ARTICLES

Misuse and Abuse of *Morse v. Frederick* by Lower Courts: Stretching the High Court’s Ruling Too Far to Censor Student Expression

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I. INTRODUCTION

In June 2007, the United States Supreme Court handed down a fractured decision in *Morse v. Frederick*, rejecting a First Amendment-based student speech claim and allowing public high school officials to censor expression that reasonably can be interpreted as promoting and celebrating illegal drug use. The holding was quickly viewed by some legal commentators as very narrow. In particular, it was perceived as being constricted and limited by both its quirky, if not unique, set of facts about the display of a banner conveying the message “Bong Hits 4 Je-

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2. The First Amendment to the United States Constitution provides, in pertinent part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated more than eight decades ago through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. See Gitlow v. New York, 268 U.S. 652, 666 (1925).
3. Writing for the majority in *Morse*, Chief Justice John Roberts concluded “that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use.” *Morse*, 127 S. Ct. at 2622.
sus"4 and by the critical concurring opinion of Justices Samuel Alito and Anthony Kennedy that provided the five-person majority with two vital votes.5 For instance, John W. Whitehead, president of the Rutherford Institute, told the Washington Post that "the decision should have a limited effect because it applies only to student speech that promotes illegal drug use."6 Similarly, Susan Goldammer, an attorney for the Missouri School Boards' Association, observed that "[t]he court explains this decision is narrowly tailored toward illegal drugs."7 In fact, the author of this law journal article, along with a colleague, opined in an August 2007 commentary that "the case may be considered a minor victory for schools—limited to the narrow circumstances of curtailing decidedly pro-drug messages that lack a political component."8 In a nutshell, the Morse ruling appeared relatively inconsequential for future student expression battles, cabined by its peculiar facts.

Such a belief seemed to make perfect sense at the time. The opinion of the Court, authored by Chief Justice John Roberts, narrowly framed the freedom of expression issue before it to be "whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use."9 Roberts focused heavily on how "[d]rug abuse can cause severe and permanent damage to the health and well-being of young people,"10 and made no mention whatsoever to schoolyard violence or school shootings. He then concluded in an equally narrow fashion "that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use."11

Perhaps more importantly, concurring Justices Alito and Kennedy wrote that they joined the fragile majority opinion only

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4. See id. (describing both the message in question and the event/location where the message was conveyed).
5. See Bob Egelko, U.S. Supreme Court; 'Bong' Case Limits Student Speech, S.F. CHRON., June 26, 2007, at A8 (writing that "legal commentators said Monday's ruling appeared to be narrowly written").
9. Morse, 127 S. Ct. at 2625.
10. Id. at 2628.
11. Id. at 2622.
on the understanding that (a) it goes no further than to hold that a
court has the power to restrain speech that a reasonable observer would
interpret as advocating illegal drug use and (b) it provides no support
for any restriction of speech that can plausibly be interpreted as
commenting on any political or social issue, including speech on is-

sues such as “the wisdom of the war on drugs or of legalizing mari-
juana for medicinal use.”

Flying in the face of such limiting language, however, some lower
federal courts are broadly interpreting the scope of the Morse ruling and,
ironically, the crucial Alito-Kennedy concurrence, to censor speech that
has absolutely nothing to do with illegal drug use but that has everything
to do with subjects such as violence and homophobic expression. Most
notably, in November 2007, the United States Court of Appeals for the
Fifth Circuit, in Ponce v. Socorro Independent School District, relied
on what it called “Justice Alito’s concurring, and controlling, opinion” in
Morse to stand for a very broad, pro-censorship principle—that
“speech advocating a harm that is demonstrably grave and that derives
that gravity from the ‘special danger’ to the physical safety of students
arising from the school environment is unprotected.” The Fifth Circuit
used its new-fangled, physical-safety principle in Ponce to hold that a
“Morse analysis is appropriate”—rather than the traditional, well-
established and more rigorous “substantial disruption” standard from
the high court’s 1969 ruling in Tinker v. Des Moines Independent Com-
munity School District—in the cases where the student speech at issue “threatens a
Columbine-style attack on a school.”

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12. Id. at 2636 (Alito, J., concurring) (citation omitted).
13. 508 F.3d 765 (5th Cir. 2007).
14. Id. at 768.
15. Id. at 770.
16. Id. at 771 n.2.
17. See infra note 18 (setting forth the test created by the United States Supreme Court in Tink-
er v. Des Moines Independent Community School District, 393 U.S. 503 (1969)).
18. 393 U.S. 503 (1969) (protecting the right of public school students to wear black armbands
to school as a form of demonstration against the war in Vietnam and as a call for a truce in that con-
c). In Tinker, the Court held that schools may censor such individual student displays of political
expression only when there is evidence the speech in question “materially disrupts classwork or
involves substantial disorder or invasion of the rights of others.” Id. at 513. The Court concluded
that “the record does not demonstrate any facts which might reasonably have led school authori-
ties to forecast substantial disruption of or material interference with school activities, and no dis-
turbances or disorders on the school premises in fact occurred.” Id. at 514.
19. This is a reference to the April 1999 events at Columbine High School in Littleton, Colo-
rado, that constituted “the most lethal school shooting in history.” Matt Bai, Anatomy of a Massa-
cre, NEWSWEEK, May 3, 1999, at 24. Eric Harris and Dylan Klebold, members of the so-called
Trenchcoat Mafia at this suburban Denver high school, killed twelve fellow students and one teacher
before taking their own lives. Id. In addition, they wounded more than twenty other students and
planted pipe bombs throughout the school that “took days for police to find and defuse.” Id.
If school administrators are permitted to prohibit student speech that advocates illegal drug use because "illegal drug use presents a grave and in many ways unique threat to the physical safety of students". . . then it defies logical extrapolation to hold school administrators to a stricter standard with respect to speech that gravely and uniquely threatens violence, including massive deaths, to the school population as a whole.\textsuperscript{21}

Put differently and more bluntly, the Fifth Circuit's decision in \textit{Ponce} allows school administrators to sidestep, avoid, and otherwise dodge the application of the \textit{Tinker} standard when the student speech threatens mass violence. By the court's reasoning, Justice Alito's concurring opinion in \textit{Morse} makes it clear that "some harms are in fact so great in the school setting that requiring a school administrator to evaluate their disruptive potential is unnecessary."\textsuperscript{22} The \textit{Tinker} standard, the Fifth Circuit suggested, was simply too complex and/or problematic to be applied to student expression referencing mass-scale violence. As it wrote, "[s]chool administrators must be permitted to react quickly and decisively to address a threat of physical violence against their students, without worrying that they will have to face years of litigation second-guessing their judgment as to whether the threat posed a real risk of substantial disturbance."\textsuperscript{23}

The years-of-litigation quip may be a thinly veiled reference to the fact that the United States Court of Appeals for the Ninth Circuit had, prior to the Supreme Court's ruling, applied the \textit{Tinker} standard in \textit{Morse} to hold principal Deborah Morse personally liable for her decision to punish student Joseph Frederick for his display of the "Bong Hits 4 Jesus" banner.\textsuperscript{24} The Ninth Circuit's ruling came down in March 2006,\textsuperscript{25} more than four years after Frederick unfurled his banner in January 2002.\textsuperscript{26}

\begin{itemize}
\item \textit{Ponce}, 508 F.3d at 766.
\item Id. at 771–72 (citation omitted).
\item Id. at 770.
\item Id. at 772.
\item Frederick v. Morse, 439 F.3d 1114, 1123–25 (9th Cir. 2006) (finding that principal Deborah Morse violated Frederick's First Amendment rights under the \textit{Tinker} standard and concluding that Morse was not entitled to qualified immunity), rev'd, 127 S. Ct. 2618 (2007). The court stated that "Frederick's punishment for displaying his banner is best reviewed under \textit{Tinker}, rather than \textit{Fraser} or \textit{Kuhlmeier}. \textit{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." Id. at 1123.
\item Id. at 1114 (identifying the date of the Ninth Circuit's ruling as March 10, 2006).
\item See Morse v. Frederick, 127 S. Ct. 2618, 2622 (2007) (identifying January 24, 2002 as the date when Frederick unfurled his banner as "the Olympic Torch Relay passed through Juneau, Alaska, on its way to the winter games in Salt Lake City, Utah").
\end{itemize}
In essence, the Fifth Circuit ripped the narrow concurring opinion of Justices Alito and Kennedy from its factual moorings and took it for a judicial joyride down a slippery slope of censorship that allows for squelching any student speech posing a potential threat to the physical safety of students. Exacerbating the problem is the fact that the Fifth Circuit is not alone in giving such a broad interpretation to the ruling in *Morse*. Specifically, the United States Court of Appeals for the Eleventh Circuit, in a July 2007 opinion centering on student speech that referenced violent conduct, wrote:

Recently, in *Morse*, the Supreme Court *broadly* held that “[t]he special characteristics of the school environment and the governmental interest in stopping student drug abuse... allow schools to restrict student expression that they reasonably regard as promoting illegal drug use.” That same rationale applies equally, if not more strongly, to speech reasonably construed as a threat of school violence.28

The Eleventh Circuit’s employment of the word “broadly” in the case of *Boim v. Fulton County School District* to describe the ruling in *Morse* seems to be a strategic linguistic device to make the Supreme Court’s reasoning stretch seamlessly from the domain of drugs to the realm of violence. This misappropriation of the *Morse* ruling appeared, however, to bother one member of the Eleventh Circuit. Judge Susan Herrell Black wrote a two-sentence concurring opinion in *Boim* to express her view that *Tinker*—not *Morse*—was the correct precedent to apply. Citing *Tinker* and writing that she was “applying the *Tinker* standard,” Black wrote:

Although I agree with the result, I would have limited the inquiry in this case to whether Rachel Boim’s story and the circumstances surrounding it would cause school officials to reasonably anticipate a substantial disruption of or material interference “with the work of the school or impinge upon the rights of other students.”29

The *Morse* holding has also been liberally interpreted at the trial court level. In particular, a federal district court in southern California wrote in February 2008 that *Morse* “affirms that school officials have a duty to protect students, as young as fourteen and fifteen years of age, from degrading acts or expressions that promote injury to the student’s [sic] physical, emotional or psychological well-being and development which, in turn, adversely impacts the school’s mission to educate

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27. See supra text accompanying note 12.
29. *Id.* at 985 (Black, J., concurring).
them."\(^{30}\) Such an expansive interpretation of the reasoning in Morse clearly does not limit the Supreme Court’s ruling to speech advocating illegal drug use, but extends it well beyond to sweep up "degrading acts or expressions."\(^{31}\) In that case, the speech at issue was deemed by United States District Court Judge John A. Houston to be "disparaging of, and emotionally and psychologically damaging to, homosexual students and students in the midst of developing their sexual orientation in a ninth through twelfth grade, public school setting."\(^{32}\) Judge Houston wrote that "the reasoning in Morse lends support for a finding that the speech at issue in the instant case may be properly restricted by school officials if it is considered harmful."\(^{33}\)

The bottom line is that while some federal judges and courts acknowledge the narrow nature of the holding in Morse,\(^{34}\) others are expansively interpreting it by choosing to ignore both its idiosyncratic facts and Justice Alito’s very precise, limiting language cited earlier.\(^{35}\) The federal appellate court opinions in both Ponce and Boim reflect a willingness on the part of the judiciary to use Morse as an end-run around Tinker in order to give public school authorities much broader power and control in a post-Columbine world to quickly silence student speech that references violence. This comes despite the fact that Justice Alito suggested in dicta in Morse that Tinker still controlled in situations involving the potential for in-school violence, as he wrote that "school officials must have greater authority to intervene before speech leads to violence. And, in most cases, Tinker's 'substantial disruption' standard permits school officials to step in before actual violence erupts."\(^{36}\)

It was, however, Justice Alito’s qualifying use of the phrase "in most cases"\(^{37}\) upon which the appellate court in Ponce pounced and

31. Id.
32. Id. See generally, Recent Cases, 120 HARV. L. REV. 1691 (2007) (providing background on Harper case and, in particular, analyzing the 2006 decision in the case by the United States Court of Appeals for the Ninth Circuit in which a divided panel relied upon the Supreme Court’s decision in Tinker to uphold the school's decision to prohibit the t-shirt in question).
34. See Doninger v. Niehoff, 527 F.3d 41, 48 (2d Cir. 2008) (describing the holding in Morse as dealing with speech encouraging illegal drug use); Lowery v. Eaverard, 497 F.3d 584, 602 (6th Cir. 2007) (Gilman, J., concurring) (describing the Supreme Court’s holding in Morse as “a narrow one”); Zanecnik v. Indian Prairie Sch. Dist. No. 204, No. 07-C-1586, 2007 WL 4569720, at *5 (N.D. Ill. Dec. 21, 2007) (writing that Morse “stands for the proposition that opposing the use of illegal drugs is a sufficient justification for regulating student speech”).
35. See supra text accompanying note 12.
37. Id.
ripped wide open, writing that "Tinker will not always allow school officials to respond to threats of violence appropriately." In other words, most cases does not mean all cases. This, in turn, means that Morse provides a new type of exigent-circumstances exception from the stringent strictures of Tinker. What appears to be happening, then, is that Morse is being construed not as an opinion about the advocacy of illegal drug use, but rather as an opinion that is, much more fundamentally and generally, about two critical and inextricably intertwined concerns in school settings—safety and danger. Morse, viewed in this light, becomes a legal mechanism for stopping speech, regardless of topic, that jeopardizes the health and safety of students.

The logic that leads to this liberal interpretation of Morse goes something like this:

1. Schools, ideally, should be safe havens from physical dangers, yet in reality they can be, as Justice Alito wrote, "places of special danger."  
2. Illegal drugs pose one such special danger; as Justice Alito reasoned, "illegal drug use presents a grave and in many ways unique threat to the physical safety of students."  
3. Drugs are not, however, the only threat to the physical safety of students in public school settings.
4. After "the deadliest school massacre in the nation's history" at Columbine High School near Littleton, Colorado, and subsequent school shootings like the one in March 2001 in Santee, California, there is a palpable danger to the physical safety of students posed by the violent conduct of fellow classmates.
5. Thus, if speech advocating illegal drug use can be squelched under Morse without having to jump through the legal hoops of Tinker, then speech that appears to advocate or threaten violence against other students can similarly be stifled under Morse.

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40. Id.
41. James Brooke, Terror In Littleton: The Overview; 2 Students In Colorado School Said To Gun Down As Many As 23 And Kill Themselves In A Siege, N.Y. TIMES, Apr. 21, 1999, at A1
42. See generally Tom Kenworthy, Up to 25 Die in Colorado School Shooting; Two Student Gunmen Are Found Dead, WASH. POST, Apr. 21, 1999, at A1 (describing the "shooting rampage on a scale unprecedented in an American school" committed by Eric Harris and Dylan Klebold).
43. See generally Todd S. Purdum, Shooting at School Leaves 2 Dead and 13 Hurt, N.Y. TIMES, Mar. 6, 2001, at A1 (describing how a 15-year-old high school freshman at Santana High School was the protagonist in "killing 2 fellow students and wounding 13 other people in the worst episode of school violence since the shootings at Columbine High School in 1999").
Judge Houston’s February 2008 opinion in *Harper*, described above,\(^44\) takes this logic one step further, at least to the extent that he ruled that *Morse* supports the censorship of speech threatening dangers to students that are not *physical* but solely *emotional*. In the context of a school’s effort to stop students from wearing clothing carrying anti-homosexual messages, Houston wrote that “the reasoning in *Morse* lends support for a finding that the speech at issue in the instant case may be properly restricted by school officials if it is considered harmful.”\(^45\) Surely, as illustrated later by a hypothetical scenario in Part IV of this Article,\(^46\) there is much speech that can be “considered harmful”\(^47\) to middle school and high school students, either emotionally or physically, and this interpretation—should additional courts adopt it—gives wide berth for future censorial efforts by public school administrators.

This Article analyzes and examines the *Morse* opinion and, in particular, how it has been interpreted expansively by some courts to the point where it may someday become the censorship exception that swallows the rule of *Tinker*. Part II focuses on the concurring opinion of Justice Alito in *Morse*, paying close attention to the language in his opinion that the Fifth Circuit seized upon and exploited in *Ponce*.\(^48\) Part III then provides greater detail on how Justice Alito’s opinion has been used—arguably, misused and abused—by lower courts in contexts outside of the realm of speech that advocates illegal drug use.\(^49\) More importantly, Part III argues that the courts that borrowed *Morse* to justify censorship of violent expression failed to appreciate a fundamental dichotomy between distinct types of harms involving public school students—*harm to self* versus *harm to others*. Part III also examines the lingering impact of the tragedy at Columbine High School on judicial decision making in student expression cases, noting multiple cases in which Columbine has been cited by federal judges.

Next, Part IV explores the ramifications of expansive interpretations of the *Morse* ruling. Part IV argues that *Morse* must be confined narrowly to its unique facts lest schools become places where concerns about the harms and dangers of speech silence expression unnecessarily, rendering student speech sterile and dull, especially when it otherwise

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44. *Supra* notes 30–33 and accompanying text.
46. *See infra* notes 168–85 and accompanying text (setting forth and analyzing a hypothetical speech controversy involving a student t-shirt emblazoned with the messages “THIN PEOPLE STINK” and “EAT TRANS FATS”).
48. *Infra* notes 52–78 and accompanying text.
49. *Infra* notes 79–144 and accompanying text.
references violence or has the potential to offend others. Part IV also creates and sets forth a hypothetical scenario to demonstrate the elasticity of Morse, at least as it has been interpreted by some courts, to serve as legal tool to quell expression far removed from messages advocating illegal drug use. Finally, Part V sets forth the Conclusion.

II. DISSECTING THE ALITO CONCURRENCE: HOW THE HIGH COURT’S NEWEST MEMBER PAVED THE WAY FOR EXPANSIVE INTERPRETATIONS OF THE MORSE RULING

Call it a case of TMI (too much information) or, alternatively, a failure to heed both the trial law maxim of “less is more” and the “ageless adage” of “the KISS principle: Keep It Simple Stupid.” More charitably and less judgmentally, if Justice Samuel Alito hoped his concurring opinion in Morse v. Frederick would be interpreted narrowly by lower courts, he might not have written so much. Had Justice Alito simply stated his conclusion in the case and left it at that, rather than attempting to explain it, there would be little legal ground for the appellate courts in Ponce and Boim to assert and claim that his opinion supports school efforts to punish students for violent-themed writings.

Justice Alito, in fact, repeatedly attempted to make it exceedingly clear that his concurrence in Morse was very limited and confined to the facts of the case. For instance, he wrote: “I join the opinion of the Court on the understanding that the opinion does not hold that the special characteristics of the public schools necessarily justify any other speech restrictions.” The speech restriction in question in Morse, of course, dealt with speech about illegal drug use, and Justice Alito further wrote that he joined the majority on the understanding that its opinion “goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use.”

50. Infra notes 145–85 and accompanying text.
51. See infra notes 186–87 and accompanying text.
52. See generally Susan Reimer, Politics and Sex: A Heady Brew, BALT. SUN, Mar. 25, 2008, at 1C ("[T]he kids have an expression that has no doubt already gone out of general use: TMI. Too Much Information.").
53. See Bill Allison, Witness Preparation from the Criminal Defense Perspective, 30 TEX. TECH L. REV. 1333, 1339 (1999) ("In the world of trial law, the maxim that 'less is more' is almost always true. As you formulate your case, you should always be aware that you do not need to overprove a point. In fact, there is great danger in doing so."). (emphasis added).
57. Id. at 2636.
nally, as if those statements were not sufficient to make his point clear, Justice Alito closed his concurrence by writing that "public schools may ban speech advocating illegal drug use. But I regard such regulation as standing at the far reaches of what the First Amendment permits. I join the opinion of the Court with the understanding that the opinion does not endorse any further extension." When viewed collectively, all three of Justice Alito's quotations mentioned in this paragraph make it clear that he did not want his opinion to be used in other factual contexts.

What is more, as if he anticipated that his opinion might be misapplied by lower courts to situations involving violent-themed expression, Justice Alito wrote that "in most cases, Tinker's 'substantial disruption' standard permits school officials to step in before actual violence erupts." Importantly, Justice Alito did not draft or craft a judicial standard for resolving the First Amendment issues in those situations that do not fall into the "in most cases" category. In any case, even if had he had articulated a new standard for regulating violent expression in public schools, such a test would have constituted mere *dicta* because the case in *Morse* had nothing to do with violent expression.

If Justice Alito had said no more than all of this, then it is highly doubtful his concurrence would have been exploited by the courts in *Ponce, Boim*, and *Harper* in very different factual contexts. Unfortunately for free speech advocates, however, Justice Alito wrote a rather lengthy paragraph in which he laid the foundation for other courts to expand his concurrence to fit the frameworks of radically different factual situations. Indeed, the Fifth Circuit in *Ponce* called it "[i]he central paragraph of Justice Alito's concurring opinion." In particular, Justice Alito wrote:

>>[A]ny argument for altering the usual free speech rules in the public schools cannot rest on a theory of delegation but must instead be based on some special characteristic of the school setting. The special characteristic that is relevant in this case is the threat to the physical safety of students. School attendance can expose students to threats to their physical safety that they would not otherwise face. Outside of school, parents can attempt to protect their children in many ways and may take steps to monitor and exercise control over the persons with whom their children associate. Similarly, students, when not in school, may be able to avoid threatening individuals and situations. During school hours, however, parents are not present to provide protection and guidance, and students' movements

[^58]: *Id.* at 2638 (emphasis added).
[^59]: *Id.*
[^60]: *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 770 (5th Cir. 2007).
and their ability to choose the persons with whom they spend time are severely restricted. Students may be compelled on a daily basis to spend time at close quarters with other students who may do them harm. Experience shows that schools can be places of special danger.61

It is important to break this paragraph down into two components in order to more fully understand it and to comprehend why it is being exploited by lower courts. Initially, Justice Alito's reference to the "usual free speech rules in the public schools"62 apparently refers to the Supreme Court's trio of pre-Morse decisions affecting the speech and press rights of public school students—Tinker v. Des Moines Community Independent School District,63 Bethel School District No. 403 v. Fraser,64 and Hazelwood School District v. Kuhlmeier.65 Summarizing the holdings in these three cases, Justice Alito wrote earlier in his Morse concurrence that Tinker "permits the regulation of student speech that threatens a concrete and substantial disruption,"66 while Fraser "permits the regulation of speech that is delivered in a lewd or vulgar manner as part of a middle school program,"67 and Kuhlmeier "allows a school to regulate what is in essence the school's own speech, that is, articles that appear in a publication that is an official school organ."68

Second, according to Justice Alito, any judicial exception to the rules established in this aging trio of cases, must be grounded in a "spe-

61. Morse, 127 S. Ct. at 2638 (Alito, J., concurring).
62. Id.
63. See generally DON R. PEMBER & CLAY CALVERT, MASS MEDIA LAW 95 (2009-2010 ed., 2008) (writing that "prior to 2007, there was a trilogy of Supreme Court cases (Tinker, Hazelwood and Bethel), each with its own rules and guidelines, that public schools may use to squelch the speech rights of students," and providing a summary of the rules created in those three cases).
64. 393 U.S. 503 (1969) (upholding the right of students to wear black armbands emblazoned with peace signs in order to protest the war in Vietnam and to call for a truce over the Winter holidays; protecting student expression unless there is a real reason to believe it will cause a substantial and material disruption of the educational atmosphere or interference with the rights of other students; and noting that an undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression).
65. 478 U.S. 675, 675–85 (1986) (allowing a school to punish a student who made a sexually suggestive speech to a captive audience of fellow students during a student-government assembly, and holding that "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse" because to allow such speech would "undermine the school's basic educational mission").
66. 484 U.S. 260 (1988) (allowing school authorities to censor school-sponsored speech and speech that is part of the curriculum, such as a school-sponsored student newspaper, if the school's reasons for censorship are "reasonably related to legitimate pedagogical concerns").
68. Morse, 127 S. Ct. at 2637 (citing Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986)).
cial characteristic of the school setting,”⁷⁰ such as “the threat to the physical safety of students.”⁷¹ For Justice Alito, such school-ground threats to physical safety seem omnipresent, as he wrote that “[e]xperience shows that schools can be places of special danger”⁷² because students “may be compelled on a daily basis to spend time at close quarters with other students who may do them harm.”⁷³

The threat to the physical safety of students at issue in Morse was the use of illegal drugs, something that Justice Alito described as “a grave and in many ways unique threat”⁷⁴ that is “just as serious, if not always as immediately obvious”⁷⁵ as acts of violence. Justice Alito, as noted earlier,⁷⁶ made it clear that when it comes to speech threatening acts of violence, the tried-and-true Tinker standard allows school officials, “in most cases,”⁷⁷ to step in to prevent such violence from materializing. As the next part of this Article explains, however, the phrase “in most cases” provides the ideal entrée for using Justice Alito’s language in the paragraph quoted above⁷⁸ to make further exceptions—exceptions beyond those applicable cases in which the speech at issue advocates illegal drug use—to the Tinker precedent.

III. ABUSING MORSE, EVOKING COLUMBINE: THE COUPLING OF JUSTICE ALITO’S CONCURRENCE WITH MEMORIES OF LITTLETON

A. Abusing Morse: How Lower Courts Expansively Interpret the Case

This section examines three different cases that have broadly interpreted the United States Supreme Court’s ruling in Morse v. Frederick to apply in contexts other than those in which the speech in question advocates illegal drug use.

1. Ponce v. Socorro Independent School District⁷⁹

The speech at issue in Ponce was “an extended notebook diary, written in the first-person perspective,”⁸⁰ in which its student author, a sophomore at Montwood High School in El Paso, Texas, described the

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⁷⁰ Morse, 127 S. Ct. at 2638.
⁷¹ Id.
⁷² Id.
⁷³ Id.
⁷⁴ Id.
⁷⁵ Id.
⁷⁶ See supra text accompanying note 59.
⁷⁷ Morse, 127 S. Ct. at 2638 (Alito, J., concurring).
⁷⁸ See supra text accompanying note 61.
⁷⁹ 508 F.3d 765 (5th Cir. 2007).
⁸⁰ Id. at 766.
"creation of a pseudo-Nazi group" at his high school. According to the United States Court of Appeals for the Fifth Circuit, the diary, which its author claimed was "a work of fiction," detailed the pseudo-Nazi group’s plan to commit a "[C]olumbine shooting" attack on Montwood High School or a coordinated "shooting at all the [district’s] schools at the same time." At several points in the journal, the author expresses the feeling that his "anger has the best of [him]" and that "it will get to the point where [he] will no longer have control." The author predicts that this outburst will occur on the day that his close friends at the school graduate.

The student, identified in the opinion only by the initials E.P., was suspended for three days after the school’s assistant principal, Jesus Aguirre, concluded that the "writing posed a ‘terroristic threat’ to the safety and security of the students and the campus." After E.P.’s parents filed a lawsuit against the school district claiming the suspension violated the First Amendment right of free speech, U.S. District Court Judge Kathleen Cardone in May 2006—more than a year prior to the Supreme Court’s ruling in Morse—applied the substantial-and-material disruption standard created by the Supreme Court in Tinker v. Des Moines Independent Community School District. Judge Cardone ruled in favor of the student and against the school, concluding that the school had failed "its burden in demonstrating a reasonable belief that [the student’s] expression would materially and substantially interfere with the operation of the school." Among the evidence cited by Judge Cardone as militating against the school and in favor of E.P. was the fact that Aguirre, immediately after deeming the notebook to constitute a threat to the student body, nonetheless sent E.P. back to class to complete the school day. Judge Cardone observed:

"It makes no sense to this Court that an administrator who genuinely believes that a student constitutes a threat to the general student population, would then send that student back into the general student population immediately following the discovery of that student’s plan to commit an attack against the school. If anything, this

81. Id.
82. Id. The student’s mother also "maintained that the notebook was fiction, and explained that she also engaged in creative writing." Id. at 767.
83. Id. at 766.
84. Id. at 767.
would appear to allow that student the perfect opportunity to carry out his plans or at least a portion thereof—before further action could be taken to stop him. However, the facts indicate that E.P. returned to class without incident, supporting E.P.’s argument that the story was, indeed, fiction.87

Judge Cardone further blasted Aguirre’s characterization of E.P.’s speech as a terrorist threat, writing:

[I]n light of E.P.’s explanation of the notebook as a dramatic monologue, E.P.’s subsequent action (or more precisely inaction) after being sent back into class after discovery of his notebook, his lack of a disciplinary record, and his subsequent good behavior while attending a private school for the entirety of this past year, Aguirre’s summary conclusion appears to be no more than mere intuition or a simple pronouncement.88

It is important to remember that Judge Cardone made her decision before the Supreme Court ruled in Morse v. Frederick. Thus, Tinker was clearly the logical rule for her to adopt and to apply. Why? First, it was not controlled by the Supreme Court’s decision in Hazelwood School District v. Kuhlmeier89 because the case did not involve speech that either was part of the school curriculum or that was sponsored by the school. Similarly, it was not controlled by the high court’s ruling in Bethel School District No. 403 v. Fraser90 because there was, as Judge Cardone noted, no evidence to suggest E.P.’s notebook contained sexually lewd, offensive, or vulgar language like that at issue in Fraser.91

By the time the case worked its way up to the Fifth Circuit, however, the Supreme Court had ruled in Morse. This would prove pivotal. The appellate court took full advantage of the Morse ruling to find a way around both Tinker and Judge Cardone’s application of the Tinker rule. To this extent, the unanimous three-judge panel in Ponce wrote that “we are guided by the Supreme Court’s recent decision in Morse v. Frederick.”92 Because the appellate court focused on Morse, its opinion never specifically criticized or otherwise even commented on the substantive reasoning, logic, and analysis of Judge Cardone under Tinker.

To effectively evade and avoid the strictures of Tinker, the Fifth Circuit opined that the limits of censorship and school authority over student speech that could result in violence “are often, but not always,

87. Id. at 696.
88. Id. at 697.
90. 478 U.S. 675 (1986).
91. Ponce, 432 F. Supp. 2d at 693–94.
92. Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765, 768 (5th Cir. 2007).
adequately determined by *Tinker.* In support of the proposition that there may be instances when *Tinker* is inadequate and does not apply, the Fifth Circuit directly quoted Justice Alito’s statement in *Morse* that *Tinker* “in most cases . . . permits school officials to step in before actual violence erupts.” Like a football running back seeing daylight and bursting through a tiny seam in the defensive line and then exploding downfield for a touchdown, the Fifth Circuit seized the opportunity provided by Justice Alito’s use of the phrase “most cases” and ran with it to reach its goal line conclusion that “*Tinker* will not always allow school officials to respond to threats of violence appropriately.” The logic here goes something like this: the word “most” means “usually,” which does not mean “always,” which, in turn, means that there must be some cases when *Tinker* simply will not suffice or work.

And what are those cases? They are the ones when, as the Fifth Circuit wrote, the speech poses the “harm of a mass school shooting.” In these instances, the appellate court reasoned, a “*Morse* analysis is appropriate” because the concerns and interests at stake are the same ones that Justice Alito focused on in his concurrence—namely, the “grave harms arising from the particular character of the school setting.” The Fifth Circuit quoted, in italics for emphasis and which was cited earlier in Part II, Justice Alito’s statement that “[e]xperience shows that schools can be places of special danger.” The court reasoned that if speech about illegal drug use can be censored under *Morse* due to the physical harm drugs cause, “then it defies logical extrapolation to hold school administrators to a stricter standard with respect to speech that gravely and uniquely threatens violence, including massive deaths, to the school population as a whole.” This type of “IF, THEN” logic and reasoning allowed the appellate court to conclude that E.P.’s “journal’s threatening language is not protected by the First Amendment” and that the school’s action against him “violated no protected right.”

93. *Id.* at 770 (emphasis added).
94. *Id.* (emphasis added) (quoting *Morse v. Frederick*, 127 S. Ct. 2618, 2638 (2007) (Alito, J., concurring)).
95. *Id.*
96. *Id.* at 771 n.2.
97. *Id.*
98. *Id.* at 770.
99. See supra note 61 and accompanying text.
101. *Ponce*, 508 F.3d at 772.
102. *Id.*
103. *Id.*
The bottom line from *Ponce* is that the Fifth Circuit used Justice Alito’s concurring opinion in *Morse* to fashion a very broad rule that allows for in-school censorship. In particular, the court wrote that “[t]he concurring opinion [in *Morse*] . . . makes explicit that which remains latent in the majority opinion: speech advocating a harm that is demonstrably grave and that derives that gravity from the ‘special danger’ to the physical safety of students arising from the school environment is unprotected.”

But such an extrapolation from *Morse* of a new censorship rule centering on “physical safety” and “danger” is off-base and misguided. Why? Because the locus of the harm is very different with illegal drug use than it is with violence. In a nutshell, the problem with illegal drug use by a high school student involves *harm to self*—harm to the student who engages in the illegal conduct. In contrast, the problem with illegal violence committed by a high school student involves *harm to others*—the students who fall victim to the actor that engages in the violent conduct.

Put differently, the use of illegal drugs threatens the physical safety of the individual students who engage in the dangerous conduct themselves: drugs are dangerous to those who use them. The actors—the students engaging in the drug use—inflict injury upon themselves by injecting, snorting, inhaling, or otherwise consuming illegal drugs.

With violence, however, the threat posed to physical safety is very different. The primary underlying concern of the school officials in cases like *Ponce* is with the physical safety *not* of the actors—not of the students who allegedly would engage in the shooting, bombing, maiming and killing—but rather with the safety of the other students who would come into contact with the actors and be harmed by them.

To put it bluntly, a student who shoots up drugs harms *himself*; a student who shoots up a school harms *others*. This not so insignificant difference between the locus of harm went unmentioned in the Fifth Circuit’s opinion in *Ponce*.

The ignored—more charitably, overlooked—dichotomy between *harm to self* versus *harm to others* also suggests that the appellate court in *Ponce* failed to understand and appreciate the difference between the concerns with the speech at issue in *Morse* and the speech at issue in *Ponce*. In *Morse*, the concern with the speech of student Joseph Frederick is that his banner might influence other students to engage in illegal drug use and thereby to harm themselves. It is, then, a question of mes-

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104. *Id.* at 770.
sage effects: that message X (the admonishment to use illegal drugs)\textsuperscript{105} will influence others to engage in harmful conduct Y (consumption of illegal drugs). As Chief Justice Roberts wrote for the \textit{Morse} majority, the concern in that case was that Frederick’s speech was “promoting illegal drug use.”\textsuperscript{106} That was the justification for censoring the speech of Joseph Frederick.

In \textit{Ponce}, however, there was no concern in any way about the influence of the student speech on others; E.P. was not promoting the illegal use of violence by his fellow students. Officials at Montwood High School were not concerned that E.P.’s message in his notebook diary would somehow influence other students to engage in violence. \textit{Ponce} simply is not a case about the potential influence of message X (the student notebook diary) on the conduct of other students. Rather, the concern of school authorities is that the writing in question is a direct manifestation of intent by its student-author to engage in the conduct himself—that E.P. might, as the Fifth Circuit wrote, engage in “physical violence against their students.”\textsuperscript{107} That was the justification for censoring the speech of E.P.

In brief, then, the speech of Joseph Frederick is censored because it might influence other students to engage in illegal conduct, while the speech of E.P. is censored because it supposedly reveals his state of mind to engage in his own illegal conduct. This difference apparently was lost on the appellate court in \textit{Ponce}, which instead conflated harm to self with harm to others, while simultaneously ignoring the distinction between censoring speech because of its potential influence on others’ conduct versus censoring speech because of what it reveals about the speaker’s own state of mind.

In summary, these differences suggest that the Fifth Circuit erred in stretching the \textit{Morse} holding to apply to a very different situation involving very different harms in \textit{Ponce}. As the next case illustrates, however, the appellate court in \textit{Ponce} is not the only court to make this mistake.

\textbf{2. Boim v. Fulton County School District}\textsuperscript{108}

In October 2003—more than three years prior to the Supreme Court’s decision in \textit{Morse v. Frederick}—high school student Rachel

\textsuperscript{105}Indeed, the majority opinion in \textit{Morse} concluded that this was a reasonable interpretation of the meaning of Joseph Frederick’s banner, as Chief Justice Roberts wrote that the “Bong Hits 4 Jesus” message “could be interpreted as an imperative: ‘[Take] bong hits . . .’—a message equivalent, as Morse explained in her declaration, to ‘smoke marijuana’ or ‘use an illegal drug.’” Morse v. Frederick, 127 S. Ct. 2618, 2625 (2007).

\textsuperscript{106}Id. at 2629.

\textsuperscript{107}\textit{Ponce}, 508 F.3d at 772 (emphasis added).

\textsuperscript{108}494 F.3d 978 (11th Cir. 2007).
Boim was suspended from Roswell High School. What landed Boim in trouble was an entry in a notebook in which she penned the following fantasy scenario about killing her math teacher:

[H]e starts taking role [sic]. Yes, my math teacher. I loathe [sic] him with every bone in my body. Why? I don't [sic] know. This is it. I stand up and pull the gun from my pocket. BANG the force blows him back and every one in the class sits there in shock. BANG he falls to the floor and some one [sic] lets out an ear piercing scream. Shaking I put the gun in my pocket and run from the room.  

On July 31, 2007, the United States Court of Appeals for the Eleventh Circuit held that school officials did not violate Boim's First Amendment right of free expression when they punished her for the abovementioned passage. Applying the Tinker standard, the appellate court wrote that Boim's writing in her notebook, which she passed to a fellow student during the period immediately before her math class was scheduled to meet, "clearly caused and was reasonably likely to further cause a material and substantial disruption to the 'maintenance of order and decorum' within" her school.

Had the Eleventh Circuit stopped its analysis there—ended it by applying Tinker and leaving it at that—the decision would be less problematic for free speech proponents.

The appellate court, however, chose to go beyond Tinker to use the then-brand new Morse opinion to bolster its conclusion. It wrote:

In our view, it is imperative that school officials have the discretion and authority to deal with incidents like the one they faced in this case. Recently, in Morse, the Supreme Court broadly held that "[i]n the special characteristics of the school environment and the governmental interest in stopping student drug abuse . . . allow schools to restrict student expression that they reasonably regard as promoting illegal drug use." That same rationale applies equally, if not more strongly, to speech reasonably construed as a threat of school violence.

The Eleventh Circuit's logic here, as reflected by the concluding sentence of this quotation, mirrors that of the Fifth Circuit's "IF, THEN" reasoning in Ponce: If school officials have the power and authority under Morse to squelch speech promoting the harms wrought by student
drug abuse, then surely they can stop speech threatening the harms caused by school violence. And just like the Fifth Circuit, the Eleventh Circuit made no effort to unpack and analyze the differences between the harms in question; there was no distinction made by the court between the harm to self caused by illegal drug use and the harm to others caused by student violence. There is, in fact, a very different rationale—not "the same rationale," as the Eleventh Circuit wrote—for punishing a student for speech because that speech might influence others to engage in harmful illegal conduct (drug use) and, in contrast, punishing a student for speech because that speech reveals her state of mind about possibly committing harmful acts against others (in Boim, a math teacher). The power of Joseph Frederick’s words resided in their supposed ability to influence and to motivate other students to try drugs. In stark contrast, the power of Rachel Boim’s words lay simply in their ability to alert school officials to the supposed harmful intentions of their author. Given that Morse is, factually speaking, decidedly distinct from Boim, it would seem that, at the very least, some effort would have been made to analyze and analogize the harms in question. Even more troubling, perhaps, is the fact the Eleventh Circuit completely ignored and failed to cite Justice Alito’s language that narrowly limited the scope of his concurrence to the unique facts of the case.\(^\text{115}\)

3. Harper v. Poway Unified School District\(^\text{116}\)

In both Ponce and Boim, two different federal appellate courts found that the ruling in Morse supported suppression and punishment not only of speech advocating the use of illegal drugs but also of student expression referencing and allegedly portending violent in-school conduct. Subsequent to those two decisions, United States District Judge John A. Houston, sitting in southern California within the liberal-leaning United States Court of Appeals for the Ninth Circuit, took the Morse ruling a giant step further to hold that it supported the suppression of a completely intangible injury—namely, emotional distress suffered by students who are the targets of homophobic expression. The case, which continues on appeal today,\(^\text{117}\) centers on a student who wore a T-shirt to school that carried the message "Be Ashamed, Our School Embraced

\(^{114}\) Id.

\(^{115}\) See supra notes 56–59 and accompanying text (citing Alito’s language limiting the scope of his concurring opinion).

\(^{116}\) Harper Reconsideration Order, supra note 30.

What God Has Condemned” on the front and “Homosexuality Is Shameful ‘Romans 1:27’” on the back. Judge Houston wrote in February 2008:

*Morse* . . . affirms that school officials have a duty to protect students, as young as fourteen and fifteen years of age, from degrading acts or expressions that promote injury to the student’s physical, emotional or psychological well-being and development which, in turn, adversely impacts the school’s mission to educate them.

Adding that “this Court agrees with defendants that the reasoning presented in *Morse* lends support for a finding that the speech at issue in the instant case may properly be restricted by school officials if it is considered harmful,” Judge Houston essentially conflated and confused the physical harm caused by an individual’s own use of drugs (the danger in *Morse*) with the emotional injury caused by viewing another’s use of speech conveyed on a T-shirt. These are radically different types of injury—physical versus emotional—that are brought about in very different ways—inhaling a substance versus reading a statement. In *Morse*, the danger of the speech is posed by its alleged ability to influence students to use illegal drugs, thereby harming their health, while in *Harper* the danger of the speech lies in its power to harm those who view it simply by reading its message — the reader of the T-shirt does not, unlike in *Morse*, need to engage in any further conduct for the harm to occur. Put more simply: In *Morse*, the logic is “if view message, then will try drugs, and then will be physically harmed,” while in *Harper* the logic for suppression is “if view message, then will be emotionally harmed.” It is quite a long legal leap to extend the reasoning in *Morse* to a case of censorship of what some might consider homophobic speech.

Viewed collectively and most liberally, the decisions in *Ponce*, *Boim*, and *Harper* illustrate that the Supreme Court’s *Morse* opinion will be used by some courts to support suppression of any speech that could result in any harm to students. In *Ponce* and *Boim*, that harm is physical violence. In *Harper*, the harm is emotional anguish. But as the plaintiff’s attorneys in *Harper* contended in their March 2008 brief to the United States Court of Appeal for the Ninth Circuit appealing Judge Houston’s ruling, *Morse* only “allows schools to restrict non-political speech that is reasonably viewed as promoting illegal drug use.”

Whether other courts choose to ignore this narrow construction of the

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119. Id. at 9.
120. Id.
holding in *Morse* remains to be seen. The next section of this Article suggests, however, that judicial remembrance of the killings at Columbine High School provides the real-world context for allowing courts to ignore Justice Alito's repeated efforts to narrowly frame the reach of *Morse*.

**B. Columbine on the Mind: A Tragedy's Influence on Free Expression**

At the heart of the decisions in cases like *Ponce* and *Boim* lies the influence on jurists of real-world acts of savage violence committed against students in the nation's public school system during the past ten years. This is not mere speculation. Indeed, if the events of September 11, 2001, forever changed the way many Americans think about issues like national security and international terrorism, then the events of April 20, 1999, at Columbine High School forever changed the way both public school officials and federal- and state-court judges perceive and interpret student writings that make reference to violence and bloodshed.\(^{123}\)

David Hudson, a staff attorney with the First Amendment Center, wrote in 2001 that "[t]he discretion granted school administrators has increased substantially in the wake of several high-profile school shootings, most particularly the tragedy at Columbine High School."\(^{124}\) The author of this article observed in a 2001 piece that, in some controversies that took place shortly after the tragedy at Columbine, "students' First Amendment speech rights were trounced not only by schools that expelled them, but by courts that refused to protect them."\(^{125}\)

Hudson and the author of this article are not alone in expressing such sentiments. Dr. Nan Stein, a senior research scientist at Wellesley College, wrote in a 2003 law journal article:

> Welcome to the post-Columbine world of schools. Students are controlled in ways that shred the U.S. Constitution and the Bill of Rights: they have been suspended retroactively for papers they have written, thoughts they have had, and for drawings. In other cases, young elementary-aged school children have been suspended for

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122. *See supra* notes 56–59 and accompanying text (describing Justice Alito's efforts to limit the scope of the *Morse* opinion).


comments they made in the heat of a touch football game or when
the teacher would not permit them to go to the bathroom, which the
administrators decided to take as death threats.126

Stein’s observations proved still valid four years later in 2007. In
Ponce, the appellate court wrote that it considered the case in light of
what it called “violence bearing the stamp of a well-known pattern of
recent historic activity: mass, systematic school-shootings in the style
that has become painfully familiar in the United States.”127 The Ponce
court added that “[o]ur recent history demonstrates that threats of an
attack on a school and its students must be taken seriously.”128

Similarly, in ruling in favor of school authorities and against the
student expression at issue in Boim, the Eleventh Circuit specifically
cited the “climate of increasing school violence.”129 The court also em-
phasized that “in the eight years preceding the incident underlying the
instant appeal, there had been 10 well-known, student-perpetrated shoot-
ings in schools, not including college campuses.”130 What’s more, the
Eleventh Circuit noted for the record that the high school principal (a
defendant in the case) was “concerned primarily about the threaten-
ing undertones of [the student’s] narrative in light of the massacre that
occurred at Columbine High School in Colorado, [and] the much more local
shooting that occurred at Heritage High School in Conyers, Georgi-
a.”131

Pre-dating these two post-Morse cases, other federal appellate
courts also made use of real-life instances of school violence to justify —
or, at least, to support — its pro-censorship rulings. For instance, in the
Eighth Circuit’s 2002 ruling in Doe v. Pulaski County Special School
District,132 in favor of school officials and against the First Amendment
rights of a student who described in a “letter how he would rape, sodom-
ize, and murder a female classmate who had previously broken up with
him,”133 the court wrote that “[w]e find it untenable in the wake of Col-
mbine and Jonesboro that any reasonable school official who came into
possession of [the student’s] letter would not have taken some action
based on its violent and disturbing content.”134

126. Nan Stein, Bullying or Sexual Harassment? The Missing Discourse of Rights in an Era of
128. Id. (emphasis in original).
129. Boim v. Fulton County Sch. Dist., 494 F.3d 978, 984 (11th Cir. 2007).
130. Id. at 983.
131. Id. at 981.
132. 306 F.3d 616 (8th Cir. 2002).
133. Id. at 619.
134. Id. at 626 n.4.
Similarly, in *LaVine v. Blaine School District* the Ninth Circuit held that school authorities did not violate the rights of a student when it expelled him for writing a poem that suggested its writer might engage in violence. In its opinion, the Ninth Circuit wrote that the case before it arises against a backdrop of tragic school shootings, occurring both before and after the events at issue here, and requires us to evaluate through a constitutional prism the actions school officials took to address what they perceived was the student’s implied threat of violent harm to himself and others. Given the knowledge the shootings at Columbine, Thurston and Santee high schools, among others, have imparted about the potential for school violence (as rare as these incidents may be when taken in context), we must take care when evaluating a student’s First Amendment right of free expression against school officials’ need to provide a safe school environment not to overreact in favor of either.

The influence of Columbine and similar school tragedies is also felt at the trial court level. For instance, in *Governor Wentworth Regional School District v. Hendrickson*, Judge Steven J. McAuliffe ruled in favor of school authorities and against a student who refused to remove from his clothing a so-called “No Nazis” patch. In reaching that pro-school conclusion, Judge McAuliffe wrote that “it is undeniable that the eruption of fatal violence at Columbine High School and other public schools casts a pragmatic shadow on what otherwise might be viewed as primarily an academic disagreement.”

More recently, in May 2008, United States District Court Judge William C. Connor wrote that “the threat of serious school violence—including mass shootings perpetrated by students—is an unfortunate fact of life in twenty-first century America.” He aptly summed up the judicial reaction to this disturbing reality, writing that “the overwhelming response has been deference on the part of courts to the judgment of educators as to whether a perceived threat should be taken seriously and met with discipline in order to ensure the safety of the school community.”

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135. 257 F.3d 981 (9th Cir. 2001), cert. denied, 536 U.S. 959 (2002).
136. Id. at 983.
138. Id. at 411.
139. Id.
141. Id. at *4.
Not surprisingly, Judge Connor cited the federal appellate court opinions in both *Ponce* and *Boim* in support of this proposition.  

In addition, the events at Columbine have influenced Fourth Amendment-based issues in public schools. For instance, a federal judge in Texas in 2001, in ruling against a student’s search-and-seizure claims, wrote:

[I]n the aftermath of the Columbine High violence, some period of hypersensitivity among schools officials was called for, and indeed should be lauded. In the face of a genuine nationwide tragedy, which has been mimicked at other schools, and with which we all therefore continue to struggle, it simply is not improper to overreact.  

At a minimum, this quotation suggests that Columbine provides some breathing space or slack for school authorities when it comes to intruding on constitutional rights in realms other than free speech. The bottom line is that the jurisprudence concerning the rights of minors in educational settings continues to operate in the long shadow cast by Columbine High School.

IV. A VERY SLIPPERY SLOPE OF CENSORSHIP: SEARCHING FOR LIMITS ON THE SCOPE OF MORME UNDER THE REASONING IN PONCE, BOIM, AND HARPER

The trio of post-*Morse* federal court opinions described in Section A of Part II makes it clear that some judges are willing to expansively view the Supreme Court’s ruling in *Morse* beyond its factual underpinnings and, in doing so, to extend its logic and reasoning to support the censorship of speech threatening physical violence and expression causing emotional injury. Thus, the issue arises whether there are any limits on just how far these or other courts may go in stretching *Morse* beyond the realm of speech advocating the use of illegal drugs.

In *Ponce*, the Fifth Circuit suggested that, indeed, *Morse* would not necessarily apply to any and all situations in which student speech threatens violence. In particular, the Fifth Circuit drew a rather strange dichotomy regarding speech portending violence—a dichotomy between

142. *Id.*
143. The Fourth Amendment to the United States Constitution provides:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.
threats that "are relatively discrete in scope and directed at adults"\textsuperscript{145} and those that threaten "a mass school shooting."\textsuperscript{146} In the former scenario, the appellate court in \textit{Ponce} suggested that the \textit{Tinker} standard\textsuperscript{147} would be appropriate for determining whether censorship of speech and punishment of its student speaker/author were constitutional.\textsuperscript{148} In the latter scenario, however, the court argued that \textit{Morse} was the correct standard to apply.\textsuperscript{149} As the Fifth Circuit wrote, threats targeting individual teachers "do not amount to the heightened level of harm that was the focus of both the majority opinion and Justice Alito's concurring opinion in \textit{Morse}. The harm of a mass school shooting is, by contrast, so devastating and so particular to schools that a \textit{Morse} analysis is appropriate."\textsuperscript{150}

It is simultaneously remarkable and disconcerting to believe that the level of constitutional protection student speech receives is largely dependent, not only on the number of potential victims and deaths to which the expression at issue alludes, but also on the identity of those potential victims. But this is precisely the case under \textit{Ponce}:

- If you threaten the life of a specific teacher, then your speech will receive heightened protection under \textit{Tinker}.
- If you threaten the lives of many students, then your speech will be summarily punished under \textit{Morse}.

Implicit, although perhaps not intended, in the Fifth Circuit's logic is the notion that some lives—those of students—are worth more than those of other people, namely teachers. The appellate court, in essence, is placing values on human life with its bastardized, post-\textit{Morse} First Amendment calculus.

What's more, there is a vagueness\textsuperscript{151} issue posed by the Fifth Circuit's use of the phrase "relatively discrete in scope and directed at \textit{adults}"\textsuperscript{152} to describe those scenarios in which protection for the student speech in question is better measured against the strictures of \textit{Tinker} than

\begin{itemize}
  \item \textsuperscript{145} Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765, 771 n.2 (5th Cir. 2007).
  \item \textsuperscript{146} Id.
  \item \textsuperscript{147} See supra note 18 and accompanying text (describing the rule articulated by the United States Supreme Court in \textit{Tinker}).
  \item \textsuperscript{148} Ponce, 508 F.3d at 771 n.2.
  \item \textsuperscript{149} Id.
  \item \textsuperscript{150} Id.
  \item \textsuperscript{151} See generally Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) (providing, in pertinent part, that "it is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined" and that "we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly"); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 910 (2d ed. 2002) ("[A] law is unconstitutionally vague if a reasonable person cannot tell what speech is prohibited and what is permitted. Unduly vague laws violate due process whether or not speech is regulated.").
  \item \textsuperscript{152} Ponce, 508 F.3d at 771 n.2 (emphasis added).
\end{itemize}
Morse. In particular, the appellate court fails to articulate how precisely limited or minor the threatened carnage must be in order for it to constitute violence that is “relatively discrete in scope.” Given that any murder in any school is headline-making news, it is inconceivable how any school shooting could ever be considered truly discrete.

In addition, the appellate court fails to consider whether a student letter threatening more than two or three “adults” would be better analyzed under Tinker. In other words, how many adults must be targeted by a student letter or a notebook like the kind at issue in Ponce before Morse—rather than Tinker—comes into play? Or does it, in fact, make any difference in terms of the number of adults targeted? Is Morse simply a ruling limited to scenarios in which the speech at issue references violence targeting students?

The Fifth Circuit suggested that this could well be the case—that Morse is merely a harm-to-students rule—when it concluded that “speech advocating a harm that is demonstrably grave and that derives that gravity from the ‘special danger’ to the physical safety of students arising from the school environment is unprotected.” It is the safety of students, in other words, that justifies the application of Morse, in the eyes of the Fifth Circuit. The safety of teachers and/or staff, conversely, was never addressed in Morse and, thus, presumably is handled under Tinker. This muddle and morass, based on faulty dichotomies, illustrates the danger when a lower court elects to expansively interpret—indeed, expansively modify—Supreme Court precedent to fit a very different factual scenario involving a very different harm.

While Ponce at least attempts to put parameters on the scope of Morse, the courts in Boim and Harper fail to do so altogether. Importantly, however, the United States Court of Appeals for the Seventh Circuit, in an April 2008 opinion authored by the prominent Judge Richard Posner, made it clear that Morse’s scope is limited, at least when it comes to squelching speech that supposedly threatens violence. In particular, in Nuxoll ex rel. Nuxoll v. Indian Prairie School District No. 204, Judge Posner wrote that “[v]iolence was not the issue in Morse.” This recognition by Judge Posner that violence had nothing to do with the legal question in Morse seems to put the Seventh Circuit in direct conflict with both the Fifth Circuit, which used Morse in Ponce to suppress student speech referencing violence, as well as the Eleventh Circuit,

153. Id (emphasis added).
154. Id (emphasis added).
155. Id at 770 (emphasis added).
156. 523 F.3d 668, 674 (7th Cir. 2008) (emphasis added).
157. See supra Part II.A.1 (discussing Ponce).
which also used Morse’s logic to suppress the violent-themed writing of Rachel Boim.\textsuperscript{158} Such a split of authority ultimately suggests that Morse did precious little to calm what one federal appellate court not too long ago aptly called “the unsettled waters of free speech rights in public schools, waters rife with rocky shoals and uncertain currents.”\textsuperscript{159}

Although appearing to slam the door shut on the use of Morse to squelch violent-themed expression, the Seventh Circuit in Nuxoll seemingly left it wide open on whether Morse could be used to suppress speech that causes psychological harm stemming from messages like the one at issue in Harper.\textsuperscript{160} In particular, Nuxoll, like Harper, dealt with clothing displaying what many people would consider an anti-gay message; in Nuxoll, the object of school officials’ ire was a T-shirt emblazoned with the phrase, “Be Happy, Not Gay.”\textsuperscript{161}

In considering whether suppression of this message was justified or whether it violated the First Amendment protection of speech, Judge Posner observed that “one of the concerns expressed by the Supreme Court in Morse was the psychological effects of drugs. Imagine the psychological effects if the plaintiff wore a T-shirt on which was written ‘blacks have lower IQs than whites’ or ‘a woman’s place is in the home.’”\textsuperscript{162} In support of this proposition, Posner cited material in Morse in which Chief Justice John Roberts, writing for the majority and quoting from the high court’s 1995 opinion in Vernonia School District 47J v. Acton,\textsuperscript{163} reasoned that “school years are the time when the physical, psychological, and addictive effects of drugs are most severe.”\textsuperscript{164}

By picking up and then locking on to this language from the majority opinion in Morse referencing the psychological harms caused by illegal drugs, Judge Posner ducks and evades Morse’s narrowly drafted concurrence in which Justice Alito opines that “illegal drug use presents a grave and in many ways unique threat to the physical safety of students. I therefore conclude that the public schools may ban speech advocating illegal drug use.”\textsuperscript{165} In a nutshell, Justice Alito focused his writing in Morse only on physical harms caused by drug use, not psychological ones, writing, at one point, that “the special characteristic that is relevant

\textsuperscript{158} See supra Part II.A.2 (discussing Boim).
\textsuperscript{159} Guiles v. Marineau, 461 F.3d 320, 321 (2d Cir. 2006), cert. denied, 127 S. Ct. 3054 (2007).
\textsuperscript{160} See supra Part II.A.3 (discussing Harper).
\textsuperscript{161} Nuxoll, 523 F.3d at 670.
\textsuperscript{162} Id. at 674 (emphasis in original) (citation omitted).
\textsuperscript{163} 515 U.S. 646 (1995).
\textsuperscript{165} Id. at 2638 (Alito, J., concurring) (emphasis added).
in this case is the threat to the physical safety of students. School attendance can expose students to threats to their physical safety that they would not otherwise face.\textsuperscript{166} This language by Justice Alito omits any reference to psychological safety; instead, Justice Alito focuses exclusively on physical safety. If other courts, however, follow Judge Posner’s lead by focusing on how Morse’s majority opinion was concerned, at least in some small part, with psychological harms as well as physical ones, then Morse will have a very long reach into the schoolyard. In fact, Morse could provide courts like those in Nuxoll and Harper with ample legal justification for restricting in-school instances of hate speech.\textsuperscript{167}

In summary, the interpretation of the logic and reasoning in Morse that transpires in the opinions of Ponce, Boim, Harper, and Nuxoll suggests that Morse might well provide the legal tool that school administrators need to squelch all manners, modes and varieties of student speech that portend harm, be it physical (Ponce and Boim) or psychological (Harper and Nuxoll). A brief hypothetical helps to illustrate not only just how muddled the meaning of Morse has become in light of these cases, but also just how far both physical and psychological harms possibly can be stretched to censor student expression under Morse.

Consider a ninth grader who wears a T-shirt displaying the message “THIN PEOPLE STINK” on the front and the command “EAT TRANS FATS” on the back. The rather corpulent student in question dons the T-shirt as a form of political protest because the state or municipality in which he lives is considering legislation to ban trans fat from school meals. The student honestly and, perhaps, reasonably believes this is just one more piece of senseless government regulation that interferes with what he considers to be personal and private health choices.\textsuperscript{168} What’s more, the student asserts that depriving him of a diet loaded with trans fats makes him grumpy and mentally distraught, as he suffers mood swings when denied the ingredients from his normal, everyday diet. This scenario may not be as far fetched as it initially sounds and, as described below, it illustrates the extent of the Morse morass created by the lower

\textsuperscript{166} Id. (emphasis added).

\textsuperscript{167} See generally Rodney A. Smolla, Free Speech in an Open Society 152 (1992) (calling hate speech “the generic term that has come to embrace the use of speech attacks based on race, ethnicity, and sexual orientation or preference”).

\textsuperscript{168} The hypothetical student is not alone in expressing such a sentiment. In a commentary published in the San Diego Union-Tribune, the president and chief executive of the Pacific Research Institute openly wondered, “Is it a proper role of government to tell us what we can or can’t eat?” Sally C. Pipes, Op-Ed., Making Choices About What We Eat, SAN DIEGO UNION-TRIB., Dec. 27, 2007, at B-9. Answering her own query in the negative, Sally C. Pipes argues that “people make choices. And government should protect—not restrict—the freedom to make those choices so long as we’re not harming others.” Id.
federal courts that have refused to confine the decision to its factual underpinnings of speech advocating illegal drug use.

Initially, it is important to note that the consumption of trans fats by students in school settings is, in fact, a controversial issue of public concern, much like illegal drug use in Morse. In January 2008, for instance, the state senate in Virginia unanimously voted “to phase out the use of artery-clogging trans fats in food sold at public schools, from the cheese pizza in the cafeteria to the chips in the vending machine.” During the same time period, “dozens of municipalities and school systems across the country have moved to ban or limit trans fats in restaurants and school cafeterias, including in New York and Philadelphia.” In February 2008, a measure similar to that in Virginia was considered in Iowa.

The issue involved in the hypothetical is clearly political, as lawmakers are, indeed, taking official legislative action with such bills. Newspaper editorial boards are even weighing in on government measures. This overt political component, when coupled with the stated intent of the student in wearing his T-shirt to convey a message of political dissent with the “EAT TRANS FATS” slogan, initially seems to suggest that the constitutionality of any effort to ban the T-shirt—a silent, passive form of expression, much like the black armbands worn by students in political protest that were at issue in Tinker—must be considered under the Tinker test. Under Tinker, the student possesses the right to wear the T-shirt unless school administrators have real reason to believe that it would cause a substantial and material disruption of the educational process or interference with the rights of other students.

But here is where Morse possibly comes into play, at least when it is expansively interpreted, as it has been by some lower courts. In particular, if courts focus on the physical harms suffered by students that are allegedly caused by ingesting trans fats, as well as on the mental injury and psychological harms that might be sustained by thin or skinny students who take umbrage and offense at the T-shirt’s other message, “THIN PEOPLE STINK,” then a Morse analysis might allow the speech


172. See, e.g., Editorial, The Trans Fat Transition, ROANOKE TIMES (Va.), Feb. 4, 2008, at B6 (setting forth the newspaper’s position on a bill in Virginia “to get unhealthful trans fats out of Virginia’s public school cafeterias and vending machines”).

173. See supra note 18 (setting forth the test created by the United States Supreme Court in Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969)).
on both sides of the T-shirt to be summarily squelched without having to jump through the hoops of Tinker.

Consider first the physical harms issue. The dangers posed to students by the consumption of trans fats, like the dangers posed by the use of illegal drugs at issue in Morse, are both physical and significant. For instance, the 2008-published Gale Encyclopedia of Diets observes:

Trans fat raises LDL cholesterol in a similar way to saturated fat and it reduces HDL cholesterol. It may also raise blood triglyceride levels. The combination of both these effects means that it is most likely to increase cardiovascular risk. The World Health Organization recommends phasing out trans fat in food manufacture and reducing trans fat consumption to no more than 1% of dietary energy or 2.5 g per day.174

The physical impact of trans fats on minors’ health has not gone unnoticed by politicians. When the city of Baltimore in March 2008 voted to ban trans fats from prepared foods sold in that metropolis, the bill’s sponsor, Agnes Welch, offered the legislation “as part of her effort to reduce childhood obesity.”175 Similarly, when signing legislation in September 2005 affecting public schools’ luncheon menus, California Governor Arnold Schwarzenegger remarked that “California is facing an obesity epidemic. That is why today I am signing into law the most progressive school nutrition reforms in the nation. This legislation will take junk food and sodas off the school campuses, and put more fruits and vegetables into school meals.”176 Other states are falling in line. As the Chicago Tribune noted more recently in April 2008 when the Illinois Senate passed legislation banning trans fat from Illinois schools that participate in the state’s lunch program:

As the number of reports of childhood obesity rises, at least eight states have limited the use of trans fats in foods, according to the National Conference of State Legislatures. California has an outright ban on trans fats in school meals, and Oregon doesn’t let schools sell snacks with trans fats.177

175. John Fritz, City OKs Ban on Trans Fat in ’09, BALT. SUN, Mar. 18, 2008, at 1A.
To the extent that municipalities and schools are prohibiting by legislation the use of trans fats in prepared foods, trans fats become illegal (at least in some settings), just like the illicit drugs with which the Supreme Court in Morse was concerned. And, if Morse is a case about preventing physical harm to students who may be influenced by a student message advocating a dangerous behavior (an admonition to take bong hits), then similar concerns about preventing physical harm to students who may be influenced by the message “EAT TRANS FATS” to engage in the dangerous behavior of consuming them animate the need for censorship in the hypothetical. Courts would seem to be splitting medical hairs to call the dangers from smoking pot graver than the multiple health-related dangers posed by childhood obesity that is caused, in part, by consumption of trans fats. Additionally, there may be a greater likelihood that students actually would heed the call of the student wearing the “EAT TRANS FATS” T-shirt, given the affordability and accessibility of food items when compared with marijuana. Finally, “EAT TRANS FATS” is a much clearer call and directive to engage in unhealthy behavior than is the more muddled marijuana message “Bong Hits 4 Jesus.”

But the Morse muddle does not necessarily end here. In particular, if a court focuses on the concurrence of Justice Alito, in which he makes it clear that he and Justice Kennedy would have protected Joseph Frederick’s speech if it could “plausibly be interpreted as commenting on any political or social issue,” 178 then it would seem that the student’s message “EAT TRANS FATS” might be protected under Morse, given that the student expressly claims to be making a political statement. Tinker would again, then, seem to be the appropriate judicial standard for determining protection of the speech. All of this illustrates, of course, just how complicated and complex Morse becomes when courts untether the case from both its peculiar facts and the limiting language of Justice Alito’s concurrence.

But the judicial inquiry would still not end there. The “THIN PEOPLE STINK” message, considered on its face, could cause emotional and psychological harm to some gangly youths, in that awkward phase of adolescence. The message may not question or deride one’s sexual orientation, as do the messages at issue in both Harper and Nuxoll, but the opinions in those cases do not confine their interpretations and understanding of Morse to such homophobic expression. In particular, it will be recalled that Judge Houston wrote in the following Harper:

Morse . . . affirms that school officials have a duty to protect students, as young as fourteen and fifteen years of age, from degrading acts or expressions that promote injury to the student’s physical, emotional or psychological well-being and development which, in turn, adversely impacts the school’s mission to educate them.\textsuperscript{179}

This reasoning regarding the Morse holding seems to allow schools to censor the T-shirt’s “THIN PEOPLE STINK” message because of the potential for emotional and/or psychological harm it could cause to thin students.

It would be rather odd, of course, for a court to consider the scope of protection for the message conveyed on one side of a T-shirt under a different judicial standard from its evaluation of the message stated on the other side of the T-shirt. But this well could be the case if the message “EAT TRANS FATS” is considered political and thus measured by Tinker, while the message “THIN PEOPLE STINK” is viewed as causing emotional harm and thus be punished under Morse. And, just to further muddy and complicate the hypothetical, imagine the word “STINK” is replaced on the T-shirt by the word “SUCK.” At least one federal court has held that the word “suck,” even when it is used as a clear statement of disapproval, “derives from a sexual connotation of oral-genital contact”\textsuperscript{180} and “may be interpreted to have a sexual connotation,”\textsuperscript{181} thus allowing for its censorship in public school settings under the Supreme Court’s 1986 ruling in Bethel School District No. 403 v. Fraser.\textsuperscript{182} In particular, U.S. District Court Judge Robert G. Doumar ruled in Broussard v. School Board of the City of Norfolk\textsuperscript{183} that school officials were entitled to censor a T-shirt carrying the anti-drug message “Drugs Suck!”\textsuperscript{184} under Fraser because those officials possess “an interest in protecting their young students from exposure to vulgar and offen-

\textsuperscript{179} Harper Reconsideration Order, supra note 30, at 9.
\textsuperscript{181} Id.
\textsuperscript{182} 478 U.S. 675, 675–85 (1986) (allowing a school to punish a student who made a sexually suggestive speech to a captive audience of fellow students during a student-government assembly, and holding that “it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse” because to allow such speech would “undermine the school’s basic educational mission”).
\textsuperscript{184} As described by the court in Broussard, the student in question: bought a concert T-shirt at a concert of a pop music group, New Kids on the Block. The shirt was black with white lettering. On the front of the shirt, printed in letters approximately eight inches in height, were the words “Drugs Suck!” On the back of the shirt was printed “NKOTB Donnie Wahlberg,” referring to the group New Kids on the Block and its leader.

\textit{Id.} at 1528.
Under such logic, then, the message "THIN PEOPLE SUCK" on the hypothetical T-shirt could be censored either under Morse (as interpreted by the courts in Harper and Nuxoll) or Fraser (as interpreted in Broussard).

Ultimately, this hypothetical illustrates that Morse has done little to clarify free-speech jurisprudence in the realm of public schools, especially when the case is interpreted broadly. And when courts so choose to expansively construe Morse, they give school officials another weapon in their censorship arsenal—a very powerful one that allows them, as it did in Ponce, to sidestep the more rigorous Tinker analysis in order to quickly and effectively squelch speech. Morse, of course, had nothing to do with either the consumption of trans fats or the injured feelings of thin youngsters, but the seemingly silly hypothetical above demonstrates how the case could, indeed, be made applicable to such subjects under the reasoning of post-Morse opinions like Ponce, Boim, Harper, and Nuxoll.

V. CONCLUSION

When is a case about bong hits not a case about bong hits? The answer, in brief, is when it is broadly interpreted as a case about harm, safety, and danger.

That appears to be the early lesson learned from the judicial decisions rendered since the Supreme Court decided Morse v. Frederick in June 2007. This Article has demonstrated how several courts have had no problem in selectively pulling language from Morse, either from the majority opinion (as in Nuxoll) or from the Alito-Kennedy concurrence (as in Ponce), to support censorship of student expression that is far removed from speech advocating illegal drug use. Today, Morse is being used as a case that supports censorship of speech that allegedly reveals the state of mind of a student to engage in violence (as in Ponce and Boim), as well as censorship of anti-gay speech that might cause emotional and psychological harm to those who read it (as in Harper and Nuxoll).

This Article has illustrated not only how the opinions of Ponce, Boim, Harper, and Nuxoll abuse Morse by taking the opinion far beyond both its peculiar facts and the limiting language in the Alito-Kennedy concurrence, but also by failing to recognize the dichotomy between harm to self versus harm to others stemming from student speech. In addition, the courts in Ponce and Boim ignored the distinction between censoring speech because of its potential influence on others' conduct

185. Id. at 1537.
versus censoring speech because of what it reveals about the speaker's own state of mind to engage in particular conduct.

Ultimately, when courts in the near future grapple with student speech referencing violence and violent conduct, the early indications from post-Morse cases like Ponce and Boim are that judges will read Morse in the lugubriously long shadows cast by the tragedy at Columbine High School. These opinions, as well as those in the emotional-harm cases like Harper and Nuxoll, are proving wrong the author's initial prognostication about the reach of Morse. In short, the ruling in Morse is not nearly as narrow as was initially thought.

186. See Calvert & Richards, supra note 8, at 26.

187. See supra notes 5-8 (describing and setting forth views that the ruling in Morse was a narrow victory for schools).