

*Frederick v. Morse*: Protecting Student Speech  
Beyond the Schoolhouse Gates

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CHAPTER ONE:  
“BONG HITS 4 JESUS”

On January 24, 2002, the Olympic torch passed through the city of Juneau, Alaska, en route to Salt Lake City. Many were interested in seeing this once in a lifetime event, and crowds gathered on both sides of the street, hoping for a glimpse of the torch. This was a big media event, and there were television cameras and reporters everywhere. The torch was going to be carried through the main streets of Juneau, including Glacier Avenue, the street where Juneau-Douglas High School (JDHS) was located. Because of this, some teachers at the high school allowed their students to view the event.

Among the students released by their teachers, most viewed the Relay from the public sidewalk on the High School side of Glacier Avenue. Some left school grounds and went to the other side of the street, the residential side. Other students left school grounds and went downtown to eat at McDonald’s.<sup>1</sup>

Not all students were released from their classrooms, and those who were were not obligated to attend the event.<sup>2</sup>

Joseph Frederick, an eighteen-year-old senior at the high school, was running late to school. Because of car problems in the morning, he did not arrive at JDHS until after

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<sup>1</sup> Law Office of Douglas Mertz, “Complaint,” *Joseph Frederick vs. Deborah Morse and the Juneau School District: 2*.

<sup>2</sup> *Frederick v. Morse* content gathered from the following sources:  
<http://writ.news.findlaw.com/hiden/20060918.html>,  
<http://www.law.com/jsp/article.jsp?id=1142338282994>, <http://splc.org/newsflash.asp?id=1213>,  
[http://splc.org/newsflash\\_archives.asp?id=1319&year=2006](http://splc.org/newsflash_archives.asp?id=1319&year=2006),  
[http://www.jsd.k12.ak.us/newdistrict/news/archive/frederickvmorse\\_archive.php](http://www.jsd.k12.ak.us/newdistrict/news/archive/frederickvmorse_archive.php),  
[http://splc.org/newsflash\\_archives.asp?id=1384&year=2006](http://splc.org/newsflash_archives.asp?id=1384&year=2006),  
<http://www.cnn.com/2007/LAW/03/19/scotus.bonghits.ap/index.html>,  
<http://abcnews.go.com/US/story?id=2953653&page=1>, <http://www.theolympian.com/19/story/79252.html>,  
<http://www.firstamendmentcenter.org/%5cnews.aspx?id=16626>

the classes had been let out to see the torch relay. He parked his car in a nearby parking lot and joined his friends and fellow classmates, who were standing on the residential side of Glacier Avenue. He never stepped foot on the school's property. As the torch was passed down the street, Frederick, with the help of other students, held up a banner stating "Bong Hits 4 Jesus." JDHS Principal Morse saw the sign from the other side of the street. Immediately Morse "crossed the street and pulled down Frederick's banner. Morse also suspended Frederick for five days, but after Frederick said he quoted Thomas Jefferson in protest, Morse increased his suspension to 10 days."<sup>3</sup>

Principal Morse claimed that she took down the banner because its message violated the school's anti-drug policies by promoting the use of drugs.<sup>4</sup> She claimed Frederick's banner did so via the words "bong" and "hits," both marijuana terminology.<sup>5</sup> According to the school's superintendent, Gary Bader, "Frederick's speech disrupted and undermined the school's 'educational mission to educate students about the dangers of illegal drugs and to discourage their use.'"<sup>6</sup> There was an incident at the relay involving the throwing of plastic Coca-Cola bottles and snowballs, but it was unrelated to the poster.<sup>7</sup> There was not, however, any disruption as a result from Frederick's poster, nor was there evidence for potential disruption. Morse justified her actions by stating that she feared if she had failed "to respond when Frederick held up his banner... [it] could create the impression that the district approved, or at least tolerated, student's use of

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<sup>3</sup> April Hale, "Supreme Court will hear 'Bong Hits 4 Jesus' case," *Student Press Law Center*, December 2006, 29 Jan. 2007 <[http://splc.org/newsflash\\_archives.asp?id=1384&year=2006](http://splc.org/newsflash_archives.asp?id=1384&year=2006)>.

<sup>4</sup> Paul M. Smith, et al., "Communications Lawyer, Courtside" *American Bar Association* 24 (Fall 2006): 1-2.

<sup>5</sup> Ann Sutton, "9<sup>th</sup> Circuit: 'Bong Hits 4 Jesus' Banner Was Free Speech," *The Associated Press*, March 15, 2006, 6 Feb. 2007, <<http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=114233828994>>.

<sup>6</sup> "Frederick v. Morse" *Juneau School District press release*, March 14, 2006.

<sup>7</sup> Mertz, "Complaint": 4.

illegal drugs.”<sup>8</sup> Morse believed she was working within her authority when she demanded Frederick remove his banner.

Frederick, on the other hand, believed that he was in no way advocating drug use and argued that his banner’s message was sheer nonsense. Drawn from stickers seen on car bumpers and snowboards, Frederick wanted to “see how people would react”<sup>9</sup> and try to get on television. Little is known about when or where he made his banner. There was no evidence that Frederick made the banner in school or with the school’s supplies. Because he grabbed the banner out of his car, it is reasonable to assume Frederick made the banner on his own time, in his own home, and with his own supplies. Frederick, in addition, wanted to use this banner “as a test of [his] First Amendment rights.”<sup>10</sup> Because of Morse’s actions, Frederick believed that his rights were violated.

Douglas Mertz, representing Frederick, sued Deborah Morse and the Juneau School District in 2002, for violation of his client’s First Amendment rights “by seizing the banner, by punishing [him] for displaying the banner, and by punishing him for quoting Thomas Jefferson on civil liberties.”<sup>11</sup> Applying a traditional reading of the student speech “trilogy” of Supreme Court cases, a federal district court placed Frederick’s speech within the realm of the school day and ruled that “the banner was offensive according to the 1986 Supreme Court case *Bethel School District v. Fraser* and that the school had the right to discipline the student.”<sup>12</sup> Frederick appealed this decision. The 9<sup>th</sup> Circuit Appellate Court reversed the decision, finding that Frederick’s First

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<sup>8</sup> “Frederick v. Morse” *Juneau School District press release*, March 14, 2006, 11 Feb. 2007 <[http://www.jsd.k12.ak.us/newdistrict/news/archive/frederickvmorse\\_archive.php](http://www.jsd.k12.ak.us/newdistrict/news/archive/frederickvmorse_archive.php)>.

<sup>9</sup> “‘Bong Hits’ banner gets students suspended,” *The Associated Press State & Local Wire*, 29 Jan. 2002.

<sup>10</sup> “‘Bong Hits’ banner,” *The Associated Press*.

<sup>11</sup> Mertz, “Complaint”: 4.

<sup>12</sup> Hale, “Supreme Court will hear ‘Bong Hits 4 Jesus’ case.”

Amendment rights were violated. Basing their decision on the 1969 case *Tinker v. Des Moines Independent Community School District*, the court ruled “speech taking place outside of the classroom cannot be censored simply because it conflicts with a school’s educational mission.”<sup>13</sup> Frederick’s speech did not take place within the schoolhouse gates or at a school-related event, and it did not cause a disruption. The court ruled that Morse had violated his First Amendment rights, thereby protecting the message “Bong Hits 4 Jesus.” Morse and the school board appealed this decision, and the Supreme Court granted certiorari, hearing the case in March 2007.

*Frederick v. Morse* is a difficult student speech case to judge, as evidenced by the two radically different decisions from the district and appellate courts. Frederick’s speech raises important issues because it does not fit neatly into one of the two already-established student speech categories—student speech inside the schoolhouse gates and student speech during co-curricular activities. The district court determined Frederick’s speech occurred during a school-sponsored activity, while the appellate court found that though his speech did not occur on school property, it happened during the school day. This case introduces the need for a third category of student speech, where the fact that the speech took place off-site and independent from the school is considered. Before this area is explored, however, it is necessary for the intricacies of the student speech “trilogy” to be examined.

The three student speech landmark cases are *Tinker v. Des Moines Independent Community School District*, *Bethel v. Fraser*, and *Hazelwood v. Kuhlmeier*. *Tinker* governs student speech that occurs within the schoolhouse gates. This is not limited to

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<sup>13</sup> Emily Walker, “Suspension for ‘Bong Hits 4 Jesus’ poster violated student’s rights, court says,” *Student Press Law Center*, March 2006, 6 Feb. 2007 <<http://splc.org/newsflash.asp?id=1213&year=2006>>.

speech that happens in the classroom, but also that which takes place in the cafeteria, and hallway, and the baseball field. Under this major category lies another distinction—speech that is disruptive and speech that is sexually offensive, lewd, or obscene. The standard established in *Tinker* depends on the disruption test: a student’s speech is not protected by the First Amendment if it disrupts others while within the schoolhouse gates. Under *Fraser*, speech is not protected if it is deemed to be sexually offensive or plainly obscene. Speech that occurs during a co-curricular activity is governed by the *Hazelwood* standard. Under this standard, student speech can be regulated if can be reasonably associated with the school and has a message the school does not want to be associated with.

These three cases have established different standards for the protection of student speech, yet it has been up to lower courts to interpret their meanings and limitations. It can sometimes be difficult to determine which standard governs student speech. Due to the nature of *Frederick v. Morse*, this is one of those instances. Thus, it is important to understand these landmark decisions in order to understand the need for a third category of student speech.

### Student Speech Inside the Schoolhouse Gates

In December 1965, John F. Tinker, Christopher Eckhardt, and Mary Beth Tinker, students in the Des Moines school district, attended an anti-Vietnam War meeting with other adults and students. At this meeting, the group decided to publicize their objections to a war in Vietnam as well as their support for a truce by wearing black armbands for the duration of the holiday season. When Des Moines school principals heard about the plan,

they had an emergency meeting and adopted a policy declaring “any student wearing an armband to school would be asked to remove it, and if he refused he would be suspended until he returned without the armband.”<sup>14</sup>

The students were aware of this new policy and chose to wear the armbands to school anyway. Out of eighteen thousand students in the school system, only a few wore the armbands. Two of the students, Tinker and Eckhardt, were in high school, and one, Tinker, was in junior high. As stated in the school’s new policy, the three students were asked to remove their armbands. When they refused, the students were suspended until they would come to school without them. The students did not return to school until New Year’s Day, after the planned period to wear the armbands ended.

Through their fathers, the students sought an injunction to restrain school officials and the board of directors from further disciplining them. The District Court dismissed this complaint, upholding “the constitutionality of the school authorities’ action on the ground that it was reasonable in order to prevent disturbance of school discipline.”<sup>15</sup> However, there was no evidence that notable disruption had occurred within the school. “There [was] no indication that the work of the schools or any class was disrupted. Outside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were not threats of acts of violence on school premises.”<sup>16</sup> Though there was evidence that no in-school disruption occurred from the wearing of two-inch thick black armbands, the district court found that it was within school authorities’ jurisdiction to *prevent* a possible disturbance from happening.

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<sup>14</sup> *Tinker v. Des Moines Independent Community School District*. 393 U.S. 503 (1969): 504.

<sup>15</sup> 393 U.S. 503 (1969): 504-505.

<sup>16</sup> 393 U.S. 503 (1969): 509.

On appeal, the court was equally divided in their decision, and thus the District Court's decision was affirmed. The Supreme Court granted certiorari to hear the case.

In a 7-2 decision, the judges reversed the decision. Justice Fortas wrote the majority opinion, stating that the wearing of the black armbands was protected under the First Amendment. He writes

First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.<sup>17</sup>

This would become the most famous quote from this decision, and it would be constantly referred to by lower and federal courts. Although the school environment may be different from a traditional public forum, a park or a street for example, this does not mean that both students and teachers are not awarded the same amount of First Amendment protection. Students have just as much of a right to freedom of speech as their teachers do. Though the Des Moines schools had established a policy against the wearing of such armbands, the students were protected under the First Amendment, thus making the policy unconstitutional.

The justices had to provide a way to determine speech that is protected by the First Amendment and speech that is not. Fortas writes that Tinker and the other students were punished for

a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is no evidence whatever of

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<sup>17</sup> 393 U.S. 503 (1969): 506.

petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone.<sup>18</sup>

A small minority of the school's population wore the black anti-war armbands, and no disruption was caused by them. The students who wore the black armbands did not cause a disruption in the classroom, the hallway, or the cafeteria. The wearing of the armbands, though it may have drawn attention, was not accompanied by signs, speakers, flyers, or anything of the like.

These petitioners merely went about their ordained rounds in school. Their deviation consisted only in wearing on their sleeve a band of black cloth, not more than two inches wide. They wore it to exhibit their disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known... They neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder.<sup>19</sup>

These three students, out of eighteen thousand, wanted to express their viewpoint. Their only expression against the war was the wearing of the armbands, which caused no in-school disruption. The other student's learning environment was not disturbed.

School authorities were fearful of a possible disturbance from the students' wearing of the armbands, hence the policy they established. Fortas argues that "in 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

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<sup>18</sup> 393 U.S. 503 (1969): 508.

<sup>19</sup> 393 U.S. 503 (1969): 514.

cause trouble.”<sup>20</sup> Just because a school authority is afraid of what *could* happen is not grounds for denying a student his First Amendment rights. Though a student may hold a minority opinion, he must be allowed to express it, as “this kind of openness...is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.”<sup>21</sup>

The court found no evidence to indicate that school officials had reason to anticipate that the wearing of the armbands would lead to substantial disruption in the classroom or would impede upon other student’s rights. This has become the landmark *Tinker* standard—speech is protected so far as it does not cause disruption or intrude on other student’s rights. Though a student may express a minority or controversial opinion, it is under his First Amendment right that he be allowed to do so. This does not hold for just the classroom, either. “A student’s rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects...”<sup>22</sup> as long as no disruption ensues. This “disruption” standard has become the major way in which to determine if speech within the schoolhouse gates, whether in the classroom or elsewhere, is protected. A more liberal decision on the part of the Supreme Court, students were awarded much protection under the First Amendment.

The subject of student speech appeared again in the Supreme Court seventeen years later. In *Bethel v. Fraser*, the issue became student speech that was deemed inappropriate for a school-sponsored setting. Because the speech occurred at a school-sponsored activity, lower courts believed it to be within the realm of *Tinker*. The

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<sup>20</sup> 393 U.S. 503 (1969): 508.

<sup>21</sup> 393 U.S. 503 (1969): 508-509.

<sup>22</sup> 393 U.S. 503 (1969): 512-513.

Supreme Court drew a distinction, however, between the speech occurring in *Tinker* and that in *Fraser*. The latter involved speech that was determined to be sexually obscene and offensive, whereas the former was not. This distinction limited the First Amendment protection awarded to student speech.

On April 26, 1983, during a school assembly at Bethel High School in Pierce County, Washington, Matthew Fraser, a high school student, delivered a speech where he nominated a fellow student to a student government office. Approximately 600 students, including many 14-year-olds, attended the voluntary assembly that occurred during school hours. The assembly was part of a school-sponsored educational program about self-government. During his speech, Fraser referred to his candidate in terms of a sexual metaphor, using phrases such as “he’s firm in his pants...his character is firm,” “a man who takes his point and pounds it in,” and “a man who will go to the very end—even the climax, for each and every one of you.”<sup>23</sup> Students reacted to the speech in various ways—some hooted and yelled, some mimicked the sexual activities Fraser alluded to, some were shocked and embarrassed by the speech.

Fraser had discussed his speech with two teachers prior to giving it and was advised that it should not be given because of its inappropriate nature. Fraser ignored this suggestion. The morning after he gave the speech, Fraser was notified by the Assistant Principal that he had violated the school’s “disruptive-conduct” rule; the school believed Fraser had substantially interfered with the educational process through use of his obscene, profane language. Fraser received a three-day suspension and learned he would no longer be on the list of candidates for graduation speaker after admitting that he had deliberately used the sexual innuendo in his speech.

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<sup>23</sup> *Bethel School District v. Fraser*. 478 U.S. 675 (1986): 687.

Fraser's father, on behalf of his son, filed suit in district court, stating that his son's First Amendment rights had been violated. The district court ruled that the school had indeed violated the First Amendment, and that "the school's disruptive-conduct rule is unconstitutionally vague and overbroad."<sup>24</sup> Fraser was awarded nominal damages and was allowed to be considered for graduation speaker.

The school district appealed this decision, but the appellate court upheld it, "holding that the respondent's speech was indistinguishable from the protest armband in *Tinker v. Des Moines Independent Community School District*."<sup>25</sup> The court rejected all of the school district's arguments: that Fraser's speech had a disruptive effect on the educational process, that the school had an interest in protecting an audience of minors from lewd and indecent language in a school-sponsored setting, and that the school had the power to control the language used during a school-sponsored activity. The appellate court upheld the decision that Fraser's First Amendment rights had been violated.

The Supreme Court heard the case and, in a 7-2 vote, reversed the district and appellate courts' decision. In the majority decision written by Justice Burger, the court immediately drew a distinction between the *Tinker* case and the case at bar,

The marked distinction between the political "message" of the armbands in *Tinker* and the sexual content of respondent's speech in this case seems to have been given little weight by the Court of Appeals. In upholding the students' right to engage in a nondisruptive, passive expression of a political viewpoint in *Tinker*,

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<sup>24</sup> 478 U.S. 675 (1986): 679.

<sup>25</sup> 478 U.S. 675 (1986): 679.

this Court was careful to note that the case did ‘not concern speech or action that intrudes upon the work of the schools or the rights of other students.’<sup>26</sup>

The court found a marked difference between the expression in *Tinker* and that in *Fraser*. Indeed, a student has the freedom to advocate unpopular, minority, and controversial ideas while within the schoolhouse gates. What must also be considered, however, are the “boundaries of socially appropriate behavior.”<sup>27</sup> Students must take into consideration the effect of their choice of speech on other participants and audience members. If a student fails to do so, it is within a school’s jurisdiction to “determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech.”<sup>28</sup>

The Court believed that it was completely within the school’s authority to limit Fraser’s speech. Because there were so many minors in attendance at the school assembly, the justices felt that “the speech could well be seriously damaging to its less mature audience...on the threshold of awareness of sexuality.”<sup>29</sup> Because this was a school-sponsored assembly that occurred during the school day, the court reasoned that teachers and administrators have a responsibility to protect a fragile audience, the students, from lewd, indecent, and sexually explicit speech.

The Supreme Court established a standard with the *Fraser* case, located within the realm of the *Tinker* decision:

Unlike the sanctions imposed on the students wearing armbands in *Tinker*, the penalties imposed in this case were unrelated to any political viewpoint. The First

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<sup>26</sup> 478 U.S. 675 (1986): 680.

<sup>27</sup> 478 U.S. 675 (1986): 681.

<sup>28</sup> 478 U.S. 675 (1986): 681.

<sup>29</sup> 478 U.S. 675 (1986): 683.

Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as a respondent's would undermine the school's basic educational mission.<sup>30</sup>

Fraser's speech, according to the Court, had a legitimate political viewpoint—"Vote for my friend." The problem was not with Fraser's message, but with the language he used to express his viewpoint. He was not punished for his political stance, but rather the way in which this idea was expressed. The Supreme Court ruled that because Frederick's speech was obscene and sexually explicit, it was inappropriate for a school educational activity. Additionally, the court reasoned, Fraser's choice of language undermined the school's education mission to make students feel comfortable in their environment. Based on the reactions of some of the students, not everyone felt comfortable with his language. The kind of lewd and offensive speech that yields this kind of reaction is not protected under the First Amendment.

There are issues in both the *Tinker* and *Fraser* decisions that the Supreme Court did not address, namely who decides if speech is disruptive or offensive. The *Tinker* decision does not state whose responsibility it is to determine if speech is disruptive or not. Teachers, principals, and faculty members tend to assert this authority. Another issue arises with the "disruption" factor—must one wait for the disruption to occur before the speech is banned? The Supreme Court decision does not explain the means by which to determine disruption, or if it is constitutional to ban speech *before* disruption ensues. In the same vein, teachers and school officials must exercise caution when determining if a student's speech is lewd or offensive. They must make sure they are not banning a message that is controversial, as this would certainly be protected under the First

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<sup>30</sup> 478 U.S. 675 (1986): 685.

Amendment. Despite these problems, the *Tinker* case set a generally liberal standard for student speech that occurred within the schoolhouse gates. This freedom of expression was limited, however, by the standard set in *Fraser*, where sexually obscene, lewd, or offensive student speech is not offered First Amendment protection. Both of these cases determine the amounts of First Amendment protection for students while within the schoolhouse gates—in the classroom, hallway, or at a school-sponsored activity or event. What must be considered next is the amount of protection given to student speech that does not occur during the school day or at an event, yet is still in some way attributed to the school.

#### Student Speech and Co-Curricular Activities

The Supreme Court addressed student speech within the schoolhouse gates in the late 1960s, but it was not until 1983 that a different form of student speech became an issue. Although the speech in *Hazelwood v. Kuhlmeier* was created by students during an after-school activity, the speech was part of a class offered during the school day. Though the speech was written after the school day had ended, the newspaper could easily be identified as a product of Hazelwood East High School. Because of this, the *Tinker* standard could not be applied to the case, as it only addressed speech that happened during the school day or at a school-sponsored event. As a result, the Supreme Court established a second category—student speech and co-curricular activities.

As part of the Journalism II curriculum at Hazelwood East High School in Missouri, the class members published a newspaper, *Spectrum*, every three weeks or so during the school year. The newspaper was written and edited by the class, and over

4,500 copies of it were distributed to students, teachers, administrators, and the Hazelwood community. The actual printing of the newspaper was funded by the Board of Education, and other expenses were covered by *Spectrum*'s sales profits. The majority of the academic year 1982-1983 Journalism II class was taught by Robert Stergos; however, on April 29, 1983, Stergos left because he took a job elsewhere. Another teacher, Howard Emerson, took over this position.

Though Stergos and then Emerson were the overseers of the paper, the students had the responsibility to create topics, write stories, and edit the paper. They had a choice in the content and the format of the paper. They were responsible for gathering information about the stories, in the form of interviews, surveys, and any other appropriate methods. The publishing of the *Spectrum* was the culmination of the students' work. The creation and publication of the newspaper was all part of the curriculum of the Journalism II class. Students were able to apply what they learned through their textbooks, lectures, and class time to this newspaper. During the spring 1983 semester, it was protocol for the journalism teacher to submit proofs of the newspaper to the principal, Robert Eugene Reynolds. Upon approval of the paper, *Spectrum* would be sent to the printer.

Principal Reynolds received the May 13<sup>th</sup> edition of *Spectrum* on May 10, 1983. He objected to two of the articles in the paper, a story about "three Hazelwood East students' experiences with pregnancy; the other discussed the impact of divorce on students at school."<sup>31</sup> Reynolds feared that the girls featured in the pregnancy article, though it used fake names, might still be identifiable from the text. Additionally, he thought that some of the references to birth control and sexual activity were inappropriate

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<sup>31</sup> *Hazelwood School District v. Kuhlmeier*. 484 U.S. 260 (1988): 263.

for some of the younger students at the high school. In the divorce story, a student was identified by name. The student complained about her father not spending enough time with her family, and that her parents argued about everything. Reynolds felt that the student's parents should have been given the opportunity to respond to these claims, or at least the ability to consent to the remarks. Reynolds was not aware that in the final copy of the article, Emerson deleted the student's name.

Because he received the page proofs on May 10, three days before the paper was to be printed, Reynolds knew that there was no time to make the necessary changes to the articles. Instead, he concluded that his only option was to pull the two pages that the articles appeared on, leaving the *Spectrum* issue to four pages. Though Reynolds was not opposed to the other articles that appeared on the two pages, they had to be deleted because they were on the same pages as the divorce and pregnancy stories. Reynolds told Emerson of his decision to withhold two total pages, and he informed his school superiors, who concurred.

The students sued the school district, declaring that their First Amendment rights had been violated. The District Court decided in favor of the school, concluding 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 has a ‘substantial and reasonable basis.’”<sup>32</sup> The court found that Reynolds’ concern with being able to identify the two pregnant students, the references to birth control and sexual activity, and a lack of privacy about the student’s divorced parents constituted a reasonable basis to delete the two pages of the May 13, 1983 edition of *Spectrum*.

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<sup>32</sup> 484 U.S. 260 (1988): 264.

On appeal, the Eighth Circuit Appeals Court reversed this decision. The court held that not only was *Spectrum* a part of the school curriculum, but also a public forum. Because of this, the court concluded “that *Spectrum*’s status as a public forum preclude school officials from censoring its contents except when (quoting *Tinker*) ‘necessary to avoid material and substantial interference with school work or discipline...or the rights of others.’”<sup>33</sup> The court found no evidence that indicated any such interference that might occur if the articles had remained. Because of this, the court ruled that the First Amendment rights of the students had been violated.

The Supreme Court granted certiorari and heard the case in 1987. In a 5-3 decision, the appeals court decision was reversed, protecting the actions of the school district. In the majority opinion written by Justice White, the court first questioned whether *Spectrum* could be characterized as a forum for public expression. The court found that Mr. Stergos, the Journalism II teacher, had a great deal of control over the paper, including the selection of “the editors...scheduled publication dates, decided the number of pages for each issue, assigned story ideas to class members.”<sup>34</sup> Ultimately, he had the final say about the paper. Though it was a classroom assignment, it was his duty as a teacher to guide his students. Journalism II was a part of the school curriculum, with the culmination being *Spectrum*. It was a newspaper that was produced in the school and thus associated with it.

White draws a distinction between *Tinker* and *Hazelwood*: “The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment

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<sup>33</sup> 484 U.S. 260 (1988): 265.

<sup>34</sup> 484 U.S. 260 (1988): 268.

requires a school affirmatively to promote particular student speech.”<sup>35</sup> Unlike the appellate court, the Supreme Court found that the type of speech and the situation in *Tinker* differs greatly from that of the *Hazelwood* case. “The latter question concerns educators’ authority over 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.”<sup>36</sup> *Spectrum* comfortably fits into this category because it was part of the school curriculum, supervised by a faculty member, and designed to teach students certain skills associated with the course.

White and the majority believed that “a school must be able to set high standards for the student speech that is disseminated under its auspices...and may refuse to disseminate student speech that does not meet those standards.”<sup>37</sup> A school has the authority to disassociate itself and disseminate its resources with student speech that is inappropriate for the school setting. “Educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”<sup>38</sup> The principal felt that some of the material was not appropriate for the younger members of the high school community, and he thus had the authority to deny the printing of those pages. The Supreme Court, in this landmark decision, ruled that a student’s freedom of expression is limited when the imprimatur of the school is associated with it.

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<sup>35</sup> 484 U.S. 260 (1988): 270.

<sup>36</sup> 484 U.S. 260 (1988): 271.

<sup>37</sup> 484 U.S. 260 (1988): 271-272.

<sup>38</sup> 484 U.S. 260 (1988): 273.

With the decisions in *Tinker*, *Fraser*, and *Hazelwood*, the Supreme Court established some important precedents on student speech. According to *Tinker*, student speech that is somehow school-related is protected so long as no disruption ensues and no student's rights are impinged upon. *Fraser* states that student speech at a school-sponsored event is not protected if it is determined to be sexually offensive, lewd, or obscene. *Hazelwood* creates a second category of student speech, that which occurs as part of a co-curricular activity. Because a school can reasonably be associated with this type of speech, the school has the authority to determine what speech they believe to be appropriate, and what speech is not. With these landmark decisions, the Supreme Court established two camps for student speech to fall under—speech that occurs inside the schoolhouse gates, and speech that occurs as part of a co-curricular activity. The former is dictated by the disruption test; the latter, if it can be reasonably associated with the school. One must consider, then, speech that does not fall into either of these two categories. The speech “Bong Hits 4 Jesus” in *Frederick v. Morse* is an example of such speech that does not fall into the *Tinker* or the *Hazelwood* camp.

### The Need for a Third Category of Student Speech

In the *Tinker* standard established by the Supreme Court, a student still retains the freedom and right to express his beliefs when he enters the school building—while in the classroom, on the baseball field, in the cafeteria, or in the hallway. A student's beliefs, no matter how controversial they may be, are protected under the First Amendment. Even if teachers or school faculty are not comfortable with the ideas, or if they do not agree with them, the ideas are still protected. The objective of a public school in the

United States is for students to learn; the best way to do so is through the sharing of ideas. It provides a great disservice to the learning environment by only sharing one side of an argument (the majority belief). Minority beliefs must be presented also, no matter how controversial or uncomfortable they may be. This in-school speech, whether it is through flyers, armbands, dialogue, or banners, is protected by the First Amendment. The only time a student's speech is not protected is if there is significant evidence that the sharing of these beliefs will result in the disruption of the classroom (or hallway, cafeteria, baseball field, etc.) or if the beliefs will impinge upon the other rights of students. Student speech is not protected if it results in the disruption of the learning, in-school, classroom environment.

*Fraser* dictates that speech that is deemed lewd, obscene, or plainly offensive during the school day or at a school-sponsored activity or event is not protected. A student has the right to express his opinions, even if they are controversial, as long as he does so in a way that is appropriate for his audience. Making lewd statements or distributing offensive flyers for the sake of just doing so is not an appropriate way to get one's message across to others. If a student, however, is not able to determine what is audience-appropriate, school teachers, principals, and administrators have the authority to do so. Again, as in *Tinker*, speech that is controversial can not be limited for the mere fact that it is controversial; this is unconstitutional. The student speech must be sexually offensive or obscene in order for it to not receive First Amendment protection.

*Hazelwood* addresses a second category of student speech—that which occurs as part of a co-curricular activity. The decision maintains that it is within the school's authority to limit student speech in anything that bears the school's imprimatur. The

school has a responsibility not only to students, but also to parents and to the rest of the community. If a school finds a topic to be inappropriate, it is within their authority to choose to not be associated with the message. Because of this, a school can control speech that directly reflects upon the school in an inappropriate way.

These two major precedents, with *Fraser* falling under *Tinker*, put student speech cases into two camps—speech that occurs inside the schoolhouse gates and speech that is co-curricular. From there, certain aspects must be addressed. If the speech in question falls under the *Tinker* standard, it must be established that the speech occurred during the school day, on school property, or at a school-sponsored event. Once this is ascertained, the disruption aspect must be addressed. It must be determined if disruption actually occurred as a result of the speech, or if school faculty had a reasonable belief that a disruption would have happened if the speech was not stopped. One must be sure that a school faculty member is not just trying to censor a student's idea that is controversial or that he does not agree with. If *Fraser* is applied, it must first be established that it occurred during the school day or at a school-sponsored activity. If it did, then it must be decided if it is lewd, obscene, or plainly offensive. If the speech falls into the *Hazelwood* category, it must be ascertained that it occurred during a co-curricular activity. The speech must somehow bear the imprimatur of the school, and community members must be able to associate the speech with the school. If a school does not agree with the message it is linked to, it must be determined that it is because it actually goes against the school's mission or policies, not because it is controversial. Although these issues might seem easy to address, lower and federal courts have often struggled with the standards

that the Supreme Court established, for example, what constitutes disruption? What is “offensive” speech? What qualities are necessary to have a school-sponsored activity?

When examining *Frederick v. Morse*, one can see that it is difficult to evaluate it solely under the *Tinker* or the *Hazelwood* standard. Although the passing through of the Olympic torch occurred during the school day, it was not truly a *school*-sponsored activity. Furthermore, Joseph Frederick was not technically on school grounds; he was across the street, on the residential side. Frederick in fact never entered Juneau District High School until after the incident occurred, and Principal Morse demanded he go to her office. It would be difficult to consider this case under the *Tinker* standard because Frederick’s speech did not occur in the school. It did not happen while in the classroom, the hallway, or a ball field. In addition, there is no evidence for disruption. Although Morse defended her actions by stating Frederick’s message went directly against the school’s anti-drug educational mission, this is not analogous with causing significant disruption.

The message “Bong Hits 4 Jesus” was displayed during an activity that some teachers allowed their students to view. Though teachers were present, not all were required to let their students out of class, and not all students were expected to attend the Olympic torch relay. This makes it difficult to place *Frederick v. Morse* within the *Hazelwood* realm because even though there were teachers and faculty at this event, it was not really school-sponsored—it was actually sponsored by Coca-Cola and other major companies. Frederick’s message may have gone against the school’s educational mission, but Morse’s defense is also problematic. There was no way to reasonably associate Frederick’s banner with JDHS, as it did not bear the logo of the school.

Such issues demonstrate the need for a third category of student speech. Although there are aspects of *Frederick v. Morse* that may fit into either or both of the *Tinker* and *Hazelwood* camps, the case does not reside comfortably into either of the standards. Because of this, two radically opposed decisions, using different standards, were made about the same case. This reveals the need for a third category of speech— independent student speech—in which *Frederick v. Morse* can reside. Further examinations of the district and appellate court decisions are necessary to see how and why *Tinker*, *Fraser*, or *Hazelwood* were applied. This will be followed by the proposal for and explanation of a third category for independent student speech.

CHAPTER TWO:  
STUDENT SPEECH BEYOND THE SCHOOL HOUSE GATES

*Frederick v. Morse*

As mentioned in Chapter One, the district and appellate court decisions in *Frederick v. Morse* raise many vital questions about the nature of student speech cases. Believing that Frederick's speech took place during the school day at a school-sponsored activity, the district court applied the *Fraser* decision to the case. Extending the student speech standard to include speech that went directly against a school's educational mission, the judge ruled in favor of Morse and the school board. The court found that because Frederick's message went against the school's anti-drug mission, Morse acted within her authority to demand the banner be taken down. On appeal the Ninth Circuit court interpreted the case much differently. Though the court acknowledged that the speech did not take place within the schoolhouse gates, they argued that this was still a student speech case. Because school was in session and Frederick was a student, the case should be decided by the student speech trilogy. The court applied the *Tinker* standard and ruled that because no disruption was caused by the message, Morse's actions were unconstitutional. The fact that a message went against a school's educational policy was not sufficient justification. This directly counters the district court's rationale for its decision. The courts could not agree on which standard to use, as *Frederick v. Morse* does not fit neatly enough into any of the established student speech categories, either student inside the schoolhouse gates or student speech occurring as part of a co-curricular activity. In order to understand why these discrepancies exist, it is essential to first

explain the court decisions in detail. This will be followed by a discussion of why a third class of independent student speech is necessary and other student speech examples that would fall into this new category.

### The District Court Decision

On April 25, 2002, Frederick filed a lawsuit against Morse and the Juneau school board in U.S. District Court. He sought declaratory and injunctive relief, and punitive damages for violations of his First Amendment rights. In a decision written by Judge John W. Sedwick, the District Court found in favor of the school board, under the standard provided in the *Bethel v. Fraser* decision.

Sedwick argues, “The critical issue...is whether the school officials were entitled to suppress Frederick’s speech and punish him.”<sup>1</sup> Frederick, citing existing Supreme Court precedent, believed that the defendants had no right to seize the banner and suspend him. On the other hand, the defendants (the school board) argued that existing Supreme Court precedents allowed them to exercise such power over Frederick, without violating his constitutional rights. Though each side agreed about the issue, both believed that their actions were protected under existing Supreme Court precedent.

A point of contention between Frederick and the Juneau school board was whether the Olympic torch viewing constituted a school-sponsored event. Believing the event was not school-sponsored, Frederick provided affidavits from fellow classmates stating that “they were not required to stay with their class, and that the entire scene was ‘chaos.’”<sup>2</sup> Sedwick found that though these facts might be true, they were “not directly

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<sup>1</sup> *Frederick v. Morse*. 2003 U.S. Dist. LEXIS 27270 (Ak. 2003): 15.

<sup>2</sup> 2003 U.S. Dist. LEXIS 27270 (Ak. 2003): 17.

contrary to any of defendants' evidence showing that it was school-sponsored."<sup>3</sup> In contrast, the school board provided enough evidence to prove the torch relay was a school-sponsored event:

Morse explains that, believing the event had educational value and significance to the community, she authorized the teachers to take their classes to view the relay. Further, she states that the band and cheerleaders were organized to greet the relay participants, and teachers and administrative officials monitored students' actions.<sup>4</sup>

Teachers had the choice to let their students out of class to see the passing of the Olympic torch throughout the streets of Juneau. Because of presence of the band and cheerleaders, similar to a "pep rally" event, the event was deemed as being school-sponsored. Sedwick argues that common sense itself is further proof for the type of event, as "the relay occurred during school hours, at a time when parents expected their children to be under school supervision."<sup>5</sup>

Frederick argued that because he was not in school prior to the event, he was not technically a participant in the school-sponsored function. Sedwick declares, "the fact that Frederick joined his fellow classmates at the school-sponsored event meant that he was attending a school-sponsored activity."<sup>6</sup> Frederick suggested that he would have been to school before the torch event began if his car had not gotten stuck in the snow earlier in the morning. Because of his intention to attend school at the beginning of the

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<sup>3</sup> 2003 U.S. Dist. LEXIS 27270 (Ak. 2003): 17.

<sup>4</sup> 2003 U.S. Dist. LEXIS 27270 (Ak. 2003): 16.

<sup>5</sup> 2003 U.S. Dist. LEXIS 27270 (Ak. 2003): 17.

<sup>6</sup> 2003 U.S. Dist. LEXIS 27270 (Ak. 2003): 17-18.

day, Sedwick found this to be more evidence that Fraser was indeed participating in a school-sponsored activity, and was thus under their authority.

Once the court determined that Frederick was participating in a school-sponsored event, the speech was considered within the *Tinker* camp. This type of speech is governed by either the *Tinker* or *Fraser* standards, not *Hazelwood*. Under *Tinker*, disruption from Frederick's message would need to be established. If *Fraser* was used, the speech must be deemed sexually offensive or obscene. Sedwick drew a distinction between the type of speech protected under *Tinker* and *Fraser* and found Frederick's speech to fall under the latter category. Sedwick writes,

Frederick's expression is not like that in *Tinker*. Frederick clearly chose a specific event at which to exhibit his sign, just as Fraser chose a specific forum in which to make his speech....This is not a case like *Tinker* where students chose to make a statement of personal opinion that was unrelated to the school's mission. To the contrary, Frederick's statements directly contravened the Board's policies relating to drug abuse prevention.<sup>7</sup>

Because the speech occurred during what was determined as a school-sponsored activity, the court found the *Tinker* (thus *Fraser*) standard was more applicable than that of *Hazelwood*. Taking a traditional reading of *Tinker*, Sedwick argued that because Frederick made a statement directly against JDHS's educational mission, *Tinker* could not be applied. Because of this, the possibility of or actual disruption would not have to be established. Instead, Sedwick found many parallels between the *Frederick v. Morse* case and *Bethel v. Fraser*. Frederick chose a specific arena to make his speech, the Olympic torch rally, just as Fraser had chosen to do so at a school assembly.

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<sup>7</sup> 2003 U.S. Dist. LEXIS 27270 (Ak. 2003): 18-19.

Sedwick extended the *Fraser* decision to include speech that undermines a school's basic educational mission:

The court in *Fraser* stated that it is the province of the Board to 'determine what manner of speech...is inappropriate.' The court recognized that certain forms of speech...might undermine the school's basic educational mission and...they may determine that certain speech does not teach students the boundaries of appropriate behavior.<sup>8</sup>

Sedwick did not state whether he considered the speech to be lewd, obscene, or plainly offensive, the test provided in *Fraser*. Instead, the judge extended the standard to also include speech that went directly against a school's educational mission. This type of student speech is not protected by the First Amendment.

Because Juneau-Douglas High School had a policy against messages advocating illegal drug use, Morse believed she had the authority to stop Frederick from displaying his message, "Bong Hits 4 Jesus." If the banner had remained up, onlookers might have associated JDHS with supporting Frederick's message. Because the banner was held up at a school-approved activity, Morse believed that Frederick's message advocated drug use and thus she had the right to remove it.

To counter, Frederick had statements from friends and fellow classmates who contended they did not understand the message as advocating drug use. Additionally, Frederick himself claimed he did not intend to convey such a message; he merely wanted to grab a camera's attention and be on television. Whatever Frederick's intentions were, Sedwick argued that "there is no requirement that the speaker intend the message as one that violates school policy...the determination of an administrator that a particular

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<sup>8</sup> 2003 U.S. Dist. LEXIS 27270 (Ak. 2003): 20.

statement is in violation of school policy is generally not scrutinized so long as the administrator's interpretation is reasonable.”<sup>9</sup> Because Morse's rationale for her actions was deemed reasonable, the District Court found in favor of her and the school board.

The District Court drew a distinction between the *Tinker* and *Fraser* standards and applied the latter to *Frederick v. Morse*. Because Frederick's message was determined as advocating illegal drug use, a message directly against the school's educational mission, *Fraser* was applied. In doing so, the court extended *Fraser* to also include speech that contradicted a school's basic educational goal. Judge Sedwick did not really address if Frederick's speech was sexually obscene or plainly offensive, the traditional standard associated with *Fraser*. Instead, he relied heavily on his expansion of the Supreme Court standard to justify his decision. He argued that the *Tinker* standard could not be applied because Frederick's statement was not unrelated to JDHS's educational mission. Because Frederick's message mentioned drugs, and JDHS had a policy against the use of illegal drugs, *Tinker* was immediately dismissed because the message was related to the school's mission. This allowed the court to avoid the question of disruption. Though Frederick noted that *Fraser* only prevented lewd, sexual and offensive speech from appearing in school, the court extended *Fraser* to include speech contrary to the educational mission of a school. Thus, because Morse reasonably believed Frederick's speech advocated the illegal use of drugs via the words “bong” and “hits,” the court ruled that she did not violate his constitutional rights by demanding he take the banner down and subsequently suspending him. Frederick appealed this, believing that the case was wrongly decided.

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<sup>9</sup> 2003 U.S. Dist. LEXIS 27270 (Ak. 2003): 21-22.

## The Ninth Circuit Court of Appeals Decision

In the opinion written by Judge Andrew Klienfeld, the Ninth Circuit Appeals Court found in favor of Frederick, thus reversing the district court decision. Klienfeld began the opinion by arguing why *Frederick v. Morse* is a student speech case, rather than speech that occurred on a public sidewalk. Frederick should, and would, have been at school prior to the Olympic torch relay if it were not for car trouble early that morning. School had started, and some students were released to see the torch pass. Though there was minimal supervision of the students, there could have been more, if the teachers and principals had so chosen. “Frederick was a student, and school was in session.”<sup>10</sup> Thus, the Supreme Court precedents that would be considered would be those involving student speech cases: *Tinker*, *Fraser*, and *Hazelwood*.

Klienfeld argued that though there were some points of contention about the facts of the case, all were immaterial to the decision. Frederick’s speech did not take place while he was in a class. It did not happen while students were in the cafeteria or on the baseball field, either. Though some disruption occurred during the Olympic torch relay because of students throwing snowballs or plastic bottles, Frederick and the other students who held the banner were not participants. Morse and the school board never claimed the “Bong Hits 4 Jesus” banner disrupted or was expected to disrupt the classroom, as *Tinker* necessitates. Rather, they objected to the banner because “its message would be understood as advocating or promoting illegal drug use.”<sup>11</sup> Frederick, conversely, said the banner’s message was nonsense and merely hoped it would be funny enough to attract television cameras. The court proceeded on the basis that Frederick’s

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<sup>10</sup> *Frederick v. Morse*. 439 F.3d 1114 (9<sup>th</sup> Cir. 2006): 1117.

<sup>11</sup> 439 F.3d 1114 (9<sup>th</sup> Cir. 2006): 1117.

banner “expressed a positive sentiment about marijuana use, however vague and nonsensical.”<sup>12</sup> The court found the central issue to be

whether a school may, in the absence of concern about disruption of educational activities, punish and censor non-disruptive, off-campus speech by students during school-authorized activities because the speech promotes a social message contrary to the one favored by the school. The answer under controlling, long-existing precedent is plainly ‘No.’<sup>13</sup>

Using the standard for disruption established in *Tinker v. Des Moines*, the court found that Frederick’s constitutional rights were violated by Principal Morse’s actions.

The court addressed why the other two landmark student speech case decisions were not applicable to the case at bar. In drawing a distinction between *Bethel v. Fraser* and *Frederick v. Morse*, the court took a very limited view of *Fraser*, arguing that the decision could only be applied to in-school speech that was sexually offensive. The speech in *Tinker*, on the other hand, was advocating a specific political viewpoint. Because Frederick’s speech “was not sexual (sexual speech can be expected to stimulate disorder among those new to adult hormones), and did not disrupt a school assembly,”<sup>14</sup> like that in *Fraser*, the standard was not appropriate for the case. The court made a similar distinction with the *Hazelwood* standard. *Hazelwood* did not control the *Frederick* case because Frederick’s “pro-drug banner was not sponsored or endorsed by the school, nor was it part of the curriculum, nor did it take place as part of an official school activity.”<sup>15</sup> Because there was no Juneau-District High School emblem on the

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<sup>12</sup> 439 F.3d 1114 (9<sup>th</sup> Cir. 2006): 1118.

<sup>13</sup> 439 F.3d 1114 (9<sup>th</sup> Cir. 2006): 1118.

<sup>14</sup> 439 F.3d 1114 (9<sup>th</sup> Cir. 2006): 1119.

<sup>15</sup> 439 F.3d 1114 (9<sup>th</sup> Cir. 2006): 1119.

sign, for example, the school could not reasonably be associated with the banner or its message, whatever it was. Thus, the *Hazelwood* standard was not applicable to the *Frederick* case.

Leaving *Hazelwood* completely out of the analysis, the appellate court's central task was to determine "how far *Tinker* goes to protect such student speech as Frederick's, and how far *Fraser* goes to protect school authority to censor and punish student speech that 'would undermine the school's basic educational mission.'"<sup>16</sup> Though the school has a right to prohibit and punish speech that is sexually offensive or obscene, there had to be some limit to this in order to protect student's constitutional rights. If a student has a minority opinion on a controversial issue, he must be allowed to express it. Although a school might not be comfortable with his ideas, they must not be allowed to prohibit them. The appellate court found that, under *Fraser*, schools have the authority to "suppress speech that disrupts the good order necessary to conduct their educational function."<sup>17</sup> Speech could be punishable if, for example, students became visibly uncomfortable or embarrassed by a student's inappropriate speech at a school assembly. The authority to restrict this type of speech, however, does not extend to Frederick's banner because "no educational function was disrupted by the banner displayed during the Coca-Cola sponsored Olympics event."<sup>18</sup> The torch relay did not occur at the school, nor was it in any way school-sponsored. The message was displayed on a public street during a public event that was only partially supervised by school officials. Furthermore, Frederick did not make his banner while he was in the school building. He did not use school resources such as paper, markers, or computers. The Olympic torch relay, as well

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<sup>16</sup> 439 F.3d 1114 (9<sup>th</sup> Cir. 2006): 1120.

<sup>17</sup> 439 F.3d 1114 (9<sup>th</sup> Cir. 2006): 1120.

<sup>18</sup> 439 F.3d 1114 (9<sup>th</sup> Cir. 2006): 1120.

as the creation of the poster, were in no way school-sponsored. Thus, Morse had no right to order that the banner be taken down.

The court used the standard established in *Tinker v. Des Moines* because it seemed to be the most applicable. The judges believed that *Fraser* could not be used because, taking a limited view of the decision, the nature of Frederick's speech was not sexually offensive. Though they acknowledged the decision addressed speech that went against a school's educational mission, it could not be applied to Frederick because the speech did not occur on school property. In addition, the court dismissed *Hazelwood* because though the incident occurred during the school day, the banner did not contain the imprimatur of the school.

Thus, the court was left with *Tinker v. Des Moines*. The appellate court found in Frederick's favor because "*Tinker* requires that, to censor or punish student speech, the school must show a reasonable concern about the likelihood of substantial disruption to its educational mission."<sup>19</sup> The court found that no disruption of the students ensued, nor was there evidence to indicate the possibility for it. Furthermore, Frederick had never stepped foot on the JDHS campus until Morse demanded he come to her office. The court had to argue that *Tinker* should be used because the event occurred during school hours, and Frederick was a student. Though the event happened during the school day, it was certainly not a school-sponsored event. The event was open to the public, including students who were allowed to leave their classes to watch. Frederick, though a student, was merely a citizen while observing the Coca-Cola sponsored Olympic torch relay. He had never stepped foot through the schoolhouse gates. According to the Ninth Circuit

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<sup>19</sup> 439 F.3d 1114 (9<sup>th</sup> Cir. 2006): 1123.

court, Morse impinged upon Frederick's First Amendment rights by demanding the banner be taken down.

Unhappy with the appellate court's decision, Morse and the Juneau school board appealed to the Supreme Court. They were granted a writ of certiorari on December 1, 2006. The case was heard on March 19, 2007, and a decision is expected in July.<sup>20</sup>

### A Third Class of Student Speech

One of the toughest aspects of *Frederick v. Morse* for the courts was deciding what student speech standard to use. The District Court relied heavily on the *Fraser* decision because the judge believed Frederick's speech was undermining the school's educational mission by advocating illegal drug use. The appellate court, conversely, found *Fraser* not to be appropriate because Frederick's banner was not sexually offensive. The *Tinker* decision was used, since neither *Fraser* nor *Hazelwood* could be applied. Begging the question of disruption, Principal Morse had to establish that students suffered a disturbance as a result of the sign. She and the school, however, justified the action by stating that it went directly against the schools educational mission—a standard that is definitely not on par with that of disruption. What will now be considered is what exactly constitutes disruption, and if Frederick's speech should have been gauged by this test.

### The Disruption Question

According to *Tinker*, student speech is not protected if it causes substantial disruption or if it impinges upon the rights of other students. Student speech that falls

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<sup>20</sup> *Frederick v. Morse*. 127 S. Ct. 722: 1.

into this category occurs within the schoolhouse gates—in the classroom, at a school assembly, in the hallway, or at a sports game.

Within the confines of *Tinker*, school officials bear the burden of demonstrating that suppression of student speech is necessary to prevent a material and substantial disruption. . . . This is a wise balance, protecting student exchange of ideas as part of their education in a democratic society, but permitting government intervention for conduct and that occasional speech that actually disrupts the school.<sup>21</sup>

As discussed by the appellate court in their decision, though Frederick’s speech occurred off school property, they stretched *Tinker* to include Frederick’s message because he was a student and school was in session.

A major issue arises with this specific case because Principal Morse and the Juneau School District failed to demonstrate that any disruption ensued because of his poster. No students were visibly upset by the banner. No fights ensued because of it. No students started to smoke marijuana because of it. No one’s education or classroom learning was disturbed. No student’s First Amendment rights were infringed upon. “The record shows no indication that the school administrators anticipated any disruption due to Frederick’s banner, or that Frederick was involved in any disruptive conduct.”<sup>22</sup> No disruption occurred because of the banner, and there was not sufficient evidence providing that disruption was foreseeable. This does not satisfy the requirement of substantial disruption, and thus Frederick’s speech is constitutionally protected under the *Tinker* standard.

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<sup>21</sup> Liberty Legal Institute, Amicus Brief in *Morse v. Frederick*, 16.

<sup>22</sup> National Coalition Against Censorship and the American Booksellers Foundation for Free Expression, Amicus Brief for *Morse v. Frederick*, February 20, 2007, 26.

Morse defended her actions by declaring that Frederick’s message of “Bong Hits 4 Jesus” went directly against the school’s anti-drug educational mission, never claiming disruption in the first place. “Although the *Tinker* standard is designed to allow schools the flexibility to discipline student speech that disrupts the educational process, it does not permit the censorship that occurred in this case.”<sup>23</sup> Just because Principal Morse may have found the message to be inappropriate or offensive was not sufficient grounds for demanding that the banner be taken down. From a First Amendment standpoint, the disruption standard established in *Tinker* cannot be replaced with a standard for speech that goes against a school’s educational mission.

Furthermore, before Morse can claim that Frederick’s message went against the school’s anti-drug educational mission, one must discern the meaning of Frederick’s message. This has proved to be a very difficult task. What exactly does “Bong Hits 4 Jesus” mean? Some might think he is advocating the use of drugs. Others might find that he is making a political statement about marijuana. Some might think religion is tied into the message. Most, including students at JDHS, regarded Frederick’s message as sheer nonsense. The banner was not advocating drugs or religion nor was it making some sort of political statement. Even the district and appellate courts did not agree on the meaning of Frederick’s message. Until a true meaning is determined, and agreed upon, it is impossible for Principal Morse or the Juneau School District to claim Frederick’s message violates the school’s educational policy.

Morse’s justification for demanding that Frederick take down his banner raises a significant issue, that of the banning of non-conforming speech.

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<sup>23</sup> National Coalition Against Censorship and the American Booksellers Foundation for Free Expression, 26.

The problem is that the very purpose of the First Amendment is to protect against the suppression of minority viewpoints. If minority views can be permanently suppressed because the majority disagrees with them, the First Amendment has been flipped on its head...If a school can automatically ban an expression simply because it is controversial and not because it causes material and substantial disruption, then *Tinker* has no significance...this cannot be the case.<sup>24</sup>

This issue directly applies to *Frederick v. Morse*. As established, no disruption occurred as a result of Frederick's banner. Morse and the school board have recognized this fact. Morse justified her action because his message, she claimed, went against the school's anti-drug policy. Especially because it is difficult to determine exactly what Frederick's message meant, this claim is not enough. A controversial statement that goes against a school's educational policy is not synonymous with causing material or substantial disruption. There is a great fear that if this policy becomes adopted, schools will be able to ban any speech that they do not agree with. Just because a message is controversial does not mean that it is not protected by the First Amendment. Schools are a place to share and discuss ideas, whether they be majority *or* minority opinions. Censorship of ideas is not acceptable. "The *Tinker* standard still applies to much student-initiated expression. School officials cannot, under *Tinker*, silence student expression simply because they dislike it. They must reasonably forecast that the student expression would lead to substantial disruption or invade the rights of others."<sup>25</sup> Even if a teacher feels uncomfortable or is not accepting of a student's speech, it must be allowed to be shared

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<sup>24</sup> Justin T. Peterson, "School Authority v. Students' First Amendment Rights: Is Subjectivity Strangling the Free Mind at Its Source?", *Michigan State Law Review* 31 (Fall 2005): 955.

<sup>25</sup> David L. Hudson and Ferguson, John E., "A First Amendment Focus: The Courts' Inconsistent Treatment of *Bethel v. Fraser* and the Curtailment of Student Rights," *John Marshall Law Review* 36 (Fall 2002): 187.

with others. Such speech is protected until a substantial disruption occurs in the classroom, or if other student's constitutional rights are infringed upon. This is the standard that has been established in *Tinker v. Des Moines*. It does not address controversial issues, because they are protected until disruption occurs.

It is up to school teachers and faculty members to determine when disruption is "substantial." Does one have to wait until the disruption occurs, or can a teacher prevent the disruption? In Frederick's situation, neither is applicable. No disruption occurred directly because of the poster. As for the issue of preventing possible disruption, this is more difficult to gauge. In the case at bar, this is not an issue, either. Because few understood Frederick's message, no one was visibly upset or offended by it. Frederick provided affidavits from fellow classmates stating that the message was nonsense. There is nothing documented that students, upon seeing the sign, started to smoke marijuana immediately. In addition, many people's attention was drawn to the Olympic torch relay, not Frederick's banner. Because of these reasons, there is no evidence that a substantial disruption would have occurred if Morse had not taken down the banner. This further establishes that Morse violated Frederick's constitutional rights.

#### Beyond the Disruption Question

The appellate court applied the *Tinker* standard to *Frederick v. Morse*, and it was undoubtedly correct in deciding in Frederick's favor. Because the banner caused no disruption to JDHS students, Morse was wrong for having demanded Frederick take down his sign. What must be considered next, then, is if *Tinker* was the correct standard

to apply to the case. Because the *Fraser* and *Hazelwood* decisions were not at all applicable to the situation, *Tinker* was used by default.

A key issue in *Frederick v. Morse* is whether or not Frederick's speech occurred at a school-sponsored event. The District Court found that Morse and the Juneau School Board presented enough evidence to demonstrate that the nature of the event was indeed school-sponsored because faculty members, the band, and cheerleaders were present. Because of this, the court relied on the *Bethel v. Fraser* standard to decide the case. Since the banner was displayed at a school-sponsored event and presented an offensive message, they argued, it was within Morse's authority to demand it be taken down.

Conversely, the Appellate Court argued that the Olympic torch relay was not at all associated with the school and thus the school was not sponsoring it. Coca-Cola and other major companies were sponsoring the public event. Teachers at JDHS had the *option* of allowing their students to watch the torch pass by Glacier Avenue. Students were not, however, required to attend the event, stand together, create a map of where the torch had traveled, or any other such educational activity. Parents did not have to sign permission slips to allow their children to view the event, as necessary to go on a school field trip. Some students stood on the school side of the street, others on the residential side, and still others went to the local McDonald's. Tight supervision of the students was definitely lacking by teachers and faculty. Furthermore, on a technicality, Frederick had not stepped foot on the school's property until after he held up his banner and Morse demanded he go to her office.<sup>26</sup> Because Frederick was a student and school was in session when the incident occurred, the Appellate Court ruled that this was indeed a

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<sup>26</sup> Law Office of Douglas Mertz, "Complaint," *Joseph Frederick vs. Deborah Morse and the Juneau School District*: 4.

student speech case, as opposed to speech that merely occurred on a public sidewalk. Because the speech was not sexually offensive and was not a school-sponsored event, the court used the *Tinker* standard to decide the case. Applying the disruption test, the court ruled that because the banner did not cause substantial disruption, Frederick's First Amendment rights were indeed violated.

Frederick's speech does not fit neatly into one of the two established categories of student speech—that which occurs within the schoolhouse gates and that which happens as part of a co-curricular activity. Frederick did not display his banner in the classroom, at an assembly, or at any other school-sponsored activity. It is immaterial that the incident occurred during school hours because Frederick was not on school property. There was no way to link Frederick's message directly to the school because there was no type of JDHS insignia on the banner. Frederick did not make the banner while within the schoolhouse gates, nor did he use JDHS's resources. He did not base his message on any poster or sign he had seen around the school and had not learned the phrase during a classroom session. Furthermore, Frederick had not set foot on his high school's property until after the torch relay had passed and Morse demanded he go to her office. Though he may have had the intention of attending school that morning, the fact is that he was not there. He parked his car off-campus and ran to meet his friends on the residential side of Glacier Avenue. Because

the planning, creation, and display of Frederick's speech occurred completely off school grounds and without school resources...it was the school principal—not Frederick—who quite literally crossed the line between a non-public and public

forum when she left school property, marched across the street, and grabbed Frederick's banner.<sup>27</sup>

Morse's actions undoubtedly violated Frederick's constitutional rights. What must be considered, then, is *why* exactly this is so. Under what Supreme Court precedent does Frederick's banner fall under?

It has been established that both the *Hazelwood* and *Fraser* decisions are not applicable to the case at bar. *Hazelwood* is not appropriate because "it has been widely and correctly recognized that *Hazelwood* 'governs only when a student's school-sponsored speech could reasonably be viewed as speech of the school itself.'"<sup>28</sup> Because Frederick's speech was not school-sponsored, created during a co-curricular activity, and impossible to associate the school with the message, *Hazelwood* does not apply. A similar line of argument applies to the *Fraser* decision. "Fraser gave administrators the authority to censor the 'manner' of student speech where it is lewd or vulgar. But provocative speech that does not fall into that category is still protected under *Tinker*, and this Court should reaffirm that important principle."<sup>29</sup> Fraser gave a sexually offensive speech during a school-sponsored assembly; it is the manner in which he did so that essentially got him into trouble. Unlike Fraser, Frederick's speech occurred on public property and was not sexually offensive. Thus, *Fraser* cannot be applied to this case. Frederick's speech does not satisfy the requirements of either of these major student speech precedents. Of the three landmark student speech cases, the standard set in *Tinker* had to have been applied. But even this is complicated because Frederick's

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<sup>27</sup> Student Press Law Center, Feminists for Free Expression, et al., Amicus Brief in *Morse v. Frederick*, 4.

<sup>28</sup> Lambda Legal Defense and Education Fund, Inc., Amicus Brief in *Morse v. Frederick*, February 20, 2007, 11.

<sup>29</sup> Lambda Legal Defense and Education Fund, Inc., 16.

speech did not occur within the schoolhouse gates—one of the main elements of the precedent.

### Beyond Tinker's Gates

It is hopefully evident enough now that *Frederick v. Morse* does not fit neatly into the “student speech trilogy” of *Tinker-Fraser-Hazelwood*. Although the current case can fulfill some of the criteria in the cases, it does not sit comfortably in one. One of the biggest issues with *Frederick v. Morse* is that his speech did not occur while inside the schoolhouse gates or at a school-sponsored event. Though his banner was displayed during school hours, the speech itself took place while off-campus at a public event. Frederick's message was created outside of school with his own materials. He had not attended school before the Olympic torch relay. Though the event took place during school, not all students were allowed out to view it, thus the event was not school-sponsored. Coca-Cola and other major companies were the sponsors. The Olympics was the sponsor. Juneau District High School was most definitely not the sponsor. Though students and faculty members were exposed to Frederick's message, so were members of the general public. His message was not sexually inappropriate or plainly offensive. If anything, the meaning is still undeterminable. There was no way to associate Frederick's message with JDHS, the principal, or faculty members. The *Fraser* and *Hazelwood* standards are not applicable to the case. Leaving *Tinker* to be applied to the case, there is some difficulty in doing so because Frederick's speech did not take place in school, the area over which *Tinker* reigns.

Student speech cases have become more complicated, especially with the advent of the Internet. The line between speech that occurs within the schoolhouse gates and speech that does not can easily be blurred. One can imagine other student speech situations like *Frederick v. Morse*, where the situation does not lend itself to being decided by *Tinker*, *Fraser*, or *Hazelwood*.

For example, in *A.B. vs. State*, a minor at Greencastle Middle School in Indiana was punished for her expletive-filled MySpace.com page that criticized the school principal for his policy against body piercing. The principal discovered the website, and the state placed her on probation for being a delinquent. The minor, called A.B, appealed this decision, “contending that her comments were political speech protected by federal and state laws because they concerned school policy.”<sup>30</sup> The appeals court ruled that A.B.’s were indeed protected under the First Amendment, and that the juvenile court had violated her constitutional rights by placing her on probation.

In *Nick Emmett v. Kent School District No. 415*, Washington high school senior Emmett posted a website at home, called the “Unofficial Kentlake High Home Page,” a site that explicitly stated that it was for entertainment purposes only. One of the links on the site was to “mock obituaries” and a vote on who would be the next person to “die” the following week. After a news story about the website’s supposed “hit list” of people to be killed, Emmett removed his website. He was called into the principal’s office the next day, and eventually received a suspension, even though there was never any mention of

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<sup>30</sup> Jared Taylor, “Indiana court rules in favor of student who published MySpace.com page,” *Student Press Law Center*, April 2007, 17 Apr. 2007 <<http://splc.org/newsflash.asp?id=1501&year=2007>>.

disruption resulting from the site. The appellate court eventually ruled that the school had indeed violated Emmett's rights by suspending him for the website parody.<sup>31</sup>

In *Thomas v. Granville Central School District*, four high school students published their own underground newspaper. They funded the newspaper with their own money and distributed it before and after school, only when they were off-campus. The school suspended them for five days and forced them to write essays on the harm their speech had caused the school. The students sued the school for violating their First Amendment rights to publish an independent newspaper, and the court ruled in favor of the students:

After school hours are traditionally the realm of parents, the court said, and therefore the court was loathe to allow the school to regulate that time. As members of the public, students are subject to the same laws as any other citizen, and therefore school regulations are unnecessary, the court said.<sup>32</sup>

This court realized that because the newspaper was independent of the school, the students were considered citizens and were subject to the established laws. The school had no right to regulate their speech, as it was not the product of a school-sponsored or co-curricular activity.

These three student speech cases have similar characteristics to those in *Frederick v. Morse*. None of these situations fit neatly into the student speech trilogy, either. More specifically, none of these cases comfortably fulfill Tinker's requirements. In *A.B. vs. State*, *Nick Emmett v. Kent School District*, and *Thomas v. Granville Central School*

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<sup>31</sup> Dale Herbeck, "Nick Emmett v. Kent School District No. 415" *Cyberlaw, Spring 2006*, 17 Apr. 2007 <<http://www2.bc.edu/~herbeck/cyberlaw.emmettvkent.html>>.

<sup>32</sup> Student Press Law Center, "The other side of the schoolhouse gate," *Student Press Law Center*, 2001, 11 May 2007, <<http://splc.org/legalresearch.asp?id=11>>.

*District*, none of the speech occurred within the schoolhouse gates. The websites and newspapers were made at home, after school was over, with the student's own computers and resources. No disruption ensued from any of these situations.

Especially with the advent of the Internet, student speech cases have become more complex. The line between speech that occurs during the school day and speech that does not is no longer always clear. Though speech may occur outside of the classroom between two students, it may affect others during the following school day. A new standard must be established for this type of speech. Though the disruption test is the best way to do this, it must account for the fact that students are not in the classroom, the hallway, the lunchroom, or the baseball field. This standard must be more favorable to student speech than *Tinker* is because the speech does not occur while a student is within the schoolhouse gates. This test must also allow for the sharing of controversial and uncomfortable ideas, and it must not ban speech that does not conform to a school's educational policy. This new standard for independent student speech will be created and explored in the following chapter.

## CHAPTER THREE:

### A NEW CATEGORY FOR STUDENT SPEECH

A major issue with *Frederick v. Morse* is that it does not fit into one of the two previously established student speech categories. The speech did not take place within the schoolhouse gates, where *Tinker* governs, nor did it occur as part of a co-curricular activity, where *Hazelwood* covers. Because of this, none of the standards established in the two decisions are truly applicable to the case at bar. This reveals the need for a third category for student speech, speech that is independent from the school. This independent student speech must occur off-site from the school. The speech must not be created with the school's resource, such as paper, markers, posters, or computers. The speech must not be school-controlled, meaning it cannot be created as part of a school assignment or activity. There can be no link between the speech and the school. In this new proposed category, the student speech must be totally independent from the school.

#### A New Category: Independent Student Speech

A major component of this student speech category is where the discourse itself occurs. None of the speech can fall within the realm of *Tinker*, which reigns over speech that takes place on a school's premises. As asserted in this landmark case, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>1</sup> As previously established, student speech that occurs inside the schoolhouse gates is protected so far as it does not result in disruption or infringe upon another student's First Amendment rights. This is not limited

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<sup>1</sup> *Tinker v. Des Moines Independent Community School District*. 393 U.S. 503 (1969): 506.

to just the classroom setting, however. “A student’s rights...do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects...”<sup>2</sup> Student speech qualifies under *Tinker* if it occurs during the school day, at a school-sponsored event, or during a school-related activity. This includes, but is not limited to, speech that occurs in the classroom, the hallway, a class field trip, or a baseball game off-site. If questionable student speech occurs during one of these scenarios, *Tinker*’s disruption standard must be applied. *Tinker* allows for a moderate level of student speech protection, as the speech is allowed up until the point of disruption or infringement upon another student’s rights. Any speech happening inside the schoolhouse gates or at a school event must be considered under *Tinker* and would not qualify for the new standard.

A similar line of argument follows with *Hazelwood*. Student speech receives even less protection if it was created during a school-sponsored co-curricular activity. This 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. These activities may fairly be characterized as part of the school curriculum...”<sup>3</sup> Speech that occurs at a school event, concert, or play would be considered under *Hazelwood*, where the school has the authority to regulate it. Speech in a school-sponsored newspaper or on an official website hosted by the school would also fall into this category, so long as one could reasonably associate the speech with the school. If a school does not feel it should be

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<sup>2</sup> 393 U.S. 503 (1969): 512-513.

<sup>3</sup> *Hazelwood School District v. Kuhlmeier*. 484 U.S. 260 (1988): 271.

associated with a certain message or topic, *Hazelwood* dictates that it has the power to regulate the speech. Thus, any speech that occurs during a co-curricular activity qualifies for the *Hazelwood* standard and would not be considered under the new category of student speech.

To be considered under the new category for student speech, the speech could not have been created while inside the schoolhouse gates or at a school-sponsored co-curricular activity. Furthermore, the speech, such as a poster, website, or newspaper, could not have been created with a school's resources. The use of a school's paper, markers, computer, or copy machine would render the speech ineligible for this new third category. A teacher or faculty member could have no knowledge of the message. A banner or website, for example, could not have been worked on during a student's free class period while in the school building, as he is technically still within the schoolhouse gates. Additionally, the speech cannot be made as part of school-directed expression. An assignment made for a class would not be considered under this new standard. A message that is controlled or directed by the school cannot qualify as independent student speech.

Speech that falls under this category, concisely put, would occur independently from the school. So long as this speech does not fulfill elements within *Tinker* or *Hazelwood*, it would have the potential to be considered under the new standard. This student speech would have to take place outside of the schoolhouse gates or a co-curricular activity. It would have to happen at home, after school hours, or on public property, for example. Even if the speech occurs during school hours, it would still qualify under the new category so long as the student had not passed through the

schoolhouse gates. This addresses the off-site aspect of the category. Additionally, the speech must not be school-controlled. The speech cannot occur as part of a school assignment. This speech cannot be related to the school in any way. It cannot mention the school, be made in the school, or be created with the school's supplies or resources.

Joseph Frederick's speech of "Bong Hits 4 Jesus" fits comfortably in this new proposed category of independent student speech. Frederick had never set foot on the Juneau District High School campus the day of the Olympic torch relay. He was running late due to car problems. He drove from home, parked in a public parking lot, and immediately met his friends on the residential side of Glacier Avenue. Though there were teachers present at the event, it was optional for them to allow their students to attend. Students were not required to all stand together on the JDHS side of Glacier Avenue, nor were they required to watch the torch relay at all. The viewing was in no way related to a school educational activity, such as studying the history of the Olympics or following the torch's travels throughout the world. The speech present at this event was in no way school-controlled. The torch relay event itself was not a school-sponsored, but rather a public event. No one could reasonably associate the Coca-Cola sponsored Olympic torch relay with JDHS. It is irrelevant that Frederick's speech occurred during school hours, as the scenario fulfills the "off-site" aspect of the category.

The second part of this category to consider is the independent nature of the speech. In order to do so, one must consider where Joseph Frederick made the banner, though little is known about it. It could have been made at his house, a friend's house, or in a public place. What is definite about his poster is that it was not made at school or during a co-curricular activity, or with the school's supplies. Teachers or faculty had no

knowledge of the poster's existence, or that it would be displayed at the Olympic torch relay. The banner said "Bong Hits 4 Jesus." There was no reference to the school name, its logo, or any other way to associate the message with the school. Thus, Frederick's speech can be viewed as independent from the school.

There is also little known about when the poster was made. Though it is not necessary to know this for the new category of student speech, it is an interesting aspect to consider. It could have been made the day before the relay, in an attempt to receive television attention for its message. It could have been made in response to a class discussion about the legalization of marijuana, a current controversial issue in both Alaska and the United States. Frederick claimed that aside from trying to attract television cameras, he wanted to assert his First Amendment rights. This idea could have come from a class on Constitutional Law of some sort that he was taken. His banner could have been his way of testing what he had learned in school. Even though it is not wholly relevant to know the when the poster was made, this aspect strengthens a main point of this new test. Frederick may have been testing something he learned in the classroom with his message of "Bong Hits 4 Jesus." Even if this is the case, Frederick expressed his ideas outside of the school setting. He was not on school property, and this was not done during a school-sponsored event. Frederick displayed his message while standing on public property. Additionally, his speech did not bear any kind of "JDHS" insignia on it. Because of this, the *Tinker* and *Hazelwood* standards cannot be applied. Frederick's speech can reasonably be considered under the new category of student speech, that which is independent, off-site, and not controlled by the school.

## A New Test for Out of School Student Speech

Now that this new category of off-site, non-school-controlled, independent student speech has been defined, the level of a student's First Amendment protection must be explored. *Hazelwood* offers the most limited amount of protection for student speech, as school teachers and faculty have the right to ban any speech they do not want the school to be associated with. *Tinker* allows a moderate level of protection because student speech is allowed up until it causes disruption. This new category of student speech must allow for the highest level of protection for students, as it has the least amount to do with the school.

Student speech in this category has to be non-criminal in order to be protected. There are well-defined categories of speech that are not protected under the First Amendment. These classes include obscenity<sup>4</sup>, fighting words<sup>5</sup>, defamation<sup>6</sup>, incitement<sup>7</sup>, and true threats<sup>8</sup>. For example, the precedent set in *Watts v. United States* demands that speech must be considered

Against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.<sup>9</sup>

Independent student speech that violates this standard would be considered criminal and would thus not be protected under the First Amendment. Under these conditions, it is not

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<sup>4</sup> *Miller v. California*, 392 U. S. 616 (1968).

<sup>5</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

<sup>6</sup> *New York Times v. Sullivan*, 376 U.S. 254 (1964).

<sup>7</sup> *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>8</sup> *Watts v. United States*, 394 U.S. 701 (1969).

<sup>9</sup> 394 U.S. 701 (1969): 708.

the school's responsibility to punish the student speech, as it should be handled by the legal system. This speech would not be considered under the established standards of *Tinker* or *Hazelwood*. Essentially, it should not even enter the schoolhouse gates, as existing legislation would prevent and punish the speech. Up until the point that the speech becomes criminal, the speech would be protected under the First Amendment.

One can imagine that off-site, independent student speech could somehow wind up in school. For example, a student participates in an anti-homosexual rally with his church group. When he arrives at the rally, he receives a t-shirt with the message "Gay? Not fine by me." printed on it. He wears the t-shirt for the duration of the event. This message is protected under the First Amendment because the student speech is independent. He is off-site of the school, did not attend the rally as part of a school assignment, and has not used any resources to make the t-shirt. The student is merely expressing his viewpoint in a non-criminal manner. His message is protected under the First Amendment.

Imagine the student wears the t-shirt with the message "Gay? Not fine by me." to school the following day. This reduces the student's level of First Amendment protection from independent speech to speech within the schoolhouse gates. Thus, the standards used to evaluate this speech are *Tinker* and *Hazelwood*. The message in and of itself cannot be banned by school authorities, though it may be controversial. This example illustrates another aspect of the test: a student's speech also has to be viewpoint neutral. This is to ensure that the protection awarded to students from *Tinker* is not abused. If a student is advocating a certain opinion, however controversial it may be, it must be allowed. Just because a message enters the schoolhouse gates does not mean it can be

banned because of the viewpoint it advocates. A school authority is not allowed to ban a message simply because he does not agree with it. Even if a teacher or faculty member is uncomfortable with a student's message, it must be permitted, as conflicting opinions on controversial topics are an integral part of education. A student can be angry with a teacher or classmate and is allowed to express his opinions. A student is allowed to challenge what he has learned in the classroom. He must be allowed to disagree with a school's basic educational mission. These opinions can be articulated via posters, flyers, protests, or websites. If done so outside of school, speech advocating these beliefs would be awarded the utmost First Amendment protection.

Extending the "Gay? Not fine by me." t-shirt example, imagine a homosexual student feels uncomfortable knowing that his peer has radical ideas against homosexuality. He does not want to go to his classes because he is fearful of what this student may do to him. This brings off-site, independent student speech into the schoolhouse gates, and it has a negative effect on a student. There would be few instances where the school would be able to regulate this type of speech—student speech in this new category that has a negative impact on the learning environment. This, in essence, is exactly what *Tinker* reigns over. And *Tinker* and *Hazelwood*, the two landmark decisions for student speech, should remain just here. If independent student speech makes its way into the schoolhouse gates, it should be regulated by those standards that have been explicitly made for the realm of the school—speech inside the schoolhouse gates and speech during a co-curricular activity.

Much caution must be exercised when applying this new test. Off-campus, non school-controlled, independent student speech is to be awarded the same level of

protection as adult speech. Speech should be awarded First Amendment privileges up until the point it advocates criminal activity. When a criminal act, such as a true threat or libel, is mentioned, the existing legal precedents must address and punish the speech. Here, students are awarded the same level of protection as adults are, and their speech is to be treated accordingly.

Students are to be treated as citizens and given equal First Amendment protection up until the point that the speech enters the school. When student speech enters through the schoolhouse gates, it will be governed by the standards established in *Tinker* and *Hazelwood*. School teachers and faculty must be sure that the speech is viewpoint neutral; a student cannot be punished for his ideas, no matter how controversial or radical they may be. Off-site speech that enters the school must definitely be disruptive in order to be banned under *Tinker*. A school cannot just ban a student's off-site message because it goes against the educational mission. As long as the flyer, banner, or newspaper, does not bear the imprimatur of the school, it would be protected under *Hazelwood*. This third category of speech must award students with the highest level of First Amendment protection possible, as the speech relies heavily on the independence of the student and has little to do with the school.

This new test relies heavily on the fact that the student speech occurs independently from the school. If this outside speech does enter the school, it should be governed by *Tinker* and *Hazelwood*, since these are the precedents for student speech. It must be taken into consideration, however, that the speech originated from outside of the schoolhouse gates. The application of *Tinker* and *Hazelwood* must be done so with caution. School authorities must be sure that disruption has ensued, or that the speech

can reasonably be associated with the school. In this new category, students ought to be awarded with the highest level of First Amendment protection.

#### A New Approach to *Frederick v. Morse*

It has been established now that Frederick's message of "Bong Hits 4 Jesus" fits into the new proposed category of student speech because it occurred independently and outside of school. Frederick had not been to JDHS before the Olympic torch relay. He was standing on a residential street when he displayed the banner. There was no way his message could have been reasonably associated with his high school. He made the banner on his own time, with his own materials, and at his home or elsewhere. He did not make the banner in school, nor was it part of a school-controlled assignment. Thus, his message meets the requirements as independent student speech.

Though the Ninth Circuit court found in favor of Frederick, the disruption standard established in *Tinker* was used. Though this was the best option to use when compared to *Fraser* and *Hazelwood*, the application was a stretch. Frederick's speech did not occur while he was inside the schoolhouse gates, the main component of speech that resides within the *Tinker* realm. Thus, it is nearly impossible to judge his speech against the disruption standard, for it never entered the school building. Frederick's speech is a better fit for the new third category, independent student speech, and the accompanying standard must be applied.

Frederick's speech occurred off-site and independent from the school. The first prong of the test is to determine if his speech advocates criminal activity. The message "Bong Hits 4 Jesus" does not contain obscenities or fighting words. It does not defame

or incite. It is not a true threat. His speech does not violate any of the established exceptions to the First Amendment. Because the speech is non-criminal, it is protected. For *Frederick v. Morse*, the test should stop here: Frederick's speech occurred independently from Juneau District High School, on public property. Here, he is awarded the same level of First Amendment protection as any other citizen. Because his speech not criminal, it is protected, and thus Principal Morse violated his First Amendment rights.

In order to demonstrate this test completely, it is important to consider the other aspects of the test: viewpoint neutrality and the appearance of the speech inside the schoolhouse gates. Though Frederick's message may be controversial (if one can discern what it even means), it is viewpoint neutral. Though teachers or faculty members may have been uncomfortable with the message, Frederick is allowed to express his opinion. Additionally, the legalization of marijuana is a major issue in Alaska as well as in the United States. There are many conflicting opinions about this, and students must be allowed to state what they think.

Principal Morse defended her action by stating that his speech went directly against the school's anti-drug educational mission. Again, there is no way to reasonably associate Frederick's message with the Juneau District High School. Furthermore, Frederick's message was never brought into the schoolhouse gates. There was no discussion of his message when students returned to their classes. No student began to smoke marijuana as a result of the message. Frederick's message was displayed off-site and independently from his school. The message was not brought into the school, and so the standards established in *Tinker* and *Hazelwood* cannot be applied.

Frederick's speech resides in the new category of student speech, that which takes place off-site and is independent from the school. Under this new test, students are given the same First Amendment right as adults. The first prong is to address the criminality of the speech. If the speech is non-criminal, it must be allowed to exist. Applying this test to *Frederick v. Morse*, Frederick's speech is undoubtedly protected by the First Amendment because he advocated nothing of the criminal nature. Thus, Principal Morse did not have the authority to demand he remove his banner.

Although the Ninth Circuit Court correctly found in favor of Frederick, the right standard was not applied. Though they picked the best of the landmark student speech decisions, *Frederick v. Morse* does not fit well enough into the provisions established in *Tinker*. Many elements about the case, especially the fact that Frederick's speech did not occur while inside the schoolhouse gates, render the application of *Tinker* to be incorrect. The appellate court attempted to stretch the *Tinker* standard to speech that occurred during the school day, essentially school hours, whether it was on school premises or not. Though the court was trying to protect Frederick's speech, this action could result in a chilling effect. If this court expanded the decision to encompass independent student speech that occurs *during* school hours, one could imagine other courts doing the same in order to restrict student speech. Thus, this new proposed category of independent speech is essential to protect students' First Amendment rights.

In Justice Brennan's famous dissent in the landmark *Hazelwood v. Kuhlmeier* case, he states

The Court opens its analysis in this case by purporting to reaffirm *Tinker's* time-tested proposition that public school students "do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'" *Ante*, at 266 (quoting *Tinker, supra*, at 506). That is an ironic introduction to an opinion that denudes high school students of much of the First Amendment protection that *Tinker* itself prescribed...The young men and women of Hazelwood East expected a civics lesson, but not the one the Court teaches them today.<sup>10</sup>

Students, when outside of the schoolhouse gates, are considered to have the same constitutional protection as other citizens are. As long as student speech does not advocate a criminal act, this free speech must be protected under the First Amendment. Once a student enters the schoolhouse gates, these rights become complicated. As Justice Brennan argues, though students certainly do not give up their rights while at school or at a school-related event, there are certain guidelines that must be followed. As of now, there are two precedents established for student speech. *Hazelwood v. Kuhlmeier* offers the least amount of protection for a student's First Amendment rights. For speech that occurs during a co-curricular activity, the school has the right to ban any speech that could reasonably be associated with the school. This includes, but is not limited to, a school play, newspaper, concert, or event. *Tinker v. Des Moines School District* offers a moderate level of protection for students. Once a student enters the schoolhouse gates, he does not surrender his First Amendment rights. He is protected up until his speech causes disruption or impinges upon the rights of another student. The third level of student

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<sup>10</sup> 484 U.S. 260 (1988): 290-291.

speech, speech that is independent from the school, awards students with the greatest level of expression. These messages that occur off-site and independently from a school are treated as though they exist in the public forum, because, in essence, they do. It is only when the speech is brought into the school, however, that *Tinker* and *Hazelwood* can govern it. *Frederick v. Morse* illustrates the need for a third category of student speech, as it does not fit into *Tinker* or *Hazelwood*. It also demonstrates the need for a new standard, where students are considered as citizens, up until the point the speech enters the schoolhouse gates.