
***Morse v. Frederick* One Year Later: New Limitations on Student Speech and the “Columbine Factor”**

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INTRODUCTION

When Justice Samuel Alito agreed with other members of the Supreme Court that a school principal could constitutionally prohibit a student from holding up a sign with the words “Bong Hits for Jesus,” he thought that the prohibition was limited to speech about illegal drugs.² He was wrong. One year later, federal courts have expanded *Morse v. Frederick*³ far beyond its facts to include restrictions on student speech advocating illegal conduct and speech threatening school safety. This article suggests that the expansion of *Morse* has two causes. The first is the Court’s opinion itself. The second is what this article has labeled the “Columbine factor.”

One way to characterize Supreme Court opinions is to divide them into principled or ad hoc. Principled opinions provide lower courts with guidance. Ad hoc opinions are harder to apply in the future and leave lower federal courts with little guidance. The Supreme Court opinion in *Morse v. Frederick*⁴ is an ad hoc opinion. It provides federal courts with little guidance in the area of student speech.

Morse concerned a First Amendment challenge by a high school student who was suspended for holding up a banner containing the words “Bong Hits for Jesus” at a time when students were released from class to watch the Olympic Torch Relay pass in front of their school. After the Supreme Court granted certiorari, it was fully expected that the Court would clarify the First Amendment rights of students. Contrary to expectations, the Court’s opinion in *Morse* did little to clarify student rights. Instead, the predictive value of *Morse* can be summed up in the following way: “students have a right to speak in

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2. *Morse v. Frederick*, 127 S. Ct. 2618, 2638 (2007) (Alito, J., concurring) (“I therefore conclude that the public schools may ban speech advocating illegal drug use. But I regard such regulation as standing at the far reaches of what the First Amendment permits. I join the opinion of the Court with the understanding that the opinion does not endorse any further extension.”).

3. 127 S. Ct. 2618 (2007).

4. *Id.*

schools except when they don't."⁵

The aim of this article is to discuss new limitations on student speech arising from the unprincipled nature of the Court's opinion in *Morse* and from the Columbine factor. The Columbine factor arises from a heightened concern about the safety of students in schools after tragic events such as the Columbine massacre.⁶ In some instances, this factor has resulted in a judicial balancing test where fear of a Columbine attack is balanced against the First Amendment rights of students.⁷ Any attempt to predict the outcome of a student-speech case in the twenty-first century should take the Columbine factor into account. Yet this is difficult. It is difficult because it is a heuristic⁸ that lies outside traditional legal theories. Nevertheless, the Columbine factor exists. It can be seen in the September 11, 2008 opinion of a federal judge who wrote that the "term 'Columbine' connotes death as a result of one or more students shooting other students."⁹ It can be seen in the 2008 opinion of another judge who wrote that mass shootings are a fact of life and that it is "*against this backdrop that courts across the country have considered First Amendment challenges.*"¹⁰

As Part III of this article will show, judicial references to school shootings make clear that the shootings themselves, along with the media's sensationalized coverage of them, has had its effect. Television imagery of students running away from a shooter is fear-inducing.¹¹ This fear, fueled by

5. *Id.* at 2634 (Thomas, J., concurring).

6. The tragedy that became "Columbine" began on April 20, 1999, when high school students Eric Harris and Dylan Klebold drove to Columbine High School near Littleton, Colorado. They walked to the highest point on the campus. At 11:19 a.m., a witness heard one of them yell, "Go, go." At that moment, "[Klebold and Harris] pulled out their shotguns and began shooting." Michael Janofsky, *Columbine Victims Were Killed Minutes into Siege at Colorado School, Report Reveals*, N.Y. TIMES, May 16, 2000, available at 2000 WLNR 3236860. After killing twelve students and one teacher and injuring twenty-three others, Harris and Klebold committed suicide by shooting themselves in the head. *Id.*

7. See *infra* Part III.4.1 (discussing *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765 (5th Cir. 2007)).

8. Heuristics are part of the decision-making process. According to psychologists, heuristics are judgmental shortcuts. The so-called "availability heuristic" is particularly relevant to the Columbine factor. See *infra* Part IV (providing further discussion of Columbine factor as availability heuristic). Under this heuristic, a person "assumes that if examples are brought to mind quickly (such as graphic images of students running from a school shooter), then there must be a lot of them." JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 191 (Daniel Kahneman et al. eds., 1982).

9. *Johnson v. New Brighton Area Sch. Dist.*, No. 06-1672, 2008 U.S. Dist. LEXIS 72023, at *26 (W.D. Pa. Sept. 11, 2008). The use of the term "Columbine" to mean school shooting is widespread. For example, the Santana High School shooter told his friends that he was going to "pull a Columbine." Kevin Vaughan, *Cult of Youth Violence: On Edge of Society, Disaffected Youth Identify with the Infamous*, DENVER ROCKY MOUNTAIN NEWS, Dec. 15, 2007, available at 2007 WLNR 24784087. The Santana shooter was a fifteen-year-old freshman who killed two students and injured thirteen others at his high school near San Diego, California. One witness who heard the student talk about bringing a gun to school recalled, "I even mentioned Columbine to him. I said I don't want a Columbine here at Santana. But he said, 'No, nothing will happen, I'm just joking.'" *Two Dead In School Shooting*, CBS NEWS, Mar. 5, 2001, <http://www.cbsnews.com/stories/2001/03/05/national/main276424.shtml>.

10. *Cuff v. Valley Cent. Sch. Dist.*, 559 F. Supp. 2d 415, 420 (S.D.N.Y. 2008) (emphasis added).

11. "[M]any agree that the media pays disproportionate attention to sensational stories aimed at fear inducing topics." Paul Ohm, *The Myth of the Superuser: Fear, Risk and Harm Online*, 41 U.C. DAVIS L. REV.

easy-to-recall images, exaggerates the probability of risk that a Columbine attack will occur.¹² Added to this, is the Court's unprincipled opinion in *Morse*. By failing to provide lower courts with guidance, and by characterizing schools as places of "special danger,"¹³ *Morse* opened the door to extreme interpretations of what the case meant and to its use as the legal foundation for Columbine-related concerns.

This article will begin, in Part I, by discussing the approaches to student First Amendment cases that preceded *Morse*. Part II will discuss the *Morse* case itself. Part III will develop the article's main theme: the expansive ways that *Morse* has been interpreted by lower federal courts and the influence of the Columbine factor on recent student First Amendment cases. Part IV will discuss the Columbine factor as an "availability heuristic" and make a suggestion about what the Court should have done in *Morse*.

I. BACKGROUND: APPROACHES TO STUDENT SPEECH THAT PRECEDED *MORSE*

A. *Tinker v. Des Moines Independent Community School District*: "Substantial Disruption"

The modern era of student speech cases began with the Supreme Court's opinion in *Tinker v. Des Moines Independent Community School District*.¹⁴ It was in *Tinker* that the Court famously announced that students do not lose their First Amendment rights "at the schoolhouse gate" and that teacher expression was also subject to the protection of the First Amendment.¹⁵ *Tinker* involved students who were suspended after coming to school wearing black armbands

1327, 1367 (2008). The following Associated Press story provides dramatic proof of one of this article's themes: the role of easy to recall television imagery as a foundation for the heuristic of fear surrounding Columbine concerns. In a story discussing the Columbine tragedy ten years later, the AP stated,

Traumatic images of the Columbine shooting played out on TV screens across the nation: frightened students streaming out of the school, a wounded boy struggling to escape through a window, ranks of heavily armed SWAT officers waiting for permission to go in. The coverage went on for hours Unlike some of the shootings that were covered in the aftermath . . . millions of Americans watched as it unfolded, which obviously has a much greater effect on the American psyche

Dan Elliott, *10 Years Later, Columbine's Hold Remains Strong*, YAHOO NEWS, Apr. 17, 2009, http://news.yahoo.com/s/ap/20090417/ap_on_re_us/columbine_anniversary;_ylt=AoqEtU.

12. People will exaggerate and become especially fearful of dangers that are easy to recall. Psychologists have found that "the judged frequency of classes is biased by the availability of their instances for . . . retrieval." JUDGMENT UNDER UNCERTAINTY, *supra* note 8, at 164. Put another way, examples "whose instances are easily retrieved will appear more numerous than a class [of examples] of equal frequency whose instances are less retrievable." *Id.* at 11.

13. Justice Alito wrote in his *Morse* concurrence that "[e]xperience shows that schools can be places of special danger." *Morse v. Frederick*, 127 S. Ct. 2618, 2638 (2007) (Alito, J., concurring).

14. 393 U.S. 503 (1969).

15. *Id.* at 506.

to signify their political opposition to the Vietnam War. The Court held that wearing a black armband was akin to pure speech¹⁶ and that the suspension was an unconstitutional denial of the students' First Amendment rights.¹⁷ When the Court decided *Tinker*, it created a framework to determine whether a school could constitutionally prohibit student speech. Under the *Tinker* approach, any restriction on student speech is unconstitutional unless *the school can demonstrate* that a student's expression would cause "substantial disruption" or "material interference" with the work of the school.¹⁸ Moreover, mere "apprehension of disturbance" will not be enough to overcome a student's First Amendment rights.¹⁹

B. Bethel School District No. 403 v. Fraser: "Educational Mission" and Prohibition of "Vulgar and Lewd" Speech

A second approach to student-speech cases was created by the Court in *Bethel School District No. 403 v. Fraser*.²⁰ *Fraser* involved a student speaker who used sexually suggestive words to describe a student candidate in front of an all-school assembly, which included students as young as fourteen.²¹ The Court concluded that, unlike *Tinker*, the student's words in *Fraser* were unrelated to any political viewpoint.²² After his speech, the student speaker was suspended. Despite a First Amendment challenge, the Supreme Court upheld the suspension. The Court held that the First Amendment rights of public-school students "are not automatically coextensive with the rights of adults in other settings"²³ and that school officials could punish speech that would undermine a "school's basic *educational mission*."²⁴ Thus, *Fraser*

16. *Id.* at 505.

17. *Id.* at 511 ("[T]he prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.").

18. *Tinker*, 393 U.S. at 514. The burden of proof is on the school under the *Tinker* approach. See *Jacobs v. Clark County Sch. Dist.*, 526 F.3d 419, 429 n.24 (9th Cir. 2008) (stating that under *Tinker* any "restriction is unconstitutional unless *the school can show* that 'engaging in the forbidden conduct would materially and substantially interfere with the . . . operation of the school.'" (emphases added) (internal citations omitted)).

19. *Tinker*, 393 U.S. at 508.

20. 478 U.S. 675 (1986).

21. *Id.* at 683. Matthew Fraser's speech contained the following sentences: "I know a man who is firm—he is firm in his pants . . . Jeff Kuhlman is a man who takes his point and pounds it in . . . 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." *Id.* at 687 (Brennan, J., concurring). During the speech, other students "simulated the sexual activities" alluded to by student speaker, Matthew Fraser. *Id.* at 678.

22. *Id.* at 685. The Court distinguished the sexual content of the student's speech in *Fraser* with "the political message" of the student armbands in *Tinker*. *Id.* at 680.

23. *Id.* at 682.

24. *Fraser*, 478 U.S. at 685 ("The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission.").

created a new exception to *Tinker*. This was an exception based on lewd, vulgar speech inconsistent with the school's "educational mission"²⁵ and the "fundamental values of a public school education."²⁶

C. *Hazelwood School District v. Kuhlmeier*: "School Sponsored Speech" and "Related to Legitimate Pedagogical Concerns"

Two years after *Fraser*, the Court in *Hazelwood School District v. Kuhlmeier*²⁷ created a third approach to student speech, and a second exception to *Tinker*. *Kuhlmeier* grew out of a principal's decision to prohibit the publication of stories about pregnancy and divorce in a high-school newspaper.²⁸ The Court began its opinion by distinguishing *Tinker* on the basis that the school there merely *tolerated* student speech, whereas in *Kuhlmeier*, if the publication were allowed to go forward, then the school would be seen as *affirmatively promoting* certain student speech.²⁹ Specifically, the court held that "[e]ducators are entitled to exercise greater control" over student expression that appears to be school sponsored.³⁰

As the Court did in *Fraser*, the Court in *Kuhlmeier* refused to use the *Tinker* approach.³¹ Instead of relying on *Tinker*'s substantial disruption test, the Court in *Kuhlmeier* used a reasonableness standard. The Court held that school officials do not violate the First Amendment by exercising control over school-sponsored student speech, so long as the actions of the officials are "reasonably related to legitimate pedagogical (educational) concerns."³² It is against this legal background that the Supreme Court decided *Morse v. Frederick*.

25. *Id.*

26. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685-86 (1986) (stating that "vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of a public school education").

27. 484 U.S. 260 (1988).

28. The principal objected to the articles because he thought that their subjects were easily identifiable. He mistakenly believed that the student's name was used in the divorce story and that the anonymity of the pregnant student was not protected. *Id.* at 263.

29. *Id.* at 270-71. This part of the Court's holding in *Kuhlmeier* is more complex than it initially appears. At first blush, the Court seems to be making a distinction between private speech and government speech. But the Court in *Kuhlmeier* did not rely on a simple distinction between private and government speech. Instead, the Court's decision in *Kuhlmeier* is important from a jurisprudential point of view, not just because it created another *Tinker* exception, but because it used a *forum analysis*. This is demonstrated by the opinion itself. The Court held that "the evidence that school officials *never intended* to designate Spectrum (newspaper) as a *public forum* remains overwhelming." *Id.* at 270 (emphases added).

30. *Id.* at 271.

31. The Court stated that the *Tinker* standard "need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression." *Kuhlmeier*, 484 U.S. at 272-73.

32. *Id.* at 273. One court defined the word "pedagogical" as it was used in *Kuhlmeier* as "related to learning." *Fleming v. Jefferson Cty. Sch. Dist.*, 298 F.3d 918, 925 (10th Cir. 2002).

II. WHAT THE SUPREME COURT DECIDED IN *MORSE*

The majority opinion in *Morse* was concerned with six issues: (1) whether *Morse* was a school speech case at all; (2) whether judicial deference should be given to the disciplinary decision of a school official; (3) whether the principal was entitled to official immunity; (4) whether student speech could be prohibited merely on the ground that it was “offensive”; (5) what framework of analysis to use; and (6) whether to create a new category of speech exempt from First Amendment protection. Two of the most significant issues—creation of a new student speech prohibition and judicial deference to school authority—were influenced by the Columbine factor.

A. Characterization of *Morse* as a School-Speech Case

The first issue the Court confronted was whether *Morse* was a school-speech case at all. The issue arose because the fourteen-foot “Bong Hits for Jesus” banner was held by students standing *on the sidewalk across the street* from the school. A sidewalk is a traditional public forum ordinarily subject to strict-scrutiny analysis.³³ The Court got around the sidewalk issue by characterizing the torch relay as a “school supervised event”³⁴ that took place while teachers were “monitor[ing] the students’ actions.”³⁵ The Court specifically rejected the student’s argument that this was not a school-speech case.³⁶ This was vitally important to the Court’s decision. It allowed the Court to move away from the sidewalk as a public forum subject to strict scrutiny and embrace the more lenient First Amendment standards applicable to school-speech cases.³⁷

B. Qualified Immunity

Comfortable with the fact that *Morse* was a school-speech case, the second issue the Court confronted was whether the principal was entitled to immunity. The Ninth Circuit had held that Principal *Morse* was not entitled to qualified

33. *Frisby v. Schultz*, 487 U.S. 474, 480 (1988) (stating that “public streets and sidewalks have been used for public assembly and debate, the hallmarks of a traditional public forum”). The Ninth Circuit opinion in *Morse* referred to what it called the “sidewalk issue” in the following way: “One amicus . . . argues that we should analyze this not as a student speech case, but simply speech on a public sidewalk Were this factually such a case the law would be easy indeed, but the facts established that this is a student speech case.” *Frederick v. Morse*, 439 F.3d 1114, 1117 (9th Cir. 2006), *rev’d*, 127 S. Ct. 2618 (2007).

34. *Morse v. Frederick*, 127 S. Ct. 2618, 2621 (2007).

35. *Id.* at 2622. The Court pointed to the fact that the event took place when “school was in session” and while teachers were “monitor[ing] the students’ actions.” *Id.*

36. *Id.* at 2624 (“[Student] Frederick cannot ‘stand in the midst of his fellow students, during school hours, at a school sanctioned activity and claim he is not at school.’”).

37. Regulation of speech in a public forum is ordinarily subject to strict scrutiny. *See Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992). School speech is different. “First Amendment standards applicable to student speech in public schools, however, are unique, and courts accord more weight in the school setting to the educational authority of the school” *Barr v. Lafon*, 538 F.3d 554, 567 (6th Cir. 2008).

immunity.³⁸ This left her personally liable to student Frederick for money damages under 42 U.S.C. § 1983.³⁹ The issue of qualified immunity is a significant part of the Court's opinion that has largely been ignored by commentators.⁴⁰

Although the Supreme Court may have been fractured with respect to the First Amendment issue, the Court was *unanimous* in its opinion that the Ninth Circuit should be *reversed on the qualified immunity issue*. For example, in his dissent, Justice Stevens wrote that he agreed with the majority of the Court "that the principal should not be held liable for pulling down Frederick's banner."⁴¹ During oral argument, the attorney for the student began by stating that "this case is about free speech." Justice Roberts shot back, "It's a case about money. Your client wants money from the principal personally for her actions in this case."⁴²

When the case was finally decided, the Court announced that certiorari was granted on two questions. The first question was whether the student had a constitutional right to hold up his "Bong Hits" banner. The second question was whether the right was so clearly established that the principal could be held personally liable for taking it down.⁴³ With respect to the qualified immunity issue, the Court held that because the first question was resolved against the student, we "have no occasion to reach the second."⁴⁴ This approach is consistent with qualified immunity analysis. If no constitutional right can be established, then a school official is entitled to qualified immunity.⁴⁵

38. *Morse*, 439 F.3d at 1124. Using the three-part test the Court developed in *Saucier v. Katz*, 533 U.S. 194, 201 (2001), the Ninth Circuit held "that defendant Morse is not entitled to qualified immunity." *Id.*

39. The student in *Morse* brought his action against Principal Deborah Morse under 42 U.S.C. § 1983. This is a federal civil rights statute which allows a plaintiff to recover damages from any person acting "under color of state law" (e.g., a public school principal or teacher) who violates the plaintiff's constitutional rights. Specifically, 42 U.S.C. § 1983 provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . ." Actions for damages brought under section 1983 are designed to compensate a plaintiff for injuries caused by deprivation of constitutional rights.

40. The following summary from this excellent article is typical. About the case, an author for the *National Law Journal* wrote that the student's federal lawsuit against the principal "ultimately boiled down to one question . . . whether a principal may, consistent with the First Amendment, restrict student speech at a school event." Clay Calvert, *A Narrow Win for Schools*, 29 NAT'L L.J. 32 (2007). Similarly, about *Morse*, another commentator, in an outstanding and provocative article, wrote that "the case presented a simplistic question pitting low value speech against a high government interest." Andrew Carter, *The Court's Missed Opportunity in Harper v. Poway*, 2008 BYU EDUC. & L.J. 125, 126 (2008).

41. *Morse v. Frederick*, 127 S. Ct. 2618, 2643 (2007) (Stevens, J., dissenting). Similarly, Justice Breyer wrote that "qualified immunity bars the student's claim for monetary damages." *Id.* at 2638 (Breyer, J., concurring in part, dissenting in part).

42. Transcript of Oral Argument at 29-30, *Morse*, 127 S. Ct. 2618 (No. 06-278).

43. *Morse*, 127 S. Ct. at 2624 (citations omitted).

44. *Id.*

45. The first step in the qualified immunity analysis is to establish the existence of a constitutional right. See *Lowery v. Euverard*, 497 F.3d 584, 587 (6th Cir. 2007). The second step is to demonstrate that the

The issue of qualified immunity is important because of the far-reaching consequences if the Court had decided the issue the other way. One amicus brief argued that the Ninth Circuit must be reversed to avoid the loss of school teachers “due to the fear of personal liability.”⁴⁶ Similarly, one Justice remarked that qualified immunity in this case involves “whether principals and teachers around the country have to fear that they’re going to have to pay out of their own pocket whenever” they take any disciplinary action against a student.⁴⁷

C. Judicial Deference to School Authority

The third issue the court confronted was the issue of judicial deference to school authority. Deference concerns whether school punishment should be subject to judicial oversight.⁴⁸ It considers the fact that teachers are often forced to make quick “on the spot” decisions in circumstances that change rapidly.⁴⁹ By ruling in favor of the principal’s decision to remove the “Bong Hits” banner and suspend the student, the Supreme Court decided that deference should be given to a teacher’s disciplinary action.⁵⁰ *Morse’s*

constitutional right was clearly established at the time of the incident in question. *Id.* “If the constitutional right was *not* clearly established at the time of the incident in question, summary judgment must be granted for the [state actor].” *Ruiz v. Lebanon County*, No. 04-CV-02359, 2007 U.S. Dist. LEXIS 73953, at *17 (M.D. Pa. Oct. 3, 2007) (emphasis added) (citing *Saucier v. Katz*, 533 U.S. 194, 202 (2001)). Justice Breyer was very critical of the use of the *Saucier* qualified immunity test in his *Morse* concurrence. *Morse*, 127 S. Ct. at 2642 (“I would end the failed *Saucier* experiment now.”). After *Morse* was decided, the Court reconsidered the *Saucier* procedure and concluded that “while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory.” *Pearson v. Callahan*, 129 S. Ct. 808, 818 (2009). The sequence the Court was referring to was the two-prong test whereby a court was required to resolve the constitutional question first, and if the plaintiff had satisfied the first step, the court would then decide whether the constitutional right at issue was “clearly established” at the time of the defendant’s alleged misconduct. *Id.* at 816. The Court unanimously held that “the *Saucier* protocol should not be regarded as mandatory in all cases,” explaining that its decision “does not prevent the lower courts from following the *Saucier* procedure; it simply recognizes that those courts should have the discretion to decide whether that procedure is worthwhile in particular cases.” *Id.* at 818, 821.

46. Brief for Amicus Curiae Nat. Sch. Boards Assoc. and Nat. Assoc. of Secondary Sch. Principals et al. Supporting Petitioners, *Morse*, 127 S. Ct. 2618 (No. 06-278) (“The Ninth Circuit’s startling departure from qualified immunity principles must be corrected to avoid loss of . . . effective school leadership due to fear of personal liability.”).

47. Transcript of Oral Argument at 29-30, *Morse v. Frederick*, 127 S. Ct. 2618 (2007) (No. 06-278).

48. One federal court explained that the issue of deference concerns whether public schools “should be allowed to manage their affairs and shape their destiny free of minute supervision by federal judges and juries.” *Brandt v. Bd. of Educ.*, 480 F.3d 460, 467 (7th Cir. 2007).

49. In its description of the facts, the Court in *Morse* wrote that “[w]hen Frederick suddenly and unexpectedly unfurled his banner, *Morse had to decide to act or not act on the spot.*” *Morse*, 127 S. Ct. at 2629 (emphasis added). Similarly, Justice Breyer wrote in his concurrence that “the circumstances here *called for a quick decision.*” *Id.* at 2639 (Breyer, J., concurring in part, dissenting in part) (emphasis added).

50. Noting that school officials have “educational expertise and familiarity with the students involved,” and that great weight should be given to a school official’s judgment, a Florida state court cited *Morse* for its conclusion that a court should give “deference to their (school officials) judgment.” *D.G. v. Florida*, 961 So.2d 1063, 1065 (Fla. Dist. Ct. App. 2007). Similarly, citing *Morse*, a federal district court stated that “school

movement toward a more deferential approach was immediately noticed by other federal courts. After *Morse* was decided, the Eleventh Circuit wrote that “this Court will not interfere with the administration of a school. This principle was recently reaffirmed by the Supreme Court in *Morse v. Frederick*.”⁵¹

Morse’s approach is part of a *general movement toward according more deference to school officials*. The foundation for this movement appears to be the Columbine factor. Both the movement toward deference and the Columbine factor can be seen in the following quotation from a federal court opinion. The opinion points to “shootings” by students as a reason why courts should *defer* to the disciplinary actions of school officials:

The threat of serious school violence—including *mass shootings perpetrated by students*—is an unfortunate fact of life in twenty first century America . . . It is *against this backdrop* that courts across the country have considered First Amendment challenges to discipline imposed on students for speech that school officials viewed as threatening. The overwhelming response has been *deference on the part of the courts* to the judgment of the educators.⁵²

The same court emphasized that it was not the role of the court to substitute its judgment for that of teachers “who, unlike the Court, are educational professionals.”⁵³

*D. Court Refuses to Adopt “Offensiveness” as a Basis
for Restraints on Student Speech*

The fourth issue the Court faced was whether to adopt the position that student speech could be prohibited merely on the ground that it was offensive.⁵⁴ The word “offensive” is a coat of many colors. Does it mean vulgar offensive *language*, or does it mean that the reader finds the *content itself* offensive, regardless of whether the language is offensive? Despite the *Morse* Court’s deferential approach, the Court refused to embrace the position that student speech could be prohibited merely on the ground that the content was offensive.⁵⁵ Such a position, the *Morse* Court declared, went “too far.”⁵⁶ The

punishment should not be subject to judicial oversight.” *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 597 (W.D. Pa. 2007).

51. *Boim v. Fulton Cty.*, 494 F.3d 978, 983 (11th Cir. 2007) (citation omitted).

52. *Cuff v. Valley Cent. Sch. Dist.*, 559 F. Supp. 2d 415, 420 (S.D.N.Y. 2008). In *Cuff*, the court decided that a school did not violate a student’s First Amendment rights by disciplining him for turning in a paper to a teacher that contained the phrase “blow up the school.” *Id.*

53. *Id.* at 424.

54. *Morse v. Frederick*, 127 S. Ct. 2618, 2629 (2007) (noting that “[p]etitioners urge us to adopt the broader rule that Frederick’s speech is proscribable because it is plainly ‘offensive’”).

55. *Id.* at 2629. The Court found that the Court’s opinion in *Fraser*, which prohibited the vulgar, crude *language* the Court found offensive, “should not be read to encompass any speech that could fit under some definition of ‘offensive.’” *Id.* In short, it was not the content of *Fraser*’s speech (endorsing his friend as a

word “offensive” should *not* be read to include prohibition of speech that could fit under anyone’s definition of offensive *content* as opposed to offensive *language*. The Court pointed out the danger that political or religious speech that the listener disagrees with might be deemed offensive to some.⁵⁷ With this in mind, it carefully limited its holding by stating that the “concern here is not that Frederick’s speech was offensive but that it was reasonably viewed as promoting illegal drug use.”⁵⁸

The Court’s refusal to adopt a broad offensiveness standard as a basis for suppressing student speech was immediately embraced by other federal courts. After *Morse* was decided, a district court noted “the Supreme Court’s recent rejection of a rule allowing prohibition of ‘any speech that could fit under some definition of *offensive*.’”⁵⁹ Similarly, the Second Circuit recognized that, like the student in *Morse*, “the student in the pending case was not disciplined for conduct that was merely ‘offensive.’”⁶⁰

E. Framework for Analysis

Another issue the Court confronted was what analytical framework to use. Instead of choosing the approach found in *Tinker*, *Fraser*, or *Kuhlmeier*, the Court appeared to take something from all three. First, the Court in *Morse* embraced two principles found in *Fraser*: that the rights of students are not “coextensive with the rights of adults”⁶¹ and that these rights can be circumscribed if they interfere with the “educational mission” of the school.⁶² Specifically, *Morse* held that any message which could reasonably be interpreted as advocating the use of illegal drugs was “inconsistent with the school’s educational mission”⁶³ and could be prohibited.

With respect to *Tinker*, the *Morse* Court deliberately rejected *Tinker*’s “substantial disruption” test as a mandatory framework for analysis.⁶⁴ *Morse*,

candidate) that the court found offensive, it was the vulgar *language* the student used to deliver the content.

56. *Id.*

57. *Id.*

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

59. *De Pinto v. Bayone Bd. of Educ.*, 514 F. Supp. 2d 633, 644 (D.N.J. 2007) (quoting *Morse*, 127 S. Ct. at 2629). Similarly, the Sixth Circuit noted that *Morse* “reaffirmed the doctrine that a school may not prohibit student speech solely on the ground that the speech is ‘offensive.’” *Morrison v. Bd. of Educ. of Boyd County*, 521 F.3d 602, 623 (6th Cir. 2008).

60. *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 40 (2d Cir. 2007) (citation omitted).

61. *Morse v. Frederick*, 127 S. Ct. 2618, 2626 (2007) (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986)).

62. *Fraser* held that a school need not tolerate student speech that is inconsistent with its “basic educational mission.” *Fraser*, 478 U.S. at 685. Similarly, *Fraser* also found that “[t]he First Amendment does not prevent school officials from determining that to permit a vulgar and lewd speech such as respondent’s would undermine the school’s basic educational mission.” *Id.*

63. *Morse*, 127 S. Ct. at 2623.

64. *See id.* at 2627 (stating that “the mode of analysis set forth in *Tinker* is not absolute”). The Court also

however, did not reject *Tinker* altogether. Far from it. The Court in *Morse* actually relied on portions of *Tinker* as a foundation for its own opinion. Citing *Tinker*, the Court acknowledged that students in school retain their constitutional right to freedom of expression⁶⁵ and that the scope of First Amendment rights of students should be understood in light of the special characteristics of the school setting.⁶⁶ The *Morse* Court also followed *Tinker* on the issue of who had the burden of proof. School officials still had the burden of proof to demonstrate that student speech did not fall within the protection of the First Amendment. What changed under *Morse*, *Fraser*, and *Kuhlmeier* was that the burden was easier to satisfy. Under *Tinker*, school officials had the heavy burden of demonstrating that the prohibition of student speech was necessary to prevent “substantial and material disruption.”⁶⁷ By rejecting *Tinker*’s substantial disruption test, the Court in *Morse* engineered a movement away from *Tinker*’s stricter standard toward a more lenient one. This approach permits the suppression of student speech whenever the message can reasonably be interpreted as advocating the use of illegal drugs and such a message is determined to be inconsistent with the school’s education mission.⁶⁸

*F. Creation of a New Category of Student Speech Exempt from
First Amendment Protection: Prohibition of Speech
Promoting Illegal Drugs*

The sixth issue the Court decided, and the second issue influenced by the Columbine factor, was the establishment of a new student speech exception to First Amendment protection. Before *Morse* was decided, there were two generally recognized exceptions to the student First Amendment rights. The first was lewd, vulgar speech under the exception developed by the Court in *Fraser*.⁶⁹ The second was school-sponsored speech that a reasonable observer would view as having the school’s imprimatur. This is the exception developed by the Court in *Kuhlmeier*.⁷⁰

Morse created a third exception. This was an exception based on the

noted “that the rule of *Tinker* is not the only basis for restricting student speech.” *Id.*

65. *Id.* at 2622.

66. *Id.* (quoting *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 513 (1969)).

67. *Tinker*, 393 U.S. at 513. Citing *Tinker*, one court wrote that “[t]he school bears the burden of demonstrating sufficient facts to support its forecast of substantial disruption.” *Lowery v. Euverard*, 497 F.3d 584, 603 (6th Cir. 2007) (Gilman, J., concurring) (emphasis added).

68. See *Doninger v. Niehoff*, 514 F. Supp. 2d 199, 213 (D. Conn. 2007) (“In *Morse v. Frederick* . . . the Supreme Court extended *Fraser* to cover on campus speech . . . advocating the use of drugs, a message ‘clearly disruptive of and inconsistent with the school’s educational mission to educate students about the dangers of illegal drugs and to discourage their use.’” (quoting *Morse v. Frederick*, 127 S. Ct. 2618, 2623 (2007) (emphasis added)).

69. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986). The school acted within its authority “in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech.” *Id.*

70. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988) (stating “[e]ducators are entitled to exercise greater control” over student expression that appears to be school sponsored).

government's interest in stopping student drug abuse.⁷¹ On the surface, the new *Morse* exception allowed schools to prohibit student speech that encouraged the use of illegal drugs. Specifically, the Court in *Morse* held that "the governmental interest in stopping student drug abuse" permits schools to "restrict student expression that they reasonably regard as promoting illegal drug use."⁷²

III. THE EXPANSIVE INTERPRETATION OF *MORSE* AND THE EMERGENCE OF THE COLUMBINE FACTOR

If the new exception created by the Court in *Morse* had been read narrowly by all federal courts, then *Morse* would have fallen into the category of cases like *Fraser*, which created a narrow exception to student First Amendment rights.⁷³ But that's not what happened. Lower federal courts quickly began to use the case to create broad exceptions to student First Amendment rights unimagined by the *Morse* majority.

Read narrowly, *Morse* concerns a limitation on student speech advocating illegal drugs. This is what Justice Alito believed the case meant. He wrote that "the decision in the present case allows the restriction of speech advocating illegal drug use."⁷⁴ But the narrow exception that Justice Alito thought the Court created didn't last long. One year later, it has been stretched far beyond the original exception based on speech about illegal drugs to exceptions based on illegal *conduct*,⁷⁵ school safety,⁷⁶ and perhaps even a so called psychological exception.⁷⁷

A. *The Significance of Justice Alito's Concurrence*

Moreover, Justice Alito's concurrence, *far from narrowing the reach of Morse, has potentially become as important as the majority opinion.* This is because it has *inadvertently* provided the foundation for new limitations on student speech.⁷⁸ In his concurrence, Justice Alito characterized schools as

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

72. *Id.*

73. Some federal courts did interpret *Morse* narrowly. See *Lowery v. Euverard*, 497 F.3d 584, 602 (6th Cir. 2007) (Gildman, J., concurring) ("The Court's holding was a narrow one . . . namely that a 'principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use.'") (citing *Morse*, 127 S. Ct. at 2618). Similarly, another court concluded that *Morse* simply added "a third exception to *Tinker*, allowing a school to censor speech that is 'reasonably viewed as promoting illegal drug use.'" *DePinto v. Bayonne Bd. of Educ.*, 514 F. Supp. 2d 633, 639 (D.N.J. 2007).

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

75. See *infra* Part III.C.

76. See *infra* Part III.D.

77. See *infra* note 82.

78. Ironically, broadening the category of student speech exempt from First Amendment protection was certainly not the intent of Justice Alito. His goal was to narrow the exception, not expand it. In his

“places of special danger.”⁷⁹ He explained that a student’s First Amendment rights can be altered in a public-school setting because school “attendance can expose students to threats to their physical safety that they would not otherwise face.”⁸⁰ When students are not in school, they may be able to avoid dangerous situations. When students are in school, however, they “*may be compelled* on a daily basis to spend time at close quarters with *other students who may do them harm*. Experience shows that *schools can be places of special danger*.”⁸¹ When a Supreme Court Justice characterizes schools as places of “special danger” and says that because of this, the First Amendment rights of students can be altered, this opens the door to additional limitations on student speech.

B. *The Emergence of New Limitations on Student Speech*

The first new limitation on student speech to emerge from *Morse* was a limitation based on illegal conduct. The second was a limitation based on the threat to student safety arising from the Columbine factor. There also appears to be a third so-called “psychological” exception, although this last exception is much vaguer, undefined, and therefore less significant than the other two.⁸² These new exceptions have extended the reach of *Morse* far beyond its facts, and well beyond the narrow drug-related speech exception that Justice Alito and other members of the Court thought they had created.⁸³

concurrency he wrote, “I do not read the [majority] opinion to mean that there are necessarily any grounds for such regulation that *are not already recognized in the holdings of this Court*.” *Morse*, 127 S. Ct. at 2637 (Alito, J., concurring) (emphasis added).

79. *Id.* at 2638.

80. *Morse v. Frederick*, 127 S. Ct. 2618, 2638 (2007) (majority opinion).

81. *Id.*

82. What this article will term the “psychological exception” is *perhaps* another implied expansion of *Morse*. This nascent “psychological exception” arose out of the Seventh Circuit’s opinion in *Nuxoll v. Indian Prairie Sch. Dist.*, 523 F.3d 668 (7th Cir. 2008). In that case, Judge Posner used *Morse* to expand *Tinker*’s substantial disruption standard to include not just disruption caused by physical disorder or violence, but so-called “psychological disruption” as well. *Nuxoll*, 523 F.3d at 674. Specifically, Judge Posner noted that the term substantial disruption in *Tinker* is undefined and that avoiding violence is not a school’s only concern. *Id.* Judge Posner went on to conclude that “[v]iolence was not the issue in *Morse* In fact one of the concerns expressed by the Supreme Court in *Morse* was the *psychological* effects of drugs.” *Id.* (emphasis added). In summary, what the Seventh Circuit appears to be saying is that student speech can be prohibited, not only if it can be linked to *physical* disruption, but also if the speech can be linked to so-called “psychological disruption.” *Id.* Specifically, Judge Posner suggests that the sign carried by the student in *Morse* was evidence of the school’s fear of *psychological* disruption. *Id.* As well as noting that the Court in *Morse* was concerned with the psychological effects of drugs, Judge Posner also wrote about the psychological effect if one student wore a T-shirt with the words, “a woman’s place is in the home.” *Id.* With respect to what this comment has labeled the “psychological exception,” Judge Posner went on to explain that “children are in school to be taught by adults rather than to practice attacking each other with *wounding words*, and *school authorities have a protective relationship* and responsibility to all the students.” *Id.* at 675 (emphases added).

83. See *Morse*, 127 S. Ct. at 2638 (Alito, J., concurring) (noting how *Morse* stands for nothing more than “public schools may ban speech advocating illegal drug use”). Justice Alito also wrote that

illegal drug use presents a grave and in many ways unique threat to the physical safety of students. I therefore conclude that the public schools may ban speech advocating illegal drug use. But I regard

C. *Expanding Morse Beyond Drug-Related Speech to Create an Illegal Conduct Exception*

1. *Bar-Navon v. School Board of Brevard County*

The first expansion of *Morse* occurred when a federal district court interpreted *Morse* as involving a prohibition having nothing to do with illegal drugs. In *Bar-Navon v. School Board of Brevard County*,⁸⁴ a Florida district court described *Morse* as involving a prohibition of student “advocacy of illegal conduct.”⁸⁵ Advocacy of *illegal conduct* is a much *broader exception* to student speech than a prohibition based merely on *advocacy of illegal drugs*. The *Bar-Navon* case involved a First Amendment challenge by a high-school student who had a number of visible body piercings. The female student insisted on her First Amendment right to wear jewelry in her upper lip and chest cleavage.⁸⁶ The student handbook prohibited jewelry worn in body piercings along with chains that connected one part of the body with another.⁸⁷ The district court explained that the Supreme Court opinion in *Morse* applied to prohibit student speech advocating illegal conduct.⁸⁸ The court concluded, however, that *Morse*’s so-called “illegal conduct” exception did not apply to this particular case because wearing jewelry in body piercings is not an illegal act. Specifically, the Florida district court held that it “is not reasonable to infer that Plaintiff’s jewelry presentation is advocacy of an *illegal act*; therefore *Morse* does not apply.”⁸⁹

The *Bar-Navon* case is important, not because of the holding itself, but because of how the court interpreted *Morse*. The court in *Bar-Navon* interpreted the Supreme Court’s opinion in *Morse* as creating a new exception to the First Amendment protection of student speech. The exception was based not merely on advocacy of illegal drugs, but on student “advocacy of illegal conduct.”⁹⁰

such regulation as standing at the far reaches of what the First Amendment permits. I join the opinion of the Court with the understanding that the opinion does not endorse any further extension.

Id.

84. 2007 U.S. Dist. LEXIS 82044 (M.D. Fla. Nov. 5, 2007).

85. *Id.* at *16.

86. *Id.* at *4 n.1. The student also wore “a nose ring, a lip ring, and two studs beneath her lip.” *Id.* at *3.

87. *Id.* at *3. The prohibition was based on the fact that chains and jewelry constituted a safety hazard.

Id.

88. Specifically, the Florida district court described *Morse* as “a case involving *student advocacy of illegal conduct* off school premises during a school sponsored break.” *Bar-Navon*, 2007 U.S. Dist. LEXIS 82044, at *15 (emphasis added). It went on to conclude that “the Court carved out exceptions to [the *Tinker*] standard based on the *category of speech* involved [such as *Morse*’s exception for] student advocacy of illegal conduct during a school approved break.” *Id.* at *19 (emphases added).

89. *Id.* at *20 n.3.

90. *Bar-Navon v. Sch. Board of Brevard County*, 2007 U.S. Dist. LEXIS 82044, at *19 (M.D. Fla. Nov. 5, 2007).

2. Miller v. Penn Manor School District

Similarly, on September 30, 2008, another federal court interpreted *Morse* as holding that a school may constitutionally limit student speech that advocates illegal conduct. In *Miller v. Penn Manor School District*,⁹¹ a Pennsylvania district court relied on *Morse* to hold that a school district had the right “to prohibit student speech that advocates . . . violation of law.”⁹²

The case arose out of a high-school student’s insistence on wearing a T-shirt that contained an image of an automatic handgun along with the statement, “United States Terrorist Hunting Permit, Permit No. 91101, Gun Owner-No Bag Limit.”⁹³ The student argued that the shirt contained “a political message” expressing support for American troops in Iraq.⁹⁴ School officials read the T-shirt’s message differently. They believed it advocated illegal conduct; specifically, “illegal vigilante behavior.”⁹⁵ The court agreed with the school. It held that the T-shirt advocated “citizens taking the law into their own hands. Thus, the T-shirt advocates *illegal conduct*.”⁹⁶

Significantly, before reaching its conclusion, the district court interpreted *Morse* broadly as providing a new limitation on student speech. This was a limitation not based merely on advocacy of illegal drugs, but a much broader exception based on advocacy of *any* illegal conduct. Specifically, the court in *Penn Manor* cited *Morse* for the conclusion that student “speech that promotes *illegal behavior may also be restricted*.”⁹⁷

3. Snyder v. Blue Mountain School District

In *Snyder v. Blue Mountain School District*,⁹⁸ another federal district court relied on *Morse* to conclude that student speech advocating unlawful behavior could be prohibited. *Blue Mountain* involved an eighth-grade student who created an imposter profile of the school’s principal on MySpace. The profile implied that the principal was “a pedophile and a sex addict.”⁹⁹ When the student was suspended, the parents filed an action in federal court claiming that the First Amendment precluded the school from suspending a student for a profile “which is non-threatening, non-obscene and a parody.”¹⁰⁰ Citing *Morse* and *Fraser*, the court disagreed. It held instead that a school can “*restrict*

91. 588 F. Supp. 2d 606 (2008).

92. *Id.* at 618.

93. *Id.* at 624.

94. *Id.*

95. *Miller*, 588 F. Supp. 2d at 624.

96. *Id.* at 625.

97. *Miller v. Penn Manor Sch. Dist.*, 588 F. Supp. 2d 606, 623 (2008).

98. 2008 U.S. Dist. LEXIS 72685 (M.D. Pa. Sept. 11, 2008).

99. *Id.* at *2.

100. *Id.* at *7.

*speech that promotes unlawful behavior.*¹⁰¹ The court found that the student's speech was lewd, made no political statement, and made the school's principal "out to be a pedophile and a sex addict."¹⁰² The court further explained that falsely accusing the principal of being a pedophile was an illegal act and could give rise to criminal charges against the student.¹⁰³ Therefore, the *Blue Mountain* court concluded, the student's speech was "akin to the speech that promoted illegal actions in the Morse case" and could be prohibited.¹⁰⁴

B. Expanding Morse Beyond Drug-Related Speech: The School Safety Exception Based on the Columbine Factor

In addition to the illegal conduct exception, *Morse* has spawned another exception. This is the "school safety" exception. This new exception arises out of the emerging perception that schools have become places of "special danger."¹⁰⁵ Proof of this new *perception*¹⁰⁶ is everywhere. It is seen in polls, which show that 70 percent of respondents believe that a school shooting could happen at their school.¹⁰⁷ It is seen in federal court decisions, which begin by announcing that "we live in a time when school violence is an unfortunate reality . . . [as evidenced by the] Columbine, Thurston, Santee and other school shootings."¹⁰⁸ It is seen in the fact that, after the Columbine massacre,

101. *Id.* at *17.

102. *Snyder*, 2008 U.S. Dist. LEXIS 72685, at *17.

103. *Id.* at *17-18. "The speech at issue here could have been the basis for criminal charges against J.S. (the student)." *Id.*

104. *Snyder v. Blue Mountain Sch. Dist.*, 2008 U.S. Dist. LEXIS 72685, at *17-18 (M.D. Pa. Sept. 11, 2008). The prohibition was also based on the use of words such as "dick head," which the court regarded as lewd and vulgar. *Id.* at *17.

105. Justice Alito wrote in his *Morse* concurrence that "[e]xperience shows that schools can be places of special danger." *Morse v. Frederick*, 127 S. Ct. 2618, 2638 (2007) (Alito, J., concurring).

106. The scope of this article is limited to discussing the *perception* that schools are dangerous. It is beyond the scope of this article to discuss the separate question of whether this perception has any basis in fact.

107. "Just before the 1 year anniversary of the Columbine shooting, a Wall Street Journal NBC News poll found that 70% of Americans believed such a shooting could occur at a school in their own community." *Terror in Our Schools*, <http://karisable.com/crssster.htm> (last visited Apr. 10, 2009). Similarly, when a child psychologist appeared on the Today Show and stated that school shootings were rare, reporter Ann Curry said, "But this is the fourth case since October." *Bowling for Columbine*, available at <http://www.bowlingforcolumbine.com/library/fear/index.php> (last visited Jan. 4, 2009). The four school shootings to which the reporter was referring at that time were the following: (1) students in a prayer group were killed by another student in Paducah, Kentucky; (2) a fourteen-year-old and a sixteen-year-old killed five students and injured others in Pearl, Mississippi; (3) three months later, in March 1998, a thirteen-year-old boy and an eleven-year-old boy "killed four students and a teacher in Jonesboro, Arkansas"; and (4) a fifteen-year-old opened "fire in a cafeteria filled with students, killing two and wounding twenty-three others" in Springfield, Oregon. *Id.* Never one to mince words, Geraldo Rivera referred to the incidents as "an epidemic of depraved adolescent murders." *Id.*

108. *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 987 (9th Cir. 2001). Similarly, another federal court wrote that the "threat of serious school violence—including mass shootings perpetrated by students—is an unfortunate fact of life in twenty first century America." *Cuff ex rel. B.C. v. Valley Cent. Sch. Dist.*, 559 F. Supp. 2d 415, 420 (S.D.N.Y. 2008).

students referred to the reality of school violence as the “new normal.”¹⁰⁹

In light of the concern for school safety emerging from the Columbine factor, it is hardly surprising that a student’s poem describing a plan to kill her math teacher¹¹⁰ or a student diary containing a plan to carry out a “Columbine style attack”¹¹¹ have recently been held not to be entitled to First Amendment protection. Nor is it surprising that federal courts should rely on *Morse*, inasmuch as some Justices emphasized student safety as a reason for their decision.¹¹² Nowhere is the emergence of the school-safety exception based on an expansive interpretation of *Morse* and the Columbine factor seen more clearly than in the following Fifth Circuit opinion.

I. Ponce v. Socorro Independent School District: Expanding Morse Beyond Drug-Related Speech to Create a New Limitation on Student Speech Based on Student Safety and the Columbine Factor

In *Ponce v. Socorro Independent School District*,¹¹³ the Fifth Circuit created a new category of student speech exempt from First Amendment protection. This is a category of speech based on a concern for school safety and having as its legal foundation the Court’s opinion in *Morse*.

The *Ponce* case began when a high-school sophomore showed another student his diary in which he described forming a group to commit violent attacks. The student wrote about his plan to set another student’s house on fire and to “brutally” kill his dog.¹¹⁴ He also detailed a plan to commit a “Columbine shooting” attack on his high school or a coordinated shooting at all the district’s schools.¹¹⁵ A school official obtained the diary from the student author named “E.P.” After reading E.P.’s diary, the official suspended him and recommended that he be transferred to another school.¹¹⁶ E.P.’s parents filed an action in federal district court claiming that the diary was a creative work of fiction and that the high school violated E.P.’s First Amendment right of free

109. Columbine High School students used the “term ‘new normal’ when discussing their state of mind in the wake of the hellish violence that shattered their lives.” Fatal Shootings at U.S. Colleges and Universities, http://www.usislam.org/fallofUSA/fatal_shootings_at_us.htm (last visited Apr. 12, 2008).

110. See *Boim v. Fulton County Sch. Dist.*, 494 F.3d 978, 980 (11th Cir. 2007); see also *infra* text accompanying notes 133-39.

111. See *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 766 (5th Cir. 2007); see also *infra* text accompanying notes 113-32.

112. In his concurrence, Justice Alito wrote that “school officials must have greater authority to intervene before speech leads to violence” and that “[s]chool attendance can expose students to threats to their physical safety that they would not otherwise face.” *Morse v. Frederick*, 127 S. Ct. 2618, 2638 (2007) (Alito, J., concurring).

113. 508 F.3d 765 (5th Cir. 2007).

114. *Id.* at 766.

115. *Id.* Throughout his diary, the student expressed his feeling that anger “will get the best of me” and that “[I] will no longer have control.” *Id.*

116. *Id.* at 767.

speech.¹¹⁷ Relying on *Tinker*'s substantial disruption test, the district court ruled in favor of E.P.¹¹⁸ The high school appealed the district court's decision to the Fifth Circuit.

When the case reached the Fifth Circuit, the court refused to follow *Tinker*'s substantial disruption test and used the more lenient approach of *Morse* instead.¹¹⁹ The court framed the issue in the following way: "This appeal presents the question of whether *student speech that threatens a Columbine style attack* on a school is protected by the First Amendment. Today we *follow the lead of the United States Supreme Court in Morse . . . and hold that it is not.*"¹²⁰

The Fifth Circuit began its opinion by announcing that *Morse* declined to apply *Tinker* because of the scope of the harm at stake and because deterring harm is a compelling state interest.¹²¹ Specifically, the court explained that the school "need not evaluate the potential for disruption [under the *Tinker* test] . . . it is *per se* unprotected because of the *scope of the harm* it potentially foments."¹²²

The introduction of a "scope of the harm" factor by the Fifth Circuit based on fear of a Columbine style attack is significant for two reasons. First, it harkens back to the balancing test used by the Supreme Court in 1951 when cases were decided in the context of the fear of Communism.¹²³ In that era, the Court asked whether "the gravity of the evil" justified an invasion of free speech.¹²⁴ In *Dennis v. United States*,¹²⁵ the Court found that it did.¹²⁶

117. *Ponce v. Socorro Indep. Sch. Dist.*, 432 F. Supp. 2d 682, 687 (W.D. Tex. 2006).

118. *Ponce*, 508 F.3d at 767 ("The [district] court held that under the Supreme Court's *Tinker* standard, the evidence was insufficient to prove that SISD [the school] acted upon a reasonable belief that disruption would occur.").

119. *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 766 (5th Cir. 2007). The Fifth Circuit also wrote, "We are guided by the Supreme Court's recent decision in *Morse* . . . [T]he majority and concurring opinions in *Morse* explain well why the actions of the school administrators here satisfy the requirements of the First Amendment." *Id.* at 768.

120. *Id.* at 766.

121. *Id.* at 769.

122. *Id.*

123. Professor Kathleen M. Sullivan writes that "[a]fter World War II, fears mounted of threats to national security posed by the Soviet Union and China, and anti-communist sentiment generated a number of restrictions on subversive speech." KATHLEEN M. SULLIVAN, *CONSTITUTIONAL LAW* 777 (6th ed. 2007). It was in this context that leaders of the Communist party were prosecuted, and the First Amendment case of *Dennis v. United States*, 341 U.S. 494 (1951) was decided in favor of a restriction on First Amendment rights.

124. See *Dennis*, 341 U.S. at 510 ("In each case [courts] must ask whether the *gravity of the 'evil,'* discounted by its improbability, *justifies such invasion of free speech as is necessary to avoid the danger.*" (emphases added) (citation omitted)). In a similar vein, the Court commented on the "inflammable nature of world conditions" and conspiracy as a sufficient danger in and of itself to justify suppression of speech. *Id.* at 511. *Dennis* was diminished substantially when the fear of Communism abated in the late 1960s and the Court decided *Brandenburg v. Ohio*, 395 U.S. 444 (1969). In his *Brandenburg* concurrence, Justice Douglas wrote that he saw "no place in the regime of the First Amendment for any 'clear and present danger' test whether strict . . . or free-wheeling as the Court in *Dennis* rephrased it." 395 U.S. at 454 (Douglas, J., concurring).

125. 341 U.S. 494 (1951). The Court stated that "[t]he formation by petitioners of such a highly organized

The scope of harm factor in *Ponce* is also significant because it opens the door to a new category of student speech exempt from First Amendment protection. This is a category of speech based on fear arising from Columbine concerns. It is triggered when a student writes about violence against other students or the entire student body. In such a situation, at least according to the Fifth Circuit, *the scope of the harm is so great* that this in itself provides *reason enough for the speech to be prohibited*. This is the Columbine factor at work, and it is reflected in the following portion of the court's opinion in *Ponce*:

The speech in question here is not about violence aimed at specific persons, but of violence bearing the stamp of a well known pattern of recent historic activity: mass, systematic school shootings in the style that has become painfully familiar in the United States [the Columbine factor] [A]s the concurring opinion [by Justice Alito] points out, school attendance results in the creation of an essentially captive group of persons protected only by the limited personnel of the school itself [T]his environment makes it possible for a single armed student to cause massive harm to his or her fellow students.¹²⁷

The excerpt above demonstrates that the court relied on the Columbine factor and *Morse* to establish a foundation for its new student safety exception.¹²⁸ The Fifth Circuit drew a parallel between the threat drugs posed to student safety in *Morse* and the threat to student safety from E.P.'s plans for a "Columbine" attack on his high school. Specifically, the court noted that if *Morse* permitted school officials to prohibit speech advocating drug use because of the threat to physical safety caused by drugs, "then it defies logical extrapolation to hold school administrators to a stricter standard with respect to speech that gravely and uniquely threatens violence, including massive deaths, to the school population as a whole."¹²⁹ From this important conclusion—namely, that student speech threatening violence is as dangerous to students as the threat to physical safety caused by drugs—the court concluded that the student's journal was "not protected by the First Amendment."¹³⁰ The Fifth Circuit went on to hold that the school's disciplinary action against the student

[Communist] conspiracy, with rigidly disciplined members . . . coupled with the inflammable nature of world conditions, [and] similar uprisings in other countries . . . convince us that their convictions were justified" *Id.* at 510-11.

126. *Id.* at 511.

127. *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 770-71 (5th Cir. 2007).

128. Specifically, the Fifth Circuit explained that the concurrence in *Morse* "goes on to expound with further clarity why some harms are in fact so great in the school setting that requiring a school administrator to evaluate their disruptive potential is unnecessary. In doing so it provides the specificity necessary for determining the *harms that are so serious* as to merit the *Morse* analysis." *Id.* at 770 (emphasis added).

129. *Id.* 771-72.

130. *Id.* 772.

“violated no protected right.”¹³¹

Using school safety as a state interest to justify narrowing students’ constitutional rights is not new. School safety has been used in Fourth Amendment analysis to narrow students’ rights against unreasonable search and seizure.¹³² What is new is its expansion into First Amendment cases. This new limitation on student speech is part of the legacy that *Morse* has spawned.

2. *Boim v. Fulton County: Expanding Morse Beyond Drug-Related Speech to Include an Exception Based on Student Safety*

Student First Amendment rights were narrowed again by the school safety exception when the Eleventh Circuit expanded *Morse* beyond drug-related speech to prohibit speech making no reference to drugs. In *Boim v. Fulton County*,¹³³ a high-school student named Rachel wrote:

As I walk to school . . . my stomach ties itself in knots. [sic] . . . I have the gun hidden in my pocket. I cross the lawn and head [sic] to my locker on A hall. Smiling sweetly to my friends . . . My first to [sic] classes pass by my heart thumping . . . Constantly I can feel the gun in my pocket. 3rd period, 4th, 5th and then 6th period . . . I enter the class room. Then he starts taking role. Yes, my math teacher. I loathe [sic] him with every bone in my body. Why? I don’t know. This is it. I stand up and pull the gun from my pocket. BANG the force blows him back and every one in the class sit [sic] there in shock. BANG he falls to the floor and some one [sic] lets out an ear piercing scream¹³⁴

After a school official read the story, Rachel was suspended. Her parents sued in federal court claiming that the school violated Rachel’s First Amendment rights.¹³⁵ The district court ruled in favor of the school. When the

131. *Ponce*, 508 F.3d at 772. Earlier, the Court outlined the student safety exception by noting that it was limited to speech advocating harm to physical safety and “arising from the school environment.” *Id.* at 770. The court explained that it was not concerned with speech threatening harm. Rather it was concerned with a specific threat arising from the special characteristics of the school environment. *Id.* (stating “speech advocating harm that is demonstrably grave and that derives that gravity from the ‘special danger’ to the physical safety of students arising from the school environment is unprotected” (emphasis added)). And what is this characteristic of the school environment? According to the Fifth Circuit, it is the fear that “a single armed student [can] cause massive harm to his or her fellow students.” *Id.* at 770-71.

132. See generally *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995). *Vernonia* involved a Fourth Amendment challenge to a public school’s random suspicionless drug testing of student athletes. *Id.* at 648. In ruling in favor of the school, the Supreme Court concluded that “[d]eterring drug use by our Nation’s schoolchildren is at least as important as . . . deterring drug use by . . . trainmen . . . [I]t must not be lost sight of that this program is directed more narrowly to drug use by school athletes, where the risk of immediate physical harm . . . is particularly high.” *Id.* at 661-62 (emphasis added).

133. 494 F.3d 978 (11th Cir. 2007).

134. *Id.* at 980-81.

135. *Boim v. Fulton County Sch. Dist.*, No. 05-CV-3219, 2006 U.S. Dist. LEXIS 53129, at *4-5 (N.D. Ga. Aug. 1, 2006). The action was also brought by the student’s conservator. *Id.* at *1.

case was appealed to the Eleventh Circuit, that court, like the Fifth Circuit in *Ponce*, characterized a school's duty to prevent violence as a "compelling interest."¹³⁶

Like the Fifth Circuit in *Ponce*, the Eleventh Circuit in *Boim* focused on the Columbine factor. Specifically, the court announced that it was concerned about Rachel's story "in light of the massacre that occurred at Columbine High School in Colorado, [and] the much more local shooting that occurred at Heritage High School."¹³⁷ The court pointed to the fact that "in the eight years preceding the incident underlying the instant appeal, there had been 10 well-known, student perpetrated shootings in schools, not including college campuses, located within the United States."¹³⁸

Clearly relying on the Columbine factor and the increasing perception of schools as dangerous places, the court went on to hold that "*in this climate of increasing school violence . . . and in light of schools' indisputably compelling interest to act quickly to prevent violence on school property . . . we must conclude that the defendants did not violate Rachel's First Amendment rights.*"¹³⁹

3. Johnson v. New Brighton Area School District¹⁴⁰: *Expanding Morse Beyond Drug-Related Speech to Include an Exception Based on Student Safety*

On September 11, 2008, in another decision similar to *Ponce* and *Boim*, a federal court relied on *Morse* and the Columbine factor to uphold the ten-day suspension of a high-school senior after he responded to a friend's greeting, "What's up, Osama?"¹⁴¹ According to the student, he jokingly responded, "If I were Osama, I would have already pulled a Columbine."¹⁴² A teacher was present at the time of the exchange. She reported the incident to the principal,¹⁴³ and the student was suspended. The student filed an action in

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

137. *Id.* at 981. What the Eleventh Circuit was referring to is that five years before, a fifteen-year-old student shot six of his classmates at Heritage High School in Georgia. *Id.* at 984. Heritage was less than an hour away from the high school that Rachel Boim attended. *Id.* One freshman at Heritage High School said, "People have been saying [the student shooter's] been wanting to do this all year long." *Teen suspect in Georgia school shooting may face adult charge*, CNN, May 20, 1999, <http://edition.cnn.com/US/9905/20/conyers.school.shooting.05/> (last visited Apr. 12, 2009).

138. *Boim*, 494 F.3d at 983.

139. *Boim v. Fulton County*, 494 F.3d 978, 984 (11th Cir. 2007). The school safety exception based on the Columbine factor concerns not just student safety, but school liability. For example, in *Boim*, after holding that the student's constitutional rights were not violated, the court noted that "[w]e can only imagine what would have happened if the school officials, after learning of Rachel's writing, did nothing about it and the next day Rachel did in fact come to school with a gun and shoot and kill her math teacher." *Id.*

140. 2008 U.S. Dist. LEXIS 72023 (W.D. Pa. Sept. 11, 2008).

141. *Id.* at *3.

142. *Id.*

143. The teacher's version of the incident is different from that of the student. In an e-mail to the principal

federal district court claiming that school officials violated his First Amendment rights. The school filed a motion for summary judgment. In ruling on the motion, the court noted that the defendant school relied on *Tinker*, but that “they also look[ed] to its progeny, especially *Morse v. Frederick*.”¹⁴⁴

When the court ruled in favor of the school, it relied on *Morse* and the Columbine factor. Specifically, the court stated, “In today’s society, the term ‘Columbine’ connotes death as a result of one or more students shooting other students and school staff.”¹⁴⁵ Citing *Morse*, the court emphasized the importance of school safety and the responsibility of the school to ensure that safety. In light of this, the court found that “our society today charges teachers, school officials and administrators with the responsibility to provide students not only with an environment conducive for learning, *but one that is safe*.”¹⁴⁶ Citing *Morse* again, the court added that “under certain circumstances viewpoint discrimination may be warranted.”¹⁴⁷ The court concluded that there was “no First Amendment protection” for student speech that “advocated conduct harmful to all other students.”¹⁴⁸

4. *Miller v. Penn Manor School District: Expanding Morse Beyond Drug-Related Speech to Include an Exception Based on Student Safety and the Columbine Factor*

The September 2008 district court opinion in *Miller v. Penn Manor School District*¹⁴⁹ has already been discussed in this article as an illustration of the new illegal conduct exception.¹⁵⁰ But *Miller* also provides an example of the school safety exception. This portion of the case began when an assistant principal told a high-school student to turn his T-shirt inside-out. The T-shirt contained images of an automatic handgun along with the words, “Special Issue-Resident-Lifetime License, United States Terrorist Hunting Permit No. 91101, Gun Owner-No Bag Limit.”¹⁵¹ An official explained that the school believed the T-shirt’s message “advocated the hunting of human beings.”¹⁵² The parents disagreed and filed an action in federal court contending that the censorship of

she wrote, “Just thought you would want to know . . . Cory Johnson just walked into the library. Someone said, ‘go to class, Osama.’ He said, ‘Someone calls me that again, I’m going to do a Columbine on this school.’ He may have been kidding, but he does seem very angry . . .” *Id.* at *4-5.

144. *Johnson*, 2008 U.S. Dist. LEXIS 72023, at *10.

145. *Id.* at *26.

146. *Johnson v. New Brighton Area Sch. Dist.*, 2008 U.S. Dist. LEXIS 72023, at *27 (W.D. Pa. Sept. 11, 2008).

147. *Id.*

148. *Id.*

149. 588 F. Supp. 2d 606 (E.D. Pa. 2008).

150. *See supra* Part III.C.2.

151. *Miller*, 588 F. Supp. 2d at 611.

152. *Id.* at 613. The student responded to the school official’s directive by standing up and stating: “This is bullshit.” *Id.* at 612. He was given a two-hour detention for using foul language and for failing to follow directions. The detention has never been enforced. *Id.* at 613.

their son's T-shirt violated his constitutional right of free speech.¹⁵³ The court ruled in favor of the school.¹⁵⁴ Before making its ruling, the court referred to what this article has labeled the Columbine factor. Specifically, the court noted that "the problem of violence in schools has dramatically changed over the past 30 to 40 years Schools at all levels have been affected either directly or indirectly by the violent events that have occurred at places like Columbine . . . and Red Lion."¹⁵⁵

Statements like the one above, as well as similar statements contained in the other opinions discussed in this section, demonstrate the existence of the Columbine factor and its influence on the outcome of student First Amendment cases.¹⁵⁶ Ultimately, these cases involve an issue beyond student speech. They involve the issue of the tension between liberty on the one hand and school security on the other. This is the same issue that arose after 9/11. Some scholars speculate that on September 10, 2001, the government was "supplying too much liberty and not enough security."¹⁵⁷ The problem is that school security and student liberty are dual obligations.¹⁵⁸ Whether the new cases discussed in this article will tilt the balance between free expression and school security in favor of the schools remains to be seen. It is too soon to make a substantive evaluation. *Morse* was decided only one year ago and the Columbine cases in this article were decided as recently as two months ago. Instead, the aim here is to focus on the Columbine factor and the role that the Court's opinion in *Morse* played in providing the legal foundation for Columbine concerns.

153. *Id.* at 618.

154. The court's ruling took place in the context of a motion for preliminary injunction. *Id.* at 617.

155. *Miller v Penn Manor Sch. Dist.*, 588 F. Supp. 2d 606, 617 (2008). The Red Lion incident took place on April 24, 2003, at a junior high school in Pennsylvania. It involved "a fourteen year old student who . . . shot and killed the school principal and himself in the school cafeteria." *Id.* at 616 n.19.

156. Although it has not yet been labeled the "Columbine factor," the effect of the school safety exception based on the Columbine factor has been noticed by federal courts when confronted with First Amendment claims. For example, after *Morse*, the Fourth Circuit wrote that "[p]rotecting the physical security of its people is the first job of any government, and the threat of mass murder implicates that interest in the most compelling way This is the lesson of a variety of *recent school cases* in which students have made *Columbine-style threats*, been suspended or expelled, and then sued—*cases which have almost uniformly been decided in [school] defendants' favor.*" *Mora v. City of Gaithersburg*, 519 F.3d 216, 223 (4th Cir. 2008) (emphasis added) (internal citations omitted).

157. Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605, 621 (2003).

158. Thomas Powers, *Can We Be Secure and Free?*, 151 PUB. INT. 3, 21 (2003) ("In Madison's *Federalist* 51 . . . it is clear that there is not so much a 'tension' between liberty and security as there is a *duality of our concern with security on the one hand, and with liberty, on the other.*" (emphasis added)). The same author also states that "[i]n a liberal republic, liberty presupposes security: the point of security is liberty." *Id.* at 5.

IV. THE COLUMBINE FACTOR AS AN “AVAILABILITY HEURISTIC” AND WHAT THE COURT SHOULD HAVE DONE IN *MORSE*

A. *The Columbine Factor as a Heuristic Based on Fear*

No doubt some will argue that the Court’s opinion in *Morse* and the federal court cases that have expanded it are anti free speech.¹⁵⁹ This article takes the position that the prohibition of student speech in *Morse*, and the cases that have expanded it, are *not* necessarily motivated by an anti-student-speech agenda. Instead, the motivation appears to be an overwhelming concern for student safety and that this concern cannot be understood without reference to the Columbine factor.

The existence of the Columbine factor is part of a growing body of evidence that heuristics play a role in decision making, even by federal judges. Heuristics are strategies that people use to judge uncertain events.¹⁶⁰ In 1974, psychologists began describing a mechanism for decision making called the “availability heuristic.”¹⁶¹ “A person is said to employ the availability heuristic whenever he estimates frequency or probability by the ease with which instances or associations come to mind.”¹⁶² What this means is that if an example of something can be “brought to mind quickly, then there must be a lot of them.”¹⁶³ Salience plays a part, too. For example, the salient image of seeing a car overturned, or a house burning, is much more likely to have an impact on the subjective probability of the event happening again.¹⁶⁴ In short, if a catastrophic risk (like a Columbine-style attack) is easy to imagine because it is “available” through dramatic imagery, then its probability is more likely to be exaggerated.

After 9/11, legal scholars began to import the “availability heuristic” from psychology into law in an effort to explain how fear influences decision making. Specifically, legal scholars began to explore how the “availability

159. For example, one recent Note suggests that *Morse* was motivated by the Court’s “eagerness to allow schools to prohibit pro-drug speech.” Note, *The Supreme Court, 2006 Term: Leading Case: Constitutional Law—Freedom of Speech and Expression—Student Speech*, 121 HARV. L. REV. 295, 296 (2007).

160. See Russell B. Korobkin, *The Problems with Heuristics for Law*, in HEURISTICS AND THE LAW 45, 54 (Gerd Gigerenzer & Christoph Engel eds., 2006) (“Recent evidence documents that judges, like laypeople, often rely on heuristic reasoning rather than deductive logic when reaching probability judgments.”); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1085 (2000) (“Often, systematic errors arise from the use of decision-making heuristics that simplify decision-making tasks . . .”).

161. JUDGMENT UNDER UNCERTAINTY, *supra* note 8, at 11. The first chapter of this book originally appeared as an article in *Science* in 1974. *Id.* at 3.

162. *Id.* at 191 (quotations and citations omitted).

163. *Id.*

164. *Id.* at 11. “Time” appears to be related to salience and availability. *Id.* (“[R]ecent occurrences are likely to be relatively more available than earlier occurrences. It is common experience that the subjective probability of traffic accidents rises temporarily when one sees a car overturned by the side of the road.”).

heuristic” might lead to an exaggerated sense of risk.¹⁶⁵ Law review articles began to examine whether heuristics lead people “to miscalculate risk when faced with fear.”¹⁶⁶ Scholars like Cass Sunstein concluded that “the availability heuristic can lead to serious errors of fact, in terms of both excessive controls on small risks that are cognitively available and insufficient controls on large risks that are not.”¹⁶⁷

Fear and the “availability heuristic” have influenced discussions on several topics: national security in the wake of 9/11,¹⁶⁸ whether a criminal will overestimate the likelihood of being arrested,¹⁶⁹ and even fear of the Internet.¹⁷⁰ The student expression cases discussed in this article provide an example of another area where fear and the “availability heuristic” have begun to influence decision making.

B. What the Court Should Have Done in Morse: “Special Characteristics” of Schools in 2009 Include the Columbine Factor

The Court in *Morse* uses the words “special characteristics” or “circumstances” of the school environment no less than four times in six pages.¹⁷¹ Yet, it never tells us why. The Court should have explained that student First Amendment jurisprudence is context driven and that the protection the First Amendment offers varies with the characteristics of the setting in which the First Amendment challenge is made. For example, the Court in *Kuhlmeier* concluded that the contextual framework of a student newspaper was different than that of an ordinary newspaper for First Amendment

165. Cass R. Sunstein, *Fear and Liberty*, 71 SOC. RES. 967, 967 (2004).

166. Paul Ohm, *The Myth of the Superuser: Fear, Risk and Harm Online*, 41 U.C. DAVIS L. REV. 1327, 1362 (2008).

167. Sunstein, *supra* note 165, at 969-70. Other scholars have written that, although the availability heuristic “can often lead to estimates that approximate statistical probabilities, as memorable events can be memorable precisely because they are common. Unfortunately . . . memorable events can also be memorable for reasons having nothing to do with their general prevalence—for example because they are vivid [and] well publicized . . .” Korobkin & Ulen, *supra* note 160, at 1087.

168. Sunstein, *supra* note 165, at 967.

169. See Korobkin & Ulen, *supra* note 160, at 1089.

170. See generally Ohm, *supra* note 166. Ohm argues that “fear of the internet can trigger the availability heuristic” and a “tendency to exaggerate.” *Id.* at 1366. “First, although the causes or mechanisms of online risk are sometimes bogged down in technical detail, they result in tangible easy to imagine effects. Planes fall out of the sky, power grids go dark . . . credit card numbers are stolen. Second, the media report on online risks incessantly.” *Id.*

171. *Morse v. Frederick*, 127 S. Ct. 2618, 2622 (2007) (noting “we have held . . . that the rights of students must be ‘applied in light of the *special characteristics* of the school environment’” (emphasis added) (internal citations omitted)). Three pages later, the Court emphasizes that “this Court made clear that ‘First Amendment rights, applied in light of the *special characteristics* of the school environment are available to teachers and students.”” *Id.* at 2625 (emphasis added). Two pages later, the Court states that “student First Amendment rights are ‘applied in light of the *special characteristics* of the school environment.’” *Id.* at 2627 (emphasis added). Finally, the Court states, “The ‘*special circumstances of the school environment*’ and the governmental interest in stopping student drug abuse . . . allow schools to restrict student expression that they reasonably regard as promoting illegal drug use.” *Id.* at 2629 (emphasis added).

purposes. Schools should be “able to set higher standards for student speech . . . than those demanded by some newspaper publishers.”¹⁷² Similarly, another court explained that the protection the Amendment offers varies “with the specific characteristics of the environment or setting in which the challenges are made.”¹⁷³

Tragically, the so-called “special characteristics” of a public-school setting have changed dramatically in the twenty-first century. When *Tinker* was decided in 1969, the Court used the phrase “substantial disruption” to illustrate the limits of speech. In 1969, this phrase included student political protests culminating in marches, sit-ins, and class boycotts. Yes, such conduct disrupted class. And, yes, such conduct was a legitimate concern.

The concern today is entirely different. It goes beyond the disruption present in the hurly-burly world of healthy free speech debate to something more. During the time this article was written, Ryan Shallenberger, a student at a South Carolina high school, was accused of planning a “Columbine-suicide attack” on his school with explosives.¹⁷⁴ This only reinforces the Columbine factor and the fact that student-speech cases today can only be understood in the context in which they are decided. Unfortunately, in 2009, this context includes the Columbine factor and the underlying perception that schools are, in the words of Justice Alito in *Morse*, “places of special danger.”¹⁷⁵

172. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271-72 (1988) (emphasis added).

173. *Coll. Republicans at San Francisco State Univ. v. Reed*, 523 F. Supp. 2d 1005, 1014 (N.D. Cal. 2007) (“The same type of regulation might survive First Amendment challenge in one context but fail to survive it in another. This follows in part because the nature of the governmental interests that challenged regulations are designed to promote can vary considerably from setting to setting—as can the magnitude or sensitivity of competing First Amendment concerns.” (emphasis added)).

174. CNN Newsroom Transcripts, April 21, 2008, <http://transcripts.cnn.com/TRANSCRIPTS/0804/21/cnr.06.html> (last visited Aug. 27, 2008). Like many school attackers, the student planned his attack and wrote his plan down. “A hate filled diary and a frightening plot add up to tight security at a South Carolina High School . . . [P]olice say Shallenberger’s journals suggest he planned a Columbine-style suicide attack.” *Id.*

175. *Morse*, 127 S. Ct. at 2638 (Alito, J., concurring). The presence and influence of the Columbine factor is not limited to federal courts. The Columbine factor has been used as a basis to limit the rights of students by state courts as well. In ruling that a school did not violate the constitutional rights of a student after he said that he was going to bring a gun to school, line the teachers up, and shoot them, a Pennsylvania state court found that:

We are also painfully aware that far too many times within the last two years our nation has mourned as a result of horrific carnage wrought by gun wielding school students. On December 1, 1997 a 14-year old brought a gun to a school prayer group meeting in West Paducah, Kentucky, opened fire and killed three students while wounding five others . . . [O]n April 20, 1999 at Columbine High School in Colorado, fifteen people perished when two students went on a killing rampage. In light of this tragic and stark reality of the potential danger of gun related violence within our schools . . . a threat by a student to bring a gun to school can in no way be treated as a joking statement . . . [I]t is of paramount importance that our schools must be kept as centers of learning free from fear for personal safety.

In re B.R., 732 A.2d 633, 639 (Pa. Super. Ct. 1999) (emphasis added).

CONCLUSION

This article has been critical of the Court for not providing a framework for student First Amendment analysis. But the same criticism can be made, and indeed has been made, about the three other Supreme Court student-speech cases that preceded *Morse*. With respect to *Tinker*, the Second Circuit wrote, “It is not entirely clear whether *Tinker*’s rule applies . . . only to political speech.”¹⁷⁶ With respect to *Fraser*, one court wrote that “the Supreme Court has acknowledged that *Fraser* is an exception to *Tinker*, but *has not clarified the debate on what that exception is.*”¹⁷⁷ Similarly, with respect to *Kuhlmeier*, courts are unsure whether *Kuhlmeier* requires viewpoint neutrality.¹⁷⁸

If only pure expression were at stake, then any discussion about student speech would be at an end. Thanks to Justice Fortas’s opinion in *Tinker*, students have First Amendment rights, and it is unconstitutional for school officials to interfere with those rights. But the Columbine factor introduces another dimension, the possibility that expression will become action. It is this contextual factor that should be acknowledged and put into a principled framework of analysis.

176. Guiles *ex rel. Guiles v. Marineau*, 461 F.3d 320, 326 (2d Cir. 2006), *abrogated by* 514 F. Supp. 2d 199 (D. Conn. 2007).

177. *DePinto v. Bayonne Bd. of Educ.*, 514 F. Supp. 2d 633, 638 n.1 (D.N.J. 2007).

178. There is a split among the circuits on the issue of viewpoint neutrality. The First Circuit held that *Kuhlmeier* does not require viewpoint neutrality, while the Eleventh Circuit believes that it does. *Compare Ward v. Hickey*, 996 F.2d 448, 454 (1st Cir. 1993) (“The Court in *Kuhlmeier* did *not* require that school regulation of school-sponsored speech be viewpoint neutral.”), *with Searcy v. Harris*, 888 F.2d 1314, 1319 n.7 (11th Cir. 1989) (“There is no indication that the [*Kuhlmeier*] court intended to . . . *allow a school official to discriminate based on a speaker’s views.*” (emphasis added)).