

## ARTICLES

### FROM AFTER-SCHOOL DETENTION TO THE DETENTION CENTER: HOW UNCONSTITUTIONAL SCHOOL-DISRUPTION LAWS PLACE CHILDREN AT RISK OF PROSECUTION FOR “SPEECH CRIMES”

by

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*As unrest erupts across the country over issues of police violence and race, how and when police use their authority inside schools is receiving renewed scrutiny. Students of color are uniquely at risk of being subject to overzealous arrest as a result of a confluence of dangerous factors: Young people are constantly surveilled throughout the school day, constitutional search-and-seizure protections are diminished, and police have the benefit of not just the criminal laws that would apply in the “real world,” but a host of vague and subjective “speech crimes” for which they can justify detention, search, and arrest. This Article focuses on the most subjective of all school-based offenses: “Disruption.” Using the vehicle of a recent Kentucky appellate case dismissing a First Amendment challenge to an especially open-ended “school disruption” statute (which the U.S. Supreme Court declined to review), this Article traces how these statutes have been used to turn what was previously grounds for (at worst) a suspension into a basis for arrest, prosecution, and jailing. The focus of this Article is on the constitutional infirmity of Kentucky’s statute and similar school-disruption statutes across the country. Remarkably, the authors find Kentucky and a number of other states have statutes that expose students*

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to criminal penalties based on a threshold lower than what the First Amendment would require to validate even a minor disciplinary sanction under the well-established Tinker standard.

Although the Supreme Court missed a chance in *Masters v. Kentucky* to set clear boundaries for when nonviolent “speech crimes” can be grounds for arrest, another vehicle may be on the way. The nationally publicized case of South Carolina teen Niya Kenny, arrested on “disruption” charges while shooting smartphone footage of the brutal police takedown of a Black classmate, is making its way through the federal courts. The authors conclude that Supreme Court clarification is desperately needed to curb the potential that vague, overbroad laws will be applied subjectively against students of color and those voicing contrarian criticism of their schools. Clarification is especially overdue at a time of renewed youth activism, as young people engage in peaceful political protests that, under the most extreme state “disruption” statutes, could constitute grounds for arrest.

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I. INTRODUCTION

One moment, 18-year-old Niya Kenny was uneventfully sitting through a lecture in her 12th grade algebra class. The next moment, she unwittingly became

the creator of a viral smartphone video that provoked nationwide outrage.<sup>1</sup>

Kenny began filming as a Richland County sheriff's deputy entered her classroom to confront a student who refused a teacher's orders to put away her phone and go to the principal's office.<sup>2</sup> Kenny continued recording as the deputy wrestled the noncompliant student out of her desk, slammed her to the floor and dragged her across the classroom, as startled classmates cried out in her defense.<sup>3</sup>

At worst, Kenny might have expected to face school discipline for using her cellphone camera during class and shouting. What she got instead was an arrest, a stay in the county jail, and a misdemeanor charge of violating South Carolina's "Disturbing Schools Law," which carries a potential penalty of 90 days in jail or a fine of up to \$1,000.<sup>4</sup>

Even after the Richland County Sheriff's Office concluded that Deputy Ben Fields used excessive force and fired him,<sup>5</sup> the charge against Kenny did not immediately go away. It took 10 months for the state prosecutor's office to decide against charging either Fields or any of the students.<sup>6</sup> The case has lingered for years afterward as the focus of a civil lawsuit putting the South Carolina statute's constitutionality at issue.<sup>7</sup>

As schools fortify their police presence, adding full-fledged officers with arrest authority, students face increasing jeopardy when vague laws carry the risk of jail time for nonviolent "speech crimes."<sup>8</sup> While Kenny's case put Spring Valley High

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<sup>1</sup> For a detailed narrative of the Niya Kenny case, see Josh Gupta-Kagan, *The School-to-Prison Pipeline's Legal Architecture: Lessons from the Spring Valley Incident and Its Aftermath*, 45 *FORDHAM URB. L.J.* 83, 92–96 (2017).

<sup>2</sup> Richard Fausset & Ashley Southall, *Video Shows Deputy Flipping Student in South Carolina, Prompting Inquiry*, *N.Y. TIMES* (Oct. 26, 2015), <https://www.nytimes.com/2015/10/27/us/officers-classroom-fight-with-student-is-caught-on-video.html>.

<sup>3</sup> *Id.*

<sup>4</sup> Complaint at 10, *Kenny v. Wilson*, 2017 WL 4070961 (D.S.C. 2016) (No. 2:16-cv-2794-CWH); Evie Blad, *She Recorded Her Classmate's Arrest, Then Got Arrested, Too*, *EDUC. WK.* (Jan. 14, 2017), <https://www.edweek.org/ew/articles/2017/01/25/she-recorded-her-classmates-arrest-then-got.html>; Evie Blad, *ACLU, Arrested Students Sue Over South Carolina's 'Disturbing Schools' Law*, *EDUC. WK.* (Aug. 11, 2016), [https://blogs.edweek.org/edweek/rulesforengagement/2016/08/aclu\\_arrested\\_students\\_sue\\_over\\_south\\_carolinas\\_disturbing\\_schools\\_law.html](https://blogs.edweek.org/edweek/rulesforengagement/2016/08/aclu_arrested_students_sue_over_south_carolinas_disturbing_schools_law.html).

<sup>5</sup> Erik Ortiz & Craig Melvin, *South Carolina Deputy Ben Fields Fired After Body Slamming Student: Sheriff*, *NBC NEWS* (Oct. 28, 2015), <https://www.nbcnews.com/news/us-news/south-carolina-deputy-ben-fields-fired-job-sheriff-n452881>.

<sup>6</sup> Clif LeBlanc, *No Charges for 2 Girls, Officer in Viral Spring Valley Video Incident*, *THE STATE* (Sept. 2, 2016), <https://www.thestate.com/news/local/article99603512.html>.

<sup>7</sup> *Kenny v. Wilson*, 885 F.3d 280, 284 (4th Cir. 2018) (reversing and remanding district court's dismissal on standing grounds).

<sup>8</sup> See Shabnam Javdani, *Policing Education: An Empirical Review of the Challenges and Impact of the Work of School Police Officers*, 63 *AM. J. COMMUNITY PSYCHOL.* 253, 255 (Feb. 2019) (noting sharp growth in police presence in schools between 1997 and 2007, with estimates of the

School and South Carolina's school-disruption law on a national stage, comparable laws are on the books in 25 other states.<sup>9</sup> The most extreme versions empower police to arrest students for momentary acts of defiance that once resulted in nothing worse than suspension.<sup>10</sup>

In 2019, the U.S. Supreme Court passed up a chance to clarify whether a state can, constitutionally, prosecute and jail a teenager for expressive conduct with no greater showing than it would take to justify school discipline—and arguably, even less. But although the justices declined to take up the case of *Masters v. Kentucky*,<sup>11</sup> the issue is unlikely to go away. Whether through Kenny's ongoing civil suit, or some other yet-to-be-identified vehicle, the Court should set clear boundaries on the authority of school police to criminalize “back-talking” offenses.

Whether police should be patrolling and making arrests inside schools became a matter of urgent national concern after the May 25, 2020, killing of a 46-year-old Black man, George Floyd, at the hands of a white Minneapolis police officer during an arrest for a petty crime.<sup>12</sup> Students across the country, outraged over Floyd's death and those of other Black victims of excessive force, helped lead campaigns to persuade districts to remove armed police (sometimes referred to as School Resource Officers, or “SROs”) from schools.<sup>13</sup>

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number of officers patrolling school as high as 30,000); Catherine J. Ross, “*Bitch, Go Directly to Jail: Student Speech and Entry into the School-to-Prison Pipeline*,” 88 TEMP. L. REV. 717, 723 (2016) (“The proliferation of armed police officers at schools has only intensified the risks of entering the fast track from school to court.”).

<sup>9</sup> See *infra* Section III.D.

<sup>10</sup> See Amanda Ripley, *How America Outlawed Adolescence*, ATLANTIC (Nov. 2016), <https://www.theatlantic.com/magazine/archive/2016/11/how-america-outlawed-adolescence/501149/> (explaining that “at least 22 states” criminalize expressive behavior disruptive to schools, putting schoolchildren at risk of arrest and prosecution).

<sup>11</sup> *Masters v. Kentucky*, 551 S.W.3d 458 (Ky. Ct. App. 2017), *cert. denied*, 139 S. Ct. 1221 (2019).

<sup>12</sup> See Chao Xiong & Paul Walsh, *Ex-Police Officer Derek Chauvin Charged with Murder, Manslaughter in George Floyd Death*, STAR TRIB. (May 30, 2020), <https://www.startribune.com/protests-build-anew-after-fired-officer-charged-jailed/570869672/> (describing George Floyd's asphyxiation death when officer Derek Chauvin pinned Floyd to the pavement with his knee).

<sup>13</sup> See Melanie Asmar, *Denver School Board Votes to Phase Police Out of Schools*, COLO. INDEP. (June 12, 2020), <https://www.coloradoindependent.com/2020/06/12/denver-school-board-phasing-out-police/> (stating that school resource officers would be removed from Denver public schools by June 2021 in reaction to community concern over disproportionate criminal referrals of Black youth); Katherine Knott, *Charlottesville Schools, Police Agree to End MOU for School Resource Officers*, DAILY PROGRESS (June 11, 2020), [https://www.dailyprogress.com/news/local/charlottesville-schools-police-agree-to-end-mou-for-school-resource-officers/article\\_558f34f9-d3fd-5fc5-8b22-5334f173655f.html](https://www.dailyprogress.com/news/local/charlottesville-schools-police-agree-to-end-mou-for-school-resource-officers/article_558f34f9-d3fd-5fc5-8b22-5334f173655f.html) (reporting that, following nationwide unrest over police violence, Charlottesville, Virginia, schools will end relationship with police department); Ryan Faircloth, *Minneapolis Public Schools Terminates Contract with Police Department Over George Floyd's Death*, STAR TRIB. (June 2, 2020), <https://www.startribune.com/mpls-school-board-ends->

The Floyd protests are among the converging societal factors that make it timely for a national conversation about whether young people are in peril of arrest and prosecution simply for being outspoken. In recent years, particularly following the February 2018 Parkland school shootings in South Florida, there has been a resurgence in student activism, including walkout protests that could qualify as prosecutable crimes in some states.<sup>14</sup> The nascent school de-policing initiative coincides with a broader bipartisan movement to roll back “tough-on-crime” laws enacted during the 1990s that filled America’s prisons.<sup>15</sup> The reform movement has even been felt at the school level, as both Texas and South Carolina have narrowed their school-disruption laws in recent years to primarily target outside trespassers rather than students.<sup>16</sup>

Just as the public is taking a renewed interest in policing and in the over-criminalization of nonviolent behavior, the local news business is disintegrating, with fewer professional journalists to cover matters of importance to communities than at any time in modern history.<sup>17</sup> Because of the loss of journalistic watchdog

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contract-with-police-for-school-resource-officers/570967942/ (stating that the May 25, 2020, killing of 46-year-old black man by Minneapolis police during arrest for minor offense prompted school board to sever ties with police department).

<sup>14</sup> Adela Uchida, *Protest by Del Valle Students Scrapped After Threats of Arrest, Suspension*, CBS AUSTIN (Mar. 10, 2017), <https://cbsaustin.com/news/local/protest-by-del-valle-students-scrapped-after-threats-of-arrest-suspension> (quoting Texas students who called off planned protest against Trump administration immigration crackdown after authorities warned them that anyone who walked out and returned to campus could face arrest); see Vivian Yee & Alan Blinder, *National School Walkout: Thousands Protest Against Gun Violence Across the U.S.*, N.Y. TIMES (Mar. 14, 2018), <https://www.nytimes.com/2018/03/14/us/school-walkout.html> (reporting that shooting deaths of 17 people at Florida’s Marjory Stoneman Douglas High School prompted a student-led protest march at the school and copycat events at hundreds of schools across the country); see also Ryan McKinnon, *No Student Walkout at Lincoln Memorial Academy Amid Rain and Arrest Talk*, FLA. TIMES-UNION (Aug. 16, 2019), <https://www.jacksonville.com/news/20190816/no-student-walkout-at-lincoln-memorial-academy-amid-rain-and-arrest-talk> (explaining that students abandoned plans to walk out in protest of a county school board takeover of their charter school, after they were told the protest could be grounds for criminal charges under Florida’s school-disruption law).

<sup>15</sup> Eric Westervelt & Barbara Brosher, *Scrubbing the Past to Give Those with a Criminal Record a Second Chance*, NPR (Feb. 19, 2019), <https://www.npr.org/2019/02/19/692322738/scrubbing-the-past-to-give-those-with-a-criminal-record-a-second-chance> (reporting that 20 states have expanded access to expungement with the goal of enabling former offenders to obtain housing and employment without stigma); see Maggie Astor, *Left and Right Agree on Criminal Justice: They Were Both Wrong Before*, N.Y. TIMES (May 16, 2019), <https://www.nytimes.com/2019/05/16/us/politics/criminal-justice-system.html> (describing newfound bipartisan consensus that mass incarceration tactics enacted during “war on drugs” proved overly costly and counterproductive).

<sup>16</sup> S.C. CODE ANN. § 16-17-420 (1993); TEX. EDUC. CODE ANN. § 37.124 (West 2013).

<sup>17</sup> See Elizabeth Grieco, *U.S. Newspapers Have Shed Half of Their Newsroom Employees Since 2008*, PEW RES. CTR. (Apr. 20, 2020), <https://www.pewresearch.org/fact-tank/2020/04/20/u-s->

coverage, it is increasingly important that students themselves can safely blow the whistle on inadequacies and hazards in their schools without fear of being accused of criminally disruptive behavior.<sup>18</sup> Vaguely worded “disruption” laws that carry the potential of arrest, prosecution, and jail can intimidate student critics from sharing information with the public. For all of these reasons, it is worth examining the state of laws that criminalize school misbehavior, especially when those laws target students or put students at disproportionate exposure to prosecution.<sup>19</sup>

Quite a bit of excellent recent scholarship addresses the issue of heavy-handed policing of nonviolent misbehavior in public schools, and how the “criminalization” of school discipline disproportionately places nonwhite students and students with disabilities on a trajectory toward dropping out of school and entering the criminal justice “pipeline.”<sup>20</sup> This Article draws on that research and augments it by directly

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newsroom-employment-has-dropped-by-a-quarter-since-2008/ (noting that drastic decline in employment at American newspapers predated additional layoffs beginning in spring 2020 in response to the economic impact of the Novel Coronavirus pandemic that shuttered workplaces nationwide).

<sup>18</sup> See AM. B. ASS’N, HOUSE OF DELEGATES RES. 119B (enacted Aug. 15, 2017), available at [https://splc.org/wp-content/uploads/2018/08/1570\\_aba\\_resolution\\_119b\\_and\\_reporto.pdf](https://splc.org/wp-content/uploads/2018/08/1570_aba_resolution_119b_and_reporto.pdf) (calling on states to fortify legal protection for journalism students and citing examples of impactful student investigative reporting: “Students can and do use journalism to call public attention to safety hazards, when they are allowed to do so. . . . The law must ensure that this type of whistleblowing speech is heard.”).

<sup>19</sup> School disruption laws typically do not differentiate between student and nonstudent disruptors, and even some statutes that exempt students are constitutionally dubious in their breadth, as referenced in Section IV, *infra*. Nevertheless, this Article focuses on the legal risk posed to students rather than to school outsiders. This is both because young people are generally considered to be entitled to greater latitude to engage in minor misbehavior without lasting legal consequences, and because any law against disruptive activity in schools will naturally have an outsized impact on the young people who are legally required to spend all day there.

<sup>20</sup> See, e.g., Jason P. Nance, *Students, Police, and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. 919, 924–32 (2016) (examining cultural and legal developments that led to “zero tolerance” disciplinary enforcement and the proliferation of police with arrest authority in public schools, and identifying inequities in use of enforcement discretion); Barbara Fedders, *The Anti-Pipeline Collaborative*, 51 WAKE FOREST L. REV. 565, 566 (2016); Kerrin C. Wolf, *Booking Students: An Analysis of School Arrests and Court Outcomes*, 9 NW. J.L. & SOC. POL’Y 58 (2013) (analyzing a year’s worth of school arrests in Delaware and concluding that most arrests are for minor nonviolent misbehavior and that Black students are at greatly disproportionate risk of arrest) [hereinafter Wolf, *Booking*]; Paul J. Hirschfield, *Preparing for Prison? The Criminalization of School Discipline in the USA*, 12 THEORETICAL CRIMINOLOGY 79, 80 (2008) (concluding that, as school punishment is increasingly viewed as a matter of incapacitating dangerous young people rather than educating them to correct their behavior, “rule-breaking and trouble-making students are more likely to be defined as criminals—symbolically, if not legally—and treated as such in policy and practice”); Gary Sweeten, *Who Will Graduate? Disruption of High School Education by Arrest and Court Involvement*, 23 JUST. Q. 462, 462–63 (2006) (drawing on 1997 longitudinal study of young people’s experiences with the justice system to conclude that being hauled into

confronting the significant constitutional questions raised by statutes that expose students to arrest, prosecution, and jail for speech that “interferes” with school functions. A close analysis of these statutes—in particular, the Kentucky statute at the center of the *Masters* case—finds serious constitutional concerns, both because some states’ laws set a dangerously low threshold for the criminalization of pure speech and because they fail to give fair notice of what constitutes a criminally punishable “interference” or “disturbance.”<sup>21</sup> This Article draws a roadmap for litigators to challenge facially unconstitutional “school disturbance” laws, as well as point legislators toward a remedy for the most obvious constitutional infirmities.

Section II sets out the foundational First Amendment principles that constrain the government’s authority to enforce content-based prohibitions on even highly offensive and disagreeable speech, and how those fundamental principles have been applied in the unique setting of a public K–12 school. Section III examines how federal courts have skeptically reviewed statutes that expose critics of the police or other government officials to prosecution. Section IV examines the proliferation of statutes across the country that purport to criminalize speech “disrupting” or “interfering with” school functions, and how constitutional challenges to those statutes have fared. Section V focuses on one of the most extreme and dangerous of these statutes, Kentucky’s, and how the courts missed an opportunity to clarify that students cannot be criminally charged with “speech crimes” based on evidence no greater than (and potentially less than) what is needed to justify school disciplinary action. Section VI explains how the contemporary “law and order” mentality, fueled by tragic (though infrequent) acts of mass violence on school grounds, has militarized the enforcement of good-behavior standards, which makes vague criminal statutes that invite subjective prosecution all the more hazardous. Finally, Section VII concludes that, absent the authoritative guidance that the Supreme Court declined to provide in the *Masters* case, states should take the initiative on their own to rewrite misguided “school disruption” laws that invite discriminatory, viewpoint-based abuse.

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juvenile court even a single time results in a threefold increase in the likelihood of becoming a dropout).

<sup>21</sup> For an excellent discussion of some of these constitutional concerns, see Noelia Rivera-Calderón, *Arrested at the Schoolhouse Gate: Criminal School Disturbance Laws and Children’s Rights in Schools*, 76 NAT’L LAW. GUILD REV. 1, 13 (2019) (arguing that “school disturbance laws are not only unnecessary for maintaining school discipline, but are unconstitutionally vague and overbroad”).

## II. THE FIRST AMENDMENT, INSIDE AND OUTSIDE THE “SCHOOLHOUSE GATE”

### A. *Content-Based Prohibitions Rarely Survive Scrutiny*

The First Amendment is implicated whenever a government entity attempts to proscribe or punish speech on the basis of its message.<sup>22</sup> Content-based restrictions on speech are subject to the strictest judicial scrutiny, and will be struck down unless they are proven to be the least restrictive means of accomplishing a compelling government objective.<sup>23</sup> Restrictions that single out speech for differential treatment based on the speaker’s viewpoint are viewed with special disfavor, and once a regulation is found to be viewpoint-discriminatory, it almost invariably is deemed invalid.<sup>24</sup>

Political speech occupies a place of special solicitude under the First Amendment.<sup>25</sup> In overturning a newspaper editor’s conviction for violating an Alabama statute that criminalized publishing endorsements on the eve of an election, the Supreme Court observed:

Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.<sup>26</sup>

The right to freely debate political and social issues without fear of official sanction is deeply ingrained in First Amendment jurisprudence, because discussing public affairs is, along with voting, the vehicle by which people participate in self-governance.<sup>27</sup>

<sup>22</sup> See *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (“[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”).

<sup>23</sup> *Sable Commc’ns of Cal. v. FCC*, 492 U.S. 115, 116 (1989); see also Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1273 (2007) (explaining that, when strict scrutiny applies, a statute restricting speech will be deemed unconstitutional unless it is narrowly tailored to serve a compelling governmental interest).

<sup>24</sup> See *Rosenberger v. Rector*, 515 U.S. 819, 829 (1995) (“Viewpoint discrimination is . . . an egregious form of content discrimination.”).

<sup>25</sup> See Jeffrey Evans Stake, *Are We Buyers or Hosts? A Memetic Approach to the First Amendment*, 52 ALA. L. REV. 1213, 1245 (2001) (noting that “political speech which, being necessary to democracy, lies at the heart of the constitutional protection”).

<sup>26</sup> *Mills v. Alabama*, 384 U.S. 214, 218–19 (1966).

<sup>27</sup> See Clay Calvert, *When First Amendment Principles Collide: Negative Political Advertising & the Demobilization of Democratic Self-Governance*, 30 LOY. L.A. L. REV. 1497, 1507 (1997) (identifying roots of contemporary Supreme Court First Amendment jurisprudence in the



Outside of the school setting, the First Amendment is understood to make any government regulation or punishment directed at the content of speech presumptively unconstitutional with the exception of a few narrow categories recognized as constitutionally unprotected.<sup>28</sup> These categories include: (1) “fighting words” so incendiary that they would be expected to provoke an immediate violent response from the listener;<sup>29</sup> (2) speech that incites others into imminent lawless action;<sup>30</sup> (3) obscenity, which is understood to encompass only material appealing to a prurient interest in sex that offends community standards of decency and is devoid of redeeming social or artistic merit;<sup>31</sup> and (4) “true threats.”<sup>32</sup> Speech is a “true threat” and consequently unprotected under the First Amendment if an “ordinary reasonable recipient who is familiar with [the context] . . . would interpret” it as a serious expression of an intent to cause a present or future harm.<sup>33</sup> Defamatory speech exists in something of a gray zone, as it is accepted that courts may enforce civil remedies in favor of a party who is defamed, but (unlike the other categories of unprotected speech) it is increasingly recognized that defamation may not be criminally punished.<sup>34</sup> The Supreme Court has resisted excluding additional categories of speech from the ambit of the First Amendment, even where the speech is of low societal value, including graphic depictions of animal cruelty,<sup>35</sup> anti-gay hate speech,<sup>36</sup> and false claims of military heroism.<sup>37</sup>

Even if otherwise justified by a sufficient government interest, a regulation on speech may be struck down if it is unduly broad or vague. While related, the doctrines of vagueness and overbreadth are analytically distinct. A statute will be unconstitutionally broad if it proscribes substantially more speech than is necessary

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philosophy of Alexander Meiklejohn, which leads to the proposition that “[s]peech about ‘matters of public interest’ deserves the most protection because it fosters wise and informed decision making”).

<sup>28</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

<sup>29</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

<sup>30</sup> *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>31</sup> *Miller v. California*, 413 U.S. 15 (1973).

<sup>32</sup> *Virginia v. Black*, 538 U.S. 343, 344 (2003) (quoting *Watts v. United States*, 394 U.S. 705, 708 (1969)).

<sup>33</sup> *United States v. Armel*, 585 F.3d 182, 185 (4th Cir. 2009) (quoting *United States v. Roberts*, 915 F.2d 889, 891 (4th Cir. 1990)).

<sup>34</sup> See *Tollett v. United States*, 485 F.2d 1087, 1094 (8th Cir. 1973) (“[A] strong argument may be made that there remains little constitutional vitality to criminal libel laws.”).

<sup>35</sup> *United States v. Stevens*, 559 U.S. 460 (2010).

<sup>36</sup> *Snyder v. Phelps*, 562 U.S. 443, 458 (2011).

<sup>37</sup> *United States v. Alvarez*, 567 U.S. 709, 729–30 (2012).

to accomplish the government's objective.<sup>38</sup> Because guarding against unduly broad prohibitions is considered so important, a speaker is permitted to argue that a statute impermissibly criminalizes protected speech even if his own speech is unprotected and could lawfully be punished under a more narrowly drawn statute.<sup>39</sup>

A statute will be deemed unconstitutionally vague if the wording is so open-ended that it fails to provide speakers with fair notice of the scope of what is prohibited: "The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."<sup>40</sup> Statutes that inhibit the exercise of constitutionally protected free-speech rights are subject to an especially stringent review for vague wording.<sup>41</sup> Vagueness is anathema to First Amendment principles because a vague statute invites government enforcers to interject their subjective views into which speech or speaker is worthy of being heard.<sup>42</sup> Similarly, a statute restraining speech that leaves unbridled discretion in a government decision maker to pick and choose which speech may be heard is constitutionally suspect because it invites selective, viewpoint-discriminatory enforcement.<sup>43</sup> Vagueness and overbreadth challenges are concerned not just with the effect of government sanctions on any particular speaker, but also on the "chilling effect" that will inhibit others from even attempting to speak up, fearful that they may step over an indistinct boundary line.<sup>44</sup>

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<sup>38</sup> See *United States v. Williams*, 553 U.S. 285, 292 (2008) (under the overbreadth doctrine, "[a] statute is facially invalid if it prohibits a substantial amount of protected speech"); *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973) (explaining that a statute will be found facially overbroad in violation of the First Amendment if the impermissible applications of the law are substantial when "judged in relation to the statute's plainly legitimate sweep").

<sup>39</sup> *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965).

<sup>40</sup> *United States v. Harriss*, 347 U.S. 612, 617 (1954). At times, courts have located protection against vague speech-prohibitive statutes in the Due Process Clause as opposed to the First Amendment, but the analysis and the result are the same. See, e.g., *Smith v. Goguen*, 415 U.S. 566, 568, 576 (1974) (finding that Massachusetts statute allowing for prosecution of anyone who "publicly mutilates, tramples upon, defaces or treats contemptuously" the American flag was unconstitutionally vague in violation of due process).

<sup>41</sup> *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982).

<sup>42</sup> See *NAACP v. Button*, 371 U.S. 415, 433 (1963) ("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."); see also *Goguen*, 415 U.S. at 575–76 (invalidating statute that criminalized "contemptuous" treatment of American flag: "Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections. . . . Where inherently vague statutory language permits such selective law enforcement, there is a denial of due process.").

<sup>43</sup> *Ashton v. Kentucky*, 384 U.S. 195, 200–01 (1966); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90–92 (1965).

<sup>44</sup> *Button*, 371 U.S. at 433 ("The threat of sanctions may deter their exercise almost as

The contemporary societal push to criminalize young people's social-media misbehavior has given the doctrines of vagueness and overbreadth an illustrative workout.<sup>45</sup> In New York, an appeals court struck down a municipal code making it a misdemeanor for a minor to use electronic means of communication to “annoy” or “humiliate” any person, finding its breadth “alarming” because it would criminalize vast swaths of constitutionally protected speech in an effort to deter a much narrower subset of bullying speech.<sup>46</sup> The Supreme Court of North Carolina invalidated an online bullying statute on overbreadth grounds, finding it inadequately tailored to the intended objective because its criminal prohibitions extended to speech disclosing “personal” or “private” matters, requiring no showing of harm beyond the potential to cause annoyance.<sup>47</sup> As these cases illustrate, criminalizing speech is understood to be a dangerously strong medicine, to be applied—if at all—to only a well-defined subset of expressive conduct that portends serious harm.

A significant aspect of First Amendment jurisprudence is the notion of the “heckler’s veto”—the doctrine that speakers may not be silenced or penalized on the grounds that people who find their speech disagreeable will cause a disturbance.<sup>48</sup> In other words, while a speaker can be held responsible for the violence he incites his audience to join him in committing, he may not be charged with provoking the violence of critics attempting to silence him. If the government foresees that a speaker’s message will provoke a violent reaction, the legally correct response is to protect the speaker from the hecklers, not to shut down the speech.<sup>49</sup>

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potently as the actual application of sanctions.”); *see also Dombrowski*, 380 U.S. at 487 (“The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure.”).

<sup>45</sup> For a critique of the rush to criminalize youthful misjudgments because of the perceived power of online speech, *see* Ross, *supra* note 8.

<sup>46</sup> *See* *People v. Marquan M.*, 19 N.E.3d 480, 486 (N.Y. 2014) (finding that “the provision would criminalize a broad spectrum of speech outside the popular understanding of cyberbullying, including, for example: an email disclosing private information about a corporation or a telephone conversation meant to annoy an adult”).

<sup>47</sup> *See* *State v. Bishop*, 787 S.E.2d 814, 821 (N.C. 2016) (finding statute overbroad because it “prohibits a wide range of online speech—whether on subjects of merely puerile interest or on matters of public importance—and all with no requirement that anyone suffer any actual injury”).

<sup>48</sup> *See* *Bible Believers v. Wayne Cty.*, 805 F.3d 228, 234 (6th Cir. 2015) (explaining that the heckler’s veto “occurs when police silence a speaker to appease the crowd and stave off a potentially violent altercation”).

<sup>49</sup> *See* Frank D. LoMonte & Clay Calvert, *The Open Mic, Unplugged: Challenges to Viewpoint-Based Constraints on Public-Comment Periods*, 69 CASE W. RES. L. REV. 19, 39 (2018) (“Where the government’s rationale is that a speaker’s opprobrious remarks might incite others to misbehave, the constitutionally sounder response is to enforce rules against the audience’s

The government can regulate the time, place, and manner of speech, so long as the regulation is reasonable in scope and is neutral—both on its face and as applied—to the content of the speaker’s message.<sup>50</sup> For example, the government can enforce ordinances to manage crowds and noise,<sup>51</sup> but cannot prohibit expressive conduct that is directed only to certain speakers or certain messages (such as prosecuting people who burn the American flag to express dissent with U.S. government policies, but not people engaging in the same conduct to dispose of worn-out flags).<sup>52</sup> A regulation is regarded as a constitutionally permissible time, place, and manner restriction if it primarily regulates the noncommunicative aspects of expressive conduct and imposes only an “incidental” burden on speech.<sup>53</sup>

The government gets a somewhat freer hand to regulate when a speaker seeks to use publicly owned property as the platform to convey a message. A speaker’s First Amendment right of access to government property to convey a message will vary with the character of the property, and the extent to which the speaker’s expressive use of the property will interfere with the property’s intended purpose and function.<sup>54</sup> This “public-forum doctrine” recognizes that not all government property is equally suitable for the public’s communicative use; there is a decisive difference between the sidewalk outside the U.S. Supreme Court and the chief justice’s chambers, even though both are government-owned.<sup>55</sup> Accordingly, the First Amendment right to occupy and use public property for expression operates on a sliding scale, so that the speaker’s expressive access is virtually unrestricted in a “traditional public forum” (like the Supreme Court sidewalk), while the government is free to enforce any reasonable and viewpoint-neutral restriction on “non-forum” property incompatible with public expressive use (like the chief justice’s

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nonspeech misbehavior.”).

<sup>50</sup> See *United States v. O’Brien*, 391 U.S. 367, 385 (1968) (rejecting constitutional challenge to statute outlawing burning of Selective Service draft cards, because the statute was found to be justified by the government’s interest in accurate record keeping and not directed solely at the destruction of draft cards for expressive purposes); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 380–91 (1992) (holding that local ordinance that selectively banned cross burning only when done with the knowledge that the conduct would “arouse anger, alarm or resentment in others on the basis of race, color, creed, religion or gender” violated the First Amendment).

<sup>51</sup> See *Ward v. Rock Against Racism*, 491 U.S. 781, 794–801 (1989) (finding that ordinance restricting volume of performances at New York’s Central Park bandshell was facially constitutional because it applied without regard to content).

<sup>52</sup> *Texas v. Johnson*, 491 U.S. 397, 411 (1989).

<sup>53</sup> *Wall Distrib., Inc. v. City of Newport News*, 782 F.2d 1165, 1168 (4th Cir. 1986).

<sup>54</sup> See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45–46 (1983).

<sup>55</sup> See *United States v. Grace*, 461 U.S. 171, 179 (1983) (holding that protests outside the Supreme Court building are constitutionally protected speech, because sidewalks are among those areas of public property that “traditionally have been held open to the public for expressive activities and are clearly within those areas of public property that may be considered, generally without further inquiry, to be public forum property”).

chambers).<sup>56</sup> A school building is generally recognized as a non-public forum, because schools are not traditionally held open for widespread expressive use by the general public.<sup>57</sup> Consequently, a viewpoint-neutral restriction on speech—for instance, prohibiting members of the public from entering the building during class time to hand out leaflets, regardless of what the leaflets say—would pass constitutional muster if motivated by a non-speech concern, such as the safety risk of allowing strangers to wander the hallways.

The existence of the “public-forum doctrine” raises tricky analytical questions when assessing the constitutionality of statutes that criminalize disruptive school speech. A statute that exposes a speaker to prosecution for speech disruptive to school functions could be viewed as a content-based criminal prohibition on expressive conduct, triggering strict scrutiny and a strong presumption of unconstitutionality. Alternatively, the statute might be viewed as a place-based restriction on the communicative use of school premises, so that a First Amendment challenge would be reviewed under the more deferential forum analysis. Or, as we shall see, a third possibility exists: The statutes could be reviewed under the unique analytical framework that applies to content-based punishment of student speech in the school setting, derived from the Supreme Court’s landmark *Tinker* case.<sup>58</sup>

### *B. Student Speech Rights and the “Substantial Disruption” Threshold*

Although public schools are government agencies subject to constitutional constraints, First Amendment rights diminish somewhat when the speaker is a student and the regulator is a school.<sup>59</sup> The diminution is often justified by the need to maintain order during instructional time and to protect impressionable young listeners who are not free to leave.<sup>60</sup>

Contemporary student-speech jurisprudence originates with the foundational *Tinker* case, which established the First Amendment rights of students to engage in

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<sup>56</sup> See James M. Henderson, Sr., *The Public Forum Doctrine in Schools*, 69 ST. JOHN’S L. REV. 529, 533–34 (1995) (explaining that the level of scrutiny applied to speech restrictions affecting streets and parks will be more rigorous than that applied to restrictions in jailhouses, military bases, and other public premises “that are not associated with freedom of speech”).

<sup>57</sup> See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988) (stating that “public schools do not possess all of the attributes of streets, parks, and other traditional public forums that time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions”); see also *Student Coalition for Peace v. Lower Merion Sch.*, 776 F.2d 431 (3d Cir. 1985) (school athletic field was not a public forum to which anti-war demonstrators could claim a right of access).

<sup>58</sup> *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 512–13 (1969).

<sup>59</sup> See *id.*

<sup>60</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271–72 (1988).

peaceful protest activity even while within, as Justice Abe Fortas's majority opinion memorably declared, "the schoolhouse gate."<sup>61</sup> The justices found that a school district acted unconstitutionally in suspending three students for violating a rule against armbands, which the students wore as a silent show of support for a cease-fire in Vietnam and in mourning for those killed in war.<sup>62</sup> The Court forged an enduring standard that has anchored school-speech jurisprudence for more than half a century: A school may not enforce a content-based restriction on student speech "without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline."<sup>63</sup> Notably, in the *Tinker* case itself, there was evidence that students engaged in sharp exchanges over the Vietnam war,<sup>64</sup> yet in the Court's view, merely provoking heated discussion did not constitute the level of disruption that causes student speech to lose constitutional protection.<sup>65</sup> While the Court has since retreated from *Tinker's* seeming absolutism and recognized diminished constitutional rights in certain contexts—when a student uses a school-provided curricular medium for speech,<sup>66</sup> or when a student encourages illegal drug use at a school-sponsored event<sup>67</sup>—*Tinker* remains the default standard that governs a public school's authority to prevent or punish speech.<sup>68</sup>

Because it relaxes the government's burden as compared with the off-campus strict scrutiny standard, *Tinker* represents a halfway-measure of First Amendment protection, and the Court justified this compromise by reference to "the special

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<sup>61</sup> *Tinker*, 393 U.S. at 506.

<sup>62</sup> See Mary Beth and John Tinker, *Tinker Turns 50: Students are in "Mighty Times" Again*, DES MOINES REG. (Dec. 12, 2015), <https://www.desmoinesregister.com/story/opinion/columnists/iowa-view/2015/12/12/tinker-turns-50-students-mighty-times-again/77115952/> (describing historical backdrop to December 1965 protests and relating it to modern-day student activism over climate change and other contemporary issues).

<sup>63</sup> *Tinker*, 393 U.S. at 511.

<sup>64</sup> "On the day John Tinker wore his armband to school, a group of students surrounded him in the North High School cafeteria at lunchtime. They harassed him, saying the armband was unpatriotic." Daniel P. Finney, *Kaepernick Anthem Protest Echoes Tinker Case 51 Years Ago*, DES MOINES REG. (Oct. 7, 2016), <https://www.desmoinesregister.com/story/news/local/columnists/danielfinney/2016/10/07/kaepernick-anthem-protest-echoes-tinker-case-51-years-ago/91579234/>.

<sup>65</sup> *Tinker*, 393 U.S. at 508–13.

<sup>66</sup> See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (recognizing a diminished level of constitutional protection when students speak in the pages of a school-funded newspaper that bears the school's imprint and might be mistaken for a school-approved message).

<sup>67</sup> See *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (finding that school administrator had authority to discipline student for pro-drug banner displayed at school-organized outing).

<sup>68</sup> See Amanda Harmon Cooley, *Controlling Students and Teachers: The Increasing Constriction of Constitutional Rights in Public Education*, 66 BAYLOR L. REV. 235, 247 (2014) (describing *Tinker* as "the essential framework for the analysis of student First Amendment claims").

characteristics of the school environment.”<sup>69</sup> One of the compromises embodied in the *Tinker* standard is that, while a government agency normally is forbidden from enforcing a “prior restraint” that prevents speech from being heard,<sup>70</sup> a school is not subject to the same constraints and may act to interdict speech based solely on a reasonable belief that substantial disruption is likely.<sup>71</sup>

In the half-century since *Tinker*, consensus has been elusive as to what qualifies as a “material” or “substantial” level of disruption justifying punishment for speech.<sup>72</sup> Some general principles, however, seem widely agreed-upon. Speech does not lose its protection simply because it addresses a controversial political, religious, or social topic—even if the speaker uses vivid language or imagery.<sup>73</sup> The Supreme Court reinforced this point in its most recent student-speech case, *Morse v. Frederick*, rejecting a school district’s position that student speech loses protection if it is “offensive” and instead deciding the case on narrower, fact-specific grounds.<sup>74</sup> But speech becomes punishable if it portends violence (even if the “threat” is not especially realistic or believable), or threatens to escalate already-existing safety problems at the school, such as racial tension or gang activity.<sup>75</sup>

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<sup>69</sup> *Tinker*, 393 U.S. at 506.

<sup>70</sup> See *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (“Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”).

<sup>71</sup> See *West v. Derby Unified Sch. Dist.*, 23 F. Supp. 2d 1223, 1233 (D. Kan. 1998), *aff’d*, 206 F.3d 1358 (10th Cir. 2000) (finding no First Amendment violation when a school punished a student for violating a rule against drawing Confederate flags, even though there was no evidence anyone reacted disruptively to his drawing: “The district had the power to act to prevent problems before they occurred; it was not limited to prohibiting and punishing conduct only after it caused a disturbance.”).

<sup>72</sup> See Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What’s Left of Tinker?*, 48 *DRAKE L. REV.* 527, 529–30 (2000) (commenting that “lower federal courts have not followed a consistent pattern” in applying *Tinker*, although schools generally have prevailed with the benefit of great judicial deference to their disciplinary decisions).

<sup>73</sup> *Holloman v. Harland*, 370 F.3d 1252, 1294–95 (11th Cir. 2004) (student’s silent protest of raising his fist during class recitation of Pledge of Allegiance was protected speech, even though other students took offense); *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 531 (9th Cir. 1992) (students had First Amendment right to wear “scab” buttons to school in support of striking teachers and in opposition to district’s decision to hire replacements); see, e.g., *Guiles v. Marineau*, 461 F.3d 320, 322–30 (2d Cir. 2006) (First Amendment protected student’s right to wear t-shirt lampooning President George W. Bush as a draft-dodging “chicken hawk” and cocaine user).

<sup>74</sup> See *Morse v. Frederick*, 551 U.S. 393, 409 (2007) (“After all, much political and religious speech might be perceived as offensive to some.”).

<sup>75</sup> See *Wisniewski v. Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 39–40 (2d Cir. 2007) (school did not violate First Amendment in disciplining student for using cartoonish Instant Messaging icon depicting his math teacher being shot in the head); see also *Dariano v. Morgan Hill Unified*

As with the First Amendment, other constitutional rights diminish in the school setting in deference to the judgment of school authorities. The Fourth Amendment still prohibits unreasonable seizures and searches on school grounds during the school day, but—unlike in the out-of-school world—police need not have “probable cause” to justify a search.<sup>76</sup> A lower standard of proof, “reasonable suspicion,” applies when school employees search students on school grounds.<sup>77</sup> Short of a full-on strip search for non-dangerous items,<sup>78</sup> very little has been deemed an “unreasonable” intrusion into students’ Fourth Amendment interests.<sup>79</sup> Additionally, school administrators may question students about suspected wrongdoing without the Fifth Amendment formalities recognized by the Supreme Court in *Miranda*,<sup>80</sup> even if the information ends up being passed to law enforcement authorities.<sup>81</sup> Because federal courts have signaled unwillingness to second guess school authorities’ decisions to search, detain, and interrogate students, young people are uniquely vulnerable to arrest in the school setting for behavior that would pass unremarked in the outside world.

### III. “SPEECH CRIMES” AND THE FIRST AMENDMENT

Laws criminalizing speech are normally reviewed with deep skepticism, and are considered unconstitutional unless they satisfy exacting scrutiny.<sup>82</sup> Time after time, the Supreme Court has invalidated convictions under imprecisely drawn statutes that run the risk of inhibiting or penalizing constitutionally protected speech. In *Cantwell v. Connecticut*, the Court threw out the conviction of a Jehovah’s Witness street preacher under a statute outlawing “breach of the peace,” finding that the

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Sch. Dist., 767 F.3d 764, 777 (9th Cir. 2014) (school did not violate First Amendment by banning American flag apparel on day devoted to Latin American pride, where evidence showed that Latino students had been taunted into near-violence during past observances of the event).

<sup>76</sup> *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985).

<sup>77</sup> *Id.* at 346.

<sup>78</sup> *Safford Unified Sch. Dist. v. Redding*, 557 U.S. 364, 368 (2009).

<sup>79</sup> *See, e.g., Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie v. Earls*, 536 U.S. 822, 835–38 (2002) (ruling that schools may force students to submit to drug tests as a prerequisite to participating in any extracurricular activity, because students have diminished privacy interests in the school setting, and urine tests are a reasonable response to unlawful and physically dangerous drug abuse).

<sup>80</sup> *Miranda v. Arizona*, 384 U.S. 436, 478–79 (1966).

<sup>81</sup> *See* Kerrin C. Wolf, *Assessing Students’ Civil Rights Claims Against School Resource Officers*, 38 PACE L. REV. 215, 233 (2018) (concluding that consensus of courts is that school administrators need not provide students with *Miranda* warnings against self-incrimination “even when the administrator plans to turn evidence gathered during the questioning over to the police”) [hereinafter Wolf, *Assessing*].

<sup>82</sup> *See* *United States v. Alvarez*, 567 U.S. 709, 715 (2012) (applying “exacting scrutiny” to federal statute that criminalized making false claims of having won military decorations).



speaker's conduct—stopping people on the street to ask for donations and play a phonograph record that criticized the Catholic church—fell short of what could constitutionally be criminalized.<sup>83</sup> Then in *Terminiello v. Chicago*, the Court overturned the conviction of a speaker who delivered an incendiary speech to a Christian veterans' rally, finding that the lower court erred in ruling that speech could be grounds for arrest and prosecution if it “stirred people to anger, invited public dispute, or brought about a condition of unrest.”<sup>84</sup> In a string of 1960s-era cases, the Court invalidated criminal cases brought against civil-rights protesters on the grounds of “breach of the peace” or “disturbing the peace,” finding that the First Amendment protects the right to encourage others to engage in sit-ins and other acts of nonviolent civil disobedience.<sup>85</sup>

When a statute makes it a crime to speak uncivilly to a government employee, such as a school administrator, all of the red flags of unconstitutionality are flying: The statute criminalizes speech based on content, and it inhibits expressing dissent on issues of public concern. The Supreme Court has repeatedly struck down statutes criminalizing unwelcome speech directed toward government employees.

In *City of Houston v. Hill*, the Court invalidated a municipal ordinance making it a crime to “assault, strike or in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty, or any person summoned to aid in making an arrest.”<sup>86</sup> The Court found the ordinance to be facially overbroad, because it extended beyond assaultive conduct and also swept in “verbal interruptions of police officers.”<sup>87</sup> As Justice Brennan wrote for the Court: “The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.”<sup>88</sup>

The *Houston* case built on the Court's prior rulings striking down similarly broad prohibitions in *Gooding v. Wilson*, which involved a Georgia statute criminalizing “opprobrious words or abusive language, tending to cause a breach of the peace,”<sup>89</sup> and *Lewis v. New Orleans*, where a statute made it a crime “wantonly

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<sup>83</sup> See *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940) (“We find in the instant case no assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, no personal abuse.”).

<sup>84</sup> *Terminiello v. Chicago*, 337 U.S. 1, 5 (1949).

<sup>85</sup> *Cox v. Louisiana*, 379 U.S. 559, 572–74 (1965); see *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Fields v. South Carolina*, 375 U.S. 44 (1963) (per curiam opinion following *Edwards*).

<sup>86</sup> *City of Houston v. Hill*, 482 U.S. 451, 455 (1987).

<sup>87</sup> *Id.* at 461.

<sup>88</sup> *Id.* at 462–63.

<sup>89</sup> *Gooding v. Wilson*, 405 U.S. 518, 519 (1972).

to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty.”<sup>90</sup> In each instance, the Court found it decisive that the statute broadly criminalized pure speech without limiting itself to the narrow categories of constitutionally unprotected speech, such as “fighting words” as defined in *Chaplinsky v. New Hampshire*.<sup>91</sup>

While avoiding violence or panic is recognized as a sufficiently compelling justification to criminalize narrow categories of speech, such as true threats, speech-restrictive statutes regularly flunk First Amendment scrutiny when the harm the government seeks to avoid is just annoyance, offense, or a reputational slight.<sup>92</sup> Thus, the Minnesota Supreme Court vacated a juvenile court’s delinquency finding in the case of a 14-year-old girl charged with disorderly conduct for shouting “fuck you, pigs!” at two police officers who had just finished questioning her.<sup>93</sup> The court found that the state’s disorderly conduct statute, which penalized “offensive, obscene, or abusive language,” was unconstitutionally overbroad unless understood to extend only to unprotected “fighting words,” and that fleeting name-calling directed at police officers did not cross that threshold.<sup>94</sup> Adding a finger-wag of editorial commentary, the justices concluded: “The arrest of this child under these circumstances appears to have been an overreaction by the police. Rather than exposing her to the ongoing stigma of criminality, a preferable approach would have been to march her home to her parents for parental discipline.”<sup>95</sup>

#### IV. “DISRUPTING SCHOOL” LAWS: A CONSTITUTIONAL CLOUD

##### A. *Facial Challenges to School-Disruption Laws Produce Unhelpful Guidance*

When a statute imposes penalties for the content of speech, speakers may challenge the constitutionality of the statute “as applied” to their particular case (arguing that the First Amendment does not permit punishing their speech), or may challenge the statute as “facially” unconstitutional (apart from any particular speaker’s choice of words).<sup>96</sup> On the handful of occasions that plaintiffs have facially challenged school-disruption statutes, the challenges have been unsuccessful, though it is not always clear whether the courts are evaluating the statutes under the diminished “in-school” First Amendment or under the “real-world” First

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<sup>90</sup> *Lewis v. New Orleans*, 415 U.S. 130, 132 (1974).

<sup>91</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

<sup>92</sup> *Matter of Welfare of S.L.J.*, 263 N.W.2d 412, 417–18 (Minn. 1978).

<sup>93</sup> *Id.* at 415.

<sup>94</sup> *Id.* at 419.

<sup>95</sup> *Id.* at 420, n.7.

<sup>96</sup> Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1321 (2000).

Amendment that applies everywhere else.

In Florida, a closely divided state Supreme Court rejected an overbreadth challenge to a statute providing that anyone who “willfully interrupts or disturbs” an educational or religious institution is guilty of a misdemeanor.<sup>97</sup> In the case, brought by a junior-high student who was adjudicated delinquent for running through the halls as part of a boisterous group and then cursing the administrator who confronted him, a 4-3 majority found that the statute could not be more specifically drafted, because authorities needed flexibility to make situational judgment calls.<sup>98</sup> The court neither cited *Tinker* nor applied its reasoning. The decision drew two vigorous dissenting opinions, with one justice writing: “The majority offers no objective standard by which the term ‘disturb’ may be measured, but leaves it to the idiosyncrasies of the persons claiming to have been ‘disturbed.’ Under the majority’s standard it is doubtful that any normal school child in this state is innocent of this crime.”<sup>99</sup>

A handful of cases have rebuffed constitutional challenges to school-disruption laws, citing a passage in the Supreme Court’s *Grayned v. City of Rockford*, in which the Court rejected a First Amendment challenge to a civil-rights protester’s misdemeanor conviction.<sup>100</sup> In *Grayned*, police arrested demonstrators outside an Illinois high school and charged them with disorderly conduct for violating a municipal noise ordinance, as well as a proscription against certain picketing activity within 150 feet of a school building during school hours.<sup>101</sup> The Supreme Court ultimately ruled that the picketing ordinance was invalid under the Equal Protection Clause, because it selectively singled out non-labor related disputes for criminalization.<sup>102</sup> However, the Court rejected a First Amendment vagueness challenge to the noise ordinance.<sup>103</sup> The Court applied a limiting construction that

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<sup>97</sup> S.H.B. v. State, 355 So. 2d 1176, 1177 (Fla. 1977).

<sup>98</sup> *Id.* at 1178.

<sup>99</sup> *Id.* at 1179 (England, J., dissenting).

<sup>100</sup> *Grayned v. City of Rockford*, 408 U.S. 104, 117 (1972). At least one state court has cited *Grayned* as a basis for rejecting a vagueness challenge to a criminal school-disturbance statute. See *In re D.H.*, 663 S.E.2d 139, 140 n.4 (Ga. 2008) (citing *Grayned* in finding that “disrupt” and “interfere” were not impermissibly vague terms in criminal statute).

<sup>101</sup> *Grayned*, 408 U.S. at 106–07.

<sup>102</sup> *Id.* at 107. The Court relied on *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 102 (1972), decided the same day as *Grayned* and also written by Justice Thurgood Marshall. In *Mosley*, the Court invalidated an essentially identical Chicago ordinance prohibiting non-labor-related picketing outside schools, finding that the distinction did not advance a substantial governmental interest because it was based on the protesters’ message rather than the disruptive potential of the protest. *Mosley*, 408 U.S. at 102.

<sup>103</sup> *Grayned*, 408 U.S. at 109.

interpreted the ordinance to apply only when noisy protest activity portends “actual or imminent interference with the peace or good order of the school.”<sup>104</sup>

In considering whether the noise ordinance was sufficiently well-tailored to survive First Amendment scrutiny, the Court focused on the nature and character of school property, citing the landmark *Tinker* school-speech case as its “touchstone.”<sup>105</sup> The Court elaborated:

Just as *Tinker* made clear that school property may not be declared off limits for expressive activity by students, we think it clear that the public sidewalk adjacent to school grounds may not be declared off limits for expressive activity by members of the public. But in each case, expressive activity may be prohibited if it “materially disrupts classwork or involves substantial disorder or invasion of the rights of others.”<sup>106</sup>

The South Carolina Supreme Court relied in part on *Grayned* in rejecting a facial overbreadth challenge to the (since revised) statute that would later become the basis for Niya Kenny’s arrest.<sup>107</sup> In the *Amir X.S.* case, the court found no First Amendment infirmity in a statute making it a crime to “wilfully [sic] or unnecessarily . . . interfere with or to disturb in any way” any educational institution or its students or teachers, or to “act in an obnoxious manner thereon.”<sup>108</sup> The court interpreted *Tinker* to apply only to “silent, passive expression,” and not to expression “accompanied by disorder or disturbance of schools,” reading *Tinker*’s “materiality” requirement out of the opinion.<sup>109</sup> Based on that narrow understanding of *Tinker*, and following the Supreme Court’s lead in *Grayned*, the South Carolina court decided that conduct that “disturbs” or “interferes with” school, or that is “obnoxious,” is constitutionally unprotected and can be criminalized—conflating the legal standards for discipline and prosecution.<sup>110</sup>

Similarly, Georgia’s Supreme Court rejected a facial vagueness challenge to a statute making it a crime to “disrupt or interfere with the operation of any public school.”<sup>111</sup> The challenge was brought by a 13-year-old student who was removed from class for loud, boisterous speech of unspecified nature, who continued speaking animatedly when sent to the principal’s office, and wandered off from the

<sup>104</sup> *Id.* at 111–12 (internal quotations omitted).

<sup>105</sup> *Id.* at 117.

<sup>106</sup> *Id.* at 118 (citing *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 513 (1969)).

<sup>107</sup> *In re D.H.*, 663 S.E.2d 139, 140 n.4 (Ga. 2008).

<sup>108</sup> *In re Amir X.S.*, 639 S.E.2d 144, 145 (S.C. 2006) (citing former S.C. CODE ANN. § 16-17-420 (1993)).

<sup>109</sup> *Id.* at 148.

<sup>110</sup> *Id.* The court did not address what would appear to be significant vagueness issues with the statute, in particular the use of “obnoxious,” because the plaintiff was found to lack standing for a vagueness challenge. *Id.* at 150.

<sup>111</sup> *In re D.H.*, 663 S.E.2d at 140 (citing GA. CODE ANN. § 20-2-1181 (2020)).

office several times in defiance of orders to stay put.<sup>112</sup> Citing *Grayned*, the Georgia court held that the operative terms of the statute contain “words of ordinary meaning” giving fair notice of the conduct that is prohibited.<sup>113</sup> The brief opinion did not grapple with the statute’s subjectivity or lack of a substantiality threshold.

Citing *Grayned*, a Florida appellate court found that a statute making it a crime to “disrupt or interfere with” school functions was neither vague nor overbroad.<sup>114</sup> The court upheld a delinquency adjudication against a middle-school student who shouted, waved her arms, and barged into the principal’s office to deliver a “tirade” directed at the police officer who had arrested her brother.<sup>115</sup> Borrowing the *Grayned* court’s use of *Tinker* as a “touchstone,” the Florida court found that the statute infringed no First Amendment freedoms because it penalized disruptive conduct as opposed to pure speech.<sup>116</sup>

### *B. Avoiding the Constitutional Question*

When speakers prosecuted for school speech have challenged their convictions under broadly worded “disruption” statutes, courts in several states have applied a narrowing interpretive gloss that avoids having to confront the dubiously constitutional breadth of the statutes’ literal wording.

A California appeals court turned away a facial First Amendment challenge to a statute making it a misdemeanor to “willfully disturb” a public school, brought by a student who was arrested after threatening to punch a classmate and an assistant principal and repeatedly directing harsh racial slurs toward others.<sup>117</sup> Despite the statute’s broad literal wording, the court held that “willfully disturb” should be understood to mean only “to act violently or in a manner that incites to violence, or to engage in conduct physically incompatible with the peaceful functioning of the campus.”<sup>118</sup> Understood in that way, the statute criminalizes only nonspeech conduct or speech that, under the *Brandenburg* incitement standard, would be unprotected in the out-of-school world. The ruling drew on the California Supreme Court’s decision, a generation earlier, to impose a similar narrowing construction on a disruptive-speech law applying only on college and university campuses.<sup>119</sup> In

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<sup>112</sup> *In re D.H.*, 663 S.E.2d at 139–40.

<sup>113</sup> *Id.* at 140.

<sup>114</sup> *M.C. v. State*, 695 So. 2d 477, 478 (Fla. Dist. Ct. App. 1997).

<sup>115</sup> *Id.* at 479.

<sup>116</sup> *Id.* at 481.

<sup>117</sup> *In re J.C.*, 176 Cal. Rptr. 3d 503, 505, 511 (Cal. Ct. App. 2014) (citing CAL. EDUC. CODE § 32210 (West 1984)).

<sup>118</sup> *In re J.C.*, 176 Cal. Rptr. 3d at 511 (internal quotations omitted).

<sup>119</sup> *Braxton v. Municipal Court*, 514 P.2d 697, 699–700 (Cal. 1973).

that case, the justices determined that it would violate the First Amendment to enforce even a non-criminal prohibition allowing postsecondary institutions to eject speakers whose words “willfully disrupted the orderly operation” of the campus:

[T]he statute, if literally applied, would succumb to constitutional attack both because of First Amendment overbreadth and vagueness. A literal construction of the terms of the statute—“willfully disrupted the orderly operation of [the] campus”—would violate constitutional mandates in that such vague language would include many forms of constitutionally protected expression and risk a chilling of free speech. Obviously the very sound of a voice can “disrupt” the silence, and the content of a speech can “disrupt” the equanimity of an audience.<sup>120</sup>

Courts in Florida and Maryland have taken similar approaches. In Florida, where state law makes it a misdemeanor to knowingly “disrupt or interfere with” school functions or activities,<sup>121</sup> courts have superimposed a requirement of specific intent to produce a disruption and proof that school functions were “materially” disrupted.<sup>122</sup> Maryland’s highest court has read the state’s school-disturbance law to apply only to conduct that “significantly interferes with the orderly activities, administration, or classes at the school,” even though nothing on the face of the statute requires “significant” interference.<sup>123</sup>

### C. *The Kenny Case: Challenging an “Obnoxious Speech” Prohibition*

When prosecutors decided not to charge Niya Kenny for videotaping the brutal police takedown of her classmate, the stage was set for a federal civil-rights lawsuit challenging both Kenny’s arrest and the law under which it was made. The American Civil Liberties Union filed suit in August 2016 on behalf of Kenny and other students who were charged under the state’s “disturbing schools” law, which at the time made it a misdemeanor criminal offense to “interfere with or to disturb in any way or in any place the students or teachers of any school or college” or to “act in an obnoxious manner” on school or college property.<sup>124</sup> The defendants included the heads of 13 law enforcement agencies across South Carolina that had taken part in school arrests. In an unusual development, the outgoing Obama administration’s Justice Department filed a “statement of interest” with the court, supporting the plaintiffs’ contention that overwhelming racial disparity in the

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<sup>120</sup> *Id.* at 700.

<sup>121</sup> FLA. STAT. § 877.13 (2020).

<sup>122</sup> *H.N.B. v. State*, 223 So. 3d 308, 310–11 (Fla. Dist. Ct. App. 2017); *T.T. v. State*, 865 So. 2d 674, 676 (Fla. Dist. Ct. App. 2004).

<sup>123</sup> See *In re Jason W.*, 837 A.2d 168, 175 (Md. 2003) (discussed *infra* at notes 254–58 and accompanying text).

<sup>124</sup> Complaint at 4–6, 28, *Kenny v. Wilson*, 2017 WL 4070961 (D.S.C. 2016) (No. 2:16-cv-2794-CWH).

pursuit of criminal charges for nonviolent “disruption” offenses signaled a significant due process problem.<sup>125</sup>

The defendants sought to dismiss the case on standing grounds, arguing that the plaintiffs were in no position to challenge the statute because they could not establish any likelihood they would be subjected to unlawful arrest in the future, and the district court agreed.<sup>126</sup> But the Fourth Circuit reversed and reinstated the case.<sup>127</sup> The appeals court found that at least three plaintiffs stated an actionable claim for injunctive relief, because the complaint alleged that they were still enrolled in school and inhibited in their willingness to speak for fear of future arrests.<sup>128</sup> The court further found that neither the *Amir* case, nor the *Grayned* case on which it drew, foreclosed the possibility of relief; the statute found to be constitutional in *Grayned* was far less encompassing and open-ended than South Carolina’s school-disturbance law, and the *Amir* decision dealt only with overbreadth and not vagueness.<sup>129</sup>

While the lawsuit was pending, South Carolina lawmakers, spurred by outrage surrounding the *Kenny* case, overhauled the state’s school-disruption statute.<sup>130</sup> The revisions brought the century-old statute, which was intended originally to penalize school trespassers but evolved into a tool for prosecuting almost no one except students, in line with its traditional purpose.<sup>131</sup> As narrowed in 2018, the statute now applies exclusively to non-student outsiders engaged in constitutionally unprotected conduct, including trespassing, loitering, assaults, and threats.<sup>132</sup>

<sup>125</sup> Statement of Interest of the United States at 3–4, *Kenny v. Wilson*, 2017 WL 4070961 (D.S.C. 2016) (No. 2:16-cv-2794-CWH); see Kristen Coble, *Disturbing Schools Law in South Carolina*, 69 S.C. L. REV. 859, 864 (2018) (describing DOJ statement’s “concern about the negative effects of law enforcement and the justice system involvement in the cycle of harsh school discipline, known as the school-to-prison pipeline”).

<sup>126</sup> *Kenny v. Wilson*, 885 F.3d 280, 287 (4th Cir. 2018).

<sup>127</sup> *Id.* at 291.

<sup>128</sup> See *id.* at 289, 291 (“Plaintiffs allege that they can be criminally prosecuted for just about any minor perceived infraction and that they can’t predict the type of conduct that will lead to an arrest.”).

<sup>129</sup> *Id.* at 291.

<sup>130</sup> See Paul Bowers & Maya T. Prabhu, *‘Disturbing Schools’ Law Revision Advances to Senate Floor*, POST & COURIER (Mar. 23, 2017), [https://www.postandcourier.com/news/south-carolinas-disturbing-schools-law-revision-advances-to-senate-floor/article\\_792b7c94-0e58-11e7-8b51-87320b9af5cb.html](https://www.postandcourier.com/news/south-carolinas-disturbing-schools-law-revision-advances-to-senate-floor/article_792b7c94-0e58-11e7-8b51-87320b9af5cb.html) (describing how *Kenny*’s case provided impetus for reform legislation).

<sup>131</sup> See Rivera-Calderón, *supra* note 21, at 9 (describing history of South Carolina statute and recent legislative revisions).

<sup>132</sup> See S.C. CODE ANN. § 16-17-420 (1993) (providing that “[i]t is unlawful for a person who is not a student to wilfully [sic] interfere with, disrupt, or disturb the normal operations of a school or college” by engaging in a range of criminally disruptive behavior).

Because the 2018 amendments cured the constitutional defects identified by the *Kenny* plaintiffs, the defendants moved for a second time to dismiss the case, this time on mootness grounds.<sup>133</sup> But in March 2020, the district court denied the motion, because in addition to attacking the validity of the former statute, the plaintiffs were asking for forward-looking relief, including clearing their criminal and disciplinary histories.<sup>134</sup>

#### *D. Crossing the Line: How States Define What Is Criminally Punishable*

Every state has generalized criminal statutes that might be applied to student speakers in extreme cases, such as laws criminalizing terroristic threats, but 26 states go further with school-specific prohibitions.<sup>135</sup> When statutes explicitly target in-school behavior, they are likely to be enforced disproportionately against students, unless (as in a handful of states) students are exempted. Statutes that are intended to, or can be expected to, result primarily in criminal charges against children are worthy of especially close scrutiny, to ensure that a reasonable school-age person would understand what is and is not a crime.<sup>136</sup>

The language of states' school-disruption statutes varies significantly. Some narrowly criminalize non-expressive conduct by outsiders, while others (like Kentucky's) broadly leave students at risk of prosecution for immaterial disturbances.<sup>137</sup> Lawmakers have made differing policy choices as to which types of people (school insiders or outsiders) are subject to arrest, the behavior that is prohibited, and the standards that must be met for the behavior to qualify as criminal, including the seriousness of the disturbance and the requisite mental state that prosecutors must prove.

One important distinction between different states' statutes is the category of individuals subject to arrest for their behavior. Most of the 26 states' statutes apply to anyone who engages in proscribed behavior, regardless of status as a student or

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<sup>133</sup> *Kenny v. Wilson*, 885 F.3d 280, 284 (4th Cir. 2018).

<sup>134</sup> *Kenny v. Wilson*, No. 2:16-cv-2794-MBS, 2020 WL 1515527, at \*4 (D.S.C. Mar. 30, 2020).

<sup>135</sup> See *infra* notes 141, 143.

<sup>136</sup> See *J.D.B. v. North Carolina*, 564 U.S. 261, 265 (2011) (holding that a child interviewee's age is a relevant factor in assessing whether questioning by authorities is perceived as "custodial" so that *Miranda* constitutional safeguards apply); Christopher Northrop & Kristina Rothley Rozan, *Kids Will Be Kids: Time for a "Reasonable Child" Standard for the Proof of Objective Mens Rea Elements*, 69 ME. L. REV. 109, 118–19 (2017) (using *J.D.B.* decision to argue more broadly for an age-sensitive understanding of "reasonableness" when a criminal offense carries a culpability threshold of negligence).

<sup>137</sup> See Rachel Smith, "Disturbing Schools" Laws: Disturbing Due Process with Unconstitutionally Vague Limits on Student Behavior, 28 J.L. & POL'Y 356, 376 (2019) (observing that, while the scope of school-disturbance laws varies, "most share a striking lack of specificity in terms of what behaviors can be punished and to what extent").



non-student. However, four states—Massachusetts, New Hampshire, South Carolina and Texas—explicitly exclude students from being subject to arrest.<sup>138</sup> And in three states—Arkansas, California and Florida—multiple statutes penalize disruptive behavior at schools, some evidently inapplicable to students and others more ambiguous.<sup>139</sup>

States vary considerably in how narrowly or broadly they define the range of proscribed school conduct. Our analysis concluded that criminal statutes in 16 states are constitutionally questionable under prevailing First Amendment jurisprudence because they criminalize “disrupting,” “disturbing,” or “interfering with” school functions, and/or insulting school employees, without regard to the substantiality or materiality of the disturbance, the bare constitutional minimum even for disciplinary action, let alone arrest.<sup>140</sup> They include: Arkansas, California, Delaware, Florida, Georgia, Idaho, Kentucky, Maryland, Mississippi, Montana, Nevada, New Mexico, North Dakota, Rhode Island, Washington, and West Virginia.<sup>141</sup> However, courts in California, Florida, and Maryland have added a narrowing judicial gloss that blunts the worst of the overbreadth concerns.<sup>142</sup>

Of the 26 states with school-disturbance statutes, about half provide relatively detailed descriptions of the scope of prohibited conduct that would make the statutes relatively less vulnerable to vagueness challenge.<sup>143</sup> While some begin with

<sup>138</sup> MASS. GEN. LAWS ANN. ch. 272, § 40 (West 2018); N.H. REV. STAT. ANN. § 193:11 (1973); S.C. CODE ANN. § 16-17-420 (1993); TEX. EDUC. CODE ANN. § 37.124 (West 2013).

<sup>139</sup> ARK. CODE ANN. § 5-71-226 (2020); ARK. CODE ANN. § 6-21-606 (2020); CAL. EDUC. CODE § 32210 (West 1984); CAL. PENAL CODE § 415.5 (West 2020); FLA. STAT. § 871.01 (2020); FLA. STAT. § 877.13 (2020).

<sup>140</sup> *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 511 (1969).

<sup>141</sup> ARK. CODE ANN. § 6-21-606 (2020); CAL. EDUC. CODE § 32210 (West 1984); DEL. CODE ANN. tit. 14, § 4110 (2020); FLA. STAT. § 871.01 (2020); GA. CODE ANN. § 20-2-1181 (2020); IDAHO CODE § 18-916 (2020); KY. REV. STAT. ANN. § 161.190 (West 2020); MD. CODE ANN., EDUC. § 26-101 (LexisNexis 2020); MASS. GEN. LAWS ANN. ch. 272, § 40 (West 2018); MISS. CODE ANN. § 37-11-23 (2020); MONT. CODE ANN. § 20-1-206 (2019); NEV. REV. STAT. ANN. § 392.910 (2019); N.H. REV. STAT. ANN. § 193:11 (1973); 11 R.I. GEN. LAWS § 11-11-1 (2020); WASH. REV. CODE § 28A.635.030 (2020); W. VA. CODE ANN. § 61-6-14 (LexisNexis 2020).

<sup>142</sup> See *In re J.C.*, 176 Cal. Rptr. 3d. 503, 506 (Cal. Ct. App. 2014); Gupta-Kagan, *supra* note 1, at 107; Rivera-Calderón, *supra* note 21, at 8.

<sup>143</sup> See ARIZ. REV. STAT. ANN. § 13-2911 (2020); ARK. CODE ANN. § 5-71-226 (2020); ARK. CODE ANN. § 6-21-606 (2020); CAL. PENAL CODE § 415.5 (West 2020); COLO. REV. STAT. § 18-9-109 (2020); FLA. STAT. § 877.13 (2020); 720 ILL. COMP. STAT. 5/21.2-2 (2020); KY. REV. STAT. ANN. § 161.190 (West 2020); ME. REV. STAT. ANN. tit. 20-A, § 6804 (2001); N.M. STAT. ANN. § 30-20-13 (2020); N.D. CENT. CODE § 15.1-06-16 (2019); S.C. CODE ANN. § 16-17-420 (1993); S.D. CODIFIED LAWS § 13-32-6 (2020); TEX. EDUC. CODE ANN. § 37.124 (West 2013); UTAH CODE ANN. § 76-9-106 (LexisNexis 2020).

the familiar “disturbing schools” formulation, these statutes go further in actually enumerating what would constitute a punishable disturbance. New Mexico’s statute, for example, outlines three categories of behavior that can be penalized as disturbing school: denying students and employees lawful use of the facilities,<sup>144</sup> impeding their ability to perform school duties,<sup>145</sup> and refusing to leave school property.<sup>146</sup> Colorado follows a similar formulation.<sup>147</sup> Texas uses a still-narrower definition, defining a criminal disruption as conduct that entices or prevents students from attending school activities.<sup>148</sup> Specificity, however, is no guarantee of constitutionality, as in Maine’s questionably lawful “disturbing schools” statute that includes prohibitions against “rude . . . behavior, signs or gestures” by school visitors.<sup>149</sup>

The statutes also vary in the extent to which proscribed conduct does or does not include speech. Fourteen states refer explicitly to speech or to expressive conduct as disruptive behavior that can constitute a crime.<sup>150</sup> Nine specifically mention categories of speech, such as threats or fighting words, that are recognized as beyond the protection of the First Amendment even outside of school.<sup>151</sup> Four others reference speech in ways directed less to content than to “time, place and manner”—such as prohibitions against loud or noisy demonstrations—which states are relatively free to regulate under the Supreme Court’s *O’Brien* standard.<sup>152</sup>

Several states include speech-related language that protects school employees against verbal abuse, regardless of whether the speech rises to the level of

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<sup>144</sup> N.M. STAT. ANN. § 30-20-13(A) (2020).

<sup>145</sup> *Id.* at § 30-20-13(B).

<sup>146</sup> *Id.* at § 30-20-13(C).

<sup>147</sup> COLO. REV. STAT. § 18-9-109 (2020).

<sup>148</sup> TEX. EDUC. CODE ANN. § 37.124 (West 2013).

<sup>149</sup> ME. REV. STAT. ANN. tit. 20-A, § 6804 (2001). The Maine statute is of lesser concern for students because it applies to a person who “enters” school property and creates a disturbance, suggesting (although no appellate caselaw construing the law is available) that it is meant only for non-student outsiders.

<sup>150</sup> ARIZ. REV. STAT. ANN. § 13-2911 (2020); CAL. PENAL CODE § 415.5 (West 2020); COLO. REV. STAT. § 18-9-109 (2020); FLA. STAT. § 877.13 (2020); IDAHO CODE § 18-916 (2020); 720 ILL. COMP. STAT. 5/21.2-2 (2020); KY. REV. STAT. ANN. § 161.190 (West 2020); ME. REV. STAT. ANN. tit. 20-A, § 6804 (2001); MONT. CODE ANN. § 20-4-303 (2019); N.M. STAT. ANN. § 30-20-13 (2020); N.D. CENT. CODE § 15.1-06-16 (2019); S.C. CODE ANN. § 16-17-420 (1993); S.D. CODIFIED LAWS § 13-32-6 (2020); TEX. EDUC. CODE ANN. § 37.124 (West 2013).

<sup>151</sup> ARIZ. REV. STAT. ANN. § 13-2911 (2020); CAL. PENAL CODE § 415.5 (West 2020); COLO. REV. STAT. § 18-9-109 (2020); 720 ILL. COMP. STAT. 5/21.2-2 (2020); ME. REV. STAT. ANN. tit. 20-A, § 6804 (2001); N.M. STAT. ANN. § 30-20-13 (2020); N.D. CENT. CODE § 15.1-06-16 (2019); S.C. CODE ANN. § 16-17-420 (1993); S.D. CODIFIED LAWS § 13-32-6 (2020).

<sup>152</sup> CAL. PENAL CODE § 415.5 (West 2020); ME. REV. STAT. ANN. tit. 20-A, § 6804 (2001); S.C. CODE ANN. § 16-17-420 (1993); TEX. EDUC. CODE ANN. § 37.124 (West 2013).

substantially disruptive. Kentucky's statute prohibits disruptive speech that is directed at teachers or school employees.<sup>153</sup> Maine's statute prohibits loud speaking that interrupts or disturbs teachers or students.<sup>154</sup> North Dakota's statute prohibits rebuking, insulting, or threatening teachers.<sup>155</sup> Montana makes it a misdemeanor to insult or abuse a teacher on school grounds,<sup>156</sup> while in Idaho, it is a crime to do so "in the presence and hearing of a pupil."<sup>157</sup> None of these states include any *Tinker*-level threshold analysis with regard to the substantiality and materiality of the disruption caused by the speaker. In fact, only one of the states with statutory language referencing speech includes a *Tinker* threshold, specifically Arizona.<sup>158</sup> Of all of the states with school-disruption statutes, only Arizona and Utah (where the statute is quite narrow and appears to apply only to non-student outsiders) use formulations resembling a *Tinker* threshold as to the level of disruption required to subject an individual to prosecution.<sup>159</sup>

Another distinction exists between the different statutes with regard to the mental state that must be proven to establish guilt. When a criminal statute proscribes speech, it will be invalid if the prosecution is not required to prove some level of culpable mental state, although the Supreme Court has left open what quantum of proof will suffice.<sup>160</sup> Fifteen of the states have school-disruption statutes that use a willfulness standard.<sup>161</sup> Willfulness has not been universally defined and

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<sup>153</sup> KY. REV. STAT. ANN. § 161.190 (West 2020).

<sup>154</sup> ME. REV. STAT. ANN. tit. 20-A, § 6804 (2001).

<sup>155</sup> N.D. CENT. CODE § 15.1-06-16 (2019).

<sup>156</sup> MONT. CODE ANN. § 20-4-303 (2019).

<sup>157</sup> IDAHO CODE § 18-916 (2020).

<sup>158</sup> ARIZ. REV. STAT. ANN. § 13-2911 (2020); *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 511 (1969).

<sup>159</sup> ARIZ. REV. STAT. ANN. § 13-2911 (2020); UTAH CODE ANN. § 76-9-106 (LexisNexis 2020).

<sup>160</sup> See *Elonis v. United States*, 135 S. Ct. 2001, 2012 (2015) (holding that a culpable mental state of something greater than negligence must apply to each requisite element of a conviction under the federal threat-speech statute, but declining to decide whether recklessness would be sufficient). For an application of the *Elonis* standard in the school setting, see *People v. Khan*, 127 N.E.3d 592, 599–600 (Ill. App. Ct. 2018), in which the court addressed the constitutional question that the Supreme Court failed to resolve in *Elonis*, holding that the First Amendment requires proof of knowledge as to all essential elements of a disorderly conduct charge (in that case, a student's Facebook threat to commit a school shooting).

<sup>161</sup> CAL. EDUC. CODE § 32210 (West 1984); COLO. REV. STAT. § 18-9-109 (2020); FLA. STAT. § 871.01 (2020); ME. REV. STAT. ANN. tit. 20-A, § 6804 (2001); MD. CODE ANN., EDUC. § 26-101 (LexisNexis 2020); MASS. GEN. LAWS ANN. ch. 272, § 40 (West 2018); MISS. CODE ANN. § 37-11-23 (2020); MONT. CODE ANN. § 20-1-206 (2019); N.H. REV. STAT. ANN. § 193:11 (1973); N.M. STAT. ANN. § 30-20-13 (2020); N.D. CENT. CODE § 15.1-06-16 (2019);

can vary depending on the context in which it is used, but in the context of criminal law, it generally means that the individual acted deliberately to avoid confirming that their conduct was prohibited, rising almost to the level of knowledge.<sup>162</sup> Seven states have statutes that use standards other than willfulness, including intent in two states;<sup>163</sup> knowledge in two states;<sup>164</sup> recklessness in two states;<sup>165</sup> and “malice” in one state.<sup>166</sup> Kentucky’s unique formulation—which requires proof that the defendant “knows or should know” of the disruptive nature of the charged conduct<sup>167</sup>—appears to be the lowest threshold in any state’s statute, equivalent to mere criminal negligence.<sup>168</sup>

Delaware and Utah fail to include any explicit indication of a required mental state for “disturbing” or “disrupting” school.<sup>169</sup> This is less troubling for a statute such as Utah’s, which proscribes conduct that could not be performed without a relatively high level of awareness, such as refusing to leave school property once asked or seizing control of a building.<sup>170</sup> However, the absence of a mental state in Delaware’s statutes is particularly concerning given the statute’s broad descriptions of proscribed conduct as “disturbing public school.”<sup>171</sup> Although there are no reported cases testing the constitutionality of Delaware’s school-disruption statute, the law appears ripe for challenge. The combination of a vaguely worded prohibition and the possibility of conviction without proof of a culpable mental state make the statute a dangerous weapon in the hands of school police.

Three of the 26 states with criminal penalties for school disruption—Arkansas,

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11 R.I. GEN LAWS § 11-11-1 (2020); S.C. CODE ANN. § 16-17-420 (1993); WASH. REV. CODE § 28A.635.030 (2020); W. VA. CODE ANN. § 61-6-14 (LexisNexis 2020).

<sup>162</sup> See 21 AM. JUR. 2D *Criminal Law* § 125 (2020) (“A willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts . . .”).

<sup>163</sup> S.D. CODIFIED LAWS § 13-32-6 (2020); TEX. EDUC. CODE ANN. § 37.124 (West 2013).

<sup>164</sup> FLA. STAT. § 877.13 (2020); 720 ILL. COMP. STAT. 5/21.2-2 (2020).

<sup>165</sup> ARIZ. REV. STAT. ANN. § 13-2911 (2020); GA. CODE ANN. § 20-2-1181 (2020).

<sup>166</sup> NEV. REV. STAT. ANN. § 392.910 (2019); NEV. REV. STAT. ANN. § 394.180 (2019).

<sup>167</sup> KY. REV. STAT. ANN. § 161.190 (West 2020).

<sup>168</sup> See *Bryant v. Commonwealth*, 811 S.E.2d 250, 253 (Va. 2018) (“‘Criminal negligence’ is judged under an objective standard and may be found to exist where the offender either knew or should have known the probable results of her acts.”); *Brasse v. State*, 392 S.W.3d 239, 243 (Tex. Crim. App. 2012) (explaining distinction between criminal recklessness, which requires proof that the defendant disregarded a substantial and unjustifiable risk of harm, versus criminal negligence, which requires proof only that the defendant “should have known or ‘ought to be aware’ of such risk”).

<sup>169</sup> DEL. CODE ANN. tit. 14, § 4110 (2020); UTAH CODE ANN. § 76-9-106 (LexisNexis 2020).

<sup>170</sup> See ARK. CODE ANN. § 5-71-226 (2020); UTAH CODE ANN. § 76-9-106 (LexisNexis 2020).

<sup>171</sup> DEL. CODE ANN. tit. 14, § 4110 (2020).

California, and Florida—have especially unconventional statutory structures that defy easy categorization. Each presents risks of overzealous enforcement or chilled speech:

Arkansas: Two separate Arkansas statutes make it a crime to disrupt school functions.<sup>172</sup> One applies only to groups of two or more people (which can include students) acting jointly to commit certain enumerated disruptive acts, only one of which raises any potential constitutional concern: “Prevent[ing] the meeting of or caus[ing] the disruption of any class.”<sup>173</sup> Because “disruption” is unmodified by any materiality standard,<sup>174</sup> the statute on its face raises the possibility of liability for speech that the Supreme Court found to be protected in *Tinker* (i.e., by its literal terms, the statute would apply to the group of three lead *Tinker* plaintiffs jointly agreeing to wear anti-war armbands to school, knowing that some offended schoolmates may momentarily engage in counter-speech that interrupts class). A separate Arkansas statute is titled “Annoying conduct by trespassers,” and focuses largely on school interlopers, such as making it a misdemeanor to remain on school property after being told to leave.<sup>175</sup> But the statute has two distinct sections and only one specifies that it applies to trespassers; the other section makes it a misdemeanor for “[a]ny person” to “by any boisterous or other conduct, disturb or annoy any public or private school.”<sup>176</sup> Because that portion of the statute conspicuously excludes the qualifier of its companion section—“any person not a student”—the logical implication is that legislators intended for the prohibition to apply to students.<sup>177</sup> Needless to say, a statute that penalizes “annoying” a school by unspecified “other” conduct would flunk any test of vagueness; indeed, the Supreme Court struck down a materially similar Ohio city ordinance as unconstitutionally vague nearly 50 years ago.<sup>178</sup> Neither statute contains a mens rea requirement necessary to support conviction. No publicly available opinion from Arkansas courts clarifies the boundaries of either statute.

California: Two California statutes make it a misdemeanor to disturb school operations, but one explicitly exempts students.<sup>179</sup> The other, located in the

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<sup>172</sup> See ARK. CODE ANN. § 5-71-226 (2020); ARK. CODE ANN. § 6-21-606 (2020).

<sup>173</sup> ARK. CODE ANN. § 5-71-226 (2020).

<sup>174</sup> *Id.*

<sup>175</sup> ARK. CODE ANN. § 6-21-606 (2020).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> See *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (finding ordinance that forbade “annoying” passersby on city sidewalks “unconstitutionally vague because it subjects the exercise of the right of assembly to an unascertainable standard, and unconstitutionally broad because it authorizes the punishment of constitutionally protected conduct”).

<sup>179</sup> See CAL. PENAL CODE § 415.5(f) (West 2020) (“This section shall not apply to any

Education Code, provides that any person who “willfully disturbs” a school is guilty of a misdemeanor and may be fined.<sup>180</sup> “Disturb” is neither defined nor qualified by any requirement of materiality.<sup>181</sup> However, as narrowly construed by a state appellate court, the statute penalizes only nonspeech conduct or constitutionally unprotected expression such as inciting violence.<sup>182</sup>

Florida: Three Florida statutes penalize varying types of disruptive conduct at schools.<sup>183</sup> One applies only to outsiders (people “not subject to the rules of a school”) who disturb or interrupt school activities.<sup>184</sup> Of the remaining two statutes, one makes it a misdemeanor to willfully “interrupt” or “disturb” a school or religious gathering.<sup>185</sup> The other makes it a misdemeanor to knowingly “disrupt or interfere with” a school function, or to “advise, counsel, or instruct” another person to do so.<sup>186</sup> As described *supra*, while Florida courts have rebuffed facial challenges to both statutes, the latter statute (which is by far the more actively litigated of the two and evidently the more commonly applied by police) has been judicially narrowed to apply only to intentional and material disruption, though neither limit appears on the face of the law.

In sum, seven states—Arkansas, Delaware, Idaho, Kentucky, Montana, North Dakota, and West Virginia—enforce prohibitions against disruptive (or “insulting”) school conduct that facially lack the basic safeguards necessary to make speech-restrictive criminal statutes constitutional. Statutes in nine other states—California, Florida, Georgia, Maryland, Mississippi, Nevada, New Mexico, Rhode Island, and Washington—exist in a gray area of uncertainty because, facially, their statutes expose students to prosecution for insubstantial and immaterial acts of disruption. Statutes or court interpretations in four states—Arizona, California, Florida, and Maryland—incorporate a legal standard akin to the *Tinker* material and substantial disruption test, meaning that their constitutionality depends on whether *Tinker* supplies the First Amendment standard for prosecution as well as discipline.

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person who is a registered student of the school”).

<sup>180</sup> CAL. EDUC. CODE § 32210 (West 1984).

<sup>181</sup> *Id.*

<sup>182</sup> *In re J.C.*, 176 Cal. Rptr. 3d. 503, 510 (Cal. Ct. App. 2014).

<sup>183</sup> FLA. STAT. § 871.01 (2020); FLA. STAT. § 877.13 (2020); FLA. STAT. ANN. § 1006.145 (West 2020).

<sup>184</sup> FLA. STAT. ANN. § 1006.145 (West 2020).

<sup>185</sup> FLA. STAT. § 871.01 (2020).

<sup>186</sup> FLA. STAT. § 877.13 (2020).

V. SPEECH CRIMES IN SCHOOL: WHY *TINKER* CANNOT APPLYA. *The Masters Case: Kentucky's Statute Survives Not-So-Strict Scrutiny*

In *Masters v. Kentucky*, a state appellate court rejected a constitutional challenge to the Kentucky school disruption statute,<sup>187</sup> leaving intact what is arguably the nation's most aggressively broad statute criminalizing a wide range of speech and conduct directed toward school employees. To lend some perspective to Johnathan Masters' ultimately unsuccessful legal challenge requires rewinding a quarter-century, because the law Masters was charged with violating represents Kentucky's second iteration of a school-disruption statute. The first was declared unconstitutional in a 1985 ruling, *Kentucky v. Ashcraft*.<sup>188</sup>

In the *Ashcraft* case, a father who "humiliated and intimidated" his child's teacher was charged with violating a state statute making it a crime to "upbraid, insult or abuse any teacher of the public schools in the presence of the school or in the presence of a pupil of the school."<sup>189</sup> The trial court threw out the charges, finding the statute unconstitutionally vague and overbroad.<sup>190</sup> The state court of appeals agreed, citing the Supreme Court's admonition in *Gooding* that a statute criminalizing speech "must be carefully drawn or authoritatively construed to punish only unprotected speech."<sup>191</sup> The appeals court found the statute unsalvageable because it could apply even to a fan criticizing a coach during a ballgame, or even to an insulting comment to a teacher invited to a dinner party.<sup>192</sup> Analyzed as a matter of forum doctrine, the statute fared no better, as viewpoint discrimination is forbidden even on nonpublic forum property and the statute "could be seen as a blanket prohibition against critical expressions regarding a teacher."<sup>193</sup> Accordingly, regardless of whether the speaker's conduct fell within the bounds of what legislators could legitimately criminalize, the statute was invalid for vagueness and the prosecution failed.<sup>194</sup>

Kentucky's legislature then reenacted a new version of the statute in 1990 as

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<sup>187</sup> *Masters v. Commonwealth*, 551 S.W.3d 458, 459 (Ky. Ct. App. 2017).

<sup>188</sup> *Commonwealth v. Ashcraft*, 691 S.W.2d 229, 230–33 (Ky. Ct. App. 1985).

<sup>189</sup> *Id.* at 230 (citing former KY. REV. STAT. ANN. § 161.190 (1944)).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 231 (citing *Gooding v. Wilson*, 405 U.S. 518, 522 (1972)).

<sup>192</sup> *Id.* at 232.

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

<sup>194</sup> *Id.* at 233; see M. Chester Nolte, *Invalid for Vagueness or Overbreadth: Challenging Prohibition of Protected Speech*, 30 EDUC. L. REP. 1017, 1021 (1986) (commenting that the statute at issue in *Ashcraft* was "clearly defective and vague" because parents have a legally recognized right to criticize their children's teachers without fear of government reprisal).

part of an omnibus education bill,<sup>195</sup> attempting to cure the vagueness that led to the demise of its predecessor. The replacement now provides:

Whenever a teacher, classified employee, or school administrator is functioning in his capacity as an employee of a board of education of a public school system, it shall be unlawful for any person to direct speech or conduct toward the teacher, classified employee, or school administrator when such person knows or should know that the speech or conduct will disrupt or interfere with normal school activities or will nullify or undermine the good order and discipline of the school.<sup>196</sup>

The case that put revised Section 161.190 to the constitutional test arose in a rather unexpected and unorthodox way. The plaintiff, Johnathan Masters, was neither a student nor a parent, but a researcher pursuing a graduate degree in education.<sup>197</sup> Masters enlisted the help of a secondary-school principal in the town of Cloverport, a rural community on the Kentucky-Indiana border about 80 miles west of Louisville, to distribute surveys about civics education as part of his research.<sup>198</sup> When he came to the school to pick up the completed surveys, he learned that the principal, Keith Haynes, had reneged on the understanding and did not distribute the questionnaires.<sup>199</sup> Masters became irate and started arguing with Haynes, refused several requests to leave the premises, and invited the principal to step outside and fight.<sup>200</sup> After Masters left, Haynes called the local prosecutor's office to initiate charges; two days later, Masters was cited for a misdemeanor violation of Section 161.190, the school disruption statute.<sup>201</sup>

The trial court denied Masters' motion to dismiss the charge on the grounds that the statute was unconstitutionally overbroad, and a jury found Masters guilty and imposed a \$500 fine.<sup>202</sup> Masters took the case to the Court of Appeals of Kentucky, which affirmed the conviction.<sup>203</sup>

The appeals court made short work of Masters' vagueness argument, discounting it without analysis: "Standing in the schoolhouse foyer and angrily offering to fight the principal while class is in session," the court wrote, "is conduct that will disrupt day-to-day school activities."<sup>204</sup> The court similarly rebuffed

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<sup>195</sup> See generally Kentucky Education Reform Act of 1990, 1990 Ky. Acts 1208.

<sup>196</sup> KY. REV. STAT. ANN. § 161.190 (West 2020).

<sup>197</sup> Masters v. Commonwealth, 551 S.W.3d 458, 459 (Ky. Ct. App. 2017).

<sup>198</sup> Petition for a Writ of Certiorari at 3, Masters v. Kentucky, 139 S. Ct. 1221 (2019) (mem.) (No. 18-7286).

<sup>199</sup> Masters, 551 S.W.3d at 459.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 460.

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

<sup>203</sup> *Id.* at 459.

<sup>204</sup> *Id.* at 460–61.



Masters’ overbreadth argument, concluding that the statute is a content-neutral time, place and manner restriction that is constitutional so long as it is reasonable.<sup>205</sup> Parents are free to criticize school employees, the court wrote, or to express dissatisfaction in any number of venues, including at school board meetings or in one-on-one meetings with the employees.<sup>206</sup> Where Masters crossed the line of constitutional protection, they concluded—without actually using the term “fighting words” or citing the Supreme Court’s *Chaplinsky* standard—was in challenging Haynes to fight: “Angrily telling someone you are going to physically harm them is precisely the type of speech that would incite a reasonable person to violence.”<sup>207</sup>

The Kentucky Supreme Court declined Masters’ petition for discretionary review, leaving just one hope: the United States Supreme Court. In January 2019, Masters asked the justices to hear the case, arguing that Kentucky’s statute was unconstitutionally vague and overbroad because the operative terms of the statute—exposing a speaker to as much as a year in jail for speech that undermines “good order and discipline”—were unduly open-ended and subjective.<sup>208</sup> The following month, the Court denied the petition, leaving the Kentucky Court of Appeals decision as the final word.<sup>209</sup>

The court of appeals failed in *Masters* to grapple with the larger arguments that, beyond Masters’ own perhaps legitimately punishable behavior, the Kentucky statute is fatally flawed. In doing so, the court deviated from the majority view that laws criminalizing speech, even within schools, are unconstitutional unless they are directed to the non-speech elements of expressive conduct or to speech within a narrow constitutionally unprotected category.<sup>210</sup> The court’s primary holdings—that Kentucky’s statute is a content-neutral regulation addressing merely the time, place and manner of speech, and that the statute is not unduly broad<sup>211</sup>—are both plainly erroneous. If the reasoning of *Masters* were to take hold elsewhere, it would be nearly impossible for speakers to bring successful constitutional challenges against school-disturbance laws.

Nothing about “interfere[nce] with normal school activities” requires proof

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<sup>205</sup> *Id.* at 461.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> Petition for a Writ of Certiorari, *supra* note 198, at i, 6.

<sup>209</sup> *Masters v. Kentucky*, 551 S.W.3d 458 (Ky. Ct. App. 2017), *cert. denied*, 139 S. Ct. 1221 (2019).

<sup>210</sup> Motion for Leave to File Brief in Support of Petitioner at 10, *Masters v. Kentucky*, 139 S. Ct. 1221 (2019) (mem.) (No. 18-7286).

<sup>211</sup> *Masters*, 551 S.W.3d at 461.

that the speech constitutes “fighting words” or otherwise falls within the limited categorical exceptions to the First Amendment recognized by the Supreme Court, such as threats of violence. Indeed, the Kentucky statute is considerably broader than the one the Supreme Court found unsustainably broad in *Houston*, for this reason: The *Houston* statute applied only to speech that actually interrupted or otherwise interfered with an officer during the performance of duties, encompassing only face-to-face speech in the immediate vicinity of the officer.<sup>212</sup> The Kentucky statute applies to speech that is merely *directed toward* an employee, which could include emails, text messages, blog posts or other expression (unlike that in *Houston*) that is entirely unmoored from conduct.<sup>213</sup> It could apply to speech that never even reaches its targeted recipient and that never actually results in disruption, so long as disruption is reasonably foreseeable.

In a case involving a disciplinary code rather than a criminal one, the Third Circuit in *Saxe v. State College Area School District* struck down a K–12 school speech code that made it a punishable disciplinary offense to engage in speech with the intent to interfere with school activities, without any proof that disruption was reasonably foreseeable or in fact resulted:

[B]y its terms, it covers speech “which has the purpose or effect of” interfering with educational performance or creating a hostile environment. This ignores *Tinker’s* requirement that a school must reasonably believe that speech will cause actual, material disruption before prohibiting it.<sup>214</sup>

Similarly, the Kentucky criminal code singles out speech that “such person knows or should know . . . will disrupt or interfere” with school functions, without proof that any disruption actually ensued or was the likely result of the speech.<sup>215</sup> The *Masters* case exemplifies why the standard is faulty: Haynes himself said he never thought *Masters* was going to attack him.<sup>216</sup> The speech that *Masters* was arrested for caused no material disruption; no instruction stopped and students went home at the normal time.<sup>217</sup>

That Section 161.190 is a content-based prohibition on speech is self-evident on the face of the statute, which by its terms applies to “speech *or* conduct.”<sup>218</sup> Had the Kentucky legislature intended to penalize only the nonspeech elements of expressive conduct, the inclusion of “speech” would be superfluous, and “conduct” alone would have sufficed. Because a statute cannot be read to render material terms

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<sup>212</sup> *City of Houston v. Hill*, 482 U.S. 451, 455 (1987).

<sup>213</sup> KY. REV. STAT. ANN. § 161.190 (West 2020).

<sup>214</sup> *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 216–17 (3d Cir. 2001).

<sup>215</sup> KY. REV. STAT. ANN. § 161.190 (West 2020).

<sup>216</sup> Petition for a Writ of Certiorari, *supra* note 198, at 4.

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

<sup>218</sup> KY. REV. STAT. ANN. § 161.190 (West 2020).

a nullity,<sup>219</sup> the term “speech” as juxtaposed with “conduct” necessarily refers to the speech element of expressive conduct.

That the statute is content based is further evidenced by how it was applied and interpreted in Masters’ situation. The Supreme Court has said that a statute “would be content based if it required ‘enforcement authorities’ to ‘examine the content of the message that is conveyed to determine whether’ a violation has occurred.”<sup>220</sup> The Kentucky courts did not find that Masters shouted, that he came uncomfortably close to Haynes while speaking, or that he shook his fist or waved his arms in a threatening manner—any of which would be content-neutral justifications for punishment.<sup>221</sup> To the contrary, the court of appeals expressly stated that the decisive factor was Masters’ choice of words: “Angrily telling someone you are going to physically harm them is precisely the type of speech that would incite a reasonable person to violence.”<sup>222</sup>

While the court offered that “meeting with school administrators” would be an appropriate venue in which to express dissatisfaction,<sup>223</sup> that is exactly the “time” and “place” that Masters chose. That Masters was using the very “time” and “place” that the court identified as proper for voicing grievances demonstrates that the statute is not about “time, place and manner,” nor was it applied that way to Masters.

Suppose Masters had used the very same time, place and manner to enthusiastically wish Haynes a happy birthday—that is, his visit consumed exactly the same amount of time, he was asked to stop speaking exactly as many times and refused, and he left after having his say. Would he have been guilty of the crime of disrupting school? If the answer is “yes,” then Kentucky has a wildly overbroad law making it a crime to overzealously celebrate someone’s birthday. If the answer is

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<sup>219</sup> See *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 824 (2018) (“A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.”).

<sup>220</sup> *McCullen v. Coakley*, 573 U.S. 464, 479 (2014); see also *State v. Bishop*, 787 S.E.2d 814, 819 (N.C. 2016) (holding that a statute outlawing online bullying was an unlawful content-based restraint on speech, because it “criminalizes some messages but not others, and makes it impossible to determine whether the accused has committed a crime without examining the content of his communication.”); *State v. Shank*, 795 So. 2d 1067, 1069 (Fla. Dist. Ct. App. 2001) (rejecting state’s contention that statute making it a crime to disseminate a publication “which tends to expose any individual or any religious group to hatred, contempt, ridicule or obloquy” could be construed as a content-neutral regulation directed at the manner of speech, because liability is triggered by the speaker’s choice of words that criticize or ridicule).

<sup>221</sup> *Masters v. Commonwealth*, 551 S.W.3d 458, 461 (Ky. Ct. App. 2017).

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

“no,” then the statute is an unconstitutional content-based prohibition.

It is incorrect to characterize the statute as content-neutral because it explicitly regulates speech based on its function. As the Supreme Court observed in *Reed v. Town of Gilbert*, “[s]ome facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.”<sup>224</sup> So too, the Kentucky statute criminalizes speech “when such person knows or should know that the speech or conduct will disrupt or interfere with normal school activities.”<sup>225</sup> The statute, on its face, runs afoul of the constitutional standard recognized in *Reed*.

The Court of Appeals of Kentucky’s conclusion that the statute is content-neutral is internally self-contradictory because the Court based its determination on the anticipation that Haynes would react to Masters’ words by escalating their confrontation: “[W]here the government regulates speech based on its perception that the speech will spark fear among or disturb its audience, such regulation is by definition based on the speech’s content.”<sup>226</sup> In *Ashton*, the Supreme Court expressly disapproved of criminalizing speech based on the anticipated reaction of listeners: “[T]o make an offense of conduct which is ‘calculated to create disturbances of the peace’ leaves wide open the standard of responsibility. It involves calculations as to the boiling point of a particular person or a particular group, not an appraisal of the nature of the comments *per se*.”<sup>227</sup>

The Supreme Court of North Carolina’s decision in *Bishop*, striking down a comparably broad criminal prohibition on school-related speech, is instructive.<sup>228</sup> In *Bishop*, North Carolina’s supreme court found that a statute criminalizing social-media bullying was an excessively broad, content-based restraint on speech—not, as the courts below had found, a content-neutral time, place, and manner restriction.<sup>229</sup> The statute at issue made it a criminal offense “to use a computer or computer network to . . . post or encourage others to post on the Internet private, personal, or sexual information pertaining to a minor . . . with the intent to

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<sup>224</sup> *Reed v. Town of Gilbert*, 576 U.S. 155, 163–64 (2015); see also *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 216–17 (3d Cir. 2001) (striking down school regulation that “punishes not only speech that actually causes disruption, but also speech that merely intends to do so: by its terms, it covers speech ‘which has the purpose or effect of’ interfering with educational performance or creating a hostile environment”).

<sup>225</sup> *Masters*, 551 S.W.3d at 460.

<sup>226</sup> *United States v. Marcavage*, 609 F.3d 264, 282 (3d Cir. 2010) (citing *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992)) (“Listeners’ reaction to speech is not a content-neutral basis for regulation.”).

<sup>227</sup> *Ashton v. Kentucky*, 384 U.S. 195, 200 (1966).

<sup>228</sup> See *State v. Bishop*, 787 S.E.2d 814 (N.C. 2016).

<sup>229</sup> See *id.* at 819–21.

intimidate or torment a minor.”<sup>230</sup> Because it penalized speech based on content, the statute was presumptively unconstitutional unless it survived strict scrutiny as a narrowly tailored response serving a compelling government interest.<sup>231</sup>

The North Carolina court reached its result even though the justification for the cyberbullying statute was considerably more urgent than the rationale for the Kentucky statute. The *Bishop* statute was premised on the state’s concern for “protecting children from physical and psychological harm,”<sup>232</sup> an undeniably compelling rationale. Even then, the court found the statute to be mismatched to the harm averted. Because the operative prohibitions in the North Carolina cyberbullying statute—against speech that “torments” or “intimidates” a minor—lacked any statutory definition, the court found, they could result in prosecution for speech that is merely “annoying” and presents no safety hazard.<sup>233</sup>

A school’s interest in preventing “interference,” as in Kentucky, is categorically less compelling than the state’s concerns for the safety of children in *Bishop*.<sup>234</sup> Nothing in the Kentucky statute requires any hint that safety is at risk, and unlike the North Carolina law, Kentucky’s statute applies exclusively to speech directed at adults, not children.<sup>235</sup> If the *Bishop* statute was unconstitutional, then the Kentucky statute is doubly so.

It is especially unrealistic to characterize the Kentucky statute as a “time, place and manner” restriction because it applies to speech directed to government officials while they are conducting government business—exactly the time and place in which they must necessarily be accessible for citizen feedback.<sup>236</sup> If the “time and place” to speak with school employees about how they do their jobs is not at school during the school day, then when and where is? The ability to complain about government officials is often time- and location-sensitive, and if a speaker is forbidden from protesting perceived misconduct until after leaving the premises—i.e., exclaiming in alarm at what is perceived to be an unnecessarily forceful arrest—the speech may lose its intended impact.<sup>237</sup>

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<sup>230</sup> N.C. GEN. STAT. ANN. § 14-458.1(a)(1)(d) (2020).

<sup>231</sup> *Bishop*, 787 S.E.2d at 819.

<sup>232</sup> *Id.* at 820.

<sup>233</sup> *Id.* at 821.

<sup>234</sup> See generally *id.* at 820; *Masters v. Commonwealth*, 551 S.W.3d 458, 460 (Ky. Ct. App. 2017).

<sup>235</sup> KY. REV. STAT. ANN. § 161.190 (West 2020).

<sup>236</sup> *Id.*

<sup>237</sup> See Katherine Grace Howard, *You Have the Right to Free Speech: Retaliatory Arrests and the Pretext of Probable Cause*, 51 GA. L. REV. 607, 632 (2017) (“Sometimes, speech must occur at a particular moment to have its intended effect. For example, a person who wants to express her opinion about the actions of a police officer may have lost her chance to do so impactfully if she

Government employees must necessarily be prepared while on the job to accept criticism—even, at times, unfair and undeserved criticism—without calling the police. Indeed, because speech is constrained throughout the official workday,<sup>238</sup> the statute would likely fail even the relaxed scrutiny that applies to a content-neutral time, place, and manner regulation. Such regulations must afford a reasonable opportunity for constitutionally protected speech to reach its intended audience,<sup>239</sup> and the Kentucky statute applies to all hours during which school employees are performing official duties,<sup>240</sup> leaving only their off-hours within which it is safe to direct complaints to them without fear of prosecution.

The Court of Appeals of Kentucky invoked the doctrine of “fighting words”<sup>241</sup> as if to suggest that it would be reasonably foreseeable for a person expressing anger over a government official’s decision to anticipate that the official will respond with violence. But people in positions of authority, such as a high-school principal, are expected to be the “cool head” in a time of conflict. A school is not a bar room, and it most certainly would not be foreseeable that even the most vituperative dressing-down of a government official during a business meeting would provoke a punch in the nose. As Justice Powell observed in his concurrence in the *Lewis* case, “a properly trained officer may reasonably be expected to exercise a higher degree of restraint than the average citizen, and thus be less likely to respond belligerently to fighting words.”<sup>242</sup> Similarly, when the state of Arizona tried to salvage an unconstitutionally overbroad statute criminalizing disruptive school speech by claiming it applied only to fighting words, the Arizona Supreme Court was unpersuaded that a fistfight was a foreseeable result of even repeated, harsh profanity directed toward a school employee: “We do not believe that the natural reaction of the average teacher to a student’s profane and insulting outburst, unaccompanied by any threats, would be to beat the student.”<sup>243</sup> The “fighting words” doctrine does not redeem Kentucky’s fatally defective statute.

As a content-based restraint on speech, Kentucky’s statute is invalid unless it is narrowly tailored to advance a compelling state objective and criminalizes no more speech than is necessary to attain that objective.<sup>244</sup> While the physical safety of schools is recognized to be a compelling state interest, the statute is not narrowly

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cannot speak up during the incident.”).

<sup>238</sup> KY. REV. STAT. ANN. § 161.190 (West 2020).

<sup>239</sup> See *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (to be constitutional, a content-neutral time, place, and manner regulation must “leave open ample alternative channels for communication of the information”).

<sup>240</sup> KY. REV. STAT. ANN. § 161.190 (West 2020).

<sup>241</sup> *Masters v. Commonwealth*, 551 S.W.3d 458, 461 (Ky. Ct. App. 2017).

<sup>242</sup> *Lewis v. New Orleans*, 415 U.S. 130, 135 (1974) (Powell, J., concurring) (internal quotations omitted).

<sup>243</sup> *In re Nickolas S.*, 245 P.3d 446, 452 (Ariz. 2011).

<sup>244</sup> *Boos v. Barry*, 485 U.S. 312, 321 (1988).

tailored, as it applies in situations where safety is not at issue.<sup>245</sup> The statute outlaws interference with school activities or with good order, but says nothing about physical danger.<sup>246</sup> And because the statute applies to interference with “school activities” of all kinds, even non-academic ones, a person can be convicted and jailed even if the only “activity” interrupted is a school employee’s completion of paperwork during a time when classes are out of session.<sup>247</sup> The ability to complete paperwork without interruption would readily fail the test of a compelling state interest sufficient to justify criminal penalties for speech.

Indeed, the Court of Appeals of Kentucky appeared to recognize the infirmity of the statute by attempting a saving gloss: “The statute . . . attempts to preserve a suitable learning environment by curbing *unreasonable, and potentially dangerous*, disruptions to routine school operations.”<sup>248</sup> That may, in fact, have been a constitutionally permissible way for the Kentucky legislature to write the statute—but it did not. The statute requires neither proof of an “unreasonable” disruption nor of potential danger.<sup>249</sup> Lacking any rational stopping point, the statute is unsustainably vague.

The “disruption” and “interference” proviso is the pivotal proviso of the statute, for in the absence of that proviso, the statute would be materially indistinguishable from its predecessor that was declared unconstitutional in *Ashcraft*.<sup>250</sup> The Kentucky legislature reenacted the invalidated statute as current Section 161.190, with the “disruption” and “interference” language as the only operative change. Hence, the new version is constitutional only if “interference” with school functions or activities—of any nature or duration—is the threshold for criminalization. An unbroken line of Supreme Court precedent in *Houston, Lewis*, and *Gooding* foreclose that possibility.

### *B. States Cannot Criminalize School Speech Without (at Least) Proof of a “Substantial” Disruption*

In its landmark *Tinker* case, the Court struck a delicate balance between authority and autonomy in the schoolhouse setting: School authorities may not

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<sup>245</sup> Cf. Bernard James & Joanne E.K. Larson, *The Doctrine of Deference: Shifting Constitutional Presumptions and the Supreme Court’s Restatement of Student Rights after Board of Education v. Earls*, 56 S.C. L. REV. 1, 17–18, 68 (2004).

<sup>246</sup> KY. REV. STAT. ANN. § 161.190 (West 2020).

<sup>247</sup> *Id.*

<sup>248</sup> *Masters v. Commonwealth*, 551 S.W.3d 458, 461 (Ky. Ct. App. 2017) (emphasis added).

<sup>249</sup> KY. REV. STAT. ANN. § 161.190 (West 2020).

<sup>250</sup> *Commonwealth v. Ashcraft*, 691 S.W.2d 229, 230 (Ky. Ct. App. 1985).

impose discipline for the content of speech absent a showing that punishment “is necessary to avoid material and substantial interference with schoolwork or discipline.”<sup>251</sup> Throughout its 1969 opinion, the Court refers to the importance of holding school disciplinarians to proof of “material” and “substantial” disruption, not simply a fleeting and incidental interference. It is inconceivable that the threshold for jailing a student can be lower than the threshold for suspending her from school, but that is where *Masters* leaves the state of the law: A year in jail is more easily justified than an afternoon in detention, because the Kentucky statute requires no showing that a speaker’s “interference” with school was material or substantial.<sup>252</sup>

Mere “interference” is far too insubstantial a standard upon which to base prosecution and conviction. A student who leads a chorus of “Happy Birthday” to her favorite teacher may delay the start of class by a minute. A student who overstays her appointment with the principal for five minutes may cause the principal to be late to a school board meeting. Since there is no materiality threshold in the statute, students are in peril of arrest and prosecution over the most fleeting of irritations. As the Supreme Court stated in invalidating a similarly overbroad statute criminalizing speech in *United States v. Stevens*, “the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.”<sup>253</sup>

Although the court in *Masters* failed to do so, because the Kentucky statute was deemed to be content-neutral, courts in other states have read *Tinker*-type safeguards into their school-disruption statutes. In those states, students cannot constitutionally be prosecuted for insubstantial disruptions.

In an oft-cited case, Maryland’s highest court decided that a state statute making it a crime to “willfully disturb or otherwise willfully prevent the orderly conduct” of school or college activities could not be applied to a middle-schooler who penciled, but immediately erased, the word “bomb” on the wall of a school stairwell without anyone but a teacher seeing it.<sup>254</sup> Noting that the contemporary iteration of Maryland’s school-disruption law was rooted in concern over violent civil-rights and anti-war protests by outsiders, the court found that an inconsequential act of vandalism could not have been within the intended reach of the statute.<sup>255</sup> Nor could the time that a school administrator was distracted from other duties while administering discipline be the “disturbance” that the legislature

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<sup>251</sup> *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 511 (1969).

<sup>252</sup> KY. REV. STAT. ANN. § 161.190 (West 2020).

<sup>253</sup> *United States v. Stevens*, 559 U.S. 460, 480 (2010).

<sup>254</sup> *In re Jason W.*, 837 A.2d 168, 170 (Md. 2003) (citing MD. CODE ANN., EDUC. § 26-101 (LexisNexis 2020)).

<sup>255</sup> *Id.* at 173.



intended to criminalize, as a certain level of disruption is inherent and routine in the school day.<sup>256</sup> “The only sensible reading of the statute,” the court concluded, “is that there must not only be an ‘actual disturbance,’ but that the disturbance must be more than a minimal, routine one.”<sup>257</sup> It must be one that significantly interferes with the orderly activities, administration, or classes at the school.”<sup>258</sup>

Citing Maryland’s *Jason W.* case, an Alabama appeals court reached a similar conclusion in overturning a delinquency finding under Alabama’s school-disturbance law, which criminalizes threatening language that causes “the disruption of school activities.”<sup>259</sup> The court found that the student’s behavior—telling a bus driver, while looking out the window of a moving bus, that he wanted to set a cornfield on fire—could not constitute a criminal “disruption,” because the impact on school functions was minimal.<sup>260</sup> The court rejected the school’s contention that merely forcing the principal to take time away from routine duties to investigate and punish the speech was itself a criminally punishable disruption:

To broadly construe the phrase “disruption of school activities” to include a school principal’s having to meet with a student, about even a minor behavioral infraction, instead of performing other duties, would require us to ignore the requirement that criminal statutes be strictly construed in favor of the accused, would be illogical and incompatible with common sense, and would make criminal any threat by a student that requires the intervention of a school official, an absurd result that could not possibly have been intended by the legislature. . . . Rather, it is clear to us that “the disruption of school activities” requires significant interference with activities specifically associated with the normal functioning of the school.<sup>261</sup>

Two cases involving disturbances at public meetings—analogous to disturbances within schools—are instructive. In Tennessee, an appeals court rejected the First Amendment claims of a demonstrator who was convicted of violating a prohibition against disrupting a public gathering by repeatedly shouting “kill the cops!” into a bullhorn near an outdoor memorial service for slain officers.<sup>262</sup>

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<sup>256</sup> *Id.* at 174.

<sup>257</sup> *Id.* at 175.

<sup>258</sup> *Id.*

<sup>259</sup> *P.J.B. v. State*, 999 So. 2d 581, 584–88 (Ala. Crim. App. 2008) (citing ALA. CODE § 13A-10-15(a)(1) (2015)).

<sup>260</sup> *Id.* at 582, 588.

<sup>261</sup> *Id.* at 588.

<sup>262</sup> *State v. Ervin*, 40 S.W.3d 508, 518–20 (Tenn. Crim. App. 2000). The statute at issue, Tenn. Code Ann. § 39-17-306(a), provided: “A person commits an offense if, with the intent to prevent or disrupt a lawful meeting, procession, or gathering, the person substantially obstructs or interferes with the meeting, procession, or gathering by physical action or verbal utterance.”

The challenge failed because the statute was deemed content-neutral and justified by a significant governmental interest, because it applied to disturbances going beyond mere “inconvenience.”<sup>263</sup> The appeals court emphasized that criminal liability could not, by the terms of the statute, be triggered by a fleeting or ephemeral interference: “The term ‘substantial,’ in this context, means major, consequential, or significant. Further, the statute does not attempt to punish protected conduct unless the actor acts or speaks with the specific intent to ‘prevent or disrupt a lawful meeting.’”<sup>264</sup> When a comparable statute was challenged in Georgia, the lack of “substantiality” proved decisive. There, the state Supreme Court—distinguishing the Tennessee *Ervin* case—found that Georgia’s prohibition against disrupting a public meeting was unconstitutionally overbroad because it lacked the saving constraints of the Tennessee statute: No proof of intent to disrupt was required, and disruptive speech could be penalized even if the disruption was insubstantial.<sup>265</sup> The Georgia court pointed by contrast to Tennessee’s better-tailored statute, as narrowly construed by the *Ervin* court.<sup>266</sup> In other words, outside the school setting, it is understood that states cannot criminalize expression without proof of both intent and substantiality—safeguards that the Kentucky school-disturbance statute lacks.

In the analogous context of criminal prosecution for libel, courts have recognized that a speaker may not be criminally prosecuted without—at least—the same level of proof that would entitle an injured plaintiff to a civil recovery. In *Garrison v. Louisiana*, the United States Supreme Court held that a district attorney who publicly denounced local judges as lazy and suggested they were influenced by organized crime could not be prosecuted for criminal defamation unless the legal standard was as demanding as that recognized for a civil libel suit.<sup>267</sup> Because the Louisiana statute lacked the constitutional safeguards recognized by the Court in *New York Times v. Sullivan* when speech addresses the conduct of public officials—namely, assigning the libel plaintiff the burden of proving actual malice on the part of the speaker<sup>268</sup>—the conviction could not be sustained.<sup>269</sup> Court after court has recognized that, at a minimum, criminally punishing a speaker for defamatory speech requires satisfying all of the elements that would be necessary to impose civil liability.<sup>270</sup>

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TENN. CODE ANN. § 39-17-306(a) (2020).

<sup>263</sup> *Ervin*, 40 S.W.3d, at 517–18.

<sup>264</sup> *Id.* at 519.

<sup>265</sup> *State v. Fielden*, 629 S.E.2d 252, 256 (Ga. 2006).

<sup>266</sup> *Id.* at 255.

<sup>267</sup> *Garrison v. Louisiana*, 379 U.S. 64, 77–78 (1964).

<sup>268</sup> *N.Y. Times v. Sullivan*, 376 U.S. 254, 279–80 (1964).

<sup>269</sup> *Garrison*, 379 U.S. at 79.

<sup>270</sup> See *Ivey v. State*, 821 So. 2d 937, 949 (Ala. 2001) (applying *Garrison*, Alabama’s criminal defamation statute held unconstitutional because the statute, although it applied to accusations made “falsely and maliciously,” did not incorporate the *Sullivan* standard requiring proof of actual

For all of these reasons, a statute such as Kentucky's that fails to offer, at a minimum, the *Tinker* level of protection against criminal prosecution is invalid. There is no support for the proposition that people—in school or outside of it—can be held criminally liable based on a lesser showing than would be required for civil or regulatory consequences. If fleetingly disruptive speech cannot be grounds for school disciplinary action, it cannot be grounds for arrest either.

### C. *The Tinker Standard Is Insufficiently Protective to Trigger Criminal Liability*

If we accept, as logic dictates, that the government's burden in prosecuting a student speaker for the content of speech can be no less than the government's burden in sending the same student to in-school suspension, does the inquiry end there? Could a Kentucky-type statute be rectified by, either legislatively or judicially, engrafting a "substantiality" requirement so that the *Tinker* standard serves as the trigger for both disciplinary and criminal liability? This seems implausible.

If *Tinker* has been criticized as codifying the heckler's veto,<sup>271</sup> a Kentucky-style statute does so in spades. A student could be prosecuted for entirely harmless and even well-intentioned behavior based on the foreseeability that other students will react to the speech in a wrongfully disruptive way—for instance, answering a teacher's question in class by voicing an unpopular political opinion, knowing that hot-headed classmates are likely to find the opinion provocative and escalate the discussion into shouting.<sup>272</sup>

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malice as part of the prosecution's *prima facie* case); *State v. Helfrich*, 922 P.2d 1159, 1162 (Mont. 1996) (finding Montana's criminal libel law constitutionally deficient because the truth of a publication was recognized as a defense only if the report "is communicated with good motives and for justifiable ends"); *Gottschalk v. State*, 575 P.2d 289, 209 n.1, 295–96 (Alaska 1978) (finding that Alaska's criminal defamation statute, providing that a person who "willfully speaks, writes, or in any other manner publishes defamatory or scandalous matter concerning another with intent to injure or defame" is guilty of a misdemeanor, was unconstitutionally vague and overbroad); *Mangual v. Rotger-Sabat*, 317 F.3d 45, 68 (1st Cir. 2003) (holding that Puerto Rico's criminal libel statute was constitutionally defective because, among other flaws, it protected news reports about official acts from criminal liability only if the reports were shown to be "true and fair"); *Fitts v. Kolb*, 779 F. Supp. 1502, 1515 (D.S.C. 1991) (following *Garrison*, South Carolina criminal libel statute was unconstitutionally overbroad because it "allows the imposition of criminal penalties with no showing that the publisher knew the information being published was false or had a high degree of awareness of its probable falsity").

<sup>271</sup> See Clay Calvert, *Reconsidering Incitement, Tinker, and the Heckler's Veto on College Campuses: Richard Spencer and the Charlottesville Factor*, 112 NW. U. L. REV. ONLINE 109, 122 (2018) (noting that the *Tinker* standard "permits schools to censor speech—and, by extension, speakers—based on past misconduct" by those exposed to similar speech).

<sup>272</sup> See, e.g., *Dariano v. Morgan Hill Unified Sch. Dist.*, 767 F.3d 764, 777 (9th Cir. 2014) (finding that the display of American flags on students' apparel was a prohibitable act of disruption

Nothing in *Tinker* requires proof that the speaker wrongfully intended to cause a disruption. Even a benign act of expression—as in *Dariano*, choosing the wrong day to wear an American flag t-shirt to school—can lose First Amendment protection and be grounds for punishment, as modern courts understand *Tinker*.<sup>273</sup> If *Tinker* is understood to set the constitutional standard not just for discipline but also for prosecution, then a student could be subject to arrest for loudly protesting his innocence when wrongfully accused of vandalism, or delaying the start of class while debating with the teacher over an unconstitutional directive to stand and recite the Pledge of Allegiance. The chilling potential of such a malleable standard is self-evident.

The government's burden to justify prosecuting and jailing a speaker must necessarily be greater than the burden to justify a lesser regulatory sanction such as school discipline. Professor Heidi Kitrosser has made this point in analyzing government prosecution of employees who leak confidential material to journalists.<sup>274</sup> Because government employees undertake implied (if not express) confidentiality duties when entrusted with information, it may be fair, writes Kitrosser, to hold employees to the workplace consequences of violating the professional duties they undertake.<sup>275</sup> But imprisoning them is a different story:

As a matter of institutional position, the government as employer is very differently situated from the government as prosecutor. In a free society, government necessarily has far less control over persons *qua* persons that it has over persons *qua* government employees. This translates to a much narrower discretion on the government's part to prosecute its employees under the criminal law than to punish them through the terms and conditions of their employment.<sup>276</sup>

The same is true of the school's relationship with its students.

Instructively, when a student is charged under a “real-world” criminal statute that is not exclusively aimed at in-school speech, courts generally apply “real-world” constitutional principles and not the relaxed “in-school” level of constitutional protection. Thus, courts have vacated disorderly conduct cases against young people who profanely back-talked teachers<sup>277</sup> or police officers,<sup>278</sup> holding that speech

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under *Tinker* when the symbol might be expected to provoke backlash from classmates during a day dedicated to celebrating Latin-American heritage).

<sup>273</sup> *Id.*

<sup>274</sup> Heidi Kitrosser, *Free Speech Aboard the Leaky Ship of State: Calibrating First Amendment Protections for Leakers of Classified Information*, 6 J. NAT'L SECURITY L. & POL'Y 409, 442 (2013).

<sup>275</sup> *Id.* at 444.

<sup>276</sup> *Id.* at 442.

<sup>277</sup> *In re L.E.N.*, 682 S.E.2d 156, 157 (Ga. Ct. App. 2009).

<sup>278</sup> *In re M.A.H.*, 572 N.W.2d 752, 254 (Minn. Ct. App. 1997); *L.A.T. v. State*, 650 So. 2d 214, 218 (Fla. Dist. Ct. App. 1995).

cannot be criminalized unless it falls within the narrow First Amendment exceptions for true threats, fighting words, or incitement to imminent violence.<sup>279</sup> In one memorable case, a Colorado appellate court threw out a disorderly conduct adjudication against a 14-year-old boy who made fun of a classmate during the school lunch period by passing around a social-media photo of the classmate with a cartoon penis drawn on his face.<sup>280</sup> The majority held that only speech qualifying under the Supreme Court’s narrow “fighting words” doctrine could be prosecutable as disorderly conduct, rejecting a dissenting judge’s position that the standard for “fighting words” should be adjusted downward based on the sensitivity and impulsiveness of teenagers—a position that would make it easier to prosecute a teenager than an adult for the same words.<sup>281</sup>

The most compelling justifications given for deference to school disciplinarians—that disciplinary decisions must often be made spur-of-the-moment, and that discipline may be so fleeting that it will be completed well before the judicial process can be invoked to challenge it<sup>282</sup>—apply with considerably less force to the criminal justice system. Where the sum total of the student’s misconduct is swearing at a teacher or refusing to put away a cellphone, it may make sense to defer to the decision to send the noncompliant student to the principal’s office—but not to jail. There is no time-urgent need to invoke the machinery of prosecution

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<sup>279</sup> See, e.g., *L.A.T.*, 650 So. 2d at 218 n.3 (finding that juvenile who screamed profanities at police as they were arresting his friend could not be convicted of disorderly conduct because “[t]he First Amendment does not permit the imposition of criminal sanctions for ‘making a scene’”); see also *In re Douglas D.*, 626 N.W. 725, 739–40 (Wis. 2001) (vacating disorderly conduct case against eighth-grader who wrote graphically violent fantasy story in response to a creative-writing assignment, finding that disorderly conduct statute could be applied to pure speech only if the speech crossed the line into a constitutionally unprotected “true threat”). Compare *People v. Khan*, 127 N.E.3d 592, 594–604 (Ill. App. Ct. 2018) (finding that college student was properly convicted under Illinois’ disorderly conduct statute because his Facebook post—“I bring a gun to school every day. Someday someone is going to piss me off and end up in a bag.”—was unprotected threat speech).

<sup>280</sup> *In re R.C.*, 411 P.3d 1105, 1106 (Colo. App. 2016).

<sup>281</sup> *Id.* at 1109, 1112; see also *id.* at 1115 (Webb, J., dissenting).

<sup>282</sup> See *Goss v. Lopez*, 419 U.S. 565, 580 (1975) (“Some modicum of discipline and order is essential if the educational function is to be performed. Events calling for discipline are frequent occurrences and sometimes require immediate, effective action.”); *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) (making the same point in recognizing reduced Fourth Amendment standards when students are subjected to searches by school personnel: “requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools”) (parentheses in original); see also *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 674 (1999) (“[A]s we have previously noted, courts should refrain from second-guessing the disciplinary decisions made by school administrators.”).

and adjudication, and there are ample opportunities all along the way to turn back from the decision. Society may not want principals second-guessing every in-school suspension in fear of a constitutional claim, but society *should* want police and prosecutors to hesitate before turning an unruly teen into a convict.

Charging the student with a crime demands full-dress due process and the array of other constitutional safeguards that accompany criminal prosecution—not the minimal safeguards that apply in the disciplinary setting. No court has ever held that police may place a student under arrest within a school based on a lesser evidentiary showing that would apply on the sidewalk outside. In Professor Kitrosser's terms, children are "persons *qua* persons" in the criminal justice system.<sup>283</sup> For this reason, the argument for applying *Tinker* is especially weak in a case, like Johnathan Masters', where the penalty falls on a speaker who is neither a student nor an employee. The *Tinker* doctrine is an artifact of the student/school (or, in rarer instances, the teacher/school)<sup>284</sup> relationship, not a declaration that school buildings are categorically "no-Constitution zones."<sup>285</sup>

In a case closely analogous to *Masters*, the Supreme Court of Arizona explained that the constitutional threshold for imposing criminal penalties on speech is necessarily more exacting than that recognized in *Tinker* for school discipline.<sup>286</sup> There, the court concluded that a high-school student could not constitutionally be prosecuted for repeatedly directing curse-words toward a teacher in a dispute over disciplinary sanctions, under an Arizona statute resembling Kentucky's: "A person who knowingly abuses a teacher or other school employee on school grounds or while the teacher or employee is engaged in the performance of his duties is guilty

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<sup>283</sup> Kitrosser, *supra* note 274, at 442.

<sup>284</sup> While *Tinker* spoke in broad assurances that neither teachers nor students "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," First Amendment cases involving teachers' speech more often are analyzed as a matter of public-employee law as opposed to *Tinker* "disruption." *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 506 (1969). The Supreme Court's landmark public-employee speech case, *Pickering v. Board of Education of Township High School District*, was a teacher-speech case, setting forth an enduring balancing-of-interests test that, as a practical matter, probably produces results comparable to a *Tinker* analysis. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 564, 568 (1968); *see, e.g., Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 284 (1977) (citing *Pickering*, and not mentioning *Tinker*, in evaluating teacher's challenge to dismissal that he claimed was retaliatory for critical comments made to a radio station in his role as a union leader). This indicates that the Supreme Court does not view *Tinker* as setting the constitutional standard for a school's authority to take punitive action against non-students.

<sup>285</sup> It is wildly improbable, for instance, that federal law would countenance subjecting nonstudent school visitors to mandatory drug testing without individualized grounds for suspicion, in the way that the Supreme Court has permitted when schools seek to test their students.

<sup>286</sup> *In re Nickolas S.*, 245 P.3d 446, 448 (Ariz. 2011).

of a class 3 misdemeanor.”<sup>287</sup> The Arizona court relied on prior cases from courts in Arkansas and Washington, in which similar “verbal abuse of school employee” statutes were struck down as vague and/or overbroad.<sup>288</sup> It is the overwhelming consensus of the state courts—other than Kentucky’s—that students may not be imprisoned for verbally abusing school employees, the very conduct that Kentucky law criminalizes.<sup>289</sup>

In a similar vein, the Georgia Supreme Court threw out a state statute making it a misdemeanor for any non-student to “upbraid, insult or abuse” a school employee “in the presence and hearing of a pupil.”<sup>290</sup> The statute was fatally flawed on several grounds: It was viewpoint-discriminatory, criminalizing only “negative or unfavorable” speech, and it was unjustifiably broad, applying regardless of where the speech took place or whether it provoked any disruption.<sup>291</sup>

In none of these cases from Arkansas, Arizona, Georgia, and Washington did the courts apply a diminished “school-speech” First Amendment analysis just because the speech happened to be directed toward school employees and school functions. Each court evaluated the statute by reference to “real-world” First Amendment standards, not by reference to the lesser *Tinker* level of protection that would apply in a non-criminal disciplinary case.

Courts have long recognized that laws carrying criminal penalties demand a greater level of certainty than laws carrying only civil consequences.<sup>292</sup> The widely

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<sup>287</sup> *Id.* at 449, 452–53.

<sup>288</sup> *Id.* at 450 (citing *Shoemaker v. State*, 38 S.W.3d 350, 351 (Ark. 2001); *State v. Reyes*, 700 P.2d 1155, 1159 (Wash. 1985) (en banc)).

<sup>289</sup> *See, e.g.*, KY. REV. STAT. § 161.190 (West 2020) (criminalizing conduct that could disrupt teachers in the classroom); *see* Melissa Nelson, *Ark. Court Overturns Law on Insulting Teachers*, ABC NEWS (Jan. 7, 2006), <https://abcnews.go.com/US/story?id=94008&page=1> (striking down a law barring abuse or insults directed at public school teachers); Howard Fischer, *Arizona Supreme Court: Student’s Cursing isn’t a Crime*, E. VALLEY TRIB. (Jan. 10, 2011), [https://www.eastvalleytribune.com/arizona/arizona-supreme-court-students-cursing-isnt-a-crime/article\\_2cd2f616-1d22-11e0-b82a-001cc4c002e0.html](https://www.eastvalleytribune.com/arizona/arizona-supreme-court-students-cursing-isnt-a-crime/article_2cd2f616-1d22-11e0-b82a-001cc4c002e0.html) (overturning a finding by an Arizona court commissioner that a student engaged in delinquent, criminal behavior by cursing at a teacher).

<sup>290</sup> GA. CODE ANN. § 20-2-1182 (2016), *invalidated by* *West v. State*, 793 S.E.2d 57, 59 (Ga. 2016).

<sup>291</sup> *West*, 793 S.E.2d at 61–62.

<sup>292</sup> “When an administrative regulation is challenged the standard of constitutional vagueness is less strict than when a criminal law is attacked.” *Ford Dealers Ass’n. v. Dep’t of Motor Vehicles*, 650 P.2d 328, 339 (Cal. 1982); *see also* Julie Rose O’Sullivan, *Skilling: More Blind Monks Examining the Elephant*, 39 FORDHAM URB. L.J. 343, 346 (2011) (observing that “foundational principle” of legality, which disfavors judicial action that retroactively defines what behavior constitutes a crime, “simply does not apply in civil cases”).

recognized rule of lenity in criminal law “requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them.”<sup>293</sup> For this reason, less vagueness will be tolerated in a speech-restrictive statute that carries criminal consequences. A manipulable standard like “material and substantial disruption” that might suffice in the civil context should be viewed more skeptically when used as the benchmark for criminality.

When school-disturbance statutes criminalize speech by students, it is proper to consider them in the larger context of how the criminal justice system treats minors. The justice system regularly affords young people a special measure of leniency. The public often has limited access to the records and proceedings of juvenile courts, and the records of adjudications of guilt (or “delinquency”) are readily expunged afterward—on the theory that minors deserve the opportunity to recover from youthful misjudgments without lifelong stigmatization.<sup>294</sup> The Supreme Court has taken the most severe criminal penalties—capital punishment, and life without parole—categorically off the table for juvenile defendants, on the grounds that children are less capable of appreciating the gravity of their actions or controlling their emotional impulses, and are more promising candidates for rehabilitation.<sup>295</sup> In light of the array of “second chances” that the law affords to the youngest criminal defendants, it would be strange and counterintuitive to lay an arrest trap calculated to catch children, for behavior that could not constitute a crime anywhere but school.

Although the *Tinker* ruling was regarded as a highly protective ruling, shifting substantial power away from school authority figures,<sup>296</sup> experience has shown that,

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<sup>293</sup> *United States v. Santos*, 553 U.S. 507, 514 (2008).

<sup>294</sup> When members of the press and public have asserted that the constitutional right to attend court proceedings extends to juvenile court, state courts have overwhelmingly rejected the argument, on the basis that there is a heightened privacy interest in juvenile proceedings. *See, e.g.*, *San Bernardino Cty. v. Superior Court*, 232 Cal. App. 3d 188, 208 (Cal. App. 1991) (constitutional right to attend criminal trials does not extend to juvenile delinquency hearings); *Florida Publ'g Co. v. Morgan*, 322 S.E.2d 233, 238 (Ga. 1984) (rebuffing First Amendment challenge to Georgia statute excluding the public from delinquency, deprivation, and unruliness hearings in juvenile court); *In re Lewis*, 316 P.2d 907 (Wash. 1957) (public has no constitutional right to attend proceedings of juvenile court); *see also In re J. S.*, 438 A.2d 1125, 1127 (Vt. 1981) (granting minor defendant's request to close hearing to media coverage and observing that “inherent in the very nature of juvenile proceedings are compelling interests in confidentiality . . . which we hold override any remaining First Amendment goals which access might serve”). On the ready availability of expungement, *see T. Markus Funk, A Mere Youthful Indiscretion? Reexamining the Policy of Expunging Juvenile Delinquency Records*, 29 U. MICH. J.L. REFORM 885, 887 (1996) (“Numerous statutes, both federal and state, allow for—and occasionally even mandate—the expungement of juvenile convictions when the juvenile reaches a certain age.”).

<sup>295</sup> *See Miller v. Alabama*, 567 U.S. 460, 465 (2012) (life without parole); *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (capital punishment).

<sup>296</sup> *See Theodore F. Denno, Mary Beth Tinker Takes the Constitution to School*, 38 FORDHAM



in fact, school authorities still regularly prevail in First Amendment cases because of strong judicial deference to their discretionary judgments.<sup>297</sup> Taking stock of more than 2,000 published cases citing *Tinker* as of 2013, law professor Nernard James found that student speakers prevailed in only 17 instances in which *Tinker* provided the rule.<sup>298</sup> Courts have been willing to indulge schools' fanciful forecast of "disruption," even where the risk seems speculative and the speech addresses matters of public concern.<sup>299</sup> The existence of *Tinker* has done little to curtail hair-trigger disciplinary decisions by school administrators in the online-speech era, as momentary lapses in judgment result in disciplinary action because of the perceived power, reach, and durability of the internet.<sup>300</sup>

The *Tinker* disruption test has proven perilously malleable in part because courts have felt free to "define down" exactly what must be "disrupted" to cause speech to lose First Amendment protection. For example, whistleblowers in school sports have been left unprotected when courts found their speech "disruptive" not to classwork or other essential school functions, but merely to unity and conformity within the team.<sup>301</sup> In the view of some courts, then, it is possible—for purposes of

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L. REV. 35, 55 (1970) ("[A]bsent open interruption within classrooms, which is not the issue, until students pass the bounds of argument or persuasion and undertake incitement to riot or similar overt action, they are protected.") (internal quotations omitted).

<sup>297</sup> See Chemerinsky, *supra* note 72, at 528 (observing, in reflecting on the first three decades of experience under the *Tinker* standard, "in the thirty years since *Tinker*, schools have won virtually every constitutional claim involving students' rights").

<sup>298</sup> Bernard James, *Tinker in the Era of Judicial Deference: The Search for Bad Faith*, 81 UMKC L. REV. 601, 612 (2013).

<sup>299</sup> See, e.g., *Baxter v. Vigo Cty. Sch. Corp.*, 26 F.3d 728, 737 (7th Cir. 1994) (rejecting First Amendment claim of students suspended for wearing t-shirts protesting racism and the school's grading practices, finding no "clearly established" law that entitled elementary-school students to wear apparel protesting school policies).

<sup>300</sup> See Frank D. LoMonte, *The "Social Media Discount" and First Amendment Exceptionalism*, 50 U. MEM. L. REV. 387, 408–09 (2019) (observing that, because of the perceived dangerousness of online speech, schools and colleges have punished social-media speech that would never have been punished if uttered face-to-face, including obvious jokes and unserious, figurative references to violence); David R. Wheeler, *Do Students Still Have Free Speech in School?*, ATLANTIC (Apr. 7, 2014), <https://www.theatlantic.com/education/archive/2014/04/do-students-still-have-free-speech-in-school/360266/> (enumerating cases in which schools disciplined students for "seemingly innocuous online activity," including a Kansas student suspended for a Twitter post making fun of his school's football team, and a group of 20 Oregon students suspended for "liking" or "retweeting" a post claiming a female teacher flirted with her students).

<sup>301</sup> See *Lowery v. Euverard*, 497 F.3d 584, 594, 596 (6th Cir. 2007) (finding that high school football players' petition seeking firing of coach they categorized as abusive was unprotected speech because it threatened "team harmony" and "team unity" by challenging the coach's authority); *Wildman v. Marshalltown Sch. Dist.*, 249 F.3d 768, 772 (8th Cir. 2001) (rejecting

school discipline—to “substantially” disrupt school operations by doing nothing more than circulating a disrespectful letter about a coach.

Arguably the nadir of student First Amendment rights in the modern era came in the case of a Connecticut student activist who was disciplined for a blog post attempting to drum up public support for her position in a dispute with the principal over a school policy decision.<sup>302</sup> In that case, *Doninger v. Niehoff*, the Second Circuit declined to grant injunctive relief in favor of the student blogger, finding that she exceeded the protection of *Tinker* because her blog post, which used a disrespectful vulgarity to refer to school administrators, posed the risk of a material and substantial disruption, even though no such disruption actually materialized.<sup>303</sup> The sum total of the “disruption” was the risk that members of the public would call and email the school to urge the principal to reverse her decision to cancel a scheduled music festival.<sup>304</sup> Although the record did not indicate how many calls or emails the school’s administrators actually received, the court believed that the mere foreseeability that the principal would be distracted from other duties was enough to make the student’s blog post a punishable disciplinary offense.<sup>305</sup> As in the athletic whistleblower cases, the *Doninger* judges reframed the notion of “disruption” to reach the outcome favoring the school; it was enough, the judges concluded, that the blog post was “disruptive” to “cooperative conflict resolution” in the dispute over the music festival.<sup>306</sup> In other words, urging the public to contact a government official to try to reverse a government policy decision can constitute a punishable offense, under at least some judges’ deferential view of what constitutes a substantial disruption for purposes of *Tinker*.<sup>307</sup>

That *Tinker* permits content-based discipline if offended listeners react with disruptive zeal represents a sharp break with First Amendment doctrine in the out-

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First Amendment retaliation claim by high school basketball player who was punished after she refused to apologize for letter seeking to rally teammates in opposition to unfair treatment by their coach: “[C]oaches deserve a modicum of respect from athletes, particularly in an academic setting.”).

<sup>302</sup> *Doninger v. Niehoff*, 527 F.3d 41, 44–46 (2d Cir. 2008).

<sup>303</sup> *Id.* at 51, 53–54.

<sup>304</sup> *Id.* at 50–51.

<sup>305</sup> *Id.* at 51.

<sup>306</sup> *Id.*

<sup>307</sup> *Doninger* has been widely criticized for dangerously diluting the protection afforded to students’ online political speech. See, e.g., Nathan S. Fronk, *Doninger v. Niehoff: An Example of Public Schools’ Paternalism and the Off-Campus Restriction of Students’ First Amendment Rights*, 12 U. PA. J. CONST. L. 1417, 1440 (2010) (“The *Doninger* opinion . . . highlights the need for a more protective standard by showing just how willing courts are to bend *Tinker* in such a way as to justify a school’s action”); Bradley M. Gibson, *Doninger v. Niehoff: Tinker is Online and in Trouble*, 36 N. KY. L. REV. 185, 209 (2009) (concluding that *Doninger* court misapplied *Tinker* in ways that “will likely encourage school administrators to discipline students for off-campus speech which administrators find insulting” and that “may thwart student activism”).

of-school world. As one court stated in invalidating an extravagantly broad disorderly-conduct statute: “[S]ome speech may result in disorder, yet remain protected. The fact that some speech may stir listeners to disagreement—perhaps even to disagree violently—does not by that fact alone permit regulation.”<sup>308</sup> But under the *Tinker* standard, it does. Provoking listeners to violence is understood to be a “substantial disruption” in the school world, even if the speaker neither foresaw nor intended that result.<sup>309</sup> Unless we are prepared to see students jailed for acts of overzealous activism, today’s enfeebled *Tinker* cannot define the boundary where student speech loses protection from arrest and prosecution.

Discipline is qualitatively different because discipline is regarded as an extension of the educational process and as having an educational purpose.<sup>310</sup> So viewed, it is perhaps unremarkable that courts would fashion an especially deferential approach to reviewing the educational decisions made by professional educators.<sup>311</sup> But when the decision is a law enforcement decision made by a law enforcement officer, there is already a well-developed body of authority addressing the proper level of deference—and that level is not *Tinker*.

When dealing with speech perceived as portending violence, courts have recognized that it is constitutional to impose school discipline in instances where criminal sanctions would be unconstitutional. For instance, in the case of a Mississippi high-school rapper who created a profane rap song calling out coaches he suspected of committing sexual harassment, the Fifth Circuit found that a student could be expelled and sent to an alternative school on the basis of a *Tinker*

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<sup>308</sup> Weigand v. Seaver, 504 F.2d 303, 306 (5th Cir. 1974).

<sup>309</sup> See Katherine M. Portner, *Tinker’s Timeless Teaching: Why the Heckler’s Veto Should Not Be Allowed in Public High Schools*, 86 MISS. L.J. 409, 441–43 (2017) (acknowledging, but disagreeing with, the prevailing interpretation of *Tinker* that students can be stopped from speaking or punished based on the disruptive conduct of audience members rather than their own conduct).

<sup>310</sup> See Catherine Y. Kim, *Policing School Discipline*, 77 BROOK. L. REV. 861, 867 (2012) (explaining that courts have viewed schools’ investigation and punishment of student misconduct as a non-adversarial process “for the youth’s own educational benefit”); James & Larson, *supra* note 245, at 46 (citing Supreme Court precedent permitting wide-scale student drug testing as ushering in “a dispute-resolution framework that removes judicial second-guessing from all but the most arbitrary and capricious school policies”).

<sup>311</sup> See, e.g., *Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437, 444 (5th Cir. 2001) (affording deference to school district’s implementation of mandatory uniform policy and observing that “it is not the job of federal courts to determine the most effective way to educate our nation’s youth”); *Doe v. Superintendent of Stoughton Sch.*, 767 N.E.2d 1054, 1057 (Mass. 2002) (“Because school officials are in the best position to determine when a student’s actions threaten the safety and welfare of other students, we must grant school officials substantial deference in their disciplinary choices.”).

disruption analysis, rejecting the student's argument that only a criminally punishable "true threat" could justify discipline.<sup>312</sup> Courts have long held that school disciplinary codes do not require the same level of specificity as would a criminal statute penalizing the same behavior.<sup>313</sup> There is, in short, a long history of judicial acknowledgement that the constitutional standard for arresting a student is more demanding than the standard for suspending the student from school.

An additional reason that students cannot be subject to arrest and prosecution based on crossing the boundary recognized in *Tinker* is that *Tinker* may not apply with full force to the youngest speakers. Courts have given schools a freer hand to censor or punish speech in lower K–12 grades, so that the same expression that might qualify as constitutionally protected in a high school would be unprotected in an elementary school.<sup>314</sup> As the Seventh Circuit stated in rejecting a First Amendment challenge brought on behalf of a fourth-grader who was prevented from handing out religious materials to classmates: "The 'marketplace of ideas,' an important theme in the high school student expression cases, is a less appropriate description of an elementary school, where children are just beginning to acquire the means of expression."<sup>315</sup> This is to say, a *Tinker*-based standard for criminalization would leave the youngest children the most vulnerable to arrest and prosecution. To accept *Tinker* as the point at which an arrest for disruptive speech becomes constitutional is to say that a ten-year-old could lawfully be subject to arrest for handing out invitations to Bible study.

Any contention that *Tinker* is the wrong measuring stick for criminal liability runs up against the Supreme Court's 1972 opinion in *Grayned*, which cited *Tinker* in rejecting a constitutional challenge to a city ordinance criminalizing disruptive demonstrations near schools.<sup>316</sup> While *Grayned* used *Tinker* as a "touchstone" in a

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<sup>312</sup> Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 396–97 (5th Cir. 2015) (en banc).

<sup>313</sup> See, e.g., Packer v. Board of Educ. of Thomaston, 717 A.2d 117, 132 (Conn. 1998) ("Statutes addressing school discipline, in particular, need not be as detailed as a criminal code."); Murray v. W. Baton Rouge Parish Sch. Bd., 472 F.2d 438, 442 (5th Cir. 1973) ("[I]t is clear . . . that school disciplinary codes cannot be drawn with the same precision as criminal codes and that some degree of discretion must, of necessity, be left to public school officials to determine what forms of misbehavior should be sanctioned.").

<sup>314</sup> See Walker-Serrano v. Leonard, 325 F.3d 412, 416, 422 (3d Cir. 2003) (affirming dismissal of First Amendment claims brought on behalf of third-grader who was prohibited from distributing an animal-rights petition at school, and observing that "any analysis of the students' rights to expression on the one hand, and of schools' need to control behavior and foster an environment conducive to learning on the other, must necessarily take into account the age and maturity of the student"); Baxter v. Vigo Cty. Sch. Corp., 26 F.3d 728, 738 (7th Cir. 1994) (granting dismissal on qualified immunity grounds in favor of school officials who disciplined an elementary-school child for wearing shirts that protested racism and unfair treatment at the school, because "age is a relevant factor in assessing the extent of a student's free speech rights in school").

<sup>315</sup> Muller v. Jefferson Lighthouse Sch., 98 F.3d 1530, 1538, 1540 (7th Cir. 1996).

<sup>316</sup> See *Grayned v. City of Rockford*, 408 U.S. 104, 119–20 (1972) ("Rockford's antinoise

confusing way,<sup>317</sup> a closer reading of what was narrowly decided in *Grayned* lends no support for the broader proposition that a Kentucky-style prohibition on disruptive school speech is constitutional.

The *Grayned* Court concluded that the noise ordinance was constitutional because it punished only disruptive “conduct” and “gives no license to punish anyone for what he is saying.”<sup>318</sup> In other words, nonspeech behavior that impedes school operations receives no constitutional protection—an unremarkable holding, consistent with the Court’s well-established “time, place, and manner” jurisprudence. The *Tinker* ruling, on the other hand, turned on the content-based (and, arguably, viewpoint-based) enforcement of a disciplinary code that might otherwise have been upheld as facially neutral. As the Court explained in *Tinker*, the Des Moines school system selectively prohibited anti-war armbands while allowing students to wear other political symbols (including, the evidence showed, a Nazi cross) that were no less likely to provoke disruption.<sup>319</sup> Properly understood, then, *Grayned* is not a *Tinker* case at all, and its invocation of *Tinker* is little more than make-weight. If, as the *Grayned* majority concluded, the noise ordinance was neither directed to a speaker’s message nor selectively enforced against only certain messages, then it is constitutional irrespective of whether a disruption occurs or is forecast, so long as it is reasonable in scope.<sup>320</sup> *Tinker*’s function in *Grayned* is to fortify the Court’s assertion that the ability to engage in noisy demonstrations will vary with the character of the property—which is different from saying that, once speech crosses the line of a punishable *Tinker* disruption, it automatically becomes fair game for criminal prosecution.

Outside the First Amendment context, the law recognizes a distinction between the latitude afforded to school disciplinarians versus police. When a school employee searches or questions a student, relaxed Fourth Amendment standards apply.<sup>321</sup> But if police become involved—either directly, by conducting the search

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ordinance goes no further than *Tinker* says a municipality may go to prevent interference with its schools.”).

<sup>317</sup> *Id.* at 120.

<sup>318</sup> *Id.*

<sup>319</sup> *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 510 (1969).

<sup>320</sup> See *Renton v. Playtime Theaters*, 475 U.S. 41, 47 (1986) (explaining that content-neutral regulations addressing the time, place, or manner of expression “are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication”).

<sup>321</sup> See Sarah Jane Forman, *Countering Criminalization: Toward a Youth Development Approach to School Searches*, 14 SCHOLAR 301, 327–30 (2011) (analyzing application of “reasonable suspicion” standard to searches by school personnel and critiquing its susceptibility to employees’ subjective biases and stereotypes).

or interrogation themselves, or indirectly, by supervising it—the Fourth Amendment requires the same probable cause as a search or interrogation in the outside world.<sup>322</sup> In other words, when Fourth Amendment rights are at issue, it is recognized that students' diminished constitutional protections are a creature of the educator-student relationship and not of geography. When law enforcement officers conduct police business inside a school, they must satisfy the same Fourth Amendment standards that apply outside. There is no reason the First Amendment should work differently.

## VI. CRIMINALIZING MISBEHAVIOR

In one of his final Tenth Circuit opinions before ascending to the Supreme Court, then-Judge Neil Gorsuch dissented in a 2-1 ruling rejecting a 13-year-old student's constitutional challenge to his arrest for burping repeatedly during class, in violation of New Mexico's school-disturbance law.<sup>323</sup> The majority found that the officer who arrested the seventh-grader, referred to in court papers as "F.M.," was entitled to qualified immunity from liability, because the arrest contravened no clearly established legal precedent.<sup>324</sup> But Gorsuch disagreed. New Mexico legislators could not have intended to criminalize "childish pranks" based on a mere showing that a school employee deviated from her teaching routine to administer discipline, Gorsuch wrote, because dispensing discipline is itself a routine school function.<sup>325</sup> That a trained police officer believed prankish burping was grounds for an arrest—and that federal judges agreed the officer's understanding was defensible—lays bare the dangerous malleability of statutes that criminalize "impairing" or "interfering with" school functions.

It is well-established that juveniles who are pushed out of school or become embroiled in the juvenile justice system are more likely to end up dropping out of

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<sup>322</sup> See, e.g., *State v. TyWayne H.*, 933 P.2d 251, 253–54 (N.M. Ct. App. 1997) (holding that the diminished "reasonable suspicion" standard to justify a search by school employees does not apply to a pat-down search by a police officer providing security at a dance); *F.P. v. State*, 528 So. 2d 1253, 1255 (Fla. Dist. Ct. App. 1988) (concluding that, regardless of whether school resource officer qualified as "school official" for purposes of reduced Fourth Amendment standard, probable cause was required because city police officer directed the search).

<sup>323</sup> *A.M. v. Holmes*, 830 F.3d 1123, 1129–30, 1162, 1169 (10th Cir. 2016); see also Maggie Penman, *Middle Schooler Arrested for Burping Appeals—Armed with Gorsuch Dissent*, NPR (May 13, 2017, 4:08 PM), <https://www.npr.org/sections/thetwo-way/2017/05/13/528273942/middle-schooler-arrested-for-burping-appeals-armed-with-gorsuch-dissent>.

<sup>324</sup> The child was cited for violating N.M. Stat. Ann. § 30-20-13(D) (2020), which provides that: "No person shall willfully interfere with the educational process of any public or private school by committing, threatening to commit or inciting others to commit any act which would disrupt, impair, interfere with or obstruct the lawful mission, processes, procedures or functions of a public or private school." *Id.*

<sup>325</sup> *A.M.*, 830 F.3d at 1170 (Gorsuch, J., dissenting).

school and committing crimes as adults.<sup>326</sup> Social scientists have widely documented the “school-to-prison pipeline” concern that, when a child is arrested or expelled at an impressionable age, that experience can lastingly alter the course of the child’s life.<sup>327</sup> The risk of placing a young person on a trajectory toward failure in later life counsels against imposing heavy-handed consequences for nonviolent behavior, like belching, where a lighter corrective touch might suffice. Beginning in the early 1990s, however, U.S. policymakers pursued a “get-tough” attitude toward even relatively minor acts of misbehavior throughout society, including within schools.<sup>328</sup> Outside of school, the mentality was exemplified by the aggressive “broken windows” school of policing that New York City—disputedly—credited with diminishing violent street crime.<sup>329</sup> Within school, the mentality took the form of “zero tolerance” literalism, in which even insubstantial, remote references to violence or controlled substances became grounds for punishment, regardless of context or justification.<sup>330</sup> According to one estimate, by 1997 nearly 80% of schools had embraced a zero-tolerance approach to punishing every perceived

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<sup>326</sup> See U.S. COMM’N ON CIV. RTS., *BEYOND SUSPENSIONS: EXAMINING SCHOOL DISCIPLINE POLICIES AND CONNECTIONS TO THE SCHOOL-TO-PRISON PIPELINE FOR STUDENTS OF COLOR WITH DISABILITIES* 74 (2019), <https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf> (citing research showing that students who are suspended or expelled from school were more than twice as likely as their peers to be arrested during the same month of their suspension or expulsion from school).

<sup>327</sup> See Artika R. Tyner, *The Emergence of the School-to-Prison Pipeline*, AM. B. ASS’N GP SOLO EREPORT (Aug. 15, 2017), [https://www.americanbar.org/groups/gpsolo/publications/gpsolo\\_ereport/2014/june\\_2014/the\\_emergence\\_of\\_the\\_school-to-prison\\_pipeline/](https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2014/june_2014/the_emergence_of_the_school-to-prison_pipeline/) (“Zero tolerance policies can also serve as a gateway into the school-to-prison pipeline . . . [I]n some instances the enforcement of zero tolerance policies can be far-reaching, therefore increasing the likelihood of interaction with law enforcement and future incarceration.”).

<sup>328</sup> See Jason P. Nance, *Rethinking Law Enforcement Officers in Schools*, 84 GEO. WASH. L. REV. ARGUENDO 151, 156–57, 156 n.34 (2016) (citing a 2005 case in which Tampa-area police officer handcuffed 5-year-old girl) [hereinafter Nance, *Rethinking*].

<sup>329</sup> See Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291, 293, 339–40 (1998) (explaining how New York City police commissioner William Bratton and Mayor Rudolph Giuliani implemented a concerted strategy of aggressively prosecuting misdemeanor “quality-of-life” infractions, such as subway fare evasion, under theory that an environment of tolerance for petty misconduct breeds disregard for more consequential criminal laws).

<sup>330</sup> See American Psychological Association Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools?: An Evidentiary Review and Recommendations*, 63 AM. PSYCHOLOGIST 852, 852–62 (2008) (describing zero-tolerance overreactions including a Florida school’s expulsion of 10-year-old girl whose mother placed a small knife in her lunchbox to cut an apple).

infraction, regardless of context or intent.<sup>331</sup> Zero-tolerance charges sometimes encompass elements of expression, including political speech, that unquestionably would enjoy full First Amendment protection anywhere outside of a school.<sup>332</sup> As has been observed, the zero-tolerance mentality has turned essentially every interaction between school police and students into a confrontation, since almost any act of misbehavior can be viewed as grounds for arrest.<sup>333</sup> As chillingly described by law professor Jason Nance, “if a student yells at or tussles with another student, talks back to the teacher, or steals another student’s property, SROs may arrest that student, even if that student is a five-year-old girl throwing a temper tantrum because her teacher ended a mathematical counting exercise that involved jelly beans.”<sup>334</sup>

Research documents that the most heavily policed schools are schools serving primarily non-white populations,<sup>335</sup> so statutes that criminalize speaking to school

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<sup>331</sup> See Kacanna Wood, *Restoring Our Children’s Future: Ending Disparate School Discipline Through Restorative Justice Practices*, 2014 J. DISP. RESOL. 395, 399 (2014) (citing research indicating that “at least 79 percent of schools across the country adopted zero-tolerance policies”).

<sup>332</sup> See, e.g., Victoria Taylor, *West Virginia Teen Suspended, Arrested After Wearing NRA Shirt Returns to School in the Same Shirt*, N.Y. DAILY NEWS (Apr. 23, 2013), <https://www.nydailynews.com/news/national/teen-suspended-arrested-nra-t-shirt-returns-school-shirt-article-1.1325252> (describing arrest of eighth-grader who refused to change out of a National Rifle Association T-shirt with a drawing of a rifle and the slogan, “Protect your right”).

<sup>333</sup> See Smith, *supra* note 137, at 368 (commenting that, because of zero tolerance policies, police have difficulty functioning in a mentoring role because school administrators expect them to serve as coercive enforcers of disciplinary codes).

<sup>334</sup> Nance, *Rethinking*, *supra* 328, at 155–56.

<sup>335</sup> See Evie Blad & Alex Harwin, *Black Students More Likely to be Arrested at School*, EDUC. WK. (Jan. 24, 2017), <https://www.edweek.org/ew/articles/2017/01/25/black-students-more-likely-to-be-arrested.html> (reporting that “74 percent of black high school students attend a school with at least one on-site law enforcement officer, compared with 71 percent of both Hispanic and multiracial high school students, and 65 percent of both Asian and white high school students”); Benjamin W. Fisher et al., *Protecting the Flock or Policing the Sheep? Difference in School Resources Officers’ Perceptions of Threats by School Racial Composition*, SOC. PROBS. (forthcoming) (describing how school officers assigned to schools with more nonwhite students identify students within the school as the primary threat as opposed to external interlopers, and how officers in diverse schools are more likely to perceive the student populace as dangerous even when conditions in the neighborhood do not suggest elevated youth crime rates); see also Aaron Kupchik & Geoff Ward, *Race, Poverty, and Exclusionary School Security: An Empirical Analysis of U.S. Elementary, Middle, and High Schools*, 12 YOUTH VIOLENCE & JUV. JUST. 322, 348 (2014) (summarizing findings that schools with a high percentage of nonwhite students are more likely to have metal detectors and concluding that “racial/ethnic minority youth are exposed at greater rates to a practice that seeks to identify offending youth and divert them to the criminal justice system”); Melinda D. Anderson, *When School Feels Like Prison*, ATLANTIC (Sept. 12, 2016), <https://www.theatlantic.com/education/archive/2016/09/when-school-feels-like-prison/499556/> (reporting that schools with larger populations of students of color are more likely to use intrusive surveillance techniques).



officials in a “disruptive” way unavoidably will end up being used disproportionately against people of color. Where police are present, the likelihood that an act of relatively minor misconduct will escalate from a disciplinary matter to a criminal one is heightened.<sup>336</sup> As First Amendment scholar Catherine Ross has observed:

The proliferation of armed police officers at schools has only intensified the risks of entering the fast track from school to court. These officers frequently advise principals about the law and immediately arrest offenders who might have never come to the attention of law enforcement for minor infractions in the past.<sup>337</sup>

As policymakers increasingly perceived schools as dangerous crime zones, federal grants became available for schools to hire SROs, who straddle the line between school disciplinarians and traditional law enforcement agents.<sup>338</sup> The field of school policing is so thinly regulated that even the national association representing school police officers has said: “Nobody knows how many SROs there are in the United States, because SROs are not required to register with any national database, nor are police departments required to report how many of their officers work as SROs, nor are school systems required to report how many SROs they use.”<sup>339</sup> It is widely reported that the number of officers assigned to schools is at least 17,000.<sup>340</sup> In a 2016 article, Professor Nance cites varying estimates ranging from 19,900 officers to “as high as 30,000.”<sup>341</sup> More recent data from the U.S.

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<sup>336</sup> See Wolf, *Assessing*, *supra* note 81, at 224–25 (observing that “arrests of students by SROs (and other police officers called to schools) overwhelmingly arise out of minor misbehavior, such as disorderly conduct and misdemeanor assault charges”).

<sup>337</sup> Ross, *supra* note 8, at 723–24.

<sup>338</sup> See Smith, *supra* note 137, at 367–68 (attributing growth of school policing to Congress’ decision in 1994 to allocate \$9 billion to increasing police presence in schools and surrounding communities).

<sup>339</sup> NAT’L ASS’N OF SCH. RESOURCE OFFICERS, FREQUENTLY ASKED QUESTIONS, <https://www.nasro.org/faq/> (last visited Jan. 27, 2021) [hereinafter, “NASRO FAQ”].

<sup>340</sup> See David Sherfinski, *Percentage of Public Schools with Resource Officers on the Rise: Report*, WASH. TIMES (Mar. 29, 2018), <https://www.washingtontimes.com/news/2018/mar/29/percentage-public-schools-resource-officers-rise-r/> (citing study from U.S. Department of Education documenting that the presence of police or security officers on K–12 campuses rose 10% over the past decade, and that 90% of on-site officers carry firearms); Johanna Wald & Lisa Thureau, *First Do No Harm: How Educators and Police Can Work Together More Effectively to Preserve School Safety and Protect Vulnerable Students*, CHARLES HAMILTON HOUSTON INST. FOR RACE & JUST. 1 (Mar. 2010), [http://www.njjn.org/uploads/digital-library/resource\\_1574\\_1.pdf](http://www.njjn.org/uploads/digital-library/resource_1574_1.pdf) (stating that school police officer ranks rose from 9,446 in 1997 to 17,000 by 2010); see also NASRO FAQ, *supra* note 339 (quoting 2007 U.S. Department of Justice survey as documenting 17,000 SROs).

<sup>341</sup> Nance, *Rethinking*, *supra* 328, at 152.

Department of Education's National Center for Education Statistics from the 2017–18 school year estimates that about half of the nation's 130,000-plus public schools had a sworn law enforcement officer on campus at least once a week, which would put the figure closer to 65,000.<sup>342</sup> The elusiveness of even this simplest of data points illustrates the profound oversight challenges in keeping watch over how policing authority is used in schools.

There is no serious dispute that nonwhite students are both disciplined and arrested at rates far exceeding those of white students, even when their offenses are comparable and there is no obvious logical basis for the differential treatment.<sup>343</sup> *Education Week* analyzed data from the U.S. Department of Education's Office of Civil Rights for the 2013 school year and found that, while the overall enrollment in public schools nationwide is 15.5% Black, Black students accounted for 33.4% of school arrests.<sup>344</sup> Kerrin Wolf's year-long study of school arrests in Delaware found that, during 2011, 67% of the students arrested were Black although they made up 32% of the student body.<sup>345</sup> An ACLU analysis of data from Massachusetts' largest school districts found that in 2012, Black students were at particularly disproportionate risk of being arrested for "public order offenses" such as "disrupting a lawful assembly," that are victimless and susceptible to subjective enforcement discretion.<sup>346</sup> Chalkbeat, the nonprofit education news platform, reported in 2020 (using state data) that Black students are 2.5 times more likely than white students to be arrested in public schools in Indiana.<sup>347</sup> The disparate

<sup>342</sup> U.S. DEP'T OF EDUC. NAT'L CTR. FOR EDUC. STATS., POLICIES OUTLINING THE ROLE OF SWORN LAW ENFORCEMENT OFFICERS IN PUBLIC SCHOOLS (May 2020), <https://nces.ed.gov/pubs2020/2020027.pdf>.

<sup>343</sup> Federal data shows that, although school violence is trending downward, school referrals to police continue to increase, with Black students accounting for 31% of school arrests although they comprise only 15% of the student body. Moriah Balingit, *Racial Disparities in School Discipline are Growing, Federal Data Show*, WASH. POST (Apr. 24, 2018), [https://www.washingtonpost.com/local/education/racial-disparities-in-school-discipline-are-growing-federal-data-shows/2018/04/24/67b5d2b8-47e4-11e8-827e-190efaf1f1ee\\_story.html](https://www.washingtonpost.com/local/education/racial-disparities-in-school-discipline-are-growing-federal-data-shows/2018/04/24/67b5d2b8-47e4-11e8-827e-190efaf1f1ee_story.html).

<sup>344</sup> *Which Students Are Arrested the Most?*, EDUC. W., <https://www.edweek.org/ew/projects/2017/policing-americas-schools/student-arrests.html#/overview> (last visited Feb. 24, 2021).

<sup>345</sup> See Wolf, *Booking*, *supra* note 20, at 72.

<sup>346</sup> Robin L. Dahlberg, *Arrested Futures: The Criminalization of School Discipline in Massachusetts' Three Largest School Districts*, ACLU (2012), [https://www.aclu.org/sites/default/files/field\\_document/maarrest\\_reportweb.pdf](https://www.aclu.org/sites/default/files/field_document/maarrest_reportweb.pdf); see also Coble, *supra* note 125, at 866 ("A broad disturbing schools statute invites racial disparities through implicit bias and prosecutorial discretion by giving too much discretion to school faculty and law enforcement in their interpretation and application of the statute.").

<sup>347</sup> Stephanie Wang & Dylan Peers McCoy, *Why Are Black Students in Indiana Twice as Likely to Be Arrested at School as White Peers?*, CHALKBEAT (June 24, 2020), <https://in.chalkbeat.org/platform/amp/2020/6/24/21301860/indiana-black-students-arrested-2-5-rate-of-white-peers>.

application of criminalization shows up in the makeup of youth detention facilities as well; in 2019, the nonprofit Prison Policy Initiative reported that, “[w]hile 14 percent of all youth under 18 in the U.S. are Black, 42 percent of boys and 35 percent of girls in juvenile facilities are Black.”<sup>348</sup>

The public-policy impetus toward treating school misbehavior as a crime is rooted in the widespread perception that schools are dangerous—and *increasingly* dangerous—places, so that even a hint of trouble justifies forceful intervention. This perception is often cited judicially to excuse seeming overreactions to harmless speech by students who have no intention to commit violence or to put others in fear of violence.<sup>349</sup> But the impression of schools awash in mounting violence is largely a product of the echo-chamber repetition of a handful of heart-wrenching headline cases. Research by nonprofit Texas Appleseed documents how, over the past half-century, “popular media has presented an image of juvenile delinquency and school crime that is out of keeping with reality.”<sup>350</sup> It is, in fact, well documented that young people of the present student generation are better-behaved than their parents’ generation as measured by indicators such as substance abuse and unwed pregnancy,<sup>351</sup> and that violence by young people has been on a steady downward trajectory since peaking in the early 1990s.<sup>352</sup> Tragic mass shootings have

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<sup>348</sup> Wendy Sawyer, *Youth Confinement: The Whole Pie 2019*, PRISON POL’Y INITIATIVE (Dec. 19, 2019), <https://www.prisonpolicy.org/reports/youth2019.html>.

<sup>349</sup> See, e.g., *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 771 (5th Cir. 2007) (upholding high school’s decision to expel a student who wrote a violent science-fiction story in a notebook shown to a classmate that included a fantasy about a school shooting: “[S]chool attendance results in the creation of an essentially captive group of persons protected only by the limited personnel of the school itself. . . . This environment makes it possible for a single armed student to cause massive harm to his or her fellow students with little restraint and perhaps even less forewarning.”).

<sup>350</sup> Deborah Fowler, *Texas’ School-to-Prison Pipeline*, TEX. APPLESEED 23 (Dec. 2010), [https://www.njjn.org/uploads/digital-library/Texas-School-Prison-Pipeline\\_Ticketing\\_Booklet\\_Texas-Appleseed\\_Dec2010.pdf](https://www.njjn.org/uploads/digital-library/Texas-School-Prison-Pipeline_Ticketing_Booklet_Texas-Appleseed_Dec2010.pdf); see also *id.* at 175 (tracing origin of frequently repeated statistic that 135,000 guns are brought into schools each day, which seems to be decades-old guesswork with no basis in research).

<sup>351</sup> See Steven Nelson, *Kids Better-Behaved Than Parents Were*, U.S. NEWS & WORLD REP. (June 13, 2014, 12:49 PM), <https://www.usnews.com/news/blogs/data-mine/2014/06/13/kids-better-behaved-than-parents-were> (reporting on data released by Centers for Disease Control documenting declining alcohol and drug use and other unhealthy behavior by teens).

<sup>352</sup> See *Fast Facts: School Crime*, NAT’L CTR. EDUC. STAT., <https://nces.ed.gov/fastfacts/display.asp?id=49> (last visited Feb. 24, 2021) (“From 1992 to 2018, the total victimization rate and rates of specific crimes—thefts and violent victimizations—declined for students ages 12–18, both at school and away from school.”); Christopher P. Salas-Wright et al., *Trends in Fighting and Violence Among Adolescents in the United States, 2002–2014*, 107 AM. J. PUB. HEALTH 977, 977 (2017) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5425865/>

understandably created a sense of urgency for authority figures to respond.<sup>353</sup> But those instances are extraordinarily rare and students are, statistically, safer and less likely to be victimized by violent crime at school than away from school.<sup>354</sup>

Statistics compiled by the U.S. Department of Education show that the rate of self-reported school-based offenses per 1,000 students dropped 69% between 1993 and 2008.<sup>355</sup> A gun-safety advocacy group studied a decades' worth of child shooting deaths between 2009 and 2018 and concluded that three out of four mass-shooting fatalities were the product of domestic violence and most took place in the children's own homes.<sup>356</sup> Even in the immediate aftermath of the tragic Parkland killings, a Northwestern University researcher reported that, on average over time, 20 to 30 mass shootings occur somewhere in the United States each year, and only one of those takes place at a school.<sup>357</sup> "Mass school shootings," she concluded, "are incredibly rare events."<sup>358</sup> Thus, the imagined "increase" in violence at school (where 2% of youth homicides occur) cannot rationally justify discarding constitutional protections that protect young people outside of school (where 98% of homicides occur).

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pdf/AJPH.2017.303743.pdf (reporting that, over a recent 12-year period, reported instances of fighting by youths between 12 and 17 declined by 29%); Mike Males, *California Youth Continue to Bring Steep Declines in Juvenile Arrests*, CTR. JUV. & CRIM. JUST. (Dec. 19, 2017), <http://www.cjcj.org/news/11883> (summarizing findings by a public-policy advocacy group that documented steady decline since mid-1970s in arrest rates among California youth ages 10 to 17, including a 57% decline in arrests for violent offenses since 2010).

<sup>353</sup> See Gaby Galvin, *CDC: School Homicide Rate Up Dramatically*, U.S. NEWS & WORLD REP. (Jan. 24, 2019, 1:13 PM), <https://www.usnews.com/news/national-news/articles/2019-01-24/cdc-multiple-victim-school-homicide-rate-up-dramatically-since-1994> (reporting that, after 15 years of decline, school homicides spiked during July 2009–June 2018, largely attributable to the Parkland, Fla., shootings that took 17 lives).

<sup>354</sup> *Indicators of School Crime & Safety—Indicator 1: Violent Deaths at School and Away From School*, NAT'L CTR. EDUC. STAT. (July 2020), [https://nces.ed.gov/programs/crimeindicators/ind\\_01.asp](https://nces.ed.gov/programs/crimeindicators/ind_01.asp) ("The percentage of youth homicides occurring at school each year remained at less than 3 percent of the total number of youth homicides between 1992–93 . . . and 2016–17 [and] [t]he percentage of youth suicides occurring at school each year remained at less than 1 percent of the total number of youth suicides.").

<sup>355</sup> JUST. POL'Y INST., *EDUCATION UNDER ARREST: THE CASE AGAINST POLICE IN SCHOOLS* (2011) (citing NAT'L CTR. FOR EDUC. STATS., *INDICATORS OF SCHOOL CRIMES AND SAFETY* (2010)).

<sup>356</sup> Brad Brooks, *More U.S. Children Die in Mass Shootings at Home than at School: Study*, REUTERS (Nov. 21, 2019), <https://www.reuters.com/article/us-usa-guncontrol-children/more-us-children-die-in-mass-shootings-at-home-than-at-school-study-idUSKBN1XV185>.

<sup>357</sup> Allie Nicodemo & Leah Petrino, *Schools are Safer than They Were in the 90s, and School Shootings Are Not More Common Than They Used to Be, Researchers Say*, NEWS@NORTHEASTERN (Feb. 26, 2018), <https://news.northeastern.edu/2018/02/26/schools-are-still-one-of-the-safest-places-for-children-researcher-says/>.

<sup>358</sup> *Id.*

There is no national database from which the cause of all school arrests can be gleaned, but some states have made their data accessible to researchers. Author Amanda Ripley estimated in 2012 that 10,000 students a year are arrested under state school-disturbance laws.<sup>359</sup> In South Carolina, 1,324 students were charged under the state's (since-narrowed) school-disturbance statute during the 2015–16 school year, making it the second most common basis for arrest.<sup>360</sup> Of those charged, 69% were Black and just 29% white, validating the concern that vague statutes will invite subjective application, whether intentionally or subconsciously.<sup>361</sup> Maryland's juvenile justice agency reports that 1,700 youths were referred to state supervision by the courts during 2019 for the offense of "disturbing school activities or personnel," making it one of the most common causes of commitment to the juvenile justice system.<sup>362</sup> In Kentucky, while the state does not publish granular data about school arrests, the Kentucky Center for School Safety at Eastern Kentucky University reported that, in 2017–18, 235 students received consequences of some type for violating the school-disruption statute, though no distinction was made between criminal and noncriminal sanctions.<sup>363</sup> The experience of these states indicates that school-disruption statutes are commonly enforced against students, putting them into the justice system's "pipeline."

The very existence of statutes criminalizing school misbehavior understandably leads police officers to believe that some school misbehavior is supposed to be treated as a crime. No amount of careful drafting will avoid overzealous applications. New Mexico, where legislators rewrote the state school-disruption statute in 1978 to address the constitutional infirmities of the original version,<sup>364</sup> provides an object lesson.

In April 2011, an administrator at Albuquerque's Harrison Middle School called the school police officer because a 14-year-old student ("B.M.") persistently

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<sup>359</sup> Ripley, *supra* note 10, at 6.

<sup>360</sup> Gupta-Kagan, *supra* note 1, at 102.

<sup>361</sup> See Wood, *supra* note 331, at 400 (noting that data shows Black students more frequently penalized for "subjective offenses").

<sup>362</sup> MD. DEPT. OF JUV. SERVS., DATA RESOURCE GUIDE (2019).

<sup>363</sup> KY. CTR. FOR SCH. SAFETY, KENTUCKY 2017–2018 SAFE SCHOOLS DATA PROJECT (2019).

<sup>364</sup> In *State v. Silva*, 525 P.2d 903, 908 (N.M. Ct. App. 1974), the state supreme court discussed the potential defects before ultimately finding the statute valid. The version enacted in 1978, N.M. STAT. ANN. § 30-20-13(D) (2020), attempted to cure the defects identified in the *Silva* case by, among other updates, adding a *mens rea* requirement for conviction. See generally *Castaneda v. City of Albuquerque*, 276 F. Supp. 3d 1152 (D.N.M. 2016) (tracing history of § 30-20-13 and its predecessor and comparing versions).

refused to put away her cellphone and stop texting during class, in violation of school rules.<sup>365</sup> The officer confronted the eighth-grader in the principal's office and insisted that she turn over her cellphone or face arrest for disrupting class.<sup>366</sup> The student sat silently in a chair clasping her knees and rocking back and forth, and the officer handcuffed her and placed her under arrest.<sup>367</sup> The student's family sued, but a federal district judge decided that qualified immunity protected the officer.<sup>368</sup> The court found that the officer could reasonably have believed that the behavior of which B.M. was accused—repeatedly texting during class—constituted the crime of school disruption, because the distraction that she caused “interfered with the ability of [school] employees to be available to other students.”<sup>369</sup> The case sharply underscores the foundational problem with statutes that broadly criminalize behavior “disrupting” or “interfering with” school functions: Almost anything that distracts a teacher or administrator, however fleetingly, can meet the definition. And, as with the Niya Kenny case in South Carolina, a school employee's discretionary decision to bring class to a halt to deal with an uncooperative student becomes the self-validating basis for a “disruption” arrest.

In its recent decision in *Nieves v. Bartlett*,<sup>370</sup> the Supreme Court increased the burden for a plaintiff to bring a civil action against police challenging a speech-motivated arrest. The takeaway from *Nieves* is that, if police have probable cause for arrest on *any* charge—even one as nebulous as “disorderly conduct”—a claim for retaliatory arrest in violation of the First Amendment will be subject to dismissal regardless of the strength of the plaintiff's evidence that the arrest was provoked by the content of constitutionally protected speech.<sup>371</sup> *Nieves* removes a check against overzealous use of arrest authority to punish speech, leaving those subject to “school disruption” laws even more vulnerable and without meaningful recourse. The fact that violation of any criminal code will validate even an ill-motivated arrest counsels strongly against leaving vague, speech-punitive statutes on the books.

A 2018 study of court decisions in which students sued over arrests by school resource officers concluded that “students' potential civil rights remedies against abuses by SROs are quite limited because of the considerable leeway provided to SROs in their interactions with students by existing student rights

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<sup>365</sup> G.M. *ex rel.* B.M. v. Casalduc, 982 F. Supp. 2d 1235, 1239–40 (D.N.M. 2013).

<sup>366</sup> *Id.* at 1240.

<sup>367</sup> *Id.*

<sup>368</sup> *Id.* at 1245.

<sup>369</sup> *Id.* at 1244.

<sup>370</sup> *Nieves v. Bartlett*, 139 S. Ct. 1715, 1723 (2019).

<sup>371</sup> See *Leading Cases: First Amendment—Freedom of Speech—Retaliatory Arrest—Nieves v. Bartlett*, 133 HARV. L. REV. 272, 277 (2019) (observing that Court's decision “created a substantial gap in First Amendment protections” and “made it significantly harder for plaintiffs to make retaliatory arrest claims”).

jurisprudence.”<sup>372</sup> As one commentator has observed, “recent developments in the law of qualified immunity . . . may have effectively removed potential legal liability as a disincentive to deploying maximally restrictive responses against student dissenters.”<sup>373</sup> Confirming the 2018 findings, education-law professor Perry A. Zirkel reported in 2019 that, in a universe of 229 legal claims lodged by students against school resource officers between January 2008 and August 2018, encompassing both federal and state law, students came out the clear winners in only 19 of the cases, or 8%.<sup>374</sup> “[T]he indiscriminate overuse of SROs . . . changes the culture to a fear-based, martial, exclusionary environment that is contrary to the nurturing role of the public schools to prepare children for a pluralistic, trusting, and peaceful future,” Zirkel concluded.<sup>375</sup> Those who suffer the brunt of official threats, intimidation and arrest will, predictably, be students who express non-majoritarian views or foment controversy that school authorities view as reputationally harmful.<sup>376</sup> In short, civil remedies do little to deter overreaching by law enforcement officers in any context,<sup>377</sup> but doubly do so in the school setting, where deference to authority figures is at its highest and regard for individual rights is at its lowest. Because the civil justice system inadequately deters police from misusing their arrest authority, statutes must unambiguously foreclose arrest in anything but the most extreme situations. They do not always do so today.

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<sup>372</sup> Wolf, *Assessing*, *supra* note 81, at 219; *see also id.* at 254 (“The unique role of SROs and the diminished rights of students in schools limits students’ abilities to bring successful civil rights claims against SROs to only the most egregious of cases.”).

<sup>373</sup> Josie Foehrenbach Brown, *Inside Voices: Protecting the Student-Critic in Public Schools*, 62 AM. U. L. REV. 253, 256 (2012).

<sup>374</sup> Perry A. Zirkel, *An Empirical Analysis of Recent Case Law Arising From the Use of School Resource Officers*, 48 J.L. & EDUC. 305, 317 (2019).

<sup>375</sup> *Id.* at 332.

<sup>376</sup> *See* Brown, *supra* note 373, at 312 (cautioning that schools lose access to “critical local knowledge” when they use punitive authority to suppress student criticism of perceived inequities: “simply shutting down student dissent by equating such speech with unacceptable disruption also cuts off access to the information resource students represent”).

<sup>377</sup> In an extraordinary opinion column carried by *The Washington Post* amid a wave of national protests decrying excessive police force against Black people, Judge James A. Wynn, Jr., of the Fourth U.S. Circuit Court of Appeals, warned that the public was growing increasingly impatient with the near-insurmountable burden that the Supreme Court had imposed to overcome police officers’ qualified immunity defense: “[W]hen the judiciary strips individuals’ constitutional rights of legal protection—when, for example, law enforcement officers can take lives unjustifiably, without legal consequences—it can be expected that the public will take matters into its own hands.” James A. Wynn, Jr., *As a Judge, I Have to Follow the Supreme Court. It Should Fix This Mistake.*, WASH. POST (June 12, 2020), <https://www.washingtonpost.com/opinions/2020/06/12/judge-i-have-follow-supreme-court-it-should-fix-this-mistake/>.

## VII. CONCLUSION

As the country smoldered in outrage during June 2020 over the killings of unarmed Black people by police, America's streets filled with students demonstrating against continued police presence in their schools.<sup>378</sup> Students helped achieve significant public-policy changes by doing exactly what the broadest school-disruption laws appear on their face to criminalize: talking back to authority figures.

One of many infirmities of school-disruption statutes is that they make no allowance for speech directed to the many thousands of armed police officers patrolling schools. If a student in Kentucky directed protest speech toward a school police officer that diverted the officer even momentarily from police work, that behavior would satisfy the statutory elements for arrest and prosecution—even though, as the Supreme Court has long affirmed, police are expected to absorb even harshly worded criticism without arresting their critics.<sup>379</sup>

That schools may take disciplinary action against students whose speech materially and substantially disrupts school functions is settled law.<sup>380</sup> But criminalization is quite a different matter. Across the country, students are engaging in acts of civil disobedience that might foreseeably “interfere with” normal school functions and activities, including demonstrations in response to mass school shootings.<sup>381</sup> That a student who demonstrates against gun violence might be exposed to criminal prosecution and a year in jail is intolerable in a civilized society. Unfortunately, however, that is the risk for students in Kentucky and at least a handful of other states.

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<sup>378</sup> See Dana Goldstein, *Do Police Officers Make Schools Safer or More Dangerous?*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/us/schools-police-resource-officers.html> (reporting that, in New York City, “hundreds of teachers and students marched in a protest calling for police to be removed from schools and replaced by a new crop of guidance counselors and social workers”); Lily Altavena & Chelsea Hofmann, *Hundreds of Students March to Protest On-Campus Police Officers*, ARIZ. REPUBLIC (June 5, 2020), <https://www.azcentral.com/story/news/local/arizona-education/2020/06/06/phoenix-students-protest-school-resource-officers/3159645001/> (reporting that Phoenix students called for their district to end its relationship with the city police department following the asphyxiation death of a Black Minneapolis man, George Floyd, at the hand of a white officer and other instances of excessive force around the country); Dahlia Bazzaz, *Calling for Reforms to Police and Education, Seattle Students Flood the Streets to Protest*, SEATTLE TIMES (June 5, 2020), <https://www.seattletimes.com/seattle-news/education/calling-for-reforms-to-police-and-education-seattle-students-flood-the-streets-to-protest/>.

<sup>379</sup> See, e.g., *City of Houston v. Hill*, 482 U.S. 451, 451 (1987) (striking down ordinance making it a crime to “oppose” or “interrupt” a police officer performing official duties).

<sup>380</sup> *Tinker v. Des Moines*, 393 U.S. 503, 511 (1969).

<sup>381</sup> See Yee & Blinder, *supra* note 14 (describing how students walked out of schools nationwide “by the thousands” following the fatal school shootings in Parkland, Fla., at times accepting disciplinary consequences).



Reforming overly broad school-disturbance laws is not just a matter of creating a more comfortable educational climate for students' benefit. The public regularly learns of school mismanagement or abusive behavior by school authorities because of student whistleblowers.<sup>382</sup> It is increasingly important that young people be empowered to share stories of wrongdoing by school police or other authority figures, because traditional news media coverage of schools has dwindled.<sup>383</sup> One national study, conducted even before recent newsroom downsizing worsened the problem, found that only 1.4% of mainstream media stories involved education, and even that minimal coverage was dominated by shootings and other disasters.<sup>384</sup> Because it is so challenging for adults to get a candid picture of what is going on inside schools, laws that intimidate whistleblowers like Niya Kenny from sharing stories of official misconduct arguably make schools more, not less dangerous.<sup>385</sup>

Although *Masters* is an outlier situation because it involves an adult school visitor, the far more common application of the statute will be against students. And those students—including protesters, whistleblowers, and editorial commentators—will suffer the brunt of vague, subjective enforcement if constitutionally infirm statutes are permitted to remain on the books.<sup>386</sup>

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<sup>382</sup> See, e.g., Shannon Behnken, *Mom Outraged After Cop Uses Taser on 8th Grader*, WLFA.COM (May 31, 2019), <https://www.wfla.com/8-on-your-side/better-call-behnen/video-mom-outraged-after-cop-uses-taser-on-8th-grader/> (describing how student-made cellphone video captured police officer using stun-gun to subdue 8th-grade student in school cafeteria); Christine Veiga, *Miami Sunset Principal Retires in Wake of Moldy Juice, Bug Reports*, MIAMI HERALD (Jan. 21, 2015), [https://www.miamiherald.com/news/local/education/article7890381.html?fb\\_comment\\_id=825154320878315\\_825185290875218](https://www.miamiherald.com/news/local/education/article7890381.html?fb_comment_id=825154320878315_825185290875218) (reporting that, after students used social media to publicize moldy school food, the principal who threatened whistleblowers with discipline abruptly took early retirement following criticism from district superintendent).

<sup>383</sup> A dire 2019 study by press-freedom advocate PEN America took note of the effect of shrinking newsrooms on coverage of local education news: “There are school districts that serve tens of thousands of students where a reporter won’t go to a school board meeting[] for months and months because there’s no one to go,” the report stated, quoting an Arizona newspaper publisher. PEN AMERICA, *LOSING THE NEWS: THE DECIMATION OF LOCAL JOURNALISM AND THE SEARCH FOR SOLUTIONS* 32 (2019), <https://pen.org/wp-content/uploads/2019/11/Losing-the-News-The-Decimation-of-Local-Journalism-and-the-Search-for-Solutions-Report.pdf>.

<sup>384</sup> E.J. Dionne, Jr., Darrell M. West, & Grover J. “Russ” Whitehurst, *Invisible: 1.4 Percent Coverage for Education is Not Enough*, BROOKINGS INST. (Dec. 2, 2009), <https://www.brookings.edu/research/invisible-1-4-percent-coverage-for-education-is-not-enough/>.

<sup>385</sup> See Frank D. LoMonte, *Don’t Silence Young Journalists*, EDUC. WK. (Feb. 7, 2015), <https://www.edweek.org/ew/articles/2015/02/18/dont-silence-young-journalists.html>.

<sup>386</sup> See Brown, *supra* note 373, at 307–08 (noting “particular urgency” of protecting students’ ability to share “insider’s perspective” on school matters, because school employees have been stripped of First Amendment protection for speech made pursuant to their official duties and are vulnerable to reprisal if they complain); Rivera-Calderón, *supra* note 21, at 15 (“Given

Young people attending public schools are uniquely vulnerable to government overreaching, because they spend most of their waking hours in a custodial setting interacting with government authority figures. They are doubly vulnerable because government punishment of young people takes place beneath a shroud of secrecy, as privacy laws make the student disciplinary process and the juvenile court process nearly impervious to scrutiny.<sup>387</sup> And they are more likely to run afoul of indistinct laws and regulations simply because—with the exception of prisoners—they are the most-watched people in America, subject to constant monitoring by school officials and surveillance cameras as well as by police.<sup>388</sup> School is, in many ways, the perfect “trap for the unwary” to make a misjudgment and end up in jail: Authority figures monitor students’ every move. They can search and question students with minimal justification. And the more rules schools enact, the more violations police can invoke as a basis for even more intrusive searching, interrogation, and detention.<sup>389</sup>

Although it is unlikely that many teenagers are actually being jailed for criticizing their teachers or principals, statutes like Kentucky’s still may inflict a harmful “chill” on students’ willingness to assert themselves (for instance, to complain about sexual harassment or to defend themselves when wrongfully accused of misconduct).<sup>390</sup> Because school employees are under no countervailing infirmity—no statute exposes a school employee to criminal prosecution for

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that subjective offenses create greater opportunities for the influence of implicit bias, compared with clearly-defined objective offenses, this bias and use of discretion leads to more students of color being charged with the subjectively-defined ‘disturbing school.’”).

<sup>387</sup> See Mary Margaret Penrose, *In the Name of Watergate: Returning FERPA to Its Original Design*, 14 N.Y.U. J. LEGIS. & PUB. POL’Y 75, 97–98 (2011) (criticizing schools and colleges for manipulating federal privacy law opportunistically to conceal their own mistakes and scandals by broadly defining any record they prefer not to release as a confidential “education record”); McKenzie Romero, *Behind Closed Doors: Fighting for Public Access in Juvenile Courts*, DESERET NEWS (Dec. 10, 2016), <https://www.deseret.com/2016/12/10/20602169/behind-closed-doors-fighting-for-public-access-in-juvenile-courts#file-a-photo-of-west-valley-city-police-officer-cody-brotheron-sits-at-the-podium-at-his-funeral-at-the-maverik-center-in-west-valley-city-on-monday-nov-14-2016> (describing how even serious violent crimes in Utah are adjudicated without public scrutiny when juveniles are involved, because records and hearings are sealed).

<sup>388</sup> During 2015–16, 94% of public high schools and 92% of middle schools reported using surveillance cameras. U.S. DEPT. OF EDUC., NAT’L CTR. FOR EDUC. STATS., FAST FACTS: SCHOOL SAFETY AND SECURITY MEASURES (2019). That represents a dramatic increase from 39% of high schools and 20% of middle schools during the 1999–2000 school year. U.S. DEPT. OF EDUC., NAT’L CTR. FOR EDUC. STATS., FORUM GUIDE TO THE PRIVACY OF STUDENT INFORMATION (2005).

<sup>389</sup> See Wolf, *Assessing*, *supra* note 81, at 243 (“[T]he wide array of behavior that is forbidden by school codes of conduct provides a remarkably wide array of justifications for searches.”).

<sup>390</sup> See Erica L. Green, *‘It’s Like the Wild West.’ Sexual Assault Victims Struggle in K-12 Schools*, N.Y. TIMES (May 11, 2019), <https://www.nytimes.com/2019/05/11/us/politics/sexual-assault-school.html> (commenting on intimidating climate that inhibits students who suffer sexual harassment from lodging complaints about school employees).

speaking “disruptively” to a student or parent—the statute worsens the already-existing power imbalance that especially disadvantages nonconforming students. While overbroad statutes such as those in Arkansas, Idaho, Kentucky, Delaware, Montana, North Dakota, and West Virginia might be judicially narrowed in the event of a First Amendment challenge, generations of students should not have to wait for someone to volunteer to become the “test arrestee” whose appeal provides that vehicle.<sup>391</sup> A speech-restrictive statute that cannot constitutionally be enforced as written is repugnant because a reasonable speaker cannot be expected to commit a crime in hopes that a judge will rewrite the statute.

Across the country, advocates from the left and right are uniting around “criminal justice reform” measures that decriminalize minor drug offenses, reduce the penalties for nonviolent crimes, make it easier to obtain release from jail on bail, and remove the reputational stigma that results from a publicly accessible criminal record.<sup>392</sup> While some of the movement may be motivated by mercy and a renewed belief in the power of rehabilitation, some is also based on the recognition that law enforcement agencies disproportionately choose to use their arrest authority on people of color.<sup>393</sup>

Even if arrest results in “only” a brief commitment to juvenile detention rather than adult jail, juvenile incarceration carries real consequences and real risks. Far too many juvenile detention centers have proven to be unsafe places for kids. In a series of reports named a finalist for the 2018 Pulitzer Prize in reporting, *The Miami*

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<sup>391</sup> See *supra* notes 141, 143.

<sup>392</sup> See Kevin Lapp, *Review: American Criminal Record Exceptionalism*, 14 OHIO ST. J. CRIM. L. 303, 308 (2016) (“the failure and crushing expense of a criminal justice system driven by retribution and incapacitation led to a widespread movement toward decriminalization, reduced sentencing schemes, increased rehabilitative services and decarceration”); Westervelt & Brosher, *supra* note 15, at 5 (observing that, since 2017, more than 20 states have enacted laws to facilitate expungement of criminal histories or to restore rights to those with criminal records, a product of “an emerging consensus that the social and economic problems created by mass prosecution and incarceration call for a fundamental reimagining of the criminal justice system”).

<sup>393</sup> See Timothy Williams & Thomas Kaplan, *The Criminal Justice Debate Has Changed Drastically. Here’s Why.*, N.Y. TIMES (Aug. 20, 2019), <https://www.nytimes.com/2019/08/20/us/politics/criminal-justice-reform-sanders-warren.html> (remarking on “seismic shift” in political discourse that has enabled Democrats to embrace criminal-justice reforms once viewed as “radical,” in part because of public outrage over police violence against Black suspects); Justin George, *Can Bipartisan Criminal-Justice Reform Survive in the Trump Era?*, NEW YORKER (June 6, 2017), <https://www.newyorker.com/news/news-desk/can-bipartisan-criminal-justice-reform-survive-in-the-trump-era> (describing “unlikely alliance” across parties seeking to reduce sentences and decriminalize petty offenses: “liberals who find the criminal-justice system racist, inequitable, and inhumane are joining forces with conservatives . . . who find it wasteful, harmful to families, and heavy-handed”).

*Herald* documented that employees at Florida juvenile correctional facilities used violence to keep teenage detainees in line, including offering snacks and treats as a “bounty” for detainees to attack each other for sport.<sup>394</sup> The revelations led members of the Florida legislature to stage surprise inspections of youth detention centers, where one state representative concluded: “The living conditions are horrible, horrific, deplorable.”<sup>395</sup> Even where employee behavior does not rise to the level of felonious, reports of overcrowding, inadequate medical and mental-health services, and ineffective safety precautions are commonplace.<sup>396</sup> And this is to say nothing of the conditions in county jails, where older teens like Niya Kenny often are held without the benefit of basic medical or educational services.<sup>397</sup> Taking any child into custody is a decision to put the child in the path of harm. Logic dictates that such a weighty decision should be made only where the child’s presence in school presents a hazard to others that might justify risking the child’s own safety—certainly not for behavior that is merely distracting. At a time when policymakers

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<sup>394</sup> See Carol Marbin Miller & Audra D.S. Burch, *Lightning Blasted His Shoes Off—and Illuminated a Pattern of Abuse by Staff*, MIAMI HERALD (Oct. 10, 2017), <https://centerforhealthjournalism.org/fellowships/projects/lightning-blasted-his-shoes—and-illuminated-pattern-abuse-staff> (reporting that “[a]llegations of ‘hits’ and ‘bounties’ and other acts of officially sanctioned mayhem have persisted year in and year out” in Florida Department of Juvenile Justice facilities).

<sup>395</sup> Caitlin Ostroff, *‘Horrible, Horrific, Deplorable’: Lawmakers Tour Miami-Dade Juvenile Lockup*, MIAMI HERALD (Oct. 18, 2017), <https://www.miamiherald.com/news/local/community/miami-dade/article179620421.html>.

<sup>396</sup> See Samantha Michaels, *Use of Force in California State Juvenile Detention Facilities Has Jumped Threefold Since Court Monitoring Ended*, MOTHER JONES (Feb. 21, 2019), <https://www.motherjones.com/crime-justice/2019/02/use-of-force-in-california-state-juvenile-detention-facilities-has-jumped-threefold-since-court-monitoring-ended/> (reporting that, after California ended court-supervised monitoring of conditions in youth detention centers in 2016, beatings of detainees, riots and suicides increased markedly, with researchers finding that “about one-third of detainees have been directly involved in a violent incident each month”); Neena Satija, *‘They’re Just Setting Those Babies Up for the Penitentiary’: How Minor Offenses Feed Overcrowding at Houston Youth Jail*, TEXAS TRIB. (Feb. 2, 2018), <https://www.texastribune.org/2018/02/02/why-harris-countys-youth-jail-so-overcrowded/> (reporting that population in Harris County’s primary youth detention facility nearly doubled between 2010 and 2017, and that during that time, stays for nonviolent offenses such as trespass and petty theft doubled to an average of nearly three weeks).

<sup>397</sup> See Steve Coll, *The Jail Health Care Crisis*, NEW YORKER (Mar. 4, 2019), <https://www.newyorker.com/magazine/2019/03/04/the-jail-health-care-crisis> (observing that many jails are too small and rural to hire qualified in-house medical staff, and struggle to maintain safety when detainees are experiencing withdrawal from opioids); Jeff McDonald & Kelly Davis, *Voices From Behind Bars: No Hot Water, Lax Medical Care and Pervasive Fear*, SAN DIEGO UNION-TRIB. (Apr. 26, 2020), <https://www.sandiegouniontribune.com/news/watchdog/story/2020-04-26/voices-from-behind-bars-no-hot-water-lax-medical-care-and-pervasive-fear> (reporting that San Diego jail detainees are “terrified” of the COVID-19 pandemic because of inadequate medical attention and cramped cells).

everywhere are offering adult-aged offenders second chances at rehabilitation, it is counter-intuitive for the legal system to expose vulnerable young people to dangerous confinement conditions for what could be no more than a fleeting adolescent temper outburst.

The justice system has ample tools to deal with seriously disruptive behavior at schools by way of well-established statutes criminalizing threats, harassment, and disorderly conduct. Even if school disturbance laws were wiped off the books tomorrow, it is unclear exactly what subset of antisocial behavior, if any, would fail to receive adequate punishment. But even assuming that policymakers believe schools need some enhanced protection against outsiders like the perpetrator of the Newtown, Connecticut, mass school shootings in 2012,<sup>398</sup> it is possible to craft narrower and more constitutionally sound remedies than Kentucky-style school disturbance laws. States such as Utah and (after its 2018 reform legislation) South Carolina offer a model for more precisely tailored laws that target non-expressive conduct by school intruders, without worsening the already-stifling environment for student speech in schools.

Even in states where courts have imposed a narrowing judicial construction on facially overbroad statutes, as in California, Florida and Maryland, legislators should revisit their statutes so that—if the prohibitions must exist at all—the narrowness of their scope is readily apparent to a reasonable student or police officer, not discernible only by constitutional scholars. It serves no valid purpose to leave statutes known to be unconstitutionally overbroad on the books where they can be abused for coercion and intimidation (for instance, as bargaining leverage to make families accept undeserved disciplinary action, out of fear that school authorities will escalate the case to criminal court).

Vague school-disruption laws persist as a relic of an increasingly discredited “get-tough” era in which policymakers’ default response to every societal ill was arrest, prosecution, and jail. While Johnathan Masters’ case, perhaps understandably, failed to generate the sympathy and outrage that accompanied Niya Kenny’s arrest, it should not take a viral video in every state to motivate a reexamination of antiquated criminal codes that accomplish little except making schools more disempowering.

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<sup>398</sup> See Susan Candiotti & Dana Ford, *Connecticut School Victims Were Shot Multiple Times*, CNN (Dec. 15, 2012), <https://edition.cnn.com/2012/12/15/us/connecticut-school-shooting/index.html> (reporting details of Dec. 15, 2012, mass shooting by school intruder who killed 20 elementary school students and six adults, one of the worst death tolls of any mass shooting in U.S. history).