

**BANNING ‘BOOBIES’?: A STANDARD FOR SCHOOL
DISTRICTS TO EVALUATE PLAUSIBLY LEWD, ON-CAMPUS
STUDENT SPEECH IN LIGHT OF *B.H. EX REL. HAWK V.
EASTON AREA SCHOOL DISTRICT***

*Kimbrilee M. Weber**

I. INTRODUCTION

As part of a national breast cancer awareness initiative, the Keep A Breast Foundation (“the Foundation”) began its “I • Boobies!” campaign.¹ The campaign featured plastic bracelets with the “I • boobies! (KEEP A BREAST)” slogan, which the Foundation marketed and sold nationally.² Two middle school students at Easton Area Middle School, B.H. and K.M.,³ noticed the campaign’s popularity, purchased their own bracelets, and began to wear the bracelets at school.⁴ The two girls wore their bracelets to school during the 2010-2011 academic year.⁵ Initially, teachers at Easton Area Middle School were unsure of how to react to the bracelets.⁶ As a result, the school debated the issue internally for some time.⁷ Eventually, a school security guard and the assistant principal told B.H. and K.M. that they

*J.D. Candidate, 2015, Seton Hall University School of Law; B.A., *highest honors*, 2012, Lehigh University. Thank you to Professor Ronald Riccio and my fellow *Law Review* editors for their guidance during the composition of this Comment. Thank you to my family and friends for their continued love and support throughout law school.

¹ B.H. *ex rel.* Hawk v. Easton Area Sch. Dist., 725 F.3d 293, 298 (3d Cir. 2013) (en banc) (citing Br. of Amicus Curiae KABF at 20–21), *cert. denied*, No. 13-672, 2014 WL 901854 (Mar. 10, 2014).

² B.H. *ex rel.* Hawk, 725 F.3d at 298.

³ The case refers to B.H. and K.M. by their initials throughout in order to protect their privacy. Courts do not employ uniform safeguards regarding the privacy of child parties in litigation, and use varied protections including reference to initials only or reference to first name only in case names. The proper approach is a source of debate for courts. See, e.g., *Invitation to Comment*, JUDICIAL COUNCIL OF CAL. ADMIN. OFFICE OF THE COURTS (2011), <http://www.courts.ca.gov/documents/SPR11-11.pdf> (debating a revision to California’s policy of using initials for child identification in juvenile court cases).

⁴ B.H. *ex rel.* Hawk, 725 F.3d at 298–99 (citing App. 72, 92, 106, 442).

⁵ B.H. *ex rel.* Hawk, 725 F.3d at 299.

⁶ *Id.*

⁷ *Id.* at 299.

would need to remove their bracelets while at school.⁸ The girls refused to do so, and as a result, each received an in-school suspension and was prohibited from attending an upcoming school event.⁹

The case eventually reached the Court of Appeals for the Third Circuit, and the resulting decision, *B.H. ex rel. Hawk v. Easton Area School District*, exacerbated the preexisting problem with the First Amendment rights of children in schools. The Third Circuit heard the case *en banc* and ultimately decided in favor of B.H. and K.M.'s right to wear their bracelets at school.¹⁰ Despite the majority's holding, the divisive dissents lamented the lack of an easily applicable standard for evaluating student speech.¹¹ This lack of any standard continues to plague school districts after this decision. The court's interpretation of preexisting and ambiguous school First Amendment precedent adopted distinct categories for lewd and plausibly lewd student speech.¹² The endorsement of this overly simplified approach only intensifies already existing issues concerning the scope of First Amendment rights in schools.

B.H.'s central holding, that school districts cannot ban ambiguously or plausibly lewd speech that could be construed to reflect on a social or political issue, is the most problematic part of the case's analysis.¹³ The holding gives school districts no standard or guidance to rely on when evaluating on-campus student speech, while simultaneously creating too many potential loopholes for disingenuous student speakers because of the malleability of key words in the standard. If the Third Circuit insists on delineating a vague and malleable standard to govern plausibly lewd, student on-campus speech by expanding the reach of preexisting case precedents, it must provide school districts with more effective guidance to make decisions within these gray areas. This guidance will allow officials to prevent and prepare for inevitable litigation that will result from the current standard's terms "could be interpreted by a reasonable observer as lewd, vulgar, or profane" and could "plausibly be interpreted as commenting on a political or social issue."¹⁴

⁸ *Id.* at 300.

⁹ *Id.*

¹⁰ *Id.* at 298.

¹¹ *B.H. ex rel. Hawk*, 725 F.3d at 324, 338 (Hardiman, J., dissenting and Greenaway, J., dissenting).

¹² *B.H. ex rel. Hawk*, 725 F.3d at 308, 315. The adoption of these categories was based on the Third Circuit's interpretation of the Supreme Court's holding in *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986). See discussion of *Fraser* *infra* pp. 5-6.

¹³ *B.H. ex rel. Hawk*, 725 F.3d at 298.

¹⁴ *Id.* at 302.

This Comment proposes a factor-oriented framework that will enable school districts to evaluate on-campus student speech issues as they arise, while still respecting student free speech concerns and avoiding potential litigation. The main benefit of the framework will be to provide districts with a way to define the ambiguous terms “political” and “social.” Expanding on these terms will allow school districts to more effectively comply with school speech case precedent since the Third Circuit’s ruling in *B.H.* Administrators will be able to consider speech issues against a standard that includes subjective, evaluative questions that take into consideration everyday concerns and contexts.

Part II of this Comment outlines existing Supreme Court, on-campus student speech jurisprudence and determines how *B.H.* is constrained by these cases. Part III proposes a framework for Third Circuit school districts to evaluate on-campus student speech that is consistent with Supreme Court precedent and that addresses the concerns this Comment highlights with the post-*B.H.* standard. Part III also uses the Supreme Court-endorsed public employee and teacher speech standards to inform this Comment’s framework. Part IV applies the proposed standard to two case studies to demonstrate its utility. Part V concludes this Comment by reiterating the need for clarification of the Third Circuit’s plausibly lewd speech standard in order for such a standard to have any practical applicability in school districts. The best way to achieve this outcome is through the adoption of a factor-oriented approach for administrators to use when making these difficult decisions.

II. CONSTITUTIONAL LIMITATIONS FOR ON-CAMPUS SCHOOL SPEECH

A. *Rationale for Free Speech Considerations in Schools*

In *Tinker v. Des Moines Independent Community School District*, the Supreme Court underscored the importance of First Amendment rights of schoolchildren for the first time.¹⁵ The Court concluded that a child does not check his or her constitutional rights at the door of the schoolhouse.¹⁶ Today, it is increasingly difficult for schools to uphold the broad First Amendment rights that *Tinker* carved out for students, especially in light of school safety concerns and evolving modes of speech. School speech issues are complicated by a myriad of variables: the topic of the speech, the forum where the speech is

¹⁵ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

¹⁶ *Id.*

communicated, and the sensitivity of the audience to whom the speech is directed, to name a few. One particularly problematic subset of these issues is deciding what amount of controversial and offensive speech is actually appropriate on campus.

B. Tinker v. Des Moines Independent Community School District (1969)

On December 16 and 17, 1965, junior high and high school students in Des Moines, Iowa received suspensions for wearing black armbands in support of a truce in the Vietnam War.¹⁷ The students filed a complaint through their parents, asking for an injunction that would allow them to wear their armbands without the fear of discipline.¹⁸ The Supreme Court granted certiorari to decide the case.¹⁹ When ruling in favor of the children's right to wear the armbands, the Court noted that the communication students have with one another is both inevitable and desirable in a school setting.²⁰ As a part of its decision, the Court held that the school could not ban the armband speech because it neither created the potential for a substantial disruption, nor created the risk of interfering with any of the school's activities.²¹ Under *Tinker*, a school has a heavy burden to carry in demonstrating that a student's speech would create a substantial disruption in order to justify any ban on such speech.²²

The importance of *Tinker* in shaping the foundation of a student's First Amendment rights cannot be overstated. The case demonstrates the importance of student First Amendment rights, even though the speakers are children and even though the speech occurs in a classroom setting. As the *Tinker* Court aptly pointed out, children, even while in school, are still "persons" under our Constitution.²³ It is important to keep this framework and emphasis on the protection of rights in mind as student First Amendment jurisprudence continues to evolve over time.

¹⁷ *Id.* at 504.

¹⁸ *Id.*

¹⁹ *Id.* at 505.

²⁰ See, e.g., *Tinker*, 393 U.S. at 512, 514; *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) (arguing that speech protections in schools are essential for the exchange of ideas in the classroom).

²¹ *Tinker*, 393 U.S. at 514.

²² *Id.*

²³ *Id.* at 511.

C. Bethel School District Number 403 v. Fraser (1986)

Eventually, the Supreme Court narrowed the broad speech right it outlined in *Tinker* by finding “constitutionally valid reasons” to carve out limitations.²⁴ One such limitation came before the Court less than twenty years later. In *Bethel School District No. 403 v. Fraser*, the Supreme Court tempered the *Tinker* holding by creating an exception to the broad grant of First Amendment rights in schools, thereby justifying a school’s intervention and suppression of student First Amendment rights, in specific instances of lewd speech.²⁵ Matthew Fraser was a student at Bethel High School in Washington when he delivered a nomination speech for another student’s school election campaign.²⁶ He gave his speech as a part of his school’s student assembly.²⁷ During the speech, Fraser made sexually explicit innuendos, including “he’s firm in his pants . . . his character is firm,” “a man who takes his point and pounds it in,” and “a man who will go to the very end—even the climax, for each and every one of you.”²⁸ As a result of Fraser’s controversial speech, some students felt embarrassed, some students made inappropriate sexual gestures, and one teacher decided to have a special discussion of the speech with her class the next day.²⁹ The school notified Fraser that he was going to be suspended for three days following his speech and that he lost the opportunity to speak at graduation;³⁰ as a result of these disciplinary actions, Fraser brought an action seeking damages and injunctive relief.³¹

The school district’s ability to suspend Fraser outweighed Fraser’s First Amendment right to make his speech.³² The Court evaluated the “interest in protecting minors from exposure to vulgar and offensive spoken language” in arriving at a decision.³³ Relying in part on the consideration of obscene speech in *FCC v. Pacifica Foundation*,³⁴ the Court distinguished Fraser’s speech, undeserving of First Amendment protection, from *Tinker*’s armband, which was deserving of protection.³⁵ The Court found that Fraser’s speech warranted unique

²⁴ *Id.*

²⁵ *Fraser*, 478 U.S. at 680.

²⁶ *Id.* at 677.

²⁷ *Id.*

²⁸ *Id.* at 687 (Brennan, J., concurring).

²⁹ *Id.* at 678 (majority opinion).

³⁰ *Id.* at 678.

³¹ *Fraser*, 478 U.S. at 679.

³² *Id.* at 685.

³³ *Id.* at 684.

³⁴ *Id.* at 684–85.

³⁵ *Id.* at 685.

consideration because it was lewd speech, different from the politically controversial speech at issue in *Tinker*.³⁶ The Court distinguished its holding from *Tinker* by noting that “unlike the sanctions imposed on the students wearing armbands in *Tinker*, the penalties imposed in this case were unrelated to any political viewpoint.”³⁷ Even though *Tinker* provided broad First Amendment rights for schoolchildren in a school setting, since *Fraser*, school districts are within their rights to stop lewd speech that could undermine a school’s mission.³⁸

In addition to limiting *Tinker*’s expansive allowance of student speech rights in the context of lewd speech,³⁹ the *Fraser* Court enunciated a balancing test that highlights the competing interests at play in deciding whether to allow or to ban a student’s questionable speech.⁴⁰ The *Fraser* test weighs “[t]he undoubted freedom to advocate unpopular and controversial views in schools and classrooms” against “society’s countervailing interest in teaching students the boundaries of socially appropriate behavior.”⁴¹ *Fraser* is significant because it limits *Tinker*’s broad rule of permissibility and gives more power to school districts to ban or prevent student First Amendment speech that is classified as lewd. Unfortunately, this seemingly clear exemption did not end or even simplify school districts’ inquiries into student speech issues because determining what modes and content of speech qualify as lewd or vulgar can be incredibly difficult.⁴²

*D. Morse v. Frederick (2007)*⁴³

Since *Fraser*, the Court has continued to grapple with where to draw the line in limiting student speech, while simultaneously striving to maintain the integrity of student First Amendment rights. About

³⁶ *Id.* at 680, 683.

³⁷ *Fraser*, 478 U.S. at 685.

³⁸ *Id.*

³⁹ This statement bears in mind the limitation for the cause of, or potential for, a substantial disruption that the *Tinker* Court endorsed.

⁴⁰ *Fraser*, 478 U.S. at 681.

⁴¹ *Id.*

⁴² Many courts have grappled with defining these amorphous terms. *See, e.g.*, *Pyle By and Through Pyle v. South Hadley Sch. Comm.*, 861 F. Supp. 157, 159 (D. Mass. 1994) (“People will *always* differ on the level of crudity required before a school administrator should react. The T-Shirts in question here may strike people variously as humorous, innocuous, stupid or indecent.”) (emphasis in original).

⁴³ In addition to *Tinker*, *Fraser*, and *Morse*, the Court also decided *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), the fourth and final seminal student speech case. A background of *Kuhlmeier* is omitted from this Comment because the *B.H.* court did not focus on *Kuhlmeier* in its analysis, and this Comment does not base any of its proposed framework on *Kuhlmeier*.

twenty years after *Fraser*, the Court created an additional limitation on student First Amendment rights in *Morse v. Frederick*.⁴⁴ During a school-sanctioned and supervised event celebrating the Olympic Torch Relay, a group of students at Juneau-Douglas High School in Alaska displayed a banner that read “BONG HiTS 4 JESUS.”⁴⁵ The students exhibited the banner while watching the event take place across the street from the school.⁴⁶ Joseph Frederick received a suspension for being the only student to refuse to comply with the demands of school officials to remove the banner display from the event.⁴⁷

The Court found that the school was justified in suspending Mr. Frederick, because his banner could reasonably be interpreted as the school’s toleration of illegal drug use in contravention of school policy if left displayed during the Olympic Torch Relay.⁴⁸ The Court noted that Frederick did not claim that his speech conveyed any political message;⁴⁹ the speech merely advocated drug use.⁵⁰ The lack of any political message, paired with the fact that this message could have been attributed to the school itself as an endorsement of illegal drug use, justified the ban and the resulting discipline.⁵¹

The *Morse* case is significant, even though it concerns illegal drug use and not lewd speech, because both the majority and Judge Hardiman’s dissent in *B.H.* rely heavily on the *Morse* Court’s analysis in their opinions. *Morse* foreshadowed some of the ultimately crucial considerations to the majority’s opinion in *B.H.*, by noting that “the government may likewise restrict speech that ‘a reasonable observer would interpret as advocating illegal drug use’ and that cannot ‘plausibly be interpreted as commenting on any political or social

⁴⁴ *Morse v. Frederick*, 551 U.S. 393, 397 (2007).

⁴⁵ *Id.* (citing App. to Pet. for Cert. 70a).

⁴⁶ *Morse v. Frederick*, 551 U.S. at 397.

⁴⁷ *Id.* at 398.

⁴⁸ *Id.* at 403, 408–09.

⁴⁹ *Id.* at 403.

⁵⁰ The *B.H.* holding now puts Third Circuit school districts in analogous situations in a much more precarious position when evaluating this exact same banner in the event that another “Frederick” attempted to argue that his speech did connote a political message. Making this argument, even if dishonestly, would not be a difficult feat for a student today in light of marijuana legalization movements now afoot in the United States. Should a Third Circuit school district now be forced to allow this same banner under *B.H.*? Without any clarification of the *B.H.* holding, it seems the answer may be yes, and indeed, Justice Hardiman agrees in his *B.H.* dissent when noting that “[the majority] refused to address what the result of the [*Morse*] case would have been had Frederick’s banner been ‘political.’” *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 327 (3d Cir. 2013) (Hardiman, J., dissenting), *cert. denied*, No. 13-672, 2014 WL 901854 (Mar. 10, 2014).

⁵¹ *Morse*, 551 U.S. at 408–10.

issue.”⁵² These considerations eventually form the heart of the Third Circuit majority’s *B.H.* analysis and plausibly lewd student speech test.⁵³

E. B.H. ex rel. Hawk v. Easton Area School District

School districts still struggle with managing potentially impermissible student speech because the line where student speech crosses from permissible to impermissible is far from clear, especially in the context of ambiguously lewd speech. Recently, the Third Circuit in *B.H. ex rel. Hawk v. Easton Area School District* adopted a new standard through which *plausibly* lewd speech can be evaluated.⁵⁴ This case creates another limitation on broad student First Amendment speech rights. In *B.H.*, Easton Area School district officials reprimanded students B.H. and K.M. for wearing breast cancer awareness bracelets that read “I • boobies! (KEEP A BREAST).”⁵⁵ The “I • boobies! (KEEP A BREAST)” bracelets had created a stir at school districts all over the nation; the debate was not unique to the Easton Area School District.⁵⁶

In *B.H.*, B.H. and K.M. had been wearing the bracelets to school since the beginning of the 2010–2011 year.⁵⁷ In September of that year, several teachers asked the assistant principal of the eighth grade if they should force the girls to take off their bracelets.⁵⁸ The bracelets had not caused any disruptions or prompted any problematic comments,⁵⁹ yet the school’s leadership ultimately concluded that students wearing bracelets with the word “boobies” on them would be asked to remove

⁵² *Id.* at 422 (Alito, J., concurring).

⁵³ *See infra* p. 10.

⁵⁴ *B.H. ex rel. Hawk*, 725 F.3d at 302.

⁵⁵ *Id.* at 300.

⁵⁶ *See, e.g.,* Don Carrigan, *School Changes Policy on Controversial Bracelets*, WCSH6 PORTLAND (Sept. 23, 2011, 6:48 PM), <http://www.wcsh6.com/news/article/173767/School-changes-policy-on-bracelets> (noting that high school officials in Waldoboro, Maine initially had a dress code policy banning the bracelets, but subsequently revised the policy to allow the bracelets), and Ken Christian, *Breast Cancer Fundraising Bracelets Banned from South Dakota High School*, WCSH6 PORTLAND (Sept. 2, 2010, 11:33 AM), <http://www.wcsh6.com/news/article/126283/0/portland.high.schoolsports.net> (noting that, while some school districts have allowed high school students to wear the breast cancer bracelets inside out, Baltic High School in Baltic, South Dakota has chosen to ban the bracelets completely).

⁵⁷ *B.H. ex rel. Hawk*, 725 F.3d at 299.

⁵⁸ *Id.*

⁵⁹ This was a significant factual departure from the Supreme Court’s observation in *Fraser*, where Fraser’s speech prompted bewilderment, incited inappropriate sexual gestures, and caused at least one teacher to address the speech with her class. *See supra* note 29 and accompanying text. Here, there were only de minimus and speculative reactions to the bracelets in the middle school.

their bracelets while in school.⁶⁰ Administrators feared that the bracelets might reappear during the school's upcoming breast cancer awareness month observance, and they publically announced the ban on the bracelets on October 27, 2010, the day before the observance.⁶¹

B.H. wore her "I • boobies! (KEEP A BREAST)" bracelet on the day administrators announced the ban; additionally, both B.H. and K.M. wore their bracelets the following day in honor of the school's breast cancer awareness month.⁶² After refusing to remove their bracelets, the school suspended both girls and banned them from attending the school's Winter Ball.⁶³ B.H. and K.M., through their parents, sued Easton Area School District.⁶⁴

Following an evidentiary hearing on the plaintiffs' motion for a preliminary injunction, the District Court enjoined the bracelet ban.⁶⁵ On appeal, the Third Circuit held that students wearing the "I • boobies! (KEEP A BREAST)" bracelets could not be restricted by the school district.⁶⁶ The court in *B.H.* created another exception to the already existing lewd speech exception from *Fraser* by holding that "a school may also categorically restrict speech that—although not *plainly* lewd, vulgar, or profane—could be interpreted by a reasonable observer as lewd, vulgar, or profane so long as it could not also plausibly be interpreted as commenting on a political or social issue."⁶⁷ *Fraser's* holding only focused on plainly lewd speech, whereas here, the Third Circuit's holding extended to plausibly lewd speech.⁶⁸

1. Obscenity Should Not Automatically Equal Per Se Lewdness

The Third Circuit overemphasized the references to *FCC v. Pacifica Foundation* and obscene speech from *Fraser* in connecting "plainly lewd speech" and "obscenity to minors," and this reliance has created further problems with respect to the new gray area that the plausibly lewd student speech issue created in *B.H.*⁶⁹ The Third Circuit reasoned that the *Fraser* speech was per se lewd because it was obscene

⁶⁰ *B.H. ex rel. Hawk*, 725 F.3d at 299.

⁶¹ *Id.*

⁶² *Id.* at 299–300.

⁶³ *Id.* at 300.

⁶⁴ *Id.*

⁶⁵ *Id.* at 301.

⁶⁶ *B.H. ex rel. Hawk*, 725 F.3d at 320.

⁶⁷ *Id.* at 302.

⁶⁸ *Id.*

⁶⁹ *Id.* at 316.

under the *Pacifica* standard.⁷⁰ The court explained that these “patently offensive reference[s] to sexual organs” are “obscene to minors . . . [because they] offend for the same reasons obscenity offends.”⁷¹ In holding that obscene speech such as George Carlin’s seven dirty words⁷² is patently offensive, the Third Circuit endorsed a per se lewdness-obscenity exception that overlaps with the gray area of plausibility that the court has created in its plausible lewdness exception.

This categorical exception for per se lewdness is too broad and allows a school district to entirely ban speech that, in some instances, could conceivably fall within the majority-endorsed plausibly lewd gray area.⁷³ In creating this exception, the majority has endorsed an exception to its own plausibility standard that is confusing and unworkable because the plausible lewdness standard itself is far too ambiguous.⁷⁴ If a school district can categorically ban certain words because they are obscene to minors, even though they are arguably plausibly lewd and would meet the Third Circuit’s test warranting allowance of the speech, the same speech could simultaneously meet and not meet the Third Circuit’s current test for admissibility. To achieve this confusing outcome, a speaker need only demonstrate that an obscene word, which could be plausibly construed as lewd, comments on a political or social issue. In this situation, no clear standard would govern. This contradictory result certainly cannot be what the Third Circuit intended.

Instead, to remain consistent with its plausibly lewd political or social commentary exception,⁷⁵ the Third Circuit should adopt a *presumption* of lewdness for patently offensive and obscene speech such as George Carlin’s seven dirty words. In cases where the speech at issue

⁷⁰ *Id.*

⁷¹ *Id.* at 318 (citing *FCC v. Pacifica Found.*, 438 U.S. 726, 745–46 (1978) (plurality opinion)).

⁷² See *George Carlin: 7 Dirty Words You Can't Say On Television*, YOUTUBE (Aug. 12, 2012), <https://www.youtube.com/watch?v=8dCIKqkIg1w>.

⁷³ See, e.g., *B.H. ex rel. Hawk*, 725 F.3d at 318 (discussing the school district’s “I • tits (KEEP A BREAST)” hypothetical). An argument could be made that this speech is plausibly lewd and not patently lewd based on the evolution of the meaning and colloquial use of the word “tits” over time. In endorsing a blanket ban on patently obscene speech under *Fraser*’s lewd speech standard, the Third Circuit majority has impermissibly restricted the First Amendment rights of schoolchildren.

⁷⁴ See *Petition for a Writ of Certiorari at 15, Easton Area Sch. Dist v. B.H. ex rel. Hawk*, No. 13-672 (petition for cert. filed Dec. 3, 2013), 2013 WL 6327646, at *15 (arguing that “[t]he Third Circuit’s unsupported distinction between what is ‘patently’ lewd and what is ‘ambiguously’ lewd creates an unworkable metaphysical dichotomy of meaning, which nevertheless remains ‘lewd’”).

⁷⁵ *B.H. ex rel. Hawk*, 725 F.3d at 302.

is patently offensive, and therefore presumptively lewd, the speaker will still have an opportunity to rebut the presumption of lewdness through use of this Comment's proposed standard. The speaker would then be able to argue that the speech is only plausibly lewd and can be seen as commenting on a political or social issue. If the speaker can rebut the presumption of obscenity and demonstrate that his speech meets the framework proposed in this Comment, the school district is not allowed to ban the speech, even if it is otherwise obscene. This consideration is truer to the ideals of First Amendment rights in schools and avoids contradictory and overlapping tests in the Third Circuit, while also prioritizing the interest in preventing the exposure of minors to obscene speech that the Third Circuit valued in its decision.⁷⁶

2. B.H.'s Gray Area of Plausible Lewdness

In *B.H.*, the Third Circuit majority found that the case uniquely warranted an exception to *Fraser* because the bracelets at issue were not as patently lewd as Fraser's speech;⁷⁷ instead, the bracelets fell into a gray area of plausible lewdness and qualified as speech that a reasonable observer may or may not find lewd.⁷⁸

In addition to creating an exception to *Fraser*, the Third Circuit majority's reading of the plausibility realm of lewd speech relied heavily on Justice Alito's concurrence in *Morse* to create its second limitation.⁷⁹ Alito's concurrence in the majority's decision in *Morse* was expressly conditioned on an understanding that speech that could plausibly be construed as social or political commentary would not be encompassed in *Morse's* endorsement of the constitutional ban on speech promoting illegal drug use.⁸⁰ Similarly, the *B.H.* majority

⁷⁶ *Id.* at 306 (noting the interest in limiting exposure of obscenity to minors).

⁷⁷ *Id.*

⁷⁸ *But see* Petition for a Writ of Certiorari, *supra* note 74, at *19 (arguing that Matthew Fraser's speech would now fall into the plausibly lewd gray area under the Third Circuit's adopted approach because it was plausibly political, thereby shielding Fraser from his school district's regulation, an undesirable outcome. The petition further argues that the Third Circuit *B.H.* opinion and *Fraser* leave open the issue of whether "plausibly political" speech can also be protected.).

⁷⁹ *B.H. ex rel. Hawk*, 725 F.3d at 308–14.

⁸⁰ *Id.* at 309–10 (quoting *Morse v. Frederick*, 551 U.S. 393, 422 (2007) (Alito, J., concurring)). The *B.H.* majority's reading of Justice Alito's *Morse* concurrence is an application of the narrowest rationale principle. The Third Circuit uses this principle to read Justice Alito's *Morse* concurrence as a limitation on the majority's holding in *Morse*, and also finds Justice Alito's concurrence to be binding in its majority opinion. This principle is highly controversial in its accepted breadth and application. Because this Comment's focus is a proposal for a clarified framework based on the majority's holding (a holding that has applied the narrowest rationale in a specific way to arrive

engrafted this consideration of plausible political or social speech from *Morse* as an additional safeguard protecting plausibly lewd student speech in the *B.H.* holding.⁸¹

The lack of clarity that *B.H.* provides to school districts is underscored by the disagreement between the Third Circuit judges.⁸² The entire Third Circuit heard the case,⁸³ and it produced two dissents.⁸⁴ Judge Hardiman's dissent argued that the court inappropriately combined the *Fraser* and *Morse* tests into a hybrid test in a case that had nothing to do with illegal use of drugs.⁸⁵ Judge Hardiman pointed out that "although the appellate courts have had dozens of opportunities to do so, no court has suggested that *Morse* qualifie[s] *Fraser* in any way."⁸⁶ To reflect the intent behind them, the exceptions should be treated as "independent analytical constructs that permit schools to regulate certain types of speech that would otherwise be protected under *Tinker*."⁸⁷ The ambiguity of the hybrid test that the majority adopted has created practical problems with respect to actually carrying out this test in practice.⁸⁸

Judge Greenaway echoed the concerns of Judge Hardiman by noting the troublesome position school districts are left in by the majority's decision.⁸⁹ He noted that "the unabashed invocation of a lewd, vulgar, indecent or plainly offensive term is not what is at issue here; what is at issue is the notion that we have established a test which effectively has no parameters."⁹⁰ Judge Greenaway's critique of the majority's decision provides a springboard for the continued need for a workable standard, even more so after *B.H.*'s issuance.⁹¹ He asked: "[h]ow is a school district now better able to discern when it may

at a certain conclusion), the Author accepts the majority's reading of Justice Alito's concurrence in *Morse* and does not debate the *B.H.* majority's application of the narrowest rationale principle.

⁸¹ *B.H. ex rel. Hawk*, 725 F.3d at 309–15.

⁸² *See id.* at 324, 338 (Hardiman, J., dissenting and Greenaway, J., dissenting).

⁸³ *B.H. ex rel. Hawk*, 725 F.3d at 297.

⁸⁴ *Id.* at 338.

⁸⁵ *Id.* at 330–31 (Hardiman, J., dissenting).

⁸⁶ *Id.* at 331.

⁸⁷ *Id.* at 331.

⁸⁸ *Id.* at 333.

⁸⁹ *B.H. ex rel. Hawk*, 725 F.3d at 338–39 (Greenaway, J., dissenting)

⁹⁰ *Id.* at 340.

⁹¹ This continued need for a workable standard post-*B.H.* has prompted the Easton Area School District to vote in favor of petitioning the Supreme Court for certiorari. *See 'Boobies' bracelet fight heads to Supreme Court*, USA TODAY (Oct. 29, 2013, 11:08 PM), <http://www.usatoday.com/story/news/nation/2013/10/29/boobies-bracelet-supreme-court/3310843/>.

2015]

COMMENT

659

exercise its discretion to impede the use of a particular slogan, as it relates to an awareness program, than before the issuance of this opinion?”⁹² The short answer to Judge Greenaway’s question is that it is not. After *B.H.*, Third Circuit school districts are in perhaps their worst position to date; they are caught in an era filled with revolutionary technology with evolving and rapidly multiplying forms of speech while armed with a most ambiguous and malleable test to evaluate that speech.

III. A FRAMEWORK FOR THIRD CIRCUIT SCHOOL DISTRICTS TO EVALUATE ON-CAMPUS STUDENT SPEECH THAT IS CONSISTENT WITH *FRASER* AND *B.H.*

A. *The Relevancy of Resolving This Issue*

Many comments address the problems that *Fraser* created and left unsettled, as well as the general ambiguity and inapplicability of all of the student free speech tests when considered holistically.⁹³ Yet the division between the Third Circuit judges in *B.H.* and the lack of any guidelines for applying the new standard demonstrate that this issue is far from settled and remains divisive, even to esteemed judges.⁹⁴ School districts desperately need additional clarity in order to carry out policies that are consistent with both the Supreme Court’s test and the Third Circuit’s newly articulated *B.H.* plausibility test.

The standard needs additional elaboration in order to have any applicability or longevity in school districts today. Any successful proposal must take some of the broad, sweeping terms and attempt to define them or provide examples, or at a minimum establish guideposts for school districts to look to when analyzing speech concerns. Even if these proposed solutions do not completely eliminate all ambiguity, this will create a standard that school district administrators can rely on to make an immediate decision when a student speech issue arises.

The standard must also close loopholes so a student cannot easily work around the language of the standard by making a weak argument that his or her speech comments on a political or social issue.⁹⁵ Judge

⁹² *B.H. ex rel. Hawk*, 725 F.3d at 339 (Greenaway, J., dissenting).

⁹³ See, e.g., Clay Calvert, *Mixed Messages, Muddled Meanings, Drunk Dicks, and Boobies Bracelets: Sexually Suggestive Student Speech and the Need to Overrule or Radically Refashion Fraser*, 90 DENV. U. L. REV. 131 (2012).

⁹⁴ See *supra* note 84.

⁹⁵ The concern for additional students’ testing the limits of this standard is most effectively demonstrated through considering examples that a school district would have no authority to ban under the Third Circuit’s articulated standard. See Brief of

Hardiman echoed this malleability concern in his dissent when he noted that “the Majority’s approach vindicates any speech cloaked in a political or social message even if a reasonable observer could deem it lewd, vulgar, indecent, or plainly offensive.”⁹⁶ Judge Hardiman illustrated his concern through the use of a hypothetical, whereby Matthew Fraser’s plausibly lewd speech could be protected if his classmate’s name were substituted with the name of a candidate for president because such speech could then plausibly be seen as commenting on a political or social issue.⁹⁷

Another example of this problem can be demonstrated by imagining an explicit T-shirt featuring two women engaging in sexual acts with one another. Under the current standard, a plaintiff could have a viable argument that this T-shirt should be protected as social speech because it concerns potentially both women’s sexual liberation, as well as the rights of same-sex couples, both indisputably important social and political issues.⁹⁸ The current malleability of the terms “political” and “social,” when used in the context that the majority has endorsed, would open the floodgates to many arguments similar to these hypothetical scenarios, and because of the lack of guidance for evaluating these factors, many of these scenarios would need to be permitted as protected speech by a school district. This sort of manipulation would create the risk of an easily abused standard that would soon be completely eroded to no standard at all.

The framework must also provide for an updated understanding of *Fraser* to account for evolving modes of speech and communication in order to remain relevant. This requires that the standard be flexible enough to anticipate the continually evolving technology, tastes, and stylistic preferences of schoolchildren; a standard that is too rigid will quickly become obsolete in an age of continually changing technology and trends. The standard must especially consider symbolic speech, such as the breast cancer awareness bracelets at issue in *B.H.*, because

Nat’l Sch. Bds. Ass’n et al. as Amici Curiae Supporting Petitioner, *Easton Area Sch. Dist. v. B.H. ex rel. Hawk*, 725 F.3d 293 (2014) No. 13-672 (filed Jan. 6, 2014), 2014 WL 69412, at *14–*15 and n. 26 (noting that examples such as “Illegals Suck,” “Feel My Balls,” “I want YOU to speak English,” “Axe me about Ebonics,” “Fighting for peace is like screwing for virginity,” and “Let’s Play Army (Army Insignia) I’ll lie down and you can blow the hell out of me” would all be plausibly lewd commentary on a political issue that a school district could not prevent without additional clarification of the Third Circuit’s standard).

⁹⁶ *B.H. ex rel. Hawk*, 725 F.3d at 334 (Hardiman, J., dissenting).

⁹⁷ *Id.*

⁹⁸ See also the discussion *supra* at Part II.E.1 regarding the overlap between some obscene and per se lewd words and plausibly lewd speech that comments on a political or social issue.

clothing, jewelry, portable electronics, and technology such as iPhone applications are popular modes of expression that are increasingly targeted at school-aged children.⁹⁹

Indeed, one such example of an entity's aggressively marketing to children and young adults is the Keep A Breast Foundation from *B.H.* The Foundation sponsors the Keep A Breast Traveling Education Booth ("the Booth"), which is specifically targeted at "bring[ing the Foundation's] message of breast cancer awareness and prevention directly to young people at the events they attend."¹⁰⁰ The Booth attends events such as action sports events and the Vans Warped Tour in an effort to get its message to the targeted recipients,¹⁰¹ who attend these events in large numbers.¹⁰² The Foundation aims to do this in order to "encourage[] young people to participate and learn in environments where they are already comfortable."¹⁰³ This goal is analogous to the Foundation's "I • boobies! (KEEP A BREAST)" initiative, where it has chosen to market a message in a medium it thinks will be appealing to young people as well,¹⁰⁴ with the goal of starting conversations about the topic of breast cancer awareness.¹⁰⁵

⁹⁹ See, e.g., Bruce Horowitz, *Marketing to kids gets more savvy with new technologies*, USA TODAY (Aug. 15, 2011, 2:39 PM), http://usatoday30.usatoday.com/money/industries/retail/2011-07-27-new-technologies-for-marketing-to-kids_n.htm (noting that marketing, especially through technology, is increasingly directed toward young children, and pointing out that children can develop brand loyalties at as young as two years old).

¹⁰⁰ *Traveling Education Booth*, THE KEEP A BREAST FOUND., www.keep-a-breast.org/programs/traveling-education-booth/ (last visited Oct. 28, 2013).

¹⁰¹ *Id.*

¹⁰² Teens attend the Vans Warped Tour in such high numbers that the event has created a "reverse daycare" for parents escorting teens to the concert to rest and watch movies, relax, and enjoy beverages while their children attend the Warped Tour. See Brian Kraus, *Vans Warped Tour 2013 expand "Best Day Ever" and "Reverse Daycare" parent programs to all dates*, ALT. PRESS (June 19, 2013), http://www.altpress.com/news/entry/vans_warped_tour_2013_expand_best_day_ever_and_reverse_daycare_parent_progr.

¹⁰³ *Traveling Education Booth*, *supra* note 100.

¹⁰⁴ *I LOVE BOOBIES!*, THE KEEP A BREAST FOUND., <http://www.keep-a-breast.org/programs/i-love-boobies/> (last visited Oct. 28, 2013).

¹⁰⁵ The Keep A Breast Foundation is a "leading youth focused global breast cancer organization" according to the Foundation's amicus curiae brief. *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 298 (3d Cir. 2013), *cert. denied*, No. 13-672, 2014 WL 901854 (Mar. 10, 2014). The organization co-brands products with the goal of raising awareness, and it tries to create products that are specifically attractive and appealing to young people. *Id.* The campaign created its bracelets in assorted bright colors, and these bracelets quickly became a big hit with young people, especially preteens and teens. *Id.* at 298-99. The bracelets aim to "remove the shame associated with breasts and breast health," and the Foundation says that "the program resonates with young people, and encourages them to be open and active about breast cancer prevention." See *I LOVE BOOBIES!*, *supra* note 104. A proposed framework must account for continually evolving marketing strategies in items like the Keep A Breast

B. The Benefits of a Factors Test

A framework with an enumerated factor system for a school district's evaluations is the most effective way to achieve the overarching goals of added clarity and ease of applicability.¹⁰⁶ A factors system presented as guideposts, rather than as a rigid test, will provide the fluidity necessary for varying modes of speech during changing times. A guidepost system also implicitly acknowledges that every factor within the standard will not necessarily apply to each type of potential speech issue that the framework will evaluate.

A factors system also frames the school district official's analysis when evaluating speech by posing the questions and considerations that the official should be engaging with throughout his or her analysis. This creates a streamlined and more consistent mode of evaluation for all officials in all districts, which although susceptible to an individual official's subjective analysis,¹⁰⁷ provides fenced-in parameters for these subjective evaluations. It avoids the risks of officials merely making subjective decisions, justified in post hoc rationalizations, based on the facial offensiveness of a student's proffered speech. Creating a factors system that provides ways, through rhetorical questions, to define "political" and "social" is an attempt to give some concreteness to the plausibility standard, by forcing administrators to engage in active analysis and articulate reasons for banning or allowing questionable speech, and to improve the Third Circuit's approach. This proposal will eliminate the most significant problems with the applicability of the Third Circuit's current post-*B.H.* standard. These adoptions will provide concrete considerations that will help define the abstract terms the standard relies too heavily upon, and then give these terms practical meaning.

C. Consideration of the Supreme Court's Guidance in Similar Realms

When modeling a proposed standard for school districts to evaluate plausibly lewd student speech, it is helpful to consider the legal framework that the Supreme Court has used in creating its standard for public employee speech, especially with respect to

Foundation's "I • boobies! (KEEP A BREAST)" bracelets because items like the bracelets are going to be increasingly targeted towards children and marketers will continue to strive to come up with new and inventive ways to reach this age group.

¹⁰⁶ The factors test will be used as a guidepost for analysis, rather than a rigid test.

¹⁰⁷ Some administrative officials will subjectively apply the test more strictly or loosely than others; this is unavoidable unless one panel of administrative officials makes the determinations for all schools in the Third Circuit. Because this ideal is not feasible, having all officials use the same framework decreases the risk of subjective biases being incorporated into each analysis.

teachers in schools.¹⁰⁸ This Comment's proposal can benefit from the consideration of the public employee standard, which the Supreme Court has already endorsed.¹⁰⁹ The two most important cases when considering the public employee framework, for the purpose of creating a guidepost factors test for school districts to evaluate plausibly lewd student speech, are *Pickering v. Board of Education*¹¹⁰ and *Garcetti v. Ceballos*.¹¹¹

1. *Pickering v. Board of Education of Township High School District 205, Will County, Illinois*

In *Pickering*, a teacher was fired for writing a letter to a local newspaper that was critical of the way that the Board of Education and school officials had handled past attempts to raise school revenue.¹¹² The Court held in favor of Pickering while declaring that “absent proof of false statements knowingly or recklessly made by [the speaker], a teacher’s exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.”¹¹³ *Pickering* also enumerated a balancing test whereby a court should balance the interests of the speaker-citizen against the interests of the state-employer in “promoting the efficiency of the public services it performs through its employees.”¹¹⁴ More generally, the Court also considered whether Pickering’s statements impeded his performance of daily classroom duties or inappropriately interfered with the operation of the school.¹¹⁵ *Pickering*’s standard provides a valuable overarching question that can inform this Comment’s proposed guidepost factors system: were the expressions of the speaker, as a citizen, about issues of public concern or importance?¹¹⁶

¹⁰⁸ Teacher speech is admittedly different than student speech; teachers can be government speakers in a public school setting and teachers have influence over their students. Similarities between the two situations, however, make consideration of teacher speech a benefit to this proposal.

¹⁰⁹ See *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) and *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

¹¹⁰ *Pickering*, 391 U.S. 563.

¹¹¹ *Garcetti*, 547 U.S. 410.

¹¹² *Pickering*, 391 U.S. at 564.

¹¹³ *Id.* at 574.

¹¹⁴ *Id.* at 568.

¹¹⁵ *Id.* at 572–73.

¹¹⁶ *Id.* at 574.

2. *Garcetti v. Ceballos*

In *Garcetti*, the Court found against a deputy district attorney for the Los Angeles County District Attorney's Office by holding that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."¹¹⁷ The Court further noted that "a government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations."¹¹⁸ The question "does speech have the potential to affect the school's operations,"¹¹⁹ which is similar to *Tinker's* substantial disruption test,¹²⁰ is another rhetorical question that can help inform this Comment's proposed guidepost factors test.

Garcetti focused on whether the District Attorney's speech had any potential to affect the office's operations. This consideration is applicable to this Comment's proposal because if there is a risk that speech is going to affect the function of the school, the speech, even if plausibly lewd, should not be allowed, even if it comments on a political or social issue. School systems in our society would not be able to function uninterrupted without this necessary limitation. This consideration is relevant before one even arrives at the consideration of whether the speech at issue can be deemed political or social for purposes of meeting the standard.¹²¹ Even though this consideration is akin to the *Tinker* "substantial disruption" test, it goes further and requires an actual effect on the school's operations.¹²² The standards the Court articulated in *Pickering* and reiterated and relied on, in part, in *Garcetti* are helpful because they articulate the questions that the Court has found valuable when evaluating questionably permissible speech that has some degree of undeniable societal value.

¹¹⁷ *Garcetti v. Ceballos*, 547 U.S. 410, 413, 421 (2006).

¹¹⁸ *Id.* at 418.

¹¹⁹ *Id.*

¹²⁰ *Tinker*, 393 U.S. at 514.

¹²¹ If the answer to this question is no, the analysis ends and the school district can justifiably prevent the student's speech. See further elaboration in guidepost factors test, *infra* Part III.D.

¹²² *Tinker*, by contrast, also allowed the banning of speech that school officials had "reason to anticipate" would create a substantial disruption. *Tinker*, 393 U.S. at 509.

D. Proposed Guidepost Framework for Evaluating Plausibly Lewd Speech that Plausibly Comments on a Political or Social Issue

When evaluating speech under the Third Circuit's *B.H.* holding, school district officials must first ask the necessary threshold questions to determine whether the speech qualifies as plausibly lewd, requiring an entrance into *B.H.*'s gray area where speech may either be categorically banned as lewd or be completely permissible since it poses no First Amendment problem. Once the overarching determination is made and the speech is deemed to be plausibly lewd, the factors shape the questions that school district officials should ask while evaluating the plausibly lewd speech and determining whether the speech can be considered "political" or "social" such that it cannot be restricted under *B.H.* The difficult part is determining what "political" or "social" means in the context of plausibly lewd student speech.¹²³

1. The Plausibility Inquiry

The first step is determining whether the proffered speech is plausibly lewd. Another way of phrasing this determination is to ask if a reasonable person could potentially consider the speech to be lewd.¹²⁴ The plausibility inquiry should be based on the expectations of a reasonable person, because those who are more or less sensitive in society are going to react more drastically than the average person. Making a showing of plausibility is a considerably low standard to meet.

The standard should incorporate the reasonable person's behavior based on community expectations. Sensitivity concerns must be considered against the backdrop of the community because as speech and methods of communication evolve, speech that was lewd years ago may now be commonplace, even in schools. This concern is especially relevant with younger generations. If the speech is plainly lewd or if the speech could never be construed as lewd, it does not fall

¹²³ This has only been exacerbated by the Third Circuit's refusal to provide any guidance on how to make such a determination. *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 318 (3d Cir. 2013), *cert. denied*, No. 13-672, 2014 WL 901854 (Mar. 10, 2014) ("[W]e need not speculate on context-dependent hypotheticals to give guidance to schools and district courts. The fault lines of our framework are adequately mapped out in the rest of First Amendment jurisprudence."). Interestingly, the Third Circuit has relied on the clarity of First Amendment jurisprudence to decline providing guidance; First Amendment jurisprudence continues to confuse and divide courts, however, and the majority's opinion even fuses the *Fraser* and *Morse* tests in a way that significantly detracts from any potential argument of clarity. *B.H. ex rel. Hawk*, 725 F.3d at 333 (Hardiman, J., dissenting).

¹²⁴ Consideration of what an overly sensitive or easily offended individual would think should not be factored into this analysis.

within the scope of the plausibility inquiry, and the school district's analysis ends here. If, however, the speech is determined to be plausibly lewd, the school district official's analysis continues on to the second, more complicated, portion of the analysis—the political or social issue determination.

2. The Pickering/Garcetti Overarching Question

Once an issue is deemed plausibly lewd, the *Pickering*/*Garcetti* consideration,¹²⁵ similar to *Tinker*'s substantial disruption test,¹²⁶ should be considered in order to determine whether the analysis should continue to the second stage. This inquiry requires school district officials to ask whether the speech has the potential to affect the school's mission or operations. This is similar to the questions posed in *Pickering* and *Garcetti*,¹²⁷ but it is useful in this context as well. Teacher speech has a large effect on students because of a teacher's position of authority within the school. Similarly, this concern exists with respect to the power of students and student speech to affect or influence other students.¹²⁸ Considerations involved in this overarching question are: how would outsiders or visitors to the school react to this speech? Would the visitors have reason to believe the school was endorsing the speech? Is the speech likely to have a negative effect on other students in the school?

These questions, though not entirely exhaustive of the necessary analytical inquiries, provide guideposts for school district officials to begin their analysis. These rhetorical questions, posed to the officials tasked with making the ultimate speech determination, ensure that the officials are considering the correct overarching concerns, even though the necessary determination is an admittedly fact-intensive and somewhat subjective determination. Ensuring that all school district officials in the Third Circuit begin their inquiries at the same point, regardless of the mode of speech, is a benefit that will provide continuity among school district officials' speech determinations.

¹²⁵ See *supra* Part III.C.2.

¹²⁶ *Tinker*, 393 U.S. at 514.

¹²⁷ This inquiry acknowledges that the substantial difference between *Garcetti* and this Comment's proposal is that students are not agents of the school or public employees; therefore, their speech cannot be fairly attributed to the government. Nevertheless, this is still a helpful consideration once the proper limitations are applied.

¹²⁸ See, e.g., Linda Gorman, *Peer Effects in the Classroom*, THE NAT'L BUREAU OF ECON. RESEARCH, <http://www.nber.org/digest/apr01/w7867.html> (last visited Mar. 31, 2015) (noting that at least some peer effects in the classroom do exist and characteristics like race and gender variation in classrooms can affect these effects).

3. The Political or Social Issue Determination

Once the overarching questions have been answered “yes” and “no,”¹²⁹ respectively, the inquiry continues to determine whether the speech could “plausibly be interpreted as commenting on a political or social issue.”¹³⁰ If the speech plausibly comments on either issue, the speech cannot be banned by the school district, even if plausibly lewd. If, on the other hand, the speech does not comment on a political or social issue, the school district is justified in banning the speech, even if only plausibly—not patently—lewd. Political speech and social speech are potentially overlapping categories; for the purpose of this Comment’s proposed guidepost factors test, however, they will be bifurcated into two distinct categories in order to demonstrate the somewhat different, but necessary, inquiries for both categories of speech.

i. Does the Speech Provide Commentary on a Political Issue?

In asking this question, school district officials should weigh the following factors, and no presence or absence of any one factor should be dispositive. This flexibility ensures that the test is fluid enough to anticipate that every single question may not be applicable to every potential speech issue the school district may encounter, especially as modes of speech continue to evolve. Simultaneously, the questions provide “broad strokes inquiry guideposts”; that is, the factors force school districts to ask overarching questions that *will* be applicable to many kinds of potential speech issues in order to guide the official’s analysis when evaluating speech.

The relevant guidepost factor questions in the political issue determination are as follows: (1) Does the speech *side with a viewpoint* in a *debate*?; (2) Does the speech *express satisfaction or dissatisfaction* with a *politician or policy*?; (3) Does the speech relate to current or historical events of “*news-worthy*” *significance*?/Is this speech about an issue we could reasonably expect to see covered on a news program?; (4) To what degree is the speech’s value *clouded by its lewdness*?/How much of the message is focused on the lewd aspect of the speech vs. the

¹²⁹ This means that the speech is such that a reasonable person, based on community expectations, could plausibly interpret the speech to be lewd, and the speech is not such that it could affect the school’s mission or be attributed to the school itself.

¹³⁰ B.H. *ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 302 (3d Cir. 2013), *cert. denied*, No. 13-672, 2014 WL 901854 (Mar. 10, 2014).

inherent political value of the speech?¹³¹

The most important factors in this determination are the third and fourth. The third factor considers the prominence of the political issue against the backdrop of our contemporary society. This question is highly contextual and the answer of how prominent a political issue is could change over time; an issue that is very important at one point could become much less so years later.

An example makes the practical application of this factor easy to understand. If a student is wearing an extremely controversial and plausibly lewd shirt that concerns a political movement that is being undertaken by only one or a few people halfway around the world, this is not likely to be something of “news-worthy” significance here in the United States.¹³² It is not something that would provide a justification for the plausible lewdness that it would cause within the school, and this factor would not weigh heavily in favor of admission of the speech. On the other hand, topics such as desegregation,¹³³ mass genocide abroad,¹³⁴ and local and national political campaigns would all be examples of political speech of “news-worthy” significance that would favor admission of the speech under the third factor and not automatically be overcome by any perceived lewdness in the fourth factor.

The fourth factor, the degree that the speech’s value is clouded by its lewdness, also deserves additional explanation. This factor requires that school district officials consider and compare how much of the entire message is focused on the lewd speech with the amount of the political message that can be gleaned from the speech. Speech that is more offensive on its face will need to demonstrate a higher level of value-added to a political issue in order to overcome the conclusion that it is lewd and can be banned. If speech adds more to a conversation about a political issue, the standard will potentially

¹³¹ Emphasis has been added within the factors to stress the most important parts of each question.

¹³² Critics of this proposal would counter that this is exactly the format that such grassroots insurgent political movements need to gain momentum; this Comment argues, however, that the remoteness of such an issue in the backdrop of a United States school is considerable, and any potential benefit is easily overshadowed by an even mediocre showing of cloudiness based on lewdness in factor four. *See* analysis of factor four, *infra*.

¹³³ Desegregation is an example of an issue of historical significance that would qualify as having “news-worthy” significance and weigh in favor of admission of the speech under the third factor.

¹³⁴ Genocide in other countries is an example of an issue of international significance that would qualify as having “news-worthy” significance and weigh in favor of admission of the speech under the third factor.

tolerate more plausibly lewd speech. This consideration is consistent with the concept of not allowing students loopholes to promote, wear, or use lewd speech that does not provide some actual value to a conversation of at least arguable significance in a political context.

ii. Does the Speech Provide Commentary on a Social Issue?

If the proffered, plausibly lewd speech does not fit under the political issue subheading, the speaker will need to demonstrate that it plausibly comments on a social issue in order to survive a school district's attempts to ban the speech under the *B.H.* majority's standard. Like political speech, this inquiry calls for weighing all factors, and the presence or lack of any one factor should not be dispositive. Additionally, as with the political speech determination,¹³⁵ the presence or absence of any one of these factors is not entirely dispositive; speech could provide a stronger or weaker case for meeting or lacking one of the factors, which would affect the overall balancing in the analysis. The relevant guidepost factor questions in the social issue determination are as follows: (1) Does the speech *advocate for* or *critique* a societal *strength* or *problem*?; (2) Is the speech centered on a topic that *others in the community* would know about?; (3) To what *degree* is the speech's value *clouded by its lewdness*/How much of the message is focused on the lewd aspect of the speech vs. the inherent social value of the speech?¹³⁶

The most important factors in this determination are the second and the third. It will be more difficult for a speaker to justify controversial speech that concerns a social issue that no other students in the school know about. At this point, the speech is merely controversial because any social message is lost on the potential audience. On the other hand, if the speech is on an issue that a speaker's peers, or at least some of them, are aware of, any potential lewdness may be offset by the fact that the social message is reaching an audience. Additionally, speech that has a high level of social value may offset potential lewdness; speech that does not provide much social commentary, however, will have a more difficult time offsetting lewdness to justify allowance of the proffered speech.

¹³⁵ See *supra* notes 131–134 and accompanying text.

¹³⁶ Emphasis has been added within the factors to stress the most important parts of each question.

3. Necessity of the Standard

Some speech could fit under both the political and social categories; in that event, it should be evaluated with the questions in both determinations.¹³⁷ The speech should be allowed if it would be permissible under either test. The guidepost questions are colloquial; this is a standard, however, that must remain applicable in the everyday world. It cannot be overly rigid or formalistic or it will not remain relevant over any length of time. The framework is not going to end all close calls in on-campus speech issues; ultimately it will be judgment calls by school district officials and, if litigation ensues, the skill of the litigators defending the districts and the students on these fact-sensitive issues that will be decisive. Yet the framework undeniably provides districts with a baseline form of evaluative inquiries that is fair and consistent while rightfully leaving these decisions in the hands of school district administrators.¹³⁸

Adopting the guideposts will ensure compliance with existing case precedent, guarantee that a school district official's judgment is not clouded by a speech's potential lewdness, respect the First Amendment rights of student speakers, and provide districts with a framework to document their compliance with existing case precedent in exercising their administrative discretion during these close calls. The latter reason is the most important justification for adopting these guideposts and deserves elaboration.

¹³⁷ An example of speech that may fit under both categories is speech regarding the Free Love Movement, which was a critique of the government's involvement in affairs such as birth control and marriage that called for societal change in forms such as the abolishment of marriage in favor of sexual promiscuity. See Mari Jo Buhle, *People & Events: Free Love*, PBS (Mar. 11, 2004), http://www.pbs.org/wgbh/amex/goldman/peoplevents/e_freelove.html. Speech in a school setting commenting on the Free Love Movement could foreseeably be plausibly lewd, and if so, this speech would be analyzed under factors used in both the political and the social issue determinations because of its ambiguous classification.

¹³⁸ See Petition for a Writ of Certiorari, *supra* note 74, at *34 (noting that “[t]he Third Circuit’s importation of judicial values to govern the daily decisions of deportment for public school children is a major departure from First Amendment jurisprudential deference to local values in the public school.”), and Brief for Nat’l Sch. Bds. Ass’n et al. as Amici Curiae Supporting Petitioner, *Easton Area Sch. Dist v. B.H. ex rel. Hawk*, No. 13-672 (filed Jan. 6, 2014), 2014 WL 69412, at *4 (noting that “[t]he expression [at issue in *B.H.*] is one example of a type of student speech that school officials encounter daily—sexual double-entendre intended to push boundaries, sometimes touching on a political or social concern. Educators in schools full of impressionable students at various stages of physical, cognitive, psychological, sexual, emotional and social development are authorized under *Fraser* to make reasonable determinations about the appropriateness of these messages in their own school environments.”).

2015]

COMMENT

671

Currently, school districts lack a standardized format where they can document compliance with *B.H.*'s requirements for constitutionally banning plausibly lewd student speech. The guidepost factors provide a mechanism for school districts to easily document their analysis to support a decision to ban or allow student speech. Requiring all school district officials to go through this analysis reduces the likelihood of an arbitrary or hasty decision that is based on the official's subjective evaluation of the offensiveness of the speech. An official will have to clearly articulate why speech should be banned in order to justify such a ban. This more effectively safeguards the First Amendment rights of students, while helping the districts to avoid costly, potential litigation to defend their decisions down the road.

Most of the time when these issues arise, it is unclear whether the speech should be allowed or banned and the speech is usually controversial. The standard creates questions and gets district officials thinking, so that speech will be allowed whenever it possibly can be. The ambiguity of the words "plausibly lewd" and "plausibly interpreted as a political or social issue" within the Third Circuit's endorsed standard demonstrates the majority's acknowledgement that this standard would inevitably lead to difficult calls for school district officials.¹³⁹ The guidepost factors provide districts with a workable starting point in the difficult task of defining and clarifying this standard.

IV. APPLYING THE FRAMEWORK

It is helpful to attempt to apply the framework to case studies in order to test the effectiveness of the proposal. The samples of analysis in these demonstrations will also provide a working guide for school districts when learning how to use the framework in the context of issues that arise in their own school settings.

A. Application to B.H. ex rel. Hawk v. Easton Area School District

When applying the proposal to the breast cancer awareness bracelets in *B.H.*, the first question to ask is if the speech is plausibly lewd. Could a reasonable person plausibly consider the speech to be lewd, or could the speech offend a reasonable person in the community? The term "boobies" does have the potential to offend some through its sexual connotation. It is not so patently offensive or

¹³⁹ *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 324 (3d Cir. 2013), *cert. denied*, No. 13-672, 2014 WL 901854 (Mar. 10, 2014) ("Just because letting in one idea might invite even more difficult judgment calls about other ideas cannot justify suppressing speech of genuine social value.") (internal citations omitted).

plainly lewd on its face that it is a clear call that the *Fraser* standard applies,¹⁴⁰ justifying an outright ban. Yet its lewdness is ambiguous enough to fall within the plausibly lewd gray area that the Third Circuit's majority carved out, thereby triggering the proposed guidepost factors and justifying the continuance of the analysis to the second inquiry.

The second step in the test is the *Pickering/Garcetti* overarching question, which considers how visitors would react to this speech and whether the speech could be fairly attributable to the school. Secondarily, this analysis also considers whether this speech would have a negative effect on other students in the school. In *B.H.*, B.H. and K.M. wore their bracelets, in part, during the school's breast cancer awareness activities.¹⁴¹ The middle school had already endorsed October 28th as Breast Cancer Awareness Day,¹⁴² so on this particular day, it could be argued that the school endorsed the message or the bracelets themselves. The school did not make any disclaimers, and the administration encouraged participation in the awareness events.¹⁴³ On other days, this argument might not be as strong. The bracelets carry a positive message of breast cancer awareness in bringing this topic to younger generations. Yet the sexually suggestive way that this message is carried out could run counter to the Easton Area School District or the middle school's mission. This argument is not as strong as some others, because the lewdness of the bracelet is not outright, so any argument of obstruction of the school's mission is not enough to stop the analysis.

There is also no evidence to suggest negative effects on the rest of the school that is strong enough to end the official's analysis at this stage. The district alleged two instances of disruptions within the school where students made remarks about "boobies," which occurred after the bracelet ban.¹⁴⁴ But the majority noted that "these two isolated incidents hardly bespeak a substantial disruption caused by the bracelets."¹⁴⁵ The showing of a "substantial disruption" to meet the *Tinker* test is admittedly a higher standard than what is required to demonstrate "negative effects on other students" in this Comment's proposal.¹⁴⁶ Yet two isolated incidents—not even directly linked to the

¹⁴⁰ *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685–86 (1986).

¹⁴¹ *B.H. ex rel. Hawk*, 725 F.3d at 300.

¹⁴² *Id.* at 299.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 321.

¹⁴⁵ *Id.*

¹⁴⁶ *See supra* Part III.C.2.

bracelets—are not enough to demonstrate net negative effects on other students.¹⁴⁷ As a result, the inquiry continues to the political or social issue determination. The breast cancer awareness bracelets would fit into the social, not the political, category, so the school district official would skip to the social part of the framework to continue his analysis.

The first factor provides a strong argument in favor of allowing the speech. This factor asks if the speech advocates for, or critiques, a societal strength or problem. The message “I • boobies! (KEEP A BREAST)” certainly can be viewed as advocating for awareness of breast cancer, specifically in the form of encouraging women to do self breast exams since they are crucial to breast cancer prevention.¹⁴⁸ The intention of the campaign is to promote self-awareness and a level of comfort in discussing previously uncomfortable issues related to breast health.¹⁴⁹ The bracelets are clearly a part of this campaign, and it is indisputable that the campaign is advocating for awareness of the societal problem of breast cancer.

The second factor also provides a strong argument in favor of allowing the speech. It considers whether the speech is centered on a topic that others in the community would know about. Breast cancer is certainly not an obscure issue.¹⁵⁰ The search for its cure is a cause that has a lot of community support and promotion through various campaign strategies, marketing, and charity fundraising.¹⁵¹ Others in the community would be aware of such a campaign, and it is reasonable to think that middle school children like B.H. and K.M. would be aware of such issues as well, even if in a more limited capacity.

The third factor also weighs in favor of allowing the speech; it considers the degree that the speech’s value is clouded by its lewdness. Here, there is some risk that the breast cancer campaign’s message of awareness will be lost on the children who are wearing and observing the bracelets. The bracelets may cause some children to laugh or to

¹⁴⁷ The Majority even notes that “the fact that these incidents did not occur until after the School District banned the bracelets suggests that the ban ‘exacerbated rather than contained the disruption in the school.’” *B.H. ex rel. Hawk*, 725 F.3d at 322 (citing *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 931 (3d Cir. 2011)).

¹⁴⁸ *I LOVE BOOBIES!*, *supra* note 104.

¹⁴⁹ *Id.*

¹⁵⁰ See *What are the key statistics about breast cancer?*, AM. CANCER SOC’Y, <http://www.cancer.org/cancer/breastcancer/detailedguide/breast-cancer-key-statistics> (last modified Oct. 24, 2013) (“[In 2013, a]bout 232,340 new cases of invasive breast cancer will be diagnosed in women [in the United States and a]bout 39,620 women will die from breast cancer.”).

¹⁵¹ See, e.g., SUSAN G. KOMEN, <http://ww5.komen.org/> (last visited Oct. 31, 2013) and *I LOVE BOOBIES!*, *supra* note 104.

become uncomfortable, and they may become a joke instead of a mechanism to raise awareness, as they were originally intended. But it is also undeniable that these bracelets will at least provide a forum to begin engaging children in conversations on these topics. Additionally, no real negative effect on other students within the school community resulted from the bracelets.¹⁵² Especially at the middle and high school levels, any risk of the awareness message being clouded by the plausible lewdness of the bracelets is lessened. This may pose more of a risk with younger, elementary-aged children, but it does not represent a real concern at the middle school level.¹⁵³ The positivity of the Foundation, and the overall message the bracelets aim to promote, outweighs the amount of lewdness at issue in this speech.

When using the proposed guidepost factors framework, the breast cancer awareness bracelets at issue in *B.H.* should not be banned. Although it would be reasonable to interpret the bracelets as lewd, the message of breast cancer awareness is unlikely to be wholly lost on schoolchildren, especially middle school students. The bracelet uses a somewhat controversial and attention-grabbing slogan, yet it is pretty clear that the bracelet is still about breast cancer awareness, due in part to the enormity of the awareness movement nationally.¹⁵⁴ The Easton Area School District has made an effort to add a Breast Cancer Awareness Month observance event in its schools and has encouraged children to participate.¹⁵⁵ The speech also adds value to the conversation about breast cancer in schools and encourages younger women to become active in awareness movements. Overall, the benefits and non-offensive elements of the speech outweigh the potential negatives created by the plausible lewdness through which the bracelet gets its message across. The school district should allow B.H. and K.M. to wear their “I • boobies! (KEEP A BREAST)” bracelets based on the guidepost factors.

¹⁵² See *supra* note 147.

¹⁵³ See *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 298 (3d Cir. 2013), *cert. denied*, No. 13-672, 2014 WL 901854 (Mar. 10, 2014) (noting that the bracelets did start conversations about breast cancer awareness and self-exams), *but see Breast Cancer Fundraising Bracelets Banned from South Dakota High School*, *supra* note 55 (noting that one student wore that bracelet because he found the saying humorous, not because of any potential breast cancer awareness message, and that some students liked the bracelets just because they said boobies). If the school district had evidence of students’ just wearing the bracelet for a humorous purpose or just to cause controversy because it said boobies, as in South Dakota, this would provide a stronger argument in favor of justification for a ban under this third factor.

¹⁵⁴ See, e.g., Komen, *supra* note 151.

¹⁵⁵ See *B.H. ex rel. Hawk*, 725 F.3d at 299 (“The Middle School still encouraged students to wear the traditional pink.”).

B. Application to “Screw Amabo” Political Pin Hypothetical

One potential critique of this proposal is that it provides a framework that is too malleable and that any kind of plausibly lewd speech would weigh in favor of allowance. A hypothetical is instructive to demonstrate that this is not the case. Imagine that a fifteen-year-old high school student wears a political campaign button that reads “Screw Amabo”¹⁵⁶ and on the back of the button in small print it says “Smith 2016.” The student wears this button to school as the next presidential election nears. The student argues that his speech should be protected under the First Amendment because it meets the criteria of plausibly lewd speech that comments on a political issue, and therefore, it cannot be banned by the school district.

The first step is to determine if the speech is plausibly lewd: could a reasonable person possibly construe this speech to be lewd?¹⁵⁷ Over time, the term “screw” has taken on a slang meaning,¹⁵⁸ which has become increasingly sexualized. The dictionary’s incorporation of the sexual definitions and emphasis on the fact that these usages are usually intended to be vulgar provides a strong basis for the argument that this term is plausibly lewd to justify the continuance of the analysis.

The next step is to consider how visitors would react to this speech and whether or not the speech could be fairly attributable to the school, in addition to the negative effect the speech may have on other students in the school. A school would not advocate one presidential candidate over another,¹⁵⁹ and it is unlikely that the school would even be involved in an upcoming election beyond perhaps teaching students the background of the election process or facilitating a mock election. Unless every student was wearing a button, it is unlikely that this message on its own could be seen as the entire school endorsing this political viewpoint. The speech is also unlikely to have a negative effect on other students, besides potentially aggravating those who hold a different political view. Without any evidence of a tangible

¹⁵⁶ Because President Obama is ineligible to run for re-election in 2016, this pin is meant to refer to his successor who will run in that election, presumably an individual with at least moderate political notoriety.

¹⁵⁷ It is helpful here to consider the possible definitions of the word “screw” as well as the slang meanings that the word has taken on over time. Merriam-Webster.com provides nine definitions for the term screw including, “2) a screwlike form: spiral . . . 3) a worn-out horse . . . 5) a prison guard . . . 9a) *usually vulgar*: an act of sexual intercourse, 9b) *usually vulgar*: a partner in sexual intercourse.” MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/screw> (last visited Oct. 30, 2013) (emphasis in original).

¹⁵⁸ See, e.g., *Id.*

¹⁵⁹ A public school would not *explicitly* endorse one political candidate over the other.

altercation that the pin directly caused, the net negative effect argument is weak as well. The answer to this inquiry weighs in favor of allowing the speech.

The speech concerns a political issue, so the political factors are used to determine whether the speech can plausibly be seen as commenting on a political issue. The first factor asks if the speech sides with a viewpoint in a debate. The speech certainly takes a viewpoint in the presidential election; namely, an anti-Amabo viewpoint. It is clear from the speech, especially the back of the button, that the student is supporting candidate Smith in the 2016 election. This factor weighs in favor of allowing the speech.

The second factor asks whether the speech expresses satisfaction or dissatisfaction with a politician or policy. The pin expresses clear dissatisfaction with Mr. Amabo, but no references to any reasoning or to any of the Democratic Party's or President Obama's current policies are made. Additionally, although the button indicates a preference for candidate Smith in the upcoming election, it provides no rationale, and this support is not plain from the face of the button because it cannot be seen when the button is being worn or facing upward. This evidence does not provide a strong argument that the speech should be allowed based on any sort of argument in support of candidate Smith.

The third factor asks if the speech concerns issues one could reasonably expect to see covered on the news. An upcoming election is certainly something that would be covered on the news, so the third factor easily weighs in favor of allowing the speech.

The fourth factor considers the degree to which the speech's value is clouded by its lewdness. This is the factor where the political pin has considerable trouble. The button appears to take a stance on the upcoming presidential election, but viewers of the button cannot see the pro-Smith message from looking at the button when it is being worn or facing upward. Additionally, the viewer learns nothing about the politics or practices of Mr. Amabo, his party, or his predecessor, or even why the speaker dislikes him, from the button itself, just that the wearer of the button says "Screw Amabo."¹⁶⁰ When the button is viewed as a whole, the lack of any politically supportable campaign or issue,¹⁶¹ the lack of any sort of critique of Mr. Amabo, the Democratic Party, or President Obama, and the inappropriate sexually expletive nature of the message the button conveys weigh heavily in favor of giving the

¹⁶⁰ The button appears to be nothing more than an ad hominem attack.

¹⁶¹ This excepts the back of the button, which cannot be plainly viewed.

2015]

COMMENT

677

school district official the right to ban the button.¹⁶² Even though this speech is plausibly lewd, it does not comment on any political issue based on the proposed framework to justify allowing the speech in a Third Circuit school district.

V. CONCLUSION

The Third Circuit's endorsement of all obscene speech as per se lewd should be softened to a presumption of lewdness in order to conform to its ambiguous and speaker-friendly test for plausible lewdness. Some obscene speech could fall within the plausibly lewd gray area, especially if commenting on a political or social issue, and the majority prematurely prevents this speech from consideration through its per se ban. More crucially, the standard for judging plausibly lewd speech commenting on social or political issues adopted by the majority of the Third Circuit in *B.H. v. Easton Area School District* needs clarification and a baseline starting point of guidelines in order to be workable for school districts in light of evolving modes of speech and challenges that school district officials face on a daily basis. The terms "political" and "social," which are an integral part of the majority's holding, need elaboration, or school districts will be bound by a standard that is far too malleable for speakers and too difficult for administrators to apply. This Comment's proposal clarifies the ambiguities that the Third Circuit's current standard poses through providing school districts with threshold questions and a guidepost factors test in order to determine whether plausibly lewd speech comments on a political or social issue.

In accepting this Comment's proposal, school districts will be able to show the analysis they have undergone in considering whether to ban plausibly lewd student speech. Even if the school district's decision is not the decision a student wants, this framework makes the decision less arbitrary, and ideally, will allow districts to reduce the risk of liability when they ban plausibly lewd speech that comments on a political or social issue. The framework ensures that the district is banning speech for the right reasons, not just because the speech presents a somewhat controversial or inappropriate message. This analysis ensures that school district officials are valuing the First Amendment rights of schoolchildren, while also protecting school

¹⁶² Even though this speech may be allowable when made by a citizen in public, students retain somewhat limited First Amendment rights in the context of a school, and the facts of this situation would warrant the ban on this pin in a school context based on the speech's lewdness and its failure to add any politically valuable discourse to a discussion.

678

SETON HALL LAW REVIEW

[Vol. 45:647]

districts from crushing liability in attempting to clarify, through unavoidable litigation, a standard that is currently overly ambiguous and easily manipulated.