the Flies: The Responsibility of Schools to Protect Students from Internet Threats and Cyber-Hate Speech*, 215 ED. LAW REP. 227, 233 (2007) ("The freedom and anonymity that the Internet provides . . . often frees students from normal inhibitions and leads them into decisions revealing their baser natures.").

<sup>186</sup> 494 F.3d 34 (2d Cir. 2007).

<sup>187</sup> *Id.* at 36.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 37.

<sup>190</sup> *Id.* at 38-40.

<sup>191</sup> *Id.* at 38.

<sup>192</sup> 496 F. Supp. 2d 587 (W.D. Pa. 2007).

<sup>193</sup> *Id.* at 591.

was created outside of school but quickly made its way into the school.<sup>194</sup> This time, the court ruled in favor of the student on the First Amendment claim.<sup>195</sup> Describing the page as “purely out-of-school conduct which subsequently carried over into the school setting[,]”<sup>196</sup> the court noted the unanimous finding of the Justices in *Frederick* that the “BONG HiTS 4 JESUS” banner was school-related speech and declined to find that the MySpace page fit that category.<sup>197</sup> Neither did the court find a “substantial disruption” to the operation of the school.<sup>198</sup> In other words, the court followed the reasoning of *Frederick* in attempting to connect the student’s expression to the school but found that the MySpace profile did not fall within the same ambit as Mr. Frederick’s banner.

In *Doninger ex rel. Doninger v. Niehoff*,<sup>199</sup> a high school junior and high achiever heavily involved in extracurricular activities, facing logistical problems and delays concerning a school music festival she was planning, took out her frustration on school officials by posting a vulgar, offensive, and untruthful message about them on a livejournal.com blog.<sup>200</sup> The message encouraged others to harass the officials and offered suggestions for how to do so.<sup>201</sup> In response, the school barred her from running for Senior Class Secretary.<sup>202</sup> The court found that the student “[did] not have a First Amendment right to run for a voluntary extracurricular position as a student leader while engaging in uncivil and offensive communications regarding school administrators.”<sup>203</sup> The court also held under *Wisniewski* that the blog entry could be considered on-campus speech for the purposes of the First Amendment, as it was patently school-related in both its content and purpose.<sup>204</sup> Nonetheless, it was the student’s conduct, not her speech, that seemed to guide the court. The ruling was not so much that she did not have the right to say what she said, but that she did not have the right do what she did.

#### B. *What Standard, Then?*

It seems clear from these cases that students are continuing to use the First Amendment as a sword rather than as a shield against teachers and school officials. It is difficult, though, to discern a clear standard for when schools may sanction students for messages and other

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<sup>194</sup> *Id.* at 591-92.

<sup>195</sup> *Id.* at 600.

<sup>196</sup> *Id.* at 595.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 600.

<sup>199</sup> 514 F. Supp. 2d 199 (D. Conn. 2007).

<sup>200</sup> *Id.* at 202, 206.

<sup>201</sup> *Id.* at 202, 205-06.

<sup>202</sup> *Id.* at 202.

<sup>203</sup> *Id.* at 216.

<sup>204</sup> *Id.* at 217.

forms of expression that they post on the Internet. The fact that Internet content is produced by students off-campus, perhaps in their private bedrooms, clearly does not in itself bar the schools from taking disciplinary action. However, the *Layshock* decision is inconsistent with the other two cases, at least in its result. Since the Internet is essentially universal, in that anything posted on the Internet can originate anywhere in the world and can be viewed anywhere in the world, the potential for Internet content to find its way into a school should probably not vary from one case to the next.<sup>205</sup> The standard must therefore rest on something other than geography or on whether the content can be or is viewed on a school computer.<sup>206</sup> In all three cases, the offending web pages were viewable and *were viewed* on school computers, yet the parody profile in *Layshock* was found to be beyond the school's reach.<sup>207</sup> The *Wisniewski* court found it "reasonably foreseeable that the IM icon would come to the attention of school authorities" and "would foreseeably create a risk of substantial disruption within the school environment."<sup>208</sup> The court in *Layshock* found the former but not the latter.<sup>209</sup> In *Doninger*, however, the court relied not on the threat of substantial disruption but the fact that the content was about school issues, directed at school officials, and purposefully intended to draw the attention and participation of the school community.<sup>210</sup>

While it remains unclear where the precise line is to be drawn concerning students' accountability to their schools for their online statements and expressions, what is clear is that we have public-school students using the Internet to disrupt the educational process by harassing, attacking, parodying, slandering, and otherwise abusing school officials and teachers.<sup>211</sup> Facing the unpleasant consequences of these actions, the abusers proceed to sue their victims, attempting to use the First Amendment to justify wholly unjustifiable conduct—again, as a sword instead of as a shield. Given the fact that essentially all public schools have Internet-connected computers and computer labs, it seems appropriate for the courts to allow schools to reach beyond their

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<sup>205</sup> See Wheeler, *supra* note 185, at 235 ("[U]nlike the written or spoken word, cyberspeech is simply cast out into the ether with no primary locus . . .").

<sup>206</sup> Many schools, though perhaps not all, employ filtering software on school Internet servers to prevent certain websites and content from reaching school computer terminals. For example, schools in New York City, all of whom share the same proxy server with the same IP address, employ Websense Internet filtering and security software, which prevents computers in city schools from accessing social networking sites like MySpace, streaming video sites like YouTube, sites with inappropriate content such as pornography and online gaming, Internet radio, file sharing services, online music stores, etc., even proxy sites that are designed to bypass filtering measures. See Websense, Inc., <http://www.websense.com> (last visited Aug. 12, 2008).

<sup>207</sup> *Layshock*, 496 F. Supp. at 595.

<sup>208</sup> *Wisniewski ex rel. Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 39-40 (2d Cir. 2007).

<sup>209</sup> *Layshock*, 496 F. Supp. 2d at 600.

<sup>210</sup> *Doninger ex rel. Doninger v. Niehoff*, 514 F. Supp. 2d 199, 217 (D. Conn. 2007).

<sup>211</sup> See *supra* notes 182-184.

campuses into cyberspace to regulate students' placement of school-related material on the Internet. The Internet seems to have given children and adolescents, who lack the judgment and foresight to fully appreciate the consequences of their words and actions, a forum to say whatever they please, protected further from those consequences by the perceived, if illusory, safety and absence of risk provided by the Internet's abstract distance and anonymity.<sup>212</sup> This reality can make the schools' job of educating our youth, not only in academics but in the accepted standards of civilized behavior, significantly more difficult. Allowing the schools to sanction students for inappropriate or offensive Internet-based, school-related expression which materially affects the school or school personnel seems not only reasonable but both prudent and efficient. Particularly in the wake of the Columbine and Virginia Tech shootings, schools need to be aware of, and act upon, real and perceived threats to school safety.<sup>213</sup> Institutional disciplinary processes are generally more efficient and less time-consuming and costly than the litigation of individual private rights of action in civil courts.<sup>214</sup>

Finally, as discussed throughout this Note, students need to learn to perceive and appreciate the risks and potential consequences associated with their behavior and their choices. No positive purpose will be served by allowing young people to believe that they can direct antisocial ideas at their teachers and schools with complete impunity, even online.<sup>215</sup> Where the schools' ultimate purpose is to educate children to become intelligent, productive, responsible citizens, those children must at least bear a duty not to undermine that mission and must also bear the risks that come with doing so.

## CONCLUSION

The recurring theme in all of these cases seems to be that teenagers will often act upon their momentary subjective whims and desires. Then when their actions have unpleasant consequences they will

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<sup>212</sup> See *supra* note 185 and accompanying text.

<sup>213</sup> See Thompson, *supra* note 15, at 857-58; Jacobson, *supra* note 112, at 934-35.

<sup>214</sup> The principal parodied on MySpace in *Layshock* has filed a private civil lawsuit in state court. *Layshock*, 496 F. Supp. 2d at 603 n.10.

<sup>215</sup> As a general matter, under the First Amendment citizens have the right to harbor and express unpopular or antisocial ideas, but they are not immune from private consequences. There is, for example, no "free speech" defense to the torts of libel, slander, and defamation; although the news media enjoy First Amendment protection in such cases with respect to public figures and matters of public interest, even they are not entirely immune from suit. See, e.g., *Time, Inc. v. Hill*, 385 U.S. 374, 390-91 (1967). Neither is "free speech" a defense to charges of perjury, false advertising, sexual harassment, or copyright infringement, nor can an employee use it to challenge his having been fired for cursing out his boss. See, e.g., *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 566 (1995) ("[T]he guarantees of free speech and equal protection guard only against encroachment by the government and 'erec[t] no shield against merely private conduct . . .'" (second alteration in original) (quoting *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948))).

claim, enabled by their parents and to some degree by the courts, that those consequences constitute the deprivation of a right instead of the natural result of having taken a calculated risk. The granting of constitutional rights to students that began with *Tinker* has brought with it an unfortunate forbearance of the risks that accompany those rights; somehow, we have brought young people closer to having the same rights as adults but farther from having to bear the same risks. In many ways, the school system as it functions now actually encourages young people to act recklessly instead of reasonably. While this may not be a direct result of the legal and constitutional doctrines discussed in this Note, it is still primarily the threat of legal action that motivates school officials to placate parents by ameliorating not only the disciplinary consequences of children's misbehavior, but the academic consequences of their recalcitrance.<sup>216</sup> Further, it will take significantly more than a change in the law, or a mere redefinition of students' constitutional rights, to fix what is wrong with the public schools.

We certainly do not want schools to abuse their authority; neither do we want adolescents to abuse their rights or interfere with those of others. However, if it is true that the pendulum had swung too far toward the former when *Tinker* was decided, it has most certainly swung too far in the other direction as of 2009. The *Tinker* decision was crafted to allow students to use the First Amendment as it was intended: as a *shield* against unreasonable or arbitrary governmental restrictions on speech and expression. As we have seen, today's public school students, and in many cases their parents as well, are using it as a *sword* against reasonable, legitimate school authority and discipline. If we agree with Justice Black that adolescents lack the capacity to appreciate the wisdom (or, more to the point, lack thereof) of their choices, we cannot reasonably contend that they should be immune from the risks for that reason but not have limited rights for the same reason. Expanding or emphasizing students' "rights" in a school context at the expense of concomitant accountability for unwise choices will only continue to encourage reckless behavior, which can often have tragic results.<sup>217</sup> Even constitutionally-protected behaviors have risks, and we do young people no favors, and teach them the wrong lesson, by pretending that they do not.

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<sup>216</sup> See, e.g., Taylor, *supra* note 133. Parents, of course, bear some of the responsibility for this by having become blind advocates for their children regardless of the facts in many situations involving schools and teachers. Parents and students typically view academic and disciplinary determinations through the lens of how they, and only they, personally are affected, instead of as general principles which would apply objectively to all students in all like situations. This leads to all sorts of absurd and counterintuitive demands and outcomes. See *supra* note 132 and accompanying text; Education: In Search of Reason, <http://educationsanity.blogspot.com/2007/10/cosby-on-meet-press.html> (Oct. 15, 2007, 12:32 EST); see also Samuel G. Freedman, *A Teacher Grows Disillusioned After a "Fail" Becomes a "Pass,"* N.Y. TIMES, Aug. 1, 2007, at B7, available at <http://www.nytimes.com/2007/08/01/education/01education.html>.

<sup>217</sup> See, e.g., Jay Braiman, In Memoriam: Craig J. Grumet 1987-2004, <http://mrbraiman.home.att.net/memorial/memorial.html> (last visited Aug. 21, 2008).

Although the law cannot treat public school teachers and officials as private actors with respect to students, the principles and policies underlying private relationships, such as tort and contract law, would be significantly more useful in balancing students' rights against the authority of school officials in order to meet the needs of the educational system in the twenty-first century. We can afford to lose sight of neither the rights, nor the obligations, on either side. Students and school officials, particularly teachers, see and work with each other every day. A direct, personal relationship under the law functions best where all parties concerned are encouraged to act reasonably and where each party bears both entitlements and obligations with respect to the other. Only when every person in a public school carries both rights and duties into the building, and exercises both in a reasonable manner, can they all walk out at the end of the day with a meaningful educational experience.

*Jay Braiman*<sup>†</sup>

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