**Nebraska Law Review**

Volume 81 | Issue 1 Article 8

2002

# Public School Restrictions on "Offensive" Student Speech in *Boroff v. Van Wert City Board of Education*, 220 F.3d 465 (6th Cir. 2000): Has *Fraser*'s "Exception" Swallowed *Tinker*'s Rule?

Anthony B. Schutz
*University of Nebraska at Lincoln*, aschutz2@unl.edu

Note*

# Public School Restrictions on "Offensive" Student Speech in *Boroff v. Van Wert City Board of Education*, 220 F.3d 465 (6th Cir. 2000): Has *Fraser's* "Exception" Swallowed *Tinker's* Rule?

TABLE OF CONTENTS





* Anthony B. Schutz, B.S., 1998, University of Nebraska at Kearney; J.D. expected, May 2003, University of Nebraska College of Law (NEBRASKA LAW REVIEW, Editor-in-chief, 2002). Thank you to my wife, Cori, for her unending support; Joseph Kehm, Kory George, Kendra Mattoon, and Kristin Crone for their critical examinations; Professor Peter Longo for introducing me to the First Amendment; and Professor Rick Duncan for his helpful insights and discussions with regard to this particular subject.

> The greatest moralizing and socializing force of all time.
>
> . . . .
>
> Till at last the child's mind *is* these suggestions, and the sum of the suggestions *is* the child's mind. And not the child's mind only. The adult's mind too – all his life long. The mind that judges and desires and decides – made up of these suggestions. But all these suggestions are *our* suggestions! . . . Suggestions from the State.[1]

## I. INTRODUCTION

In the unique forum of public schools, the quest for balance between student free speech and the State's interest in effectively educating those students is the source of an ongoing struggle. Formulation of workable rules that strike a proper balance is made especially difficult in this area because we have entrusted the education of our children to the State. Though many of us would not go so far as to say we have placed our children in public schools to become indoctrinated by the State according to majoritarian views, there is a very real danger that, absent appropriate safeguards, subjecting our children to compulsory state education could easily be transformed into just such an activity.

The primary weapon used to ward off such a transformation is the same weapon used to guarantee that minority views are not suppressed by government action in society at large: the First Amendment. By guaranteeing free speech to its citizens – even when such speech is contrary to majoritarian thinking – the First Amendment ensures that the government cannot force individuals into conformity by dictating silence unless the situation allows for such an abridgment of liberty. It is for this same reason that students are not stripped of their First Amendment rights upon crossing the school's threshold.[2]

The First Amendment analysis generally applied to government restrictions on speech, however, is ill-suited to the public school situation given the State's unique role as educator. By entrusting the development of our children to the State we have, in effect, given it a license to inculcate values.[3] For example, we all know that schools teach us a great deal about what is "right" and "wrong." Most of us agree that the use of civility in public discourse, respect for others, and tolerance, among a host of other values, should be taught to our children. The choice of these values, and thus the control of the school's curriculum, properly rests with the elected school boards,

1. ALDOUS HUXLEY, BRAVE NEW WORLD 20 (Harper & Row 1965) (1932).
2. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507-12 (1969) (recognizing and resolving this conflict between majoritarian pressure and individual liberty in favor of students' rights).
3. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272 (1987); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986).

school officials, and teachers to whom we have entrusted the performance of this noble task.[4]

This role, necessarily, implies the exclusion of contrary views the school has chosen not to address, as well as the authority to restrict speech that hinders the school's ability to effectively teach its chosen curriculum. First Amendment concerns arise when a student attempts to voice a view contrary to the school's – a view that has been, or is sought to be, excluded by those in control. As such, the judiciary needs to answer significant questions as to what the school can do under the guise of education. For instance, can a school silence a speaker who espouses a view contrary to that being taught without running afoul of the First Amendment? If so, under what circumstances are schools able to silence such speech: when it interferes with the lesson being taught, when it poses a threat of substantial disruption to discipline or the rights of others, or merely when it occurs on school property and the school simply does not agree with the student's view?

The protection of student speech also has a purpose broader than simply guarding against the potential for State abuses of its educational role. The very fabric of the First Amendment is implicated by silencing our young speakers. An accurate understanding of the power and scope of the First Amendment cannot be fostered in children by merely explaining its text and history in the classroom if the school itself acts contrary to the precise lesson being taught. For example, if the State, vis-à-vis the school, is allowed to sanction a student each time he utters a view in opposition to its view, he will become reluctant to voice his opinion out of fear. In such a situation, the State teaches its students that what the Constitution provides in theory, should not be relied upon in reality.[5]

The Supreme Court's First Amendment jurisprudence addresses these issues in a way that balances the competing interests of the First Amendment with those of the State as educator and insures the perseverance of a proper understanding of the First Amendment in

4. *See Hazelwood*, 484 U.S. at 273; *Fraser*, 478 U.S. at 686.

5. *See Tinker*, 393 U.S. at 507. That being said, a paradox exists in allowing children such freedoms. For an in depth treatment of this issue see Stanley Ingber, *Liberty and Authority: Two Facets of the Inculcation of Virtue*, 69 ST. JOHN'S L. REV. 421 (1995), which explores "[t]he paradox [of] granting liberty to children [which] stems from the realization that society must indoctrinate children so that they may be capable of autonomy." *Id.* at 429. Perhaps it is for this reason that some courts have relied upon the age of the speaker in justifying suppression. *See, e.g.*, Baxter v. Vigo County Sch. Corp., 26 F.3d 728, 738 (7th Cir. 1994) (finding that, on a claim of qualified immunity by school personnel, a student's right to wear expressive T-shirts was not "clearly established" given her elementary school age).

our future leaders. The "trilogy" of cases[6] devoted to this subject allows a school to restrict student speech if the school proffers a sufficient justification. That is, if the speech substantially interferes with school discipline, the work of the school, or the rights of other students, it can be restricted.[7] Alternatively, if the speech takes place during an activity that can fairly be characterized as part of the curriculum, restrictions will be justified if the school can show that its actions were motivated by a legitimate pedagogical concern.[8]

This Note's purpose is to explore the Sixth Circuit's flawed understanding of this trilogy in its evaluation of a school's restriction of student speech in *Boroff v. City of Van Wert Board of Education.*[9] Simply put, the court found no justification for the school's actions in the form of substantial interference or control of its curriculum, but rather, found the school's actions proper simply because the student's speech was "offensive."[10] The court's use of "offensiveness" as a justification, however, is plainly out of sorts with a reasoned understanding of the case law. If indeed the uninhibited ability of the school to sanction a student for "offensive" speech does exist, the court's use of such an exception in *Boroff* swallows the generally applicable rules.

In order to fully appreciate the flaws in the *Boroff* opinion, one needs to closely analyze each of the three cases handed down by the Supreme Court in this area. Part II, therefore, provides a detailed account of this "trilogy." Part III then outlines the *Boroff* court's opinion. With this background, Part IV evaluates the reasoning of *Boroff* in light of the Supreme Court's trilogy of cases, identifying two key flaws in the *Boroff* opinion: section IV.A addresses the court's failure to engage in an evaluation of whether substantial interference or curricular control justified the school's actions, and section IV.B discusses the court's unprincipled application of its "offensive" rationale to Boroff's speech. Part V concludes with a brief summary of Part IV and this author's views as to why the First Amendment should flourish in public schools.

6. This trilogy includes *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969), *Bethel School District No. 403 v. Fraser,* 478 U.S. 675 (1986), and *Hazelwood School District v. Kuhlmeier,* 484 U.S. 260 (1987).
7. *Tinker,* 393 U.S. at 509.
8. *Hazelwood,* 484 U.S. at 273.
9. 220 F.3d 465 (6th Cir. 2000), *cert. denied,* 532 U.S. 920 (2001).
10. *Id.* at 468-71.

## II. FIRST AMENDMENT JURISPRUDENCE IN PUBLIC SCHOOLS: THE TRILOGY

### A. The Substantial Interference Test: *Tinker v. Des Moines Independent Community School District*

The Court's first modern evaluation of the First Amendment in public schools was *Tinker v. Des Moines Independent Community School District*.[11] Under *Tinker*, a school is justified in suppressing student speech only upon a showing that the speech would cause "substantial interference" with the work of the school, appropriate discipline, or the rights of others.[12] This case relied upon the basic notion that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[13]

In December 1965, fifteen-year-old John F. Tinker and friends wore black armbands to school in protest of the hostilities of Vietnam and to show support for a truce.[14] The school district's principals, in response to prior information about the students' intentions, met and passed a policy prohibiting the wearing of armbands with the ultimate penalty being suspension. Two days later the students wore their armbands to school, refused to remove them, and were sent home. Asserting that the school had infringed upon his civil rights, Tinker filed a § 1983 action in the United States District Court.[15] The district court dismissed the complaint[16] and the Eighth Circuit Court of Appeals affirmed the dismissal en banc without issuing an opinion.[17]

The Supreme Court reversed the lower court's decision and held that the wearing of armbands to communicate a particular view could not justifiably be enjoined by the school where there was no evidence that the armbands would substantially interfere with the requirements of appropriate discipline in the school, the work of the school, or the rights of other students.[18] This "substantial interference" test struck a balance between the need for students to retain their First Amendment rights in the schools and the need for school officials to retain the control necessary to carry out their educational task.

---

11. 393 U.S. 503 (1969).
12. *Id.* at 509.
13. *Id.* at 506.
14. *Id.* at 504.
15. *Id.* at 504-05.
16. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 258 F. Supp. 971 (S.D. Iowa 1966).
17. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 383 F.2d 988 (8th Cir. 1967).
18. *Tinker*, 393 U.S. at 509. There was some suspicion of a potential for disruption because a former student had been killed in Vietnam and students at another high school said they would wear armbands of different colors in support of the military effort if the black armbands were allowed. The Court, however, did not find such evidence sufficient to warrant any anticipation that the wearing of the armbands would substantially interfere with the work of the schools, appropriate discipline, or the rights of others. *See id.* at 509 n.3.

The Court opined at length about the significance of student First Amendment rights in the schools:

> That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.[19]
>
> . . . .
>
> The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection.[20]

The Court went on to state that the guarantee of First Amendment freedoms to students was meant to combat transforming state-operated schools into "enclaves of totalitarianism," and to avoid a situation where students are "regarded as closed-circuit recipients of only that which the State chooses to communicate."[21]

Of course, the Court indicated that these sound principles did not constitute an absolute guarantee of liberty in the schools given the "need for affirming the comprehensive authority of the States and of school officials . . . to prescribe and control conduct in the schools."[22] Thus, the substantial interference test was implemented to enable the realization of each competing policy.[23] The Court, however, was careful to note that any interference posed by a student's speech must indeed be "substantial":

> [I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviated from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom – this kind of openness – that is the basis of our national strength and of the indepen-

19. *Id.* at 507 (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) (holding that the State could not require public school students to salute the flag)).

20. *Id.* at 512 (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (citations omitted)).

21. *Id.* at 511.

22. *Id.* at 507.

23. Justice Black's scathing dissent viewed this balance as overly protective of students and underprotective of school authority. Likening school discipline to parental discipline he stated that such control "is an integral and important part of training our children to be good citizens – to be better citizens." *Id.* at 524. He concluded that to allow students to prevail in these sorts of cases would be to "hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students." *Id.* at 526.

> dence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.[24]

With these principles firmly in hand, the Court did not limit its holding to any particular setting. In fact, the Court opined that a student may voice his or her opinion on controversial subjects during classroom hours, in the cafeteria, on the playing field, or on campus during school hours, so long as he or she does not substantially interfere with appropriate discipline, the work of the school, or the rights of others.[25]

### B. Restricting Vulgar, Lewd, or Offensive Speech: *Bethel School District No. 403 v. Fraser*

The Supreme Court's next opinion concerning the First Amendment rights of school students was *Bethel School District No. 403 v. Fraser*.[26] *Fraser* stands for the proposition that school officials can restrict lewd, vulgar, or offensive language where such language interferes with the school's work or is potentially damaging to younger students. The case also signals a partial shift by the Court in favor of school authority. While some courts have indicated this case "casts some doubt upon" the viability of *Tinker*,[27] better reasoning leads to the conclusion that this case either follows *Tinker* or is a narrow exception to its more general "substantial interference" test.[28]

The case was initiated in response to Matthew N. Fraser's suspension for violating school policy in delivering a candidacy speech at a school-sponsored assembly as part of the student government program at the school.[29] The basis for the punishment was the "elaborate graphic, and explicit sexual metaphor" Fraser used in supporting his candidate.[30] Both the district court and the Ninth Circuit Court of Appeals found that Fraser's First Amendment rights had been vio-

---

24. *Id.* at 508-09 (citations omitted).
25. *Id.* at 512-13.
26. 478 U.S. 675 (1986).
27. Baxter v. Vigo County Sch. Corp., 26 F.3d 728, 737 (7th Cir. 1994).
28. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 281-82 (1988) (Brennan, J., dissenting) (noting that *Fraser* follows *Tinker*); cases cited *infra* note 130 (regarding *Fraser* as a discrete area of school authority); *infra* notes 139-45 and accompanying text (regarding *Fraser* as a precursor to *Hazelwood*).
29. *Fraser*, 478 U.S. at 677-78.
30. *Id.* at 678. The speech went as follows:

> I know a man who is firm – he's firm in his pants, he's firm in his shirt, his character is firm – but most . . . of all, his belief in you, the students of Bethel, is firm.
>
> Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts – he drives hard, pushing and pushing until finally – he succeeds.
>
> Jeff is a man who will go to the very end – even the climax, for each and every one of you.

lated as his speech was "indistinguishable from the protest armbands in *Tinker*."[31]

The Supreme Court reversed, finding that the school was within its rights. The Court distinguished Fraser's case from *Tinker* in two ways. First, the restriction imposed upon Fraser, unlike the school's action in *Tinker*, was not based upon any viewpoint or message he was seeking to communicate; rather, the restriction was based upon the speech's sexual content, vulgarity, lewdness, and indecency.[32] Second, the Court emphasized that *Tinker* did "not concern speech or action that intrude[d] upon the work of the schools or the rights of other students," and indicated that Fraser's speech qualified as such an intrusion.[33]

The Court justified its decision upon two grounds: the school's ability to fend off interference with its work and its ability to protect younger students from speech such as Fraser's.[34] The Court first noted that the public education system has as one of its paramount objectives the "inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system,"[35] and that given this goal, it is most certainly the "work of the schools" to be able to instill fundamental values that disfavor the use of terms of debate highly offensive or highly threatening to others.[36] Thus, the Court held that part of the school's educational mission is to instill in students the belief that certain modes of expression are inappropriate.

The Court then went on to reason that because schools and older children teach by example, essentially as role models, the school need not tolerate lewd, indecent, or offensive student speech because to do so would interfere with its goal of teaching students that such speech is not acceptable.[37] Since Fraser's speech was "plainly offensive," given its glorification of male sexuality and its vulgarity, lewdness, and indecency, and since it bore the imprimatur of the school, given its placement within a school-sponsored assembly, the Court found that the school had the power to dissociate itself from Fraser's comments

---

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

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

31. *Id.* at 679.
32. *Id.* at 680.
33. *Id.* (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 478 U.S. 503, 508 (1969)).
34. *Id.* at 681-85.
35. *Id.* at 681 (quoting Ambach v. Norwick, 441 U.S. 68, 76-77 (1979)).
36. *Id.* at 683 (quoting *Tinker*, 478 U.S. at 508). The Court buttressed this observation by analogizing it to the ability of Congress "[to prohibit] the use of expressions offensive to other participants" by citing to The Manual of Parliamentary Practice, drafted by Thomas Jefferson, which prohibits the use of "indecent language." *Id.* at 681.
37. *Id.* at 683.

by punishing him in order to make the point to students that such speech was inconsistent with what was acceptable in public discourse; in other words, his speech interfered with the school's work.[38]

The Court also determined that the sexual content of Fraser's speech "could well be seriously damaging to its less mature audience."[39] By citing to the long line of cases protecting young children, especially in a captive audience, from vulgar, sexually explicit, or indecent (but not obscene) language, the Court further justified its decision.[40]

The Court then concluded its reasoning by turning to the words of Justice Murphy to indicate its historical reluctance to extend First Amendment protection to obscene or indecent language: "[S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[41]

### C. Restricting Student Speech Occurring Within the Curriculum: *Hazelwood School District v. Kuhlmeier*

The Supreme Court's most recent articulation of student speech rights is contained in *Hazelwood School District v. Kuhlmeier*.[42] The *Hazelwood* opinion is a marked departure from the standard imposed by *Tinker*. In fact, the Court specifically rejects *Tinker* as applicable to the restriction of student speech occurring within curricular events.[43] Under *Hazelwood*, a school's restriction of speech that oc-

38. *Id.* at 685-86.

39. *Id.* at 683.

40. *Id.* at 684-85 (citing Bd. of Educ. v. Pico, 457 U.S. 853 (1982) (plurality opinion); FCC v. Pacifica Found., 438 U.S. 736 (1978); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)).

41. *Id.* at 685 (quoting *Pacifica,* 438 U.S. at 746 (quoting *Chaplinsky,* 315 U.S. at 572)). Justice Brennan disagreed with this reasoning in his concurrence because he felt the language used by Fraser was far removed from what the Court normally deemed obscene, vulgar, or indecent. *Id.* at 688 (citing Ginsberg v. New York, 390 U.S. 629 (1968), and Roth v. United States, 354 U.S. 476 (1957)). His concurrence went on to agree with the Court's holding in that, under the circumstances of the case, he believed the school was correct in determining that such speech disrupted its educational mission; however, he stated that the speech "may well have been protected had he given it in school but under different circumstances, where the school's legitimate interests in teaching and maintaining civil public discourse were less weighty." *Id.* at 689. He concluded his opinion with the observation: "Courts have a First Amendment responsibility to insure that robust rhetoric . . . is not suppressed by prudish failures to distinguish the vigorous from the vulgar." *Id.* at 689-90 (quoting Thomas v. Bd. of Educ., 607 F.2d 1043, 1057 (2d Cir. 1979)).

42. 484 U.S. 260 (1987).

43. *Id.* at 272.

curs within one of these events will be allowed so long as it is motivated by a legitimate pedagogical concern.[44]

The case was filed in response to the school principal's removal of a two-page section from the school newspaper. The principal removed these pages because of two articles they contained. One article discussed three students' experiences with pregnancy and the other discussed the impact of divorce on students at the school.[45] The principal chose to delete the two pages because he was concerned that the identity of the pregnant teens was not adequately concealed, the article's reference to sexual behavior and birth control was inappropriate for some of the younger readers, and the parents of the child who was the subject of the divorce article were not given a chance to respond to its accusations.[46]

The district court, which decided the case before *Fraser* was handed down, did not apply *Tinker's* substantial interference test. Instead, it denied the injunctive relief sought by the student editors and found that "school officials may impose restraints on students' speech in activities that are an integral part of the school's educational function – including the publication of a school-sponsored newspaper by a journalism class – so long as their decision had a substantial and reasonable basis."[47] The Eighth Circuit Court of Appeals reversed, finding that the newspaper was a public forum and that, as such, its contents could not be censored except where justified under *Tinker*.[48]

---

44. *Id.* at 273.
45. *Id.* at 263.
46. *Id.* at 263-64.
47. *Id.* at 264 (quoting Kuhlmeier v. Hazelwood Sch. Dist., 607 F. Supp. 1450, 1466 (E.D. Mo. 1985) (citations omitted)).
48. Kuhlmeier v. Hazelwood Sch. Dist., 795 F.2d 1368, 1374 (8th Cir. 1986). These lower court opinions, and their subsequent visitation in the Supreme Court, mark the official entry of the public forum doctrine into this area. Application of the public forum doctrine to the *Boroff* case is unnecessary. The only relevant distinction between a public and a non-public forum is that in the former content-based restrictions are not valid unless justified under strict scrutiny, while in the latter such justification can be achieved under a lower standard – that depicted by the *Tinker-Fraser-Hazelwood* trilogy. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983) (stating that in a designated public forum, the government can only restrict speech based on content if the restriction is "narrowly drawn to effectuate a compelling state interest"); *Hazelwood,* 484 U.S. 260 (evaluating restrictions on student speech in a non-public forum).

Since there is not enough evidence contained in the opinion to adduce whether a public forum was created for Boroff's expression, and the public forum doctrine was not applied by the court, this Note will not undertake to apply such an analysis but will assume that no public forum was created. Operating under this assumption does not cast any doubt on this Note's analysis of *Boroff.* Even under the decreased standard afforded by *Tinker*, *Fraser*, and *Hazelwood*, the school's actions in *Boroff* are not justified; thus a fortiori, the school's actions could not be validated under the more demanding test of strict scrutiny. It is also worth noting that, to the extent the school in *Boroff* may have engaged in viewpoint dis-

The Supreme Court reversed the Eighth Circuit's decision, finding that the school could properly "exercis[e] editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[49] This decision marks the firm engrafting of separate standards for evaluating a school's restriction of student speech based on where the speech occurs. Student speech that occurs within an activity that can "fairly be characterized as part of the school curriculum" is more easily restricted than student speech that merely "happens to occur on the school premises."[50] The former category of speech includes "school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."[51] The Court opined that such curricular events need not occur in the classroom "so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences."[52] The Court left the latter form of speech – purely personal student speech – to be governed by *Tinker*.[53]

The Court cited three justifications for a school's increased power to restrict curricular speech: for the school to assure "[1] that participants learn whatever lessons the activity is designed to teach, [2] that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and [3] that the views of the individual speaker are not erroneously attributed to the school."[54] The Court also synthesized its holding with its prior opinions in *Tinker* and *Fraser*:

> [A] school may in its capacity as publisher of a school newspaper or producer of a school play "disassociate itself," *Fraser*, 478 U.S. at 685, not only from speech that would "substantially interfere with [it's] work . . . or impinge upon the rights of other students," *Tinker*, 393 U.S. at 509, but also from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences.[55]

---

crimination, that is, suppressed one view from discussion in favor of another, such action would not be allowed in either a public or a non-public forum. *See* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 392-94 (1993) (holding that even if a public forum wasn't created by the school district, viewpoint discrimination was contrary to the dictates of the First Amendment).

49. *Hazelwood*, 484 U.S. at 273.
50. *Id.* at 271.
51. *Id.*
52. *Id.*
53. *Id.* at 272-73.
54. *Id.* at 271.
55. *Id.* Disagreeing with the dissent, the Court also noted at this point that *Fraser* was not merely a reification of *Tinker* but rather "rested on the 'vulgar,' 'lewd' and 'plainly offensive' character of a speech delivered at an official school assem-

Simply stated, when a student's speech is school-sponsored, the school can restrict the speaker in order to shield its students from potentially sensitive topics or it can refuse to lend its name and resources to speech that is inconsistent with "the shared values of a civilized social order"[56] so long as such action is motivated by legitimate pedagogical concerns. Judicial intervention in the decisions of school boards in this area will only be merited where the restriction has no valid educational purpose.[57]

Justice Brennan wrote a scornful dissent in which Justices Marshall and Blackmun joined. The dissent conceded that in some instances student expression directly prevents the school from achieving its educational goals; however, the dissent felt that a departure from *Tinker* was not necessary in order to recognize this ability.[58] For instance, when a student stands in calculus class to deliver a speech on the merits of democracy or, as in *Fraser*, where a lewd speech is made in support of a student government candidate during a school-sponsored assembly, the pedagogical goal of the activity – to teach calculus in the former and acceptable public discourse in the latter – is materially and substantially disrupted; thus, the school may silence the speaker under *Tinker*.[59] The dissent noted, however, that speech which only conflicts with the message of the school cannot be restricted.[60] For example, in a political science class, where a student responds to a question from the instructor by stating "socialism is good," or, as in *Tinker*, where a student passively expresses his opposition to the conflict in Vietnam, the school is not justified in silencing the student lest the schools are to be transformed into "enclaves of totalitarianism."[61]

The dissent also disagreed with the majority's imposition of differing standards applicable to speech occurring within the school's curriculum and speech that only occurs on the school premises by noting that such a distinction could not be found under the Court's jurisprudence in this area.[62] The dissent observed that in *Fraser* the speech took place at a school-sponsored event but that fact did not give credence to the dichotomy promulgated by the majority because *Fra-*

---

bly rather than on any propensity of the speech to 'materially disrup[t] classwork or involv[e] substantial disorder or invasion of the rights of others.'" *Id.* at 272 n.4 (citations omitted).

56. *Id.* at 272 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986)).

57. *Id.* at 273.

58. *Id.* at 277-91 (Brennan, J. dissenting).

59. *Id.* at 279.

60. *Id.* at 280-81.

61. *Id.* at 280.

62. *Id.* at 281.

*ser* clearly followed *Tinker*, which did not even mention curricular placement.[63]

Justice Brennan further attacked each one of the three justifications offered by the majority in support of this dual standard. He found that the first concern, the prerogative of the school to control the curriculum, was fully addressed by *Tinker* because speech that occurs within a curricular event is more likely to disrupt the curricular function than when it arises in another context.[64] The second concern, assuring that young audiences are shielded from sensitive topics, was found by the dissent to be an easy avenue for viewpoint discrimination[65] used to "transform students into 'closed-circuit recipients of only that which the State chooses to communicate.'"[66] Finally, the dissent concluded that the third justification, school disassociation from that which it wishes not to condone, could have been achieved through more narrow means such as a disclaimer.[67]

## III. *BOROFF V. VAN WERT CITY BOARD OF EDUCATION*

It is against the backdrop of these three Supreme Court decisions that the Sixth Circuit addressed *Boroff v. Van Wert City Board of Education*.[68] Nicholas Boroff, a senior at Van Wert High School, appeared at school on August 29, 1997, wearing a Marilyn Manson T-shirt.[69] The front of the shirt included the band's name and a rendering of a three-faced Jesus along with the words "See No Truth. Hear No Truth. Speak No Truth." On the back of the shirt was the word "BELIEVE" with the letters "LIE" highlighted.[70] School officials decided the shirt violated the school's "Dress and Grooming" policy, which provided that "clothing with offensive illustrations, drug, alcohol, or tobacco slogans . . . [is] not acceptable."[71] Boroff was told he could either turn the shirt inside-out, go home and change, or leave and be considered truant. Boroff went home and did not return that day. On each of the next four days Boroff wore different Marilyn Manson T-shirts to school, each displaying a picture of the band's lead singer. On each

63. *Id.* at 281-82.

64. *Id.* at 283.

65. *Id.* at 288.

66. *Id.* at 286 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969)).

67. *Id.* at 289.

68. 220 F.3d 465 (6th Cir. 2000), *cert. denied,* 532 U.S. 920 (2001).

69. *Id.* at 467. Marilyn Manson is a rock band that is classified in the "goth" genre. The title is both the name of the band and the stage name of the band's lead singer, Brian Warner. *Id.* at 466.

70. *Id.* at 467.

71. *Id.*

day he was sent home and did not return. Boroff later initiated a § 1983 action against the school.[72]

The United States District Court for the Northern District of Ohio entered summary judgment for the school. The court concluded that "[a] school may prohibit a student from wearing a T-shirt that is offensive, but not obscene, on school grounds, even if the T-shirt has not been shown to cause a substantial disruption of the academic program,"[73] and further, found that "the school did not act in a manifestly unreasonable manner in finding the T-shirts offensive."[74]

The Sixth Circuit Court of Appeals affirmed the decision of the district court upon a de novo review.[75] In so doing, the court applied the *Tinker-Fraser-Hazelwood* trilogy to find the school's actions permissible under the First Amendment.[76] The court's reasoning discarded *Tinker* because it concluded that no viewpoint had been restricted by the school, and then utilized *Fraser* as the applicable standard for evaluating restrictions of "offensive" speech. It then supported its position with the increased power of school authorities articulated in *Hazelwood*.[77]

In reaching this conclusion, the court first summarized *Tinker* and then discussed *Fraser* as "cast[ing] some doubt on the extent to which students retain free speech rights in the school setting."[78] The court explained *Fraser* as distinguishing itself from *Tinker* because the suppression of the vulgar and offensive speech at issue in *Fraser* was "unrelated to any political viewpoint."[79] The court also cited *Fraser* for the proposition that "the school district had the authority to determine that the vulgar and lewd speech at issue would undermine the school's basic educational mission."[80]

The court characterized *Hazelwood* as echoing *Fraser's* position that a school's basic educational mission entitles it to restrict speech that it would be unable to censor outside of the school.[81] Under *Hazelwood*, the court opined, the school was justified in restricting a student's speech so long as the restriction "reasonably related to legitimate pedagogical concerns."[82] The court then noted the distinction, articulated by the Court in *Hazelwood*, between *Tinker* and *Fra-*

72. *Id.*
73. *Id.* at 469.
74. *Id.*
75. *Id.* at 472.
76. *Id.* at 468.
77. *Id.* at 470.
78. *Id.* at 468 (quoting Baxter v. Vigo County Sch. Corp., 26 F.3d 728, 737 (7th Cir. 1994)).
79. *Id.*
80. *Id.*
81. *Id.* at 468-69.
82. *Id.* at 469 (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988)).

*ser* in that the latter rested on the "vulgar and offensive character of the speech," while the former rested on the "propensity of the speech materially to disrupt classwork or involve substantial disorder."[83] Given these perceived differences, the court concluded that *Fraser* was "the standard for reviewing the suppression of vulgar or plainly offensive speech" where the restriction is not based on the speaker's viewpoint.[84]

In applying the principles it derived from *Tinker*, *Fraser*, and *Hazelwood*, the court rejected Boroff's assertion that the decision of the school was manifestly unreasonable because the T-shirts could not fairly be characterized as offensive.[85] The court rejected this contention even though Boroff presented evidence that T-shirts promoting other bands, such as "Slayer" and "Megadeth," were permitted by the school, as was the wearing of Marilyn Manson patches by other students.[86]

The court instead opined that the record indicated the school found all of Boroff's T-shirts offensive because Marilyn Manson "promotes destructive conduct and demoralizing values that are contrary to the educational mission of the school."[87] Specifically, the court accepted the principal's assertions that the "three-headed Jesus" T-shirt was offensive because of the "See No Truth. Hear No Truth. Speak No Truth" mantra and the "obvious implication" of the word "BELIEVE" (highlighted as such).[88] The principal also stated that the distorted Jesus figure was contrary to the school's educational mission of teaching values of tolerance; establishing "a common core of values that include . . . human dignity and worth . . . self respect, and responsibility"[89]; and instilling "into the students, an understanding and appreciation of the ideals of democracy and help[ing] them to be diligent and competent in the performance of their obligations as citizens."[90]

In expanding upon the justifications used by the principal to restrict the three-headed Jesus T-shirt, the court noted that the views associated with Marilyn Manson in the press, and those espoused by the band in its lyrics, were reasonably attributed to Boroff's wearing of the T-shirts generally because, as the principal stated, "[the T]-shirts can reasonably be considered a communication agreeing with or approving of the views espoused by Marilyn Manson in its lyrics and . . .

83. *Id.* at 469 (citing *Hazelwood*, 484 U.S. at 272 n.4).
84. *Id.*
85. *Id.* at 471.
86. *Id.* at 469.
87. *Id.*
88. *Id.*
89. *Id.* at 470.
90. *Id.*

associated to Marilyn Manson through articles in the press."[91] Additional evidence included affidavits of other school officials stating that they perceived the T-shirts to be counter-productive and against the basic educational mission of the school.[92] The court also found the record "devoid of any evidence that the T-shirts . . . were perceived to express any particular political or religious viewpoint."[93]

Based on this evidence, the court concluded that the district court was correct in finding that the school did not act in a manifestly unreasonable manner in prohibiting the T-shirts from being worn pursuant to its dress code. "[W]here Boroff's T-shirts contain[ed] symbols and words that promote[d] values that are so patently contrary to the school's educational mission, the School ha[d] the authority, under the circumstances of this case, to prohibit those T-shirts."[94]

The court expressly disfavored the view espoused by the dissent, which found evidence that the school engaged in viewpoint discrimination such that a finding of substantial disruption would be necessary under *Tinker* to justify the school's actions.[95] In so doing, the court stated that the record demonstrated that the school prohibited all of the T-shirts because of their promotion of "disruptive and demoralizing values."[96] Since the T-shirts were banned because they were determined to be "vulgar, offensive, and contrary to the educational mission of the school,"[97] the actions of the school were allowed under *Fraser*.[98]

Judge Gilman's dissent found three areas of the majority opinion that were incompatible with the Supreme Court's jurisprudence in this area: 1) the evidence suggesting that the school engaged in viewpoint discrimination, 2) the majority's misapprehension of the meaning of the terms "vulgar" and "offensive," and 3) the majority's failure to note the distinction between *Fraser* and *Hazelwood* on the one hand, and *Tinker* on the other, in that school-sponsorship is required in the former and not in the latter.[99]

---

91. *Id.* at 469. The court went on to describe magazine articles depicting the artist as an admitted drug user and quotes the lyrics of some of Marilyn Manson's songs: "you can kill yourself now because you're dead in my mind," "let's jump upon the sharp swords/and cut away our smiles/without the threat of death/there's no reason to live at all," and "Let's just kill everyone and let your god sort them out/ Fuck it/Everbody's someone else's nigger/I know you are so am I/I wasn't born with enough middle fingers." *Id.* at 470.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 471.

97. *Id.*

98. *Id.*

99. *Id.* at 472-76 (Gilman, J., dissenting).

Judge Gilman began by noting that summary judgment is inappropriate in civil rights cases where "disputed and material questions about the reasonableness of an official's actions or about an official's intent" exist.[100] He then opined that he saw just such a question as to the intent of the school officials in that the evidence suggested they may have declared Boroff's T-shirts "offensive" for impermissible reasons. The three-headed Jesus T-shirt, as stated in the principal's affidavit, was deemed "offensive" because it mocked a religious figure, which was particularly offensive to many people in the school; thus, it appeared to the dissent that it was the message expressed through the shirt that was the basis for the school's finding of offensiveness.[101] Noting that school officials have very wide latitude in their administrative restrictions on speech in the wake of *Fraser* and *Hazelwood*, the dissent nevertheless concluded that such evidence of viewpoint discrimination precluded summary judgment.[102] In the dissent's view, evidence of a perceived religious viewpoint gave viability to the conclusion that the school deemed the shirt "offensive" precisely because many people in the school vehemently opposed the message it conveyed.[103] "[T]aking sides in that manner . . . is accompanied by an all-but-irrebuttable presumption of unconstitutionality."[104]

The dissent then opined that the majority's use of the term "offensive" was out of sorts with the case law on the subject. In the dissent's view, such a characterization applies to words and phrases that are "themselves coarse and crude"[105] like George Carlin's famous list of "dirty words."[106] The dissent noted that if the lyrics of Marilyn Manson's songs had been displayed on the T-shirt, offensiveness or vulgarity could easily be found; however, the dissent disagreed with the majority's finding that no evidence existed to suggest that the school found the T-shirts offensive because of the unpopular viewpoint Boroff expressed, rather than on the character of the words themselves.[107]

Next, the dissent attacked the majority's adoption of the school's characterization that the T-shirts represented disruptive or demoralizing values. In fact, the dissent noted that since the school did not explain what disruptive or demoralizing values the T-shirts promoted, a reasonable jury could have found that the values it was speaking of were Boroff's disrespect for Christian beliefs; thereby offering further

100. *Id.* at 472.
101. *Id.* at 473.
102. *Id.* at 472.
103. *Id.* at 472-73.
104. *Id.* at 473.
105. *Id.*
106. *Id.* (citing FCC v. Pacifica Found., 438 U.S. 726 (1978)). Carlin's "Filthy Words" monologue was based upon the seven words: "shit, piss, fuck, cunt, cocksucker, mother-fucker, and tits." *Pacifica Found.*, 438 U.S. at 751.
107. *Id.* at 473-74.

evidence that it was the view espoused by the speaker, rather than the form of the expression, that was the basis for the school's action.[108]

Furthermore, the dissent opined that the promotion of disruptive and demoralizing values may not have been enough to censor the student. The school officials in *Tinker*, in all likelihood, would have found that the speech there promoted disruptive and demoralizing, not to mention unpatriotic, values; however, silencing that speech could not be allowed absent a showing of "material and substantial interference with schoolwork or discipline."[109] Thus, the dissent concluded that even if a particular view is offensive to some, it cannot be restricted without complying with *Tinker*.[110]

Finally, the dissent disagreed with the majority's notion that *Tinker* was inapplicable. According to the dissent, the majority apparently reasoned that *Fraser* and *Hazelwood* allow restrictions on speech so long as the speech is offensive and the actions of the school are not manifestly unreasonable. But, the dissent reasoned, while both opinions did confer more authority to school officials in controlling the school, both rested on the proposition that the school "might reasonably have been thought to be endorsing or condoning the student expression at issue had they taken no action."[111] The dissent concluded that since a school cannot reasonably be thought to condone or endorse T-shirts that it fails to ban, especially in the secondary school context, *Tinker* was the only case that could be applicable.[112]

## IV. THE SIXTH CIRCUIT'S FLAWED ANALYSIS

Since *Tinker*, use of the First Amendment to protect student speech in the secondary school setting has seen little success. *Hazelwood* and *Fraser* have limited the ability of students to speak their minds where the school's curricular power is implicated. Nonetheless, the Sixth Circuit's opinion in *Boroff* represents a flawed application of the increased ability of school officials to silence student views afforded by *Hazelwood* and *Fraser*. Specifically, *Boroff* uses *Fraser* and *Hazelwood* to justify a school's suppression of student speech that does not implicate the school's curricular power – speech that merely happens to occur on the school property. This is clearly wrong because only speech that occurs within a setting that can "fairly be characterized as part of the school curriculum"[113] is subject to restriction under *Fraser* and *Hazelwood*; in all other cases *Tinker* provides the proper

108. *Id.* at 474.
109. *Id.* (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969)).
110. *Id.*
111. *Id.* at 475.
112. *Id.*
113. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988).

standard. To construe these cases as the *Boroff* court did, establishes an exception that swallows *Tinker's* rule and disregards the principles upon which it was founded.

Section IV.A first analyzes the *Boroff* court's failure to recognize the distinction between speech that occurs within a curricular event and purely personal student speech. The thrust of this analysis is the *Boroff* court's flawed interpretation of *Fraser*. Second, section IV.B shows that, even if *Fraser* can be extended beyond the curricular context that *Hazelwood* found necessary to such restrictions, the court's unprincipled application of the term "offensive" to Boroff's speech was clearly wrong.

### A. Student Speech Occurring Within a Curricular Event v. Purely Personal Student Speech

The key principle missed by the *Boroff* court is that *Tinker's* substantial interference test is applicable to all speech that does not occur within an activity that implicates the school's authority over its curriculum. Instead, the *Boroff* court treated *Fraser* as the applicable standard, that is, as representing an exception to *Tinker* that allows schools to restrict lewd, vulgar, or offensive speech regardless of where that speech occurs.[114] While *Fraser* can reasonably be interpreted as either applying *Tinker* or applying the same standard as was recognized later in *Hazelwood*, it simply cannot represent the unfettered school authority to restrict vulgar, lewd, or offensive speech for which the *Boroff* court interprets it to stand, lest *Tinker*, and the principles upon which it was grounded, are to be thrown by the wayside.

This section first explains what qualifies as a curricular event and the reasons for applying higher standards to the restriction of student speech that does not occur within such an event. Next, since the *Boroff* court completely missed this fundamental premise by reasoning that *Fraser* supplied the proper analysis, the propriety of this interpretation of *Fraser* is discussed. Finally, in order to show the unsoundness of the *Boroff* court's interpretation of *Fraser*, the correct interpretations of *Fraser* are discussed along with the likely outcomes had the *Boroff* court engaged in the proper analysis.

As *Hazelwood* clearly shows, only activities that can reasonably be perceived as coming under the school's auspices qualify as curricular events, that is, activities that are supervised by faculty members and are designed to impart either knowledge or skill to the student or the audience.[115] When speech occuring within such events is restricted, the school need only show its actions were based upon a legitimate

114. *See Boroff*, 220 F.3d at 469.
115. *Hazelwood*, 484 U.S. at 271.

pedagogical concern.[116] Thus, when a student stands to profess his view of United States foreign policy on Afghanistan during a calculus class, the school may constitutionally prohibit such speech.[117] The calculus class could be nothing less than curricular, and the educational purpose that motivates the restriction is the legitimate goal of teaching calculus. Similarly, the same would be true of Boroff's shirts if he wished to wear them, instead of the school-mandated uniform, during the homecoming football game. The football game is curricular as it is designed to teach discipline, teamwork, and fair play to the student participants; it is supervised by school officials; and to allow the shirt could reasonably be perceived by the viewing public as the school's endorsement of the message contained thereon. Furthermore, the restriction would be motivated by the legitimate educational concern of teaching students that uniformity overcomes individuality in a team sport.

As *Hazelwood* illustrates, a school has greater authority within its curriculum because of the public schools' role as inculcator of societal values and the authority that must accompany that role to insure its realization, i.e., the ability to restrict that which is contrary to it's basic educational mission.[118] However, when speech cannot reasonably be construed to occur within a curricular event, the justifications for school-imposed restrictions are not present and *Tinker* demands a more exacting standard. In such instances the school can only restrict personal expression – that which merely happens to occur on the school premises – when it materially and substantially interferes with appropriate discipline, the work of the school, or the rights of other students.[119]

This limitation on a school's ability to restrict student expression exists for a variety of reasons. Most importantly, it ensures the marketplace of ideas remains intact. Given the fact that schools have universal control of their curriculum, and therefore their teachers, one of the few ways in which a student can receive information that is inconsistent with the views the State wishes to promulgate is through other students. Students have a palpable right to receive ideas.[120] The

116. *Id.* at 273.

117. *See id.* at 279 (Brennan, J., dissenting) (using a similar hypothetical to show *Tinker* would allow the school's restriction under such circumstances).

118. *See id.* at 271.

119. *See id.* at 270-71.

120. The notion that the "marketplace of ideas" gives students the right to receive information is not controversial. Such was the basis for the Court's holding in *Board of Education v. Pico*, 457 U.S. 503 (1982), where the Court found that books described by the school as "anti-American, anti-Christian, anti-Semitic, and just plain filthy," *id.* at 857, could not be removed from the school library under the auspices of curricular control because students have the right to receive ideas. *See id.* at 866-68. *See also* Kleindienst v. Mandel, 408 U.S. 753, 762-

learning that occurs within the school setting is not solely attributed to the classroom but also takes place in the halls, the cafeteria, and on the campus during school hours.[121] While the State may have blanket control over its curriculum, these other areas of learning are not subject to that censure. The State is only allotted that amount of influence in these outside areas as results from the inculcation of its beliefs within the curriculum.[122] As a result, it is outside the curriculum that the marketplace of ideas is given meaning by enabling students to choose among a variety of ways in which to explain the world around them: "to discover truth 'out of a multitude of tongues,' [rather] than through any kind of authoritative selection."[123]

*Tinker*, which remains good law and is still cited by the Court,[124] was premised upon this very notion: that student learning cannot be totally controlled by the State if the marketplace of ideas is to remain intact.[125] If this fundamental principle is to retain any legitimacy, courts cannot infringe upon *Tinker*'s standard in areas outside of the school's curriculum.

Another justification for insuring the ability of students to have the unfettered ability to pronounce views that are at odds with, or not even part of, the curriculum is to further buttress the power of the First Amendment itself. How are students to fully appreciate the values of our democratic society if students' ability to speak their minds about certain matters outside of the curriculum is tempered by the State's inculcation goal?[126] If throughout the student's experience with the State's authority – his educational life – the student is silenced based on his views, he will necessarily learn that the First Amendment is nothing more than constitutional lip-service that offers

63 (1972); Stanley v. Georgia, 394 U.S. 557, 564 (1969); Martin v. Struthers, 319 U.S. 141, 143 (1943) (all standing for this notion of student rights).

121. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512-13 (1969) (noting that communication among students is an important part of the educational process).

122. In many instances this may be enough to effectively indoctrinate the young mind to majoritarian thinking; especially where students do not critically examine the teachings laid before them.

123. Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (1943)), *quoted in Tinker*, 393 U.S. at 512.

124. *E.g.*, United States v. Playboy Entm't Group, 529 U.S. 803, 817 (2000), *cited in* Boroff v. Van Wert City Bd. of Educ., 220 F.3d 465, 475 (6th Cir. 2000) (Gilman, J., dissenting), *cert. denied*, 532 U.S. 920 (2001).

125. *See Tinker*, 393 U.S. at 507-12.

126. Ironically, the ability to restrict student speech in the curricular area is premised on the fact that the school is the inculcator of values necessary to the maintenance of a democratic society. *See* Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 681 (1986). Such restrictions, though plainly allowed by the Court, seem to directly contradict this goal if we regard the First Amendment as just such a value.

no real protection.[127] As a result, if that indoctrinated citizen is brave enough to privately question the State later in life, he will be reluctant to voice his view despite the very real protections the First Amendment guarantees.

It is for these reasons that differing standards are applied to school restrictions on student speech when it occurs within a curricular event and when it does not. The *Boroff* court, though, completely missed this very important point. The court adopted the lower standard applied to student speech restrictions under *Hazelwood* without opining as to why such a lower standard was merited. Clearly, *Hazelwood* allowed a lower standard than that articulated in *Tinker* because the school must be afforded enough control over its curriculum to effectively teach; however, this curricular control is not implicated by speech that does not occur within a curricular event; thus, *Hazelwood's* lower standard is inapplicable to speech that does not occur within a curricular event.[128] As such, *Tinker* provides the proper standard for evaluating school suppression of student speech and the reasons for allowing the expression of student views are directly applicable. Nonetheless, the *Boroff* court ignored the curricular placement requirement. It evaluated the school's actions under a lesser standard than *Tinker* because it found, in effect, that *Fraser* represented an exception to *Tinker's* rule – that schools have the ability to restrict vulgar, lewd, or offensive speech regardless of its disruptive effect or curricular placement.[129] This conclusion is clearly at odds with a reasoned understanding of *Fraser* in light of *Tinker* and *Hazelwood*.

*Fraser* can be considered as representing one of three possibilities: 1) the Court's adherence to the *Tinker* disruption standard, 2) a precursor to the *Hazelwood* decision in that it requires restricted speech to have occurred within a curricular event, or 3) a distinct area of authority for schools to regulate vulgar, lewd, or offensive speech regardless of its occurrence within the curriculum or its potential for substantial interference.[130] While the *Boroff* court adopted the third possibility, this interpretation is unjustified given the facts and rea-

127. *See Tinker*, 393 U.S. at 507. The fact that students learn through their experiences and observations in the school cannot be denied. In fact, in order to justify its holding, the Court in *Fraser* relied upon the notion that school officials and other students teach as role models. *See Fraser*, 478 U.S. at 683, 685-86.

128. *See, e.g.*, Poling v. Murphy, 872 F.2d 757, 762 (6th Cir. 1989) (applying the school-sponsorship criteria to uphold the ability of a school to sanction a student for a speech denouncing a school official given as part of a school-sponsored election campaign); Desilets v. Clearview Reg'l Bd. of Educ., 630 A.2d 333, 338 (N.J. Super. Ct. App. Div. 1993) (adhering to this principle in the context of characterizing an extra-curricular participation newspaper as a school-sponsored event under *Hazelwood*); cases cited *infra* note 144.

129. *See Boroff*, 220 F.3d at 469.

130. A few courts have determined that the *Tinker-Fraser-Hazelwood* trilogy can be summarized pursuant to this third possibility:

soning of *Fraser* and the way that case was treated in *Hazelwood*. The propriety of these interpretations and their application to the facts of *Boroff* will be discussed in turn.

As to the first possibility, *Fraser* can reasonably be construed as merely following *Tinker's* substantial interference standard. As noted by Justice Brennan's dissent in *Hazelwood*, the Court's analysis in *Fraser* tends to reinforce the idea that it was merely adhering to *Tinker*.[131] The Court in *Fraser* opined that the inculcation of values commensurate with the idea of what is proper in public discourse was the "work of the schools."[132] Thus, substantial interference with "the work of the schools" could be said to justify the imposition of restrictions on student speech and bring that case under *Tinker*.[133] As such, the *Boroff* court would have been bound to apply *Tinker* which would require a finding that the message portrayed by the T-shirt caused, or was reasonably predicted to cause, a material and substantial interference with the work of the school.[134] The court did not do so, per-

---

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

Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 214 (3d Cir. 2001); *See also* Chandler v. McMinnvill Sch. Dist., 978 F.2d 524, 529 (9th Cir. 1992); Pyle v. S. Hadley Sch. Comm., 861 F. Supp. 157, 166 (D. Mass. 1994) (both adhering to same interpretation). Notably, in a Comment published after this Note was in press, Jonathan Pyle, one of the litigants in *Pyle v. South Hadley School Committee*, attacked the holding of *Pyle*, critically examined many of the student expression cases, and concluded that *Tinker* provides the proper standard in all such cases in *Speech in Public Schools: Different Context or Different Rights?*, 4 U. PA. J. CONST. L. 586 (2002).

Given the language used in *Fraser* and *Hazelwood*, other equally reasonable evaluations may lead to different conclusions, and, insofar as one may be drawn to the characterization of courts like *Saxe*, it gives no credence to the *Boroff* court's conclusion because Boroff's speech does not qualify as lewd, vulgar, or profane, nor can it be characterized as not expressing a viewpoint. *See infra* text accompanying notes 152-82.

131. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 281-82 (1987).

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

133. This potential interpretation may turn on whether the "work of the schools" extends beyond "classwork," the disruption of which the *Hazelwood* majority expressly stated was not the basis for the *Fraser* decision. *See supra* note 55. *Compare Hazelwood*, 484 U.S. at 272 n.4 (quoting *Tinker*, 393 U.S. at 513), *with Fraser*, 478 U.S. at 683 (quoting *Tinker*, 393 U.S. at 508). Given the expanded notion of the "work of the schools" adopted by the *Fraser* Court, which includes the "inculcation of . . . values," *Fraser*, 478 U.S. at 683, such may indeed extend beyond "classwork."

134. *See Tinker* 393 U.S. at 508.

haps because the issue was not framed properly,[135] but more likely because the record before it would not support such a finding.

The record simply did not contain any evidence to support a finding of actual disruption to classwork. There was also no evidence to show that the T-shirts posed any threat of disruption to appropriate discipline. Furthermore, even though the view espoused on the T-shirts may have been contrary to others' religious beliefs, this cannot provide a basis for restriction because Boroff's view did not interfere with the rights of any other students. It appears that the only viable argument under *Tinker* that could have been made on these facts was that "the work of the school" – the school's teaching of tolerance for individual religious beliefs – was disrupted by Boroff's T-shirts.[136] This may have given the school a ground for restriction; however, one must remember that the disruption must be substantial and material.[137] This sort of passive expression, like the armband in *Tinker*, probably would not have qualified.[138]

The second possibility – that *Fraser*, like *Hazelwood*, requires that the student's vulgar, lewd, or offensive speech occur within a curricular event in order to be subject to restriction under a reasonableness standard – is also a plausible interpretation of *Fraser*. However, the Boroff court also rejected it. The speech in *Fraser* occurred within a curricular event, namely a school-sponsored assembly held pursuant to the student body election program that was supervised by faculty and designed to teach students the democratic process.[139] The Court

135. Boroff framed the constitutional examination as follows: "The way to analyze this is to first determine whether the speech is 'vulgar or offensive.' If it is, then *Fraser* allows banning it, and the analysis is complete. Otherwise, apply *Tinker* and examine if there is a threat of substantial disruption such that would allow the school to ban the speech." *Boroff*, 220 F.3d at 469.

136. If we buy into the idea that schools teach, in part, as role models, it seems ironic that the suppression of views with which the school does not agree is indicative of tolerance. A persuasive argument can be made that tolerance could not be taught, much less needed, where nothing disputatious exists to tolerate.

137. *See Tinker*, 393 U.S. at 508-09.

138. *See id.* at 514 (describing the armbands at issue as "a silent, passive expression of opinion, unaccompanied by any disorder or disturbance" and, thus, improperly restricted). *But see* McIntire v. Bethel Sch., Indep. Sch. Dist. No. 3, 804 F. Supp. 1415 (W.D. Okla. 1992) (finding that a school's restriction on student speech in the form of T-shirts was governed by *Tinker* and was proper thereunder). The T-shirts at issue in *McIntire* involved a slogan that was associated with alcohol. The school board was allowed qualified immunity because the plaintiff's right to wear the shirts was not "clearly established" because "reasonable school officials could forecast that the wearing of clothing bearing a message advertising an alcoholic beverage would substantially disrupt or materially interfere with the teaching of the adverse effects of alcohol" and was thus allowed under *Tinker*. *Id.* at 1421. In other words, the "work of the schools" was disrupted by the T-shirts. Nonetheless, just because the student's right was not "clearly established" for the purposes of qualified immunity, does not mean that such a right does not exist.

139. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 677 (1986).

in *Hazelwood* also categorized *Fraser* as standing for the proposition that a school may "dissociate itself" from student speech that is contrary to its educational mission.[140] Dissociation implies sponsorship, which is a fundamental requisite to the existence of a curricular event.[141] In fact, Justice Brennan opined in his *Fraser* concurrence that Fraser's speech "may well have been protected had he given it in school but under different circumstances, where the school's legitimate interests in teaching and maintaining civil public discourse were less weighty."[142]

Moreover, the Court in *Hazelwood* opined that the *Fraser* opinion was grounded upon the school's "authority to refuse to *sponsor* student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with 'the shared values of a civilized social order.'"[143] Given this characterization by the Court, the most plausible interpretation of *Fraser* is that it rested upon the same curricular control principles that were later applied in *Hazelwood*.[144] This being the case, one can easily analogize the restriction in *Fraser* with that of *Hazelwood* by realizing that the restriction of indecent speech in the former reasonably related to the legitimate educational function of the school to teach the values of civilized discourse during a school-sponsored curricular debate, whereas in the latter the restriction reasonably related to the educational goal of teaching proper journalism techniques in a school-sponsored newspaper.[145]

---

140. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1987).

141. *See id.*

142. 478 U.S. at 689.

143. *Hazelwood*, 484 U.S. at 272 (emphasis added) (quoting *Fraser*, 478 U.S. at 683).

144. Judge Gilman appropriately recognized this in his dissent, *Boroff*, 220 F.3d at 475, and other courts have followed just such an interpretation. *See, e.g.*, Henerey v. City of St. Charles, 200 F.3d 1128 (8th Cir. 1999) (adhering to the distinction between *Tinker* and *Fraser/Hazelwood* based on school-sponsorship in upholding a school's restriction of a student handing out condoms with the phrase "Adam Henerey, The Safe Choice" while running as a candidate in a school-sponsored election); Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 531-33 (9th Cir. 1992) (Goodwin, J., concurring) (noting that *Fraser* should not be stretched beyond the curricular context); Burch v. Barker, 861 F.2d 1149 (9th Cir. 1988) (holding that *Fraser* and *Hazelwood* are applicable to the ability of a school to regulate speech in school-sponsored activities pursuant to its power to control the curriculum); McIntire v. Bethel Sch., Indep. Sch. Dist. No. 3, 804 F. Supp. 1415 (W.D. Okla. 1992) (finding that T-shirts which are not school-sponsored, do not bear and could not reasonably be perceived as bearing the imprimatur of the school and, thus, were not subject to *Fraser* or *Hazelwood* but rather were governed by *Tinker*).

145. Though, as the *Boroff* court noted, there is language in *Hazelwood* indicating that the allowance of the restriction in *Fraser* was based on the lewd character of the speech, and not on a *Tinker* analysis, this does not mean that the speech did not first have to occur within the curriculum. *See Hazelwood,* 484 U.S. at 271-72 n.4; *Boroff,* 220 F.3d at 468-69. *But see* Broussard v. Sch. Bd., 801 F. Supp. 1526

This interpretation though, does not validate the *Boroff* court's opinion because Boroff's speech cannot reasonably be characterized as occurring within a curricular event as defined by *Hazelwood*. The hallways of the school where Boroff expressed his views, while probably supervised by faculty, are not designed to impart any knowledge upon the student. Nor can the wearing of a T-shirt within them reasonably be perceived by others as bearing the endorsement of the school. Judge Gilman recognized this fact in his dissent.[146] His reasoning rested on nothing less than the Supreme Court's statement in *Board of Education v. Mergens*:[147] "We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support speech that it merely permits on a nondiscriminatory basis. . . . The proposition that schools do not endorse everything they fail to censor is not complicated."[148]

Furthermore, the fact that Boroff's passive expression of his viewpoint may also have occurred within the classroom cannot bring the restriction under *Hazelwood* given the analogous facts of *Tinker*. There the students wore their armbands both inside and outside the classroom; however, the school was still held to a more demanding standard than that applied in *Hazelwood*.[149] Thus, this interpretation of *Fraser* – as merely foreshadowing *Hazelwood* – shows that had the court engaged in this analysis, the case would have come out differently. If left to a *Tinker* analysis, as discussed above, the school's restriction would have been without merit.[150]

The *Boroff* court adopted the third possible interpretation of *Fraser* – that a school is allowed to restrict vulgar, offensive, or lewd speech, regardless of its curricular placement or disruptive effect, subject only to a reasonableness standard of review.[151] As seen above, this interpretation is unjustified given the facts and reasoning of the Court in *Fraser* and the way that case was treated by the Court in *Hazelwood*. Moreover, given the propriety of the alternative interpretations of *Fraser*, the fact that a school is only afforded a greater ability to re-

(E.D. Va. 1992) (applying *Fraser* as a content-neutral manner restriction to allow the restriction of a student wearing a T-shirt with words "Drugs Suck" contained thereon without regard to the curricular placement of the speech). The court in *Broussard* did not engage in the tolerance/sponsorship determination but did note that even under *Tinker* the school officials could reasonably forecast a substantial disruption. *Id.* at 1537. Thus, the court there may not have been motivated to engage in the proper analysis.

146. *Boroff*, 220 F.3d at 475.

147. 496 U.S. 226 (1990).

148. *Id.* at 250.

149. *See Tinker*, 393 U.S. at 508 (describing the armbands at issue as "a silent, passive expression of opinion, unaccompanied by any disorder or disturbance" and, thus, subject to restriction only upon a showing of substantial interference).

150. *See supra* text accompanying notes 135-38.

151. *Boroff*, 220 F.3d at 468-69.

strict student speech when it occurs within its curriculum, and the paramount justifications for requiring material and substantial interference under *Tinker*, the *Boroff* court was simply wrong in giving *Fraser* an expanded meaning. As will be seen below, one need only look to the facts and opinion of *Boroff* to realize that the application of such an expanded meaning establishes an exception that swallows *Tinker's* rule.

## B. Offensive Speech and Taking Offense to Students' Views

Though the extension of *Fraser* to speech that does not occur within the curriculum and does not cause substantial interference is clearly wrong, the *Boroff* court was equally misguided in its analysis under *Fraser*. Even if we assume arguendo that *Fraser* stands for the proposition that a school has the authority to restrict lewd, offensive, or vulgar speech regardless of the curricular context in which it is uttered or its disruptive effect, one must then determine what speech qualifies as lewd, offensive, or vulgar. As this section will show, "offensive" speech, in its constitutional sense, is qualified by the offensiveness of the manner chosen to communicate one's view – the offensive form of the speech – rather than the offense one may take to the view expressed by the speaker. While the evidence shows that the school regarded Boroff's T-shirts as offensive because of its disagreement with the views expressed thereon, the court found the record devoid of any indication that the school based its restriction of Boroff's speech on any message communicated thereby. Since finding that a repugnant viewpoint did not motivate the school's actions was necessary to allow the application of *Fraser* in lieu of *Tinker* and *Hazelwood*, such a characterization appears to be an unprincipled application of a label that enables simpler analysis.

The dissent took the correct position that "offensive" speech is that which is offensive in form rather than in substance.[152] This view is completely commensurate with the holding in *Fraser*. The restriction in *Fraser* was based on the sexually connotative form of the speech, and not on any offensiveness in the message conveyed.[153] Presumably, the message conveyed by Fraser's speech was that his candidate would take action on behalf of students and would thus be a prime choice for the student council.[154] That message was simply not the

152. *Id.* at 473-74.

153. *See Hazelwood,* 484 U.S. at 286 n.2 (Brennan, J., dissenting) (noting that the *Fraser* exception is limited "to the appropriateness of the *manner* in which the message is conveyed, not of the message's *content*"); East High Gay/Straight Alliance v. Bd. of Educ., 81 F. Supp. 2d 1166, 1193 (D. Utah 1999) ("*Fraser* speaks to the form and manner of student speech, not its substance. It addresses the mode of expression, not its content or viewpoint.").

154. *See Fraser,* 478 U.S. at 687 (Brennan, J., concurring); *supra* note 30.

basis for the school's action or the Court's opinion. Under the Court's analysis, the sexually explicit metaphor used by Fraser was not regarded as constituting a message, but rather only represented the form of expression used to communicate his view of the candidate. There are numerous places in *Fraser* where the Court referred to the ability of the school to regulate "the offensive form of expression,"[155] "the use of expressions offensive to other[s],"[156] inappropriate "modes of expression,"[157] and "what manner of speech . . . is appropriate."[158] In fact, the Court was careful to note that the actions of the school were unrelated to any message the speaker may have espoused.[159] As such, it is clear that the restriction allowed in *Fraser* was based upon the form the message took and not on the content of the message itself.

This principle is aptly demonstrated by the notion, articulated in *Fraser*, that a student may be allowed to wear Tinker's armband but not Cohen's jacket.[160] In *Cohen v. California*,[161] the Court found the application of a statue that criminalized "offensive conduct" unconstitutional. Paul Cohen was convicted of violating this statute for wearing a jacket bearing the words "Fuck the Draft."[162] The Court's evaluation of the constitutionality of the statute's application to Cohen's speech under the First Amendment rested upon the premise that offensiveness can only exist in the form of the expression, the use of the word "fuck," rather than on any judgment about Cohen's express view of the draft: "[Cohen's] conviction . . . can be justified, if at all, only as a . . . regulation of the *manner* in which he exercised that freedom, not as a . . . prohibition on the substantive message it conveys."[163] Thus, while Cohen's jacket may be an impermissible expression within the school,[164] a similar jacket bearing the words "Draft

155. *Fraser*, 484 U.S. at 681.
156. *Id.*
157. *Id.* at 683.
158. *Id.*
159. *Id.* at 680.
160. *Id.* at 682 (quoting Thomas v. Bd. of Educ., 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring)).
161. 403 U.S. 15, 19 (1971).
162. *Id.* at 16.
163. *Id.* at 19 (emphasis added).
164. It is unnecessary to regard *Fraser* as defining an exception to *Tinker* in order for the school to restrict such speech. Such would be the case because the use of vulgarity within curricular events would be subject to certain restriction under *Hazelwood*. Furthermore, the use of vulgarity outside of those events may pose enough of an interference with the school's work that the school could restrict such speech under *Tinker*. *See Hazelwood*, 484 U.S. at 279 (Brennan, J., dissenting) (noting that *Tinker* would allow restriction in similar circumstances).

While it would be difficult to imagine a world where a school could not restrict the use of obscenities in student communications, it remains to be seen exactly what forms of speech qualify as "offensive" within the school. While the defini-

Unfair" could not be excluded absent a showing of substantial interference or curricular placement.[165] One cannot characterize a particular view as "offensive" without per se engaging in some sort of judgment about its propriety. As the dissent correctly noted, restrictions based upon such a judgment are evaluated under "an all-but-irrebuttable presumption of unconstitutionality."[166]

The *Boroff* majority, though, glossed over the evidence indicating that the school may have considered Boroff's T-shirts offensive because of the views expressed thereby. It is possible that the court simply engaged in such an unprincipled analysis in order to avoid harder questions posed by the application of *Tinker* and *Hazelwood*. The court expressly stated that it found no evidence that any particular

---

tion of what manner of speech qualifies as "offensive" in the school setting may be more lax than George Carlin's "dirty words," especially given the relatively tame speech restricted in *Fraser*, it is not clear what standard would be determinative.

*Fraser* itself is partially based on the sexual nature of the speech used. *See Fraser*, 478 U.S. at 680 (referring to the "sexual content" of Fraser's speech as distinguishing it from *Tinker*). Insofar as sexually explicit language is related to obscenity, one could conclude that the ability to restrict speech under *Fraser* is at least analogous to the ability of the government to restrict speech that falls within those narrow categories afforded lesser First Amendment protection. *See, e.g.*, Roth v. United States, 354 U.S. 476 (1957) (demonstrating that obscenity is afforded a lower level of First Amendment protection); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (demonstrating that "fighting words" are subject to restriction without any additional justifying circumstances).

Inasmuch as *Fraser* may help us flesh out this issue, the same reduced protection is not justifiably applied to Boroff's speech. The messages conveyed by his shirts go to the very heart of the First Amendment. They involve issues of moral controversy discussed at great length by scholars and lay people alike – the existence of God, the ability to learn while blinded by one's beliefs in a supreme being, the legality of drug use, individual insignificance, and the existence of truth. *See Boroff*, 220 F.3d at 467, 470. This sort of speech plainly does not fall within any of the categories afforded lesser constitutional protection.

165. While a school can surely suppress a particular opinion under *Tinker*, *see Tinker*, 393 U.S. at 511, the ability to do the same under *Hazelwood* may be subject to argument. On the one hand, the censorship of the articles in that case does appear to be based on the views espoused therein and the ability of the school to refuse to sponsor speech contrary to the values it seeks to teach. On the other, the opinion is also firmly based on the conflict such speech posed to the educational mission of the paper itself: the promotion of proper journalistic techniques. *See supra* section II.C. To adopt the first basis as the fundamental reasoning of the Court gives the school the necessary power to control its curriculum and effectively inculcate values. To adopt the second, adheres more to *Tinker* which teaches us that schools are not to be "Orwellian guardian[s] of the public mind." *Hazelwood*, 484 U.S. at 286 (Brennan, J., dissenting). This author tends to favor the second view. If the school wishes to justify its teachings, then it should have to do so in light of contrary views. If for example, socialism is advocated by a student during a discussion of capitalism in a civics class, *see id.* at 279, the school should address the issue. To merely bar the other side from the conversation gives the appearance of illegitimacy to the school's view.

166. *Boroff*, 220 F.3d at 473. Or, at the very least, must be evaluated under *Tinker* or *Hazelwood*. *See supra* note 165.

"religious or political viewpoint" was used as the basis for restricting Boroff's speech with regard to either his three-headed Jesus T-shirt or the other T-shirts bearing only Marilyn Manson's image.[167] However, the record indicated that the principal found the three-headed Jesus T-shirt particularly offensive because it displayed a distorted figure of Jesus and because it bore the words "See No Truth. Hear No Truth. Speak No Truth." and "BELIEVE" (highlighted as such).[168] These words and figures in themselves cannot reasonably be labeled as offensive.[169] Rather, it appears that the only reasonable explanation for the principal's characterization is that he took offense to the anti-Christian message conveyed – that there is no truth, that Jesus is a fraud, that faith is a lie.

This reasonable inference, which would have been enough to reverse the lower court given the procedural stance of the case, is buttressed by the fact the principal also stated that he found the three-headed Jesus T-shirt offensive because "mocking this particular religious figure is particularly offensive to a significant portion of our school community."[170] As Judge Gilman aptly noted, it appears clear that the principal found this shirt offensive because it said something by mocking Jesus and because many people, including the principal, "disagreed vehemently with what they perceived this T-shirt as saying."[171] Given this statement, it is ridiculous to say that no evidence existed upon which to find the school restricted Boroff's speech in response to any religious viewpoint. One can take offense to many things but "offensive" in its constitutional sense simply cannot be based upon a judgment regarding the view espoused by a speaker.

Though the court opined that the three-headed Jesus T-shirt was treated no differently than the T-shirts displaying Marilyn Manson's picture,[172] the justification for the restriction of the latter T-shirts has even less of a basis. While Marilyn Manson's appearance may have been "ghoulish and creepy,"[173] the shirts were not evaluated by the court or the school as offensive in form but rather were found offensive because of their "reasonably supposed promotion" of "disruptive and demoralizing values" derived from song lyrics,[174] Marilyn Manson's

167. *Boroff*, 220 F.3d at 470.
168. *Id.* at 469.
169. *See supra* note 164.
170. *Boroff*, 220 F.3d at 472.
171. *Id.* at 473.
172. *Id.* at 471.
173. *Id.* at 467.
174. *Id.* at 470-71. As correctly noted by Judge Gilman's dissent, the form of expression used in these song lyrics easily qualifies as vulgar or offensive. *Id.* at 473-74; *see supra* note 164. Under the court's interpretation of *Fraser*, if a student on campus uttered these words, they could properly be disciplined. However, the court explicitly relied upon the values promoted by the song lyrics: the substantive message they communicated.

express views of certain subjects, and the association of certain viewpoints to Marilyn Manson through the media.[175] Given these statements, there are two glaring problems with the court's reasoning.

First, how could Boroff be said to promote "disruptive and demoralizing values" without expressing a viewpoint? The viewpoint *is* the promotion of these detrimental values. Promotion is in its very essence the taking of a side on a subject. The principal in *Boroff* stated as much in his affidavit: "I believe that the Marilyn Manson [T]-shirts can reasonably be considered a communication agreeing with or approving of the views espoused by Marilyn Manson . . . and . . . associated to Marilyn Manson through articles in the press."[176] Offensiveness simply cannot be based upon the repulsiveness of the message conveyed. In order to suppress such a viewpoint, disruption must be shown under *Tinker* or the speech must be curricular under *Hazelwood*. Neither was shown here.

Second, even if one accepts for the sake of argument that the T-shirts with only Marilyn Manson's picture did not express a viewpoint, it cannot be avoided that the court's association of "demoralizing and disruptive values" to these T-shirts in particular is absurd. It goes without saying that some symbols can be closely associated with certain views.[177] For example, an armband can stand for opposition to Vietnam, a raised middle finger for a vulgar phrase, or a confederate flag for the suppression of minority civil rights.[178] But, can one reasonably associate Marilyn Manson's face with the promotion of drug use, violence, or intolerance based only upon his songs dealing with such subjects or media portrayals of his views? If this is so, then the school should have also stricken from its hallways all memorabilia bearing the faces of the Beatles, Eric Clapton, Aerosmith, Snoop Dogg, Madonna, the Rolling Stones, and Bill Clinton, as well as an infinite

175. *Boroff*, 220 F.3d at 470.

176. *Id.* at 469.

177. Again, we run into the unavoidable fact that Boroff clearly expressed a viewpoint.

178. The display of such a flag was at issue in *Denno v. School Board*, 218 F.3d 1267 (11th Cir. 2000), where school administrators were found to be entitled to qualified immunity because the student's right to display such a flag on school property during school hours but not as part of any school-sponsored event was not "clearly-established." *Id.* at 1274-75. In so finding the court cited, among other cases, *West v. Derby Unified School District No. 260*, 206 F.3d 1358 (10th Cir. 2000). In *West*, the court found that the drawing and circulation of a confederate flag by a student was properly punished under the *Tinker* analysis given the potential for substantial disruption in light of the history of race relations in the school. *Id.* at 1366. Alternatively, the *West* court found that *Fraser* may allow the restriction of such a flag even though it was not part of a school-sponsored event. *Id.* Significantly though, neither the Tenth Circuit in *West* nor the Eleventh Circuit in *Denno* expressly found that *Fraser* extended that far. The former court relied upon the *Tinker* disruption standard, *id.*, while the latter declined to reach the actual merits given the issue in the case was only whether the right of the student was "clearly established," *Denno*, 218 F.3d at 1275.

number of other household names that have lived lives, or become associated with activities through the media, which are contrary to the social values the school wished to indoctrinate in its students.

Notwithstanding the attenuated nature of the association of demoralizing values to Marilyn Manson's picture, Boroff presented evidence that T-shirts with pictures of such bands as "Slayer" and "Megadeth" were allowed along with patches bearing Marilyn Manson's face or name.[179] These facts exemplify the absurdity of the notion that these particular T-shirts were "offensive" such that regulation was necessary while other equally "offensive" shirts, under the school's reasoning, were allowed.

Moreover, to allow other equally "offensive" images, while singling out Boroff's T-shirts, tends to buttress the notion that it was Boroff's message that was offensive to the authorities involved. Such motivation necessitates justification in the form of substantial interference or curricular placement. In fact, the Court in *Tinker* found this sort of selective enforcement of speech restrictions relevant to its finding that the school had overstepped its authority, stating that "[c]learly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference . . . is not constitutionally permissible."[180]

The main reason the court was compelled to find that no viewpoint was used as the basis for the school's action was to distinguish this case from *Tinker* – which explicitly dealt with the suppression of particular views but required substantial interference – and *Hazelwood* – which arguably allowed the restriction of particular views but required curricular placement – in order to allow the application of *Fraser*.[181] This appears to be nothing more than the unreasoned application of a label that was necessary to embark upon the path chosen by the court. There is really no question that the evidence adduced points to the fact that it was Boroff's message that was offensive to the school officials. To say the school relied upon something else is improbable, if not implausible.

A democratic society must tolerate that which is unpopular unless the setting allows for the restriction.[182] In a school, the setting allows

179. *Boroff*, 220 F.3d at 469.

180. *Tinker*, 393 U.S. at 511 (finding such given the evidence presented that students in the school were allowed to wear symbols of controversial significance, including an Iron Cross and buttons relating to national political campaigns).

181. *See Boroff*, 220 F.3d at 468.

182. *Tinker*, 393 U.S. at 508-09. As the Third Circuit stated in striking down an anti-harassment policy as overbroad: "The Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it." Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 215 (3d Cir. 2001) (citing Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock

for such restrictions only when justified by substantial disruption or curricular placement. The court, however, did not engage in the proper analysis. By merely attaching the "offensive" and "not expressive of a viewpoint" labels to Boroff's speech, the court allowed the school to restrict that which is plainly protected under the First Amendment.

## V. CONCLUSION

The role of instilling values in our nation's youth is an exceedingly important task. If we must entrust this function to state operated public schools and compulsory education, we must also keep in mind the risks associated with delegating the power of indoctrination to the State. The key means of keeping these risks from fruition is the First Amendment.

As has been discussed at length above, the Supreme Court has articulated standards for the restriction of student speech in order to ensure that students are not stripped of their First Amendment right to free speech. Simply put, the general rule is that a school can restrict student speech only if it materially and substantially interferes with the work of the school, appropriate discipline, or the rights of other students.[183] *Tinker* is still the law and for good reason: to strangle student viewpoints merely because they are contrary to that which the school thinks is proper would transform our schools into "enclaves of totalitarianism."[184] What is more, if our future leaders are to understand the true value of the First Amendment, they must learn to appreciate its protection through experience. These principles were afforded substantial weight by the *Tinker* Court[185] and are no less relevant today.

The fact that the Supreme Court recognized the school's inculcation role in *Fraser* and *Hazelwood* and decided that when speech occurs within a curricular event school authorities should have greater control, does not invalidate the underlying premise of *Tinker*. Granted, the school must retain control of discipline and its curriculum, but tolerance is the rule when a student's speech implicates neither. *Fraser* was completely in line with this fundamental under-

---

principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."), *Tinker*, 393 U.S. at 509 (finding that a school may not prohibit speech based on the "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint"), and Street v. New York, 394 U.S. 576, 592 (1969) ("It is firmly settled that . . . the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.")).

183. *See supra* text accompanying notes 18-25.

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

185. *See supra* text accompanying notes 19, 21.

standing. That case merely represents the notion that the school teaches as a role model and thus may dissociate itself from offensively lewd speech that materially interferes with teaching civilized public discourse in a civics program.[186] But, to give *Fraser* a broader meaning, to extend this ability beyond the curriculum or disregard the notion of substantial interference, opens the door wide to restrictions that are invalid under *Tinker*.

The *Boroff* majority missed this key component of the Court's First Amendment jurisprudence and seized upon the term "offensive" to justify its restriction while the dissent recognized many of the flaws of the majority's reasoning. Maybe the school could have justified its actions by restricting the religious viewpoint proffered by Boroff if that view substantially interfered with the goal of teaching tolerance or was expressed within a curricular event. However, there was no evaluation of whether the speech occurred within such an event nor was there any evidence presented of material and substantial disruption. As such, the ability of the school to restrict Boroff's speech simply did not exist.

Though Marilyn Manson's views are not commensurate with mine, I think it is imprudent, if not dangerous, to draw a line that cannot be maintained in order to shield students from that which the State finds repugnant. To restrict speech under the rubric of "offensiveness" is to cultivate just such a distinction. The term "offensive" does not depict a standard but an opinion. As *Boroff* shows, it is altogether too easy for a school to attach such a label to speech with which it does not agree. I cannot help but think that First Amendment protection is at its best when we experience views we neither agree with nor respect. Only then are we assured that the First Amendment is really working.

I fear that if John Tinker's armband was evaluated by the Van Wert School and reviewed by a court under *Boroff*, that case would have come out differently: with the court finding the school had constitutionally restricted Tinker's message because of its offensiveness. The fears of the majority in *Tinker* may indeed become a reality if courts allow school authorities to restrict all manner of student speech that is deemed offensive precisely because it conflicts with what the school wishes to teach.

One must always remember the potential for public schools to become so much a part of a "Brave New World."[187] As John Stuart Mill wrote many years ago:

> A general State education is a mere contrivance for molding people to be exactly like one another; and as the mold in which it casts them is that which pleases the predominant power in the government – whether this be a monarch, a priesthood, an aristocracy, or the majority of the existing generation –

186. *See supra* text accompanying notes 26-41, 130-51.
187. *See supra* text accompanying note 1.

> in proportion as it is efficient and successful, it establishes a despotism over the mind.[188]

As true today as it was in the days of Mill, and later in *Tinker*,[189] the perseverance of such essential freedoms as the First Amendment is one of our only means of ensuring that truth is found among a variety of conflicting voices and is not simply infused in our children by the State. If the First Amendment is to have a chance of persevering, our future leaders must fully understand its power and not be taught by those in control that its theoretical protections are fleeting in reality.

*Anthony B. Schutz*

188. JOHN STUART MILL, ON LIBERTY 129 (Currin V. Shields, ed., The Bobbs-Merrill Company, Inc. 1956) (1859).

189. *See supra* text accompanying notes 19-20, 120-27.