

STUDENTS, VIOLENCE, AND VIOLENT STUDENT SPEECH:
THE PRESERVATION OF FIRST AMENDMENT RIGHTS
IN A FRIGHTENING AGE

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ABSTRACT

This work examines how American federal and state courts address cases of violent student speech in the wake of Columbine and other infamous incidents of school violence. Three general types of violent student speech are studied in the work: non-sponsored curricular speech, noncurricular speech, and threatening speech. After outlining the relevant Supreme Court case law, this study finds that different legal standards should apply to each type of violent student speech, with a new and protective standard needed for non-sponsored curricular speech. *Tinker* applies to instances of noncurricular speech (assuming that speech is properly subject to the school's authority), and in many instances, the true threat doctrine alone is best suited to address threatening student speech. Generally, this study finds that, in many instances, *violent* speech is treated as *threatening* speech — a position grounded in emotion rather than the Constitution.

Furthermore, this study concludes that the Supreme Court must remake both student speech and true threat jurisprudence in order to better address instances of violent student speech. Additionally, courts must be more receptive to student speech claims and less deferential to school decision making in a realm where school officials have no special expertise.

Future research should be dedicated to addressing state nuances in the true threat doctrine and addressing the non-*Tinker* regulation of off-campus student speech.

DEDICATION

“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.” — *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943)

“Under our Constitution, the condition of being a boy does not justify a kangaroo court.”
— *In re Gault*, 387 U.S. 1, 28 (1967)

“Turned loose with lawsuits for damages and injunctions against their teachers as they are here, it is nothing but wishful thinking to imagine that young, immature students will not soon believe it is their right to control the schools rather than the right of the States that collect the taxes to hire the teachers for the benefit of the pupils. This case, therefore, wholly without constitutional reasons in my judgment, subjects all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students.” — *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 525 (1969) (Black, J., dissenting)

“This Court should not be a haven for complaints by students and their parents against actions taken by school officials in their extremely difficult task of educating and controlling the

irresponsible behavior of their students. As is often the case, as it is here, these types of conflicts are better handled within the educational system and not in the federal trial and appellate courts.”— *D.F. v. Board of Education of Syosset Central School District*, 383 F. Supp. 2d 119, 131 (E.D.N.Y. 2005).

“. . . [T]he standard set forth in *Tinker v. Des Moines Independent Community School District* is without basis in the Constitution. . . . In my view, the history of public education suggests that the First Amendment, as originally understood, does not protect student speech in public schools.”— *Morse v. Frederick*, 551 U.S. 393, 410-11 (2007) (Thomas, J., dissenting)

This work is dedicated to the proposition that the First Amendment does not have an age requirement, with even the youngest speakers fit for the amazing power that comes with the freedom of expression.

This work is also dedicated to my father — a man who loved learning, chess, Elton John, and the University of Alabama. He is dearly missed.

LIST OF ABBREVIATIONS AND SYMBOLS

| | |
|-----------------------------|--|
| <i>[no citation signal]</i> | In Bluebook citation system, no signal denotes that the textual proposition is directly stated by the cited material |
| <i>But see</i> | In Bluebook citation system, <i>but see</i> denotes material that tends to contradict the textual proposition |
| <i>Compare</i> | In Bluebook citation system, <i>compare</i> denotes a useful comparison between two or more authorities that reach differing conclusions on the textual proposition |
| <i>Contra</i> | In Bluebook citation system, <i>contra</i> denotes material that directly contradicts the textual proposition |
| <i>E.g.</i> | In Bluebook citation system, <i>e.g.</i> denotes material that directly supports the textual proposition, but there are multiple sources that support the same proposition |
| <i>En banc</i> | A court session where all sitting judges (rather than a select panel) hear a case |
| <i>Id.</i> | See the previously cited source |
| <i>Infra</i> | See a source included later in the material |
| <i>Per se</i> | From Latin meaning “by itself,” <i>per se</i> rules remove factual considerations to arrive at consistent outcomes |
| <i>Prima facie</i> | From Latin meaning “at first appearance,” <i>prima facie</i> denotes a matter that is self-evident from the collected facts |
| <i>See</i> | In Bluebook citation system, <i>see</i> denotes material that tends to support the textual proposition |
| <i>See also</i> | In Bluebook citation system, <i>see also</i> denotes additional material that supports the textual proposition |

See generally In Bluebook citation system, *see generally* denotes background material related to the textual proposition

Supra See a source included previously in the material

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CHAPTER 1

INTRODUCTION

In 1940, public school teachers ranked “talking out of turn,” “chewing gum,” “making noise,” “running in the hall,” “cutting in line,” “dress code violations,” and “littering” as the top seven problems they faced on a daily basis.¹ Fifty years later, the list looked vastly different as “drug abuse,” “alcohol abuse,” “pregnancy,” “suicide,” “rape,” “robbery,” and “assault” took the place of those now charmingly innocuous offenses.² Accordingly, school violence, or “youth violence that occurs on school property, on the way to or from school or school-sponsored events, or during a school-sponsored event,”³ has become a national problem, with 7.4% of students reporting being threatened or injured with a weapon on school property in a 2011 nationwide survey.⁴

School shootings, such as those at Columbine High School in Littleton, Colo.⁵ and most recently at Sandy Hook Elementary in Newtown, Conn., represent the most infamous and tragic examples of school violence. However, school shootings are not a new problem, but the number of such incidents is increasing. From 1969 to 1988, there were 42 school shootings in the United

¹ ALEXANDER VOLOKH & LISA SNELL, STRATEGIES TO KEEP SCHOOLS SAFE 3 (1998), <http://reason.org/files/60b57eac352e529771bfa27d7d736d3f.pdf>.

² *Id.*

³ CENTERS FOR DISEASE CONTROL AND PREVENTION, UNDERSTANDING SCHOOL VIOLENCE 1 (2012), http://www.cdc.gov/violenceprevention/pdf/schoolviolence_factsheet-a.pdf.

⁴ *Id.*

⁵ See Chapter 2, *infra*, for more on the continuing legacy of the Columbine shooting.

States; yet, the following two decades saw 115 such incidents.⁶ In 2009 alone, there were 22 school shootings.⁷

In an effort to combat both generalized violence and shootings, school administrators and lawmakers have tried a variety of solutions from increasing school security to adopting tough, “zero-tolerance”⁸ policies in regards to student discipline. States have also passed laws designed to criminalize “bullying” — the assorted anti-social practices that may drive some students to become violent.⁹ In 2012, however, North Carolina took anti-bullying legislation a step further when it both expressly prohibited students from bullying teachers or other school employees¹⁰ and criminalized any cyberbullying or online student speech “whether *true or false*, intending to immediately provoke, and that is likely to provoke, any third party to stalk or harass a school employee.”¹¹

I. Violent student speech: an introduction and three categories

⁶ JESSIE KLEIN, *THE BULLY SOCIETY: SCHOOL SHOOTINGS AND THE CRISIS OF BULLYING IN AMERICA’S SCHOOLS 2* (NYU Press, Kindle edition, 2012).

⁷ *Id.*

⁸ See Chapter 2, *infra*, for a discussion of zero-tolerance school discipline policies.

⁹ See, e.g., Tracy Tefertiller, *Out of the Principal's Office and Into the Courtroom: How Should California Approach Criminal Remedies for School Bullying?*, 16 BERKELEY J. CRIM. L. 168 (2011) (arguing that strengthening existing laws are preferable to crafting specific anti-bullying statutes); Karly Zande, *When the School Bully Attacks in the Living Room: Using Tinker to Regulate Off-Campus Student Cyberbullying*, 13 BARRY L. REV. 103 (2009) (concluding that current case law should be interpreted broadly to allow for regulation of off-campus student speech). *But see* Deborah Ahrens, *Schools, Cyberbullies, and the Surveillance State*, 49 AM. CRIM. L. REV. 1669 (2012) (arguing that overzealous application of bullying statutes alters the relationship between schools and students and removes possibility of self-regulation, as well as indoctrinates students into culture of surveillance). See also Chapter 2, *infra*, for a discussion of the legal literature regarding bullying.

¹⁰ N.C. GEN. STAT. § 115C-407.15 (2013). “Bullying or harassing behavior includes, but is not limited to, acts reasonably perceived as being motivated by any actual or perceived differentiating characteristic, such as race, color, religion, ancestry, national origin, gender, socioeconomic status, academic status, gender identity, physical appearance, sexual orientation, or mental, physical, developmental, or sensory disability, or by association with a person who has or is perceived to have one or more of these characteristics. (b) No student or school employee shall be subjected to bullying or harassing behavior by school employees or students.”

¹¹ N.C. GEN. STAT. § 14-458.2 (2013) (emphasis added).

In addition to serving as the impetus for anti-bullying laws, episodes of school violence can also prompt administrators to target student speech that expresses violent themes.¹² The 2007 Virginia Tech shooting, according to one expert in the area of student speech, prompted a revival of a more aggressive stance toward violent student speech as “[s]chools are looking for and making up things out of statements that, in the past, would have been passed over as foolish kid talk.”¹³ Broadly speaking, cases dealing with violent student speech can be separated into three categories: violent expression related to pedagogy and classroom activities, violent expression unrelated to pedagogy, and student speech that truly threatens others.¹⁴

There is perhaps no better example of both violent expression related to pedagogy and the rush to punish violent student speech than the facts highlighted in *Cuff v. Valley Central School District*.¹⁵ In *Cuff*, a 10-year-old fifth-grade student identified in court documents as “B.C.” was completing an assignment in science class wherein he was to both color a drawing of an astronaut and write a wish of anything he wanted on the spaceman’s leg.¹⁶ After a slew of questions prompted the teacher to offer, “When I mean anything you want, anything. You can write about missiles,”¹⁷ B.C. decided to write his wish: “Blow up the school with the teachers in it.”¹⁸

¹² Judy Wang, *Sensitive Speech: High Schools React to Violent Expression After Virginia Tech Massacre*, STUDENT PRESS LAW CENTER, Fall 2007, http://www.splc.org/news/report_detail.asp?id=1365&edition=43.

¹³ *Id.*

¹⁴ See Chapter 2, *infra*, for more on these categories and the distinctions between them.

¹⁵ 677 F.3d 109 (2d Cir. 2012).

¹⁶ *Id.* at 111.

¹⁷ 677 F.3d at 116 (Pooler, C.J., dissenting).

¹⁸ 677 F.3d at 111. B.C. had been “disciplined by teachers and school administrators for misbehavior in and around school” before his drawing. *Id.* His previous misbehavior included two similar incidents: a drawing depicting someone firing a gun and a story he wrote in fourth grade about a natural disaster in America that demolished all the schools and killed all the teachers. *Id.*

Many of his classmates laughed at B.C.'s scribbblings, but another was so concerned that she told the science teacher what B.C. wrote.¹⁹ The teacher found little humor in the elementary student's wish and sent him to the principal's office.²⁰ After meeting first with B.C. and then his parents, the principal decided to suspend the student for a total of six days.²¹ B.C.'s parents, however, objected to his punishment and sued the school district, alleging a violation of the child's First Amendment rights.²² The plaintiffs, however, found little redress as the school district was granted summary judgment in federal district court, a decision upheld by the Second Circuit Court of Appeals.²³

A federal district court case from Mississippi, *Bell v. Itawamba County School Board*,²⁴ serves as an example of violent expression unrelated to pedagogy, the second category of violent student speech cases. In that case, Taylor Bell, a high school senior, wrote, performed, and uploaded in August 2010 a rap song to YouTube in which he accused two school employees of inappropriate conduct involving female students.²⁵ Bell's lyrics included lines such as "looking down girls' shirts / drool running down your mouth / messing with wrong one / going to get a pistol down your mouth" and "middle fingers up if you can't stand that nigga / middle fingers up if you want to cap that nigga."²⁶ On January 7, 2011 — shortly after school officials discovered the song — Bell was removed from class to meet with his principal, the district superintendent,

¹⁹ Id.

²⁰ Id.

²¹ Id. at 112. The suspension included five days suspended off campus and another day of in-school suspension.

²² Id.

²³ See Chapters 4 and 5, *infra*, for a discussion of the Second Circuit's reasoning in *Cuff*.

²⁴ 859 F. Supp. 2d 834 (N.D. Miss. 2012).

²⁵ Id. at 836.

²⁶ Id. The court added in a footnote that there were "no allegations of racism in relation to the use of the term 'nigga' throughout the subject song." Id.

and a school board attorney who accused him of making threats and unfounded allegations with his song.²⁷ Bell was then sent home and later informed he was indefinitely suspended.²⁸

Ultimately, the Itawamba County School Board decided to both suspend Bell for seven days and force him to transfer to an alternative school for five weeks due to the song's "harassment and intimidation of teachers and possible threats against teachers."²⁹ Bell's mother eventually challenged the school's response in federal court, claiming her son's First Amendment rights were violated by the suspension and subsequent transfer.³⁰ The U.S. District Court for the Northern District of Mississippi saw the matter differently, however, and found the school's disciplinary action entirely consistent with established First Amendment principles.³¹

An example of the third category of violent student speech — violent student speech that truly threatens others — comes from the Ninth Circuit's decision in *Wynar v. Douglas County School District*.³² In that case, a clearly troubled student at Douglas High School in Minden, Nev. named Landon Wynar evidenced on his MySpace page "in a string of increasingly violent and threatening instant messages sent from home to his friends" a fascination with school shootings and a desire to commit his own schoolyard massacre.³³ His messages focused on an attack on April 20, the anniversary of the Columbine massacre and a day proximate to the Virginia Tech anniversary,³⁴ and contained such insights into his thinking as "i have a sweet gun / my neighbor is giving me 500 rounds . . . ive watched these kinds of movies so i know how NOT to go wrong / i just cant decide who will be on my hit list" and "that stupid kid from vtech.

²⁷ Id.

²⁸ Id.

²⁹ Id.

³⁰ Id.

³¹ Id. at 840-41. See Chapters 4 and 6, *infra*, for a discussion of the court's reasoning in *Bell*.

³² 2013 U.S. App. LEXIS 18056 (9th Cir. 2013).

³³ Id. at *3.

³⁴ The shooting at Columbine High School occurred on April 20, 1999, and the Virginia Tech shooting happened on April 16, 2007. See Chapter 2, *infra*, for more on the continuing legacy of the Columbine shooting.

he didnt do shit and got a record, i bet i could get 50+ people / and not one bullet would be wasted.”³⁵

Wynar’s friends joked with him about school violence, but they eventually became so concerned that he might follow through with his plans that they talked first to a football coach and then to the principal at Douglas High.³⁶ Wynar was then taken into police custody, where he told authorities that the MySpace messages were simply jokes.³⁷ After first being suspended for 10 days, Wynar was formally charged under a Nevada law that prohibited students from “threaten[ing] or extort[ing] another pupil, teacher, or school employee” and mandated a suspension or expulsion for at least a semester.³⁸ At a school board hearing, Wynar, then represented by an attorney, was given a chance to present exculpatory evidence, but he declined to do so.³⁹ The school board eventually decided to expel him for 90 days, and his father then sued the school district in federal court, alleging a violation of Landon’s First Amendment rights.⁴⁰ At trial, the district court granted the school board’s motion for summary judgment⁴¹ — a decision subsequently upheld by the Ninth Circuit.⁴²

II. Statement of the problem and need for the study

The various forms of expression created by B.C., Bell, and Wynar come in a post-Columbine America where school administrators and the public alike fear the next episode of school violence. But in addition to their common themes of violence and death, they were

³⁵ *Wynar*, 2013 U.S. App. at *5-6. As the court noted, “All typographical errors in the messages quoted throughout are in the original messages.” *Id.* at *6.

³⁶ *Id.* at *6-7.

³⁷ *Id.* at *7-8.

³⁸ *Id.* at *8.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at *8-9.

⁴² *Id.* at *25. See Chapters 4 and 7, *infra*, for a discussion of the Ninth Circuit’s reasoning in *Wynar*.

decided under the same framework crafted by more than 40 years of Supreme Court jurisprudence.

Since there have been public school students, there has been student expression — expression that is all too often silenced by administrators. And while the Supreme Court first gave constitutional protection to student speech in the landmark case of *Tinker v. Des Moines Independent Community School District*,⁴³ the four decades since that decision have seen a gradual erosion in student speech rights. Nowhere is that erosion more pronounced than in the area of violent student expression, as what was once dismissed as harmless, childish behavior is now seen as a possible vision of the next school tragedy.

Educators may see violent student expression as a source of danger, but what they and courts across the land ignore is that students have free speech rights despite the uncomfortable nature of their expression. This study seeks to clarify and defend exactly what those rights should be, arguing for both a greater allowance of student artistic expression as well as a better application of the true threat doctrine in regard to student speakers. Using the Supreme Court's jurisprudence on violent speech as a guide, this study will show why violent student speech in many instances should be allowed the full measure of free speech protection and how courts should better circumscribe limitations on violent student speech. To achieve this goal, the study will offer a tiered system of examination, with violent student expression related to pedagogy receiving the most protection under a new standard highly protective of student speech, violent student expression unrelated to pedagogy receiving lesser constitutional safeguards under the traditional *Tinker* analysis, and student speech that truly threatens others receiving the least — if any — protection. Furthermore, this study will argue that attention should be focused primarily on those speakers who are most likely to pose a threat to the school environment.

⁴³ 393 U.S. 503 (1969). See Chapter 4, *infra*, for a full discussion of *Tinker*.

III. Theoretical framework

Various First Amendment theories have arisen in part to answer the basic question of why the United States and its citizens are better off with free expression rights than without them, yet scholars and jurists have been unable to agree on a single rationale behind the guarantees of freedom provided in the First Amendment.⁴⁴ These theories are important — and the lack of consensus magnified — as they are used to justify decisions that either promote free expression or suppress it in favor of another overriding value. Ultimately, First Amendment theories fall into one of two broad categories: those that consider free expression as a critical value in its own right or those positing free expression as simply a means to another end.⁴⁵ In the realm of student speech, at least five such theories can be used to argue persuasively in favor of free speech rights for students: the marketplace of ideas as serving the pursuit of truth, Meiklejohnian/democratic governance theory, the checking power against authority, a theory that views speech as a safety valve, and free speech serving to aid self-realization. Only the final such theory — that free speech enables individuals to reach their full potential — truly values expression for expression's sake and is therefore the best defense for violent student speech.

a. The marketplace of ideas: A search for truth

Most commonly, and perhaps inappropriately, attributed to John Stuart Mill's *On Liberty*,⁴⁶ the marketplace of ideas theory suggests that all ideas — good, bad, or somewhere in between — do battle against one another in an intellectual marketplace. This battle results in the best, truest ideas rising to the top and general acceptance, while those lesser ideas are ultimately

⁴⁴ Calvin R. Massey, *Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression*, 40 UCLA L. REV. 103, 115 (1992).

⁴⁵ *Id.*

⁴⁶ See Jill Gordon, *John Stuart Mill and the 'Marketplace of Ideas,'* 23 SOCIAL THEORY & PRACTICE 235 (1997) (suggesting the attribution of the metaphor to Mill is incorrect and that it does not adequately summarize his views on speech). See also Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1 (2004).

cast aside. The pursuit of truth is therefore served by allowing all combatants into the arena where the consuming public may fairly evaluate each idea on its own merits. Under this theory, government can regulate speech only in an instance where the marketplace has failed, such as incitement to imminent violence, a situation that leaves little room for the dispassionate and reasoned analysis the theory posits.⁴⁷

This theory suggesting the marketplace of ideas and the broader pursuit of truth as the underpinning of the First Amendment found its way into the Supreme Court's speech jurisprudence via Justice Oliver Wendell Holmes's dissent⁴⁸ in *Abrams v. United States*.⁴⁹ In *Abrams*, the Court was called upon to decide the constitutionality of a criminal conviction under the Espionage Act of 1918, a law that criminalized speech against the government and was akin to seditious libel⁵⁰ in Holmes's view.⁵¹ While the Court upheld the conviction in a 7-2 decision, Holmes used his dissent to espouse the marketplace of ideas theory:

To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.⁵²

⁴⁷ Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 833-34 (2008).

⁴⁸ Robert C. Post, *Symposium on Law in the Twentieth Century: Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2359 (2000).

⁴⁹ 250 U.S. 616 (1919).

⁵⁰ Seditious libel laws are criminal statutes that generally punish those who criticize the government as such laws protect the image of the sovereign and the state at the expense of making political speech a crime. Christina E. Wells, *Lies, Honor, and the Government's Good Name: Seditious Libel and the Stolen Valor Act*, 59 UCLA L. REV. DISC. 136, 138 (2012).

⁵¹ Post, *supra* note 48, at 2359.

⁵² 250 U.S. at 630 (Holmes, J., dissenting).

Holmes’s metaphor, with its broad concepts and protection for expression, changed the way that courts examined the regulation of free speech in the United States.⁵³ With his dissent, Holmes linked the idea of a marketplace for speech with his idea of a First Amendment centered on the discovery of truth or, as he phrased it, the “experiment.”⁵⁴ Thus, the marketplace of ideas theory “seeks to protect the dialogue necessary for advancing truth,” as Professor Robert Post concluded.⁵⁵ The specific truth under investigation is unimportant under a marketplace theory, as “all communication conveying ideas relevant to our understanding the world” would be protected, even those absent any political or otherwise critical content.⁵⁶

Despite the usefulness of the metaphor, there are some issues with the marketplace of ideas, and most of the problems are centered on the theory’s conceptualization of an “uninhibited, costless, and perfectly efficient free market.”⁵⁷ If the question of truth is decided by the idea that is most popular at a given time, then truth is “simply what the majority thinks it is...leaving little reason to attach much value to ‘truth’ so conceived,” according to Professor Stanley Ingber.⁵⁸ Indeed, if truth is decided by the majority, then the marketplace is simply a reflection of the positions of powerful speakers, therefore resulting in the perpetual maintenance of the status quo.⁵⁹

Furthermore, there is no inherent guarantee that the marketplace will work as intended. A marketplace of free speech where not all speakers play by the same fair rules will not necessarily result in truth, as not all consumers in the marketplace will be insulated from emotional or

⁵³ Blocher, *supra* note 47, at 824-25. See also THOMAS HEALY, THE GREAT DISSENT.

⁵⁴ Post, *supra* note 48, at 2360.

⁵⁵ *Id.* at 2369.

⁵⁶ *Id.* at 2363.

⁵⁷ Blocher, *supra* note 47, at 831.

⁵⁸ Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts*, 69 TEX. L. REV. 1, 14 (1990).

⁵⁹ Blocher, *supra* note 47, at 832-33.

otherwise irrational appeals.⁶⁰ Also, while marketplace of ideas theory assures that truth will eventually win in the minds of consumers, the battle for supremacy may be an extended debate — one in which even “patently untrue ideas” can come to dominate the intellectual landscape for a significant period of time.⁶¹

However, the most obvious problem with the marketplace of ideas theory is that expression is not always the best conveyor of truth. Rather, experience can be more important than speech as often a willingness to re-evaluate truth is dependent on growth gained only through the acquisition of first-hand knowledge.⁶²

Despite these issues with the theory, the Supreme Court has been receptive to its use in the school setting.⁶³ In applying the marketplace of ideas to primary and secondary education, scholars are divided as to whether it requires more or less freedom for students. Some, like Martin H. Redish and Kevin Finnerty, argue that students should be taught to be consumers of ideas in part to ward off the dangers of government indoctrination.⁶⁴ The authors conclude it would be “counterproductive” to educate children in an environment where the state preselects all values, thereby leaving the pupils ill-prepared for an adult world where they must choose from competing messages.⁶⁵ Also, without an education that values expression, not only will young adults be unable to choose from various messages, but they will be similarly unable to contribute to the marketplace with their own ideas.⁶⁶ As Susannah Barton Tobin concludes, the

⁶⁰ Massey, *supra* note 44, at 123-24.

⁶¹ *Id.* at 124.

⁶² Ingber, *supra* note 58, at 14-15.

⁶³ See *Tinker*, 393 U.S. at 512 (“The classroom is peculiarly the ‘marketplace of ideas.’ The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, [rather] than through any kind of authoritative selection.’”) (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

⁶⁴ Martin H. Redish & Kevin Finnerty, *What Did You Learn in School Today? Free Speech, Values Inculcation, and the Democratic-Educational Paradox*, 88 CORNELL L. REV. 62, 79 (2002).

⁶⁵ *Id.* at 90-91.

⁶⁶ Ingber, *supra* note 58, at 74.

school environment — much like the “real world” — offers students a marketplace of ideas where “bad” speech may be adequately countered by “good” speech from other students or even the school administration.⁶⁷

Still, other scholars argue that the marketplace of ideas theory requires schools to maintain some type of control over student speech for the marketplace to fully thrive. Schools, as Joseph Blocher contends, improve the abilities of students to participate and contribute to the marketplace, but they must also impose rules to protect younger pupils “who are still on their way to becoming fully functional buyers and sellers of ideas.”⁶⁸ Michael C. Jacobson also argues that the marketplace of ideas theory is inappropriate for student speech, as it was a concept designed to protect speech in truly public arenas rather than insular school settings and it unfairly “allow[s] for high school students to impose their views on other students while preventing elementary school students from doing the same.”⁶⁹

Dean Bruce C. Hafen, however, is more direct in his assertion of a school’s authority and duty to control the marketplace.⁷⁰ After acknowledging a school’s connection to the “political, intellectual, and social goals” of the marketplace of ideas,⁷¹ Dean Hafen argues that schools have an obligation to control the marketplace:

In a public school, the marketplace of ideas cannot be controlled by judges as a practical matter, nor can it be controlled by students as a matter of personal maturity; therefore, if faculty and

⁶⁷ Susannah Barton Tobin, Note, *Divining Hazelwood: The Need for a Viewpoint Neutrality Requirement in School Speech Cases*, 39 HARV. C.R.-C.L. L. REV. 217, 243 (2004).

⁶⁸ Blocher, *supra* note 47, at 871.

⁶⁹ Michael C. Jacobson, Note, *Chaos in Public Schools: Federal Courts Yield to Students While Administrators and Teachers Struggle to Control the Increasingly Violent and Disorderly Scholastic Environment*, 3 CARDOZO PUB. L. POL’Y & ETHICS J. 909, 928 (2006). As Jacobson further argues, “A high school and a public park, for instance, are two greatly different environments. Students should not be allowed the same amount of constitutional leniency granted to a speaker in a public place while they are in school, because their audience is captive and especially impressionable.” *Id.* at 928-29.

⁷⁰ Bruce C. Hafen, *Developing Student Expression Through Institutional Authority: Public Schools as Mediating Structures*, 48 OHIO ST. L.J. 663, 706 (1987).

⁷¹ *Id.* at 736.

administrators lack the discretion to control it, there is little meaningful marketplace at all — neither in the school nor in the public square of the future.⁷²

Dean Hafen’s conclusion is alarmist, to say the least. In arguing that schools must control student expression so that the “public square of the future” can thrive, it seems as if there is a fundamental misconception of the theory at play. The adult marketplace is stocked with both wheat and chaff, and adults must be able to sort through all of the ideas — eliminating the noise, as the theory suggests, to find truth. Dean Hafen suggests the school marketplace will be overcrowded with juvenile and worthless expression. Indeed, the school speech marketplace may be filled with distractions such as gossip, name-calling, and otherwise anti-social speech such as bullying. However, that crowded marketplace looks little different from the one adults must contend with, and adolescents must gain the skills necessary to sort through a busy, often polluted arena of expression.

Under a true marketplace theory, all student speech — even speech with violent themes — would be protected expression. Despite the issues with the theory and the arguments against its application in an educational setting, the marketplace of ideas and the search for truth is still a powerful justification for student expression. The theory imagines an arena where all ideas compete for supremacy in the minds of consumers, but it says nothing about where those consumers learn how to differentiate between ideas. By allowing students a wide berth to formulate their own ideas and share them with peers — even when those ideas may have violent themes — they can learn how to be consumers in the marketplace of ideas.

b. Democratic self-governance and Meiklejohn

⁷² Id. at 706.

Outside of the marketplace of ideas theory, there is a separate line of legal scholarship that argues, as recently suggested by the Supreme Court, that the First Amendment “exists principally to protect discourse on public matters[.]”⁷³ First Amendment theories that suggest free expression is protected only so far as it contributes to the advancement of democratic self-government are most closely linked with Professor Alexander Meiklejohn, a philosopher, educator, and prolific free speech advocate.⁷⁴ As he saw it, the First Amendment does not protect the “freedom to speak”; rather, it guarantees the thoughts and communications necessary to govern, making the focal point of the First Amendment a public power of governmental responsibility instead of an individualized private right.⁷⁵ Meiklejohn argued that three distinct elements comprised this responsibility: the duty to understand issues facing a democratic society, passing judgment on elected representatives on how they address those issues, and debating the best ways to enact governmental measures or replace representatives if the need arises.⁷⁶

Perhaps due to — or in spite of — historical phenomena such as the McCarthy Era, self-governance theory is the most influential justification for free speech in the United States.⁷⁷ Self-governance theory, in turn, justifies free speech by suggesting that “expression is indispensable for the promotion of the free flow of ideas that is necessary for a democratic polity to govern itself,”⁷⁸ or put more simply, “free expression is...the precondition for democratic self-governance.”⁷⁹ Freedom of expression is also “an outgrowth of the American consensus that

⁷³ *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2733 (2011).

⁷⁴ Clay Calvert, *Meiklejohn, Monica, & Mutilation of the Thinking Process*, 26 PEPP. L. REV. 37, 37 n. 6 (1998).

⁷⁵ Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255 (1961).

⁷⁶ *Id.*

⁷⁷ Guy E. Carmi, *Dignity—The Enemy from Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification*, 9 U. PA. J. CONST. L. 957, 972 (2007).

⁷⁸ Massey, *supra* note 44, at 116-17.

⁷⁹ *Id.* at 117.

public issues are best decided by universal suffrage,” according to the theory.⁸⁰ Therefore all facts and information speaking to public decisions must be available to the community without any government intervention regarding truth or falsity.⁸¹

That prohibition on governmental interference in the flow of information is not total, however. Owing to its focus on the democratic process, the theory allows — but does not mandate — the restriction of speech that undermines the democratic process.⁸² According to Meiklejohn, this undermining interference can be either speech that misrepresents facts necessary for a community to make decisions or it can be as benign as a speaker speaking outside of the established rules of political debate.⁸³ Yet the idea that censorship can be democratically justified begins to call the theory somewhat into question. As Professor Stanley Ingber observed, “Suppression in a democratic society is most commonly suppression in the name of the people; it often illustrates democracy at work as a majority clamors for government to expunge certain ideas or perspectives from public discourse.”⁸⁴ Much like where a simple majority of consumers can decide truth in the marketplace theory, the fact a majority can censor speech consistent with the principles contained within self-governance theory should call its ultimate wisdom into doubt. Meiklejohn also presupposed a certain tidiness to democracy that simply is not based in reality; to censor a speaker with an otherwise valid point simply because they failed to observe some normative rule is rather chilling.⁸⁵ Furthermore, the state simply

⁸⁰ Ingber, *supra* note 58, at 15.

⁸¹ *Id.* at 16.

⁸² Curtis G. Bentley, *Student Speech in Public Schools: A Comprehensive Analytical Framework Based on the Role of Public Schools in Democratic Education*, 2009 BYU EDUC. & L.J. 1, 18 (2009).

⁸³ Calvert, *supra* note 74, at 41.

⁸⁴ Ingber, *supra* note 58, at 17.

⁸⁵ Robert Post, *Meiklejohn’s Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1117 (1993) (concluding that Meiklejohn’s “paradigm of the town meeting specifically presupposes that the function of American democracy is to achieve an orderly, efficient, and rational dispatch of common business, and it consequently implies that aspects of public discourse incompatible with that function are constitutionally expendable”).

lacks the moral authority in a democracy to simply conclude what speech is worthy of its citizenry.⁸⁶

In applying the self-governance theory to student speech, Dean Hafen first made the observation that students cannot vote and therefore have no ability to influence school board elections; consequently, he concludes that “public schools are not accountable to their students.”⁸⁷ Dean Hafen, therefore, argues that self-governance theory has no place in schools, even citing *Bethel School District v. Fraser*⁸⁸ for the proposition that schools must exert more control over students so that they may “teach[] democratic processes by maintaining standards that ‘teach by example the shared values of a civilized social order.’”⁸⁹

Dean Hafen, however, ignores the basic duty of public education in preparing children for adulthood. Professor Amy Gutmann, though, makes a persuasive case for such a duty, arguing of primary school students specifically, “[c]hildren must learn not just to *behave* in accordance with authority, but to *think* critically about authority if they are to live up to the democratic ideal of sharing political sovereignty as citizens.”⁹⁰

As scholars suggest, this is not a matter of teaching children to misbehave or to throw off authority at every turn; rather, it is simply the issue of preparing them to be citizens that participate in American democracy. By instilling in them critical thinking skills — skills that include questioning authority — they will be better prepared to be both adults and citizens. Gutmann and the principles contained in her work make a compelling case for the protection of student speech under self-government theory. Likewise, in her criticism of the failure to consider

⁸⁶ RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 16 (Vintage Books 1993).

⁸⁷ Hafen, *supra* note 70, at 707.

⁸⁸ 478 U.S. 675 (1986)

⁸⁹ Hafen, *supra* note 70, at 707 (quoting *Fraser*, 478 U.S. at 683). *Fraser*, interestingly enough, arose in the course of a student government election. See Chapter 4, *infra*, for a full discussion of *Fraser*.

⁹⁰ AMY GUTTMAN, *DEMOCRATIC EDUCATION* 51 (Princeton University Press 1999) (1987) (emphasis in original).

the theory of self-government in student speech, Professor Josie Foehrenbach Brown argued that “the articulated rationale for the protection of student speech frequently underplays the value of critical student speech and rarely considers how the suppression of student criticism could be at odds with schools’ responsibility to inculcate the habits of citizenship.”⁹¹

Thus at least some current scholars recognize the nexus between student speech and the obligation of public schools to instill in students the tools necessary to participate in democracy. Yet Professor Meiklejohn noted the importance of education to what would become his theory of expression and self-government decades ago. In defining exactly what expression was to be protected by a First Amendment premised on a self-governance theory, he argued there were four “forms of thought and expression within the range of human communications from which the voter derives the...capacity for sane and objective judgment which, so far as possible, a ballot should express.”⁹² The first of these protected forms of expression was education or, as Professor Meiklejohn defined it, “the attempt to so inform and cultivate the mind and will of a citizen that he shall have the wisdom, the independence, and, therefore, the dignity of a governing citizen.”⁹³

Where violent student speech is concerned, a direct application of self-governance theory is perhaps not the best justification for expression. However, the theme of self-governance through a safety valve theory can certainly support violent student speech.⁹⁴ Perhaps Professor

⁹¹ Josie Foehrenbach Brown, *Inside Voices: Protecting the Student-Critic in Public Schools*, 62 AM. U. L. REV. 253, 282-83 (2012).

⁹² Meiklejohn, *supra* note 75, at 256.

⁹³ *Id.* at 257. Meiklejohn’s other favored forms of expression were “[t]he achievements of philosophy and the sciences,” “[l]iterature and the arts,” and “[p]ublic discussions of public issues.”

⁹⁴ See notes 107-118 and accompanying text, *infra*.

Meiklejohn did not consider student speech as the foundation of this emphasis on education,⁹⁵ but he at least recognized the importance of education in advancing the cause of self-government and democracy. Therefore, it is at least plausible to suggest that student speech would receive a great deal of protection in a regulatory regime premised on the idea of Meiklejohnian self-governance.

c. The First Amendment value in checking the power of authority

In crafting a unique perspective on the purpose of the First Amendment, Professor Vincent Blasi went back to the colonial era and the motivations of the Founders:

[T]he colonial pamphleteers, like the opposition leaders in England whom they so admired, organized much of their political thought around the need they perceived to check the abuse of governmental power. The First Amendment was an outgrowth of this body of thought, as can be discerned from a brief examination of the most important eighteenth-century American writings on freedom of speech and freedom of the press.⁹⁶

For Professor Blasi, the First Amendment was based on the rights and abilities of the people to rebuff the power of the government through expression — most notably, dissent. The central premise of this “checking value,” as he called it, is “that the abuse of official power is an especially serious evil.”⁹⁷ The seriousness of this “evil,” therefore, requires that the people be allowed to freely expose corruption to the public, thereby mandating legal protection for expression that accomplishes this goal. Professor Blasi further supported his theory by suggesting that human nature and its institutions are inherently suspect and prone to abuse⁹⁸ as

⁹⁵ Meiklejohn, *supra* note 75, at 257. Meiklejohn wrote specifically of the “[f]reedom of education” as “the basic postulate in the planning of a free society.” Freedom of education most likely entails a freedom from undue oversight of curriculum and teaching methods.

⁹⁶ Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. B. FOUND. RES. J. 521, 533 (1977).

⁹⁷ *Id.* at 538.

⁹⁸ *Id.* at 541 (“Human beings have an unmistakable tendency to hurt each other, so much so that the prevention of man-made evil can be viewed as the most important task of all political arrangements.”).

well as by his assertion that “the general populace must be the ultimate judge of the behavior of public officials.”⁹⁹

While some may contend the checking value theory is properly subsumed by the self-governance theory, there are observable differences. Professor Blasi argued that “the self-government value is concerned with, and thus supports special protection for, a much broader range of communication” while “[t]he checking value focuses on the particular problem of misconduct by government officials.”¹⁰⁰ Professor Calvin Massey characterized the difference in the theories as the “[u]nfettered public discourse...most commonly associated with the self-governance rationale” as compared with the “*informed* public debate that is facilitated by the checking value.”¹⁰¹

Thus Professor Massey makes a basic distinction between the two theories: The checking value facilitates expression about the workings of government only when that expression contains knowledge of those workings, whereas the self-governance theory would protect a broader range of speech regarding government. The distinction aligns well with the foundation of Professor Blasi’s checking value theory — criticizing and perhaps preventing the abuse of government power — as one cannot logically comment on the propriety of government actions without first being knowledgeable about those actions.

In practice, court acceptance of the checking value theory is most evidently apparent where the press has been guaranteed access to trials and other public proceedings under the assumption that coverage will aid in procuring fair treatment for all parties involved.¹⁰²

Analogizing to the student press in this example is difficult as it is not readily apparent what

⁹⁹ Id. at 542.

¹⁰⁰ Id. at 558.

¹⁰¹ Massey, *supra* note 44, at 132 (emphasis in original).

¹⁰² Id. at 131.

events or proceedings the typical high school newspaper would cover to similarly ensure fairness. Even if the student press could operate in such a fashion, the oversight allowed by the Supreme Court's decision in *Hazelwood School District v. Kuhlmeier*¹⁰³ would likely render any possible checking value meaningless. Furthermore, the fact that students are not the ultimate authority in the school setting clouds the application of the checking value.¹⁰⁴

However, that does not mean students should be powerless to protest when administrators step outside the boundaries of a reasonable exercise of their authority. For example, assuming the facts in *Bell* to be true — in that a school employee had sexually harassed a student¹⁰⁵ — then students should have had every right to complain in addition to pressing for accountability from school administrators. As Professor Brown noted in her survey of student petitions, secondary public school students have protested against practices as varied and important as the treatment of faculty to the relatively minor (at least to the outsider) counting of ballots in a vote determining the design of a class t-shirt.¹⁰⁶ Simply because the student press may be ineffective at policing the abuse of administrative authority does not mean the checking value has no application in regards to student speech. Rather, student dissent can serve a vital role in bringing to light abuses of power and the mistreatment of students — thus fulfilling the very purpose of the checking value embedded within the First Amendment even when that speech may have violent themes.

d. Free speech as a safety valve

¹⁰³ 484 U.S. 260 (1988). See Chapter 4, *infra*, for a full discussion of *Hazelwood*.

¹⁰⁴ See Hafen, *supra* note 70 at 707. As Dean Hafen argues, “Application of the checking value theory argues for local public awareness of educational activities and for a strong spirit of disclosure to enable communication and cooperation between schools and parents. However, it does not support the assumption that student media organizations should play the same independent role in providing public evaluations of school policies — even though there is great educational value in encouraging public comment by students. The analogy to the public press in the democratic marketplace is inapposite, due to the absence of ultimate student authority.”

¹⁰⁵ See note 25 and accompanying text, *supra*.

¹⁰⁶ Brown, *supra* note 91, at 286-87.

Perhaps student speech generally and violent student speech specifically could be protected under the “pressure release” theory, a variant of self-governance suggested by Professor Thomas Emerson.¹⁰⁷ Professor Emerson’s theory posits that society functions best when it provides its citizens a means to peaceably express dissent instead of pushing them to some form of violent revolt; in essence, “[s]ocial peace is to be had by free speech.”¹⁰⁸ As Professor Emerson argued, “[S]uppression of expression conceals the real problems confronting a society and diverts public attention from the critical issues. It is likely to result in neglect of the grievances which are the actual basis of the unrest, and thus prevent their correction,”¹⁰⁹ meaning that expression brings issues worthy of debate to the forefront of society and prevents them from festering. This also promotes stability, as “a society will be both more stable and more free in the long run if openness values prevail.”¹¹⁰ The theory has also been described as the formulation of “a necessary means of emotional catharsis that allows minorities the opportunity to respond to their antagonists”¹¹¹ and more simply as “valves through which the citizens may blow off steam.”¹¹² Even though Professor Emerson focused more on the application of this theory as a means of continuing democratic government¹¹³ and some scholars have argued that “[s]ocial science does not bear out...pressure release theory,”¹¹⁴ violent student speech — under at least one reading of the theory — would be beneficial to society as it allows students to express violent thoughts without doing harm to the larger societal body.

¹⁰⁷ See Massey, *supra* note 145, at 130. See also Smolla, *supra* note 86, at 12-13 (contending that democratic participation, political truth, facilitation of majority rule, prevention of majoritarian abuses, and stability are all at the intersection of speech and self-governance).

¹⁰⁸ *Id.*

¹⁰⁹ Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 884 (1963).

¹¹⁰ Smolla, *supra* note 86, at 13.

¹¹¹ Alexander Tsesis, *The Boundaries of Free Speech*, 8 HARV. LATINO L. REV. 141, 152 (2005) (reviewing RICHARD DELGADO & JEAN STEFANIC, UNDERSTANDING WORDS THAT WOUND).

¹¹² Smolla, *supra* note 86, at 13.

¹¹³ Massey, *supra* note 44, at 130.

¹¹⁴ Tsesis, *supra* note 111, at 152.

In the school setting, the pressure release theory can apply when students, guest speakers, and other non-school officials raise the specter of troubling topics that administrators would rather not discuss themselves. Under pressure release theory, the advantages gained by students being able to discuss issues like sex and school violence is outweighed by the burden to the school or administrators.¹¹⁵ Also, several scholars — specifically those writing about student artwork and online expression — have evidenced some level of support for the pressure release theory as applied to violent student speech, arguing that society “should be thankful” when teenage speakers express themselves online using violent themes instead of turning to actual violence.¹¹⁶ Furthermore, scholars argue that art is “a silent, non-violent, non-disruptive form of expression that is perfectly suited to the school environment” — an environment that does not tolerate acting out, yelling, or other means of expressing anger or frustration; thus leaving art — no matter the specific content — and other forms of non-disruptive speech as much needed outlets¹¹⁷ comporting with the pressure release theory. In short, there is certainly support for the pressure release theory as applied to student speech where scholars admonish courts and school administrators to not “ignore the principle that free speech functions as a form of release for teenage frustrations.”¹¹⁸

e. Self-expression as a path to self-realization

¹¹⁵ Tobin, *supra* note 67, at 243.

¹¹⁶ Clay Calvert, *Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground*, 7 B.U. J. SCI. & TECH. L. 243, 282 (2001). *See also, e.g.*, Matthew I. Schiffhauer, Note, *Uncertainty at the “Outer Boundaries” of the First Amendment: Extending the Arm of School Authority Beyond the Schoolhouse Gate into Cyberspace*, 24 ST. JOHN’S J.L. COMM. 731, 759 (2010) (“Students have engaged in childish banter and mocked teachers, school administrators and fellow students for decades. Today, students have opened their views to the world by venting frustrations and expressing opinions on the Internet.”); Richard Salgado, Comment, *Protecting Student Speech Rights While Increasing School Safety: School Jurisdiction and the Search for Warning Signs in a Post-Columbine/Red Lake Environment*, 2005 B.Y.U.L. REV. 1371, 1385 (2005) (“Troubled students, deprived of any acceptable outlet to vent their frustrations, could hide their feelings, which could possibly lead to violence.”).

¹¹⁷ Anna Boksenbaum, Note, *Shedding Your Soul at the Schoolhouse Gate: The Chilling of Student Artistic Speech in the Post-Columbine Era*, 8 N.Y. CITY L. REV. 123, 170 (2005).

¹¹⁸ Calvert, *supra* note 116, at 285.

In his concurring opinion for 1927's *Whitney v. California*,¹¹⁹ Justice Louis Brandeis wrote, "Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means."¹²⁰ Thus Justice Brandeis introduced a concept new to the Supreme Court's jurisprudence: Liberty can be valued simply as a thing unto itself rather than simply a way to accomplish some other goal such as the search for truth or self-governance. Since *Whitney*, this theory of self-realization has been offered to justify expression in a variety of Supreme Court cases,¹²¹ and it was cited recently in Justice John Paul Stevens's dissenting opinion in *Citizens United v. FEC*.¹²²

There is a growing body of scholarship that supports expression via this theory of self-realization as a way for all individuals to reach their full potential.¹²³ Expression and speech are naturally valued under this theory as "the notion has persisted that the cognitive and communicative activities we associate with the concept of freedom of speech represent an unusually worthy form of endeavor, a variety of human behavior that has intrinsic, not just instrumental, value."¹²⁴

The theory, however, has been met with some criticism. As Professor Massey argues, it does not sufficiently explain why expression should be granted such an exalted status as

¹¹⁹ 274 U.S. 357 (1927).

¹²⁰ 274 U.S. at 375 (Brandeis, J., concurring).

¹²¹ See Joseph A. Tomain, *Cyberspace Is Outside the Schoolhouse Gate: Offensive, Online Student Speech Receives First Amendment Protection*, 59 *DRAKE L. REV.* 97, 160-67 (2010) (tracing the use of the self-realization theory in Supreme Court jurisprudence).

¹²² Justice Stevens, in contrasting the issue of corporate speech with the speech of corporeal beings, observed, "One fundamental concern of the First Amendment is to 'protect the individual's interest in self-expression.' Freedom of speech helps 'make men free to develop their faculties,' it respects their 'dignity and choice,' and it facilitates the value of 'individual self-realization[.]'" 558 U.S. 310, 466 (2010) (Stevens, J., concurring in part and dissenting in part) (citations omitted).

¹²³ Massey, *supra* note 44, at 133.

¹²⁴ Blasi, *supra* note 96, at 545.

compared to other activities.¹²⁵ Similarly, Professor Ingber states that “[s]elf-realization and self-expression...are not uniquely matters of speech. They may be accomplished through virtually all voluntary conduct.”¹²⁶ Furthermore, an individual’s self-realization is perhaps not always preferable for society, as Professor Ingber observes:

Self-fulfillment may mean fostering an individual's talent to make bombs, molest children, or shout insults and obscenities. Does the goal of self-fulfillment somehow sanctify such qualities? Stripped by individualism's moral relativism and value skepticism of any standard of reference for “proper” development, self-realization justifiably may appear to many as nothing more than a glorification of self-gratification or social irresponsibility.¹²⁷

Under the self-realization theory, speakers are clearly the dominant figures, even to the possible detriment of speech consumers.¹²⁸ An individual’s invocation of the self-realization defense of speech also forces external authorities to either assume all speech is vital to self-expression or simply accept the speaker’s assertion at face value¹²⁹ — an odd position that could logically extend itself to the sort of anti-social activities referenced by Professor Ingber. Also, because the protection of expression is not premised on its purpose, the question of what exactly is protected speech under a self-realization theory would be decided by determining the boundaries between conduct and speech, an issue not easily decided.¹³⁰

Still, there is an undeniable attraction to the values espoused in the self-realization theory — namely that speech is important because it helps define who we are as individuals.¹³¹ It also

¹²⁵ Massey, *supra* note 44, at 133-34.

¹²⁶ Ingber, *supra* note 58, at 19.

¹²⁷ *Id.* at 20.

¹²⁸ See Massey, *supra* note 44, at 134 (observing that self-realization theory “focuses exclusively on the relationship of speech to the self-actualization of the speaker, ignoring completely the possibility that speech which aids one person’s self-realization is destructive of the auditor’s identical quest”).

¹²⁹ Bentley, *supra* note 82, at 16.

¹³⁰ See generally Lawrence Byard Solum, *A Theory of the First Amendment Freedom of Speech*, 83 NW. U. L. REV. 54, 110 (1988) (arguing the “attempt to distinguish between speech and conduct is doomed to failure”).

¹³¹ See Tomain, *supra* note 121, at 159.

allows for the widest possible realm of expression, as all speech would be protected under the self-realization theory.

In the student speech arena, Professor Joseph Tomain used the self-realization theory to mount a vigorous defense of online student speech, arguing “[s]tudents play an important role in exercising free speech rights, and these rights should be protected because they help fulfill youths’ development of self-realization.”¹³² This embrace of students and self-realization is a stark contrast to Dean Hafen’s contention that because self-realization is “ultimately grounded in self-autonomy, it does not generally apply to children, whose very lack of actual autonomous power dictates their need for protection against their own immaturity.”¹³³ Professor Tomain, however, emphasizes both the self-realization theory and the role schools should play in developing students:

Self-realization theory helps maintain robust protection of free speech rights guaranteed under the Constitution. A school should not be permitted to punish a student engaging in online political speech merely because she uses the term “douchebag.”... Nor should a school be permitted to punish a student who creates an online parody profile of a school administrator merely because it finds the profile offensive and valueless. Schools are not keepers of the public mind. Protecting online student speech is important — regardless of whether it involves political speech or merely offensive, juvenile humor — because it helps avoid the chilling effect on free speech and protects the value of self-realization. Such protection is especially important in our diverse and pluralistic country where we recognize “one man's vulgarity is another's lyric.”¹³⁴

Ultimately, self-realization theory should be the cornerstone for the support of student speech rights because it respects the rights of young individuals to grow and discover themselves using expression. As Professor Tomain suggests, it does not matter that this speech may appear

¹³² *Id.* at 171.

¹³³ Hafen, *supra* note 70, at 708.

¹³⁴ Tomain, *supra* note 121, at 105-6 (citations omitted).

to others to be worthless or immature; students must learn the best use of speech and ideas, and their speech — despite what administrators may think of it — can be useful for students as they develop into adults.

If violent student speech specifically is to be vigorously defended,¹³⁵ its defense must be premised on the self-realization theory. Where violent student speech is concerned, there are few legitimate self-government defenses aside from pressure release theory, a theory that favors expression not for the nature of expression itself but for rather the ills that might befall society without it. Thus the pressure release theory fails to realize the inherent and individual value in expression, as speech is much more valuable than a simple prophylactic for society. The marketplace of ideas theory fails to specifically address the issues surrounding violent student speech or provide it with sufficient justification. Therefore, it falls to the self-realization theory to provide a defense of violent student speech in the face of ongoing fears regarding school shootings and other deplorable, catastrophic acts in and around the nation's schools.

B.C.'s drawing in *Cuff* was certainly not the heady stuff of governance, and it is hard to tease out any particular idea contained within that could contribute to a marketplace of ideas. But it was important to him. Maybe the seeds of a brilliant comedic mind were planted inside B.C. that day or perhaps he was simply expressing his frustration with being at school when he would rather be anywhere else. His drawing did not represent a danger to himself, his classmates, any of the school's teachers, or anyone else. His drawing — despite the reactionary reception it garnered from administrators — represented a fundamental expression of self, one that should be

¹³⁵ Any defense of violent student speech, however, must recognize that at some point absolutist speech doctrine gives way to safety concerns. There is little to be gained by advocating for students such as Wynar and his talk of body counts, bullets, and plans for attack. Rather, his case (and others like it) are valuable primarily as demonstrating what speech *should* be addressed by school officials in contrast to harmless speech with violent themes.

protected by the First Amendment and both respected and encouraged by educators despite whatever perceived message or implications it may contain.

Furthermore, and perhaps most importantly, B.C.'s speech was undertaken during the course of his school work, thereby taking it outside of the factual situations seen in *Tinker* (extracurricular speech) and *Hazelwood* (curricular speech bearing the "imprimatur" of the school).¹³⁶ As such, any censorship of this speech should be approached with great care and deference to the speech and educational interests of the children involved.

Bell and *Wynar*, while they similarly involve violent themes, represent distinctly different legal, educational, and social challenges. Bell's YouTube video, as extracurricular speech, falls properly under the *Tinker* framework, but it brings two important issues into focus: the extent to which school officials may venture off-campus (and into cyberspace) to punish speech and what exactly qualifies as a "material and substantial" disruption¹³⁷ for the purpose of *Tinker*'s analysis. Wynar's MySpace messages, while they were similarly disseminated via an online forum, represent a still different issue as they resembled something closer to a traditional "true threat" and were therefore perhaps outside of the boundaries of the First Amendment.¹³⁸

IV. Purpose of the study

¹³⁶ As the *Hazelwood* Court explained, *Tinker* governs "educators' ability to silence a student's personal expression that happens to occur on the school premises" whereas *Hazelwood* concerns "educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." *Hazelwood*, 484 U.S. at 271. B.C.'s speech, therefore, seems to be in a separate category as individual student speech undertaken in the course of an assignment exists in a realm where "[n]o reasonable member of the public would suppose the teacher mandated such a topic upon the student, or upon the class for that matter." Adam Hoising, "School Sponsorship" and *Hazelwood*'s Protection of Student Speech: Appropriate for All Curriculum Contexts?, 4 NEB. L. REV. BULL. 1, 16 (2012). Additionally, different educational responsibilities are implicated in cases such as B.C.'s. See also Chapter 5, *infra*.

¹³⁷ See *Tinker*, 393 U.S. at 511 ("[T]he prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.").

¹³⁸ The Ninth Circuit did not reach the question of whether the messages were true threats, preferring instead to address the case using school speech analysis. As the court concluded, since the school's actions were justified, there was no reason to address the true threat issue. See *Wynar*, 728 F.3d at 1070, n. 7.

While defining his self-governance theory of expression, Professor Meiklejohn expounded on the state of education and the American people:

The primary social fact which blocks and hinders the success of our experiment in self-government is that our citizens are not educated for self-government. We are terrified by ideas, rather than challenged and stimulated by them. Our dominant mood is not the courage of people who dare to think. It is the timidity of those who fear and hate whenever conventions are questioned.¹³⁹

His sentiments are as true today as they were when he wrote them in 1961. The American people love speech when it is easy and popular but hate it in times of trouble. A recent poll found a full third of those surveyed believe the First Amendment goes too far in the freedoms it grants.¹⁴⁰ And nowhere is that fear of expression more pronounced than in America's schools. Rather than encouraging students to be expressive, administrators and the Supreme Court have slowly rolled back speech rights for students. *Tinker* struck a perfect balance between the rights of students and the necessities of a functioning school environment, but the Court — through its jurisprudence in *Fraser*, *Hazelwood*, and *Morse v. Frederick*¹⁴¹ — has chipped away until there is little left of that iconic and cornerstone decision.

This error in judgment is only compounded in the area of violent student speech, where in a noble but misguided attempt to keep students safe, teachers and principals have taken to treating even the youngest would-be offenders like the next school shooting villains. There is certainly both a time and place for preventative security measures, but subjecting a student to discipline for nothing more than a fanciful wish written in crayon on a drawing of an astronaut is not one of them.

¹³⁹ Meiklejohn, *supra* note 75, at 263.

¹⁴⁰ Gene Policinski, *Fear After Violent Incidents Imperils Our Core Liberties*, FIRST AMENDMENT CENTER, July 16, 2013, <http://www.firstamendmentcenter.org/fear-after-violent-incidents-imperils-our-core-liberties>.

¹⁴¹ 551 U.S. 393 (2007). See Chapter 4, *infra*, for a full discussion of *Morse*.

Expression is not always pleasant for those who may consume or be exposed to it, but that does not make it less important for those who are creating it. For while it might be prudent for teachers, administrators, and especially school counselors to give violent student expression a closer examination, that inclination to favor the appearance of security over expression cannot withstand true constitutional scrutiny.

This study seeks to bring the issues associated with violent student speech into greater focus by differentiating between types of violent student speech. In arguing for a limited and targeted approach to dealing with violent student speech, this study aims to provide a better way forward for schools, students, and the principles enshrined in the First Amendment.

V. Research questions

1. What is the current state of Supreme Court jurisprudence regarding a child's First Amendment rights inside and outside of the school environment? (Chapter 4)
2. What insight can decisions outside of student speech jurisprudence provide to the analysis of violent student speech? (Chapter 4)
 - 3a. How are violent non-sponsored curricular student speech cases decided? (Chapter 5)
 - 3b. How should courts decide violent non-sponsored curricular student speech cases? (Chapter 5)
 - 4a. How are violent noncurricular student speech cases decided? (Chapter 6)
 - 4b. How should courts decide violent noncurricular student speech cases? (Chapter 6)
 - 5a. How are threatening student speech cases decided? (Chapter 7)
 - 5b. How should courts decide threatening student speech cases? (Chapter 7)
6. What is the proper balance between judicial intervention and deference to school administrators? (Chapter 8)

VI. Limitations

The bulk of this study is comprised of legal scholarship using both cases from different jurisdictions in the United States as well as legal research from other scholars. Judicial opinions, however, “are written under the severe pragmatic constraints of a most unusual social and historical institution that necessarily values institutional authority over true intellectual authority.”¹⁴² As such, it can be difficult to directly compare cases from different jurisdictions, and any such comparison must be taken as simply noting the distinctions between differing approaches rather than an attempt to synthesize an authoritative statement of the law. However, this study will attempt to suggest a better way forward in dealing with issues related to violent student expression.¹⁴³

¹⁴² Charles W. Collier, *The Use and Abuse of Humanistic Theory in Law: Reexamining the Assumptions of Interdisciplinary Legal Scholarship*, 41 DUKE L.J. 191, 271 (1991).

¹⁴³ See generally Chapter 3, *infra*, for a discussion of this study’s limitations and methodology.

CHAPTER 2

LITERATURE REVIEW

This chapter will examine and summarize the current legal literature regarding violent student speech, detail this study's innovative contribution to the body of scholarship, and provide an overview of the chapters in this study.

I. Review of literature

The academic, cultural, and legal study of violent student expression has grown extensively since the April 20, 1999 shooting at Columbine High School in Littleton, Colo. In the nearly 15 years that have followed, law reviews and authors across the country have taken up the task of examining the legal issues surrounding student speech and the threat of violence in schools. Naturally, these law review articles can speak only to one or two issues in the much more expansive context of violent student expression. Indeed, there are few works that have the capacity to comprehensively cover the topics associated with violent student expression, and the most prominent, a 2013 book titled "Violence in Student Writing: A School Administrator's Guide," is structured as a guide for educational professionals rather than a thorough examination of the legal issues surrounding violent student expression.

Originating from research contained in her dissertation,¹ Gretchen Oltman promises in the introduction of her book to provide a “solid background to [violent student writing], from an educational, philosophical, and legal standpoint.”² She begins her analysis in the first chapter by firmly rooting the study in the post-Columbine landscape, noting, “While the actual numbers of violent incidents or widely publicized events might be decreasing . . . as long as students face danger at school, educators will be questioning whether violence prevention methods are actually effective in practice.”³ From there, Oltman traces the history of student speech before the Supreme Court; though given the practical nature of her book, she devotes only five pages to explaining the consequences of *Tinker*, *Fraser*, *Hazelwood*, and *Morse*.⁴ More importantly, however, Oltman chooses to only briefly explain the lower court cases that speak directly to the issue of violent student expression rather than extensively explain the decisions.⁵

Although Oltman certainly loses depth in her approach, she does manage to produce an accessible text for education practitioners as each chapter closes with a summary and helpful tips for both primary and secondary educators. In the chapter addressing the response to violent student writing, for example, she advises K-6 administrators to “[i]dentify the response options for student violent writings that do not include suspension or expulsion” and seventh through

¹ Gretchen A. Oltman, *Dealing with Violent Student Writing in the English Classroom: A Framework for Public School Administrators* (May 2009) (published in ProQuest Dissertations & Theses database Ph.D. dissertation, University of Nebraska).

² GRETCHEN OLTMAN, *VIOLENCE IN STUDENT WRITING: A SCHOOL ADMINISTRATOR’S GUIDE* xiii (2013).

³ *Id.* at 2.

⁴ *Id.* at 13-18.

⁵ These cases, such as *Cuff*; *Doe v. Pulaski County Special School District*, 306 F.3d 616 (8th Cir. 2002); *Ponce v. Socorro Independent School District*, 508 F.3d 765 (5th Cir. 2007); and others (which will be discussed in length in later chapters) are given either short paragraph summaries — see *id.* at 64-65, 93-94 — or one-line summations of the violent student expression central to the case. *Cuff* is unfortunately one of the victims of this relatively shallow approach as the only information given about the case is that it was about “[a] wish to blow up the school.” *Id.* at 33. This approach lacks depth, detail, and, most unforgivingly, context.

12th grade schools are told to “[d]raft a student violent writing incident form that is compliant with your school district’s policies.”⁶

In essence, the book is what it proclaims to be on its cover: a guide on the issue of violent student writing for school administrators. Oltman caters to individuals working with students on a daily basis rather than legal scholars, so she therefore paints with broad strokes rather than analytical insights. Perhaps owing to the nature of its intended audience, the book is also slightly bent toward censorship as it cautions instructors with such tips as “[c]onsider setting limits on what may be written in journals, including announcing what may be off-limits and subject to administrative referral.”⁷ Given the absence of thorough legal analysis and the bias toward administrators and censorship, Oltman’s text cannot serve as the definitive legal text in the area of violent student expression.

Other works — namely law review articles — lack sufficient length to explore all of the issues associated with violent student expression, so they too cannot be definitive works. Still, these articles do provide the legal analysis missing from Oltman’s book, and they should be considered a worthwhile source of information. In a survey of major American law reviews, more than 50 articles were determined to be related enough to the topic of violent student expression to include in this literature review.⁸ These articles discuss a variety of topics with an even wider array of perspectives, but they can be condensed into five popular, recurring themes: bullying; the regulation of Internet and off-campus student speech; student expression, artwork,

⁶ Id. at 98, 99.

⁷ Id. at 59. Oltman, however, does recognize the value in student expression as she explains “[w]riting, as a practice, can also be utilized as a form of therapy or violence prevention.” Id. at 55.

⁸ Legal database LexisNexis was used to conduct a search of major American law reviews with the key words of “Columbine” (as a proxy for violence and concerns about violence) and “student speech.” This resulted in 234 results, which were narrowed down to first 166 by requiring five mentions of “student speech” and then to 52 by requiring five mentions of “Columbine” as well. All searches were examined for useful articles that somehow addressed the topic of school violence and its relationship to student expression, and a premium was placed on articles written by learned legal scholars. Other relevant articles were included as well.

and the “true threat” standard; student expression in the post-Columbine world; and the current state of Supreme Court jurisprudence with a focus on *Morse* and the regulation of violent student expression.

a. Bullying

Bullying is alternately defined by scholars as “aggressive and repeated behavior based on an imbalance of power among people”⁹ or “repeatedly teasing someone who clearly shows signs of distress.”¹⁰ Bullying is further classified as direct (“hitting, kicking, or making insults, offensive and sneering comments, or threats”) or indirect (“a student is purposely isolated from a group or when a bully spreads a rumor about a peer”).¹¹ Bullying is also defined as an intentionally repeated act as the victim must be a target of recurring harassment.¹²

Victims of bullying often “suffer school phobia, increased truancy, or impaired concentration and classroom achievement” and symptoms such as “sleep disturbances, bedwetting, abdominal pain, high levels of anxiety and depression, loneliness, low self-esteem, and heightened fear for personal safety” may resemble those faced by child abuse victims.¹³ Bullying also results in higher truancy as well as long-lasting adulthood issues such as depression, negative self-concept, and suicide.¹⁴ Most importantly for the topic of school violence, some bullied students resort to violence to deal with their aggressors, choosing to strike

⁹ Kathleen Hart, Note, *Sticks and Stones and Shotguns at School: The Ineffectiveness of Constitutional Antibullying Legislation as a Response to School Violence*, 39 GA. L. REV. 1109, 1113 (2005).

¹⁰ Farley Andersen, *Defining and Enforcing the Federal Prosecutor's Duty to Disclose Exculpatory Evidence: Thirteenth Annual Georgia Symposium on Ethics and Professionalism: A Symposium of the Mercer Law Review: Comment: Pacifism in a Dog-Eat-Dog World: Potential Solutions to School Bullying*, 64 MERCER L. REV. 753, 768 (2013).

¹¹ *Id.* at 768-69.

¹² *Id.* at 772.

¹³ Douglas E. Abrams, *Recognizing the Public Schools' Authority to Discipline Students' Off-Campus Cyberbullying of Classmates*, 37 N.E. J. ON CRIM & CIV. CON. 181, 212 (2011).

¹⁴ Renee L. Servance, Comment, *Cyberbullying, Cyber-Harassment, and the Conflict Between Schools and the First Amendment*, 2003 WIS. L. REV. 1213, 1216-17 (2003).

back at either their tormentor or other random targets.¹⁵ The speculative causal link between bullying and school violence resulted in “state legislatures across the country . . . looking for ways to improve school safety by reducing occurrences of bullying and harassment on public school grounds” after numerous school shootings.¹⁶

Many scholars addressing the topic of bullying focus on “cyberbullying,” or the “willful and repeated harm inflicted through the medium of electronic text.”¹⁷ Given the diversity of 21st century technology, cyberbullying can take many forms, including text messages in emails and chat programs, forwarding confidential messages to unintended audiences, assailing victims with a flood of hostile messages, creating derogatory websites or fake social media profiles, and using camera phones to take embarrassing pictures of cyberbullying victims.¹⁸ This type of bullying can be uniquely effective as aggressors can maintain anonymity as well as operate without the confines of time and space;¹⁹ in short, “a cyberbullying victim may experience more damaging effects than a traditional bullying victim because the home is no longer a place to hide from the ridicule.”²⁰ Cyberbullying can be quite traumatic to its victims. Scholars argue that “electronic media can transform a single act of harassment into something powerful enough to destroy a young person’s life.”²¹

¹⁵ *Id.*

¹⁶ Hart, *supra* note 9, at 1111.

¹⁷ Kevin Turbert, Note, *Faceless Bullies: Legislative and Judicial Responses to Cyberbullying*, 33 SETON HALL LEGIS. J. 651, 653 (2009). See also Karly Zande, *When the School Bully Attacks in the Living Room: Using Tinker to Regulate Off-Campus Student Cyberbullying*, 13 Barry L. Rev. 103, 106 (2009) (defining cyberbullying as “the use of technology to humiliate, embarrass, or otherwise bully another”) (“Instead of rushing to the playground and local restaurants after school, today’s students “meet up” with their peers on social networking websites, such as MySpace and Facebook, and instant messaging programs. In response to this constant availability of technology, bullies have adapted their tactics to the times, giving rise to an emerging problem known as cyberbullying.” *Id.* at 104-105).

¹⁸ John O. Hayward, *Anti-Cyberbullying Statutes: Threat to Student Free Speech*, 59 CLEV. ST. L. REV. 85, 88 (2011).

¹⁹ Turbert, *supra* note 17, at 654.

²⁰ *Id.* at 653.

²¹ James A. O’Shaughnessy, *Is Cyber-Bullying the Next “Columbine”: Can New Hampshire Schools Prevent Cyber-Bullying and Avoid Liability?*, 52 N.H.B.J. 42, 43 (2011). See Raul R. Calvoz, Bradley W. Davis & Mark A. Gooden,

While scholars generally agree that bullying and cyberbullying are destructive and anti-social behavior,²² there is some disagreement as to whether public schools should have the authority to act, what the scope of that authority should be, and how that legal authority should be framed in the context of Supreme Court jurisprudence. In arguing that schools “should receive great latitude to restrict” bullying,²³ scholars suggest that it is due to the reality that “public schools are better equipped to handle student speech that is not actionable in the criminal or civil courts, but still disrupts the lives of teachers and students in the educational community.”²⁴ Not only should schools act to address bullying and cyberbullying, these scholars argue, but they are also obligated to act given the importance of the educational mission of the school as “the nation depends on public education to help sustain leadership in the increasingly global environment marked by swift technological advances.”²⁵ Furthermore, scholars argue that increased criminal and civil penalties for bullying are inappropriate given the nature of socially and intellectually immature children, leaving school discipline as the only adequate response.²⁶

Cyber Bullying and Free Speech: Striking an Age-Appropriate Balance, 61 CLEV. ST. L. REV. 357 (2013) (listing teenage cyberbullying victims who committed suicide). See also Abrams, *supra* note 13, at 182 (citing the “deliberate indifference of teachers and school administrators” who failed to prevent the suicides of cyberbullying victims).

²² See generally Emily Gold Waldman, *A Post-Morse Framework for Students’ Potentially Hurtful Speech (Religious and Otherwise)*, 37 J.L. & EDUC. 463, 494 (2008) (noting that “ad hominem speech” such as “derogatory remarks about another student’s appearance, clothing, or personality” lacks political content and can therefore be more justifiably censored).

²³ *Id.* at 469.

²⁴ Todd D. Erb, Note, *A Case for Strengthening School District Jurisdiction to Punish Off-Campus Incidents of Cyberbullying*, 40 ARIZ. ST. L.J. 257, 282 (2008). See also Abrams, *supra* note 13, at 184 (“[P]ublic elementary and secondary schools also remain on the front lines because most cyberbullying pits perpetrators against victims who know one another largely or entirely from the school’s classrooms and hallways.”).

²⁵ Abrams, *supra* note 13, at 207 (“[D]isruption of a public school’s work is material and substantial whenever students’ non-political speech leads the school’s professional educators to divert significant attention from teaching toward maintaining order and discipline, mediating student disputes, or preventing or stemming daily violence and recrimination.”).

²⁶ See Erb, *supra* note 24, at 284 (“Policymakers and judges have two distinct options if they want to truly address the problem of cyberbullying in our schools: either strengthen civil and criminal remedies with which victims could deter harassers, or defer to school discretion in punishing abusive Internet speech. Strengthening civil and criminal judicial remedies is not appealing for two primary reasons. First, the stakes are much higher for children in such proceedings. Convictions would show up on criminal records and could affect a student’s chances to get admitted into college or the military after high school. Second, there is not a structure already in place to track bullying

Scholars who believe schools should police bullying amongst students use various legal arguments to justify their position. For many, the authority to discipline students for bullying begins with *Tinker*, as “*Tinker* analysis will give school administrators and courts a workable and well-developed test for determining whether or not schools can curtail student cyberbullying, even when such speech occurs off campus.”²⁷ Other scholars argue that *Fraser*, with its approval of the censorship of student speech that lacks apparent value, should serve as the basis for regulating speech that serves only to bully students.²⁸ Stepping outside of the traditional Supreme Court student speech jurisprudence, commentators have also suggested alternative means for the justification of discipline designed to limit bullying speech, including the fighting words and true threat doctrines.²⁹

Scholars addressing the topic of bullying have also examined state statutes designed to combat the problem. This analysis has either taken the form of in-depth examination of a given state law³⁰ or broad-stroke, comparative analysis of multiple state laws.³¹ Much of this scholarship has resulted in one of two conclusions: cyberbullying statutes are either presently

speech on web sites throughout the community. Asking police officers and judges to make time in their daily schedules to address these comparatively petty issues (although not petty in the eyes of the students) would not make for good public policy or efficient government.”).

²⁷ Zande, *supra* note 17, at 106. See also Turbert, *supra* note 17, at 685 (arguing for “the continued, calculated use of the *Tinker* standard against substantially disruptive off-campus affairs”).

²⁸ See Abrams, *supra* note 13, at 222-24.

²⁹ Turbert, *supra* note 17, at 654 (“Although these threats are rare, the true threats doctrine is a limited alternative measure schools may take in disciplining severe cases of cyberbullying.”). See Elizabeth M. Jaffe & Robert J. D’Agostino, *Bullying in Public Schools: The Intersection Between the Student’s Free Speech Rights and the School’s Duty to Protect*, 62 MERCER L. REV. 407, 441-44 (analyzing cyberbullying with the true threat and fighting words doctrines). See also Calvoz, Davis & Gooden, *supra* note 21, at 381 (“[W]e believe that two other approaches — beyond true threats and *Tinker* — consistent with our three-part paradigm above, are available to schools dealing with cyber bullying: the *Fraser* fundamental values standard, and the fighting words doctrine. These approaches, we believe, address a gap between the true threats doctrine and *Tinker* — a gap into which much cyber bullying conduct falls.”).

³⁰ See, e.g., Turbert, *supra* note 17, at 658-60 (examining New Jersey’s anti-cyberbullying law); O’Shaughnessy, *supra* note 21, at 45 (describing New Hampshire’s cyberbullying statute); S Cal. Rose, Note, *From LOL to Three Months in Jail: Examining the Validity and Constitutional Boundaries of the Arkansas Cyberbullying Act of 2011*, 65 ARK. L. REV. 1001 (2012).

³¹ See Darryn Cathryn Beckstrom, *State Legislation Mandating School Cyberbullying Policies and the Potential Threat to Students’ Free Speech Rights*, 33 VT. L. REV. 283, 309-313 (2008) and Andersen, *supra* note 10, at 773-76.

unconstitutional³² or they are ineffective at preventing school violence because they are unduly limited by the Constitution.³³ Those scholars who believe the statutes to be unconstitutional cite both overbreadth³⁴ and vagueness;³⁵ one scholar writing about a definition of bullying premised on an imbalance of power between two students argued “[t]his certainly takes in a large area of speech that could include teasing someone because they are obese, skinny, tall, short, wear eyeglasses, have long, short or no hair, or speak with a high or low pitched voice.”³⁶

Outside of legislative solutions, scholars also advocate for a variety of extralegal solutions to the cyberbullying problem including increased parental involvement and technological monitoring,³⁷ tort law efforts,³⁸ and refocused media coverage.³⁹

Invariably, any discussion of the prudence of cyberbullying regulation and school discipline turns to the question of whether schools and the state should be allowed to regulate off-campus student speech. Scholars who assert that off-campus cyberbullying should be within the purview of school discipline argue that “when cyberbullying incidents originate off-campus and fail to rise to the level of civil or criminal liability, but directly affect one or more individuals associated with the school environment, courts should expand the deference currently given to

³² See Rose, *supra* note 30, at 1028. See generally Hayward, *supra* note 18.

³³ Hart, *supra* note 9, at 1152-53 (“Unfortunately, most antibullying statutes currently in force are likely to be ineffective in preventing school violence, due in large part to the current constitutional requirement that allows regulation of student speech only where the school can show a probable, tangible, and disruptive effect from the prohibited speech. This approach ignores the fact that bullying is not just physical. More insidious behavior, such as verbal and psychological bullying, can have devastating effects on the participants and often leads to more explosive incidents of school violence.”).

³⁴ See, e.g., Rose, *supra* note 30, at 1002-03 (“[T]he [Arkansas] Cyberbullying Act is unconstitutionally overbroad because it attempts to criminalize constitutionally protected speech and is not limited to a recognized exception to First Amendment protection.”); Hayward, *supra* note 18, at 120-22.

³⁵ Hayward, *supra* note 18, at 118.

³⁶ *Id.*

³⁷ Beckstrom, *supra* note 31, at 314-16.

³⁸ *Id.* at 317-19.

³⁹ Hayward, *supra* note 18, at 90 (“The media must focus more on the responsibility of parents to educate their children on the responsible use of technology, rather than exploiting the harm done by cyber bullying. No doubt it causes serious harm, but that does not justify legislation that infringes on student free speech rights.”).

school districts to punish such speech.”⁴⁰ These scholars also argue that authority to regulate off-campus online bullying is justified because “[u]nlike traditional methods of disseminating speech, the Internet is a borderless, ubiquitous medium that allows instantaneous, continuous, and comprehensive distribution of one’s message. Unlike the bathroom wall, the Internet is not limited by geography.”⁴¹ Scholars wary of allowing schools to punish students for off-campus cyberbullying are often leery of giving administrators “limitless” authority unbounded by geography, ultimately concluding the result would be that “no student, even in the privacy of his or her own home, can write about controversial topics of concern to them without worrying that it may be ‘disruptive’ or cause a ‘hostile environment’ at school.”⁴² Other scholars argue for a compromise in which schools can discipline off-campus cyberbullying only where the Internet speech serves as a true threat aimed at students, teachers, or school administrators.⁴³

Ultimately for many scholars, it seems that student speech and the regulation of off-campus cyberbullying can coexist as one scholar concluded, “Students would still be free to voice legitimate criticism about their school or about members of the school community. However, abusive personal attacks would not be outside school authority simply because a student speaks through an off-campus web site.”⁴⁴

b. Internet/off-campus speech

The scholarship regarding the regulation of Internet/off-campus student speech reads as something of a history of the medium, with scholars writing in the early 2000s of an online experience where “[u]sers wishing to customize their interface can establish a web-site of their

⁴⁰ Erb, *supra* note 24, at 260.

⁴¹ Servance, *supra* note 14, at 1215.

⁴² Hayward, *supra* note 18, at 91 (arguing that “students will be punished for off-campus speech based on the way people *react* to it at school.”) (emphasis in original).

⁴³ Beckstrom, *supra* note 31, at 285.

⁴⁴ Servance, *supra* note 14, at 1239.

own design that includes chat room or bulletin board features obtained from one of many no-cost providers easily found on the Internet.”⁴⁵ Those public school students who decided to “customize their interface” using school computers or show other students websites made off campus were likely to face the ire of school administrators, as the use of school property was an early justification for the punishment of student Internet speech.⁴⁶ Another similarly antiquated factor considered in some instances was whether the student’s website linked to the school’s website.⁴⁷

However, in an era where “[m]ore and more students have Internet access while on campus . . . through smart phones in their pockets”⁴⁸ the use of school property and linking to a school website as dispositive factors seem almost quaint by comparison. Today, students “might be communicating while off campus on Facebook or Twitter, but an on-campus student happens to read the messages and shares them among her classmates in the hallways.”⁴⁹ Thus as technology evolves, the demarcation between off-campus and on-campus speech can “often seem nonexistent.”⁵⁰

⁴⁵ Aaron H. Caplan, *Public School Discipline for Creating Uncensored Anonymous Internet Forums*, 39 WILLAMETTE L. REV. 93, 95 (2003).

⁴⁶ See Clay Calvert, *Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground*, 7 B.U. J. SCI. & TECH. L. 243, 264 (2001) (“If the Web site was created using school facilities and computers, then the school should be able to exercise greater control and authority over the speech because it controls the property that is used by the student.”).

⁴⁷ David L. Hudson, Jr., *Censorship of Student Internet Speech: The Effect of Diminishing Student Rights, Fear of the Internet and Columbine*, 2000 L. REV. M.S.U.-D.C.L. 199, 219-20 (2000). Other factors articulated by Hudson included the use of school property, whether the Internet speech was connected to pedagogical work, and an examination of whether the student distributed material on campus. See also Calvert, *supra* note 46, at 262-69 (citing a student’s place of enrollment, place of origin of the speech, the place of download of the speech, the content of the speech, and the presence of absence or a site disclaimer or warning as possible factors in deciding the appropriateness of student punishment).

⁴⁸ Brett T. MacIntyre, Note, *When the Classroom is Not in the Schoolhouse: Applying Tinker to Student Speech at Online Schools*, 36 SEATTLE UNIV. L. R. 1503 (2013).

⁴⁹ *Id.* at 1505.

⁵⁰ *Id.* See also, e.g., John T. Ceglia, Note, *The Disappearing Schoolhouse Gate: Applying Tinker in the Internet Age*, 39 PEPP. L. REV. 939, 956-57 (2012) (“Modern cellular telephones provide students with unfiltered access to the Internet at any time and in any place. Thus, students now have the ability to bring off-campus student speech on campus without the school’s knowledge and beyond the school’s ability to regulate the content brought onto

As more and more students take to the Internet, school administrators, in turn, are “exerting more control over student web users,”⁵¹ arguing that Internet speech is either “visible from school, was about school, or had an effect on school.”⁵² This Internet speech, many administrators claim, can then result in conflicts on-campus, thus justifying school intervention into off-campus speech.⁵³ Generally, student Internet speech that receives school discipline can be categorized into three types: “threat of violence,” “parody, satire, and caustic commentary,” or a combination of the two.⁵⁴ Whatever the type, student Internet speech is likely to be “considered lewd or offensive by many adults”⁵⁵ as “cultural changes have led today’s students to express sentiments that are much more violent and ‘crude’ than those of their predecessors.”⁵⁶ Even with these themes of violence, scholars contend that today’s student Internet speakers are not necessarily more physically violent or dangerous than students historically; rather, online

school grounds.”); Kenneth R. Pike, *Locating the Mislaid Gate: Revitalizing Tinker by Repairing Judicial Overgeneralizations of Technologically Enabled Student Speech*, 2008 B.Y.U.L. REV. 971, 973 (2008) (“As students adopt email, Web sites, cell phones, and instant messaging software to facilitate personal expression, however, they are increasingly able to affect others at a distance, blurring the line between on-and off-campus speech. This ‘telepresence’ creates significant difficulties for a jurisprudence of student expression that draws distinctions based on whether a student is at school, at a school-sanctioned event, or might reasonably be viewed as acting under the school’s imprimatur.”).

⁵¹ Matthew I. Schiffhauer, Note, *Uncertainty at the ‘Outer Boundaries’ of the First Amendment: Extending the Arm of School Authority Beyond the Schoolhouse Gate into Cyberspace*, 24 ST. JOHN’S J.L. COMM. 731, 731-32 (2010).

⁵² Caplan, *supra* note 45, at 158.

⁵³ Schiffhauer, *supra* note 51, at 734.

⁵⁴ Calvert, *supra* note 46, at 267.

⁵⁵ Adam Dauksas, Note, *Doninger’s Wedge: Has Avery Doninger Bridged the Way for Internet Versions of Matthew Fraser?*, 43 J. MARSHALL L. REV. 439, 450 (2010). See also Richard Salgado, Comment, *Protecting Student Speech Rights While Increasing School Safety: School Jurisdiction and the Search for Warning Signs in a Post-Columbine/Red Lake Environment*, 2005 B.Y.U.L. REV. 1371, 1404-05 (2005) (observing that “[m]ost teenagers communicate differently than adults” with hyperbolic speech that “character[izes] each event in their lives as critical, pivotal, or otherwise earth-shattering”).

⁵⁶ Schiffhauer, *supra* note 51, at 759. See also Caplan, *supra* note 45, at 101 (finding that a website containing anonymous student speech “contained no shortage of vulgar locker-room talk, idle boasting about strength and sexual prowess, scatological insults, and gossip about teachers or other students.”).

violent student speech is “merely a reflection” of student exposure to contemporary “music, movies, and video games.”⁵⁷

For many scholars, student Internet speech is framed as a conflict between the positive qualities of online speech and the fears of administrators. The Internet with its inherent potential for anonymity, scholars argue, has encouraged student speech as students believe they can express themselves without “official retaliation, social ostracism, and an invasion of privacy.”⁵⁸ This anonymous expression, in turn, gives students the freedom to “explicitly state their thoughts and allows them to use the Internet not only as a cathartic expression of their frustrations and artistic sensibilities, but also as a diversion.”⁵⁹ In addition to being an idle pastime, the Internet, as scholars argue, can also serve as a safety valve for students to vent their potentially violent thoughts and feelings before they do actual harm.⁶⁰ Other scholars cite statistics showing students use of the Internet in scholastic purposes to showcase the medium’s positive attributes.⁶¹

This utility of the Internet is framed against the assertion that “public school officials seem to fear that the Internet is some dark force of evil that corrupts students.”⁶² It is fear, then as these scholars argue, that motivates administrators to “restrict email access, block access to ‘controversial material,’ punish students for anything that they somehow construe as a threat, and

⁵⁷ Sandy S. Li, Note & Comment, *The Need for a New, Uniform Standard, The Continued Threat to Internet-Related Student Speech*, 26 LOY. L.A. ENT. L. REV. 65, 90 (2005).

⁵⁸ *Id.* at 93-94.

⁵⁹ *Id.* See also Hudson, *supra* note 47, at 222 (“The Internet offers an outlet for students who feel alienated at school. The Internet may even afford officials an opportunity to examine the potential dangerousness of certain disturbed students. The unparalleled educational opportunities of the Internet are often subsumed by talk about the gloom and doom of cyberspace.”).

⁶⁰ See Calvert, *supra* note 46, at 282.

⁶¹ See Dauksas, *supra* note 55, at 439-40 (“A recent study done by the National School Boards Association found nearly 60% of students who use online social networking websites discuss relevant educational topics, and more than 50% talk specifically about school assignments.”).

⁶² Hudson, *supra* note 47, at 200. See also Calvert, *supra* note 46, at 286 (“‘Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears.’ Today, principals seem to fear the Internet and punish children.” (quoting *Whitney v. California*, 274 U.S. 357, 376 (1927), Brandeis, J., concurring)).

require filtered access to all computers.”⁶³ However, as Aaron Caplan argued, the apprehension of online student expression is not necessarily unique to school administrators as society at large is in the grips of conjoining moral panics⁶⁴ — over potentially dangerous youth and disruptive technologies — that intersect with online violent student expression.⁶⁵ As Caplan asserted, fear of school violence “is but part of a large complex of distrustful attitudes towards adolescents.”⁶⁶

Regardless of why administrators may be inclined to punish online student speech, the effective reality of regulation is clear; as one scholar stated, “It is as if a school principal were living in each student’s home, monitoring personal Web pages and doling out punishment for anything emotionally or physically disturbing to teachers or that may affect negatively other students’ opinions of teachers.”⁶⁷ Yet when administrators have the authority to punish off-campus speech that is critical of their performance, scholars argue this tends to make them a protected class of public officials both immune to criticism and contrary to doctrine established in cases such as *New York Times v. Sullivan*.^{68 69}

⁶³ Hudson, *supra* note 47, at 210.

⁶⁴ Caplan, *supra* note 45, at 114. As defined by sociologist Stanley Cohen, a moral panic is “[a] condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by editors, bishops, politicians and other right-thinking people; socially accredited experts pronounce their diagnoses and solutions; ways of coping are evolved or (more often) resorted to; the condition then disappears, submerges or deteriorates and becomes more visible. Sometimes the object of the panic is quite novel and at other times it is something which has been in existence long enough, but suddenly appears in the limelight. Sometimes the panic is passed over and is forgotten, except in folklore and collective memory; at other times it has more serious and long-lasting repercussions and might produce such changes as those in legal and social policy or even in the way society conceives itself.” Id.

⁶⁵ See Caplan, *supra* note 45, at 114-18.

⁶⁶ Id. at 117-18.

⁶⁷ Calvert, *supra* note 46, at 251. See also William Bird, Recent Case, *Doe v. Pulaski County Special School District*, 306 F.3d 616 (8th Cir. 2002), 26 U. ARK. LITTLE ROCK L. REV. 111, 140-41 (2003) (arguing that without properly justifying school authority for punishing off-campus Internet speech, courts may unintentionally — or perhaps intentionally — grant school administrators limitless authority). See also Pike, *supra* note 50, at 100 (“The approach of assuming that all Internet speech qualifies as on-campus speech and is therefore subject to a substantial disruption analysis seems primarily to benefit school officials with an axe to grind over the disrespectful commentary of immature, ungrateful students.”).

⁶⁸ 376 U.S. 254 (1964).

The ability for administrators to reach outside the traditional physical boundaries of campus gives many scholars cause for concern, but others assert the power is necessary to deal with the challenges of online student expression and possible student violence. As one scholar in favor of school authority to punish off-campus Internet expression stated, “[T]he on-campus or off-campus origination of such expression should not dictate the school’s authority to restrict it or discipline the speaker if the speech can be reasonably interpreted as a threat.”⁷⁰ If schools were not allowed to punish students for online speech that expresses some sort of threat, these scholars argue, “[s]chools would be impeded from directly addressing harassment or bullying that originates off campus . . . so schools and students would necessarily be required to resort to the courts.”⁷¹ Furthermore, school discipline, as the argument goes, is appropriate in these situations, as suspensions and expulsions are both adequate and just; without school intervention, there may be no punishment where civil and criminal authorities fail to intervene; and resorting only to criminal sanctions may result in an overburdened court system.⁷² Yet other scholars are

⁶⁹ See, e.g., Calvert, *supra* note 46, at 249-50. (“[I]t is particularly ironic because public school principals and teachers, in defamation law, are often considered public officials — the very class of individual about whom, according to the United States Supreme Court, speech should be “uninhibited, robust and wide-open”); Caplan, *supra* note 45, at 161-62 (“[I]n our system, public officials with responsibility for law enforcement have a special obligation to accept criticism with grace.”).

⁷⁰ Kathy Luttrell Garcia, *Poison Pens, Intimidating Icons, and Worrisome Websites: Off-Campus Student Speech That Challenges Both Campus Safety and First Amendment Jurisprudence*, 23 ST. THOMAS L. REV. 50, 68 (2010).

⁷¹ *Id.* at 72-73.

⁷² See *id.* at 68-72. *But see*, e.g., Calvert, *supra* note 46, at 245 (“[I]f traditional and generally applicable off-campus civil law remedies such as libel are available for teachers and principals who feel defamed by student speech that originates off campus, then why should school administrators be able to mete out a second, in-school punishment against those students? Likewise, if generally applicable criminal threat statutes exist to punish students for off-campus expression that allegedly menaces school personnel or other students, why should a school be able to double-dip and punish those students as well?”); Schiffhauer, *supra* note 51, at 760-61 (“[I]mprudent punishments for Internet speech have the potential to do more harm to students and the school environment than the expression itself.”)

concerned that “some courts . . . define on-campus speech in such an expansive manner that practically any Internet-related student speech will be deemed on-campus speech in the future.”⁷³

Scholars generally agree that courts have struggled in the area of student Internet expression as they attempt to define both the limits of school administrative authority and the legal standards that should apply to student cyberspeech.⁷⁴ Scholars alternately decry the lack of a “uniform standard”⁷⁵ and accuse courts of applying a “patchwork”⁷⁶ of speech regulations, while stronger language accuses courts of *ad hoc* decision making.⁷⁷ This “patchwork” of regulations include at least three different adjudicative standards that courts have used in deciding student Internet speech cases: “reasonably foreseeable,” intent to reach campus, and appropriate nexus.⁷⁸

⁷³ Li, *supra* note 57, at 92. See also Caplan, *supra* note 45, at 143-51 (arguing against school authority to punish off-campus speech by pointing to jurisdictional issues, interference with parental authority, lack of institutional competence, due process concerns, the potential chilling effect on speech, the unlikelihood of a substantial disruption, and lack of an institutional imprimatur among other reasons).

⁷⁴ See Ceglia, *supra* note 50, at 945 (“While courts routinely recognize that constitutional rights are necessarily limited within public education facilities, they have struggled to determine how far, and under what circumstances, those rights may be curtailed when the speech does not originate on campus.”). See also, *e.g.*, *id.* at 957-58 (“[T]he Internet has muddled this already unsettled area of the law and presents schools and courts alike with challenges when determining whether and how to regulate off-campus online student speech. Indeed, the oft-cited schoolhouse gate designation trumpeted in *Tinker* has all but disappeared in a modern world dominated by technology that knows no physical boundaries or demarcations.”); Kyle W. Brenton, Note, *BONGHITS4JESUS.COM? Scrutinizing Public School Authority Over Student Cyberspeech Through the Lens of Personal Jurisdiction*, 92 MINN. L. REV. 1206, 1206-07 (2008) (contending that “constitutional jurisprudence provides only the vaguest outline for deciding when a particular student’s cyberspeech may constitutionally be regulated by the school” even though courts have the obligation of deciding the issue); *id.* at 1207 (arguing that the “overreaching of school administrators” to punish online speech will continue absent “clear judicial standards”).

⁷⁵ Li, *supra* note 57, at 106 (“Without a uniform standard, there is a strong possibility that Internet-related student speech will continue to be curbed in favor of school districts.”).

⁷⁶ Ceglia, *supra* note 50, at 958. See also Schiffhauer, *supra* note 51, at 753 (“[L]ower courts are left to their own devices in determining the proper bounds of school authority over student Internet speech.”).

⁷⁷ Pike, *supra* note 50, at 990 (“[W]hen it comes to student cyber-speech, the lower courts are in complete disarray, handing down ad hoc decisions that, even when they reach an instinctively correct conclusion, lack consistent, controlling legal principles.”). See also *id.* at 1006-07 (“It is clear that children, like adults, often mistreat one another — on and off the Internet — without ever escalating their mistreatment to legally actionable levels. This is an unfortunate fact of life, but unpredictable administrative response from schools — not to mention inconsistent judicial response from the courts — only serves to compound the problem.”).

⁷⁸ See Clay Calvert, *Punishing Public School Students for Bashing Principals, Teachers and Classmates in Cyberspace: The Speech Issue the Supreme Court Must Now Resolve*, 7 FIRST AMEND. L. REV. 210 (2009). See also Frank D. LoMonte, “The Key Word Is Student”: *Hazelwood Censorship Crashes the Ivy-Covered Gates*, 11 FIRST AMEND. L. REV.

Under the reasonably foreseeable standard, student Internet speech can be regulated by school administrators if it is “reasonably foreseeable” that the speech will come to the attention of school administrators⁷⁹ whereas the intent to reach standard focuses on whether the student speaker intended for his or her speech to affect the physical campus.⁸⁰ Those single-minded approaches contrast with the “appropriate nexus” examination that uses a variety of “geographic, temporal, operational and contextual” factors to determine whether school officials can act against student Internet speech.⁸¹ While the appropriate nexus analysis allows for a more complex examination of the facts surrounding student speech controversies,⁸² the test is not without its own flaws — namely that of vagueness.⁸³

Given the variety of approaches used by lower courts, scholars are eager for the Supreme Court to take up the issue of student Internet speech,⁸⁴ arguing such a move would provide

305, 357 (2013) (concluding “almost all” cases regarding K-12 student Internet speech have regarded online speech as on-campus “either because the speech itself is viewable at school or because off-campus viewers might react to it at school”); Brenton, *supra* note 74, at 1216-17 (finding that courts analyze school online speech cases “at four points along the spatial axis” between a student’s home and campus: speech that occurs “unambiguously” off-campus, speech occurring off-campus but brought on campus by the speaker, speech that originates on campus, and speech that “poses a foreseeable risk of reaching campus”).

⁷⁹ *Id.* at 228. *See also id.* at 230-31 (“The notion of reasonable foreseeability that some result or consequence might transpire or occur — in this case, the reasonable foreseeability that the off-campus-created speech will capture the attention of school officials — invokes basic negligence principles, borrowed from tort law and applied here to a constitutional question of First Amendment protection for student expression.”). *But see id.* at 235-37 (arguing the “reasonably foreseeable” rule is short-sighted in practice as “any and all controversial or provocative speech that is created and posted off campus by a student will come to the attention of school authorities” because of tattletale students, curious teachers and administrators, and in the in-school discussion generated by the speech).

⁸⁰ *Id.* at 238-39. *See also id.* at 234 (comparing reasonably foreseeable with intent to reach campus, concluding reasonably foreseeable rule “would not protect from disciplinary authority a student who not only does not subjectively in-tend for his off-campus website to come to the attention of school authorities”).

⁸¹ *Id.* at 243.

⁸² *See id.* at 245 (“What does seem clear is that the test accounts for the potential weighing and balancing of many different variables, not simply and solely an examination of the foreseeability of the speech reaching the attention of school officials.”).

⁸³ *See id.* at 244-45.

⁸⁴ *See, e.g.,* MacIntyre, *supra* note 48, at 1522 (“The Supreme Court’s silence on the on-campus versus off-campus distinction, combined with the emerging popularity of online learning for high school students, leaves school administrators, students, and lower courts uncertain about how to treat student speech now that the high school model is changing to include more online opportunities.”); Jay Braiman, Note, *A New Case, an Old Problem, a Teacher’s Perspective: The Constitutional Rights of Public School Students*, 74 BROOKLYN L. REV. 439, 471 (2009) (“It

guidance to students⁸⁵ and school administrators⁸⁶ in addition to moving the Court beyond often subjective and fact-specific student speech cases.⁸⁷ With the lower court uncertainty in the field, focus in the academy has shifted from establishing what the law is to what the law should be.⁸⁸ However, there is little to no agreement among scholars as to how courts should guide the regulation of online student expression.

Central to the disagreement on the direction of the law is the question of *Tinker*'s place in the 21st century and the regulation of student Internet expression, with scholars arguing alternately that *Tinker* remains the best way to decide student speech cases generally,⁸⁹ it should not apply to Internet cases specifically,⁹⁰ the decision's central holding should be modified to

therefore seems increasingly likely that the next round of Supreme Court jurisprudence on students' speech rights, if there is to be one, will probably originate from the bedroom of a bored, angst-ridden teenager with an ax to grind against his school or someone in it.”).

⁸⁵ See Dauksas, *supra* note 55, at 456 (“[T]he Court should set forth a clear standard that gives adequate notice to adolescent students of the forms of online speech that are subject to punishment by school authorities.”).

⁸⁶ See, e.g., Ceglia, *supra* note 50, at 978 (“Students and school administrators will benefit from a clear standard that is easy to apply to student speech of any form and made in any location. Students and school administrators need a standard that does not require them to either differentiate between the geographic location where the speech originated and the method of communication utilized by the student, or predict how or if the speech will affect the school at some undefined time in the future.”); Salgado, *supra* note 55, at 1403 (arguing that educators will be better able to focus on speech that truly pertains to campus when clear distinctions between on and off campus speech are established and enforced). See generally Jonathan Pyle, Comment, *Speech in Public Schools: Different Context or Different Rights?*, 4 U. PA. J. CONST. L. 586, 634 (2002) (asserting that “the First Amendment must reduce to a simple rule if it is both to mean something and have an effect in the school” as administrators “cannot be expected to consult with attorneys frequently”).

⁸⁷ See, e.g., Ceglia, *supra* note 50, at 978 (“Subjective standards are inefficient, difficult to apply, and contrary to judicial economy concerns as our courts continue to be flooded by student speech cases resulting in fact-sensitive holdings.”); Calvert, *supra* note 78, at 252 (arguing the Supreme Court should move beyond traditionally fact-specific cases like *Fraser* and *Morse* to take up an Internet speech case that would provide clarity in the area). *But see* Salgado, *supra* note 55, at 1402-03 (stating that while the on-campus/off-campus question would “ideally” be settled by the Supreme Court, school districts and state legislatures can also establish workable boundaries for school authority).

⁸⁸ See Pike, *supra* note 50, at 996 (“But without a clearly articulated legal standard, especially one easily applied by teachers and administrators who lack legal training, focus shifts away from an analysis of what the law is to a question of what the law ought to be.”).

⁸⁹ Li, *supra* note 57, at 102 (arguing that *Tinker* remains the “most applicable standard” for online expression that does not involve concerns of school sponsorship as *Tinker* adequately balances self-expression and a school's need to function as a learning institution). See also Caplan, *supra* note 153, at 126 (arguing that *Tinker* offers a “more durable basis for deciding future cases”).

⁹⁰ Clay Calvert, *Tinker Turns 40: Freedom of Expression at School and Its Meaning for American Democracy* April 16, 2009; Symposium, *Tinker's Midlife Crisis: Tattered and Transgressed But Still Standing*, 58 AM. U.L. REV. 1167,

better address modern concerns,⁹¹ the standard should be scrapped entirely,⁹² or that it simply needs to be better interpreted by lower courts.⁹³ Those scholars arguing for a new standard

1177 (2009). *See also, e.g., id.* at 1178-79 (arguing that *Tinker* is inappropriate as applied to Internet speech cases because aggrieved parties can pursue civil cases, the *Tinker* standard interferes with parental rights when applied to off-campus speech, and *Tinker's* facts are "radically unlike" online speech cases); Brenton, *supra* note 74, at 1224 ("A student who comes to school the morning after creating a website on her home computer does not bring the site with her, attached to her person. Supreme Court student-speech precedent, therefore, should not apply to off-campus cyberspeech until and unless a court determines that the school's power to regulate extends far enough to encompass it."); *id.* at 1226 (arguing the *Tinker* standard is designed to answer whether speech is disruptive, not threshold question of whether speech is properly regulated as student speech); *id.* at 1228 ("The *Tinker* test is very good for examining a factual record and determining whether or not on-campus speech was in fact disruptive, and thus vulnerable to suppression. It has significantly less utility for conducting a nuanced, careful analysis of whether speech that has in fact caused a disruption was student speech.").

⁹¹ *See* Ceglia, *supra* note 50, at 976-77 ("[P]ermitting school authorities to regulate the conduct of a student within the walls of his or her private home, does little to actually ensure that schools are safer. The exercise of school authority regardless of the student's geographic location does little to ensure that the school environment is not disrupted. If school administrators attempt to regulate the conduct of students on the Internet, they will surely waste scarce time and resources that could be better spent educating or regulating speech within the 'schoolhouse gate.' In addition, [*Tinker*] is subject to misuse by school authorities attempting to suppress unpopular student opinions or those that they do not agree with.").

⁹² *See, e.g.,* Dauksas, *supra* note 55, at 448 ("But, fearful of classroom disruption, it appears these lower courts have retreated to the broad reach of *Tinker* to solve a complex issue for which its rationale was never intended."); Ceglia, *supra* note 50, at 988 (referring to *Tinker* as "outdated"); Michael C. Jacobson, Note, *Chaos in Public Schools: Federal Courts Yield to Students While Administrators and Teachers Struggle to Control the Increasingly Violent and Disorderly Scholastic Environment*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 909, 937 (2006) ("In this day and age of escalating violent incidents at schools combined with the heightened sense of anxiety associated with the global war on terrorism, the standard that has been used (albeit with some changes) since 1969 no longer serves the purpose of ensuring that schools are safe and effective while preserving the appropriate constitutional rights of minors."); *id.* at 939 ("If, after thirty-five years of constitutional jurisprudence, federal courts of this country still cannot get it right, and if the current standard will allow for the continued erosion of whatever limited respect students still have for their teachers and school officials, perhaps the Supreme Court should disregard the entire standard it established (starting with *Tinker*) and start from scratch."); Braiman, *supra* note 84, at 453-54 (arguing that granting public school students constitutional rights "does not help us to teach or encourage young people to act reasonably"); *id.* at 441 ("A constitutional standard for students' rights as against school authority is too great a burden for teachers and principals to bear and encourages young people to act recklessly instead of reasonably.").

⁹³ *See, e.g.,* MacIntyre, *supra* note 48, at 1522 (arguing courts should require schools to show "more than just the possibility of disruption" and to explain why "a substantial disruption was likely to occur"); *id.* at 1525-26 ("A desire to avoid the unpleasantness that accompanies insults directed at teachers, or speech that the school simply does not like, is not enough. There needs to be more than 'undifferentiated fears of possible disturbances or embarrassment to school officials.'"); Schiffhauer, *supra* note 51, at 769 ("Courts must not permit school officials to stir up a 'buzz' in the school and then claim that a substantial disruption occurred."); Caplan, *supra* note 45, at 136 (noting "*Tinker's* transformation from student shield to school sword"); *id.* at 138 (arguing administrators have "transform[ed] *Tinker* into a green light for any punishment of student speech that could be disguised by a suitable pretext"); Calvert, *supra* note 46, at 275 (asserting that courts "should embrace" a "healthy amount of skepticism" when evaluating claims from administrators of school disruption resulting from a student website). *See also* Dauksas, *supra* note 55, at 457 ("The present landscape, as set forth by lower federal and state courts, shows that a student's punishment for offensive online expression under *Tinker* depends almost entirely on the level of tolerance of presiding judges and justices for the language being used.").

advocate most notably for a reformulated “intent to disrupt” analysis or that the “true threat” doctrine should have a greater place in deciding questions of student speech regulation.

In arguing that *Tinker* should apply in online learning environments, Brett T. MacIntyre stated simply that “the test for online students’ speech should simply be whether or not there was a material or substantial disruption, or the reasonable foreseeability of a substantial disruption, to the learning environment”⁹⁴ — meaning that the central holding from *Tinker* should still apply in 21st century settings. Other scholars, however, would augment the central “material and substantial disruption” standard at the heart of *Tinker* with parallel justification for speech censorship from the decision that suggests school administrators can squelch expression that infringes on the “rights of others.”⁹⁵ This secondary standard from *Tinker*, as scholars argue, would allow for more clarity in student speech jurisprudence if it was applied uniformly to both “fairly easy” on-campus and “more complex” off-campus speech cases,⁹⁶ while others believe the “rights of others” prong should only be applied to threatening Internet expression.⁹⁷

⁹⁴ MacIntyre, *supra* note 48, at 1517.

⁹⁵ In arguing for the “rights of others” standard, scholars point to the following passage from *Tinker*: “A student’s rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without ‘materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school’ and without colliding with the rights of others. But conduct by the student, in class or out of it, which for any reason — whether it stems from time, place, or type of behavior — materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.” *Tinker*, 393 U.S. at 512-13 (internal citation omitted). *But see* Pyle, *supra* note 86, at 631 (arguing that “the interest in protecting comfort levels does not outweigh the interests of free speech”).

⁹⁶ Ceglia, *supra* note 50, at 981. *But see* Braiman, *supra* note 84, at 473 (arguing that “[s]ince the Internet is essentially universal” the standard for examining the potential of Internet speech reaching campus “should probably not vary from one case to the next”).

⁹⁷ *See* Schiffhauer, *supra* note 51, at 765 (“[C]ourts should first consider the school’s proffered justification for punishing the Internet expression at issue. If the school claims that the expression was threatening, it should be analyzed under *Tinker*’s ‘rights of others’ prong. Although a school should be accorded some deference in this area, the court should perform an independent contextual analysis.”). *But see* Calvert, *supra* note 90, at 1191 (asserting that the rights of others prong should be abandoned by courts due to “the speculative nature of its application and the danger that it could lead to viewpoint-based discrimination against political expression”).

As suggested by one scholar, another possible new standard to govern off-campus Internet speech would be regulation based on the difference between an “active telepresence” and a “passive telepresence.”⁹⁸ Under this standard, an “active telepresence” would be a question of “whether the student manifested a particular desire for his or her expression to be seen, heard, read, or to otherwise take place on campus”⁹⁹ evidencing an intent to “directly impact the campus environment through remote means.”¹⁰⁰ In practice, however, there is little distinction between this possible standard and the “intent to disrupt” standard already in use by some courts.¹⁰¹ Another scholar suggests treating online speech as conduct rather than speech, in turn removing First Amendment protections and leaving students to approach online speech with “caution, reasonable care, and an appreciation of risk.”¹⁰²

Finally, a number of scholars argue that the “true threat” doctrine should govern online student expression, operating as either an independent justification for the censorship¹⁰³ of student speech or working in conjunction with *Tinker*.¹⁰⁴ While some scholars suggest that the “true threat” standard does not afford administrators enough control over troublesome student speech,¹⁰⁵ others argue it strikes an appropriate balance, stating “[i]f the online expression was

⁹⁸ See Pike, *supra* note 50.

⁹⁹ *Id.* at 1006.

¹⁰⁰ *Id.* at 1002.

¹⁰¹ See *id.* at 1002 (“[T]he objective mode of expression as manifested by the choice and implementation of a given technology can establish something like ‘intent to disrupt.’”). See also note 80 and accompanying text, *infra*.

¹⁰² Braiman, *supra* note 84, at 470.

¹⁰³ Dauksas, *supra* note 55, at 458-60.

¹⁰⁴ See Li, *supra* note 57, at 99 (“Once a court determines that the *Fraser* and *Kuhlmeier* standards do not apply because the case only involves non-school sponsored Internet-related student speech, a court must then decide whether the speech constitutes a true threat under the reasonable speaker approach. When using this approach, a court should consider the totality of the circumstances, including the listeners’ reactions, the speaker’s intentions, the school’s reaction, and whether the threats sound equivocal. When looking at the speaker’s intentions, a court should consider several factors: the student’s academic standing, the student’s level of social activity, the student’s psychological history, and the student’s willingness and promptness to remove the Internet speech in question. If a court decides that the speech did not constitute a true threat, it should apply the *Tinker* test.”).

¹⁰⁵ See Garcia, *supra* note 70, at 78 (“Under this standard, only expressions that are intended to be taken as a threat would be sanctionable, no matter how threatening the expression might seem. So the student who sends an email threatening to kill a classmate or teacher as a joke, could not be disciplined by the school. Neither could a

subject to punishment only when it constituted a ‘true threat’ of violence to members of a school’s community, students . . . would not have to fear using lewd or offensive language in online communications that take place away from a school’s campus.”¹⁰⁶ As Adam Dauksas argued, by limiting the regulation of Internet expression to only that speech that fits the definition of a true threat, this fashions a space for students “to create online speech away from school that simply offends, rather than harms” and “remain[s] true to *Tinker*.”¹⁰⁷ Yet many issues remain in using the true threat standard to regulate student expression.

c. Student expression and true threats

As first established by the Supreme Court in *Watts v. U.S.*¹⁰⁸ and defined most recently in *Virginia v. Black*,¹⁰⁹ a true threats are “those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”¹¹⁰ Yet, as the Court pointed out, “[t]he speaker need not actually intend to carry out the threat.”¹¹¹ Thus for a speaker to make an actionable true threat, there need not be intent to carry out any sort of violence, as the speaker needs only to “intentionally or knowingly communicated the alleged threat.”¹¹² Furthermore, the Court has offered three justifications for a prohibition on true threats: “preventing fear, preventing the

student who threatens a Columbine-style massacre as a joke. Practically speaking, even students who intended to communicate a threat could not be disciplined by the school unless sufficient evidence existed of the student’s intent.”).

¹⁰⁶ Dauksas, *supra* note 55, at 458.

¹⁰⁷ *Id.* at 460.

¹⁰⁸ 394 U.S. 705 (1969) (per curiam).

¹⁰⁹ 538 U.S. 343 (2003).

¹¹⁰ *Id.* at 360.

¹¹¹ *Id.* at 360-61.

¹¹² Jonnie Mackie, Case Note, *The True Threat Doctrine as Misapplied in Doe v. Pulaski County Special School District*, 57 ARK. L. REV. 303, 333 (2004).

disruption that follows from that fear, and diminishing the likelihood that the threatened violence will occur.”¹¹³

While the Court established the doctrine in *Watts*, a Vietnam-era protest case where violent speech was protected as a matter of political hyperbole by the Court,¹¹⁴ it has provided little guidance in the doctrine’s application or evolution, leaving scholars to decry the lack of clarity from the Court.¹¹⁵ Predictably, the Court’s relative doctrinal silence has resulted in a circuit split on the issue, with some circuit courts applying a test based on the perspective of a “reasonable speaker” and others relying on a “reasonable listener” test.¹¹⁶ While “[b]oth tests require the examination of the totality of the circumstances in which the alleged threat was made”¹¹⁷ and are criticized generally as vague and overbroad,¹¹⁸ scholars are in disagreement as

¹¹³ Andrew P. Stanner, Note, *Toward an Improved True Threat Doctrine for Student Speakers*, 81 N.Y.U.L. REV. 385, 388 (2006).

¹¹⁴ In *Watts*, the Court overturned the conviction of a Vietnam War draftee who swore “[i]f they ever make me carry a rifle the first man I want to get in my sights is L. B. J. . . . They are not going to make me kill my black brothers.” 394 U.S. at 706 (per curiam). In finding for the defendant, the justices concluded that “[t]he language of the political arena...is often vituperative, abusive, and inexact. We agree with petitioner that his only offense here was a kind of very crude offensive method of stating a political opposition to the President. Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise.” *Id.* at 708 (internal citations, quotations omitted). See Chapter 7, *infra*, for a full discussion of *Watts*.

¹¹⁵ See, e.g., Stanner, *supra* note 113, at 391 (“[T]he Court has deliberately avoided placing limits on the scope of the true threat doctrine, thereby leaving lower courts with little guidance to distinguish true threats from protected speech. The result is that assessing true threats is a ‘highly fact-specific determination.’”); Mackie, *supra* note 112, at 318 (2004) (“[T]he seeds for the true-threat doctrine were planted without the Court establishing a bright-line test under which the doctrine could take root.”); Mary Jo Roberts, Case Note, *Porter v. Ascension Parish School Board: Drawing in the Contours of First Amendment Protection for Student Art and Expression*, 52 LOY. L. REV. 467, 491-92 (2006) (“Without much guidance from the Supreme Court, the true threat analysis is itself the subject of a variety of interpretations. Consequently, the inquiry into whether student speech is protected by the First Amendment has become an intricate maze, and legal jurists and scholars have a myriad differing opinions as to the outcome of particular factual scenarios. When confronted with this complex legal landscape, a lack of clarity in the law seems preordained.”).

¹¹⁶ See Anna Boksenbaum, Note, *Shedding Your Soul at the Schoolhouse Gate: The Chilling Of Student Artistic Speech in the Post-Columbine Era*, 8 N.Y. CITY L. REV. 123, 138 (2005) (citing the First, Second, and Ninth Circuits as courts using a “reasonable speaker” test that evaluates whether a speaker “reasonably should have foreseen that the listener would interpret the statement as a threat” and the Second [“in conflict with itself”], Fourth and Seventh Circuits as using a “reasonable listener” test that examines whether “the recipient could reasonably have regarded the defendant’s statement as a threat”). See also Mackie, *supra* note 112, at 318-26 (examining the “reasonable speaker” and “reasonable listener” approaches).

¹¹⁷ Boksenbaum, *supra* note 116, at 138.

to what the split of opinion means for schools and students, with some arguing “[i]n the school context, the tests yield significantly different results for students and teachers”¹¹⁹ and others countering that “[t]he failure of courts to agree on which test to apply to the true threat doctrine has not proven to be critical in the student speech context” and the differences between the circuits are simply “an inconsequential academic debate.”¹²⁰ Where students are concerned, the circuit split may indeed be less consequential if only due to the deference afforded to school administrators where violent speech is an issue.¹²¹ Furthermore, students may not be allowed the same measure of violent hyperbole as seen in *Watts* due to issues surrounding school safety.¹²²

Student violent speech cases — as one scholar has noted, an irony of sorts given the anti-war origins of *Tinker*¹²³ — can lead to a variety of consequences, from criminal prosecutions and school discipline to tort liability.¹²⁴ These cases ask a simple question at their core: “With the understanding that school authorities have dramatically more control over their students than the state would have over the public, at what point do educational authorities clarify the boundaries

¹¹⁸ See Stanner, *supra* note 113, at 391-92. (“As Professor Jordan Strauss puts it, the true threat doctrine, in its current form, subjects citizens to ‘the same risks posed by vague and overbroad laws that regulate First Amendment behavior,’ including contradictory outcomes and unfair penalties.”). See also *id.* at 388 (“[T]he determination of a true threat turns largely on the whim of the judge deciding a given case.”).

¹¹⁹ Boksenbaum, *supra* note 116, at 138. See also *id.* (“Under the *Kelner/Fulmer* test, which looks at whether or not the recipient’s interpretation of the statement as a threat was reasonable, a court would examine whether it is reasonable for a teacher to interpret a student’s drawings as a real threat to cause harm. Conversely, the *Schneider/Malik/Maisonet* test examines whether the recipient’s perception of the statement as a real threat was reasonably foreseeable and holds the student accountable for the teacher’s reaction to his or her artwork.”).

¹²⁰ Roberts, *supra* note 115, at 483.

¹²¹ See Stanner, *supra* note 113, at 391 (“[R]easonable people can have widely disparate reactions to student threats, particularly in the wake of highly publicized incidents of school violence. Lower courts have tried to identify reliable factors to aid them in assessing reasonableness, but it remains the case that ‘a true threat is in the eyes of the beholder, regardless of what criteria courts may claim to apply.’”).

¹²² See Robert D. Richards & Clay Calvert, *Columbine Fallout: The Long-Term Effects on Free Expression Take Hold in Public Schools*, 83 B.U.L. REV. 1089, 1108 (2003) (“At the same time that many judges are focused on Columbine, they ignore the specific protection afforded to ‘hyperbole’ by the Supreme Court[.]”).

¹²³ See Louis P. Nappen, Note, *School Safety v. Free Speech: The Seesawing Tolerance Standards for Students’ Sexual and Violent Expressions*, 9 TEX. J. ON C.L. & C.R. 93, 100 (2003) (“Punishing students for writing, drawing, or talking about firearms is a new phenomenon; many of the landmark cases on pre-empting violence, such as *Tinker*, deal, ironically, with peace activists.”).

¹²⁴ Sarah E. Redfield, *Threats Made, Threats Posed: School and Judicial Analysis in Need of Redirection*, 2003 BYU EDU. & L. J. 663, 690-91 (2003).

between free expression and school safety, beyond which a youth may not cross, especially concerning symbolic expressions of . . . violence?”¹²⁵ However, “[w]hich causes may be pursued in which venues is not always clear. In some instances, school disciplinary action may provide the only avenue for redress. In other instances, criminal proceedings may be a more appropriate route.”¹²⁶ Regardless of the venue, even threatening student speech is still protected by the First Amendment, so speech analysis is involved in both criminal proceedings and lawsuits seeking redress from school punishment, with the former most often invoking the true threat analysis and the latter employing the “material and substantial” disruption standard.¹²⁷

Scholars have attempted to generalize these cases, with some arguing that “[c]ourts have generally protected [First Amendment rights] when students are facing criminal charges such as disorderly conduct or delinquency”¹²⁸ while others argue that courts have difficulties in deciding whether student speech is harmless play or a harmful threat.¹²⁹ Irrespective of the final adjudication, most of the students in cases involving violent artwork share common factors: They

¹²⁵ Nappen, *supra* note 123, at 95.

¹²⁶ Redfield, *supra* note 124, at 692-93.

¹²⁷ *Id.* at 693. *See also, e.g.,* Richard V. Blystone, *School Speech v. School Safety: In the Aftermath of Violence on School Campuses Throughout This Nation, How Should School Officials Respond to Threatening Student Expression?*, 2007 BYU EDUC. & L.J. 199, 202 (2007) (“To withstand students’ First Amendment claims, school boards must show one or more of the following: (1) the student speech constituted a ‘true threat’; or (2) by engaging in threatening or disruptive speech, the student substantially or materially interfered with the workings of the school; or that (3) the student speech impinged upon the rights of other students to be secured and let alone; and that (4) where practicable, the school board adhered to procedural guidelines prior to suspending or expelling the student, or documenting his or her permanent record.”); Boksenbaum, *supra* note 116, at 140 (describing violent student artwork cases as either “(1) civil rights cases in which students have brought actions alleging that their First Amendment Rights have been violated by internal school disciplinary actions in response to their artwork” or “(2) cases seeking to overturn delinquency adjudications which are based on artwork that is violent in content”).

¹²⁸ Barbara J. Brunner, Note, *The Right to Write? Free Expression Rights of Pennsylvania’s Creative Students After Columbine*, 107 DICK. L. REV. 891, 907 (2003).

¹²⁹ *See* Redfield, *supra* note 124, at 711 (“In a majority of these cases, the courts and schools have found it difficult to identify the line between threat and jest, and threat and a cry for help. The judicial analysis, while sometimes talking in terms of distinguishing jest from threat, seems nevertheless to miss the necessary factors and thus fails to focus on the difference between making and posing a threat.”). *See also* Brunner, *supra* note 128, at 897 (“In the narrow contexts of creative writing, fiction, and artistic expression, courts traditionally have protected student speech, provided that such expression does not contain elements that may reasonably be interpreted as true threats under the circumstances.”).

are male — usually with psychological or behavioral issues — and their artwork evidences a desire for school “to disappear, generally as a result of some act of violence.”¹³⁰ Courts in these cases generally consider “where the artwork/writing was created, and at whose bidding it was created,” meaning “a poem written by a student independently at home and then brought to school will be approached with more suspicion than a poem written as a creative writing assignment.”¹³¹ Yet some scholars argue that courts evidence a “lack of cohesion from case to case” and fail to focus on truly important factors such as emotional stability and possible depression.¹³² Ultimately, the key criticism of courts in this area is that they “fail to recognize the vital difference between a threat made and a threat posed.”¹³³ This failure, scholars argue, is due

¹³⁰ Boksenbaum, *supra* note 116, at 150 (finding similar works of art that “depict[] schools blowing up and burning down, students aiming guns at or shooting teachers and fellow students”).

¹³¹ *Id.* at 140. Boksenbaum cites the perspective of the work (first-person or third-person), the fictional or non-fictional nature of the character depicted, the likelihood of events taking place, and the personal background of the student as factors courts also consider.

¹³² Redfield, *supra* note 124, at 694. *See also id.* at 713-15 (listing family situation, academic performance, social networks, history of relationships and conflicts, history of harassment, history of violence, recent personal losses, current grievances, any known difficulties in coping, access to weapons, among several other factors that courts should consider in violent student expression cases).

¹³³ *Id.* at 663. Redfield argues courts must make this distinction between students who happen to express themselves violently and students who actually pose a danger to teachers, administrators, and classmates. *See also* Stanner, *supra* note 113, at 402 (arguing it is a “crucially important distinction between students who make threats (i.e., tell people they intend to harm someone), and students who pose threats (i.e., ‘engage[] in behaviors that indicate an intent, planning, or preparation for an attack’)). *But see, e.g.* *id.* (“None of this is to say that threats made should not be taken seriously, but rather that ‘all threats are not created equal.’”); *id.* at 402-03 (“All threats must be taken seriously by school officials, but not every threat should be taken literally. Not every threat represents the same danger, nor requires the same response. One major reason for this is that juveniles, much more than adults, can have any number of motivations for making threatening comments, many of which are entirely unrelated to the actual threatened act.”).

in part to the complex nature of violent student speech cases¹³⁴ and perhaps owing to an institutional incompetence on the part of courts or an over-extension of student speech rights.¹³⁵

Just as courts must determine the difference between students who threaten and those who pose a threat, schools should sort the various violent messages uttered by students to determine which truly merit some form of punishment. Professor R. George Wright identifies a particular class of messages — doubtful threats — that pose a unique challenge for schools and the courts.¹³⁶ As Wright defines them, doubtful threats are those speech acts “threatening future violence at a specific target. The target could be an individual, group, or institution. The point in the future may be ascertainable or unclear. At a minimum, doubtful threats evidence some intent

¹³⁴ See, e.g., Stanner, *supra* note 113, at 403-04 (“Two factors combine to make threat assessment particularly difficult in the case of student speech. The first complication is the age of the speaker. An adolescent’s personality is markedly different than that of an adult, and often adolescents will engage in behavior that seems quite strange to others...The second complication in student threat assessment is that the assessor must have a heightened understanding of that particular school’s environment.”); Redfield, *supra* note 124, at 717-18 (arguing that courts fail to adequately focus on student backgrounds when considering threatening speech as “the balance of First Amendment rights against potentially threatening speech is somehow skewed away from the kind of analysis that would directly benefit school safety”).

¹³⁵ See, e.g., Stanner, *supra* note 113, at 407 (“One logical conclusion is that courts are simply institutionally incompetent to handle student threat speech cases. Even if courts were capable of properly identifying those students that pose a threat, they are unable to offer an appropriate response that would lessen the likelihood of a future attack.”); *id.* at 413 (“Courts must consider that the best judicial response to student threats may be no response.”). See also, e.g., Jacobson, *supra* note 92, at 909 (contending that “every decision upholding students’ right to free expression” weakens the “structural integrity of the foundation that is our system of public education”); Braiman, *supra* note 84, at 452 (“[S]tudents...can, and often do, use the First Amendment not as a shield against government overreach into free expression, but as a sword to justify conduct which would not be justifiable in any other context.”). *But see*, e.g., Pyle, *supra* note 86, at 593 (“The availability of judicial review to students is normatively important because of the compulsory nature of education. A careful legal analysis has no place for the ‘common-sense’ notion that school boards are in charge of schools, and that courts should not, *reductio ad absurdum*, have to act as a ‘super school board,’ adjudicating every minor liberty deprivation that might occur in a school. Schools, like jails, are distinguished from the public realm by their institutional status. There is nothing abnormal or improper about lawsuits arising out of institutional settings when rights-claimants have exhausted their institutional remedies. The lawsuit is the only mechanism students and parents have to enforce counter-majoritarian constitutional provisions like the Free Speech Clause. Although it would be ideal if disputes could be resolved within the school institution, courts have a wholly proper task of second-guessing school board decisions.”); *id.* at 594 (contending that “[l]egal analysis should respect the complexity of the school’s function, and not assume that independent student speech is irrelevant to the school’s mission” and that “[m]uch...of what is learned in school does not occur under the direction of teachers and administrators”).

¹³⁶ See R. George Wright, Symposium, *Doubtful Threats and the Limits of Student Speech Rights*, 42 U.C. DAVIS L. REV. 679, 682 (2009) (“In difficult free speech situations, school administrators must rely not only on the judicial cases, but also on practical wisdom and closely informed judgment to determine what best suits their particular school’s purposes. At the heart of this intersection lies student speech in the form of ‘doubtful threats.’”).

to execute the threatened violence. Contrasted with more serious threats, however, doubtful threats usually lack imminence.”¹³⁷ Doubtful threats may not be so severe as to disrupt the school, but “they may introduce significant distractions into the learning environment, both for the target of the threat and others.”¹³⁸ Yet when these “distractions” are punished, courts frequently uphold discipline using the *Tinker* “material and substantial disruption” standard, a contradiction that exists, as Wright suggested, because “courts sense that not every instance of behavior amounting to substantial distraction will also qualify as disruption under *Tinker*.”¹³⁹ Rather than to allow the status quo to remain, Wright argued that courts should expand *Tinker* to cover disruptions in addition to distractions.¹⁴⁰ Other scholars argue that schools should do a better job of distinguishing between students who may simply cause a disruption in the school environment with their potentially threatening speech and students who actively seek to cause a disruption.¹⁴¹

One possible factor limiting administrative discretion in school discipline is the use of “zero-tolerance” policies that mandate specific school responses in the event of certain student behaviors.¹⁴² After high-profile school shootings, these policies spread from concrete offenses

¹³⁷ *Id.* at 682.

¹³⁸ *Id.* at 683.

¹³⁹ *Id.* at 693-94.

¹⁴⁰ *See id.* at 695 (“The rationale undergirding these decisions should then be based on a distraction, not disruption, analysis. Thus, instead of forcing lower courts to justify these administrative responses under *Tinker*'s disruption analysis, I argue the Supreme Court should revise this doctrinal area to accommodate the reality that distraction can frustrate educational missions and purposes as much as disruption.”).

¹⁴¹ *See* Nappen, *supra* note 123, at 125 (“Educators need to distinguish a ‘disruption’ from deliberately ‘causing a disruption.’ In other words, some students may be ‘passively disruptive.’ A need for discipline is obvious when there is a call for rioting or jumping up and down and throwing desks, i.e. ‘a clear and present danger.’ However, subtle drawings or questionable t-shirts deserve more than zero-tolerant reactions. People could look at such expressions with amusement or they could overreact. Educators must avoid causing the disruptions they fear by overreacting. At the very least, educators who over-punish are disrupting the disciplined children's educations.”)

¹⁴² *See generally* Kevin P. Brady, *Zero Tolerance or (In)Tolerance Policies? Weaponless School Violence, Due Process, and the Law Of Student Suspensions and Expulsions: An Examination of Fuller v. Decatur Public School Board of Education School District*, 2002 BYU EDUC. & L. J. 159 (2002) (detailing the history of zero tolerance policies and defining them as policies that “mandate predetermined consequences or punishments for specific offenses”).

such as drug and weapon possession on campus to the often ephemeral controversies surrounding student speech.¹⁴³ According to scholars, under zero-tolerance policies “students who complete purely fictional creative writing assignments that contain violent imagery or threatening content may be subject to automatic disciplinary measures or mandatory counseling simply because of the modern national circumstance of increased school violence.”¹⁴⁴ This push to broaden the reach of school discipline while simultaneously removing discretion from administrators “has significantly narrowed students’ constitutional right to free expression,”¹⁴⁵ as while zero-tolerance policies have an appearance of fairness, they tend to “work inequity in individual cases”¹⁴⁶ — or as some put it more bluntly, “zero-tolerance often amounts to zero common sense.”¹⁴⁷ In addition, education researchers as well as various policy groups have criticized zero tolerance regulations as both ineffective and over inclusive.¹⁴⁸ Furthermore, as scholars contend, zero-tolerance policies when applied to student speech do nothing but “teach the next generation of American citizens that the rights recognized under the Constitution are not guaranteed, but merely ephemeral.”¹⁴⁹ Zero-tolerance policies have also resulted in more litigation against school districts as “[d]isgruntled parents” seek to overturn punishments and reap monetary damages.¹⁵⁰

¹⁴³ David L. Hudson, Jr., *Fear of Violence in Our Schools: Is "Undifferentiated Fear" in the Age of Columbine Leading to a Suppression of Student Speech?*, 42 WASHBURN L.J. 79, 81 (2002).

¹⁴⁴ Brunner, *supra* note 128, at 895.

¹⁴⁵ Fiona Ruthven, Note, *Is the True Threat the Student or the School Board? Punishing Threatening Student Expression*, 88 IOWA L. REV. 931, 946 (2003).

¹⁴⁶ *Id.* at 960.

¹⁴⁷ Clay Calvert, *Free Speech and Public Schools in A Post Columbine World: Check Your Speech Rights at the Schoolhouse Metal Detector*, 77 DENV. U.L. REV. 739, 767 (2000). *See also* Pyle, *supra* note 86, at 623 (arguing zero-tolerance policies as applied to speech are contrary to the central holding in *Tinker*).

¹⁴⁸ Angie Fox, Note and Comment, *Waiting to Exhale: How "Bong Hits 4 Jesus" Reduces Breathing Space for Student Speakers & Alters the Constitutional Limits on Schools' Disciplinary Actions Against Student Threats in the Light of Morse v. Frederick*, 25 GA. ST. U.L. REV. 435 (2008).

¹⁴⁹ Ruthven, *supra* note 145, at 966.

¹⁵⁰ Lisa M. Pisciotto, Comment, *Beyond Sticks & Stones: A First Amendment Framework for Educators Who Seek to Punish Student Threats*, 30 SETON HALL L. REV. 635, 637 (2000).

Still, scholars argue that “[s]chool officials must respond to threats and reports of threats appropriately[.]”¹⁵¹ For many scholars, this response includes the use of the current or a modified true threat standard to punish student speech. The desire to use the true threat standard is rooted for some in a belief that threatening expression in the school environment is wholly unprotected speech, as evidenced by at least one scholar comparing such speech to the classic tropes of yelling “fire” in a crowded theater or joking about a bomb in an airport.¹⁵² But for some, threatening speech must still be afforded some First Amendment protection; as one scholar stated, “When faced with threatening student speech, school administrators must have the authority to punish true threats, but they must exercise their authority within the constraints imposed by the First Amendment.”¹⁵³ Thus, the solution becomes to first analyze student speech cases with a true threat standard before moving on to a traditional *Tinker* analysis.¹⁵⁴ Other scholars, however, argue for an “augmented true threat analysis” that “would adhere less closely to *Tinker*, and more closely to *Fraser* and *Hazelwood*.”¹⁵⁵ Still others argue for a standard derived directly from *Fraser* to govern violent student expression,¹⁵⁶ while one scholar suggested a three-step examination that calls for schools to look at the circumstances of the threat, how a

¹⁵¹ Redfield, *supra* note 124, at 670. *But see* Brenton, *supra* note 74, at 1244 (arguing that parents are better situated to police and respond to Internet activity of children as parents “are far better suited to monitor and shape their children’s activities”).

¹⁵² See Garcia, *supra* note 70, at 66-67. (“Statements that ‘reasonably could be perceived as a threat of school violence, whether general or specific, while on school property during the school day,’ are akin to ‘falsely yelling ‘fire’ in a crowded theater’ or falsely claiming ‘possession of an explosive device while on board an aircraft,’ and should be just as unprotected by the First Amendment. In short, messages that promote violence are ‘antithetical to the mission of public schools’ and have ‘no place’ there. Such messages are unacceptable in this environment whether the message originates on campus or off.”).

¹⁵³ Ruthven, *supra* note 145, at 960. *See also* Calvert, *supra* note 147, at 767 (“Unfortunately, what is said in jest and what simply is silly are being swept up together with true threats in post-Columbine hysteria.”).

¹⁵⁴ Ruthven, *supra* note 145, at 960. As Ruthven argued, the true-threat-then-*Tinker* approach “will demand a more nuanced approach to student speech than that taken under zero tolerance policies.” *Id.*

¹⁵⁵ Redfield, *supra* note 124, at 619.

¹⁵⁶ *See* Nappen, *supra* note 123, at 121 (arguing for a standard built on the holding in *Fraser* that asks if the school “provided any notice or warning that such expression could constitute a violation and what the punishment for that violation could be,” whether the student believed the expression would or could be disruptive, and whether the student’s expression was disruptive).

reasonable person would perceive the threat, and whether the speech did or could disrupt the school environment.¹⁵⁷

Some scholars, however, are quick to decry the application of the true threat standard to artistic student speech, arguing that it “has the immediate effect of significantly chilling student expressive speech and narrows students’ understanding of the definition and role of art and artists in society.”¹⁵⁸ As Anna Boksenbaum contended, applying the true threat standard to student artwork results in an examination of both the “metaphorical content of the speech” and “the student’s ability to foresee the frightened reaction of a teacher or another student to the speech.”¹⁵⁹ The latter, a judicial reliance on a student’s foresight, is akin to “plac[ing] an adult burden on a child,” according to Boksenbaum.¹⁶⁰ As she concluded, “It is questionable whether a student would ever believe that a drawing could put a teacher in fear of imminent physical harm.”¹⁶¹

In addition to focusing on the application of the true threat standard in the school setting, scholars also devote considerable attention to the use of school disciplinary measures where violent student speech is concerned. In these situations, “[s]tudents are suspended, sometimes expelled, sometimes required to have psychological evaluations, or otherwise detained before

¹⁵⁷ Pisciotta, *supra* note 150, at 662.

¹⁵⁸ Boksenbaum, *supra* note 116, at 129. *But see* Jacobson, *supra* note 92, at 936 (arguing that those who support the rights of students to express themselves violently are “not seeing the big picture”).

¹⁵⁹ *Id.* at 156.

¹⁶⁰ *Id.* at 158. *See also* Stanner, *supra* note 113, at 411 (“In general, juveniles experience emotion more strongly than adults, and exercise worse judgment. Thus, a reasonable person and a reasonable adolescent might have very different ideas about what constitutes a true threat. Application of the former standard to all student cases disregards these unique characteristics of juvenile speech.”).

¹⁶¹ *Id.* *See also, e.g., id.* at 159 (“Art itself may simply be too vague and ambiguous to constitute a true threat in the legal sense. A child’s artwork is especially unlikely to be indicative of a specific intent to act in a certain way.”); Kathryn E. McIntyre, Note, *Hysteria Trumps First Amendment: Balancing Student Speech with School Safety*, 7 SUFFOLK J. TRIAL & APP. ADV. 39, 51-52 (2002) (“Although a student’s drawing may succeed in offending his teacher, a drawing cannot objectively be said to be a threat to commit a crime. There needs to be something more to transform the drawing from offensive speech to a threat to commit a crime.”).

they can return to school.”¹⁶² In many instances, however, scholars disagree with policies as applied, arguing that “[p]unishing troubled students for expressing their feelings could inhibit the discovery of those potentially dangerous feelings by other students, and thus foreclose from teachers and administrators the opportunity to intervene.”¹⁶³ Those opposed to the application of school discipline in cases of violent speech contend that removing students from school only exacerbates the risk of those students becoming truly violent as suspensions and expulsions remove a vital source of stability from the lives of troubled students.¹⁶⁴ Scholars also question the basic fairness of school discipline in these situations¹⁶⁵ and point to the difficulties of punishing students for what are only violent thoughts and suggestions.¹⁶⁶ To alleviate these concerns, scholars suggest that schools involve students in formulating disciplinary procedures as well as explaining to them the possible “constitutional and personal” consequences of free expression.¹⁶⁷

While some scholars lament the often harsh nature of school discipline, others extol its useful qualities, arguing that punishment of those students who use violent expression will teach others “that interference with the school’s most basic values will not be tolerated” and that

¹⁶² Redfield, *supra* note 124, at 720.

¹⁶³ Mackie, *supra* note 112, at 343.

¹⁶⁴ See Boksenbaum, *supra* note 116, at 178. See also, e.g., Stanner, *supra* note 113, at 406 (“[P]unishing the speaker is not an effective solution to the problem. Not only is it unlikely to prevent violence even in that particular case, but it may actually exacerbate the danger by adding to a student's underlying sense of anger or despair.”); Fox, *supra* note 148, at 471 (“[R]esearch indicates that such punishment is indeed likely to undermine the prevention of school violence. Although school administrators may feel the need to exact punitive action against a threatening student to ‘set an example,’ in fact ‘suspension or expulsion of a student can create the risk of triggering either an immediate or a delayed violent response.’”).

¹⁶⁵ See note 160 and accompanying text, *infra*.

¹⁶⁶ See Nappen, *supra* note 123, at 119 (“When it comes to school safety, we are bordering on punishing for ‘thought crimes.’”). But see Pisciotta, *supra* note 150, at 666 (“Punishment of pure speech may be a necessary evil within the educational setting.”).

¹⁶⁷ Brunner, *supra* note 128, at 916. See also *id.* (“Contrary to the beliefs of those who claim that the free speech rights guaranteed to students after *Tinker* opened the door to student-dominated disciplinary chaos in America's schools, providing students with information regarding their First Amendment rights and when those rights may be abridged for the sake of safety may actually instill in them a renewed sense of respect for school officials.”).

“[t]his necessarily reinforces the ideal that students must consider what they say in the context of their environment and the listeners who may be affected.”¹⁶⁸ Outside of its properties for instruction, scholars also argue discipline in the form of suspensions and expulsions allows for a reduction in distractions as problem students who use violent expression are removed from the classroom¹⁶⁹ and such punishment forces parents to take responsibility for a child’s actions and perhaps motivates them to prevent future issues.¹⁷⁰ Also, when courts allow suspensions to stand, school administrators are given “sufficient means to protect school safety without unduly burdening student speech rights”¹⁷¹ as the documentation of punishment enters a student’s permanent record and informs other schools after a possible transfer about a student’s potential issues with violence.¹⁷² Thus, as some scholars conclude, where student safety is concerned, “[t]he potential harm is . . . serious enough to outweigh the slight detriment to the student that may be caused by a suspension, or even expulsion[,]”¹⁷³ and that, ultimately, “the First Amendment should take a back seat while teachers and administrators are given the broadest discretion permissible under the law to discipline students and document their behavior.”¹⁷⁴

¹⁶⁸ Blystone, *supra* note 127, at 214. *But see* Pyle, *supra* note 86, at 610 (“Although rules are effective teachers, they are rarely used to teach the formal curriculum. Detention and suspension are unusual repercussions for failure to recite the Gettysburg Address correctly. The educational process would not seriously be harmed if teachers were constrained to teach subject matter with grades and maintain order with the discipline code.”).

¹⁶⁹ Wright, *supra* note 136, at 698 (arguing that individuals in the school community can focus better once a distraction-causing speaker is removed from the learning environment).

¹⁷⁰ Pisciotta, *supra* note 150, at 667.

¹⁷¹ Ruthven, *supra* note 145, at 965. *See also* Blystone, *supra* note 127, at 216 (arguing “courts should be removed from the disciplinary process whenever possible”). *But see* Ruthven, *supra* note 145, at 965 (“Once an investigation shows that the speech at issue is neither a true threat nor a material or substantial disruption to school operation or individual rights, the school’s interest in safety is no longer sufficient to justify sanctioning the speaker.”).

¹⁷² Pisciotta, *supra* note 150, at 667.

¹⁷³ Garcia, *supra* note 70, at 86.

¹⁷⁴ Blystone, *supra* note 127, at 215-16. *See also, e.g.* Jacobson, *supra* note 92, at 936 (“Violent incidents in schools (as well as the threat of violent incidents) deprive students of their constitutionally protected property right to an education because they divert students’ attention from their studies. It creates an atmosphere of fear and apprehension while diminishing the school’s educational mission. As such, no matter how important the First Amendment rights of a student in public school may be, they should never outweigh the right of students to receive their public education free from threats of violence or a violent atmosphere.”); Pisciotta, *supra* note 150, at

Thus, deference, as some scholars argue, should be the key in regulating student expression — especially student expression that is violent in nature.¹⁷⁵

Whereas scholars cannot agree on the proper place of school discipline or the best role for the true threat doctrine in adjudicating violent student speech cases, there is one broad consensus: The 1999 Columbine High School shooting changed the way courts examine student speech generally and violent student speech specifically.¹⁷⁶

d. Post-Columbine assessment of student speech and schools

In the first year after the shooting at Columbine, scholars were quick to note the rush to censorship across the country, including discipline for a high school newspaper columnist who suggested satirically that assassinating the president would be a good stress reliever;¹⁷⁷ the efforts in Colorado, Georgia, New Mexico, and Tennessee to ban the style of trench coats worn by the Columbine shooters;¹⁷⁸ and, ironically enough, cases in Louisiana and Texas involving

669 (“Instead of just focusing on the value of individual freedom, as courts seem inherently to do, schools can and must provide the socially valuable service of encouraging and developing society’s shared values.”).

¹⁷⁵ See, e.g., Jacobson, *supra* note 92, at 941 (arguing school administrators should be given deference as “they are truly in the best position to make judgment calls based on the personality of students, the makeup of the student body as a whole, the potential for unrest, or other adverse effects on discipline and safety”); Pisciotta, *supra* note 150, at 665 (“Courts must consider and respect that educators simply wish to perform their jobs as effectively as possible and have a strong desire to avoid litigation and the uncertainties of the courtroom.”). *But see* Pyle, *supra* note 86, at 595 (arguing against a broad grant of deference to administrators, suggesting judges should “inquire more deeply and consider how freedom might benefit the educational environment in ways that school officials lack the political capacity to recognize”).

¹⁷⁶ See, e.g., Redfield, *supra* note 124, at 688-89 (arguing judicial notice of “Columbine-like violence” has gone too far); Roberts, *supra* note 115, at 487 (contending that courts “routinely invok[e] Columbine to decide cases involving school violence or the threat thereof[.]”); Boksenbaum, *supra* note 116, at 182 (“Using the myth of Columbine, the courts have employed an analytical backdrop that casts every student as a potential mass murderer.”); Wright, *supra* note 136, at 715 (arguing that courts apply the *Tinker* standard differently in the “post-Columbine era”); Brunner, *supra* note 128, at 910 (“Although several years have passed since the Columbine shootings, their aftermath is still being felt, and public pressure for strong reaction to violent student writing is still influencing at least some judges to consider further suspensions of students’ free speech rights for the sake of school safety.”).

¹⁷⁷ Calvert, *supra* note 147, at 742.

¹⁷⁸ Richard C. Demerle, Note, *The New Scylla and Charybdis: Student Speech vs. Student Safety After Columbine*, 10 B.U. PUB. INT. L.J. 428, 430 (2001).

administrators that attempted to prevent students from wearing black arm bands.¹⁷⁹ It was simply, as Professor Clay Calvert wrote, “a story of censorship.”¹⁸⁰ Two years after the shooting, the story was much the same as scholars noted “a drastic increase in expulsions and suspensions for behavior or speech . . . neither criminal nor violent.”¹⁸¹ The legal principles underlying this “constrict[ion]” of First Amendment rights were not entirely apparent, as lawyer Edward T. Ramey wrote, but it was expression that felt “many of the emotional aftershocks” of the Columbine attack¹⁸² as the fear of violence on a tragic scale gave administrators “all the reasons — legitimate or illegitimate — they needed to trounce the First Amendment rights of public school students,” according to Professors Robert D. Richards and Clay Calvert.¹⁸³

The post-Columbine fear of violence, however, was not transient as it lingered for years after the shooting — long enough for scholars to note the “long-term legal consequences for student speech rights.”¹⁸⁴ There was some hope following Columbine that “common sense [would] begin to reemerge” but that was couched with the understanding that “when other disturbing events . . . arise, irrational fears will not be suppressed for long.”¹⁸⁵ When Columbine was followed by a 2005 school shooting in Red Lake, Minn. that killed five students, a teacher, and a security guard; the 2007 Virginia Tech massacre that killed 32 people; the 2012 shooting at

¹⁷⁹ Hudson, *supra* note 143, at 79-80. *See also* Calvert, *supra* note 147, at 739 (detailing the story of a Dallas, Texas high school student who wore an armband to mourn the students killed at Columbine and later had to sue her school to protect her expressive rights and prevent a three-day suspension from being noted in her transcript).

¹⁸⁰ Calvert, *supra* note 147, at 740.

¹⁸¹ McIntyre, *supra* note 161, at 41.

¹⁸² Edward T. Ramey, *Student Expression: The Legacy of Tinker in the Wake of Columbine*, 77 *DENV. U.L. REV.* 699, 709 (2000).

¹⁸³ Richards & Calvert, *supra* note 122, at 1091. *See also, e.g.*, McIntyre, *supra* note 161, at 52 (“School shootings have generated a climate of fear, but that fear does not provide a rational basis for curtailing a student’s First Amendment rights or excluding them from education.”); Brenton, *supra* note 74, at 1206 (“[S]chool administrators lack a strong incentive to protect the free speech rights of their students - they are more concerned with preserving the integrity of the educational process against perceived threats.”).

¹⁸⁴ Richards & Calvert, *supra* note 122, at 1091.

¹⁸⁵ Calvert, *supra* note 147, at 767. *See also* Salgado, *supra* note 55, at 1375 (“As Columbine, Red Lake, and other tragedies have demonstrated, and as future tragedies may demonstrate, speech can be infringed, but violence is likely to continue.”).

Sandy Hook Elementary School in Newtown, Conn. that killed 20 elementary school children and six adults; and many other lower-profile school-related incidents (in addition to the shootings in Tuscon, Ariz. and Aurora, Colo.),¹⁸⁶ the resulting media coverage made it difficult for any fears of school violence to subside — even if schools themselves were getting safer.¹⁸⁷ In short, much like the terror attacks of Sept. 11, 2001 changed the way Americans view terrorism, Columbine changed the way administrators and courts evaluate school safety and the freedoms allotted to students — especially those students who express themselves with violent imagery.¹⁸⁸

The post-Columbine problem for expression was best summarized by Richard Salgado when he wrote that “[v]irtually anything can now set off warning lights - educators treat a satirical website parodying school administration the same way they treat a legitimate danger.”¹⁸⁹

¹⁸⁶ *Timeline of Worldwide School and Mass Shootings: Gun-related Tragedies in the U.S. and Around the World*, INFOPLEASE.COM, (Nov. 6, 2013 9:42 AM), <http://www.infoplease.com/ipa/A0777958.html>.

¹⁸⁷ *See, e.g.*, Hudson, *supra* note 47, at 103-04 (“School advocates may well cite their earnest desire to prevent another Columbine . . . [B]ecause of Columbine, Springfield, and other incidents, school safety concerns trump free-speech rights. There are several problems with this phenomenon. First, it is not at all clear that there has been a marked increase in school violence. Some studies have shown the opposite — that school violence is on the decline . . . Just because the media reports on a subject does not necessarily mean that there is an increase in that phenomenon. Oftentimes, our society — and particularly the media — seize on certain anomalous events and incorrectly report a disturbing trend.”); W. David Watkins & John S. Hooks, *The Legal Aspects of School Violence: Balancing School Safety With Students’ Rights*, 69 *Miss. L.J.* 641, 644-45 (1999) (“[T]he number of twelfth graders who reported being injured by a weapon while at school did not increase significantly between 1976 and 1996. In fact, a recent study measuring trends in nonfatal violent behaviors among adolescents in the United States between 1991 and 1997 indicates ‘significant linear decreases’ in aggressive behaviors such as fighting and carrying guns onto school property. A survey of principals of schools with seventy-five percent or more of the student population living in poverty, showed significant reductions in the number of conflicts among students, in the use of drugs and alcohol among students, and in physical or verbal abuse of teachers. Data from the National Crime Victimization Survey for 1996 indicate that incidences of violent victimization among adolescents are at their lowest levels since the survey instrument was revised in 1992. Despite recent tragedies, homicides in school are extremely rare events.”); Salgado, *supra* note 55, at 1393-94 (“[S]tatistically speaking, schools are among the safest places for children to be. In any given year, a student is three to four times more likely to be hit by lightning than to be the victim of violence in school. Yet an atmosphere of fear has become pervasive in the nation’s schools. Fueled by media hype, fear of the unthinkable and, perhaps, a bit of guilt, more parents are demanding that school boards implement strict policies to deal with kids who step out of line.”); Fox, *supra* note 148, at 435 (“[R]esearch demonstrates that school violence in this country has steadily declined since the early 1990s, when it peaked alongside other forms of juvenile crime.”).

¹⁸⁸ Clay Calvert, *Misuse and Abuse of Morse v. Frederick by Lower Courts: Stretching the High Court’s Ruling Too Far to Censor Student Expression*, 32 *SEATTLE UNIV. L. R.* 1, 21 (2008).

¹⁸⁹ Salgado, *supra* note 55, at 1384. *See also, e.g.*, *id.* at 1400 (arguing that the Columbine rationale makes administrators “prone to interpret any hint of violence as foreshadowing on-campus violence, thus putting any

In essence, the post-Columbine environment is one where “fear and panic” can often overtake the judgment of administrators and courts as they attempt to keep schools safe, resulting in the restriction of speech rights.¹⁹⁰ Other scholars have cynically noted that “[i]t could be that Columbine provided a ready excuse to justify restricting other forms of disagreeable student expression, not simply those with an allegedly violent theme or intimation.”¹⁹¹ Ultimately, no matter its cause, this “overreaction” can be quite costly for students as otherwise harmless speakers are “lump[ed] . . . in with criminals” when speech cases become criminal issues.¹⁹²

Just as the fear of school violence has changed the behavior of administrators, it has also altered the way courts across the country examine student speech issues. When courts invoke Columbine in the name of school safety — in addition to giving administrators a wide berth of discretion in punishing speech — in essence it elevates the tragedy to a mythic status and “consequently place(s) heavy emphasis on the prevention of future Columbines, despite the fact that this kind of incident, though undeniably tragic, is by nature isolated and extremely rare.”¹⁹³

speech at risk of creating ‘substantial disruption within the school,’” which “collapses the on-and off-campus distinction”); Pyle, *supra* note 86, at 623 (contending that even “responsible” efforts to monitor violent expression “will certainly result in school officials taking action against students who are not in fact potential killers”); Erwin Chemerinsky, *Address, The Hazelwooding of the First Amendment: The Deference to Authority*, 11 *FIRST AMEND. L. REV.* 291, 292 (2013) (arguing the shooting at Columbine “cause[d] schools to be more aggressive in disciplining students who they perceived as a threat through violent imagery”); Brenton, *supra* note 74, at 1206 (arguing school violence has caused school administrators to censor student speech they regard as improper).

¹⁹⁰ Calvert, *supra* note 147, at 764. *See also, e.g.,* McIntyre, *supra* note 161, at 53 (“In the wake of school violence across the country, schools . . . are justified in being concerned for the safety of their student body, but the subjective fear or apprehension of a teacher or administrator is not sufficient to curtail a student’s First Amendment rights. Closing the doors of an educational facility to a student by disciplining or punishing his expression prior to analyzing the circumstances under which the student expression occurred is not consistent with the goal of education or the First Amendment.”); Pisciotta, *supra* note 150, at 665-66 (cautioning school administrators to not abuse discretion in area of nonviolent speech in censoring expression “because they disagree with the underlying message or because the speech casts the school in an unfavorable light”).

¹⁹¹ Richards & Calvert, *supra* note 122, at 1095.

¹⁹² *Id.* at 1140. *See also* Boksenbaum, *supra* note 116, at 128 (arguing violent school expression cases “illustrate that many school administrators and judges believe that a punitive response to student creative expression is both a permissible and justifiable restriction of students’ First Amendment rights in school”).

¹⁹³ Boksenbaum, *supra* note 116, at 155. *See also, e.g.,* *id.* at 151 (contending that without the “Columbine rationale” many examples of student speech censorship would be “a gross overstepping of school disciplinary

Even as some scholars argue that student speech and safer schools are “complementary objectives” rather than mutually exclusive ones,¹⁹⁴ focusing on safety at the expense of speech “expands the substantial disturbance doctrine such that its limits are ultimately meaningless.”¹⁹⁵ Thus in the “post-Columbine era,” as Professor R. George Wright argued, the “meaning and rigor of the *Tinker* disruption standard has . . . significantly changed, even if the test remains formally unchanged.”¹⁹⁶

According to Edward T. Ramey, for both schools and courts, the greatest consequence of the looming threat of school violence is that it has become “seductively easy to be innocently dishonest” where student expression is concerned.¹⁹⁷ Owing to the hysteria following Columbine, Ramey argued,

We become at least temporarily more tolerant of those who, frequently with the best of intentions, would impose (rather than truthfully seek to teach and inculcate) a viewpoint or lifestyle and stifle a competing one. The Columbine tragedy does not call for prohibiting blue hair or gothic dress styles any more than letter jackets or cardigan sweaters. It does not justify depriving students of the opportunity to think for themselves and engage in emotive and intellectual expression merely because it does not resonate with our own sensitivities. It does not justify the exclusion of controversial subjects from the halls of our schools. Columbine is not a license to demean our young people as incapable or unworthy of being respected or trusted.¹⁹⁸

Yet in writing about teachers and administrators, commentators are quick to conclude it is difficult for schools to operate in an environment preoccupied with safety concerns. As one scholar wrote, “Long gone are the times when an educator’s obligation was solely to teach and to

boundaries); note 187 and accompanying text, *supra* (arguing schools are safe despite media perception and shooting tragedies).

¹⁹⁴ Salgado, *supra* note 55, at 1376.

¹⁹⁵ Boksenbaum, *supra* note 116, at 151.

¹⁹⁶ Wright, *supra* note 136, at 715. As Wright noted, this change “may or may not be justified,” but “[e]ither way . . . we are better off explicitly admitting such a judicial shift. Transparency and candor require no less.”

¹⁹⁷ Ramey, *supra* note 182, at 710.

¹⁹⁸ *Id.*

prevent students from being impaired by a lack of education . . . ” as now “the job of the modern educator also encompasses protecting students from an array of physical harms including threats to their lives.”¹⁹⁹ In addition to fearing for the lives of their pupils, “[T]eachers and school personnel must walk a very thin line between ensuring that student expression is not unconstitutionally stifled, particularly in the creative arts, and responding appropriately to signals that may indicate an intent to cause harm.”²⁰⁰ School personnel also have three other important, possibly consuming, fears according to scholars: the worry of civil liability in the wake of school violence if “signs” were missed,²⁰¹ students pursuing First Amendment claims,²⁰² and unwelcomed notoriety resulting from media reports of student discipline.²⁰³

Of course, civil liability resulting from incidents of school violence can exist only where the school has some affirmative duty to its students, a topic of concern to both scholars and school districts given the costs of suits, ultimate liability, and recovery from acts of violence.²⁰⁴ As to the issue of civil liability, students who are physically injured in acts of school violence

¹⁹⁹ Roberts, *supra* note 115, at 467.

²⁰⁰ Brunner, *supra* note 128, at 895. *See also* Pisciotta, *supra* note 150, at 640 (“Ultimately, educators are faced with a dangerous dilemma. The educators can take a threat seriously, possibly infringing students’ First Amendment rights, and then become confronted with a lawsuit brought by indignant parents. Alternatively, educators can wait to see if the vociferous, threatening student eventually comes to school carrying a handgun, intent on fulfilling his murderous threats.”).

²⁰¹ *See, e.g.*, Brunner, *supra* note 128, at 895 (“School officials may find themselves facing liability actions if a true threat is missed and students subsequently harm another or themselves, but they may also find themselves in court if students are wrongly disciplined for exercising their free speech rights in a creative context.”); Demerle, *supra* note 178, at 429 (“As if worrying about student safety was not enough, educators and lawmakers also must worry about legal liability.”). *See also* Calvert, *supra* note 147, at 750 (“[M]any school administrators are concerned about Columbine-like violence at their own institutions and seem ready to censor any speech that advocates or vaguely suggests such violence.”).

²⁰² Brunner, *supra* note 128, at 895.

²⁰³ *See id.* at 896-97 (“Without judicial standards clearly delineating the extent to which educators may impinge on students’ speech rights in the name of security, any individual school’s response to violent student speech has the potential to generate conflict rising to a national level of interest.”).

²⁰⁴ *See* Demerle, *supra* note 178, at 429 (noting that Columbine’s Jefferson County School Board faced up to \$50 million in costs for “building repair, counseling, lawsuits and future requirements”). *See generally* Patrick Skahill, *Newtown Residents Demolish A School, And Violent Memories*, NPR, (Nov. 6, 2013 9:39 AM), <http://www.npr.org/2013/10/25/240242673/newtown-residents-demolish-a-school-and-violent-memories> (explaining plan to demolish Sandy Hook Elementary in effort to recover from tragedy).

often seek redress in federal courts as they allege a violation of substantive due process rights guaranteed by the Fourteenth Amendment;²⁰⁵ the issue of substantive due process protection, in turn, centers on two questions: whether the school has a duty to protect students against injuries from third-parties and whether a school is liable where it has acted in some way to create the danger.²⁰⁶ Most lower courts to examine the issue have found no duty for schools,²⁰⁷ even when “[s]chool attendance frequently creates the nexus between the threatening and threatened students, who may be current or former dating partners or friends, especially where the two students attend the same school.”²⁰⁸ Still, that may be of little consolation to school districts who could be liable under state law tort claims of negligence, strict liability, and failure to supervise.²⁰⁹

Central to the idea of post-school violence liability is the concept of “leakage,” the notion that students often allude to plans of school violence in the form of “subtle threats, boasts, innuendos, predictions, or ultimatums” as recorded in “stories, diary entries, essays, poems, letters, songs, drawings, doodles, tattoos, or videos.”²¹⁰ The Columbine shooters themselves wrote essays for English classes that contained “images of graphic violence” but there was no formal discipline or other form of intervention.²¹¹ In many such instances, arguments of liability are premised on facts showing there was pre-attack leakage with a school response that was

²⁰⁵ Watkins & Hooks, *supra* note 187, at 647-48.

²⁰⁶ *Id.* at 656-57.

²⁰⁷ *Id.* at 658.

²⁰⁸ Garcia, *supra* note 70, at 82-83.

²⁰⁹ Watkins & Hooks, *supra* note 187, at 662.

²¹⁰ Redfield, *supra* note 124, at 712 (quoting FBI school threat assessment report). *Contra* Jacobson, *supra* note 92 at 935 (“Regrettably, the connection between school violence and First Amendment expression is hazy, at best.”).

²¹¹ Brunner, *supra* note 128, at 891-92. *See also, e.g.*, Pisciotta, *supra* note 150, at 640 (explaining that shooter Dylan Klebold wrote violent English essays and shooter Eric Harris posted death threats on his personal website); Jacobson, *supra* note 92, at 935 (contending writings from Klebold and Harris showed “non-discriminate hate towards all types of people”).

somehow lacking and failed to prevent violence.²¹² To deal with both leakage and simple violent expression that does not foretell any violence in a way that embraces the First Amendment, scholars argue schools should “encourage speech” and “be prepared to respond appropriately when warning signs appear.”²¹³ The best response, in turn, can be as simple as meeting with the students, parents and relevant authorities in order to contextualize any violent expression.²¹⁴

Scholars argue that issues surrounding threatening speech are more difficult in the school setting due to “the variety of information that school officials have at their disposal”²¹⁵ and the tendency of a closed campus environment to amplify safety concerns.²¹⁶ Still, even as scholars express concerns for the difficulties administrators face, school officials are certainly not immune from criticism, as some label the current “subjective” system of school discipline for violent expression as one “ripe for inequity, censorship, and discrimination.”²¹⁷

In short, the post-Columbine environment is certainly a litigious one as students and parents are empowered to aggressively protect speech rights in addition to demanding proactive violence solutions from schools.²¹⁸ Metal detectors in schools are an obvious example of the post-Columbine litigious environment as some districts have been sued for invading the privacy rights of students in using the devices, while others have been sued for failing to use them to

²¹² See Salgado, *supra* note 55, at 1394 (detailing one shooting incident foretold by poems).

²¹³ *Id.* at 1395.

²¹⁴ See *id.*

²¹⁵ Blystone, *supra* note 127, at 205.

²¹⁶ See *id.* at 207 (“Once the speaker’s message is conveyed, whatever the form, the damage is done, especially in a closed setting such as a school. More than in other settings, a threat conveyed on a school campus can have long-lasting effects because at school, the recipient of the expression cannot simply leave the premises and is likely to run across the speaker the next day or sometime in the very near future. The recipient’s only practical recourse may be to notify a teacher and hope that action is taken.”).

²¹⁷ Nappen, *supra* note 123, at 125.

²¹⁸ See Brunner, *supra* note 128, at 896 (noting that students and parents feel “entitled” to notice of threatening students and questioning the extent to which a duty should apply).

prevent violence.²¹⁹ And while he was objecting to students pursuing First Amendment claims, perhaps Richard Blystone was right as he wryly noted that “[m]ore lawsuits . . . will not improve the environment in today’s schools.”²²⁰ Equally as clear is the simple fact that “[e]xpelling or suspending a student does not preclude the student from returning to campus with a loaded gun.”²²¹

Columbine, as one scholar argued, is “not ancient history” but “rather a current danger to students throughout the country,” as infamous school shootings continue to occur and necessitate a balancing between school safety and free expression.²²² Outside of being a label for heightened security concerns and justification for the continued push to censor student speech, Columbine’s lasting legacy may also be changes to the way students speak. For many disaffected students, Columbine gave them “an actual name to associate with their anti-institutional feelings - the anger and frustration that derive naturally from the institutional setting and its social and disciplinary structure.”²²³ In addition to becoming a label for feelings that are otherwise difficult to communicate, Columbine and similar shootings are often forbidden topics of discussion in the school setting, making them attractive issues for anti-authoritarian youth.²²⁴ “The mass hysteria of censorship,” therefore, “could have the unintended and unfortunate consequence of actually

²¹⁹ Watkins & Hooks, *supra* note 187, at 703. *See also id.* at 712 (“Students often allege their school’s safety policies compromise their constitutional guarantees. Measures promoting school safety can, therefore, generate considerable litigation. Yet, school districts that do not enact safety measures expose themselves to the risk of litigation as students injured on school grounds increasingly look to schools as the ensurers of their safety.”).

²²⁰ Blystone, *supra* note 127, at 215. *But see* Pyle, *supra* note 86, at 634-35 (“[S]chools have no reason to fear lawsuits challenging everyday exercises of school discipline. Their power to maintain order gives them a virtually unchecked ability to take action against students who directly disrupt the classroom...When teachers and principals push the boundaries of the First Amendment, they do so in knowing attempts to promote values, not to preserve order. Litigation results, unsurprisingly and appropriately.”)

²²¹ Salgado, *supra* note 55, at 1413.

²²² Ronald C. Schoedel III, Comment, *Morse v. Frederick: Tinkering with School Speech: Can Five Years of Inconsistent Interpretation Yield a Hybrid Content-Effects-Based Approach to School Speech as a Tool for the Prevention of School Violence?*, 2012 B.Y.U.L. REV. 1633, 34-35 (2012).

²²³ Boksenbaum, *supra* note 116, at 174.

²²⁴ Calvert, *supra* note 147, at 766.

promoting the very speech that it attempts to deter.”²²⁵ That legacy can be seen today in cases such as *Wynar*, where the student referenced the shooting at Virginia Tech and boasted of his ability to kill more people in a similar attack.²²⁶

e. Scholarly analysis of Supreme Court student speech jurisprudence

With only four major cases from the Supreme Court, it is not surprising that scholars have devoted a great deal of attention to analysis and criticism of the Court’s jurisprudence. Three of the Court’s decisions — *Tinker*, *Hazelwood*, and *Morse* — have received the greatest attention, while *Fraser* has largely been confined to its facts. For those supporting student speech rights, *Tinker* still represents a high water mark for expression, with its progeny slowly chipping away at its central holding. *Morse*, the most recent Court decision, has many detractors in the scholarly community, with some arguing it goes too far in enabling student speech rights while others assert that the decision gives school administrators all the authority they need to censor student speech — especially when the decision is interpreted broadly by lower courts.²²⁷

On the day it was decided, *Tinker* established a standard for adjudicating student speech cases, but it also made clear the dichotomy to come in student speech jurisprudence and scholarship, with Justice Abe Fortas crafting a “speech protective approach” for the majority and Justice Hugo Black framing student speech as “inconsistent with the functioning of schools” and calling for deference to administrators in his dissent.²²⁸ The standard itself is measured and circumscribed according to pro-speech scholars, with Dean Erwin Chemerinsky arguing that the Court’s decision did not create “absolute protection for speech rights in schools”²²⁹ and Student Press Law Center Executive Director Frank LoMonte characterizing the standard as “a

²²⁵ *Id.*

²²⁶ *Wynar*, 728 F.3d at *6.

²²⁷ See Chapter 4, *infra*.

²²⁸ Chemerinsky, *supra* note 189, at 293.

²²⁹ *Id.* at 303.

compromise level of protection well short of what an adult citizen could expect if punished under a content-based government regulation.”²³⁰ Scholars also argue that *Tinker* is sufficiently clear to serve notice to administrators as to what acts of censorship are constitutionally impermissible²³¹ while simultaneously giving administrators enough authority to maintain school operations and functions.²³²

Yet *Tinker* faces the proposition of “waning in importance in the annals of First Amendment law,”²³³ with the most obvious sign of its decline coming in the three cases that followed it where the Court decided to carve out fact-based exceptions to *Tinker* rather than apply it.²³⁴ In essence, the decision has become a backup rule instead of the default one, according to Professor Calvert, with courts turning to *Fraser*, *Hazelwood*, and *Morse* for application before settling on *Tinker*.²³⁵ When *Tinker* is chosen as a standard, however, many scholars argue that it is often misapplied, usually resulting in a victory for school administrators.²³⁶ As Professor Calvert argued, *Tinker*’s decline can be blamed on two relatively recent developments in society: the “climate of fear of mass-scale violence in public schools” and the use of the Internet by students to mock or otherwise deride classmates, teachers, and administrators thus making censorship an attractive option.²³⁷ To reinvigorate the *Tinker* standard, Professor Calvert advised against granting school administrators “excessive” deference, in addition to advising the abandonment of the “rights of others” prong²³⁸ and

²³⁰ LoMonte, *supra* note 78, at 310.

²³¹ Pyle, *supra* note 86, at 634.

²³² See *id.* at 622 (“If school administrators can point to an actual disruption, and not just a disruption of their peace of mind, then courts will defer to their judgment.”).

²³³ Calvert, *supra* note 90, at 1168.

²³⁴ *Id.* at 1173.

²³⁵ *Id.* at 1175.

²³⁶ See note 93, *infra*.

²³⁷ Calvert, *supra* note 90, at 1186-87. *But see* Pyle, *supra* note 86, at 623 (“[E]ven a heightened sense of alert does not warrant the carving out of exceptions to *Tinker*.”).

²³⁸ See notes 95-97 and accompanying text, *infra*.

refraining from making any additional exceptions to *Tinker* lest those exceptions “swallow up” the decision.²³⁹

Fraser has seen comparatively little attention from courts and scholars, suggesting it is the narrowest of the Supreme Court opinions on student speech and confined only to the censorship of vulgar or profane speech in the school setting. However, as courts have recently struggled in exactly how to define the prohibition on vulgarity contained in *Fraser*, attention may be turning to a closer study of the decision and its current application.²⁴⁰ *Hazelwood*, conversely, has been criticized by scholars in a number of areas, including its slow creep into the realm of colleges,²⁴¹ its negative effects on the student press,²⁴² and its tacit endorsement of viewpoint discrimination,²⁴³ or the regulation of speech based on a specific point of view rather than its general content.²⁴⁴

Given that it is the Court’s most recent decision in the area of student speech, *Morse* has received quite a bit of attention from scholars on topics ranging from its scope as it is written and perhaps intended to how it has been applied by lower courts. Initially, the holding in the case was seen as generally limited to its facts and circumscribed by the concurring opinion of Justices

²³⁹ Calvert, *supra* note 90, at 1191.

²⁴⁰ See generally 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).

²⁴¹ See, e.g., Chris Sanders, Commentary, *Censorship 101: Anti-Hazelwood Laws and the Preservation of Free Speech at Colleges and Universities*, 58 ALA. L. REV. 159 (2006); LoMonte, *supra* note 78.

²⁴² See, e.g., J. Marc Abrams, S. Mark Goodman & William R. Mureiko, Comment, *End of an Era? The Decline of Student Press Rights in the Wake of Hazelwood School District v. Kuhlmeier*, 1988 DUKE L.J. 706 (1988); Carol S. Lomicky, *Analysis of High School Newspaper Editorials Before and After Hazelwood School District v. Kuhlmeier: A Content Analysis Case Study*, 29 J.L. & EDUC. 463 (2000)

²⁴³ See, e.g., Denise Daugherty, Note and Comment, *Free Speech in Public Schools: Has the Supreme Court Created a Haven for Viewpoint Discrimination in School-Sponsored Speech*, 20 GA. ST. U.L. REV. 1061 (2004); Filipp Kofman, Fleming v. Jefferson County: *A Need for Viewpoint Neutrality*, 22 GEO. MASON U. CIV. RTS. L.J. 151 (2012); Susannah Barton Tobin, Note, *Divining Hazelwood: The Need for a Viewpoint Neutrality Requirement in School Speech Cases*, 39 HARV. C.R.-C.L. L. REV. 217 (2004).

²⁴⁴ Kofman, *supra* note 243, at 155. Viewpoint discrimination is also defined as a “particularly ‘egregious form of content discrimination.’” *Id.* (citation omitted). In the school setting, as Kofman argued, allowing for viewpoint discrimination “would lead to undue broadening of the Hazelwood standard” and “give school administrators nearly as much authority to restrict speech as possessed by private property owners.” *Id.* at 174.

Samuel Alito and Anthony Kennedy.²⁴⁵ According to scholars, the majority opinion — derided by some as “*ad hoc*”²⁴⁶ — “drew a very thick line around a very small box”²⁴⁷ in regards to the amount of censorship that was constitutionally permissible and declined to “give schools complete discretion in disciplinary matters.”²⁴⁸ Thus, *Morse* should have entered the jurisprudence alongside *Hazelwood* and *Fraser* as a narrow exception to the rights generally respected by *Tinker*.²⁴⁹

Yet after the decision was handed down by the Supreme Court, it was quickly interpreted in ways “unimagined by the *Morse* majority.”²⁵⁰ Despite the language of the majority opinion that attempted to limit the decision’s scope, lower courts began to use the opinion “to censor speech that has absolutely nothing to do with illegal drug use but that has everything to do with subjects such as violence and homophobic expression.”²⁵¹ As one scholar argued in the wake of lower court interpretation, “[T]here is widespread disagreement on what *Morse* means and how it should be applied, or even to which school speech cases it should be applied.”²⁵²

²⁴⁵ Calvert, *supra* note 188, at 1-2. See also Schoedel, *supra* note 222, at 1633 (referring to the holding in *Morse* as “originally thought to be quite narrow in its scope”).

²⁴⁶ Caroline B. Newcombe, *Morse v. Frederick One Year Later: New Limitations on Student Speech and the “Columbine Factor,”* 42 SUFFOLK U. L. REV. 427 (2009).

²⁴⁷ Braiman, *supra* note 84, at 441.

²⁴⁸ Fox, *supra* note 148, at 474.

²⁴⁹ Newcombe, *supra* note 246, at 438. See also Braiman, *supra* note 84, at 447 (contending that the Court “merely carved out a new particularized exception to *Tinker*” rather than a new, comprehensive standard to decide student speech cases).

²⁵⁰ *Id.*

²⁵¹ Calvert, *supra* note 188, at 3. See also, *e.g.*, *id.* at 24 (“[S]ome judges are willing to expansively view the Supreme Court’s ruling in *Morse* beyond its factual underpinnings and, in doing so, to extend its logic and reasoning to support the censorship of speech threatening physical violence and expression causing emotional injury. Thus, the issue arises whether there are any limits on just how far these or other courts may go in stretching *Morse* beyond the realm of speech advocating the use of illegal drugs.”); Schoedel, *supra* note 222, at 1635 (questioning whether the central holding of *Morse* can spread outside of drug-related speech after lower courts interpreted the cases broadly); *id.* at 1645 (“Lower courts are sharply divided over the breadth of the *Morse* holding, with much of the confusion ensuing shortly after the issuance of the *Morse* opinion.”); Newcombe, *supra* note 246, at 438 (“[*Morse*] has been stretched far beyond the original exception based on speech about illegal drugs to exceptions based on illegal conduct, school safety, and perhaps even a so called psychological exception.”).

²⁵² Schoedel, *supra* note 222, at 1645.

The expansion of *Morse* beyond what was perhaps its intended scope can be blamed primarily on the language and assortment of opinions generally, Justice Alito’s concurring opinion specifically, and the lingering concerns regarding school safety after Columbine and other acts of school violence.²⁵³

As members of the Court “came to divergent viewpoints regarding the scope and effect of the majority’s decision” even as the justices were in the process of handing down the decision in *Morse*, “it is not surprising that the federal courts of appeals . . . have reached varying interpretations of the *Morse* holding and its impact on school administrators’ authority.”²⁵⁴ Chief Justice John Roberts wrote in *Morse* for a thin majority of himself and Justices Antonin Scalia, Clarence Thomas, Anthony Kennedy, and Samuel Alito.²⁵⁵ Justice Thomas agreed in the result only to weaken *Tinker*.²⁵⁶ Justices Alito and Kennedy wrote to say they only supported the majority decision so far as in supported the censorship of apolitical pro-drug speech.²⁵⁷ Thus with the fractured Court, the majority opinion was robbed of much of its clarity and intellectual force as it failed to “either overturn or strongly reaffirm the *Tinker* principle.”²⁵⁸ Furthermore, the seeds for student censorship were planted clearly on the face of the Court’s decision as it embraced four things that could be used to argued for a narrowing of student speech rights: a

²⁵³ See, e.g., Newcombe, *supra* note 246, at 427 (arguing the expansion of *Morse* has two chief causes: the Court’s opinion and the “Columbine factor”); Waldman, *supra* note 22, at 489-91 (contending the *Morse* opinion set the stage for an expansive interpretation).

²⁵⁴ Richard Howell, Note and Comment, *After Morse v. Frederick: The United States Court of Appeals for the Fifth Circuit Takes Another Step Toward Abrogating the Tinker Standard for Student Speech By Permitting Restrictions on Speech Which Poses a “Special Danger” to the School Environment*, 60 BAYLOR L. REV. 1046, 1058 (2008).

²⁵⁵ Justice Stephen Breyer concurred in the result, as he believed the case should have been decided in favor of *Morse* on the question of qualified immunity alone. See generally Clay Calvert, Symposium, *Qualified Immunity and the Trials and Tribulations of Online Student Speech: A Review of Cases and Controversies from 2009*, 8 FIRST AMEND. L. REV. 86 (2009).

²⁵⁶ *Morse*, 551 U.S. at 410 (Thomas, J. concurring).

²⁵⁷ *Morse*, 551 U.S. at 422 (Alito, J. concurring).

²⁵⁸ Braiman, *supra* note 84, at 441. As Braiman argued, “The case, disappointingly, brings us no closer to understanding what the difference is, or what it should be, between the free speech rights of students in school and those of everyone else, everywhere else, in America.” *Id.*

new exception for student speech rather than an existing standard (meaning that additional exceptions could be created), student safety as a compelling reason for censorship, political speech as an important factor in the constitutionality of censorship, and viewpoint-based restrictions on speech.²⁵⁹

Another key factor in the expansion of *Morse* is Justice Alito’s concurring opinion. Joined by Justice Kennedy, Justice Alito wrote to say he supported the majority’s opinion only so far as that it censored no other student speech as “[h]e was concerned that a broad reading of *Morse* would allow schools to punish any speech that interfered with the school’s educational mission.”²⁶⁰ In essence, Justice Alito likely thought his opinion would make it clear *Morse* was limited to the censorship of speech about illegal drugs and nothing more.²⁶¹ Yet in writing his opinion, “he stressed that schools’ disciplinary authority must be tied to the special characteristics of the school environment—citing the physical safety of students as specifically relevant;”²⁶² his mere mention of school safety as an issue for consideration resulted in the Eleventh, Second, and Fifth Circuits interpreting *Morse* broadly to support speech censorship where safety might be a concern.²⁶³ These courts, with help from Justice Alito’s opinion, have construed *Morse* as providing a “new type of exigent-circumstances exception from the stringent strictures of *Tinker*,”²⁶⁴ in effect, “rip[ping] the narrow concurring opinion of Justices Alito and Kennedy from its factual moorings.”²⁶⁵ The broadest interpretation of *Morse* — one that sees the

²⁵⁹ Waldman, *supra* note 22, at 481-91.

²⁶⁰ Fox, *supra* note 148, at 454.

²⁶¹ Newcombe, *supra* note 246, at 427.

²⁶² Fox, *supra* note 148, at 454.

²⁶³ *Id.* at 453.

²⁶⁴ Calvert, *supra* note 188, at 7.

²⁶⁵ *Id.* at 5.

case about safety and danger broadly²⁶⁶ and grants school administrators a great deal of deference²⁶⁷ — has five logical steps according to Professor Clay Calvert:

1. Schools, ideally, should be safe havens from physical dangers, yet in reality they can be, as Justice Alito wrote, “places of special danger.”

2. Illegal drugs pose one such special danger; as Justice Alito reasoned, “illegal drug use presents a grave and in many ways unique threat to the physical safety of students.”

3. Drugs are not, however, the only threat to the physical safety of students in public school settings.

4. After “the deadliest school massacre in the nation’s history” at Columbine High School near Littleton, Colorado, and subsequent school shootings like the one in March 2001 in Santee, California, there is a palpable danger to the physical safety of students posed by the violent conduct of fellow classmates.

5. Thus, if speech advocating illegal drug use can be squelched under *Morse* without having to jump through the legal hoops of *Tinker*, then speech that appears to advocate or threaten violence against other students can similarly be stifled under *Morse*.²⁶⁸

Since it “inadvertently provided the foundation for new limitations on student speech,” Justice Alito’s opinion has possibly become as important as the majority’s carefully crafted and narrow holding.²⁶⁹ Despite the importance it has attained in lower courts, some scholars fault the opinion for failing to clearly state when a safety and security exigency mandates an exemption from the *Tinker* standard,²⁷⁰ while others simply label Justice Alito’s talk of school safety as dicta.²⁷¹ Ultimately, if Justice Alito had truly intended both for *Morse* to be a narrow holding and

²⁶⁶ *Id.* at 7.

²⁶⁷ Fox, *supra* note 148, at 469. *See also* Schoedel, *supra* note 222, at 1645 (“Courts since *Morse* have determined that deference to school authorities can now be given based on something wider — but how much wider varies from court to court.”).

²⁶⁸ Calvert, *supra* note 188, at 7.

²⁶⁹ Newcombe, *supra* note 246, at 439.

²⁷⁰ Howell, *supra* note 254, at 1062 (describing the current state of the law as “ambiguous” as to when *Tinker* can be “skipped” in favor of *Morse*).

²⁷¹ *See* Calvert, *supra* note 188, at 6 (“Justice Alito suggested in dicta in *Morse* that *Tinker* still controlled in situations involving the potential for in-school violence, as he wrote that ‘school officials must have greater authority to intervene before speech leads to violence. And, in most cases, *Tinker*’s ‘substantial disruption’

for his opinion to thusly confine the majority opinion to the facts of the case, he “might not have written so much,” as Professor Calvert succinctly opined.²⁷²

The third and final reason for the expansion of *Morse* — and perhaps the underpinning of Justice Alito’s fears in his concurring opinion — is the continued apprehension of school violence in the aftermath of Columbine and other acts of school violence.²⁷³ Where student speech is concerned, as Caroline Newcombe argued, Columbine introduced the “possibility that expression will become action,” thereby necessitating a broad interpretation of *Morse* that allows for administrators to effectively address student safety issues.²⁷⁴ Indeed, as Professor Calvert resignedly concluded, “[W]hen courts in the near future grapple with student speech referencing violence and violent conduct, the early indications from post-*Morse* cases...are that judges will read *Morse* in the lugubriously long shadows cast by the tragedy at Columbine High School.”²⁷⁵

For those in favor of curbing speech rights, post-*Morse* student speech has become “a trap for the unwary school administrator” as they “cannot fashion the sort of comprehensive school speech policy that will best meet the needs of their school without quite possibly running afoul of one of the various limits imposed on the reading of *Morse*.”²⁷⁶ Jay Braiman argued even

standard permits school officials to step in before actual violence erupts.”). *See also id.* at 10 (arguing that Justice Alito did not “craft or draft” a standard for those cases not covered by *Tinker* where violent expression is concerned, and if he had, it would have been dicta as “*Morse* had nothing to do with violent expression”). *But see* Fox, *supra* note 148, at 470 (suggesting a legal framework for the *Morse* exigency standard where “once the school initiates emergency action and has time to adequately assess the threat, any additional action must arise from a determination that: (1) the speech may still reasonably be regarded as posing a threat of physical harm, and thus, disciplinary action is in furtherance of a compelling interest per *Morse*; or (2) such facts exist allowing the school to reasonably forecast substantial disruption within the school under *Tinker*”).

²⁷² *Id.* at 9. As Professor Calvert continued, “Had Justice Alito simply stated his conclusion in the case and left it at that, rather than attempting to explain it, there would be little legal ground for . . . appellate courts . . . to assert and claim that his opinion supports school efforts to punish students for violent-themed writings.” *Id.*

²⁷³ *See* Part I.c., *infra*, for more on the shooting at Columbine High School and the resulting impact on schools and courts.

²⁷⁴ Newcombe, *supra* note 246, at 453. *See also id.* (“It is this contextual factor [of school violence] that should be acknowledged and put into a principled framework of analysis.”).

²⁷⁵ Calvert, *supra* note 188, at 34.

²⁷⁶ Schoedel, *supra* note 222, at 1663.

stronger against *Morse* and what he saw as its inherent permissiveness, stating the decision “enables students to continue flouting and defying school authority by characterizing conduct, which would be unacceptable and unjustifiable in any other context, as protected expression.”²⁷⁷ Yet for scholars supportive of student expression, the decision “might well provide the legal tool that school administrators need to squelch all manners, modes and varieties of student speech that portend harm, be it physical . . . or psychological . . .”²⁷⁸ even as the central thesis key to the majority’s holding — that Frederick’s banner would have encouraged drug use among students — remains a questionable proposition.²⁷⁹ To the further dismay of pro-speech scholars is the simple reality that “[a]s courts expand the scope and power of *Morse*, they contract and reduce the force of *Tinker*.”²⁸⁰

Few, it seems, are content with the Supreme Court’s decision. Ultimately, *Morse* represents something of a failure for clarity in the development of the law as it “has done little to clarify free-speech jurisprudence in the realm of public schools”²⁸¹ and neither affirmed nor rejected *Tinker* as a continuing and relevant standard.²⁸² Whether the Court will take up student speech again certainly remains to be seen, but one thing is clear: If the Court chooses to address the bounds of student expression, it will be stepping back into a murky area of the law, and its decision will likely leave all parties unhappy.

II. Conclusion

²⁷⁷ Braiman, *supra* note 84, at 442. *Contra* Pyle, *supra* note 86, at 593 (“Just as it protects the rights of criminals against a powerful government and an unsympathetic popular majority, the Constitution protects parents and children from a government that forces children to attend school and from a popular majority that might not respect the way some students and parents choose to live.”).

²⁷⁸ Calvert, *supra* note 188, at 28.

²⁷⁹ See Chemerinsky, *supra* note 189, at 295 (“[I]t is hard to believe that any student in the school, the smartest or the slowest, would be more likely to use illegal drugs just because of the banner that Frederick held up.”).

²⁸⁰ Calvert, *supra* note 90, at 1171. *See also* *id.* at 1169 (arguing that *Tinker* faces a “new problem” of being “overshadowed” by *Morse* and being used only in situations where cases “mirror or closely parallel its facts”).

²⁸¹ Calvert, *supra* note 188, at 33.

²⁸² Braiman, *supra* note 84, at 441.

Scholars seem to disagree on a range of topics including the directions student speech jurisprudence should take, the extent of school administrative authority to punish off-campus speech, and how schools and courts should address violent speech in the wake of so many infamous incidents of school violence. And just as in 1969 when *Tinker* was decided, the terms of debate are the same: freedom for students and court deference to school administrators.

Columbine and its continuing legacy has certainly complicated the examination of student speech rights generally and violent student speech specifically. We — school administrators, teachers, students, jurists, and scholars alike — do not wish to see another incident of horrific school violence as one dead or seriously injured member of the school community is one too many. School violence, as is the case with senseless violence anywhere, is abhorrent, and everything possible should be done to protect school children.

Where the disagreement comes, however, is in what role the censorship of speech plays in the protection of schools. For while it is true that the Columbine shooters did express themselves violently before the attack,²⁸³ there is nothing to concretely prove why they did what they did.²⁸⁴ If school shooters do indeed give hints to their possible future actions — as might certainly be the case in *Wynar* — then administrators and courts must be given the tools to both predict and prevent acts of school violence. But, more importantly, they should have the discretion and responsibility to act only in cases where there is a real chance of danger; in essence, we must find a way to sort cases like *Cuff*, *Bell*, and *Wynar* in a principled way and act to censor and punish speech only when necessity calls for it.

III. Significance of the study

²⁸³ See note 211, *infra*.

²⁸⁴ As director and provocateur Michael Moore suggested in his film “Bowling for Columbine,” a great deal of blame for the attacks can be focused on the nation’s permissive attitude and access to guns. His title comes from the suggestion that media and violent video games caused the attacks on a day when the shooters were originally thought (but since proven untrue) to have gone bowling with classmates.

Few works have addressed the Supreme Court’s student speech jurisprudence in an exclusively legal setting. Still fewer works have comprehensively addressed the problems posed by violent student expression, and those that have are catered toward education practitioners rather than legal scholars. This study will attempt to rectify those oversights while grounding all analysis firmly within current Supreme Court case law regarding violent speech and media and true threats. Furthermore, this study will attempt to craft a comprehensive legal framework for analyzing violent student speech cases — a framework that protects student expression that happens to be violent while also allowing school administrators to deal with speech that truly poses a threat and a danger to the school community.

This study represents an attempt to add to the body of legal literature regarding violent student speech using traditional methods of legal research and legal reasoning. The suggested framework for the analysis of violent speech cases is derived from the tradition of reasoning by analogy in the law,²⁸⁵ as the framework seeks to group together like cases in order to both better analyze them and to suggest the proper method for courts to decide such cases in the future.

The framework also represents the study’s primary contribution to the literature as it seeks to make two important distinctions: one between violent speech that serves a direct purpose in the learning process and violent speech that is simply self-expression on the part of the student and a second distinction between violent student expression and student speech that is truly a threat. Scholars have studied violent student expression in art and other forms,²⁸⁶ and scholars have analyzed violent student expression as threatening speech,²⁸⁷ but few — if any —

²⁸⁵ See Chapter 3, *infra*.

²⁸⁶ See, e.g., Roberts, *supra* note 115; Brunner, *supra* note 128; Boksenbaum, *supra* note 116.

²⁸⁷ See, e.g., Wright, *supra* note 136; Redfield, *supra* note 124; Ruthven, *supra* note 145; Blystone, *supra* note 127.

have successfully combined the examination of violent student speech as expression and violent student speech as a threat.

This study will thus fill a gap in the literature. Not only will it do that, but this study will also propose a better way to decide cases of violent student expression — an approach that is consistent with cherished First Amendment principles, respectful of the Supreme Court’s decision in *Tinker*, and a serving as a direction for the law that will properly balance the rights of student speakers and the need for school safety.

IV. Study overview

This study is organized into eight chapters, with Chapters 5-7 focusing most specifically on the legal analysis of violent student speech, with other chapters concentrating on broader and more fundamental issues associated with violence and student speech.

Chapter 1 serves as the introduction to this study and includes a statement of the problem and need for the study, a theoretical framework centered on First Amendment theory, the purpose of the study, research questions, limitations inherent to the study, and the study’s significance.

Chapter 2 is a review of the legal scholarship relevant to this study, covering a summary of the topics frequently discussed by legal scholars in the area of student speech and school violence including bullying; the regulation of Internet and off-campus student speech; student expression, artwork, and the “true threat” standard; student expression in the post-Columbine world; and analysis of the current state of Supreme Court jurisprudence.

Chapter 3 focuses on legal research, analysis, and the legal framework integral to this study.

Chapter 4 is a summary of the relevant Supreme Court precedents in the area of violence and student speech, including the student speech quartet of *Tinker*, *Fraser*, *Hazelwood*, and *Morse*; cases on the rights of children generally; decisions premised on protecting children from speech; and cases specifically addressing whether speech can be censored due to violent content.

Chapter 5 begins the analysis crucial to this study by concentrating on the first category of violent student speech: that speech that is somehow connected to a student speaker's education. Exemplified by cases such as *Cuff*, this chapter will examine other such decisions before concluding that most — if not all — courts have inappropriately analyzed violent student speech commissioned by schools. This chapter will argue for a new standard to govern these cases, a standard built on themes first illuminated in *Hazelwood* and one that will provide a much greater degree of protection for student speakers who use violent themes in class assignments.

Chapter 6 will focus on expressive and creative violent speech unrelated to the school curriculum, the second category of violent student speech as seen in *Bell*. This chapter will examine the preliminary issue of whether off-campus speech should be speech subject to school discipline; as such, a key question of this chapter will be what standard should govern online student expression (as much speech in this category will be speech disseminated online). After settling on an intent-based standard, this chapter will next turn to *Tinker*'s application in cases such as *Bell*, arguing that in cases where there is no true threat posed by students, administrators have been granted too much deference at the expense of student speech that only happens to be violent.

Chapter 7 examines the violent student speech that can reasonably be seen as a threat to those in the school community as exemplified in *Wynar* and other cases. This chapter will examine the preliminary issue of the true threat standard as established by the Supreme Court,

muddled by a confusing circuit split, and often misapplied in the school setting. This chapter will argue that speech that falls under this category should primarily be a criminal issue rather than one of school discipline, but school administrators should be given the greatest amount of deference in these instances where students make clear and actionable references to violence in concrete, rather than abstract, terms.

Chapter 8 will complete the study by returning to the research questions as well as making broad conclusions regarding violence and violent student speech. This chapter will also provide suggestions for future study.

V. Restatement of research questions

1. What is the current state of Supreme Court jurisprudence regarding a child's First Amendment rights inside and outside of the school environment? (Chapter 4)
2. What insight can decisions outside of student speech jurisprudence provide to the analysis of violent student speech? (Chapter 4)
- 3a. How are violent non-sponsored curricular student speech cases decided? (Chapter 5)
- 3b. How should courts decide violent non-sponsored curricular student speech cases? (Chapter 5)
- 4a. How are violent noncurricular student speech cases decided? (Chapter 6)
- 4b. How should courts decide violent noncurricular student speech cases? (Chapter 6)
- 5a. How are threatening student speech cases decided? (Chapter 7)
- 5b. How should courts decide threatening student speech cases? (Chapter 7)
6. What is the proper balance between judicial intervention and deference to school administrators? (Chapter 8)

CHAPTER 3

METHODOLOGY

“The field of law wears many hats. It is a profession, a subject of public debate, a means of governance, and an academic field connected to many other academic fields.” — Orin Kerr¹

Legal scholarship² is an academic field with its own practices, standards,³ and even system of citation⁴ apart from the general field of social science research despite the similarities the study of law may have with other fields. Legal scholarship has a wide range of possible audiences, including practicing attorneys, judges, lawmakers, legal academics, and academics in other fields.⁵ Yet as legal writer Orin Kerr concludes simply, “The goal of legal scholarship is to offer insight into the legal system[.]”⁶ Therefore, this chapter will attempt to generally explain legal analysis and research — the cornerstones of legal scholarship — in addition to surveying the methodology of this study specifically. Part I will define both legal analysis and legal research as conceptualized by scholars in the field, while Part II will introduce the legal

¹ Orin Kerr, *The Audiences for Legal Scholarship*, THE VOLOKH CONSPIRACY (June 4, 2012 2:44 PM), <http://www.volokh.com/2012/06/04/the-audiences-for-legal-scholarship/>

² Legal scholarship is defined loosely as the study of how both the citizenry and its rights are regulated by a complex system of statutory, administrative, and case law.

³ Sarah Valentine, *Legal Research as a Fundamental Skill: A Lifeboat for Students and Law Schools*, 39 U. BAL. L. REV. 173, 211 (2010) (“Law is a profession with its own language, procedure, and structure, all requiring analysis and reasoning skills.”).

⁴ This study, like most legal scholarship, will use the Bluebook system of footnote citations. See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review et al. eds., 19th ed. 2005).

⁵ Kerr, *supra* note 1.

⁶ *Id.*

framework that governs the heart of this study. Part III will conclude and briefly summarize this chapter.

I. Legal analysis and legal research

Legal analysis “has a logic of its own” with a structure designed to bring order to systemic ambiguities and to allow for jurists and scholars to determine whether the law in a given area is undergoing a systematic shift.⁷ This analysis is not always absolute, objective, or even clear,⁸ but it does represent a system of rules — rules that “are discovered in the process of determining similarity or difference[s]” in various cases deciding the same issues.⁹ Therefore, the “heart of the study of law”¹⁰ is a three-step process of reasoning by example where first similarity is seen between cases, a rule of law is found to be inherent in the first case, and the rule is made applicable to the second case.¹¹ In the abstract, the process of reasoning by example appears to be quite simple — at least as framed by Professor Edward Levi:

A falls more appropriately in B than in C. It does so because A is more like D which is of B than it is like E which is of C. Since A is in B and B is in G (legal concept), then A is in G. But perhaps C is in G also. If so, then B is a decisively different segment of G, because B is like H which is in G and has a different result from C.¹²

⁷ See EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 140.

⁸ Id. at 1. As Levi states, “In an important sense legal rules are never clear, and, if a rule had to be clear before it could be imposed, society would be impossible.” See also, e.g., RUGGERO J. ALDISERT, LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING 3 (3rd ed. Nat’l Inst. for Trial Advocacy 1997) (contending that “[v]alue judgments” on the part of those in the legal system “form the critical decisional points in the law”); id. at 70 (“Formal criticism of the ‘reasoning’ of courts seems, at times, to form the *raison d’être* for law review publications . . . Often an alleged attack on the ‘reasoning’ of the court is really a disagreement with the value judgment implied in the court’s major premise — a disagreement with the court’s selection and interpretation of the applicable legal precept.”).

⁹ Levi, *supra* note 7, at 3.

¹⁰ Aldisert, *supra* note 8, at 96. As Aldisert argues, “The importance of legal reasoning by analogy cannot be overstated . . . [I]t lies at the heart of the Socratic method in the classroom and the courtroom.”

¹¹ Levi, *supra* note 7, at 1-2.

¹² Id. at n. 8.

Legal reasoning, therefore, is simply a process of determining likeness and difference in a set of judicial outcomes. This process is key to the development of law,¹³ and it is often a source of contention in cases, with “[l]awyers and judges . . . often vulnerable to attacks on their reasoning by analogy.”¹⁴ However, given the importance of legal reasoning, it “cannot be artificial, esoteric, or understandable only to an elite legal priesthood; it must be capable of public comprehension.”¹⁵

Whereas legal reasoning is the process in which jurists and scholars study the current state and future direction of the law, legal research is the process of gathering texts “that explain or analyze”¹⁶ those rules observed in individual cases. As Supreme Court Justice Felix Frankfurter described it, legal research requires imagination to find relationships, the ability to synthesize the law, and the “prophetic quality of piercing the future” in order to know the right questions to ask and which ways to direct research.¹⁷ Legal research is centered on the collection of primary and secondary sources that speak to a specific research question; primary sources are those pronouncements of law from either the judicial, legislative, or executive branches of American government,¹⁸ whereas secondary sources include “[r]esearch guides, directories, dictionaries, law reviews, current awareness resources, blogs, and working papers” that “can

¹³ See *id.* at 3 (“Reasoning by example in the law is a key to many things.”) See also *id.* at 3-4 (stating that reasoning by example shows the role litigants and society have in the development of the law in addition to bringing into focus similarities and differences in the interpretation of case laws, statutes, and constitutions).

¹⁴ Aldisert, *supra* note 8, at 51. See also *id.* at 70 (“Legal reasoning is subject to more scrutiny than any other aspect of the judicial process.”).

¹⁵ *Id.* at 41.

¹⁶ MORRIS L. COHEN & KENT C. OLSON, *LEGAL RESEARCH IN A NUTSHELL 2* (11th ed. W. Grp. 2013).

¹⁷ Ian Gallacher, *Forty-Two: The Hitchhiker's Guide to Teaching Legal Research to the Google Generation*, 39 AKRON L. REV. 151, 158 (2006). See Valentine, *supra* note 3, at 178 (2010) (“Legal research is a legal skill that teaches basic legal knowledge necessary for successful completion of law school. It also requires issue-spotting, legal analysis, and the application of law to facts. When taught as a legal skill, legal research reinforces and supports the learning of doctrine and analysis.”) See also LAUREL CURRIE OATES, ANNE ENQUIST & KELLY KUNSCH, *THE LEGAL WRITING HANDBOOK 41* (4th ed. Aspen Publishers 2006) (“Analysis is the process of taking a statute or case apart . . . [i]n contrast, synthesis is the process of putting the pieces together.”).

¹⁸ Lisa Smith-Butler, *Cost Effective Legal Research Redux: How to Avoid Becoming the Accidental Tourist, Lost in Cyberspace*, 9 FL. COASTAL L. REV. 293, 294 (2008).

point a researcher to primary sources of law and clarify legal concepts.”¹⁹ This distinction between primary and secondary is both important (as primary authorities are binding and controlling on a given issue)²⁰ and fixed as “[a]n authority is either part of ‘the law,’ or it is not.”²¹

In sorting through primary authorities during legal research, court opinions must be given their proper weight, as “[e]very holding of every decision does not deserve the black-letter law treatment that some judges or commentators wish to give it.”²² This means that opinions must be put in the proper context of the American legal system, with binding decisions in the area of the research topic from the Supreme Court afforded the most weight and decisions from lower appellate and trial courts given less weight.

In the realm of secondary authorities, law review articles can be an important source as “they are among the best sources for researching changes in the law.”²³ These pieces are “the major forum through which legal academics debate and develop legal theories[.]” in addition to offering sections that summarize relevant law and footnotes to other secondary authorities.²⁴ Furthermore, law review articles are usually edited by students, advocate for changes in the legal system, and have a less neutral perspective than legal encyclopedias and treatises.²⁵ Articles by leading scholars should be given the most credibility, but the weight of an individual article can depend on a number of factors such as the author’s expertise, the journal’s reputation, the

¹⁹ *Id.* at 328.

²⁰ Court decisions are one example of primary authorities, but they can also be secondary authorities as decisions in one jurisdiction are not binding (but merely suggestive) in another jurisdiction that has not decided the issue at hand. *See* Cohen & Olson, *supra* note 16, at 5-6 (“Legal sources differ in the weight they are accorded. Some are binding authority, while others are only persuasive in varying degrees or are useful only as tools for finding other sources. Each source must be used with a sense of its place in the hierarchy of authority. In evaluating authority, you must distinguish between primary and secondary authority.”).

²¹ AMY E. SLOAN, *BASIC LEGAL RESEARCH* 5 (5th ed. Wolters Kluwer Law & Bus. 2012).

²² Aldisert, *supra* note 8, at 13.

²³ Cohen & Olson, *supra* note 16, at 44.

²⁴ *Id.*

²⁵ *Id.*

passage of time since the article's publication, and the depth of the article's research and analysis.²⁶

Despite its ubiquity, there are legitimate caveats to undertaking legal research. First, while legal research first began in a system of printed casebooks in 1789,²⁷ it began to move to computer databases beginning in the 1970s.²⁸ The move to electronic sources brought more access to information, but that has its own complications as now researchers can be lost in a “tsunami of legal information,”²⁹ with useful information being harder to find in the sea of what is currently available.³⁰ Second, research is a nonlinear process, one that needs to be constantly reevaluated to determine relevance and relative success.³¹ Finally, good legal research requires an ability to place texts in proper “historical, social, economic, political, and legal contexts;”³²

²⁶ Sloan, *supra* note 21, at 47.

²⁷ Gallacher, *supra* note 17, at 160.

²⁸ *Id.* at 164. *See also* Smith-Butler, *supra* note 18, at 294 (noting that “[g]enerations of law students, now attorneys, learned to research with print finding aids” while now electronic databases have become the norm).

²⁹ Valentine, *supra* note 3, at 205. *See also id.* at 194-95 (“The ability to locate more authority (both primary and secondary), across more jurisdictions, creates a situation where ‘the coin of judicial precedent has been debased’ and the ‘delegalization of law’ has begun. This has been described as the ‘relaxation of the hierarchical distinctions among primary, secondary, and tertiary source materials’ and evidence of ‘the diminishing autonomy of the law.’”).

³⁰ *Id.* at 189. *See also id.* (“[T]he concept of a conscious, thoughtful, articulable research process has been disrupted by the ease of typing one or two words into a search engine and being rewarded with pages of results.”).

³¹ *See, e.g.,* Sloan, *supra* note 21, at 15 (“As you locate information, you will need to evaluate its relevance to your research issue. One important aspect of assessing the information you find is making sure it is up-to-date. The law can change at any time. New cases are decided; older cases may be overruled; statutes can be enacted, amended, or repealed. Therefore, keeping your research current is essential.”); *id.* at 17 (stating that research terms or a research plan may need revision to be completed).

³² Oates, Enquist & Kunsch, *supra* note 17, at 42. *See also* Valentine, *supra* note 3, at 207-08 (“Legal research requires an ability to sort through and correctly spot the issues provoked by a given set of facts; the ability to formulate a research plan; knowledge of how to find, read, and update primary authority; knowledge of the available secondary sources and when and how to use them to educate oneself on the issue; an understanding of jurisdiction and the nature of precedent so as to recognize the applicable primary authority; an ability to understand citation; the capacity to synthesize and apply the information found to the original issue; and an ability to recognize when the research process is complete. It also requires the researcher to be able to accomplish all of those steps in which-ever format (print, electronic, or some combination) is available.”).

the inherent skepticism needed to question and evaluate all materials;³³ and the realization that “legal research cannot be mechanically divorced from legal analysis and reasoning.”³⁴

II. The suggested legal framework for the analysis of violent student speech

In sorting the various cases that have addressed violent student speech, common themes and fact patterns tend to emerge. Using legal reasoning, a framework was established to both make some sense of these cases and to argue for a better way forward for courts examining violent student speech. This framework (seen in the following chart) is built on three different types of student speech intersecting with violent expression:

| Type of expression | Legal analysis | Examples |
|--|---|--|
| <p>Chapter 5: Violent non-sponsored curricular student speech</p> <p>Violent speech created in the normal course of education or in furtherance thereof</p> | <p>Does the expression appear to be a true threat?</p> <p>If no</p> <p>Non-sponsored curricular speech standard</p> | <p><i>Cuff, Cox v. Warwick Valley Central Sch. Dist.</i>, 654 F.3d 267 (2nd Cir. 2011); <i>Emmett v. Kent Sch. Dist.</i>, 92 F. Supp. 2d 1088 (W.D. Wash. 2000); <i>Finkle v. Bd. of Ed. of Syosset Cent. Sch. Dist.</i>, 386 F. Supp. 2d 119 (E.D.N.Y. 2005)</p> |
| <p>Chapter 6: Violent noncurricular student speech</p> <p>Violent speech created outside of the classroom</p> | <p>Does the expression appear to be a true threat?</p> <p>If no</p> <p>Is the expression truly student speech?</p> <p>If yes</p> <p><i>Tinker</i> material, substantial disruption standard</p> | <p><i>Bell; Miller v. Penn Manor Sch. Dist.</i>, 588 F. Supp. 2d 606 (E.D. Penn. 2008); <i>In re George T.</i>, 93 P.3d 1007 (Cal. 2004); <i>Latour v. Riverside Beaver Sch. Dist.</i>, 2005 U.S. Dist. LEXIS 35919 (W.D. Penn. 2005)</p> |
| <p>Chapter 7: Threatening student speech</p> <p>Student speech properly analyzed under the true threat standard</p> | <p>Does the speech lack constitutional protection under true threat analysis?</p> <p>If no</p> <p><i>Tinker</i> material, substantial disruption standard</p> | <p><i>Wynar; Commonwealth v. Milo M.</i>, 740 N.E.2d 967 (Mass. 2001); <i>State v. McCooey</i>, 802 A.2d 1216 (N.H. 2002); <i>S.G. v. Sayreville Bd. of Ed.</i>, 433 F.3d 417 (3rd Cir. 2003); <i>Lovell v. Poway Unifed Sch. Dist.</i>, 90 F.3d 367 (9th Cir. 1995)</p> |

³³ Oates, Enquist & Kunsch, *supra* note 17, at 42.

³⁴ Valentine, *supra* note 3, at 211.

Chapter 5 addresses violent non-sponsored curricular student speech, or violent speech created during the normal course of education such as when educators commission speech for the purposes of in-class assignments. This category will also govern cases where students have been so interested in school assignments as to create their own expression³⁵ or to create expression for the purpose of review and advice from instructors.³⁶ In short, this first category governs violent student expression that is fundamentally related to advancing the learning process of students. It must be created either at the behest of a school or by a student as an extension of their education. This category is narrowly defined as this study will suggest a new standard for evaluating this type of student speech — a standard that is far more protective than any Supreme Court formulation to date.

Chapter 6 addresses violent student speech that exists outside of the curriculum. Here, the violent speech is not connected to the educational process and is brought into the school community by a student speaker. This speech is properly adjudicated by the existing *Tinker* material and substantial disruption standard.

Analysis as curricular and extracurricular speech presupposes the speech in question is eligible for First Amendment protection. Therefore, before this analysis can take place, there needs to be at least a perfunctory examination of whether the speech in question is a threat to another person. If the speech resembles a threat, then it is properly analyzed as such in Chapter 7. Where student speech is threatening but its regulation does not survive true threat analysis, schools may properly seek to sustain discipline under the traditional *Tinker* standard.

In noncurricular student speech, if the expression is both abstract in nature and should not be interpreted as a threat by reasonable adult listeners, then the speech is deserving, first, of a real

³⁵ See *Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088 (W.D. Wash. 2000).

³⁶ See *Lavine v. Blaine Sch. Dist.*, 279 F.3d 719 (9th Cir. 2002), cert. denied, *Lavine v. Blaine Sch. Dist.*, 2002 U.S. LEXIS 4948 (2002).

analysis as to whether it is student speech subject to school discipline, and second, if it is truly student speech, it should receive the full measure of protection under the *Tinker* standard. In this category, student expression should be evaluated as a whole and not judged on its most violent component parts; therefore, *Bell*, even as a student in the case suggested that his teacher should be “cap[ped],”³⁷ properly belongs in this category as the would-be threat is only a single line in the student’s rap song.

If a student either intended speech to be a threat, it contained literal threats of violence, or the speech, when taken as a whole, was best interpreted as a threat by reasonable adults, then schools should have the greatest measure of authority to punish the speech. *Wynar*, with its discussion of body counts and dates for an attack, belongs in this final category.

This framework represents a principled attempt at separating that speech deserving of protection under the educational process from that speech that simply represents self-expression from students; in other words, this separates speech the school must foster and encourage as a part of its educational mission from speech it must simply tolerate.³⁸ Furthermore, it also attempts to delineate a category of speech where school administrators should actually have the great degree of deference that courts tend to award them.

III. Conclusion

This chapter outlined the necessary concepts and themes in legal analysis, legal research, and the framework for this study. This study will rely on both primary and secondary sources in an effort to illuminate the legal and social issues regarding the regulation of violent student speech. Such speech cases will then be analyzed using the traditional reasoning-by-analogy

³⁷ *Bell v. Itawamba County Sch. Bd.*, 859 F. Supp. 2d 834, 836 (N.D. Miss. 2012).

³⁸ Frank D. LoMonte, “*The Key Word is Student*”: *Hazelwood Censorship Crashes the Ivy-Covered Gates*, 11 FIRST AMEND. L. REV. 305, 360 (2013) (“*Tinker* is about speech that the government is asked to tolerate, and *Hazelwood* is about speech that the government is asked to affirmatively promote.”).

strategy thereby distinguishing critical factual similarities and differences in order to best address violent student speech under the Constitution. This analysis will also be used to argue that, in many situations, Supreme Court precedent is currently being misapplied by lower courts.

CHAPTER 4

REVIEW OF RELEVANT LAW

Understanding the regulation of violent student speech in public schools requires a broad survey of several areas of Supreme Court precedent in order to gain the necessary insight into how violent student speech cases should be addressed. This survey should include not only the Court's First Amendment and student speech jurisprudence, but it should also take into account the rights of children outside of the context of expression as delineating the speech rights of children is key to understanding the speech rights they possess in schools. Furthermore, comparing the Court's decisions on violent books and video games to decisions regarding the protection of minors from sexually explicit or indecent material also creates a useful contrast. Thus, this chapter will seek to explore the rights of children generally and their First Amendment right to violent media specifically in addition to detailing the Court's evolving student speech jurisprudence.

Part I will examine the Supreme Court's definition and regulation of speech, looking at both the difficult question of symbolic speech and the doctrine of originalism.

Part II will examine the status of children under the law, beginning with an examination of how the rights of children are limited as compared to those rights possessed by adults. This section will survey the justification for those limitations by contrasting court decisions in

juvenile due process (Part II.a), expression (Part II.b), and reproductive freedoms (Part II.c). Part II.d will summarize the section.

Part III will examine the Supreme Court’s student speech jurisprudence after *Tinker*, detailing how and why subsequent cases *Fraser v. Bethel School District*, *Hazelwood v. Kuhlmeier*, and *Morse v. Frederick* began to limit the decision’s application.

Part IV will look at the efforts to protect children from sexually explicit and indecent media as seen in Supreme Court decisions in *Ginsberg v. New York*¹ and *FCC v. Pacifica*.²

Part V focuses on the efforts to limit child access to violent media, beginning first with pulp fiction detective novels and comics in *Winters v. New York*³ and continuing with the crusade to restrict the sale of violent video games to children that culminated in *Brown v. Entertainment Merchants Association*.⁴

Finally, in Part VI, this chapter concludes by arguing that children have First Amendment rights that are nearly coextensive with adults, and where those rights are limited, they are circumscribed in specific, narrowed ways — ways that are not likely to expand to cover a prohibition on violent media access or production, especially considering the Court’s decision in *Brown*. Therefore, children have a fundamental right to both access the violent expression of others and produce violent expression that is not a true threat or otherwise subject to regulation under the Constitution, and this conclusion should be a guiding principle in all analysis regarding violent student speech.

I. The definition and regulation of speech

¹ 390 U.S. 629 (1968).

² 438 U.S. 726 (1978).

³ 333 U.S. 507 (1948).

⁴ 131 S. Ct. 2729 (2011).

This Part will examine what is — and subsequently what is not — speech under the Constitution in addition to examining how the Supreme Court decides First Amendment cases.

a. What is speech?

In defining exactly what is and what is not speech, a logical place to start is the text of the First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.⁵

While the First Amendment establishes the five core freedoms of religion, speech, press, assembly, and petition, it does little to define them. But what is speech — and what is the press, for that matter? Unfortunately, the actual text of the Constitution is rather silent on the issue. As Professor R. George Wright noted, a “number of potentially crucial terms” in the Bill of Rights are without sufficient definition.⁶ Perhaps if the text of the document is not enough, then possibly we could gain some measure of understanding exactly what is “speech” from the ideas and intentions of the Framers of the Constitution. However, this focus on what the Framers intended or what they meant when writing the text — the originalist⁷ approach to Constitutional interpretation — is not without its own deficiencies, and those issues are only magnified when applied to the First Amendment.

Indeed, if we look to the Framers for any definition or meaning of “speech,” we find little help as the debates in Congress on the press and speech clauses of the First Amendment generally do not answer any questions, and few states took up the issue during the ratification of

⁵ *U.S. Const. amend. I.*

⁶ R. George Wright, *What Counts as “Speech” in the First Place?: Determining the Scope of the Free Speech Clause*, 37 PEPP. L. REV. 1217, 1219 (2010).

⁷ See generally, Sotirious A. Barber & James E. Fleming, *CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS* (2007).

the Constitution.⁸ Instead, we are left with a “dearth” of material that speaks to the intended meaning of the First Amendment.⁹ The best explanation behind the First Amendment is perhaps the most cynical as “political expediency” in spurring ratification of the Constitution — rather than a commitment to personal liberties or a dedication to speech and the press specifically — does more to explain the First Amendment than any grand philosophy.¹⁰ Furthermore, the doctrine of incorporation, or the process by which the federal Bill of Rights was made applicable to the states,¹¹ has pushed the reach and scope of the First Amendment far beyond any strict textualist construction.

If, however, we are to gain some measure of the Framers’ First Amendment intent or what was then contemporary understanding, English legal commentator Sir William Blackstone serves as one of the few touchstones as to what the Framers possibly believed the freedoms of press and speech should be. Blackstone, a legal scholar active and influential during the Framing generation, held that a free press was one that operated without prior restraints from the government, usually in the form of a bond or license.¹² In Blackstone’s regulatory regime, prior restraints would be forbidden, but almost any form of post-publication punishment — including the use of seditious libel statutes to criminally prosecute government critics — would be

⁸ See Wright, *supra* note 6, at 1221.

⁹ Kevin W. Saunders, *Symposium on Censorship & the Media: Government Censorship of Media: The Framers, Children, and Free Expression*, 25 ND J. L. ETHICS & PUB POL’Y 187, 190 (2011).

¹⁰ Derigan Silver & Dan Kozlowski, *The First Amendment Originalism of Justices Brennan, Scalia and Thomas*, 17 COMM. L. & POL’Y 385, 390 (2012) (quoting historian Leonard W. Levy).

¹¹ See generally Steven T. Voight, *Exploring the Original Intent of Congress for the Fourteenth Amendment and the Incorporation Doctrine*, 79 PA BAR ASSN. QUARTERLY 126 (2008). Under the Fourteenth Amendment, the fundamental freedoms contained in the Bill of Rights are said to be “incorporated” in the amendment’s due process clause and therefore applicable against state governments. *Id.* at 127-28. This point is relevant in a discussion of the original meaning of the First Amendment simply because the text of the amendment states “Congress shall make no law[.]” Clearly, in the modern era, we have gone beyond the plain text of the amendment.

¹² Matthew D. Bunker, *Originalism 2.0 Meets the First Amendment: The “New Originalism,” Interpretive Methodology, and Freedom of Expression*, 17 COMM. L. & POL’Y 329, 334 (2012).

allowed.¹³ Thus, Blackstone’s conceptualization of free expression is “far more limited than the modern view,” as succinctly framed by one scholar.¹⁴ While the exact amount of influence Blackstone had on the Framers is somewhat debatable,¹⁵ the Alien and Sedition Acts, a set of four bills passed in the fifth Congress in 1789 designed to criminally punish speech against the government, at least bear out Blackstone’s principles as the Framing generation began the task of governing under the Constitution.¹⁶

Even with the Framers as a collective leaving little behind to discern the original intent of the First Amendment, many scholars still turn to individual Framers to divine their solutions to contemporary speech issues. Professor Kevin W. Saunders, for example, tried to answer the question of whether the Framers would have allowed children to play violent video games.¹⁷ His approach focused on exploring the opinions of the Framers in regards to child rearing generally how children should be sheltered from certain corrupting influences specifically.¹⁸ Thomas Jefferson, as Professor Saunders contended, opposed sending American children to England for fear that they would be corrupted by drinking, horse racing, and boxing.¹⁹ Likewise, James Madison had concerns that children would be overly influenced by those around them.²⁰ Thus, Professor Saunders arrived at the conclusion the Framers would fear the effects that violent video games would have on children and would therefore prohibit minors from gaining access to them.²¹

¹³ *Id.*

¹⁴ Saunders, *supra* note 9, at 189.

¹⁵ Bunker, *supra* note 12, at 335-36.

¹⁶ See generally, William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91 (1984).

¹⁷ See Saunders, *supra* note 9.

¹⁸ *Id.*

¹⁹ *Id.* at 199.

²⁰ *Id.* at 201.

²¹ *Id.* at 235 (“From the preceding analysis it seems impossible to claim to be an originalist, while maintaining that children have a right directly to obtain violent video games and that the video game industry has a right to provide

However soon after Professor Saunders's work was published, the Supreme Court addressed the question of whether minors had a constitutional right to access violent video games in *Brown v. Entertainment Merchants Association*.²² In that case, the Court found a California statute barring the sale of such games to minors to be unconstitutional²³ without relying on an originalist constitutional interpretation; yet Professor Saunders's investigation at least foreshadowed both some of the discussion during *Brown*'s oral argument,²⁴ and Justice Clarence Thomas's dissenting opinion built on many of the originalist principles espoused by Professor Saunders.

In his dissent, Justice Thomas engaged in a historical inquiry surveying Puritan beliefs along with the writings of John Locke, Rousseau, and Jefferson before concluding “[t]he freedom of speech,’ as originally understood, does not include a right to speak to minors without going through the minors' parents or guardians.”²⁵ The *Brown* dissent premised on originalism and concluding that minors had fewer free speech rights than adults was not the first such dissent for Justice Thomas. Just four years earlier, Thomas concluded in his dissent in *Morse v. Frederick*²⁶ that “the history of public education suggests that the First Amendment, as originally understood, does not protect student speech in public schools.”²⁷ To arrive at that conclusion,

those materials directly to children. While parents might be seen to have a right to obtain the games for their children, a right on the part of children and vendors clearly runs contrary to the beliefs of the Framers.”)

²² 131 S. Ct. 2729 (2011). See Part V, *infra*, for a discussion of the case and its regulation of media access for minors.

²³ *Id.* at 2741-42. The majority opinion, written by Justice Antonin Scalia, found that the California statute failed the strict scrutiny test as it was both over inclusive and under inclusive.

²⁴ Oral arguments, *Brown v. Entertainment Merchants Association*, Supreme Court website (May 16, 2013, 2 PM), http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1448.pdf. Justice Alito made the quip “Well, I think what Justice Scalia wants to know is what James Madison thought about video games,” and Justice Scalia responded, “No, I want to know what James Madison thought about violence. Was there any indication that anybody thought, when the First Amendment was adopted, that there — there was an exception to it for — for speech regarding violence?”

²⁵ *Brown*, 131 S. Ct. at 2761 (Thomas, J., dissenting).

²⁶ 551 U.S. 393 (2007). See Part III, *infra*, for a discussion of the case.

²⁷ *Id.* at 410-11 (Thomas, J., dissenting).

Justice Thomas relied on historical research regarding America's first public schools²⁸ and early judicial and scholarly support for the legal doctrine of *in loco parentis*,²⁹ a concept granting authority to school administrators in order to supervise and discipline children in public schools.

Despite the historical evidence marshalled to support his positions in both *Morse* and *Brown*, Justice Thomas failed to convince any of his fellow justices to sign on to either of his opinions, signaling a personal and idiosyncratic approach rather than a broad commitment from the Court to this type of interpretative method.³⁰ While inquiries into the minds of Jefferson, Madison, and the rest of the Framers are at least intellectually interesting, they fail to truly and definitively answer the First Amendment questions of the 21st century, and even those deeply involved with the historical research like Professor Saunders admit as much.³¹ Therefore, in answering the question of what is and what is not speech, we must go beyond both the text of the First Amendment and the intent or original understanding of the Framers to arrive at a workable definition of speech.

Some of the most difficult speech cases to reach the Supreme Court have focused not on spoken or written language but on whether conduct in a given case was sufficiently expressive to merit First Amendment protection. One possible definition of speech as suggested by Professor Wright might be as simple as requiring a relevant and voluntary act on the part of the speaker in

²⁸ As Justice Thomas's historical inquiry concluded, "[I]n the earliest public schools, teachers taught, and students listened. Teachers commanded, and students obeyed. Teachers did not rely solely on the power of ideas to persuade; they relied on discipline to maintain order." *Id.* at 412. See also William C. Nevin, *In the Weeds with Thomas: Morse, in loco parentis, Corporal Punishment, and the Narrowest View of Student Speech Rights*, 2014 BYU EDUC. & L.J. 249 (2014).

²⁹ In his dissent, Justice Thomas cited Blackstone's definition of *in loco parentis*: "[A parent] may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then in loco parentis, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed." *Id.* at 413 (quoting Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 441 (1765)).

³⁰ See Kenneth W. Starr, Symposium, *Our Libertarian Court: Bong Hits and the Enduring Hamiltonian-Jeffersonian Colloquy*, 12 LEWIS & CLARK L. REV. 1, 15 (2008) (concluding that, in his *Morse* dissent, Justice Thomas's approach was an "iconoclasm" as compared to other justices on the Court).

³¹ Saunders, *supra* note 9, at 190.

order to receive First Amendment protections.³² This definition would clearly cover simple pure speech as well all forms of symbolic speech, or nonverbal and non-written forms of communication. Yet as Professor Wright argued, there is a danger in crafting a definition of speech that is too broad as such a definition “risks diluting and trivializing, and eventually even subverting, the constitutionally fundamental status of speech.”³³ In cases like *U.S. v. O’Brien*³⁴ (draft card burning), *Texas v. Johnson*³⁵ (flag burning), and — most importantly for a discussion of student speech rights — *Tinker v. Des Moines Independent Community School District*³⁶ (student armbands protesting the Vietnam War), the deciding factor is often to what extent the Court is willing to privilege the symbolism at hand as speech. Symbolic speech has been analyzed by the Supreme Court under different rubrics, the most stringent being a requirement to both communicate “a particularized message” and do so that “in the surrounding circumstances the likelihood [should be] great that the message would be understood by those who viewed it.”³⁷

Perhaps the best way to view symbolic speech is simply as a “short cut from mind to mind,”³⁸ as phrased by Justice Robert H. Jackson in the Supreme Court’s majority opinion in *West Virginia State Board of Education v. Barnette*.³⁹ Under Justice Jackson’s formulation, symbolic speech deserves as much First Amendment protection as a newspaper or any other written or spoken expression — in symbolic speech, we are communicating all the same, simply relying on shared understanding between individuals rather than a written or spoken language.

³² Wright, *supra* note 6, at 1233-34.

³³ *Id.* at 1241.

³⁴ 391 U.S. 367 (1968).

³⁵ 491 U.S. 397 (1989).

³⁶ 393 U.S. 503 (1969).

³⁷ James M. McGoldrick, Jr., *United States v. O'Brien Revisited: Of Burning Things, Waving Things, and G-Strings*, 36 U. MEM. L. REV. 903, 918 (2006) (quoting *Spence v. Washington*, 418 U.S. 405, 410-11 (1974)).

³⁸ *Id.* at 924.

³⁹ 319 U.S. 624, 632 (1943).

Ultimately, in deciding the fundamental question of what is speech, the issue turns on the speaker's intent, since without a speaker's intention to be understood in some definitive fashion by an audience, it is doubtful that speech in the constitutional sense has taken place.⁴⁰ The Court's approach in considering both the speaker's intent and the audience's capacity for understanding that intent is, at the end, a "sound" approach, according to Professor Edward J. Eberle.⁴¹ In considering the text of the Constitution, the lack of any clear intent from the Framers, and the difficulties in evaluating symbolic speech, "properly setting the bounds of what should count as speech for First Amendment purposes is a judicially and theoretically inescapable task of unavoidable complexity," as Professor Wright concluded.⁴²

b. The Supreme Court's overall speech framework

The beginnings of the Supreme Court's speech jurisprudence were rather simplistic. Under a theory advanced in early 20th century cases such as *Chaplinsky v. New Hampshire*,⁴³ either speech was totally protected under the Constitution as a fundamental right or it was not protected at all, with libelous speech, obscenity, and fighting words comprising the sum total of speech outside constitutional purview.⁴⁴ Yet as the Court took up free expression cases in the latter half of the 20th century, a new and more complex system of evaluating speech evolved as a two-tiered system soon became four levels of constitutional analysis. Under this new analysis, no longer was it simply protected or unprotected speech; the former now includes high,

⁴⁰ Wright, *supra* note 6, at 1238.

⁴¹ Edward J. Eberle, *The Architecture of First Amendment Free Speech*, 2011 MICH. ST. L. REV. 1191, 1198 (2011).

⁴² Wright, *supra* note 6, at 1258.

⁴³ 315 U.S. 568 (1942). In *Chaplinsky*, the Court addressed the criminal conviction of a man accused of calling a city marshal "a God damned racketeer" and "a damned Fascist." *Id.* at 569. The conviction was upheld by the Court under the theory that the language was properly proscribable as "fighting words" or "epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace," as the Court found Chaplinsky's insults to be. *Id.* at 574.

⁴⁴ Eberle, *supra* note 41, at 1191-92.

intermediate, and low levels of protection for speech, while the latter is best thought of as “minimally valued speech” and still outside the scope of the First Amendment.⁴⁵

Highly protected speech includes expression at the heart of the First Amendment, be it political, religious, academic, scientific, or artistic speech.⁴⁶ Such speech is protected by the strict scrutiny test, a demanding system of evaluation that requires that government must show a compelling interest for its speech regulation along with narrow tailoring and that its regulation is the least restrictive means available for achieving the desired goal.⁴⁷ Under this system of strict scrutiny, the results of the test should be “highly predictable” and generally in favor of free speech interests — so predictable, that strict scrutiny is best conceptualized as a rule that grounds the Court’s First Amendment jurisprudence, according to Professor Eberle.⁴⁸ However, strict scrutiny is no longer the assumed victory for expression it once was, with courts expanding ways to avoid strict scrutiny examination, the weakening of the compelling interest standard, and the general difficulty of conducting narrow tailoring analysis.⁴⁹

Intermediate levels of protected speech include commercial speech and types of offensive speech outside of indecency and obscenity.⁵⁰ Instead of receiving the benefits of the strict scrutiny test, intermediate and low level protections for speech involve various types of balancing tests where the value of the speech is measured against the importance of the government’s interest in regulating the expression.⁵¹ *Central Hudson Gas & Electric Corp. v.*

⁴⁵ Id. at 1193-94.

⁴⁶ Id. at 1205.

⁴⁷ See generally, K.G. Jan Pillai, *Phantom of the Strict Scrutiny*, 31 NEW ENG. L. REV. 397 (1997).

⁴⁸ Eberle, *supra* note 41, at 1225-26.

⁴⁹ Matthew D. Bunker, Clay Calvert & William C. Nevin, *Strict in Theory, But Feeble in Fact? First Amendment Strict Scrutiny and the Protection of Speech*, 16 COMM. L. & POL’Y 349, 377-78 (2011).

⁵⁰ Eberle, *supra* note 41, at 1205-06.

⁵¹ Id. at 1226.

Public Service Commission,⁵² a case in which the Court established a four-part test evaluating the constitutionality of restrictions on commercial speech, represents a typical example of how the Court views intermediately protected speech. In essence, this category of expression recognizes the speech interest of the speaker as somewhat important, yet that individualized importance must be balanced against sometimes equally important state counter-interests, such as protecting consumers in the area of commercial speech.

Low value speech, which is likewise treated with a context-specific balancing test, includes broadcast indecency, libel directed against private individuals, and nude dancing among other subjects.⁵³ Often this speech is allowed to be channeled or directed in specific ways, such as broadcast indecency's confinement to late night hours⁵⁴ or the regulatory authority given to municipalities to regulate adult bookstores and theatres via city ordinance.⁵⁵ Where low value speech is concerned, the Court has cited the colorful analogy of a barnyard pig taking residence in a front parlor — the point being that government may properly confine the pig to its place in the pigpen rather than deal with its presence in an unwanted place.⁵⁶

Finally, unprotected speech still includes fighting words (as seen in *Chaplinsky*), obscenity, defamation containing actual malice,⁵⁷ incitement, and child pornography.⁵⁸ This

⁵² 447 U.S. 557 (1980).

⁵³ Eberle, *supra* note 41, at 1206.

⁵⁴ See *F.C.C. v. Pacifica*, 438 U.S. 726, 750 (1978) (noting that the Court's decision to uphold the F.C.C.'s action against a radio station for airing indecent programming rested on "a host of variables" including the time of day).

⁵⁵ See *City of Renton v. Playtime Theatres*, 475 U.S. 41, 54 (1986) (concluding that a city ordinance limiting adult theatres to areas more than 1,000 feet from a residential area, school, church, or park "represents a valid governmental response to the admittedly serious problems created by adult theaters") (internal quotation omitted).

⁵⁶ See *Pacifica*, 438 U.S. at 750. See also Clay Calvert, *Of Burning Houses and Roasting Pigs: Why Butler v. Michigan Remains a Key Free Speech Victory More Than a Half-Century Later*, 64 FED. COMM. L.J. 247 (2012) (tracing the origins and use of the pig analogy).

⁵⁷ "Actual malice" is seen in a statement containing a known falsity or evidencing a reckless disregard for the truth. *New York Times v. Sullivan*, 376 U.S. 254, 280 (1964). Absent a showing of actual malice, otherwise defamatory speech about public officials and public figures is insulated from civil liability. When defamatory statements are

speech is often circumscribed due to its lack of societal value, such as in the case of obscenity,⁵⁹ or because, as seen in incitement, fighting words, and child pornography, its harm to both individuals and society far outweighs any potential benefit from the expression contained in the speech.⁶⁰

While the Supreme Court’s speech jurisprudence has evolved into something more or less ordered, it is not a simple task to place the Court’s student speech decisions into the overall framework. At first blush, it is easier to see what student speech is not — namely, it is not highly protected speech nor is it speech without protection whatsoever. At its apex, student speech never received the (supposed) total protections of strict scrutiny. Likewise, “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”⁶¹ Therefore, student speech broadly comprises both intermediately and low valued speech as evidenced by the Supreme Court’s quartet of seminal cases on the issue.

The precise level of protection, however, depends on the specific school context and the accompanying characteristics of the speech: *Tinker*, with its standard of requiring a substantial disruption before speech can be regulated, applies where the speaker is clearly a student and the content of the speech is not vulgar; *Bethel School District No. 403 v. Fraser*⁶² controls where the speech is lewd or otherwise unfit for a school audience; *Hazelwood School District v.*

made with actual malice, the constitutional shield is removed because such utterances fail to operate in the best interest of free speech and democratic discourse.

⁵⁸ Eberle, *supra* note 41, at 1207.

⁵⁹ See *Miller v. California*, 413 U.S. 15, 24 (1973) (defining obscenity, in part, as speech that does not have “serious literary, artistic, political, or scientific value”). See also Catherine J. Ross, *Anything Goes: Examining the State’s Interest in Protecting Children from Controversial Speech*, 53 VAND. L. REV. 427, 449 (2000) (describing obscenity as “what is generally called hard-core pornography”).

⁶⁰ See *New York v. Ferber*, 458 U.S. 747, 758 (1982) (concluding non-obscene child pornography is outside of the scope of the First Amendment as “the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child”).

⁶¹ *Tinker*, 393 U.S. at 506.

⁶² 478 U.S. 675 (1986).

*Kuhlmeier*⁶³ applies where pedagogical concerns are implicated and when speech “bear[s] the imprimatur of the school;”⁶⁴ and finally, when read narrowly, *Morse v. Frederick* stands for the proposition that student speech regarding illegal drug use can be silenced given the need to protect children from the dangers of such drugs under reasoning similar to *Fraser*. *Tinker* most closely represents an intermediate-level protection of speech where a student’s free expression rights are balanced against a school’s necessities of order and operation, whereas *Fraser*, *Hazelwood*, and *Morse* all track closer to a low-value system of regulation since each case skews somewhat in favor of school needs rather than the free expression rights of students.

II. Recognizing and circumscribing child rights generally

The rights, responsibilities, and liberties of children have developed in a “patchwork and inconsistent fashion” as Congress, state policymakers, and courts (the Supreme Court among them) have struggled to craft consistent ways to deal with children under the law.⁶⁵ In delineating the rights of children, analysis generally centers on a child’s level of capacity or ability to “understand the material information, to make a judgment about the information in light of their values, to intend a certain outcome, and to communicate freely their wishes to care givers or investigators.”⁶⁶ Capacity is important under the “choice theory” of children’s rights; without competency, children are incapable of making reasonable choices and are thus properly denied the rights and responsibilities afforded to adults.⁶⁷ Choice, as the theory posits, is central to the

⁶³ 484 U.S. 260 (1988).

⁶⁴ *Id.* at 271.

⁶⁵ Larry Cunningham, *A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status Under Law*, 10 UC DAVIS J. JUV. L. & POL’Y 275, 277 (2006). *See also* Shabnam Naznin Ahmed, Comment, *The Breached Contract: What Society Owes Its Children for Minimizing Their Constitutional Rights*, 50 HOW. L.J. 841, 859 (2007) (“The Court appears to understand that children deserve constitutional protections but is unable to articulate a particular test to determine which rights are applicable to children.”).

⁶⁶ *Id.* at 279 (quotation omitted).

⁶⁷ *See id.* at 279. *See also* Anne C. Dailey, *Children’s Constitutional Rights*, 95 MINN. L. REV. 2099, 2100-01 (2011) (“Choice theory understands rights as deriving from the decisionmaking autonomy of the individual. From the perspective of choice theory, children do not enjoy most constitutional rights because they lack the capacity for

exercise of rights such as voting, expression, and personal liberty interests in marriage and other aspects of family life, and children simply lack the necessary autonomy to exercise these rights responsibly.⁶⁸ An adult's freedoms are limited only when the exercise of those freedoms would conflict with the rights of another, but the rights of children are limited for their own protection — in essence, to save them from their own misinformed choices.⁶⁹ Children, therefore, are the “Achilles heel of [classical] liberalism” where rights are premised on the idea that individuals can choose actions and influences of their own informed accord.⁷⁰ This Part will explore the rights of children, including rights to due process, expression, and privacy in sexual matters.

As Professor Anne Dailey argued, choice theory cannot truly address the place of children under the law as it is too narrow and fails to recognize the need to instruct the young in the democratic arts of expression and public participation.⁷¹ The better frame for a consideration of children's rights, then, may be a theory that premises the protection of child rights on their status as developing citizens — citizens that must be nurtured intellectually and allowed to “develop their capacity for rational choice and autonomous action.”⁷² Under this developmental rights theory, childhood is merely a temporary status, one that eventually gives way to

autonomous choice. The theory that children do not possess adult rights because they lack autonomous decisionmaking skills is reinforced by the existence of a robust constitutional doctrine of parental rights.”).

⁶⁸ Dailey, *supra* note 67, at 2106-07. *See also* Catherine J. Ross, *An Emerging Right for Mature Minors to Receive Information*, 2 U. PA. J. CONST. L. 233, 273 (1999) (“The Constitution grants minors a certain degree of autonomous rights, which increase in relation to capacity.”).

⁶⁹ Cunningham, *supra* note 65, at 280.

⁷⁰ Ahmed, *supra* note 65, at 892. *See also* Tamar Ezer, *A Positive Right to Protection for Children*, 7 YALE H.R. & DEV. L.J. 1 (2004) (“Children defy the conventional view of rights as implying fully rational, autonomous individuals who can exercise free choice and require freedom from governmental interference.”).

⁷¹ *See* Dailey, *supra* note 67, at 2012.

⁷² Ezer, *supra* note 70, at 40. *See also* Dailey, *supra* note 67, at 2103-04 (“The theory proposes a class of ‘developmental rights’ that operate to secure children's future autonomy by promoting their socialization into autonomous adults. The paradigm of developmental rights, it is argued, better describes children's existing constitutional rights and provides a more robust normative framework for thinking about what rights children should or should not have.”).

adulthood.⁷³ Yet during childhood, children should be allowed to “maximize the resources available to them” — without regard to their capacity — in order to “minimize the degree to which they enter adult life affected by avoidable prejudices incurred during childhood.”⁷⁴ By encouraging growth and development in a child, we are therefore “protecting the interests of the adult that the child will become,” as Professor David Archard wrote.⁷⁵ No matter how theorists conceive of their rights, the fact remains that children are “active laborers, consumers, and political activists” as they explore expression and their place in society.⁷⁶

The law tends to deal with children in one of three ways: a categorical presumption of incompetence as seen in areas such as contract law, the inability of children to make a valid will,⁷⁷ laws banning underage alcohol consumption,⁷⁸ the denial of voting rights,⁷⁹ and the prohibition of the death penalty as applied to juveniles;⁸⁰ disregarding the question of competence altogether in areas such as criminal law and expression⁸¹ where basic rights are guaranteed to all under the Constitution; and areas such as abortion rights that require a case-by-

⁷³ See David Archard, Symposium, *Do Children Have the Same First Amendment Rights as Adults? Free Speech and Children's Interests*, 79 CHI.-KENT L. REV. 83, 88 (2004).

⁷⁴ John Eekelaar, *The Emergence of Children's Rights*, 6 OXFORD J. LEGAL STUD. 161, 170 (1986).

⁷⁵ Archard, *supra* note 73, at 88.

⁷⁶ Annette Ruth Appell, *Accommodating Childhood*, 19 CARDOZO J.L. & GENDER 715, 747 (2013). See also *id.* at 744-47 (tracing the important involvement of children in various social and political movements, including the Civil Rights Movement, student speech, and gay rights).

⁷⁷ Cunningham, *supra* note 65, at 320.

⁷⁸ See *id.* at 298 (stating that the “increased risk of injury and death as a result of decreasing the drinking age” is used as a proxy for child capacity).

⁷⁹ See, e.g., Ahmed, *supra* note 65, at 860-61 (“While children born in the United States are U.S. citizens, they are afforded no political rights. We deprive them of these rights because of the same reason...that children cannot fully exercise these rights until they reach the age of eighteen, an age that has been determined by the government to be an age of maturity, when they no longer need the guidance and care required to help them develop into well-bred citizens.”); Cunningham, *supra* note 65, at 295 (explaining that a child’s lack of capacity is the basis for tying the right to vote and age and that “[m]inors are presumptively incapable of governing themselves because they lack the capacity to do so”).

⁸⁰ *Roper v. Simmons*, 543 U.S. 551, 570 (2005) (finding that the “susceptibility of juveniles to immature and irresponsible behavior means their irresponsible conduct is not as morally reprehensible as that of an adult” in concluding the death penalty as applied to juveniles to be unconstitutional (internal quotation omitted)).

⁸¹ See Cunningham, *supra* note 65 at 360-61 (contending that the Supreme Court has alternately embraced speech rights for children and restricted those rights).

case analysis of the child’s level of competence and ability to exercise rights in an informed and responsible manner.⁸² The Court’s approach to the rights of children is best seen by surveying three areas — criminal due process, First Amendment expression, and abortion rights — where it has issued important decisions defining, and in some cases limiting, child rights. Especially important in these cases is how the Court has dealt with the issue of child capacity, as some decisions have taken capacity into account, while others — namely those in expression and criminal due process — have afforded rights to children regardless of capacity. Thus these decisions, when taken as a whole, show how expression is different from other rights and one fundamental for children, a principle that should underlie all analysis regarding First Amendment rights for children.

a. *In re Gault* and criminal due process rights for juveniles

In 1967, the Supreme Court decided *In re Gault*,⁸³ a case that established the proposition that juveniles were entitled to many of the same due process criminal rights as adults and a decision cited frequently “as marking the start of the children’s rights movement in constitutional law.”⁸⁴ In common law, the question of juvenile justice was a simple one, as children younger than 7 were presumed to be incapable of the necessary intent to be criminally culpable and children older than 14 were presumed to be adults for the purposes of criminal law.⁸⁵ Between 7 and 14, a “rebuttable presumption of incapacity” served to test the culpability of individual defendants.⁸⁶ However, by the turn of the 20th century, reformers were pushing for a separate court system designed to handle only juvenile cases; under this new system, all children were

⁸² Id. at 277. See also id. at 278 (“For better or worse, the law cares in most instances about whether children are capable of exercising certain rights or being held accountable for their actions.”).

⁸³ 387 U.S. 1 (1967).

⁸⁴ Dailey, *supra* note 67, at 2129.

⁸⁵ Cunningham, *supra* note 65, at 311.

⁸⁶ Id. at 311-12.

deemed “psychologically troubled, malleable victims” who were in need of reform rather than punishment.⁸⁷ Yet as the Court found in *Gault*, many features of these juvenile courts served to deprive children of constitutionally guaranteed rights rather than provide a gentle nudge away from the path of juvenile delinquency.

The reformation of the juvenile justice system began with a simple offense when 15-year-old Gerald Gault was charged with delinquency after prank calling a neighbor with a phone conversation of the “irritatingly offensive, adolescent, sex variety.”⁸⁸ At Gerald’s first hearing on his charge of delinquency in juvenile court, testimony was presented from unsworn witnesses and no transcript or recording was made of the proceeding.⁸⁹ When Gerald was released from custody, there was no explanation from law enforcement officials as to why he was being sent home from the juvenile detention center, and his family was told only that there were to be “further [h]earings on Gerald’s delinquency.”⁹⁰ This proceeding, however, was in accordance with Arizona state law, as the Court explained in its opinion, as the state’s juvenile justice system denied child defendants notice of the charges pending against them, the right to counsel, the right to confront and cross-examine witnesses, the right against self-incrimination, the right to a transcript of the proceedings, and the right to appellate review.⁹¹

After both an intermediate appellate court and the Arizona Supreme Court dismissed a habeas corpus petition from Gerald’s parents, the U.S. Supreme Court granted cert to consider the constitutional issues of a system that denied juvenile defendants many due process

⁸⁷ Id. at 313. (“The so-called ‘Child Savers Movement’ pushed for the establishment of separate courts for minors who committed crimes to provide rehabilitation, not punishment. In doing so, they had a consistent vision of children and their capacity to abide by the requirements of the law. Children — also known as ‘infants’ — were viewed as psychologically troubled, malleable victims who needed the guiding hand and protection of the state.”).

⁸⁸ *Gault*, 387 U.S. at 4.

⁸⁹ Id. at 5-6.

⁹⁰ Id. at 6.

⁹¹ Id. at 10.

protections granted to adult defendants. Not surprisingly, the Court held Arizona’s juvenile justice system to be unconstitutional with Justice Abe Fortas concluding for the majority that “it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase ‘due process.’ Under our Constitution, the condition of being a boy does not justify a kangaroo court.”⁹² Indeed, as Justice Fortas reasoned early in the opinion, “neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.”⁹³

As Justice Fortas explained, the juvenile justice system as originally formulated was designed to be shepherded along by informal proceedings where “a fatherly judge touched the heart and conscience of the erring youth by talking over his problems, by paternal advice and admonition, and in which, in extreme situations, benevolent and wise institutions of the State provided guidance and help to save him from a downward career.”⁹⁴ Under this system, the state acted with its *parens patriae* authority⁹⁵ to “deny to the child procedural rights available to his elders” under the theory that a child had only a “right to custody,” meaning basic care and attention from either parents or the state.⁹⁶ Yet, as Justice Fortas argued, this system originally

⁹² *Id.* at 27-28.

⁹³ *Id.* at 13.

⁹⁴ *Id.* at 26 (internal quotation omitted).

⁹⁵ This is the authority of the state to act when necessary as the parent of a child and contrasts with *patria potesta*, the authority of parents. See Kathryn L. Mercer, *A Content Analysis of Judicial Decision-Making- How Judges Use the Primary Caretaker Standard to Make a Custody Determination*, 5 WM. & MARY J. OF WOMEN & L. 1, 14 (1998). See also, e.g., Dailey, *supra* note 67, at 2113 (“[P]arental rights and state *parens patriae* authority together operate to reinforce and justify the paternalistic treatment of children as less than full constitutional rights-holders.”); Cunningham, *supra* note 65, at 321-22 (“Children are presumptively incapable of taking care of themselves. Until a child reaches the age of majority, he or she is owed a duty of care by his or her parents or other legal guardian. If a parent fails to carry out this duty, the state — under its [*parens patriae*] authority — steps in to take care of the child. A parent who neglects a child can be criminally prosecuted and/or have his or her parental rights terminated. Sometimes the state aids parents in carrying out their duties. For example, compulsory school attendance and curfew laws are designed to ensure that all children — categorically — are provided with sufficient education and do not cause harm to themselves or others at night.”); Ahmed, *supra* note 65, at 896 (arguing that children “must rely on adults for nurture, care, and guidance” and when parents fail in that duty, the government must provide the same); Ezer, *supra* note 70, at 3 (“Although children defy the conventional view of negative rights, they lend themselves more readily to a positive rights regime. Their very dependence and capacity for growth call for a positive right to protection and to the means necessary for their development.”).

⁹⁶ *Gault*, 387 U.S. at 18.

designed to gently correct wayward youth and shrouded in secrecy as to “hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past”⁹⁷ fostered “arbitrariness” instead of the “enlightened procedure” that child advocates sought.⁹⁸

In comparing those rights possessed by adults in criminal and civil proceedings with those afforded to juveniles under the state of Arizona’s system, Justice Fortas concluded that “[s]o wide a gulf between the State’s treatment of the adult and of the child requires a bridge sturdier than mere verbiage, and reasons more persuasive than cliché can provide.” For the Court, it was not enough for juvenile justice reformers to simply assert that a system cloaked in secrecy and lacking in procedural process was better for children; rather, they had to affirmatively prove with some evidence that it was necessary to deprive children of constitutional rights that those in the United States would otherwise possess. Thus an important principle contained in *Gault* is a mandate that when the state seeks to abridge the rights of a child that would be normally guaranteed to an adult, it is appropriate to put the burden of proof on the state as a matter of simple fairness.⁹⁹ If the state cannot meet its burden of showing why a minor’s rights should be curtailed, as the Court would later frame the *Gault* holding, “the child’s right is virtually coextensive with that of an adult.”¹⁰⁰

⁹⁷ Id. at 24.

⁹⁸ Id. at 19.

⁹⁹ See Ahmed, *supra* note 65, at 894-95 (“Courts should give children full rights unless an institution shows it is contributing to children’s development into good citizens by doing something to address concerns of their development. The reasoning we employ to restrict children’s rights not only applies to the child but also applies to the government — if the government is going to deny children exercise of free rights to protect them, then the government should carry the burden of proving that its programs are in fact, protecting children. It is not fair, nor does it make sense, for a child to carry the burden of proving that he was not given the appropriate tools to develop into a mature, responsible citizen. The burden of proof should be placed on the state institution involved.”).

¹⁰⁰ *Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (plurality opinion). See Part II, *infra*, for more on the decision and its implications for child rights.

While the majority's holding certainly implied that children should be given a wide array of constitutional rights, Justice Hugo Black's concurring opinion was much more direct in asserting the constitutional rights of minors in the courts:

Where a person, *infant or adult*, can be seized by the State, charged, and convicted for violating a state criminal law, and then ordered by the State to be confined for six years, I think the Constitution requires that he be tried in accordance with the guarantees of all the provisions of the Bill of Rights[.]¹⁰¹

Not all of Justice's Black's colleagues on the Court shared his views; two justices, in fact, would stress the themes of deference to authority and the protection of children that would come to dominate debates in student speech and child media access. Although Justice John Harlan concurred in the Court's result,¹⁰² he urged caution and deference to state legislatures in juvenile issues, arguing that "state authorities are confronted by formidable and immediate problems" and "have determined that the most hopeful solution for these problems is to be found in specialized courts, organized under their own rules and imposing distinctive consequences."¹⁰³ Justice Potter Stewart likewise took up the task of defending the juvenile justice system status quo in his dissent, arguing that the aims of criminal adjudication and juvenile proceedings were entirely different — one system purposed on the criminal's "conviction and punishment" and the other premised on the "correction of a [child's] condition."¹⁰⁴ Justice Stewart believed strongly in the arguments advanced by the state of Arizona, namely that juvenile procedures outside of criminal courts and unbound by traditional due process demands¹⁰⁵ would result in a more therapeutic

¹⁰¹ *Gault*, 387 U.S. at 61 (Black, J., concurring) (emphasis added).

¹⁰² *Gault*, 387 U.S. at 78 (Harlan, J., concurring in part, dissenting in part).

¹⁰³ *Id.* at 69-70.

¹⁰⁴ *Gault*, 387 U.S. at 79 (Stewart, J., dissenting).

¹⁰⁵ Or, as Justice Stewart somewhat derisively framed them, "technical niceties." *Id.* at 81.

environment for children.¹⁰⁶ As he concluded, “[T]o impose the Court's long catalog of requirements upon juvenile proceedings in every area of the country is to invite a long step backwards into the nineteenth century.”¹⁰⁷

While the Court’s decision in *Gault* certainly represents an important moment for the rights of children, the majority’s opinion can also be read as concerning itself primarily with “the child’s vulnerability to state overreaching” rather than providing an explicit and affirmative recognition of the rights and dignities of children under the law.¹⁰⁸ Still, the majority’s decision is important for the rights of children because the Court’s holding does not rest on the determination of child capacity,¹⁰⁹ as the Court implicitly concludes, some rights are guaranteed under the Constitution no matter the age or capacity of an individual. Two years after *Gault*, the Supreme Court would again take up the rights of children and offer a definite statement of what they were guaranteed under the Constitution and the First Amendment; with *Tinker v. Des Moines Independent Community School District*¹¹⁰ the Court began its exploration of student speech.

b. *Tinker v. Des Moines* and the First Amendment rights of expression for children

After first getting into the arena by acknowledging the free expression rights of public school students in *West Virginia v. Barnette*,¹¹¹ the Supreme Court began its substantive exploration in student speech with its 1969 decision in *Tinker*. In *Tinker*, school administrators

¹⁰⁶ See *id.* at 79 (“In the last 70 years many dedicated men and women have devoted their professional lives to the enlightened task of bringing us out of the dark world of Charles Dickens in meeting our responsibilities to the child in our society. The result has been the creation in this century of a system of juvenile and family courts in each of the 50 States.”).

¹⁰⁷ *Id.*

¹⁰⁸ Dailey, *supra* note 67, at 2130.

¹⁰⁹ See Cunningham, *supra* note 65, at 359.

¹¹⁰ 393 U.S. 503 (1969). See Part II, *infra*, for a full discussion of the facts of this case and its place in student speech jurisprudence.

¹¹¹ 319 U.S. 624 (1943) (upholding right of elementary school students to refrain from saying the Pledge of Allegiance). See notes 127-128, *infra*, for discussion.

learned of a plan formulated by students and local adults to wear black armbands to school to protest the Vietnam War.¹¹² To prevent students from doing so, area principals met and decided to institute a policy so that any student with an armband would be first asked to remove it before being suspended.¹¹³ Three students wore armbands in violation of the policy, refused to remove them, and were subsequently suspended.¹¹⁴ The parents of the students then sued, seeking both an injunction against further discipline and nominal damages.¹¹⁵ They found no relief at the district court level, however, as the court upheld the actions of the administrators as constitutional in light of their responsibilities to maintain school discipline.¹¹⁶ The Eighth Circuit Court of Appeals split equally in an *en banc* decision, thereby affirming the lower court's decision in favor of the school district.¹¹⁷

The issue before the Supreme Court in *Tinker*, simply stated, was a matter of determining who wins when the free expression rights of students collide with the rules of school officials.¹¹⁸ In finding for the students, the Court established a new standard by which to evaluate the question of expression versus school discipline:

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,” the prohibition cannot be sustained.¹¹⁹

¹¹² 393 U.S. at 504.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 504-05.

¹¹⁷ *Id.* at 505.

¹¹⁸ *Id.* at 507.

¹¹⁹ *Id.* at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (1966)).

The Court found the school administrators' arguments of possible school disruption unconvincing.¹²⁰ As the majority opinion concluded, there was “no evidence whatever of petitioners' interference, actual or nascent, with the schools' work” and the armbands in no way interfered with the rights of other students.¹²¹ Simply fearing the negative repercussions of the armbands was not sufficient to punish the students as the Court found that the “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.”¹²²

Justice Fortas, again writing for the majority,¹²³ established early in the Court's opinion the thinking that would underlie his analysis when he wrote, “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,”¹²⁴ a line cited in some form in almost every subsequent student speech case. It was crucial to recognize a child's right to First Amendment expression at the outset of *Tinker*, because, again, if a child had no First Amendment rights outside of the theoretical “schoolhouse gate,” the question of whether they could assert those rights would obviously be a moot one; thus, as Professor Catherine J. Ross concluded, the Court made it “clear by implication” that children have First Amendment rights outside the school setting.¹²⁵ Justice Fortas, however, repeatedly turned to the topic of rights for students throughout the Court's opinion:

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are

¹²⁰ *Id.* at 508.

¹²¹ *Id.*

¹²² *Id.*

¹²³ Justice Fortas may have been chosen to write the majority opinion in *Tinker* because he was seen as the Court's “expert on children's rights” after his opinion in *Gault*. John W. Johnson, *Behind the Scenes in Iowa's Greatest Case: What is Not in the Official Record of Tinker v. Des Moines Independent Community School District*, 48 *DRAKE L. REV.* 473, 485 (2000).

¹²⁴ *Id.* at 506.

¹²⁵ Ross, *supra* note 68, at 236.

“persons” under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.¹²⁶

Justice Fortas’s declaration that “schools may not be enclaves of totalitarianism” is specially evocative of similar language in *West Virginia State Board of Education v. Barnette*,¹²⁷ a case barring school officials from compelling students to recite the Pledge of Allegiance in which the Court cautioned that “no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”¹²⁸ To emphasize the broad nature of child First Amendment rights, Justice Fortas also explained that the free expression rights belonging to students were not temporally, physically, or scholastically limited:

The principle of these cases is not confined to the supervised and ordained discussion which takes place in the classroom. The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student’s rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without “materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school” and without colliding with the rights of others.¹²⁹

¹²⁶ *Tinker*, 393 U.S. at 511.

¹²⁷ 319 U.S. 624 (1943).

¹²⁸ *Id.* at 642.

¹²⁹ *Tinker*, 393 U.S. at 512-13.

Thus, according to the majority, the free speech rights of students are not to be limited to the confines of the classroom or even to administration-approved discussion topics. As the Court would later characterize *Tinker*, the decision shows that while children are subject to more state authority than adults, the state “may not arbitrarily deprive [children] of their freedom of action altogether.”¹³⁰

Justice Stewart, however, disagreed with what he saw as the majority’s broadest point — that “the First Amendment rights of children are co-extensive with those of adults”¹³¹ — and sought to distance himself from that conclusion in a one-paragraph concurring opinion. In arguing that the First Amendment rights of children were indeed limited, Justice Stewart pointed to the Court’s then-recent decision in *Ginsberg*, a case in which the justices upheld a New York law banning the sale of sexually suggestive magazines to minors.¹³² Justice Stewart wrote simply that he “continue[d] to hold the view he expressed”¹³³ in *Ginsberg* that a state can determine, consistent with the Constitution, that children lack the necessary capacity for the exercise of First Amendment rights.¹³⁴

As Justice Stewart argued in *Ginsberg*, “The Constitution guarantees, in short, a society of free choice. Such a society presupposes the capacity of its members to choose.”¹³⁵ Where speakers cannot choose to exercise free expression, due either to the setting where the speech occurs such as before a captive audience or where listeners lack the necessary capacity, Justice Stewart maintained that “government regulation of that expression may co-exist with and even

¹³⁰ *Bellotti*, 443 U.S. at 637, note 15 (plurality opinion).

¹³¹ *Tinker*, 393 U.S. at 515 (Stewart, J., concurring).

¹³² See Part IV, *infra*, for a discussion of *Ginsberg*.

¹³³ *Tinker*, 393 U.S. at 515 (Stewart, J., concurring).

¹³⁴ *Ginsberg*, 390 U.S. at 649-50 (Stewart, J., concurring).

¹³⁵ *Id.* at 649.

implement First Amendment guarantees.”¹³⁶ According to Justice Stewart, it was “only” a lack of capacity that would allow the state to abridge the rights of minors.¹³⁷

Justice Stewart, therefore, invoked the specter of capacity in *Tinker* whereas his brethren in the majority — despite their broad recognition of the expressive rights of children — were largely silent on the matter of whether First Amendment rights for minors were premised on capacity.

Justice Black, who wrote a concurring opinion embracing the fundamental rights of children in *Gault*, issued a scathing dissent¹³⁸ in *Tinker*, arguing the majority’s decision represented a shift of the “power to control pupils” from school administrators to the Court.¹³⁹ By the time the case was decided, Justice Black was nearing the end of his tenure on the Court, and, according to biographer Roger K. Newman, it was a period notable for an increasing number of dissents¹⁴⁰ and the loss of “the marked sense of knowing when not to write.”¹⁴¹ The justice took his *Tinker* dissent both seriously and personally, as it began with a set of handwritten notes that were typed, retyped, and even edited shortly before he read his dissent from the bench.¹⁴² Before he began reading, Justice Black took the opportunity to deliver extemporaneous remarks, beginning them in part with his declaration that “I want it thoroughly known that I disclaim any sentence, any word, any part of what the Court does today.”¹⁴³

¹³⁶ *Id.*

¹³⁷ *Id.* at 650.

¹³⁸ *Tinker*, 393 U.S. at 515 (Black, J., dissenting).

¹³⁹ *Id.*

¹⁴⁰ ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 588. See also JOHN W. JOHNSON, THE STRUGGLE FOR STUDENT RIGHTS: *TINKER V. DES MOINES* AND THE 1960s 176 (finding that Justice Black dissented on 18 occasions during the term *Tinker* was decided — more than any other justice that term).

¹⁴¹ Newman, *supra* note 140, at 588. Newman notes that as early as 1966, friends and family noticed a change in Justice Black’s demeanor and the justice himself agreed that “Court work is harder now” and “My mind isn’t as quick.” *Id.* at 589. Additionally, in the spring of 1968, the justice suffered a transitory, or “mini,” stroke. *Id.*

¹⁴² Johnson, *supra* note 140, at 176.

¹⁴³ *Id.*

Justice Black, a self-professed First Amendment absolutist,¹⁴⁴ viewed the case primarily as one deciding the proper time and place of speech instead of an administrative ban on the speech of students; as he plainly stated in his dissent, “I have never believed that any person has a right to give speeches or engage in demonstrations where he pleases and when he pleases.”¹⁴⁵ Justice Black also suggested the majority opinion revived the *Lochner*¹⁴⁶-era practice of acting as a super legislature¹⁴⁷ before concluding that “taxpayers send children to school on the premise that at their age they need to learn, not teach.”¹⁴⁸ Arguments for judicial restraint and time, place, and manner restrictions aside, the justice also framed speech rights for students as turning over control of the nation’s schools to the children who attend them, writing, “[I]f the time has come when pupils of state-supported schools, kindergartens, grammar schools, or high schools, can defy and flout orders of school officials to keep their minds on their own schoolwork, it is the

¹⁴⁴ See Hugo L. Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865, 867 (1960) (“It is my belief that there are ‘absolutes’ in our Bill of Rights, and that they were put there on purpose by men who knew what words meant, and meant their prohibitions to be ‘absolutes.’ The whole history and background of the Constitution and Bill of Rights, as I understand it, belies the assumption or conclusion that our ultimate constitutional freedoms are no more than our English ancestors had when they came to this new land to get new freedoms. The historical and practical purposes of a Bill of Rights, the very use of a written constitution, indigenous to America, the language the Framers used, the kind of three-department government they took pains to set up, all point to the creation of a government which was denied all power to do some things under any and all circumstances, and all power to do other things except precisely in the manner prescribed.”).

¹⁴⁵ *Tinker*, 393 U.S. at 517 (Black, J., dissenting). See also *id.* at 521-22 (“The truth is that a teacher of kindergarten, grammar school, or high school pupils no more carries into a school with him a complete right to freedom of speech and expression than an anti-Catholic or anti-Semite carries with him a complete freedom of speech and religion into a Catholic church or Jewish synagogue. Nor does a person carry with him into the United States Senate or House, or into the Supreme Court, or any other court, a complete constitutional right to go into those places contrary to their rules and speak his mind on any subject he pleases. It is a myth to say that any person has a constitutional right to say what he pleases, where he pleases, and when he pleases.”).

¹⁴⁶ *Lochner v. New York*, 198 U.S. 45 (1905). The Court’s decision invalidated a New York state law setting maximum hours for bakers. The majority in *Lochner* found that the law violated a “liberty of contract,” a theory used to find many otherwise lawful economic regulations unconstitutional. See generally David A. Strauss, *Centennial Tribute Essay: Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373 (2003) (explaining why *Lochner* was one of “the most widely reviled decision[s] of the last hundred years”).

¹⁴⁷ 393 U.S. at 518-21 (Black, J., dissenting).

¹⁴⁸ *Id.* at 523. See also Newman, *supra* note 140, at 592 (detailing Justice Black’s comments to his wife that he might begin his *Tinker* dissent by writing “It’s a fine thing America is going to the moon because the Supreme Court will have extended jurisdiction”).

beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary.”¹⁴⁹

This concern that students would soon run America’s schools represented a “deep-seated fear” of what Justice Black “believed was the natural, inevitable outcome of allowing students the freedom to express themselves whenever they wished,” according to biographer Howard Ball.¹⁵⁰ Indeed, during conference before the case was decided, Justice Black implored his fellow justices to find for the school district “on a broad ground, as broad as possible” because “[t]he schools are in great trouble” and “[c]hildren need discipline — the country is going to ruin because of it.”¹⁵¹ In his dissent, Justice Black also accused the majority of misconstruing Court case law to arrive at a conclusion supporting speech rights for students; “I deny, therefore,” Justice Black wrote, “that it has been the ‘unmistakable holding of this Court for almost 50 years’ that ‘students’ and ‘teachers’ take with them into the ‘schoolhouse gate’ constitutional rights to ‘freedom of speech or expression.’”¹⁵²

In Justice Black’s view, there are no speech rights for public school students¹⁵³ — an outlook premised primarily on his concern that such rights would, in essence, turn over control of schools from administrators to students¹⁵⁴ and courts.¹⁵⁵ While Justice Black did not win the

¹⁴⁹ 393 U.S. at 518 (Black, J., dissenting).

¹⁵⁰ HOWARD BALL, HUGO L. BLACK: COLD STEEL WARRIOR 207.

¹⁵¹ Newman, *supra* note 140, at 591.

¹⁵² 393 U.S. at 521 (Black, J., dissenting) (quoting majority at 506).

¹⁵³ Justice Black’s desires to limit the free speech rights of students apparently extended far beyond what was evident on the face of his dissent. In correspondence to a son’s law school classmate, the justice contended that even the First Amendment rights of college students should be limited. “[W]hile I believe that the level of intelligence of college students would enable them to make mature judgments superior to that of high school students,” Justice Black wrote, “I still did not intend for my dissent in *Tinker* to be limited to grade school or high school students.” See Newman, *supra* note 140, at 593.

¹⁵⁴ See 393 U.S. at 525 (“One does not need to be a prophet or the son of a prophet to know that after the Court’s holding today some students in Iowa schools and indeed in all schools will be ready, able, and willing to defy their teachers on practically all orders. This is the more unfortunate for the schools since groups of students all over the land are already running loose, conducting break-ins, sit-ins, lie-ins, and smash-ins. Many of these student groups, as is all too familiar to all who read the newspapers and watch the television news programs, have already

argument in *Tinker*, he certainly established a reoccurring frame of speech for debate: speech rights for public school students versus control for school administrators and judicial deference to their decision-making authority.

While later Court decisions would erode the student right to expression established in *Tinker*,¹⁵⁶ the decision still represents at least some implied recognition of the autonomy rights of children without regard to capacity.¹⁵⁷ Additionally, *Tinker* was not the only case where the Court explicitly recognized the First Amendment rights of children. In *Erznoznik v. City of Jacksonville*,¹⁵⁸ the Court concluded that, “[i]n most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors.”¹⁵⁹

In the decade following the *Tinker* decision, the Court would both recognize and subsequently limit the freedoms of children as it turned to address the reproductive rights of minors.

c. The reproductive rights of minors as defined by the Supreme Court

With three decisions in the latter half of the 1970s, the Court upheld another key right of minors — this time a right to privacy in the areas of conception and childbirth — but unlike due

engaged in rioting, property seizures, and destruction. They have picketed schools to force students not to cross their picket lines and have too often violently attacked earnest but frightened students who wanted an education that the pickets did not want them to get.” (Black, J., dissenting).

¹⁵⁵ See *id.* at 525-26 (“I, for one, am not fully persuaded that school pupils are wise enough, even with this Court’s expert help from Washington, to run the 23,390 public school systems in our 50 States.”).

¹⁵⁶ See Part III, *infra*, for a discussion on the Supreme Court’s student speech jurisprudence following *Tinker* in the *Fraser*, *Hazelwood*, and *Morse* cases.

¹⁵⁷ See, e.g., Dailey, *supra* note 67, at 2127; Ezer, *supra* note 70, at 10; Cunningham, *supra* note 65, at 360.

¹⁵⁸ 402 U.S. 205 (1975). In *Erznoznik*, the Court evaluated the constitutionality of a city ordinance preventing drive-in movie theaters from showing films containing nudity. The ordinance, as the Court concluded, was an unconstitutional burden on otherwise protected speech as it included a prohibition of nudity such as “a picture of a baby’s buttocks, the nude body of a war victim, or scenes from a culture in which nudity is indigenous . . . [or]scenes of the opening of an art exhibit as well as shots of bathers on a beach.” *Id.* at 213. Even as the city argued the ordinance was necessary to protect children, the Court found its overbreadth to be fatal. *Id.* at 214.

¹⁵⁹ *Id.* at 214.

process and expression rights, the Supreme Court would move to substantively limit that right in light of the developmental and cognitive status of children. In *Planned Parenthood v. Danforth*¹⁶⁰ and *Bellotti v. Baird*, a fractured Court struggled to define the permissible limits on a minor's right to choose an abortion, while in *Carey v. Population Services International*¹⁶¹ a similarly divided Court found laws designed to limit a minor's access to contraceptives to be unconstitutional. Where the Supreme Court found a broad right to criminal due process rights for minors in *Gault* and was at least receptive to similarly broad rights in *Tinker*, the sexual privacy rights addressed in *Danforth*, *Carey*, and *Bellotti* were decided on much more narrow grounds with the justices generally split on whether minors could be trusted to properly exercise the reproductive rights afforded to adults. In short, these reproductive rights are given much less protection under the Constitution because of "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing," as the *Bellotti* Court phrased it.¹⁶²

The first of these cases, *Planned Parenthood v. Danforth*, was a broad post-*Roe v. Wade*¹⁶³ attack on a Missouri statute regulating many aspects of abortion, including requirements for a woman's written consent before the procedure in addition to the written consent of a spouse in the case of a married woman.¹⁶⁴ Missouri's regulations also included a provision requiring parental consent of one parent or guardian where a woman "is unmarried and under the age of eighteen years" unless a doctor determined the abortion to be a medical necessity.¹⁶⁵ After a

¹⁶⁰ 428 U.S. 52 (1976).

¹⁶¹ 431 U.S. 678 (1977) (affirming a woman's right to an abortion).

¹⁶² *Bellotti*, 443 U.S. at 634.

¹⁶³ 410 U.S. 113 (1973).

¹⁶⁴ *Danforth*, 428 U.S. at 85 (Missouri House Bill No. 1211, plurality opinion appendix).

¹⁶⁵ *Id.*

divided district court panel found most of the state law to be constitutional under *Roe*,¹⁶⁶ Planned Parenthood and other plaintiffs appealed to the Supreme Court, arguing Missouri’s law infringed on various rights including privacy in the physician-patient relationship and a physician’s right to care for patients “according to the highest standards of medical practice.”¹⁶⁷

Writing for a fractured Court, Justice Harry Blackmun and a plurality invalidated most of the state law, including the parental consent provision.¹⁶⁸ In discussing the wisdom of calling for parental consent before an unmarried minor’s abortion, Justice Blackmun framed the argument as the state “point[ing] out that the law properly may subject minors to more stringent limitations than are permissible with respect to adults”¹⁶⁹ while the plaintiffs “emphasize[d] that no other Missouri statute specifically requires the additional consent of a minor's parent for medical or surgical treatment[.]”¹⁷⁰ Furthermore, the plaintiffs pointed out the inequity of asking unmarried minors for parental consent before an abortion while not requiring the same of those minors seeking an abortion who married with parental consent.¹⁷¹

Justice Blackmun and the plurality found the arguments of the plaintiffs convincing, stating that, in the Court’s judgment, Missouri “may not impose a blanket provision . . . requiring the consent of a parent or person *in loco parentis*”¹⁷² as a condition for abortion of an unmarried

¹⁶⁶ Id. at 59.

¹⁶⁷ Id. at 58.

¹⁶⁸ Id. at 74. Most notably, the Court left intact the sections calling for both written consent from the female patient before an abortion procedure and other record keeping measures. Id. at 67, 80-81. Along with the parental consent provision, the Court also struck down the spousal notification requirement, stating, “Clearly, since the State cannot regulate or proscribe abortion during the first stage, when the physician and his patient make that decision, the State cannot delegate authority to any particular person, even the spouse, to prevent abortion during that same period.” Id. at 69.

¹⁶⁹ Id. at 72. *See also* id. (citing “certain decisions . . . considered by the State to be outside the scope of a minor's ability to act in his own best interest” include those decisions regarding access to firearms without parental consent, access to certain types of media, the ability of minors to pawn property, and the sale of tobacco and alcohol to minors).

¹⁷⁰ Id. at 73.

¹⁷¹ Id.

¹⁷² *See* note 29, *supra* (defining doctrine of *in loco parentis*).

minor[.]”¹⁷³ In arriving at that determination, Justice Blackmun likened the parental consent provision to the similarly invalidated spousal consent requirement, concluding that “the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent.”¹⁷⁴

Consistent with both *Gault* and *Tinker*, Justice Blackmun found that “[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority” and that “[m]inors, as well as adults, are protected by the Constitution and possess constitutional rights.”¹⁷⁵ Where the state wishes to limit the rights of minors guaranteed by the Constitution, the Court’s plurality established that it must show a “significant” interest that “is not present in the case of an adult.”¹⁷⁶ Missouri, as Justice Blackmun found, could not show that specific interest in the case of its abortion consent provision:

One suggested interest is the safeguarding of the family unit and of parental authority. It is difficult, however, to conclude that providing a parent with absolute power to overrule a determination, made by the physician and his minor patient, to terminate the patient's pregnancy will serve to strengthen the family unit. Neither is it likely that such veto power will enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure. Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant.¹⁷⁷

Preserving the family unit simply was not a convincing enough state interest to abridge the rights of the “competent minor,” or at least it was not a plausible interest in the eyes of the

¹⁷³ *Danforth*, 428 U.S. at 74.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 75.

¹⁷⁷ *Id.* (citation omitted).

plurality where an abortion was concerned. Yet Justice Blackmun cautioned that the Court was not foreclosing the possibility that a minor’s right to an abortion may be somewhat limited, writing,

We emphasize that our holding...does not suggest that every minor, *regardless of age or maturity*, may give effective consent for termination of her pregnancy. The fault with [the Missouri law] is that it imposes a special-consent provision, exercisable by a person other than the woman and her physician, as a prerequisite to a minor's termination of her pregnancy and does so without a sufficient justification for the restriction.¹⁷⁸

Thus the plurality at least hinted that constitutionally permissible restrictions on a minor’s right to an abortion could be based on a minor’s capacity (or lack thereof). Yet that conclusion certainly conflicts with the Court’s earlier language regarding a “competent minor mature enough to have become pregnant.” If nothing else, it is at least a confusing intertwining of two important developmental stages that are not always conjoined: biological sexual maturity and legal competency. It is not difficult to envision a situation where a truly incompetent minor — either through extreme youth or mental disability — becomes pregnant. Yet in that case, the biological maturity necessary to achieve pregnancy is irrelevant where the minor clearly lacks capacity. Furthermore, and more importantly in the determination of the plurality, the fundamental flaw with the parental consent provision was not that it lessened the reproductive rights of minors; rather, its fatal defect was that it granted a third party a veto over the minor’s right to choose to have an abortion — the same fatal defect seen in the spousal consent provision. Thus perhaps the plurality’s holding is best seen as an extension and affirmation of *Roe* rather than an especially dedicated attempt to uphold the rights of minors under the Constitution.¹⁷⁹

¹⁷⁸ Id. (citation omitted) (emphasis added).

¹⁷⁹ See Cunningham, *supra* note 65, at 326 (concluding the holding in *Danforth* “flowed directly” from the finding in *Roe* that “the abortion decision is a fundamental right”). See also GARY R. HARTMAN, ROY M. MERSKY & CINDY L. TATE, LANDMARK SUPREME COURT CASES: THE MOST INFLUENTIAL DECISIONS OF THE SUPREME COURT OF THE UNITED STATES 8 (“The

While the plurality’s opinion carried the day, other justices on the Court had different views on the constitutionality of requiring parental consent before a minor’s abortion and how a child’s capacity (or lack thereof) can affect their right to privacy in determining whether to have an abortion. More specifically, all of the justices who wrote separately from the plurality would have found the Missouri law’s parental consent requirement to be either constitutional or constitutional with some redrafting.

In his concurring opinion, Justice Stewart found the “primary constitutional deficiency” of the parental consent provision to be its “absolute limitation” on a minor’s right to an abortion.¹⁸⁰ For him, the law would have presented a “materially different constitutional issue” if it provided for a judicial mechanism to referee abortion decision disputes between parents and pregnant minors or if the law allowed for a judicial determination that the minor is competent enough to make a decision regarding an abortion¹⁸¹ — at least suggesting that Justice Stewart would have voted to uphold a law drafted as such. In his analysis, Justice Stewart found a significant state interest¹⁸² in “encouraging” a minor to seek the advice of her parents before obtaining an abortion, arguing that “a girl of tender years, under emotional stress, may be ill-equipped to make [a decision regarding an abortion] without mature advice and emotional support[]” and that “[i]t seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place.”¹⁸³ Justice Stewart, while he was careful to expressly state the failings of the Missouri law,

decision in *Danforth* further refines *Roe* by allowing and disallowing certain medical and procedural restrictions on the woman’s right to receive an abortion.”).

¹⁸⁰ *Danforth*, 428 U.S. at 90 (Stewart, J., concurring).

¹⁸¹ *Id.* at 91.

¹⁸² *See id.* (“There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child.”)

¹⁸³ *Id.*

thus found minors in need of assistance in deciding reproductive issues and that parents — rather than doctors — are better sources of that decision-making aid.

In his dissent, Justice Byron White argued that the parental consent provision served not to benefit any interest of the state or parents but that it served only to “vindicate the very right created” in *Roe* — that being the “right of the pregnant woman to decide ‘whether *or not* to terminate her pregnancy.’”¹⁸⁴ In forcing the minor to consult with her parents before an abortion, Justice White seemed to argue the result might be a more deliberate consideration of the procedure, thereby protecting the right of a minor to make an informed decision regarding the matter. “Missouri is entitled to protect the minor unmarried woman from making the decision in a way which is not in her own best interest,” Justice White wrote, “and it seeks to achieve this goal by requiring parental consultation and consent.”¹⁸⁵ Yet if the minor must make the decision in a certain, almost preordained manner, then what good is her choice? Justice White’s opinion is unclear to this point, but it necessarily implies that minors lack the necessary competence to exercise the privacy rights associated with reproduction. Indeed, as Justice White concluded, states traditionally “have sought to protect children from their own immature and improvident decisions, and there is absolutely no reason expressed by the majority why the State may not utilize that method here.”¹⁸⁶

Justice White’s support for the parental consent provision entails a belief that reproductive rights are premised on capacity. The Missouri law did not make a distinction between competent and incompetent minors, and it did not allow for any judicial determination of competence; it is not hard to imagine a scenario where an otherwise mature, rational 17-year-

¹⁸⁴ *Id.* at 94-95 (White, J., concurring in part, dissenting in part) (emphasis in the original) (quoting *Roe*, 410 U.S. at 153).

¹⁸⁵ *Id.* at 95.

¹⁸⁶ *Id.*

old woman would be denied the right to choose an abortion simply because her parents disagreed with the decision. Therefore, to arrive at Justice White’s conclusion, one must necessarily assume that minors categorically lack the capacity necessary to exercise the prerogatives associated with reproductive freedom.

Instead of a parental veto, Justice John Paul Stevens in his opinion characterized the parental consent provision as “the advice and moral support of a parent” in the “decisionmaking process” regarding an abortion.¹⁸⁷ Justice Stevens would have upheld the Missouri law just as Justice White, as Justice Stevens cited the “State’s interest in the welfare of its young citizens” and referenced laws restricting a minor’s right to contract, ability to work and travel, and requirements for parental consent to marry.¹⁸⁸ As Justice Stevens concluded, “The State’s interest in protecting a young person from harm justifies the imposition of restraints on his or her freedom even though comparable restraints on adults would be constitutionally impermissible.”¹⁸⁹ This contention appears to be in sync with the majority’s proposition that the state must show some significant interest to restrict the rights of a minor that would be otherwise given to an adult;¹⁹⁰ Justice Stevens, however, would find a significant interest in protecting minors from the harm resulting from an ill-informed decision regarding abortion where the plurality dismissed that interest as one operating where “the pregnancy has already fractured the family structure.”¹⁹¹ Justice Stevens, though, countered the plurality’s conclusion as to the state’s interest in requiring parental consent to justify the law:

It is unrealistic, in my judgment, to assume that every parent-child relationship is either (a) so perfect that communication and accord will take place routinely or (b) so imperfect that the absence of

¹⁸⁷ Id. at 103 (Stevens, J., concurring in part, dissenting in part).

¹⁸⁸ Id. at 102.

¹⁸⁹ Id.

¹⁹⁰ See, e.g., id. at 75 (plurality opinion); note 99 and accompanying text, *supra*.

¹⁹¹ Id. at 75.

communication reflects the child's correct prediction that the parent will exercise his or her veto arbitrarily to further a selfish interest rather than the child's interest. A state legislature may conclude that most parents will be primarily interested in the welfare of their children, and further, that the imposition of a parental-consent requirement is an appropriate method of giving the parents an opportunity to foster that welfare by helping a pregnant distressed child to make an implement a correct decision.¹⁹²

Thus Justice Stevens shared much of his reasoning with Justices White and Stewart in that they all believed the state had a valid interest in fostering a rational, calculated decision when minors seek an abortion, and they also found minors lacking in capacity to exercise the freedoms associated with reproduction unless aided by the intervention of a benevolent parent. As Justice Stevens concluded, “The Court seems to assume that the [biological] capacity to conceive a child and the judgment of the physician are the only constitutionally permissible yardsticks for determining whether a young woman can independently make the abortion decision. I doubt the accuracy of the Court's empirical judgment.”¹⁹³

Between the plurality’s marginal endorsement of the reproductive rights of minors and other justices who would reject those rights due to a lack of capacity on the part of minors, *Danforth* is not exactly an expansive validation of children’s rights where reproductive issues are concerned. If there are three approaches to dealing with the rights of minors and capacity — the granting of rights regardless of capacity, categorical incapacity for the exercise of rights, and individualized examination of capacity¹⁹⁴ — then *Danforth* represents the start of the post-*Roe* journey to figure out exactly where to place the reproductive rights of minors. The plurality straddled the line between ignoring capacity and perhaps an unexpressed preference for an individualized determination, whereas the other justices on the Court would clearly place the

¹⁹² Id. at 103-04 (Stevens, J., concurring in part, dissenting in part).

¹⁹³ Id. at 105.

¹⁹⁴ See notes 77-82 and accompanying text, *supra*.

right to make a decision regarding abortion in the realm of categorical incapacity. Other cases, however, would soon give clarity to how the Court would treat the reproductive rights of minors.

In *Carey*, the Court examined the constitutionality of a New York law that banned the sale of contraceptives to minors in addition to preventing advertising for contraceptives and limiting their distribution only to licensed pharmacists.¹⁹⁵ Writing for the Court, Justice William Brennan found all three provisions of the law unconstitutional, but he was able to command only a plurality as to the law preventing the sale of contraceptives to minors.¹⁹⁶ In discussing New York's asserted interest in preventing minors from accessing contraceptives, Justice Brennan phrased it as "a regulation of the morality of minors, in furtherance of the State's policy against promiscuous sexual intercourse among the young"¹⁹⁷ at the expense of an otherwise protected privacy right. Yet, as the justice wrote, "The question of the extent of state power to regulate conduct of minors not constitutionally regulable when committed by adults is a vexing one, perhaps not susceptible of precise answer."¹⁹⁸ Justice Brennan then walked through a list of rights guaranteed to minors by the Constitution including freedom of expression, equal protection against racial discrimination, due process in civil and criminal proceedings, and "the right to privacy in connection with decisions affecting procreation" that "extends to minors as well as to adults."¹⁹⁹ Given those protected privacy rights, the plurality cited with approval the holding from *Danforth* and its requirement that the state show a "significant" interest in minors not otherwise present in adults for a regulation to survive constitutional examination.²⁰⁰ Justice Brennan, however, went even further in his support of *Danforth* in concluding that "[s]ince the

¹⁹⁵ *Carey*, 431 U.S. at 681.

¹⁹⁶ *Id.* at 691 (plurality opinion). In Part IV of the opinion (the only section lacking a majority of the Court), Justice Brennan was joined by Justices Potter Stewart, Thurgood Marshall, and Harry Blackmun.

¹⁹⁷ *Id.* at 692.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 692, n. 14, 693.

²⁰⁰ *Id.* at 693.

State may not impose a blanket prohibition, or even a blanket requirement of parental consent, on the choice of a minor to terminate her pregnancy, the constitutionality of a blanket prohibition of the distribution of contraceptives to minors is *a fortiori* foreclosed[]”²⁰¹ — thereby finding the ban on the sale of contraceptives to minors unconstitutional.

As to the state’s asserted interest — preventing promiscuous sex among minors — Justice Brennan argued “there is a substantial reason for doubt” that limiting access to contraceptives would “substantially” discourage sexual activity,²⁰² and he cautioned that a state needs “more than a bare assertion, based on a conceded complete absence of supporting evidence” when it seeks to “burden the exercise of a fundamental right.”²⁰³ Likewise in Part V of the Court’s opinion, Justice Brennan found (with the support of a majority of his fellow justices) that a ban on contraceptive advertising premised on a state interest of not “legitimiz[ing] sexual activity of young people” could not survive under the First Amendment.²⁰⁴

Concurring justices expressed a variety of views as to the ban on the sale of contraceptives to minors. Justice White found the state failed to affirmatively show how the contraceptive ban advanced its asserted interest in preventing sex among minors.²⁰⁵ Justice Lewis Powell argued that there was “no justification” for any heightened review of state laws infringing on the reproductive rights of minors,²⁰⁶ yet he found constitutional defects in preventing married minors from accessing contraceptives and not allowing parents to distribute

²⁰¹ Id. at 694.

²⁰² Id. at 695.

²⁰³ Id. at 696.

²⁰⁴ Id. at 701. New York also contended that ads for contraceptives “would be offensive and embarrassing to those exposed to them.” Id.

²⁰⁵ Id. at 702 (White, J., concurring in part, concurring in the result).

²⁰⁶ Id. at 705 (Powell, J., concurring in part, concurring in the result).

contraceptives to their children.²⁰⁷ Generally, though, Justice Powell argued for a wide degree of state authority to govern sexual activity of minors:

[I]n my view there is considerably more room for state regulation in this area than would be permissible under the plurality's opinion. It seems clear to me, for example, that the State would further a constitutionally permissible end if it encouraged adolescents to seek the advice and guidance of their parents before deciding whether to engage in sexual intercourse. The State justifiably may take note of the psychological pressures that might influence children at a time in their lives when they generally do not possess the maturity necessary to understand and control their responses. Participation in sexual intercourse at an early age may have both physical and psychological consequences. These include the risks of venereal disease and pregnancy, and the less obvious mental and emotional problems that may result from sexual activity by children. Moreover, society has long adhered to the view that sexual intercourse should not be engaged in promiscuously, a judgment that an adolescent may be less likely to heed than an adult.²⁰⁸

Justice Powell, with only the proviso that parents be allowed to distribute contraceptives to their children,²⁰⁹ would therefore grant states a great deal of authority to regulate the sexual conduct of minors, even suggesting that a narrowly crafted contraceptive advertising ban could survive First Amendment scrutiny.²¹⁰

Justice Stevens gave two specific reasons for his concurring opinion: his belief that *Danforth* was not dispositive²¹¹ and his contention that a minor's constitutional right to use

²⁰⁷ See id. at 707-08.

²⁰⁸ Id. at 709 (citation omitted).

²⁰⁹ See id. at 710.

²¹⁰ See id. at 712, n.6 ("The State argues that unregulated commercial advertisement of contraceptive products would be viewed by the young as 'legitimation' of — if not an open invitation to — sexual promiscuity. The Court simply finds on the basis of the advertisements in the record before us that this interest does not justify total suppression of advertising concerning contraceptives. The Court does leave open the question whether this or other state interests would justify regulation of the time, place, or manner of such commercial advertising. In my view, such carefully tailored restrictions may be especially appropriate when advertising is accomplished by means of the electronic media.") (citation omitted).

²¹¹ Id. at 713 (Stevens, J., concurring in part, concurring in the judgment). As Justice Stevens argued, "the options available to the already pregnant minor are fundamentally different from those available to nonpregnant minors. The former must bear a child unless she aborts; but persons in the latter category can and generally will avoid

contraceptives was “frivolous” argument.²¹² However, as he wrote, “common sense” would conclude that minors will engage in sex “regardless of what the New York Legislature does.”²¹³ Yet, Justice Stevens reasoned, the true purpose behind the law was simply the communication of disapproval from the legislature to minors; the law was therefore “propaganda, rather than a regulation of behavior,” he concluded.²¹⁴ Even as he believed that minors did not have a constitutional right to privacy in contraceptives, Justice Stevens nevertheless found the state’s attempt at propaganda flawed:

Although the State may properly perform a teaching function, it seems to me that an attempt to persuade by inflicting harm on the listener is an unacceptable means of conveying a message that is otherwise legitimate. The propaganda technique used in this case significantly increases the risk of unwanted pregnancy and venereal disease. It is as though a State decided to dramatize its disapproval of motorcycles by forbidding the use of safety helmets. One need not posit a constitutional right to ride a motorcycle to characterize such a restriction as irrational and perverse.²¹⁵

Justice Stevens found the state’s aim of expressing disapproval constitutional but found fault with its methods as expressed in the statute, therefore explaining his decision to side with the Court’s outcome in the case. Justice William Rehnquist, however, in a blustery and vigorous dissent,²¹⁶ found fault with the Court’s entire opinion, arguing that

childbearing by abstention.” *Id.* In his view, the Constitution gave greater protection to the minor’s right to choose abortion and less such protection to the right of a minor to use contraception.

²¹² *Id.*

²¹³ *Id.* at 714.

²¹⁴ *Id.* at 715.

²¹⁵ *Id.*

²¹⁶ *Id.* at 717 (Rehnquist, J., dissenting.) The then-Associate Justice Rehnquist opened his opinion with the following paragraph: “Those who valiantly but vainly defended the heights of Bunker Hill in 1775 made it possible that men such as James Madison might later sit in the first Congress and draft the Bill of Rights to the Constitution. The post-Civil War Congresses which drafted the Civil War Amendments to the Constitution could not have accomplished their task without the blood of brave men on both sides which was shed at Shiloh, Gettysburg, and Cold Harbor. If those responsible for these Amendments, by feats of valor or efforts of draftsmanship, could have lived to know that their efforts had enshrined in the Constitution the right of commercial vendors of contraceptives to peddle them to unmarried minors through such means as window displays and vending machines located in the men’s

[n]o questions of religious belief, compelled allegiance to a secular creed, or decisions on the part of married couples as to procreation, are involved here. New York has simply decided that it wishes to discourage unmarried minors under 16 from having promiscuous sexual intercourse with one another. Even the Court would scarcely go so far as to say that this is not a subject with which the New York Legislature may properly concern itself.²¹⁷

Justice Rehnquist argued that the Court's decision prevented New York from using its traditionally reserved police powers to "legislate in the interests of its concept of the public morality as it pertains to minors" and represented a "fundamental" departure from "a wise and heretofore settled course of adjudication to the contrary."²¹⁸

Justice Rehnquist would not have to spend long in the judicial wilderness as the Court would make a significant course correction just two years later in *Bellotti v. Baird*. In *Bellotti*, the Court addressed the constitutionality of a Massachusetts law that required parental consent before any abortion performed on a minor; if one or both parents refused consent, a state judge could grant such consent.²¹⁹ The federal district court found three key constitutional deficiencies in striking down the law: a requirement for parental notification in "virtually every case," an ability for a judge to veto an abortion where the minor was capable of informed consent, and the law's failure to explicitly inform parents to consider only the best interests of the minor.²²⁰

Members of the Court voted 8-1 to uphold the district court's decision finding the law unconstitutional, but the justices remained just as fractured as they were in *Danforth* and *Carey*. In *Bellotti*, however, the conservatives on the Court prevailed as a plurality opinion established the framework for a permissible parental notification regime even as it struck down the

room of truck stops, notwithstanding the considered judgment of the New York Legislature to the contrary, it is not difficult to imagine their reaction." *Id.*

²¹⁷ *Id.* at 718.

²¹⁸ *Id.* at 719.

²¹⁹ *Bellotti*, 443 U.S. at 625 (plurality opinion).

²²⁰ *See id.* at 631-32.

Massachusetts law.²²¹ The Court announced — in what Justice Stevens called an “advisory opinion,”²²² which has since become the “law of the land with respect to [a] minor’s access to abortions”²²³ — that for a parental consent provision to survive constitutional scrutiny a pregnant minor must be granted a hearing allowing her to show either “(1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents’ wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests.”²²⁴ The proceeding for the minor,²²⁵ according to the Court, can take place prior to any consultation with her parents, a position that Justice White found “inconceivable” in his dissent.²²⁶

The Court’s plurality opinion is significant for two reasons. First, it firmly established that the constitutional privacy rights of minors regarding abortion are subject to an individualized assessment of capacity.²²⁷ Second, the Court also attempted to clarify and perhaps constrain children’s rights as the plurality’s opinion is one of the only decisions from the Court to attempt a “systematic overview of children’s constitutional rights,” as one scholar has argued.²²⁸

²²¹ See *id.* at 643-44. Justice Powell wrote a plurality opinion that was joined by Chief Justice Warren Burger, Justice Stewart, and Justice Rehnquist. Justice White dissented, arguing the state law should have been upheld as constitutional. *Id.* at 656 (White, J., dissenting). Thus, there were five votes on the Court to uphold a parental consent requirement but only one to uphold the Massachusetts law as written.

²²² *Id.* at 656 (Stevens, J., concurring).

²²³ Cunningham, *supra* note 65, at 327.

²²⁴ *Bellotti*, 443 U.S. at 643-44 (plurality opinion).

²²⁵ The Court cautioned that, while the hearing was discussed in terms of a judicial proceeding, a state could “delegate the alternative procedure to a juvenile court or an administrative agency or officer.” *Id.* at 643, n. 22. “Indeed, much can be said for employing procedures and a forum less formal than those associated with a court of general jurisdiction.” *Id.*

²²⁶ *Id.* at 657 (White, J., dissenting).

²²⁷ See *id.* at 644, n. 23 (plurality opinion) (“[T]he peculiar nature of the abortion decision requires the opportunity for case-by-case evaluations of the maturity of pregnant minors.”)

²²⁸ See Dailey, *supra* note 67, at 2133.

Writing for the plurality, Justice Powell confirmed again that “[a] child, merely on account of his minority, is not beyond the protection of the Constitution.”²²⁹ But, he cautioned, that observation was “but the beginning of the analysis.”²³⁰ Children, according to the plurality, occupy a special place under the law, meaning that “constitutional principles [should] be applied with sensitivity and flexibility to the special needs of parents and children.”²³¹ The “sensitivity” justifying the limitation of child rights is premised on three guiding principles of children and the law, according to Justice Powell: “the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.”²³² Prior Court decisions, as Justice Powell characterized them, allowed for states to adjust legal systems to account for child vulnerability in addition to limiting the freedom of choice for children where their decisions may have “potentially serious consequences.”²³³ Furthermore, Justice Powell pointed to the Court’s decision in *Ginsberg v. New York*²³⁴ as illustrating “the Court’s concern over the inability of children to make mature choices, as the First Amendment rights involved are clear examples of constitutionally protected freedoms of choice.”²³⁵

After making it clear why the state had the authority to act to limit the freedom of children, Justice Powell turned his attention to clarifying exactly what made abortion different from other situations faced by a minor.²³⁶ As he explained, the abortion decision cannot be postponed, the right to choose an abortion cannot be delayed, and the consequences of denying a

²²⁹ *Bellotti*, 443 U.S. at 633 (plurality opinion).

²³⁰ *Id.*

²³¹ *Id.* at 634.

²³² *Id.*

²³³ *Id.* at 635.

²³⁴ See Part IV, *infra*, for a discussion of *Ginsberg* and its First Amendment implications for the rights of children.

²³⁵ *Bellotti*, 443 U.S. at 636.

²³⁶ See *id.* at 642-43.

minor the ability to obtain an abortion can be “grave and indelible.”²³⁷ This intensified importance, according to Justice Powell, allowed for the state to intervene in the minor’s abortion decision, enabling it to first require the consent of her parents or to alternately gauge a minor’s capacity where she was unwilling or unable to gain parental consent; however, the state’s authority was circumscribed by the minor’s right to an individualized hearing that “must ensure that the provision requiring parental consent does not in fact amount to the absolute, and possibly arbitrary, veto that was found impermissible in *Danforth*.”²³⁸

Where the Court speculated as to the capacity of minors to exercise abortion rights in *Danforth*, it effectively concluded in *Bellotti* that minors can neither be denied as a rule the right to choose an abortion (much as in not allowing minors the right to vote or make contracts) nor can they be assured of the full measure of the rights allotted to adults. Rather, where abortion rights are concerned, minors are entitled to no less than an opportunity to individually prove their capacity even as the Court concluded, in the words of Professor Larry Cunningham, “a minor’s right to seek an abortion is not absolute.”²³⁹

d. What these cases mean for the speech rights of children

Outside of the realm of abortion rights, *Bellotti*’s lasting impact is likely the Court’s discussion of the three reasons for abridging the rights of children: their vulnerability as maturing adults, their inability to make informed decisions, and the protection of the rights of parents to raise their children as they see fit.²⁴⁰ The *Bellotti* Court, however, stressed in its plurality opinion that the abortion decision faced by minors was simply a different matter, one distinct from other

²³⁷ *Id.* at 642.

²³⁸ *Id.* at 644 (quotation omitted).

²³⁹ Cunningham, *supra* note 65, at 327.

²⁴⁰ See *Bellotti*, 443 U.S. at 634.

situations in the life of a minor.²⁴¹ What happens, then, when the Court’s reasoning — again, the vulnerability of children, their imperfect ability to make decisions, and the rights of parents — is extrapolated and applied to an area where a different constitutional right such as expression is implicated? At least one court has found the argument unconvincing.

The Third Circuit in *Circle School v. Pappert*,²⁴² a case on the constitutionality of a Pennsylvania law requiring public, private, and parochial students to each day recite the Pledge of Allegiance and for schools to inform parents when students opted out of the Pledge, found that the state’s reliance on cases such as *Bellotti* was “fundamentally misplaced” as “[t]hose decisions were rendered under a different provision of our Constitution [and] invoked a different set of competing interests and rights,” according to the court.²⁴³ Furthermore, “the interests involved in those cases — the maturity of the pregnant minor seeking abortion, the significant third-party effects such abortions may have, and the state’s interest in protecting the fetus — are wholly different from the state’s provision of proper educational curriculum and the students’ right to be free from compelled expression.”²⁴⁴

Thus, at least as considered by one court, a parental consent regime that functions to curtail the rights of minors where abortion is concerned may be constitutional, but when that regime is transplanted to burden expression,²⁴⁵ the regulation fails. As the Third Circuit astutely noted, *Danforth*, *Carey*, and *Bellotti* implicate different rights and different portions of the Constitution when compared to free speech cases. Those cases tried to establish boundaries as to the state’s authority to intrude on the intimate relationships of minors and one of the most

²⁴¹ See *id.* at 642-43.

²⁴² 381 F.3d 172 (3rd Cir. 2004).

²⁴³ *Id.* at 179.

²⁴⁴ *Id.*

²⁴⁵ The Third Circuit found the Pennsylvania law to be both viewpoint discrimination and a regulation that would chill student free speech. See *id.* at 180-81.

difficult decisions minors could ever confront; they required a delicate balancing of the rights of minors and an appreciation of the circumstances surrounding the abortion decision. In essence, the state is allowed to intervene in some limited way because the consequences are so great. Expression, however, is governed by the principles of the First Amendment — principles that begin with the idea that the state “shall make no law . . . abridging the freedom of speech[.]”²⁴⁶ which is certainly a stark contrast to the state regulatory authority generally presumed in health and general welfare. But what are the consequences of expression for children? In student speech cases, minors seek to overturn adverse school discipline, usually a suspension or in some cases an expulsion from public schools — a far cry from the morass faced in deciding whether to have an abortion. In short, abortion and expression — as rights and as state justification for the limitations of a minor’s free exercise thereof — are very different.

Expression and criminal due process, however, are at least somewhat similar in that they belong to the same historically fundamental class of rights. The right to an abortion for a minor may indeed be properly restricted to those who can show the capacity necessary to make an informed decision. But it is worth considering that broad, fundamental rights such as criminal due process — the basic rights that serve as guarantees expected for anyone in a democracy — are given regardless of capacity. *Tinker* established that children have First Amendment rights inside and outside of the classroom, and while intervening decisions may have somewhat eroded the central holding of *Tinker*, it still stands for the simple proposition that children have a right to free expression. However, as Parts III and IV will explain, those First Amendment rights have been limited in some circumstances, primarily in the school setting and instances where children may be exposed to sexually explicit material.

²⁴⁶ *U.S. Const. amend. I.*

One final take away from the Court’s line of case regarding the reproductive rights of minors may be Justice Stevens’s concurring opinion in *Carey* in which he found legislation attempting to show disapproval of the sexual activity of minors as nothing more than “propaganda.”²⁴⁷ Government and the rest of civil society have an interest in the proper development, safety, and education of children, and those important obligations intersect at the prevention of school violence. There are certainly appropriate measures to be taken in preventing harm in our nation’s schools, but at some point, those measures, such as the use of school discipline in *Cuff* and other similar cases, are so ineffective and vapid that they cross into the realm derided by Justice Stevens. The material properly excluded from the possession of children has not included — and will likely never include — expression with violent themes. Therefore, when considering the limitations that can or should be placed on student speech with violent themes, the analysis should begin with the proposition that students have a fundamental right to their expression regardless of its violent content.

III. Student speech post-*Tinker*

Tinker, heralded by scholars as “the most important Supreme Court case in history protecting the constitutional rights of students,”²⁴⁸ served as the sole Court case in the area of student speech rights for less than 20 years before two cases decided in the 1980s began to erode the principles established in the iconic 1969 ruling. Those subsequent decisions, *Bethel School District v. Fraser* and *Hazelwood School District v. Kuhlmeier*, were followed in 2007 by *Morse v. Frederick*, another Court decision that limited free speech rights for students. This section will detail the facts and analysis in *Fraser*, *Hazelwood*, and *Morse*, focusing specifically on why the

²⁴⁷ *Carey*, 431 U.S. at 715 (Stevens, J., concurring in part, concurring in the judgment). See also notes 214-215 and accompanying text, *supra*.

²⁴⁸ Erwin Chemerinsky, *Do Students Leave Their First Amendment Rights at the Schoolhouse Gates: What’s Left of Tinker?*, 48 DRAKE L. REV. 527 (2000).

Court decided against the application of *Tinker* and what those decisions mean for current student speech cases. This section will conclude by examining the lower court analysis employed in selected violent student speech cases.

a. *Bethel School District v. Fraser*

In *Fraser*, a Pierce County, Washington high school senior stood before an assembly of 600 students to give a student government nominating speech that veered into the patently sexual:

I know a man who is firm — he's firm in his pants, he's firm in his shirt, his character is firm — but most . . . of all, his belief in you, the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts — he drives hard, pushing and pushing until finally — he succeeds. Jeff is a man who will go to the very end — even the climax, for each and every one of you. So vote for Jeff for A. S. B. vice-president — he'll never come between you and the best our high school can be.²⁴⁹

Some students yelled and lewdly gestured during Fraser's speech, while others seemed to be confused and embarrassed, according to a school counselor who attended the assembly.²⁵⁰ The day after he gave his speech, Fraser was summoned to the principal's office and informed of his punishment: a three-day suspension and a removal from a list of students being considered to speak at graduation.²⁵¹ Upon appealing his discipline, Fraser won in federal district court as the court found that the school violated his First Amendment rights.²⁵² The Ninth Circuit subsequently upheld the district court's decision, finding Fraser's sexually-themed speech was indistinguishable from the armband protest in *Tinker*.²⁵³ Furthermore, the Ninth Circuit

²⁴⁹ 478 U.S. at 687 (J. Brennan, concurring.). See also *id.* at 677 (majority opinion).

²⁵⁰ *Id.* at 678.

²⁵¹ *Id.*

²⁵² *Id.* at 679.

²⁵³ *Id.*

concluded that allowing administrators to censor student speech that appeared to be lewd or indecent would only “increase the risk of cementing white, middle-class standards for determining what is acceptable and proper speech and behavior in our public schools.”²⁵⁴

However, the Supreme Court, in a majority opinion written by Chief Justice Warren Burger reversed the Ninth Circuit’s decision and found Fraser’s punishment to be constitutional, holding that “[t]he First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent’s would undermine the school’s basic educational mission.”²⁵⁵ While the Court did not expressly state the decision was a break from precedent, Chief Justice Burger distinguished the case from *Tinker*, citing the “marked distinction” between Fraser’s speech and the “nondisruptive, passive expression” of Mary Beth Tinker’s armband.²⁵⁶ Chief Justice Burger also noted that the discipline imposed on Fraser was “unrelated to any political viewpoint” unlike the punishment levied in *Tinker*.²⁵⁷ So while *Fraser* would become an exception to the *Tinker* analysis, the Court was somewhat less than explicit in explaining how the two decisions would interact.²⁵⁸

In evaluating the merits of Fraser’s speech, the chief justice made a few points in examining the fundamental nature of both schools and student expression. First, after noting that public schools function in part to train students for participation in democracy, Chief Justice Burger cited the notion that “[t]he undoubted freedom to advocate unpopular and controversial views in schools” must be weighed against “society’s countervailing interest in teaching students the boundaries of socially appropriate behavior.”²⁵⁹ This “socially appropriate behavior” that

²⁵⁴ Id. at 680 (quoting *Fraser v. Bethel Sch. Dist*, 755 F.2d 1356, 1363 (9th Cir. 1985)).

²⁵⁵ Id. at 685.

²⁵⁶ Id. at 680.

²⁵⁷ Id. at 685.

²⁵⁸ See *Morse*, 551 U.S. at 404 (stating “[t]he mode of analysis employed in *Fraser* is not entirely clear”).

²⁵⁹ *Fraser*, 478 U.S. at 681.

schools should instill in their students includes consideration for all sensibilities in “[e]ven the most heated political discourse,” according to Chief Justice Burger, who cited a litany of various House and Senate rules governing member decorum to support his proposition.²⁶⁰

Second, after citing *Cohen v. California*²⁶¹ and its protection of possibly offensive expression in the public square, the chief justice noted that speech rights are not always the same between adults and students: “It does not follow . . . that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school.”²⁶² Thus, according to the Court, “the First Amendment gives a high school student the classroom right to wear Tinker’s armband, but not Cohen’s jacket.”²⁶³

Finally, Chief Justice Burger concluded the majority opinion by focusing extensively on a paternalistic need to protect students from the subject matter in Fraser’s speech.²⁶⁴ The majority derided Fraser as a “confused boy” as it again endorsed a school’s right to determine whether “essential lessons of civil, mature conduct” can be conveyed in an environment permissive to lewd and indecent speech.²⁶⁵ The chief justice also wrote that Fraser’s speech was “acutely insulting to teenage girl students” and could be “seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human

²⁶⁰ Id. at 681-82. As the chief justice concluded, “Can it be that what is proscribed in the halls of Congress is beyond the reach of school officials to regulate?” This assertion fails to take into account that the rules governing conduct in Congress are determined by the membership and subject to amendment. No such situation exists in public schools.

²⁶¹ 403 U.S. 15 (1971) (finding a jacket bearing the words “Fuck the Draft” to be protected speech under the First Amendment).

²⁶² *Fraser*, 478 U.S. at 681.

²⁶³ Id. at 682 (quoting *Thomas v. Bd. of Ed., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1055 (2nd Cir. 1979) (Newman, C.J., concurring in the result)).

²⁶⁴ See id. at 683-86.

²⁶⁵ Id. at 683.

sexuality.”²⁶⁶ Finally, he cited approvingly *Ginsberg v. New York* and *F.C.C. v. Pacifica* as cases representing “limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children” and an endorsement of the state’s interest in “protecting minors from exposure to vulgar and offensive spoken language.”²⁶⁷

In his concurring opinion, Justice William Brennan made it clear he would have decided the case exclusively under *Tinker*’s framework, as he concluded that administrators have the authority to “prevent disruption of school educational activities”²⁶⁸ even as Fraser’s speech was “far removed” from speech typically shunned by the First Amendment²⁶⁹ and may have been protected school speech in a different factual situation.²⁷⁰ Even though Justice Brennan rejected the majority’s comparison of the speech to obscenity²⁷¹ and similarly chided his colleagues for their paternalistic reasoning,²⁷² he still ultimately agreed with the actions of school administrators as they “sought only to ensure that a high school assembly proceed in an orderly manner.”²⁷³

Thus Justice Brennan agreed that the reaction to Fraser’s speech was constitutional in order to ensure the smooth operation of an official school assembly, but he did not reconcile his

²⁶⁶ *Id.*

²⁶⁷ *See id.* at 684-85.

²⁶⁸ *Id.* at 687 (Brennan, J., concurring in the judgment).

²⁶⁹ *See id.* at 688 (comparing Fraser’s speech to obscenity constitutionally prohibited in *Ginsberg v. New York* and *Roth v. U.S.*, 354 U.S. 476 (1957)).

²⁷⁰ *See id.* (concluding a similar speech may have been protected in the educational setting where “where the school’s legitimate interests in teaching and maintaining civil public discourse were less weighty”).

²⁷¹ *See id.* at 689, n. 2 (“[T]o my mind, respondent’s speech was no more ‘obscene,’ ‘lewd,’ or ‘sexually explicit’ than the bulk of programs currently appearing on prime time television or in the local cinema.”).

²⁷² *See id.* (“The Court speculates that the speech was ‘insulting’ to female students, and ‘seriously damaging’ to 14-year-olds, so that school officials could legitimately suppress such expression in order to protect these groups. There is no evidence in the record that any students, male or female, found the speech ‘insulting.’”) (citation omitted).

²⁷³ *Id.* at 689.

conclusion with the fact there was no serious disruption²⁷⁴ due to the speech and there was no argument made that administrators had to act to prevent disruptions in future speeches. In his dissent, Justice Thurgood Marshall pointed out this contradiction by expressly stating he agreed with Justice Brennan’s principles while still finding the Bethel School District’s actions to be unconstitutional due to the lack of a disturbance in the school.²⁷⁵ As Justice Marshall argued, “[W]e may not unquestioningly accept a teacher’s or administrator’s assertion that certain pure speech interfered with education,” signaling his preference to decide the case under *Tinker* and find for Fraser.

Finally, Justice John Paul Stevens argued in his dissent that Fraser lacked fair notice of what was subject to a punitive disciplinary response from the school.²⁷⁶ Fraser, as Justice Stevens contended, had no reason to anticipate such a response from the administration, and furthermore, the student was better situated “to determine whether an audience composed of 600 of his contemporaries would be offended by the use of a four-letter word — or a sexual metaphor — than is a group of judges who are at least two generations and 3,000 miles away from the scene of the crime.”²⁷⁷ Basing his conclusion on Fraser’s lack of actual or constructive notice as to what was prohibited by the school,²⁷⁸ Justice Stevens failed to mention *Tinker* anywhere in his opinion, so it is unclear how he would have addressed the Court’s student speech jurisprudence in deciding the case at hand.

Ultimately, *Fraser* stands for the proposition that school administrators can move to censor student speech they find to be lewd or offensive, and that, furthermore, this censorship need not be premised on the presence or threat of a disruption. Often, lower courts have

²⁷⁴ See note 280 and accompanying text, *infra*.

²⁷⁵ See *Fraser*, 478 U.S. at 690 (Marshall, J., dissenting).

²⁷⁶ See *id.* at 691-92 (Stevens, J., dissenting).

²⁷⁷ *Id.* at 692.

²⁷⁸ See *id.* at 692-93.

interpreted this authority to act against vulgar or offensive speech broadly in giving schools the ability to censor any student speech found to be objectionable; other courts have interpreted *Fraser* more narrowly, upholding the constitutionality of school discipline only where student speech was sponsored by the school in some way.²⁷⁹ The lack of such a disturbance in *Fraser*²⁸⁰ and the subsequent constitutionality of the school's actions makes the case an exception to the *Tinker* standard; whether *Fraser* was truly an exception would be a matter of debate as the Court carved yet another way out of *Tinker* analysis in its next student speech case.

b. *Hazelwood School District v. Kuhlmeier*

School administrative authority to censor student speech would broaden with the Court's 1988 decision in *Hazelwood*. The facts in the case center on a dispute between a principal and student journalists working for Hazelwood (Missouri) East High School's Spectrum, a newspaper that was produced as a part of the school's journalism curriculum.²⁸¹ Before each issue was published, standard procedure dictated that the paper's faculty advisor submit page proofs to the high school's principal for prior approval.²⁸² Three days before the publication of the final issue of the school year, the principal found fault with two stories: one on students and

²⁷⁹ See David L. Hudson, Jr. & John E. Ferguson, Jr., *A First Amendment Focus: The Courts' Inconsistent Treatment of Bethel v. Fraser and the Curtailment of Student Rights*, 36 J. MARSHALL L. REV. 181, 191 ("However, recent developments in the lower courts show the *Fraser* decision may do more to curtail the rights *Tinker* recognized than *Hazelwood*. The problem originates in the way *Fraser* is interpreted by some lower courts. The issue that has caused a split in the First Amendment's application is whether *Fraser* allows schools to censor any speech deemed vulgar or offensive (broad reading), or whether *Fraser* only allows the regulation of speech that is sponsored by the school (narrow reading).")

²⁸⁰ In the majority opinion, scant evidence is cited for the proposition that the speech disrupted the operation of the school. During the speech, some in the audience "hooted and yelled" while others "simulated" the acts *Fraser* referenced, and the day after the speech, one teacher felt compelled to discuss the speech with her class. *Id.* at 678. Still, there is no sign the speech was disruptive in a way that would satisfy the *Tinker* standard, even though Justice William Brennan argued in his concurring opinion the case was easily decided under *Tinker*. *See id.* at 687-90 (Brennan, J., concurring in the judgment). Perhaps this point was best addressed by a rule in the Bethel High School disciplinary code: "Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures." *Id.* at 678. For the majority, *Fraser*'s speech was disruptive simply as a matter of course.

²⁸¹ 484 U.S. at 262.

²⁸² *Id.* at 263.

teenage pregnancy and another on students dealing with divorced parents.²⁸³ In the principal's judgment, the students in the pregnancy story might have found their privacy compromised, even with the paper's decision to use anonymous names; while in the story dealing with divorce, the principal thought that parents were not given the opportunity to respond to unflattering comments.²⁸⁴ After considering the timeframe and with the end of the year nearing, the principal decided to simply withhold from publication the two pages containing the stories rather than seek changes to their content.²⁸⁵

Student editors unhappy with the principal's decision then sued, arguing their First Amendment rights had been violated.²⁸⁶ The district court, however, concluded the principal's actions were justified in light of the school's educational function.²⁸⁷ The Eight Circuit reversed, finding *Spectrum* to be a public forum that could be censored only under *Tinker*'s material and substantial interference standard.²⁸⁸ The Supreme Court then reversed the Eighth Circuit and upheld the principal's censorship, choosing to make a distinction between *Tinker* and situations where a school is called to sponsor student expression in some way.²⁸⁹

In writing for the majority, Justice Byron White first considered the legacy of *Tinker* — that “[s]tudents in the public schools do not ‘shed their constitutional rights to freedom of speech or expression at the schoolhouse gate’”²⁹⁰ — in light of the Court's decision in *Fraser*, citing

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 264.

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.* at 265.

²⁸⁹ *Id.* at 272-73.

²⁹⁰ *Id.* at 266 (quoting *Tinker*, 393 U.S. at 506).

from that case both the idea that student speech rights can be limited and that courts should defer to school administrative decisions.²⁹¹

In concluding the censorship was constitutionally permissible, Justice White quickly dismissed the Eighth Circuit's public forum determination. As he found, "The 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.'" ²⁹² Instead of a square, park or other type of historically recognizable public forum, Justice White argued, *Spectrum* was a tightly-controlled environment where the advisor picked the paper's editors, picked publication dates, assigned stories to those taking the school's Journalism II class, edited stories, and dealt with the printing company.²⁹³ That level of control evidenced a purpose to create a "supervised learning experience for journalism students," rather than a public form, according to Justice White.²⁹⁴

Justice White then distinguished *Hazelwood* from *Tinker*, with the former being a question of whether a school must "affirmatively . . . promote particular student speech" and the latter simply being a matter of whether a school must "tolerate particular student speech."²⁹⁵ This first category is exempt from the material and substantial disruption standard as Justice White concluded what was "articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression."²⁹⁶

²⁹¹ See *id.* at 266-67.

²⁹² *Id.* at 267 (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)). See also Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1220-21 (1984) (explaining differences in traditional, designated, and nonpublic forums).

²⁹³ *Id.* at 268.

²⁹⁴ *Id.* at 270.

²⁹⁵ *Id.* at 270-71.

²⁹⁶ *Id.* at 272-73.

Thus the school's level of control over the newspaper and its integration with the curriculum both set the facts of *Hazelwood* outside the realm of *Tinker* and allowed school officials a greater degree of control over a particular subset of student speech. In defining what is to be considered part of a school's curriculum, Justice White cited "school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school" that must be "supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences."²⁹⁷ Control over this form of curriculum-based, sponsored student expression is easily justifiable, according to Justice White:

Educators are entitled to exercise greater control over this second form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.²⁹⁸

Under the *Hazelwood* standard, administrators can silence all sponsored speech that would fall under the *Tinker* rubric as well as "speech that is . . . ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences."²⁹⁹ Given the facts of the case, Justice White focused on the "immature audiences" issue as he cautioned that schools "must be able to take into account the emotional maturity of the intended audience" where student speech on sensitive topics like divorce and teen pregnancy are concerned.³⁰⁰ *Hazelwood*'s holding, though, is premised on the educational and supervisory nature of the relationship between the school and the newspaper in addition to giving schools the

²⁹⁷ *Id.* at 271.

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.* at 272.

ability to distance themselves from student speech that might be unfairly attributed to the administration.³⁰¹

In his dissent, Justice Brennan argued that the school administrators of Hazelwood East High School “breached [a] promise” and “dash[ed]” the expectations of students with the decision to remove the pages from the newspaper.³⁰² In his view, *Tinker* still exclusively controlled student speech even after the Court’s decision in *Fraser* as he argued the Court “applied the *Tinker* test...in *Fraser*” and “from the first sentence of its analysis, *Fraser* faithfully applied *Tinker*.”³⁰³ Furthermore, he characterized the majority’s decision in *Hazelwood* as “erect[ing] a taxonomy of school censorship, concluding that *Tinker* applies to one category and not another” but not “cast[ing] doubt on *Tinker*’s vitality.”³⁰⁴

Justice Brennan would have clearly preferred to decide the case under *Tinker*, stating that an “educator may, under *Tinker*, constitutionally ‘censor’ poor grammar, writing, or research because to reward such expression would materially disrupt the newspaper’s curricular

³⁰¹ See Samuel P. Jordan, Comment, *Viewpoint Restrictions and School-Sponsored Student Speech: Avenues for Heightened Protection*, 70 U. CHI. L. REV. 1555, 1560-61 (2003) (“The Court cited two primary justifications for the heightened interest of school authorities when student speech is school-sponsored. First, the educational context of the speech — including involvement of faculty members and the pursuit of educational objectives in the sponsored activity — implicates the school’s custodial and tutelary responsibilities more directly. Second, a school’s promotion of speech introduces the possibility that the expression will be attributed to the school itself. Speech that bears the imprimatur of the school resembles official speech, leaving the school free to employ reasonable measures to guard against misattribution. Because of the educational context and the perception of imprimatur, Hazelwood authorizes regulation of school-sponsored speech so long as the regulation is ‘reasonably related to legitimate pedagogical concerns.’”). *But see* Adam Hoising, “*School Sponsorship*” and *Hazelwood’s Protection of Student Speech: Appropriate for All Curriculum Contexts?*, 4 NEB. L. REV. BULL. 1, 8 (2012) (“But the Court did not emphasize the teacher’s control. Instead, the Court focused on how the speech affected the public perception, i.e., whether the public could reasonably believe the school supported or ratified the speech.”).

³⁰² *Id.* at 278 (Brennan, J., dissenting.).

³⁰³ *Id.* at 281, 282 (citation omitted). *Contra id.* at 272 n. 4 (“The dissent perceives no difference between the First Amendment analysis applied in *Tinker* and that applied in *Fraser*. We disagree. The decision in *Fraser* rested on the ‘vulgar,’ ‘lewd,’ and ‘plainly offensive’ character of a speech delivered at an official school assembly rather than on any propensity of the speech to ‘materially disrupt classwork or involv[e] substantial disorder or invasion of the rights of others.’”) (majority opinion) (citations omitted).

³⁰⁴ *Id.* at 281.

purpose.”³⁰⁵ However, Justice Brennan argued that *Tinker* could not protect school action under the guise of a curricular purpose where administrators moved to protect members of the school population or disassociate the school from student speech — unless, as he posited, “one believes that the purpose of the school newspaper is to teach students that the press ought never report bad news, express unpopular views, or print a thought that might upset its sponsors.”³⁰⁶

As Justice Brennan concluded, since the censorship did not serve a “legitimate pedagogical purpose,” it could not have been employed to prevent a disruption of classwork under *Tinker*.³⁰⁷ Ethically, he continued to find fault with Hazelwood’s principal, as he argued that even if the editing of the newspaper was constitutional, the principal acted “brutal[ly]” in employing a “paper shredder” to remove a total of six articles where he found problems with only two of the stories.³⁰⁸

Ultimately, Justice Brennan found the majority’s decision as one “denud[ing] high school students of much of the First Amendment protection that *Tinker* itself prescribed.”³⁰⁹ In closing, he reflected not only on *Tinker* but also the promises to students contained in *Barnette* as he ruefully observed, “The young men and women of Hazelwood East expected a civics lesson, but not the one the Court teaches them today.”³¹⁰

Overall, the Court’s holding is broad and grants a great deal of latitude where administrators and teachers act in the interest of “legitimate pedagogical concerns,”³¹¹ and that leeway only increases when courts defer to administrators in determining what is a valid

³⁰⁵ *Id.* at 284 (internal quotation omitted).

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 289.

³⁰⁸ *Id.* at 290.

³⁰⁹ *Id.*

³¹⁰ *Id.* at 291.

³¹¹ *See id.* at 273 (“[E]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”).

pedagogical purpose.³¹² Still, this authority must be read in light of the requirement that speech subject to *Hazelwood* oversight must bear the school's imprimatur in addition to being supervised by faculty with some attached learning component.

c. *Morse v. Frederick*

Morse, the Court's most recent student speech decision, came in 2007 after a near two decade silence on the issue. In *Morse*, high school students were dismissed from class in order to watch the 2002 Olympic torch relay as it passed through Juneau, Alaska.³¹³ One student, a senior named Joseph Frederick, did not attend school that day but met his friends to watch the torch on property across the street from Juneau Douglas High School.³¹⁴ As torchbearers and the cameras passed the students, Frederick and his friends unveiled their surprise for the day: a 14-foot banner reading "BONG HiTS 4 JESUS."³¹⁵ Principal Deborah Morse crossed the street to demand the students take down their banner, and all but Frederick complied.³¹⁶ Following the incident, Frederick was suspended for 10 days — a punishment that was eventually reduced to eight days.³¹⁷ Upon appealing his suspension on First Amendment grounds, Frederick's claim was rejected by the district court, as it held the school had "the authority, if not the obligation" to silence Frederick's pro-drug speech at a gathering of students.³¹⁸ The Ninth Circuit, however,

³¹² Jordan, *supra* note 301, at 1555. See also Bruce C. Hafen & Jonathan O. Hafen, Symposium, *Twenty-Five Years After Tinker: Balancing Students' Rights: The Hazelwood Progeny: Autonomy and Student Expression in the 1990s*, 69 ST. JOHN'S L. REV. 379, 376 (1995) ("These courts accept the Supreme Court's recognition that school officials must have broad discretion to pursue their primary educational mission of preparing children for adulthood and full integration into society.").

³¹³ 551 U.S. at 397.

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.* at 398.

³¹⁷ *Id.*

³¹⁸ *Id.* at 399 (quoting App. to Pet. for Cert 37a).

reversed, applying *Tinker* and reasoning that administrators had failed to show Frederick's speech would cause a substantial disruption in the operation of the school.³¹⁹

At the Supreme Court, the exact message of Frederick's banner became a key issue in the case, as the majority settled on two possible meanings: either an imperative to use illegal drugs or a celebration of illegal drug use.³²⁰ The precise meaning of the two, however, was ultimately irrelevant to the majority since it found Frederick's banner to be implicitly pro-drug and upheld his punishment on those grounds.³²¹

In writing for the majority, Chief Justice John Roberts attempted to bring order to the Court's student speech jurisprudence by explaining the applicable principles from both *Fraser* and *Hazelwood*.³²² *Fraser*, Chief Justice Roberts wrote, was notable for establishing both that student First Amendment rights are not "automatically coextensive" with the rights of adults in other settings and that *Tinker* does not control all student speech situations.³²³ According to the chief justice, *Hazelwood* was instructive in deciding *Morse* as it confirmed both of the underlying principles from *Fraser*. Despite their usefulness, neither *Fraser* nor *Hazelwood* would become the basis for the majority's holding as Chief Justice Roberts expressly declined to extend *Fraser*'s prohibition of indecent speech to cover pro-drug expression³²⁴ and found that *Hazelwood* was similarly inapplicable as no reasonable observer would believe Frederick's banner bore the school's imprimatur.³²⁵

³¹⁹ *Id.*

³²⁰ *Id.* at 402.

³²¹ *Id.* at 403.

³²² *See id.* at 403-06.

³²³ *Id.* at 404-05 (quoting *Fraser*, 478 U.S. at 682).

³²⁴ *See id.* at 409 ("Petitioners urge us to adopt the broader rule that Frederick's speech is proscribable because it is plainly 'offensive' as that term is used in *Fraser*. We think this stretches *Fraser* too far; that case should not be read to encompass any speech that could fit under some definition of 'offensive.' After all, much political and religious speech might be perceived as offensive to some. The concern here is not that Frederick's speech was offensive, but that it was reasonably viewed as promoting illegal drug use.") (citation omitted).

³²⁵ *Id.* at 405.

In holding for Principal Morse, the Court focused on the dangers posed by illegal drug use; Chief Justice Roberts cited survey statistics showing that many middle and high school students have either used or sold drugs.³²⁶ The danger posed by illicit substances, in addition to a school's obligation to protect students, thus took the facts in *Morse* out of the *Tinker* framework, as the majority concluded:

Tinker warned that schools may not prohibit student speech because of “undifferentiated fear or apprehension of disturbance” or “a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” The danger here is far more serious and palpable. The particular concern to prevent student drug abuse at issue here, embodied in established school policy, extends well beyond an abstract desire to avoid controversy.³²⁷

Justice Samuel Alito, joined by Justice Anthony Kennedy, authored a concurring opinion to state explicitly his belief that the majority's holding in *Morse* “goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (2) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue.”³²⁸ Justice Alito explained in his concurrence that he was wary of any interpretation of the majority opinion that would allow for the censorship of student speech contrary to a school's educational mission; furthermore, he disclaimed any such interpretation as “dangerous” and an abuse.³²⁹ Yet with a single paragraph, he encouraged lower courts to enable school administrators to act with broad authority to censor student speech in regard to school safety:

[A]ny argument for altering the usual free speech rules in the public schools cannot rest on a theory of delegation but must instead be based on *some special characteristic of the school*

³²⁶ See *id.* at 407.

³²⁷ *Id.* at 408-09 (citations omitted).

³²⁸ 551 U.S. at 422 (Alito, J., concurring).

³²⁹ *Id.* at 423.

*setting. The special characteristic that is relevant in this case is the threat to the physical safety of students. School attendance can expose students to threats to their physical safety that they would not otherwise face. Outside of school, parents can attempt to protect their children in many ways and may take steps to monitor and exercise control over the persons with whom their children associate. Similarly, students, when not in school, may be able to avoid threatening individuals and situations. During school hours, however, parents are not present to provide protection and guidance, and students' movements and their ability to choose the persons with whom they spend time are severely restricted. Students may be compelled on a daily basis to spend time at close quarters with other students who may do them harm. Experience shows that schools can be places of special danger.*³³⁰

While Justice Alito's opinion was only a concurrence and any point he had to make in regard to school violence was certainly *dicta*, those inherent limitations have not stopped lower courts from using the justice's opinion in violent student speech cases.³³¹

d. Application of Supreme Court student speech precedent in violent speech cases

Morse, when read perhaps as narrowly as the majority intended,³³² does little to curtail student speech rights. However, that has not prevented some courts from using the decision to censor student expression.³³³ That overreach, however, is merely a symptom of a larger issue with the misapplication of Supreme Court precedent in the student speech arena. At lower court levels, the outcome of student speech cases is greatly dependent on exactly which decision — *Tinker*, *Fraser*, *Hazelwood*, or *Morse* — a court chooses to apply, but even when the correct case is applied, the ultimate outcome may still be flawed due to a misconception of the issues at play or simply a deference to school administrators.

³³⁰ *Id.* at 424 (emphasis added).

³³¹ See Chapter 2, *supra*

³³² See 551 U.S. at 408-10 (declining to expand the holding of *Fraser* to cover pro-drug student speech as offensive and questioning the dissenters' decision to "sound[] the First Amendment bugle").

³³³ See generally Clay Calvert, *Misuse and Abuse of Morse v. Frederick by Lower Courts: Stretching the High Court's Ruling Too Far to Censor Student Expression*, 32 SEATTLE UNIV. L. R. 1 (2008). See also Chapter 2, *supra*, for discussion on Justice Alito's opinion and its consequences for student speech jurisprudence in lower courts.

In *Cuff*, a case in which a fifth-grade student wrote as a class assignment of a wish that his school “[b]low up . . . with the teachers in it,”³³⁴ the Second Circuit made it clear courts should defer to school administrators where violent speech is concerned: “[I]n the context of student speech favoring violent conduct, it is not for courts to determine how school officials should respond. School administrators are in the best position to assess the potential for harm and act accordingly.”³³⁵ In deciding the case, the court focused on the *Tinker* standard, applying it as “whether school officials might reasonably portend disruption from the student expression at issue.”³³⁶ The court also stressed that the standard was objective, “focusing on the reasonableness of the school administration’s response.”³³⁷ Yet in ultimately concluding the administration’s response was reasonable, the court showed just how unreasonable and reactionary it was. The court noted that the astronaut drawing caused one student to become “very worried,” but that was not enough to meet the *Tinker* standard and justify the silencing of B.C.’s expression.³³⁸ To do that, the court engaged in extended and elaborate speculation:

School administrators might reasonably fear that, if permitted, other students might well be tempted to copy, or escalate, B.C.’s conduct. This might then have led to a substantial decrease in discipline, an increase in behavior distracting students and teachers from the educational mission, and tendencies to violent acts. Such a chain of events would be difficult to control because the failure to discipline B.C. would give other students engaging in such behavior an Equal Protection argument to add to their First Amendment contentions . . . A failure of the appellees to respond forcefully to the “wish” might have led to a decline of parental confidence in school safety with many negative effects, including, e.g., the need to hire security personnel and even a decline in enrollment.

Thus, appellees could reasonably have concluded that B.C.’s astronaut drawing would substantially disrupt the school

³³⁴ See 677 F. 3d 109, 111 (2nd Cir. 2012). See also Chapter 1, *supra*.

³³⁵ *Cuff*, 677 F.3d at 113.

³³⁶ *Id.* (quoting *Doninger v. Niehoff*, 527 F.3d 41, 51 (2d Cir. 2008)).

³³⁷ *Id.*

³³⁸ *Id.* at 114.

environment, and their resulting decision to suspend B.C. was constitutional.³³⁹

According to the court's argument, if B.C.'s drawing was not punished other students might copy his expression to such an extent that the student body would be both distracted and prone to violent acts. Then, teachers and administrators would be unable to control the school to such a degree that parents would lose faith in their abilities, thereby resulting in decreased enrollment. The Second Circuit's claims are so speculative and so exaggerated that it might have gotten the same mileage out of simply trying to pin the potential downfall of Western civilization on B.C.'s crayon drawing. Despite the flaws in the court's reasoning, it is at least helpful in one respect: It shows how far courts are willing to stretch the boundaries of the *Tinker* standard to justify the actions of school administrators.

In *Bell*, a case in which a student composed and published to YouTube a rap song with violent themes that criticized school employees,³⁴⁰ the case likewise turned on an examination of the *Tinker* standard as the district court considered whether the student's song "caused or tended to cause a material and/or substantial disruption at school" or "whether it was reasonably foreseeable to school officials that the song would cause a material and/or substantial disruption at school."³⁴¹ The issue of whether the school had authority to punish the speech was barely questioned as the court simply took Bell's decision to publish the song on YouTube and Facebook as evidence of intent to "publish to the public" without any concern of whether he intended to reach the campus specifically.³⁴² As far as actual disruption to the school, the court

³³⁹ *Id.* at 114-15.

³⁴⁰ *See* 859 F. Supp. 2d 834, 836 (N.D. Miss. 2012). *See also* Chapter 1, *supra*.

³⁴¹ *Bell*, 859 F. Supp. at 839.

³⁴² *Id.* at 837-38.

pointed to coaches identified in the song as being angered by its content and to “adversely affected” teaching styles.³⁴³ In terms of possibly foreseeable disruption, the court argued that

a public high school student's song (1) that levies charges of serious sexual misconduct against two teachers using vulgar and threatening language and (2) is published on Facebook.com to at least 1,300 “friends,” many of whom are fellow students, and the unlimited internet audience on YouTube.com, would cause a material and substantial disruption at school.³⁴⁴

Finally, in *Wynar*,³⁴⁵ a case in which a student sent violent MySpace messages detailing his thoughts and plans for a Virginia Tech massacre-like shooting at his own high school,³⁴⁶ two preliminary questions were (1) did the student’s messages constitute a “true threat” and (2) did the school have the authority to act against violent messages that were disseminated online and off-campus.³⁴⁷ The court easily dismissed the former — ruling in essence that because the school’s actions to suspend the student were justified, the court need not address the potentially trickier issue of whether the messages were a true threat³⁴⁸ — but the latter took more time and attention. After discussing relevant precedent and approaches from other circuits, the court lamented the difficulty of the task at hand: “One of the difficulties with the student speech cases is an effort to divine and impose a global standard for a myriad of circumstances involving off-campus speech. A student's profanity-laced parody of a principal is hardly the same as a threat of a school shooting[.]”³⁴⁹ Faced with that almost impossible task, the court admitted it was “reluctant to try and craft a one-size fits all approach”³⁵⁰ and instead went with a narrower rule

³⁴³ *Id.* at 840.

³⁴⁴ *Id.*

³⁴⁵ 728 F.3d 1062 (9th Cir. 2013).

³⁴⁶ *See id.* at 1065-66. *See also* Chapter 1, *supra*.

³⁴⁷ *Id.* at *11-18.

³⁴⁸ *Id.* at n. 7.

³⁴⁹ *Id.* at *16.

³⁵⁰ *Id.*

for off-campus speech that allows schools to act against such speech where administrators have “an identifiable threat of school violence” that “meets the requirements of *Tinker*.”³⁵¹

Having announced a rule to govern off-campus speech that threatens school violence, the Ninth Circuit then proceeded to apply its rule to *Wynar* by first examining the standard elucidated by *Tinker*.³⁵² The court discussed both prongs of *Tinker* — the substantial disruption/material interference with school activities and the “rights of other students to be secure and to be let alone”³⁵³ — before concluding that “it is an understatement that the specter of a school shooting qualifies under either prong.”³⁵⁴ As the court determined, “We need not discredit Landon's insistence that he was joking; our point is that it was reasonable for Douglas County to proceed as though he was not.”³⁵⁵

The Ninth Circuit’s determination in *Wynar* was assuredly a reasonable one because any student who speaks in terms of dates for a shooting attack and intended targets certainly seems like a threat to the school community. Yet the court’s analysis was curious to say the least. Why, given the facts in the case, would a court examine *Wynar* using student speech jurisprudence when the speech was clearly a true threat and therefore unprotected under the Constitution? Facially, as the Ninth Circuit argued, it gave *Wynar* the benefit of the doubt as it were; by assuming his speech was constitutionally protected, it allowed the court to continue its First Amendment analysis. But any instance where *Tinker* is invoked is another chance for it to be watered down or its key issues conflated. Therefore, where student speech cases can be properly resolved using true threat analysis, that should be the preferred method of adjudication — not a reliance on *Tinker* or the creation of a new standard from Justice Alito’s opinion in *Morse*.

³⁵¹ *Id.* at *17.

³⁵² *Id.* at *19-25.

³⁵³ *Tinker*, 393 U.S. at 514.

³⁵⁴ *Wynar*, 728 F.3d at *20.

³⁵⁵ *Id.* at *23.

A few general points can be made from these three examples alone. First, despite the Court's most recent decision in *Morse, Tinker* remains a key standard in the area of student speech generally and violent student expression specifically. Second, in the 21st century, students have access to tools and means of expression that Mary Beth Tinker could not have conceived in the Vietnam War era, meaning that courts will be forced to address the limits of school control over online speech. Finally, decisions regarding violent student expression cannot be made in a vacuum as the nation, along with scholars and jurists, has been shaken by repeated episodes of school violence. In cases such as *Cuff, Bell*, and especially *Wynar*, courts seem to be quite suspicious of interfering in any discipline that can be couched in terms of school safety.

IV. Protecting children from expression

Laws reflecting the concerns over the effects media and expression might have on children have been before the Supreme Court for more than 50 years, but these laws designed to shield children have often been struck down by the Court. “We have before us legislation not reasonably restricted to the evil with which it is said to deal,” wrote Justice Felix Frankfurter for the Court in *Butler v. Michigan*,³⁵⁶ a 1957 case on a Michigan state law banning the sale and distribution of any literature “tending to incite minors to violent or depraved or immoral acts” or “manifestly tending to the corruption of the morals of youth.”³⁵⁷ The problem with the law, at least as Justice Frankfurter and the majority saw it, was that the regulation made it a crime to sell books to adults that would otherwise be legal; in essence, “quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence,” according to Justice Frankfurter.³⁵⁸ The result was to “reduce the adult population of

³⁵⁶ 352 U.S. 380, 383 (1957).

³⁵⁷ *Id.* at 381.

³⁵⁸ *Id.* at 383.

Michigan to reading only what is fit for children,” which, as the majority concluded, was an impermissible result under the Constitution.³⁵⁹

Protecting children from expression is a relatively new social endeavor that dates to the Industrial Revolution as labor reformers sought to portray children as innocents in need of protection from cruel labor practices.³⁶⁰ As societal views of children softened and began to conceptualize minors as vulnerable, the justice system accordingly embraced notions of paternalism where children were concerned.³⁶¹

In attempting to shield children from potentially harmful expression, the general interest asserted by the government can be broken down into two distinct sub-interests: aiding parents in their attempts to protect children and unilaterally preventing minors from accessing explicit materials.³⁶² Generally, courts have accepted without criticism the need to protect children as a valid governmental reason for censorship,³⁶³ but that does not mean such an interest should escape scrutiny. The first half of the protectionary interest — one suggesting that government acts to protect minors to aid parental oversight — “relies on a simplistic view that presumes a harmony between the interests of individual parents and the interests of the state,” according to Professor Catherine J. Ross.³⁶⁴ Furthermore, as Professor Ross has argued, it preempts some measure of parental decision making, suggests parents are incapable of controlling what speech

³⁵⁹ Id. at 383-84.

³⁶⁰ See Ross, *supra* note 68, at 441-42.

³⁶¹ See id. at 495.

³⁶² Ashutosh Bhagwat, *What If I Want My Kids to Watch Pornography? Protecting Children from “Indecent” Speech*, 11 WM. & MARY BILL OF RTS. J. 671, 674 (2003).

³⁶³ Id. at 673 (“[C]ourts generally have accepted this interest without comment or argument.”). See also Ross, *supra* note 68, at 429 (“Confronted with the incantation that the state aims to safeguard children, courts at every level, including the Supreme Court, have regularly failed to scrutinize the interest alleged by the government.”).

³⁶⁴ Id. at 435.

their children access without government assistance, and the interest ignores potential private market solutions for parents seeking to protect their children from controversial expression.³⁶⁵

Yet the interest in aiding parental supervision has proven to be the source of “fairly universal agreement” since consensus in the American legal system holds that parents should control the upbringing of children and that government should provide assistance in that effort.³⁶⁶ However, where the government acts to protect minors irrespective of the rights and wishes of parents, this second protectionary interest risks violating the principles inherent in the First Amendment³⁶⁷ and highlights the general lack of proof that controversial speech harms children.³⁶⁸

The Court may have found the state regulation in *Butler* unconstitutional, but that did not foreclose successful governmental attempts to shield children from possibly harmful expression. Yet where such laws and regulations have been found to be constitutional, they focus on preventing children from accessing sexually explicit material, and not other types of subject matter thought to be harmful such as violence.³⁶⁹ This Part will begin by first examining two

³⁶⁵ See *id.* at 477-93.

³⁶⁶ Bhagwat, *supra* note 362, at 683. See also Ross, *supra* note 68, at 472 (“The government’s strongest argument in support of a compelling interest in regulating speech to shield minors is the claim that the state acts to reinforce parental decisionmaking and to help parents enforce their personal choices about what their children are ready to read, see, or hear.”).

³⁶⁷ Bhagwat, *supra* note 362, at 696 (“[O]ne’s conclusions regarding the validity of the independent governmental interest turn on one’s views of the State’s proper role in a democratic society and on the fundamental purposes of the First Amendment.”).

³⁶⁸ See Ross, *supra* note 68, at 435 (“To justify intrusions on parental rights and family privacy, proponents of abridging speech would need to demonstrate specific harm flowing from the speech.”). See also *id.* at 494 (“[T]he proponents of government regulation have failed to articulate any specific harm to children that would establish such an independent compelling interest.”).

³⁶⁹ See *id.* at 456 (“The treatment of violent speech is distinguishable from the speech considered in *Pacific* which involved sexuality and bodily functions. Although there is widespread concern about the amount of violence contained in entertainment that reaches children, the Supreme Court has never held that speech containing violent sentiments or imagery lies outside the protection of the First Amendment as applied to either adults or children. The sole exceptions are speech that fits the definition of ‘fighting words’ or rises to the level of ‘incitement[.]’”)

cases, *Ginsberg* and *Pacifica*, which curtailed various speech rights with the intention of protecting children.

a. *Ginsberg v. New York*

A little more than a decade after *Butler*, the Court heard arguments in *Ginsberg v. New York*, a case challenging a conviction under a state law that made it a crime to sell nude magazines and other printed materials to minors deemed “harmful”³⁷⁰ and obscene³⁷¹ to them.³⁷² New York, by tailoring the law to include only a ban on the sale to minors of “harmful” materials appealing to their specific “prurient, shameful or morbid interest[s],” sought to create a variable definition of obscenity, making a class of regulatable works as to minors that would be perfectly legal for adults to buy and sell. Justice Brennan, in writing for a 6-3 majority, concluded for the Court that “we cannot say that the statute invades the area of freedom of expression constitutionally secured to minors,”³⁷³ thereby upholding the conviction and making *Ginsberg* “the leading case recognizing the power of the State to protect children,” according to one scholar.³⁷⁴

The Court’s majority rejected the notion the law was an invasion of the First Amendment rights of minors, arguing instead that the statute simply “adjusts the definition of obscenity”³⁷⁵ for the protection of children.³⁷⁶ Justice Brennan found two permissible state interests in the law:

³⁷⁰ “Harmful” under the state law meant nudity that “(i) predominantly appeals to the prurient, shameful or morbid interest of minors, and (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) is utterly without redeeming social importance for minors.” 390 U.S. at 633 (quoting New York Penal Law Sec. 484-f).

³⁷¹ See notes 58-59 and accompanying text, *supra*, for discussion on historical lack of First Amendment protection for obscene speech.

³⁷² See 390 U.S. at 631-33.

³⁷³ *Id.* at 637.

³⁷⁴ Bhagwat, *supra* note 362, at 675.

³⁷⁵ 390 U.S. at 638.

³⁷⁶ See *id.* at 639 (“The well-being of its children is of course a subject within the State’s constitutional power to regulate[.]”).

supporting parental efforts to control what material is available to minors³⁷⁷ and an “independent interest in the well-being...of youth.”³⁷⁸ As to the latter interest, the law included a legislative finding that the proscribed material was “a basic factor in impairing the ethical and moral developments of our youth” and functioned as “a clear and present danger to the people of the state.”³⁷⁹ While Justice Brennan conceded that the legislature’s finding was “doubtful” as to “express[ing] an accepted scientific fact,”³⁸⁰ that did not preclude the state’s authority; rather, for the law to be constitutional, it required only that the Court “be able to say that it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors.”³⁸¹

This relative lack of scrutiny, usually phrased as the “rational basis” test, is employed where a fundamental right is not implicated by state regulation.³⁸² Since the majority found the state law to be a definition of a special subset of speech without First Amendment protection (obscenity), rather than the broad prohibition of materials seen in *Butler*, this meant the law was due only the forgiving analysis of rational basis examination. Justice Brennan’s opinion bore out the rational basis test in its conclusion as it simply found the state law was constitutional because the Court “cannot say that [the law], in defining the obscenity of material on the basis of its

³⁷⁷ See *id.* As Justice Brennan argued, “The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children’s well-being are entitled to the support of laws designed to aid discharge of that responsibility . . . Moreover, the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children.” *Id.*

³⁷⁸ *Id.* at 640.

³⁷⁹ *Id.* at 641 (quoting New York Penal Law Sec. 484-e).

³⁸⁰ *Id.*

³⁸¹ *Id.* at 641.

³⁸² See Kenji Yoshino, *Why the Court Can Strike Down Marriage Restrictions Under Rational-Basis Review*, 37 N.Y.U. REV. L. & SOC. CHANGE 331, 331-32 (2013) (concluding that under “ordinary” rational basis review government regulations are given “enormous deference” and the Court “must cudgel its imagination for any possible rationale that might have supported the legislation”). *But see* Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 NYU J.L. & LIBERTY 897 (arguing rational basis examination “is nothing more than a Magic Eight Ball that randomly generates different answers to key constitutional questions depending on who happens to be shaking it and with what level of vigor”).

appeal to minors under 17, has no rational relation to the objective of safeguarding such minors from harm.”³⁸³ According to the Court, where minors and sexually explicit material are concerned, states have a wide degree of latitude to regulate, even as studies into the harmfulness of such material “all agree that a causal link has not been demonstrated” and “they are equally agreed that a causal link has not been disproved either.”³⁸⁴

Yet “[e]thical and moral questions, however, are by their nature not susceptible to empirical or scientific proof; rather, their answers exist in the eyes of the beholder,” as Professor Ashutosh Bhagwat wrote in regard to *Ginsberg*’s lack of scientific proof.³⁸⁵ Because the speech interest of minors to receive sexually explicit speech is so minimal, according to the Court, nothing more than moral uneasiness is required to engage in censorship. *Ginsberg*, therefore, “firmly established” the power of the government to protect children from the actual or even “purported” harms of sexually explicit speech.³⁸⁶

b. *F.C.C. v. Pacifica*

The Court’s decision in *Ginsberg* upheld state efforts to restrict media access to minors, but that restriction was based on a shifted interpretation of obscenity as applied to minors rather than the complete ban on a whole class of products as seen in *Butler*. This targeted approach in shielding minors from sexually suggestive expression would continue with the 1978 decision in *F.C.C. v. Pacifica*, a ruling in which the Court upheld the Federal Communication Commission’s authority to sanction broadcasters who aired indecent programming during a time when children were likely to be in the listening or viewing audience.³⁸⁷ The case arose from an October 1973 broadcast of a George Carlin monologue, one in which the comedian listed “the words you

³⁸³ 390 U.S. at 643.

³⁸⁴ *Id.* (quotation omitted).

³⁸⁵ Bhagwat, *supra* note 362, at 685.

³⁸⁶ *Id.* at 675.

³⁸⁷ *See Pacifica*, 438 U.S. at 749-50.

couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say, ever.”³⁸⁸ Whereas *Ginsberg* was examined through the lens of obscenity, the Court found the speech in *Pacifica* was merely indecent, meaning it had some First Amendment protection but it was subject to more government regulation than non-indecent speech.³⁸⁹ In writing for the majority, Justice Stevens argued there were two reasons for concluding that broadcast indecency specifically was more susceptible to government regulation: the first being that “broadcast media have established a uniquely pervasive presence in the lives of all Americans”³⁹⁰ and the second that “broadcasting is uniquely accessible to children, even those too young to read.”³⁹¹ To support limiting broadcast content for the sake of children, Justice Stevens drew an analogy to the “Fuck the Draft” jacket in *Cohen*, arguing that where the written word “fuck” in a public setting might be protected expression and “incomprehensible to a first grader,” “*Pacifica*’s broadcast could have enlarged a child’s vocabulary in an instant.”³⁹² The justice then went back to the state interests in *Ginsberg* — namely those of protecting youth and supporting parental efforts to do the same — as he concluded that those concerns, in addition to the “ease with which children may obtain access to broadcast material” justified government regulation of indecent broadcast programming.³⁹³

³⁸⁸ Id. at 729 (quoting Carlin monologue). The Court quoted the Carlin monologue — known best as his “7 Dirty Words” — in an appendix to the majority opinion. It begins with: “I was thinking about the curse words and the swear words, the cuss words and the words that you can't say, that you're not supposed to say all the time, [‘cause] words or people into words want to hear your words...The original seven words were, shit, piss, fuck, cunt, cocksucker, motherfucker, and tits.” Id. at 751. During the course of the monologue, Carlin uses the “words” repeatedly in various contexts and ponders their meaning and place in society. Id. at 751-55.

³⁸⁹ See notes 53-59 and accompanying text, *supra*, for a discussion of the regulation of indecency as compared to obscenity.

³⁹⁰ Id. at 748.

³⁹¹ Id. at 749.

³⁹² *Pacifica*, 438 U.S. at 749.

³⁹³ Id. at 750.

In his concurring opinion, Justice Powell argued that children lack the capacity necessary to protect themselves from expression that most adults would actively choose to avoid.³⁹⁴ In addition to this lack of capacity, Justice Powell also argued indecent speech “may have a deeper and more lasting negative effect on a child than on an adult.”³⁹⁵ “For these reasons,” Justice Powell concluded, “society may prevent the general dissemination of such speech to children, leaving to parents the decision as to what speech of this kind their children shall hear and repeat[.]”³⁹⁶

But in Justice Brennan’s dissent, he characterized the protection of children as a “facial appeal” in order to “mask[.]” the “constitutional insufficiency” of the government’s argument.³⁹⁷ Furthermore, he argued that the monologue did not appeal to the prurient interests of minors as formulated in *Ginsberg*, and therefore made “completely unavailable to adults material which may not constitutionally be kept even from children,” which in turn violated the holding from *Butler*.³⁹⁸ Justice Brennan also believed the Court’s decision obstructed, rather than enabled, parental authority:

As surprising as it may be to individual Members of this Court, some parents may actually find Mr. Carlin's unabashed attitude towards the seven “dirty words” healthy, and deem it desirable to expose their children to the manner in which Mr. Carlin defuses the taboo surrounding the words. Such parents may constitute a minority of the American public, but the absence of great numbers willing to exercise the right to raise their children in this fashion does not alter the right's nature or its existence. Only the Court's regrettable decision does that.³⁹⁹

³⁹⁴ See *id.* at 757-58 (Powell, J., concurring in part, concurring in the judgment).

³⁹⁵ *Id.* at 758. See also *id.* (suggesting the language in Carlin’s monologue was “as potentially degrading and harmful to children as representations of many erotic acts”).

³⁹⁶ *Id.*

³⁹⁷ *Id.* at 767 (Brennan, J., dissenting).

³⁹⁸ See *id.* at 767-69.

³⁹⁹ *Id.* at 770.

Justice Brennan, however, swayed only Justice Thurgood Marshall to join his dissent, leaving the two justices in a decidedly minority position as the majority enabled the F.C.C.'s development of an indecency regulatory regime. While the statute in *Ginsberg* targeted minors, the F.C.C.'s indecency regulations do not serve to prevent minors from accessing broadcast indecency at all times; rather, the channeling of indecency to late-night "safe-harbor" hours is simply for the purpose of limiting indecency to hours when minors are less likely to be in the broadcast audience.⁴⁰⁰ However, as the *Pacifica* Court stated, much of the child-protection rationale in *Ginsberg* applies in the realm of broadcast indecency.⁴⁰¹

c. Protecting children from speech in the school setting

How far, however, does the rationale of protecting children go? When viewed through that lens, the Court's major student speech cases after *Tinker* can all be reduced in some way to protecting children. *Fraser* upheld a school's right to discipline students for sexually suggestive speech — especially where such speech "could well be seriously damaging" to younger students "on the threshold of awareness of human sexuality."⁴⁰² Similarly, *Hazelwood* enabled school administrators to "take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics."⁴⁰³ In *Morse*, the Court's most recent student speech case, the majority recognized that speech appearing to support the use of illegal drugs "pose[d] a particular challenge for school officials working to protect those entrusted to their care from the dangers of drug abuse."⁴⁰⁴ While the trifecta of student speech cases coming in the wake of *Tinker* does not explicitly overrule the Court's

⁴⁰⁰ See notes 53-54 and accompanying text, *supra*, for a discussion of the regulation of indecency.

⁴⁰¹ *Pacifica*, 438 U.S. at 750.

⁴⁰² *Fraser*, 478 U.S. at 683.

⁴⁰³ *Hazelwood*, 484 U.S. at 272.

⁴⁰⁴ *Morse*, 551 U.S. at 408.

decision, it certainly weakens its core; together with *Ginsberg* and *Pacifica*, the cases also suggest that where the state seeks to limit the speech rights of minors for the sake of their own protection, it may do so with a wide latitude. However, two questions regarding this authority are important. First, why is expression so allegedly dangerous for children? And second, what are the legal justifications to curtail expression in the name of children?

In arguing for a two-tiered approach to the First Amendment and children, Professor Kevin W. Saunders cites pornography,⁴⁰⁵ media violence,⁴⁰⁶ and violent video games⁴⁰⁷ as special concerns that require the state to intervene on behalf of children to restrict expression. Professor Saunders argues for two parallel systems of First Amendment regulation: one for adults — the traditional regime requiring the state to overcome the burden of strict scrutiny analysis when it seeks to limit fully protected expression⁴⁰⁸ — and a second regulatory regime for children, one where the state needs only to show a rational basis when it seeks to limit the First Amendment rights of minors.⁴⁰⁹ While this appears on its face to be simply what the Court endorsed in *Ginsberg*, Professor Saunders's idea is much broader and more damaging to the First Amendment; instead of carefully limiting some media access to minors based on a redefined standard of obscenity, this two-tiered approach to the First Amendment would allow *Ginsberg*'s rational basis approach to seep into all types and fora for the speech of children. Student speech rights would cease to exist in a regime where the state needed to show only a rational basis in the orderly operation of a public school before being allowed to curtail student expression.

⁴⁰⁵ See KEVIN W. SAUNDERS, SAVING OUR CHILDREN FROM THE FIRST AMENDMENT 52 (contending that adolescents use pornography as an educational tool and are therefore more susceptible to its influence).

⁴⁰⁶ See *id.* at 43-44 (“[B]y the time the average child finishes elementary school, the child has seen more than eight thousand murders and more than 100,000 other acts of violence...This exposure of children to violence as entertainment raises the question of possible psychological effects.”).

⁴⁰⁷ See *id.* at 46-47 (arguing that violent video games “teach[] kids to kill” and that “[v]ideo games appear to supply the skill necessary to be an efficient killer”).

⁴⁰⁸ See notes 47-49 and accompanying text, *supra*, for a discussion of the strict scrutiny test.

⁴⁰⁹ See Saunders, *supra* note 405, at 64-66.

Therefore, it is important to note the key commonality between *Ginsberg*, *Pacifica*, *Fraser*, and, to some extent, *Hazelwood*: They are all premised to some extent on protecting children from sexually explicit expression. This is consistent with the Supreme Court’s approach to such speech as “the Court has quite clearly treated sexually explicit speech differently from other speech in its First Amendment jurisprudence,” according to Professor Bhagwat.⁴¹⁰ So while the state may act to protect minors from sexually explicit speech, the clear implication is that in other areas such as violent expression, the state’s authority may be much more limited.⁴¹¹ Thus, the Court has acted to empower the state when it comes to protecting minors from expression, but it has done so in a limited way. As Part V will explain, this limited approach to protecting minors does not include a shield from violent expression.

V. The Supreme Court and violent speech

In 1946, the Court heard arguments in *Winters v. New York*,⁴¹² a criminal appeal under a state law that banned the sale to minors of books and magazines “devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime.”⁴¹³ After two years and two rearguments of the case,⁴¹⁴ the Court finally issued an opinion, finding the law impermissibly vague.⁴¹⁵ Thus the law

⁴¹⁰ Bhagwat, *supra* note 362, at 690-91.

⁴¹¹ See *id.* at 691 (“Given this differential treatment of sexual materials, it may be that the State possesses greater power to shield children from sexually oriented ideas and images than other ideas and images. Indeed, that seems to be the clear implication of recent cases striking down state efforts to shield minors from violence while continuing to recognize the State’s power with respect to sexual materials.”).

⁴¹² 333 U.S. 507 (1948).

⁴¹³ *Id.* at 508 (quoting New York Penal Law Sec. 1141(2)).

⁴¹⁴ Rearguments are held in a case usually due to retirement, illness or an especially divided Court. See Margaret Meriwether Cordray & Richard Cordray, *The Calendar of the Justices: How the Supreme Court’s Timing Affects Its Decisionmaking*, 36 ARIZ. ST. L.J. 183, 195, n.66 (2004). When a justice must miss an oral argument, this results in an 8-member bench and obviously makes a tie amongst the justices more of a possibility. See *id.* *Winters* was reargued, at least for the first time, because Justice Robert H. Jackson missed the initial oral argument due to his service as chief prosecutor at the Nuremberg trials. See Dillard Stokes, *Court Taking Third Swing at Magazine Ban: How Separate Crime Pulp and Hamlet?*, THE WASH. POST, Sept. 28, 1947 at B2. As to the second reargument, Professor John P. Frank wrote that, while *Winters* “should have been decided on [its] fundamental issue,” “no

was unconstitutional in spite of its goal, as the Court characterized it, of the “protection of minors from the distribution of publications devoted principally to criminal news and stories of bloodshed, lust or crime.”⁴¹⁶

Writing for the majority, Justice Stanley Reed found that the books and magazines targeted by the law were due the full measure of protection by the First Amendment despite their content:

We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature.⁴¹⁷

Thus, the Court concluded, even the scorned and blood-soaked pulp magazines of the 1940s were entitled to First Amendment protection under the majority's reasoning; the Court would express a similar sentiment almost 25 years after *Winters* when Justice Harlan wrote that “one man's vulgarity is another's lyric” in *Cohen*.⁴¹⁸ Simply put, the Court is not in a position to judge the usefulness or propriety of expression outside of those categories of speech traditionally without First Amendment protection. Rather, “the Constitution leaves matters of taste and style...largely to the individual,” as Justice Harlan wrote.⁴¹⁹ For whether it is an expletive written on the back of a jacket or a graphic true-crime story, it is protected expression under the

outside observer can know what conference room tensions or indecisions make it propitious to delay decision until another year.” John P. Frank, *The United States Supreme Court: 1946-47*, 15 U. CHI. L. REV. 1, 37 (1947).

⁴¹⁵ See *id.* at 519-20 (“The statute as construed by the Court of Appeals does not limit punishment to the indecent and obscene, as formerly understood. When stories of deeds of bloodshed, such as many in the accused magazines, are massed so as to incite to violent crimes, the statute is violated. It does not seem to us that an honest distributor of publications could know when he might be held to have ignored such a prohibition.”).

⁴¹⁶ *Id.* at 511 (footnote omitted).

⁴¹⁷ *Id.* at 510.

⁴¹⁸ *Cohen*, 403 U.S. at 25.

⁴¹⁹ *Id.*

Constitution. The reason for this principled approach to expression is simple, as Justice Reed found in *Winters*: “The present case as to a vague statute abridging free speech involves the circulation of only vulgar magazines. The next may call for decision as to free expression of political views in the light of a statute intended to punish subversive activities.”⁴²⁰ Expression therefore that seems trivial, rude, or harmful to some is protected for no other reason than it is simply not the government’s place to serve as an arbiter of taste.

Justice Frankfurter, however, viewed *Winters* differently and argued in his dissent that the Court’s decision unnecessarily struck down laws of “almost half the States of the Union.”⁴²¹ He believed so firmly that the majority was overreaching that he listed in his dissent the 20 state laws he assumed would be unenforceable under the Court’s decision.⁴²² Justice Frankfurter also took issue with the majority’s decision to bestow First Amendment protections on the magazines in question:

[T]he Court sufficiently summarizes one aspect of what the State of New York here condemned when it says “we can see nothing of any possible value to society in these magazines.” From which it jumps to the conclusion that, nevertheless, “they are as much entitled to the protection of free speech as the best of literature.” Wholly neutral futilities, of course, come under the protection of free speech as fully as do Keats' poems or Donne's sermons. But to say that these magazines have “nothing of any possible value to society” is only half the truth. This merely denies them goodness. It disregards their mischief. As a result of appropriate judicial determination, these magazines were found to come within the prohibition of the law against inciting “violent and depraved crimes against the person,” and the defendant was convicted because he exposed for sale such materials. The essence of the Court's decision is that it gives publications which have “nothing of any possible value to society” constitutional protection but denies to the States the power to prevent the grave evils to which, in their rational judgment, such publications give rise. The legislatures of New York and the other States were

⁴²⁰ *Winters*, 333 U.S. at 518.

⁴²¹ *Id.* at 524 (Frankfurter, J., dissenting).

⁴²² *See id.* at 522-23.

concerned with these evils and not with neutral abstractions of harmlessness.⁴²³

Where the majority saw a tasteless but ultimately harmless magazine, Justice Frankfurter found a dangerous threat to society — a threat that the state of New York should have had the power to address in his view. But what exactly was the threat posed by these magazines and pulp novels? As Justice Frankfurter saw it, the literature targeted by the statute could push minors into criminal acts; as he argued, “It would be sheer dogmatism to deny that in some instances . . . deeply embedded, unconscious impulses may be discharged into destructive and often fatal action.”⁴²⁴ As proof of the harm posed by such media, Justice Frankfurter cited the case of Boyd Sinclair, a 17-year-old Australian who murdered a cab driver after plotting a life of crime “based mainly on magazine thrillers which he was reading at the time.”⁴²⁵ Thus relying on anecdotal evidence and his own preference for judicial restraint,⁴²⁶ Justice Frankfurter concluded simply, “What gives judges competence to say that while print and pictures may be constitutionally outlawed because judges deem them ‘obscene,’ print and pictures which in the judgment of half the States of the Union operate as incitements to crime enjoy a constitutional prerogative?”⁴²⁷

As American society passed from the middle of the 20th century, violent pulp magazines obviously faded from legislative concern as would-be censors turned their attentions toward movies, television shows, and music. But a movement shortly after the turn of the millennium

⁴²³ Id. at 527-28.

⁴²⁴ Id. at 529-30.

⁴²⁵ Id. at 529 (quotation omitted).

⁴²⁶ Historically, the central criticism of Justice Frankfurter has centered on the belief “he was too willing and quick to surrender to the will of the legislature — that his philosophy of judicial self-restraint entailed an abdication of judicial responsibility on exactly those occasions when judicial intervention was most warranted.” Alfred S. Neely, *Mr. Justice Frankfurter’s Iconography of Judging*, 82 Ky. L.J. 535, 538 (1993). Critics, such as Yale Law School Professor Fred Rodell, labeled Justice Frankfurter as “an apostle[] of undifferentiated judicial self-restraint” and accused him of forsaking the right of judicial review as established in *Marbury v. Madison*. Id. Overall, his philosophy could best be summed as one of deference to the elected bodies of government. Yet, as some would argue, his position was a principled one. See id. at 570 (“Frankfurter’s restraint was far from mindless ritualism.”).

⁴²⁷ *Winters*, 333 U.S. at 533 (Frankfurter, J., dissenting).

would see violent video games come under attack for the negative effects they might have on children. With names like *Mortal Kombat*, *Grand Theft Auto*, and *Doom*,⁴²⁸ these highly interactive player-controlled representations⁴²⁹ often featured copious amounts of blood and gore and pushed municipalities and states⁴³⁰ to limit their sale to minors. With lower courts generally in agreement that such legislation was unconstitutional, the Supreme Court nevertheless decided to address the matter in 2011 with its decision in *Brown v. Entertainment Merchants Association*.

In *Brown*, the Court examined a California state law that prevented minors from purchasing a video game in which a player's gameplay options included "killing, maiming, dismembering, or sexually assaulting an image of a human being" where a reasonable person would find that such a depiction "appeals to a deviant or morbid interest of minors."⁴³¹ The language of the California law closely mirrored the Court's opinion in *Ginsberg* in that the law framed violent video games as a form of obscenity targeted toward minors. However, the key difference in *Brown* was that the proscribable expression was off-limits to minors due to *violence* rather than explicit sexual content. That difference would become a crucial one as the Court held

⁴²⁸ These games range in genre: martial arts and the supernatural in *Mortal Kombat*; *Doom*'s depiction of space science fiction and horror; and the relative realism of *Grand Theft Auto* and its portrayal of street crime. See Jason Farman, *Hypermediating the Game Interface: The Alienation Effect in Violent Videogames and the Problems of Serious Play*, 58 COMMUNICATION QUARTERLY 96, 97 (2010) (contending that one edition of *Grand Theft Auto* "rel[ie]d heavily on the recreation of a sense of place so familiar to many Southern Californians). While these games are varied in setting and style, they share a common element: repeated forms of intentional violence. See Nicholas L. Matthews & Andrew J. Weaver, *Skill Gap: Quantifying Violent Content in Video Game Play Between Variably Skilled Users*, 16 MASS COMMUNICATION & SOCIETY 829, 830 (2013).

⁴²⁹ Interactivity, as Justice Scalia defines it, is simply the nature of video games as "the player participates in the violent action on screen and determines its outcome." *Brown*, 131 S. Ct. at 2738. California argued the video game ban was partially justified by this interactivity, a justification that Justice Scalia rejected. See *id.*

⁴³⁰ Before the Court's decision in *Brown*, efforts to regulate violent video games failed judicial scrutiny in Indianapolis, Ind., Illinois, and Michigan. See generally Clay Calvert & Robert D. Richards, *Precedent Be Damned – It's All About Good Politics & Sensational Soundbites: The Video Game Censorship Saga of 2005*, 6 TEX. REV. ENT. & SPORTS L. 79 (2005) (detailing efforts, due principally to political expediency, in various jurisdictions to pass violent video game restrictions).

⁴³¹ *Brown*, 131 S. Ct. at 2732 (quoting Cal. Civ. Code Ann. Sec. 1746-1746.5). To be proscribable under the California law, a video game must also be "patently offensive to prevailing standards in the community as to what is suitable for minors" as well as "cause[] the game, as a whole, to lack serious literary, artistic, political, or scientific merit." *Id.* at 2732-33.

the California law to be unconstitutional,⁴³² with violent video games found to be fully protected expression under the First Amendment⁴³³ and the state falling short of meeting the burden of strict scrutiny analysis.⁴³⁴

Justice Antonin Scalia, in writing for the 7-2 majority, established early in the Court's opinion that video games were due the full measure of First Amendment protection.⁴³⁵ "The Free Speech Clause exists principally to protect discourse on public matters," Justice Scalia noted, "but we have long recognized that it is difficult to distinguish politics from entertainment and dangerous to try."⁴³⁶ The Court, as it did in *Winters* and *Cohen*,⁴³⁷ thus affirmed the principle that under the Constitution, "esthetic and moral judgments about art and literature...are for the individual to make, not for the government to decree, even with the mandate or approval of a majority."⁴³⁸

Justice Scalia also concluded that the Court's then-recent decision in *U.S. v. Stevens* ultimately controlled the outcome of *Brown*.⁴³⁹ In *Stevens*, the Court rejected the federal government's contention that depictions of animal cruelty were outside of the scope of the First Amendment⁴⁴⁰ as the majority concluded the government did not have the "freewheeling

⁴³² *Id.* at 2742.

⁴³³ *Id.* at 2733.

⁴³⁴ *See id.* at 2738. ("Because the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny — that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest. The State must specifically identify an 'actual problem' in need of solving and the curtailment of free speech must be actually necessary to the solution[.] That is a demanding standard.") (citations omitted).

⁴³⁵ *Id.* at 2733.

⁴³⁶ *Id.*

⁴³⁷ *See* note 261 and accompanying text, *supra*.

⁴³⁸ *Brown*, 131 S. Ct. at 2733 (quoting *U.S. v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 818 (2000)). *See also U.S. v. Stevens*, 559 U.S. 460, 470 (2010) ("The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs.").

⁴³⁹ *Brown*, 131 S. Ct. at 2733.

⁴⁴⁰ *Stevens*, 559 U.S. at 468.

authority to declare new categories” without such protection.⁴⁴¹ As Chief Justice Roberts found in *Stevens*, to create a category of expression outside of the First Amendment demands that the state show that “the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required[.]”⁴⁴² Thus, as the *Brown* Court found with the highly expressive nature of even the most violent video games, the state of California could not include violent video games alongside child pornography and obscenity as expression undeserving of First Amendment protection.⁴⁴³

While California attempted to tie the violent video game law to obscenity — and therefore pass constitutional muster under *Ginsberg* — Justice Scalia stated that the Court’s cases “have been clear that the obscenity exception to the First Amendment does not cover whatever a legislature finds shocking, but only depictions of sexual conduct[.]”⁴⁴⁴ He then pointed to *Winters* as a holding that “made clear that violence is not part of the obscenity that the Constitution permits to be regulated.”⁴⁴⁵ Furthermore, Justice Scalia was explicit in his rejection of California’s attempt to mimic the law upheld in *Ginsberg*, arguing that the California law “does not adjust the boundaries of an existing category of unprotected speech to ensure that a definition designed for adults is not uncritically applied to children... Instead, it wishes to create

⁴⁴¹ Id. at 472.

⁴⁴² Id. at 470 (quoting *New York v. Ferber*, 458 U.S. 747, 763-64 (1982)).

⁴⁴³ As Chief Justice John Roberts wrote in *Stevens*, “When we have identified categories of speech as fully outside the protection of the First Amendment, it has not been on the basis of a simple cost-benefit analysis.” Id. at 471. Where the Court found child pornography without First Amendment protection, Chief Justice Roberts argued, it was not because the state’s interest in protecting children outweighed the speech interest of the would-be pornographer. Rather, child pornography represented a “special case” where the market for child pornography was “intrinsically related” to the abuse of children. Id. While the chief justice allowed for the possibility that other categories of unprotected speech existed — and were still to be identified — there was “no evidence” that animal cruelty was included, as there was no need to foreclose the idea of new unprotected speech while still rejecting the federal government’s “highly manipulable balancing test.” Id.

⁴⁴⁴ *Brown*, 131 S. Ct. at 2734 (internal quotation marks omitted).

⁴⁴⁵ Id.

a wholly new category of content-based regulation that is permissible only for speech directed at children.”⁴⁴⁶

Justice Scalia certainly could have ended the majority’s opinion with the simple determination that the law was unconstitutional for the same reason the prohibition on depictions of animal cruelty failed in *Stevens*. Yet, he went on to dissect California’s rationale for the violent video game ban on several fronts, including arguing that children in the United States have long had access to violent expression in books ranging from Grimm’s Fairy Tales to *The Odyssey*.⁴⁴⁷ He also dismissed the state’s contention that video games posed a special problem due to their interactivity, stating that “young readers of choose-your-own-adventure stories have been able to make decisions that determine the plot by following instructions about which page to turn to.”⁴⁴⁸

In his concurring opinion, Justice Alito, joined by Chief Justice Roberts, agreed there was no historical tradition of regulating violent expression;⁴⁴⁹ however, he disagreed with the majority’s conclusion that the interactivity of video games was not an important issue. “Today’s most advanced video games create realistic alternative worlds in which millions of players

⁴⁴⁶ *Id.* at 2735.

⁴⁴⁷ *See id.* at 2736 (“California’s argument would fare better if there were a longstanding tradition in this country of specially restricting children’s access to depictions of violence, but there is none. Certainly the books we give children to read — or read to them when they are younger — contain no shortage of gore. Grimm’s Fairy Tales, for example, are grim indeed. As her just deserts for trying to poison Snow White, the wicked queen is made to dance in red hot slippers ‘till she fell dead on the floor, a sad example of envy and jealousy.’ Cinderella’s evil stepsisters have their eyes pecked out by doves. And Hansel and Gretel (children!) kill their captor by baking her in an oven. High-school reading lists are full of similar fare. Homer’s Odysseus blinds Polyphemus the Cyclops by grinding out his eye with a heated stake.”) (citations omitted). Justice Scalia also recounted the history of efforts to censor violent publications, beginning with dime store novels in the 1800s and continuing to movies and comic books. *See id.* at 2737.

⁴⁴⁸ *Id.* at 2738.

⁴⁴⁹ *See id.* at 2746 (Alito, J., concurring in the judgment) (“There is a critical difference, however, between obscenity laws and laws regulating violence in entertainment. By the time of this Court’s landmark obscenity cases in the 1960’s, obscenity had long been prohibited, and this experience had helped to shape certain generally accepted norms concerning expression related to sex. There is no similar history regarding expression related to violence.”) (citation omitted).

immerse themselves for hours on end,” Justice Alito argued. “These games feature visual imagery and sounds that are strikingly realistic, and in the near future video-game graphics may be virtually indistinguishable from actual video footage.”⁴⁵⁰ Furthermore, with motion-sensing technology, Justice Alito explained “a player who wants a video-game character to swing a baseball bat — either to hit a ball or smash a skull — could bring that about by simulating the motion of actually swinging a bat.”⁴⁵¹ Comparing a violent book with such technology, Justice Alito simply concluded that “the two experiences will not be the same.”⁴⁵² So while he found that the California law at issue in *Brown* failed constitutional examination,⁴⁵³ Justice Alito “would not squelch legislative efforts to deal with what is perceived by some to be a significant and developing social problem.”⁴⁵⁴

Justice Alito’s conclusion and his inherent uneasiness with the prospect of the Court striking down the California law is remarkably similar to Justice Frankfurter’s dissent in *Winters*. Both justices took issue with the violent expression in their respective cases, and both jurists relied on less than compelling evidence to cast doubt on the decisions of the Court. However, while Justice Frankfurter would have preserved the New York ban on the distribution of violent magazines to minors, Justice Alito would have invalidated the California law despite his misgivings.

⁴⁵⁰ Id. at 2748.

⁴⁵¹ Id. at 2749.

⁴⁵² Id. at 2750. See also id. at 2742 (“There are reasons to suspect that the experience of playing violent video games just might be very different from reading a book, listening to the radio, or watching a movie or a television show.”).

⁴⁵³ Justice Alito found that the law did not define “violent video game” with enough specificity and therefore “departed” from the Court-approved model in *Ginsberg*. See id. at 2743.

⁴⁵⁴ Id. at 2751. See also id. at 2742 (“In considering the application of unchanging constitutional principles to new and rapidly evolving technology, this Court should proceed with caution. We should make every effort to understand the new technology. We should take into account the possibility that developing technology may have important societal implications that will become apparent only with time. We should not jump to the conclusion that new technology is fundamentally the same as some older thing with which we are familiar. And we should not hastily dismiss the judgment of legislators, who may be in a better position than we are to assess the implications of new technology. The opinion of the Court exhibits none of this caution.”).

Justice Scalia attacked Justice Alito’s reasoning specifically in *Brown* noting that the justice “recounts all these disgusting video games in order to disgust us — but disgust is not a valid basis for restricting expression.”⁴⁵⁵ Furthermore, as Justice Scalia concluded damningly, “Justice Alito’s argument highlights the precise danger posed by the California Act: that the ideas expressed by speech — whether it be violence, or gore, or racism — and not its objective effects, may be the real reason for governmental proscription.”⁴⁵⁶

Yet Justice Alito and others would still seek to regulate violent speech due to its content. Writing some 15 years before *Brown*, Professor Saunders argued that violence should be considered alongside sex and excretory functions for the purposes of defining obscenity⁴⁵⁷ despite the Court’s determination since 1896 that obscenity must relate to sexual conduct⁴⁵⁸ — meaning that sufficiently violent content that would otherwise meet the Court’s definition of obscenity⁴⁵⁹ would be without First Amendment protection and subject to government regulation. “Obscenity speaks even better to violence than it does to sex,” Professor Saunders concluded, as “[t]he history of the concept shows the earliest concerns to have been over the depiction of violence.”⁴⁶⁰ According to Professor Saunders, the reason to suppress violent expression is a simple one: “[I]t is rational to believe that the violence that is pandemic in our

⁴⁵⁵ Id. at 2738 (majority opinion).

⁴⁵⁶ Id.

⁴⁵⁷ See generally KEVIN W. SAUNDERS, VIOLENCE AS OBSCENITY.

⁴⁵⁸ See *Swearingen v. U.S.*, 161 U.S. 446, 451 (1896) (“The words ‘obscene,’ ‘lewd’ and ‘lascivious,’ . . . signify that form of immorality which has relation to sexual impurity, and have the same meaning as is given them at common law in prosecutions for obscene libel.”).

⁴⁵⁹ See *Miller v. California*, 413 U.S. 15, 24 (1973) (specifying that state laws regulating obscenity must specifically define the prohibited expression, appeal to prurient interest in sex, and apply only to works that, when taken as a whole, lack “serious literary, artistic, political, or scientific value”).

⁴⁶⁰ Saunders, *supra* note 457, at 202. Professor Saunders finds that the English common law failed to “distinguish between sex as obscene and violence as obscene.” Id. at 98. Furthermore, he argues that laws developed in the United States between the passage of the Bill of Rights and the Fourteenth Amendment fail to exclude violence from the definition of obscenity. Id. at 104. As he concludes, “[t]here is simply no constitutional basis for the claim that to be obscene material must depict sex or excretion.” Id. at 110.

society would decrease as a result of a decrease in media violence, and the benefits seem worth the attempt. *Something* must be done.”⁴⁶¹

Undoubtedly, the rationale behind Professor Saunders’s motivation is admirable as we should all abhor violence, yet the notion that limiting expression will somehow yield that desired result is wrong and misguided.⁴⁶² Abridging a fundamental freedom such as expression should require more than a belief that “we should do *something*” and proof more substantial than media effects social science.⁴⁶³ However, as Professor Ross concluded, “[w]hen sensitive matters of freedom of speech collide with images of children’s vulnerability, and are framed in terms of the battle between good and evil, even well intentioned people can lose sight of fundamental constitutional principles.”⁴⁶⁴ Furthermore, acting to protect children seems to be an interest without limitation, since most individuals respond emotionally to notions of childhood vulnerability.⁴⁶⁵ Yet thankfully the Court seems to have spoken conclusively with *Brown* that

⁴⁶¹ *Id.* at 202 (emphasis added).

⁴⁶² *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245 (2002) (concluding that “[t]he prospect of crime...by itself does not justify laws suppressing protected speech”).

⁴⁶³ In studying the effects of violent media on children and others, social scientists have been able to demonstrate a general rise in “aggressive behavior” after exposure to violent media. *See Matthews & Weaver, supra* note 428, at 831. This effect, however, is “to other aggression-influencing factors such as substance use, abusive parents, and poverty” and is difficult to isolate from other potentially confounding variables. *See id.* *See also Ross, supra* note 68, at 506 (“Other commentators, starting from the perspective that there is more evidence to justify regulation of media violence than other forms of controversial speech, have concluded that existing social science data do not provide ‘a basis upon which one may determine with adequate certainty which violent programs cause harmful behavior.’”). In *Brown*, the Court soundly rejected social science evidence as proof necessary to restrict First Amendment rights, concluding it “show[s] at best some correlation between exposure to violent entertainment and minuscule real-world effects, such as children’s feeling more aggressive or making louder noises in the few minutes after playing a violent game than after playing a nonviolent game.” *Brown*, 131 S. Ct. at 2739. This rejection of social science is unsurprising because historically, the Court has required much more potential harm from speech — something approaching “imminent lawless action” — before it is to be silenced. *See Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

⁴⁶⁴ *Ross, supra* note 68, at 521.

⁴⁶⁵ *See id.* at 503-04 (noting one court opinion describing the interest of protecting children “as dangerous as it is compelling”).

violent content absent a true threat⁴⁶⁶ is not a permissible reason for stripping speech of First Amendment protection.

Even setting aside the Court's decision in *Brown*, it appears unlikely that the Court will ever find violent speech to be outside the boundaries of the First Amendment — if only because the Court has repeatedly rejected attempts to expand those types of expression without constitutional protection. Just as the Court declined to find depictions of animal cruelty categorically unprotected, the Court found in *U.S. v. Alvarez*⁴⁶⁷ that false speech — lies, in essence — was included in the First Amendment's guarantee of speech.⁴⁶⁸ Similarly, the Court concluded a decade earlier that simulated depictions of child pornography, when uncoupled from the justification of child sexual abuse, were likewise protected by the First Amendment.⁴⁶⁹

Therefore, while the notion of children receiving and creating violent expression may be somewhat disturbing emotionally, the First Amendment requires a higher commitment to intellectually sound analysis. The expressive rights of children are indeed limited for their own protection in the realm of sexually suggestive and explicit speech, but that protection has not

⁴⁶⁶ A “true threat” is speech unprotected by the First Amendment and includes “statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Virginia v. Black*, 538 U.S. 343, 359 (2003). Furthermore, “[t]he speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur. Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.” *Id.* at 359-60 (internal quotations omitted). *See also* Chapter 7, *infra*.

⁴⁶⁷ 132 S. Ct. 2537 (2012) (plurality opinion).

⁴⁶⁸ *See id.* at 2544 (“Absent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements. This comports with the common understanding that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee.”).

⁴⁶⁹ *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245-46 (2002) (“As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children. While these categories may be prohibited without violating the First Amendment, none of them includes the speech prohibited by the [Child Pornography Protection Act]. In his dissent from the opinion of the Court of Appeals, Judge Ferguson recognized this to be the law and proposed that virtual child pornography should be regarded as an additional category of unprotected speech. It would be necessary for us to take this step to uphold the statute.”) (citations omitted).

been extended to cover violent expression. Still, when students bring or create violent expression at school, the appreciation for their First Amendment rights can all too often be lost in the discussion of school violence and the need to prevent future tragedies.

VI. Conclusion

Those who have yet to reach the age of majority in the United States have fewer rights and responsibilities as compared to adults. They are unable to purchase alcohol, cigarettes and guns; are restricted from driving; and are prevented from exercising the simple freedom of the democratic prerogative in voting. Why? Because those choices have serious consequences, and we are suspicious of young minds exercising such important responsibilities. However, while child free expression rights are limited in specific and narrowly defined ways, those consequences seen in other adult freedoms simply do not exist for speech. Therefore, child speech rights should be celebrated as integral to the learning and maturation process rather than seen as problems to be feared and controlled.

Perhaps there has never been a consensus in the legal and cultural analysis of student speech. The *Tinker* decision certainly established a legal standard, but it was met with hostility in the form of Justice Black's dissent just as it was formulated. But Justice Black did more than simply dissent from the majority's decision; rather, he wrote angrily of students gaining control of schools and disrupting them with "break-ins, sit-ins, lie-ins, and smash-ins."⁴⁷⁰ He did not just dissent — he set the rules of engagement to come, posing speech rights for students in opposition to control and order in schools, a false dichotomy that students will lose on almost any occasion. Decades later, the disagreement as to how to treat student speech was on full display in the Court's decision in *Morse*, as the majority continued the *Fraser* and *Hazelwood* trend of carving

⁴⁷⁰ *Tinker*, 393 U.S. at 525 (Black, J., dissenting).

up *Tinker* while Justice Thomas concurred with the Court's judgment only to agree with Justice Black's view that public school students have no right to free expression.

Outside of sexually explicit speech, the Court has been hesitant to extend the government any special power to protect children from expression. This proposition was most notably on display in *Brown* when the Court brushed aside social science research to find that there was nothing especially harmful about children playing violent video games. But inside and outside of the schoolhouse gate, the Court has found, in cases like *Ginsberg*, *Pacifica*, and *Fraser*, that the state has a special authority to shield children from sexual speech that would otherwise be protected.

That special authority for sexual speech simply does not extend to violent speech that is otherwise insulated from censorship by the First Amendment. Despite our collective apprehension regarding school violence, the Constitution simply sanctions no extra scrutiny for minors and violent speech — an important principle that should guide all analysis of violent student speech.

CHAPTER 5

VIOLENT NON-SPONSORED CURRICULAR STUDENT SPEECH

This chapter begins the analysis of violent student speech by first examining violent non-sponsored curricular speech. Under current student speech case law, *Tinker* governs extracurricular student speech when it encroaches upon the grounds of the school, *Fraser* addresses sexually explicit student speech, *Hazelwood* controls where the student speech implicates pedagogical concerns and bears the sign of sponsorship from the school, and *Morse* enables a school to act against a student speaker advocating the use of illegal drugs.¹ There is, however, a clear gap in the current framework when student speech is part of the school curriculum yet it lacks any sign of the school's "imprimatur." This speech is exemplified by student assignments such as the crayon wish in *Cuff* where student expression is integrated into the curriculum but it lacks any real possibility of being mistaken for official school speech. Without the imprimatur, such speech falls outside of the realm of *Hazelwood*, and yet it is still connected to curriculum, therefore making it inappropriate to decide using *Tinker*'s material and substantial disruption analysis.

Thus this chapter will both (1) explore a subset of violent student speech cases that could rightly be considered under *Hazelwood* if only the student expression bore the sign of official school sponsorship and (2) argue for the creation of a new standard based on *Hazelwood* to govern non-sponsored curricular speech. Furthermore, this new standard would operate much

¹ See Chapter 4, Part III, *supra*, for a full discussion of the Supreme Court's student speech jurisprudence.

like the current *Hazelwood* analysis with one key distinction: where student speech is curricular and non-sponsored in nature, the only options available to school administrators are those representing pedagogical counter-speech. Discipline, such as the suspension seen in *Cuff*, would not be allowed under this new standard as it represents a corruption of the education process and a fundamental unfairness to students whose only transgression was to simply turn in an assignment or otherwise attempt to further their education.

Part I will examine several violent non-sponsored curricular student speech cases, identifying common fact patterns and tracing favored modes of analysis in lower courts. Part II will address why current Supreme Court jurisprudence fails to adequately address these cases. Part III establishes the non-sponsored curricular speech standard by detailing its operation and examining the administrative options under the standard. Part IV applies this standard to a selection of applicable cases and concludes this chapter.

I. Survey of violent non-sponsored curricular student speech cases

This Part will survey both the factual background and current legal analysis of violent non-sponsored curricular student speech cases. Generally speaking, these cases involve student speech that is deeply curricular in nature — meaning that it is engrained into the learning process and therefore outside the proper boundaries of *Tinker* — but the expression does not bear the official seal of school sponsorship, which places these cases outside of *Hazelwood* as well.² Thus these cases represent a distinct subset of student speech requiring its own, specific analysis.

a. Common factual situations in violent non-sponsored curricular speech cases

The majority of violent non-sponsored curricular student speech cases arose after a student turned in a class assignment with violent themes or content. These assignments, in turn,

² See Part II, *infra*, for discussion of why current Supreme Court jurisprudence fails to address the category of non-sponsored curricular student speech.

were either some form of artistic expression³ or fictional stories.⁴ Artistic expression in these cases include the painted portrayal of a police officer being shot,⁵ a drawing of a school surrounded by explosives in addition to the school district’s superintendent shown with a gun to his head,⁶ an experimental art project focusing on the fictional need to take vengeance on a dog killer,⁷ and fifth-grader Cuff’s wish to “[b]low up the school with the teachers in it” as depicted as a crayon-scrawled wish written on a drawing of an astronaut.⁸ Fictional stories in these cases include a graphic and fanciful depictions of violence and sex,⁹ an essay on a student’s last 24 hours of life,¹⁰ and a story detailing a teacher’s decapitation.¹¹ The commonality between the seven, however, is that they were all created either during regular coursework or they were produced at the behest of a teacher as in *Demers v. Leominster School Department*, a case in which a student was told to draw his feelings and was subsequently disciplined for his creation that depicted the school surrounded by explosives.¹²

However, the category of non-sponsored curricular speech is broader than class assignments. In *Emmett v. Kent School District*, a student was suspended for a website created off-campus that contained mock obituaries of his classmates.¹³ The pedagogical implication in Emmett is that the student was inspired to create the obituaries on his website after a creative

³ See, e.g., *In re Ryan D.*, 123 Cal. Rptr. 2d 193 (Cal. Ct. App. 2002); *Demers v. Leominster Sch. Dept.*, 263 F. Supp. 2d 195 (D. Mass. 2003); *Boman v. Bluestem Unified Sch. Dist.*, 2000 U.S. Dist. LEXIS 5297 (D. Kan. 2000); and *Cuff*.

⁴ See, e.g., *D.F. v. Syosset Cent. Sch. Dist.*, 386 F. Supp. 2d 119 (E.D.N.Y. 2005); *Cox v. Warwick Valley Cent. Sch. Dist.*, 654 F. 3d 267 (2nd Cir. 2011); and *In re Douglas D.*, 626 N.W.2d 725 (Wis. 2001).

⁵ *In re Ryan D.*, 123 Cal. Rptr. 2d at 196-97.

⁶ *Demers*, 263 F. Supp. 2d at 198-99.

⁷ *Boman*, 2000 U.S. Dist. LEXIS at *1-2.

⁸ *Cuff*, 677 F.3d at 111.

⁹ *D.F.*, 386 F. Supp.2d. at 123.

¹⁰ *Cox*, 654 F.3d at 270-71.

¹¹ *Douglas D.*, 626 N.W.2d at 730-31.

¹² *Demers*, 263 F. Supp.2d at 198-99.

¹³ 92 F.Supp.2d 1088, (W.D. Wash. 2000).

writing class.¹⁴ While the connection to coursework is not as strong as the previously mentioned examples, it still implies a serious tie to education and represents expression that should be fostered as part of the learning process.

The best example of student speech that should be encouraged as part of the educational process — and therefore representing non-sponsored curricular speech — was seen in *LaVine v. Blaine School District*.¹⁵ In *LaVine*, a student presented his English teacher with a poem describing a school shooting.¹⁶ This poem was not given to the teacher as a threat or for a grade; rather, the student simply wanted feedback from his teacher in order to improve his writing.¹⁷ This type of speech ties directly to the heart of a school's educational mission and represents all of the learning interests implicated in *Hazelwood*. Therefore, such speech should be considered part of a school's curriculum no matter who commissioned it or whether it was turned in to an instructor.

While there are clear factual similarities among these cases, there is also one key distinction: Although many students and guardians seek redress in the courts for school discipline in these cases, some students, such as those in *In re Ryan D.* and *In re Douglas D.*, are appealing adverse decisions in criminal juvenile proceedings. The student speech at issue in these juvenile proceedings is still similar, but, as Part I.b will detail, the legal analysis tends to be different, focusing less on student speech jurisprudence and more on an examination of whether the student's speech represented a true threat.

b. Common legal analysis of violent non-sponsored curricular speech cases

¹⁴ *Id.*

¹⁵ 257 F.3d 981 (9th Cir. 2001).

¹⁶ *Id.*

¹⁷ *Id.*

While the facts are remarkably similar in these cases, the legal analysis employed by courts to determine the constitutionality of disciplinary action taken by schools or other state actors against students varies greatly. Several courts turned to *Tinker* to address the issue, but it has not been the exclusive means of analysis as some courts rely on true threat analysis and state case law while others use a means of analysis that is simply unclear.

1. Cases using *Tinker* analysis

For example, in *LaVine*, the Ninth Circuit eliminated both *Fraser* and *Hazelwood* before settling on *Tinker* as controlling law¹⁸ when an 11th grade student was suspended a total of 17 days for his poem titled “Last Words.”¹⁹ As the court reasoned in a decision six years prior to the Supreme Court’s ruling in *Morse*, the poem was not “vulgar, lewd, obscene or plainly offensive,” therefore placing it outside the boundaries of *Fraser*. Likewise, it was not suited to be decided under *Hazelwood* as no members of the public could have reasonably believed that the poem bore the imprimatur of the school as the poem was only shown to the student’s teacher and friends, it was not published in a school publication, and “[i]t was not an assignment.”²⁰ *Tinker* was appropriate, as the Ninth Circuit determined, because it simply covered “all other speech” not governed by *Fraser* or *Hazelwood*.²¹ This conclusion, however, ignores the facts of *Tinker*²²

¹⁸ *LaVine*, 257 F.3d at 988-89.

¹⁹ *LaVine*, 257 F.3d at 983. The most relevant part of the poem described a narrator as he “approached, / the classroom door, / I drew my gun and, / threw open the door, / Bang, Bang, Bang-Bang. / When it all was over, / 28 were, / dead, / and all I remember, / was not felling, / any remorse, /for I felt, / I was, / lensing my soul[.]”

²⁰ *Id.* at 989. This suggests the Ninth Circuit may have at least considered an argument for the case being decided under *Hazelwood* if the poem had been a class assignment rather than something undertaken by a student on his own initiative. This conclusion, however, ignores what the educational process should be and risks a chilling effect on student seeking advice on their own creations outside of the classroom.

²¹ *Id.*

²² *Tinker*, at its core, addresses independent student speech that simply happens to take place on the grounds of a public school. The anti-war armbands worn by the students in the case had nothing to do with coursework or the mission of the school. Instead, this expression was distinctly apart from anything associated with the school or the learning environment. Assuming that *Tinker* is a broad catch-all for anything not covered by *Fraser*, *Hazelwood*, or *Morse* is simply incorrect. See Part III for discussion on why *Tinker* analysis is inappropriate for the cases discussed in this chapter.

and arbitrarily characterizes it as a default means of addressing student speech cases, thereby foreclosing any serious inquiry into the educational issues in *LaVine*.

The *LaVine* court's reasoning did not improve as it applied *Tinker*'s material and substantial disruption standard. After first noting the school "had a duty to prevent any potential violence on campus" to either the student poet or others, the Ninth Circuit found the school had a "reasonable basis" for its decision to suspend the student based on his troubled home environment, stalking allegations in regard to his girlfriend, school absences, and past disciplinary issues.²³ And that was all before getting to the analysis of the poem:

Last, and maybe most importantly, there was the poem itself. "Last Words" is filled with imagery of violent death and suicide. At its extreme it can be interpreted as a portent of future violence, of the shooting of James' fellow students. Even in its most mild interpretation, the poem appears to be a "cry for help" from a troubled teenager contemplating suicide. Taken together and given the backdrop of actual school shootings, we hold that these circumstances were sufficient to have led school authorities reasonably to forecast substantial disruption of or material interference with school activities — specifically, that James was intending to inflict injury upon himself or others.²⁴

Thus for the Ninth Circuit the possible disruption that made the student's suspension constitutional was not any fear or unease caused by the poem in the student body; rather, it was the idea that the student was going to come to class and harm himself or others as portrayed in the poem. *Tinker*, however, was not intended to operate in such a way as it allows schools to act only where a substantial disruption results from the speech *itself* and not any action possibly predicted in the speech.²⁵ In short, since the poem could not cause a school shooting or any other incident of violence, the Ninth Circuit's analysis fails to truly account for how the *Tinker* standard should operate.

²³ *LaVine*, 257 F.3d at 989-90.

²⁴ *Id.* at 990.

²⁵ See *Cuff*, 677 F.3d at 122 (Pooler, C.J., dissenting).

Furthermore, in referencing the student's issues at home and his various disciplinary transgressions, the Ninth Circuit conflates *Tinker* with an examination of whether the student was a threat to the student body instead of an evaluation of the poem's potential to cause a disruption at the school. In inquiring as to the nature of the student's behavior, the Ninth Circuit was conducting something more akin to a true threat analysis, something the court itself had determined was not germane given the finding that the school's actions were justified.²⁶

In *Cuff*, the Second Circuit did not undertake a lengthy determination of what standard to apply when a student wrote of a wish that his school and all of its teachers be blown up; rather, it simply stated general principles from *Tinker*²⁷ in light of *Hazelwood*'s subsequent narrowing of student speech rights without mentioning *Fraser* or *Morse*.²⁸ In applying *Tinker*, the court cautioned that the test does not require administrators to prove an actual disruption or that "substantial disruption was inevitable."²⁹ Instead, as the Second Circuit determined, the test in *Tinker* is an objective standard based on the reasonableness of the school's determination that a disruption was likely to occur as a result of student expression.³⁰ Finally, the Second Circuit singled out expression "in the context of student speech favoring violent conduct" as an area where courts should not attempt to "determine how school officials should respond."³¹ These

²⁶ See *LaVine*, 257 F.3d at 989 n. 5 ("The school argues that James' poem was a 'true threat' and not protected by the First Amendment at all. Because we conclude that even if the poem was protected speech, the school's actions were justified, we need not resolve this issue.").

²⁷ The relevant principles from *Tinker*, according to the Second Circuit, include the oft-repeated line that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate;" that schools cannot censor speech solely on the basis of an "undifferentiated fear or apprehension of disturbance;" and that administrators must show their actions were based on "something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Cuff*, 677 F. 3d at 112-13 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.* 393 U.S. 503, 506, 508, 509 (1969)).

²⁸ *Cuff*, 677 F. 3d at 112-13.

²⁹ *Id.* at 113.

³⁰ *Id.*

³¹ *Id.*

administrators, as the court contended, “are in the best position to assess the potential for harm and act accordingly” and should be afforded deference where violent speech is concerned.³²

In applying *Tinker* to the facts of the case and concluding that “it was reasonably foreseeable that the astronaut drawing could create a substantial disruption at the school,” the *Cuff* court — much like the Ninth Circuit in *LaVine* — noted that the student involved had a history of disciplinary issues.³³ The court also pointed out that other students had seen B.C.’s astronaut drawing and that one student was “very worried” about the drawing.³⁴ Additionally, the court wrote that B.C.’s lack of capacity or intention to carry out his wish was irrelevant — thus similarly conflating *Tinker* with a threat analysis as the Ninth Circuit did in *LaVine*. The Second Circuit also noted that “[c]ourts have allowed wide leeway to school administrators disciplining students for writings or other conduct threatening violence” as it cited to *LaVine* and several other violent student expression cases.³⁵

The *Cuff* court, however, broke from the analysis as seen in *LaVine* to discuss exactly how the astronaut drawing — rather than any violent act — could disrupt the school community.³⁶ Sharing the drawing with other students “aggravated” the threat of substantial disruption, according to the Second Circuit, and was therefore “an act reasonably perceived as an attention-grabbing device.”³⁷ If students decided to copy B.C.’s actions, the court reasoned such reproduction “might have led to a substantial decreases in discipline, an increase in behavior

³² Id. On the matter of deference, the *Cuff* court cited *Fraser* approvingly, quoting specifically the Supreme Court’s argument that “[t]he determination of what manner of speech in the classroom . . . is inappropriate properly rests with the school board.” Id. (quoting *Fraser*, 478 U.S. 675, 683 (1986)).

³³ Id. at 113-14.

³⁴ Id. at 114.

³⁵ Id.

³⁶ See id. at 114-15. See also id. at 122 (Pooler, C.J., dissenting) (“[T]he question under *Tinker* is whether this boy’s speech itself had the potential to cause a disruption at school, not whether the drawing might have predicted that B.C. was planning an attack. . . . *Tinker* requires a causal link between the speech that school officials want to suppress and the substantial disruption that they wish to avoid”).

³⁷ Id. at 114.

distracting students and teachers from the educational mission, and tendencies to violent acts.”³⁸ Furthermore, once parents became aware of the astronaut drawing and the school’s hypothetical lack of a response this could have resulted in a “decline of parental confidence in school safety with many negative effects” such as “the need to hire security personnel and even a decline in enrollment.”³⁹ Thus, as the Second Circuit found, the school “could have reasonably concluded” that the astronaut drawing would disrupt the school environment, making B.C.’s suspension constitutional.⁴⁰

So while the *Cuff* court did not make the same mistake of confusing a school shooting or other violence with the possible disruption resulting from student speech as the Ninth Circuit did in *LaVine*, the errors in the court’s reasoning are still readily apparent. By speculating as to what might happen if the school did not act to punish the astronaut drawing or by aggregating the effects of many similar drawings, the court sanctioned the very “undifferentiated fear or apprehension of disturbance” that the Supreme Court cautioned against in *Tinker*.⁴¹ Admittedly, the *Tinker* test does not require proof of an actual disturbance or that the feared disturbance was a certainty in the absence of school action.⁴² But to hold that the *Tinker* test is satisfied by the mere possibility that students in the aggregate may cause the slow demise of school discipline is to reduce the standard to nothingness, and Des Moines, Iowa school administrators would likely have made the same argument in *Tinker*. As Circuit Judge Rosemary Pooler rightly pointed out in her dissenting opinion in *Cuff*, “[S]ome disruptions — and perhaps some far more substantial than the one at issue in this case — must no doubt be tolerated, lest the slightest flicker of

³⁸ *Id.* at 114-15.

³⁹ *Id.* at 115.

⁴⁰ *Id.*

⁴¹ *Tinker*, 393 U.S. at 508.

⁴² *See Cuff*, 677 F.3d at 113.

frustration or fear in a classmate could justify sanctioning a student's speech.”⁴³ In short, the *Tinker* test does not require the moral certainty of a disruption for administrators to act, but it requires more than what was deemed acceptable by the Second Circuit in *Cuff*.

Other courts have also applied *Tinker* in cases of violent non-sponsored curricular speech. In *Demers*, the federal district court of Massachusetts used *Tinker* and a true threat analysis to uphold the suspension of an eighth grade student who drew both his school surrounded by explosives and the superintendent kneeling with a gun pointed to his head.⁴⁴ In applying *Tinker* to the facts, the court was quick to distinguish the violent drawing from the anti-war armbands stating that the former was not “silent, passive expression of opinion, unaccompanied by any disorder or disturbance.”⁴⁵ When the drawing was considered along with the student writing “I want to die” and “I hate life” repeatedly on a piece of paper, the court concluded simply that a “reasonable interpretation of the law would allow a school official to prevent potential disorder or disruption to school safety, particularly in the wake of increased school violence across the country.”⁴⁶ This conclusion, however, was reached without any proof as to the potential for disturbance at the school; again, this determination conflates the potential disruption caused by speech with the actual harm incurred as a result of school violence. Yet as the court found in *Demers*, it would have been “unthinkable” for school officials not to act.⁴⁷

Despite the outcomes in *LaVine*, *Cuff*, and *Demers*, the mere judicial determination that *Tinker* applies in a given case does not always foretell defeat for students in violent non-sponsored curricular speech cases. In *Boman v. Bluestem Unified School District*, the federal

⁴³ Id. at 120 (Pooler, C.J., dissenting).

⁴⁴ 263 F. Supp. 2d at 198-99. The student was asked to draw his feelings by a teacher, therefore placing his speech in the category of non-sponsored curricular speech.

⁴⁵ Id. at 202 (quoting *Tinker*, 393 U.S. at 508).

⁴⁶ Id. at 202-03.

⁴⁷ Id. at 203.

district court of Kansas granted a permanent injunction preventing school administrators from disciplining a student who created an abstract art poster in class and then displayed it in a school hallway.⁴⁸ The poster, unsigned by the student, was a study on word repetition focusing on the death of a dog and a promise of vengeance against the dog's killer;⁴⁹ however, the dog, its death, and the student's violent thoughts were entirely fictional.⁵⁰ Still, the student was suspended for the rest of the school year pending a psychological exam.⁵¹

In issuing a permanent injunction against the student's suspension, the federal district judge alluded to *Tinker* when he wrote that "once the circumstances surrounding the making of Ms. Boman's poster were understood by school officials, there was no factual basis for believing that Ms. Boman had willfully violated any school rule, caused a substantial disruption in the operation of the school, or invaded the rights of other students."⁵² In assessing the potential disruption (or lack thereof) caused by the poster, the judge cited the school principal's quick reaction to the poster as he first found out who created the artwork and then moved to determine whether the student was a threat.⁵³ No evidence was presented by the school to show that any students believed the poster to be a real threat, and, as the judge concluded, there was a similar lack of evidence to show a disruption in the school.⁵⁴ The judge also noted that the ancillary

⁴⁸ 2000 U.S. Dist. LEXIS 5297 at *10 (D. Kan. 2000).

⁴⁹ The student's poster contained the following text: "Please tell me who killed my dog. I miss him very much. He was my best friend. I do miss him terribly. Did you do it? Did you kill my dog? Do you know who did it? You do know, don't you? I know you know who did it. You know who killed my dog. I'll kill you if you don't tell me who killed my dog. Tell me who did it. Tell me. Tell me. Tell me. Please tell me now. How could anyone kill a dog. My dog was the best. Man's best friend. Who could shoot their best friend? Who? Dammit, Who? Who killed my dog? Who killed him? Who killed my dog? I'll kill you all! You all killed my dog. You all hated him. Who? Who are you that you could kill my best friend? Who killed my dog?" 2000 U.S. Dist. LEXIS 5389 at *2 (decision issuing preliminary injunction). The text was written in a spiral that made it "fairly difficult to read" unless the poster was rotated. *Id.*

⁵⁰ 2000 U.S. Dist. LEXIS 5389 at *4 (D. Kan. 2000) (decision issuing preliminary injunction).

⁵¹ *Id.* at *7.

⁵² 2000 U.S. Dist. LEXIS 5297 at *3-4 (D. Kan. 2000) (decision issuing permanent injunction)

⁵³ *Id.* at *6.

⁵⁴ *Id.*

distractions caused by the student’s decision to file a lawsuit — namely upset parties in the community and her disgruntled friends — could not serve as the factual evidence for a disruption under *Tinker*.⁵⁵ Therefore, without any proof of a disturbance, the student’s suspension was unconstitutional.

In finding for the student, however, the *Boman* court was careful to both limit the applicability of its ruling and reaffirm the authority of school administrators.⁵⁶ As the judge wrote, the ruling did not “in any way diminish the authority of school administrators to suspend students who willfully violate school rules” or to punish those students who cause a disruption.⁵⁷ Furthermore, the judge clarified that his ruling applied only to the student’s poster and that it did not prevent future disciplinary action against any student — including the student plaintiff in the case — guilty of violating a school rule.⁵⁸ Finally, the judge offered that the permanent injunction against the school did not prevent administrators “from adopting appropriate rules or policies concerning the posting of items on school property (including reasonable restraints on the location and manner of posting items), nor does it prohibit the school from punishing students who willfully violate such rules.”⁵⁹ Thus the ruling was carefully crafted to both demonstrate a rigorous application of the *Tinker* test and to point out possible alternatives to school administrators unhappy with the result in the case.

In assessing how courts apply *Tinker* in cases of violent non-sponsored student speech, a few points are clear. First, courts like the Ninth Circuit in *LaVine* may choose use *Tinker* in such

⁵⁵ See *id.* at *7 n.2 (“Although these things undoubtedly make operation of the school more difficult, they do not constitute the type of disruption that would justify plaintiff’s suspension because they result from factors other than plaintiff’s conduct in putting up her poster.”).

⁵⁶ See *id.* at *10-11.

⁵⁷ *Id.* at *10.

⁵⁸ *Id.*

⁵⁹ *Id.* at *10-11.

instances simply because it appears reasonable as a default option.⁶⁰ Second, courts are likely to entertain the possibility of school violence as a disruption fulfilling the requirements of the *Tinker* standard even as this violates the essence of the Supreme Court’s holding in the case.⁶¹ Finally, even though some courts, such as the district court in *Boman*, will conduct a serious inquiry into whether there was an actual disruption or serious cause to fear one, many courts will likely engage in only a perfunctory or entirely speculative *Tinker* examination en route to upholding school discipline.⁶²

2. Cases using true threat, state case law, and other means of analysis

While *Tinker* tends to be a dominant lens through which to examine the issue of violent non-sponsored curricular student speech, it is not the exclusive means of analysis for courts as they also rely on true threat examination, state case law, and other doctrines. For an example, in *Demers*, the federal district court of Massachusetts used both *Tinker* and the true threat doctrine to uphold the school’s disciplinary action “[w]ithout deciding which standard is appropriate.”⁶³

In applying the true threat doctrine in *Demers*, the district court judge first established the basics of true threat analysis as “an objective test that focuses on whether a reasonable person would interpret the alleged threat as a serious expression of an intent to cause a present or future harm.”⁶⁴ He then observed the circuit split currently in place in regard to true threat analysis and the “viewpoint of the statement” since some circuit courts have adopted a test that examines whether speech should be interpreted as threat by a reasonable speaker while others use a

⁶⁰ See notes 259-261, *infra*.

⁶¹ See notes 24-25, *supra*.

⁶² See discussion of *Cuff*, notes 37-42, *supra*, and speculative nature of court’s analysis.

⁶³ 263 F. Supp. 2d at 202. While seriously analyzing both *Tinker* and the true threat doctrine is more fundamentally sound than simply using the former to uphold school discipline and avoid discussion of the latter, not “deciding which standard is appropriate” seems like an abrogation of the central responsibility of a judge. *Id.*

⁶⁴ 263 F. Supp. 2d at 202.

reasonable listener standard.⁶⁵ Controlling precedent in the First Circuit suggested that the judge in *Demers* was required to apply the “reasonable speaker” test, meaning that the focus of the true threat inquiry was whether the student “reasonably should have foreseen” that the drawing of his school surrounded by explosives would cause others to fear harm.⁶⁶ Under this standard, as the judge noted, there is “no requirement that the speaker had the ability or actually intended to carry out the threat.”⁶⁷ Yet after laying out the basics of true threat analysis, the judge simply concluded with his determination that the student should have known “that his drawing and note would be considered a threat to the school and to himself.”⁶⁸ While it might have been the case that a 15-year-old eighth-grader⁶⁹ could have taken national concerns regarding school violence into account while drawing his picture and thus conclude that others would be frightened, to simply pronounce — with no further analysis — that the student should have understood the entirety of what he was doing is nothing more than an *ipse dixit*.⁷⁰

While *Demers* involved the dual application of *Tinker* and the true threat doctrine, juvenile court proceedings involving violent non-sponsored student speech turned almost exclusively on state statutory and case law. In the case of *In re Ryan D.*, the Court of Appeal of California overturned a juvenile court’s determination that a student’s painting of a police officer

⁶⁵ Id. See, e.g., Chapter 2, note 116, *supra* (detailing circuit split between “reasonable speaker” and “reasonable recipient” standards). See generally Chapter 7, *infra* (discussing true threat standard and application in courts).

⁶⁶ Id. (quoting *U.S. v. Fulmer*, 108 F.3d 1486, 1491 (1st Cir. 1990)).

⁶⁷ Id. (quoting *Fulmer*, 108 F.3d at 1494).

⁶⁸ Id.

⁶⁹ Id. at 198.

⁷⁰ From the Latin for “he himself said it,” an *ipse dixit* is defined by Black’s Law Dictionary as “something asserted but not proved.” BRYAN A. GARNER ET AL., BLACK’S LAW DICTIONARY (4th ed. W. Grp. 2011). In the legal context specifically, it is seen as “an assertion of authority that rests on no basis other than the fact that the authority has asserted it.” Timothy Sandefur, *In Defense of Substantive Due Process, or the Promise of Lawful Rule*, 35 HARV. J.L. & PUB. POL’Y 283, 292 (2012). See also id. (“An arbitrary act has either no reasons to explain it or only reasons that would with equal plausibility justify the opposite act. The law of the land and Due Process clauses guarantee that the government will not employ its coercive powers against the individual on the basis of ‘because I say so.’”).

being shot constituted a criminal threat.⁷¹ While the court found that the painting — created as a response to an arrest for marijuana possession and submitted as an assignment for an art class⁷² — was “intemperate and demonstrated extremely poor judgment,” it “did not convey a gravity of purpose and immediate prospect of the execution of a threat to commit a crime that would result in death or great bodily injury to the officer.”⁷³ In interpreting Section 422 of the California Penal Code,⁷⁴ the court noted that the statute required that potential threats be analyzed in the greater context of how and where they were made.⁷⁵ The court also made it clear that to be criminally proscribable under Section 422, the threat need not be personally communicated to the intended victim, but, as the court cautioned, the defendant must still at least intend for the threat to be conveyed to the victim.⁷⁶ To meet the statutory definition of a criminal threat under state law, the court made it clear that the process required the judicial system to “balance the facts against each other to determine whether, viewed in their totality, the circumstances are sufficient to meet the requirement that the communication convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat.”⁷⁷

In applying the law to the facts at hand, the court concluded that the painting failed to “convey a gravity of purpose” along with the “immediate prospect” of a crime that would result

⁷¹ *In re Ryan D.*, 123 Cal Rptr. 2d at 195.

⁷² *Id.* at 196.

⁷³ *Id.*

⁷⁴ Cal. Penal Code § 422 punished any individual “who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety[.]” *Id.* at 197.

⁷⁵ *Id.* at 198.

⁷⁶ *Id.*

⁷⁷ *Id.* at 199.

in death or great harm to the police officer depicted in the student’s work.⁷⁸ First, the court agreed that any painting as an expression of intention to do harm — “even a graphically violent painting,” as the court pointed out — is “necessarily ambiguous.”⁷⁹ Alone, therefore, the court found that the painting could not represent a criminal threat.⁸⁰ In examining the painting along with the totality of the circumstances surrounding its creation, the court determined that the context of the painting resolved the inherent ambiguity in favor of the student and against a finding of an actual threat.⁸¹ The court then discussed several facts that served to mitigate the presence of a criminal threat: the painting was turned in for a grade,⁸² a month passed between the student’s arrest and his submission of the painting, and the painting lacked any notice of an intent to do harm with words such as “‘this will be you,’ ‘I do have a gun, you know,’ or ‘watch out.’”⁸³ Furthermore, the court found that the actions of school administrators suggested the painting was not a threat, as the student’s art teacher found it to be “disturbing” and “scary” but she and an assistant principal who also saw the painting did not call police.⁸⁴

Most importantly for the student’s innocence, however, was the lack of any evidence that he had the specific intent that the painting be showed to the officer depicted in it.⁸⁵ As the court concluded, the evidence suggested that the student “could have, and perhaps even should have foreseen the possibility” that the officer would learn of the painting and see it.⁸⁶ This mere

⁷⁸ *Id.*

⁷⁹ *Id.* at 200.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* As the court noted, simply turning in an assignment “would be a rather unconventional and odd means of communicating a threat” as “[o]rdinarily, a person wishing to threaten another would not do so by communicating with someone in a position of authority over the person making the threat.” *Id.*

⁸³ *See id.* at 200-01.

⁸⁴ *Id.* at 201.

⁸⁵ *Id.*

⁸⁶ *Id.*

possibility, though, was insufficient to establish the specific intent necessary for criminal liability.⁸⁷

In concluding its opinion, the court noted the difficulty of balancing safety concerns with the constitutional guarantee of free speech:

We certainly find no fault with the school authorities and the police treating the matter seriously. The painting was a graphic, if mythical, depiction of the brutal murder of [a police officer]. Without question, it was intemperate and demonstrated extremely poor judgment. But the criminal law does not, and can not, implement a zero-tolerance policy concerning the expressive depiction of violence.⁸⁸

Thus in the case of *In re Ryan D.*, the Court of Appeal of California concluded that at least the state's criminal code must allow for the creative depiction of violence in a school setting, but it did not speculate on whether school administrators could have disciplined the student for the painting. With *In re Douglas D.*, the Wisconsin Supreme Court provided some measure of insight into the boundaries of criminal law and the application of school discipline as it applied a state disorderly conduct statute and the true threat doctrine to decide a case involving violent non-sponsored curricular speech.

In the Wisconsin case, an eighth-grade English student was given a creative writing assignment with "no limit regarding the topic" on which he was to write, and other students would finish the assignment.⁸⁹ However, instead of beginning the assignment, the student talked with friends and disrupted the class, upon which his teacher sent him into the hall outside of the classroom to begin working.⁹⁰ At the end of the class period, the student handed in the following short story:

⁸⁷ See *id.*

⁸⁸ 123 Cal. Rptr. 2d at 201-02.

⁸⁹ *In re Douglas D.*, 626 N.W.2d at 730.

⁹⁰ *Id.*

There one lived an old ugly woman her name was Mrs. C that stood for crab. She was a mean old woman that would beat children senseless. I guess that's why she became a teacher.

Well one day she kick a student out of her class & he didn't like it. That student was named Dick.

The next morning Dick came to class & in his coat he concealed a machete. When the teacher told him to shut up he whipped it out & cut her head off.

When the sub came 2 days later she needed a paperclip so she opened the door. Ahh she screamed as she found Mrs. C.'s head in the door.⁹¹

The teacher — who often referred to herself as “Mrs.C.”⁹² — believed the story to be a threat against her if she again disciplined the student.⁹³ After the class was dismissed, she informed the school principal, and the student was then called to the assistant principal's office, where he apologized and insisted the story was not a threat.⁹⁴ Despite his assertion, the student was given an in-school suspension and moved to a different English class.⁹⁵ Even with this school punishment already handed down and no sign that the student was a continuing behavioral problem, police filed a delinquency petition a month after the story was turned in alleging that the student had “engaged in abusive conduct under circumstances in which the conduct tends to cause a disturbance,” which was a violation of the Wisconsin state disorderly conduct statute.⁹⁶

In applying the disorderly conduct statute⁹⁷ to the short story in the case, the Wisconsin Supreme Court made some important preliminary determinations: pure speech could be punished under the law,⁹⁸ threatening speech in the school environment can cause a disruption irrelevant

⁹¹ Id. at 730-31 (all spelling and other errors in the original).

⁹² Id. at 730.

⁹³ Id. at 731.

⁹⁴ Id.

⁹⁵ Id.

⁹⁶ Id.

⁹⁷ The Wisconsin law specified that “[w]hoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor.” Id. at 732.

⁹⁸ See id. at 735 (“[T]he First Amendment does not inherently bar the State from applying [the disorderly conduct statute] to unprotected speech, even if the unprotected speech is purely written speech.”).

of the specific content,⁹⁹ and that the lack of an actual disruption was not dispositive to the outcome of the case.¹⁰⁰ After the initial findings, the only issue before the court was whether the student’s story was protected speech under the First Amendment, since the court determined the disorderly conduct statute could only criminalize speech that was wholly without constitutional protection.¹⁰¹

In concluding that the story was indeed protected speech under the First Amendment — and that subsequently the student’s disorderly conduct adjudication could not stand — the court noted the distinction between a “threat” and a “true threat.”¹⁰² A threat, the court reasoned, is a nebulous concept describing anything from “an expression of an intention to inflict pain, injury, evil, or punishment” to generalized menacing; a “true threat,” however, as the court defined it, is “a constitutional term of art used to describe a specific category of unprotected speech” and subject to a complete ban by the state — thus true threats were subject to proscription under the disorderly conduct statute.¹⁰³

In determining whether expression is a true threat, the court established that Wisconsin, like the court in *Demers*, employed a “reasonable speaker” analysis.¹⁰⁴ In applying the “reasonable speaker” test, the court found that the juvenile defendant “could have expected

⁹⁹ See *id.* at 737-38 (“However, we cannot agree with Douglas’s contention that threatening a public school teacher while in school is not the type of conduct that tends to cause or provoke a disturbance . . . the public has become increasingly concerned with serious student threats of violence. With this in mind, we cannot imagine how a student threatening a teacher could not be deemed conduct that tends to menace, disrupt, or destroy public order.”).

¹⁰⁰ See *id.* at 738 (“Simply because a listener exhibits fortitude in the face of a threat is no reason to allow the threat to go unpunished. Accordingly, we conclude that the fact that Douglas’s story did not cause an actual disturbance is irrelevant to the present inquiry. It is enough that Douglas conveyed his story to Mrs. C under circumstances where such conduct tends to cause or provoke a disturbance.”).

¹⁰¹ *Id.*

¹⁰² *Id.* at 738-39.

¹⁰³ *Id.* at 739 (quoting THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1868 (3d ed. 1992)).

¹⁰⁴ See *id.* at 739-40 (describing the test as whether “a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat”) (citation omitted).

another student to end his grisly tale as a dream or otherwise imagined event” just as the class assignment called for, meaning that his story was indeed not a true threat despite his teacher feeling threatened and his direct communication of the story to her.¹⁰⁵ The court cited several factors in determining that the story was not “a serious expression of a purpose to inflict harm,”¹⁰⁶ including that it was written in the third person, it contained hyperbole and “attempts at jest,” and that the student was merely completing a class assignment within its given parameters.¹⁰⁷ The fact that the story was written for class was important to the court’s analysis as it argued that “[h]ad [the student] penned the same story in a math class, for example, where such a tale likely would be grossly outside the scope of his assigned work, we would have a different case before us.”¹⁰⁸

While the Wisconsin Supreme Court’s analysis using the true threat doctrine is far superior to the application as seen in the *Demers* opinion, it still leaves something to be desired as it fails to truly consider the whether the student speaker should have “reasonably” foreseen whether others would take the short story as a true threat. The court did mention that the student “could have imagined another student to end his grisly tale as a dream or otherwise imagined event”— thus attempting to analyze what the student should have understood at the time he wrote his story — but all other relevant facts cited by the court in its analysis speak to how a reader would understand the story.¹⁰⁹ While an argument could be made that the writer was a

¹⁰⁵ *Id.* at 741.

¹⁰⁶ *Id.* at 739 (defining true threat for purposes of “reasonable speaker” test).

¹⁰⁷ *Id.* at 741.

¹⁰⁸ *Id.*

¹⁰⁹ *See id.* at 741. As the court argues, “[I]n the context of a creative writing class, [the student’s] story does not amount to a true threat. First, the story does not contain any language directly addressed from [the student] to Mrs. C. Rather, it is written in the third person, with no mention of [the student]. Second, [the student’s] story contains hyperbole and attempts at jest. It jokes that the ‘C’ in ‘Mrs. C’ is short for ‘crab.’ In addition, it suggests that Mrs. C is so mean that she beats children and speculates that, for this reason, she became a teacher. Third, Mrs. C explained to [the student] that in this particular assignment, he merely was to begin writing a story that other children would complete. Thus, [the student] could have expected another student to end his grisly tale as a

careful student of English and clearly understood what a change in narrative perspective could mean to a violent short story, this seems unlikely at best.¹¹⁰ Similarly, the court is unclear how the student should have understood what it meant to include his “attempts at jest.”¹¹¹

Admittedly, the court’s true threat test does cite both “a speaker that would reasonably foresee” and “a listener” who “would reasonably interpret,” but by the court’s own definition, the analysis begins with what the speaker knows and understands.¹¹² Therefore, more attention should have been given to precisely what a reasonable student would have understood in the writer’s situation.¹¹³

Despite finding for the student, the Wisconsin Supreme Court was careful to frame its decision as narrowly providing protection against only criminal charges, as the court maintained the school took “appropriate disciplinary action” against the student¹¹⁴ and that “[b]y no means should schools interpret this holding as undermining their authority to utilize their internal

dream or otherwise imagined event.” While an argument could be made that the writer was a careful student of English and understood how a change in narrative perspective could mean that others would see the story differently, this seems unlikely at best. Similarly, the court is unclear how the student should have understood what it meant to include his “attempts at jest.”

¹¹⁰ See *id.* But see *id.* at 756 (Prosser, J., dissenting) (noting that “in third-person fiction, the writer is not an actor; the writer stands apart manipulating the characters such as ‘Dick’ and ‘Mrs. C.’ to do his bidding” and thus the student was “capable of conveying a threat through the words and actions of his characters.”).

¹¹¹ See *id.* at 741 (majority op.).

¹¹² See note 104, *supra*.

¹¹³ The dissent, somewhat mockingly, actually phrases this line of analysis well, arguing that “looking backward, the question the circuit court faced was whether a speaker or writer in Douglas’s position (a 13-year-old boy, already an adjudicated delinquent, who had clashed with his teacher about discipline matters in the past and who was angry because his teacher had sent him out into the hall during an English class) would reasonably foresee that a listener or reader in the teacher’s position (a new teacher, beginning her first full year of teaching in a public school, in a national environment of apprehension about school violence, who is handed a crude piece of fiction that insults teachers, names and criticizes her thinly-veiled fictional equivalent, draws a parallel to a disciplinary incident in which the teacher was involved moments before, and then implies that the student will cut off her head with a machete because he is angry at her discipline) would reasonably interpret the writing as a serious expression of a purpose to inflict harm (actual injury, intimidation, or fear of injury, thereby disrupting her emotional tranquility and her ability to teach in the classroom), as opposed to hyperbole and exaggeration or jest that would make a person smile at the student’s imagination and cleverness.” *Id.* at 755 (Prosser, J., dissenting).

¹¹⁴ *Id.* at 741 (majority op.).

disciplinary procedures to punish speech[.]”¹¹⁵ In coming to the conclusion that the decision to impose an in-school suspension¹¹⁶ against the student was justified, the court engaged in a discussion of the relevant Supreme Court cases, noting *Tinker*’s admonishment that “educators may not punish students merely for expressing unpopular viewpoints” and contrasting that with the language from *Fraser* suggesting that schools must “inculcate in our children the habits and manners of civility.”¹¹⁷ The court then implied that *Fraser* was particularly applicable as it found that the school “had more than enough reason to discipline [the student] for the content of his story” as it represented “an offensive, crass insult” to the teacher.¹¹⁸ Thus, as the court concluded, “[s]chools need not tolerate this type of assault to the sensibilities of their educators or students.”¹¹⁹

There are at least three relevant observations to make regarding the court’s discussion of the use of school discipline in *In re Douglas D.* The first is that there is no suggestion that the court’s conclusion as to the constitutionality of school discipline is anything other than *dicta* as the student was not appealing his suspension.¹²⁰ Second, while the precise analysis is unclear, the court’s decision to focus on the “offensive, crass” nature of the story rather than its pedagogical implications suggests the court would find *Fraser* to be controlling where possibly threatening

¹¹⁵ *Id.* at 742.

¹¹⁶ *See id.* at 731. The length of suspension, however, was unclear.

¹¹⁷ *Id.* at 742 (internal quotation omitted).

¹¹⁸ *Id.* at 743.

¹¹⁹ *Id.*

¹²⁰ While it is unclear why the court decided to address whether the suspension was constitutional, the court was likely sensitive to various public perceptions of its decision. *See id.* at 742 n. 16 (“We recognize that public opinion regarding protected freedoms may wax and wane over time. However, courts should not easily be swayed by public opinion, particularly in matters of constitutional rights . . . Ever conscious of the principles undergirding the Constitution, this court must not succumb to public pressure when deciding the law. Headlines may be appropriate support for policy arguments on the floor of the legislature, but they cannot support an abandonment in our courthouses of the constitutional principles that the judiciary is charged to uphold.”). By both reversing the student’s juvenile adjudication and finding his suspension constitutional, the court in essence could have it both ways: upholding what it found to be its constitutional obligations in the face of a potentially unpopular decision and giving critics of the result some measure of a victory.

and graphically violent student speech is concerned.¹²¹ The court does not specify why *Fraser*, with its focus on sexually explicit speech, is applicable and *Hazelwood* is not, but the lack of any discussion of the latter is somewhat telling as a broader failure to consider the educational implications of violent non-sponsored curricular speech.

Finally, the discussion of school discipline is notable for the court’s declaration that “schools may discipline conduct even where law enforcement officials may not.”¹²² That conclusion may be an obvious one considering that the court found that the story was both protected by the First Amendment — in that it was not a true threat¹²³ — and subject to school discipline, a somewhat contradictory position noted by a dissenting justice.¹²⁴ The specifics of the student’s school discipline are unclear from the court’s opinion,¹²⁵ but at some point, the punitive authority of the school approaches that of the criminal justice system regarding what exactly a school can do to a student and what impact that adverse disciplinary decisions might

¹²¹ *Id.* at 743. *See also id.* (“[W]e also recognize that ‘it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse.’”) (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986)). *But see id.* at 748 (Crooks, J., concurring) (suggesting that “[a] school can, and should, discipline a student for speech and conduct that is inappropriate and disruptive, and in no way adds to the school’s educational mission” and implying that *Tinker* would control the analysis of whether the discipline was constitutional).

¹²² *Id.* at 743 (majority op.).

¹²³ *Id.* at 741.

¹²⁴ *See id.* at 759-60 (Prosser, J., dissenting) (“The majority opinion asserts that some speech in public schools is protected from criminal prosecution but may be suppressed by rules and punished through internal school discipline. When? Are school officials expected to know the answer by instinct? The majority’s untested thesis deserves authority and additional discussion.”). *See also id.* at 758-59 (“The proposition that speech uttered in the exact same context — same speaker, same words, same time, same place — is fully protected by the First Amendment against some state action but not against other state action, is less established. To give speech a dual character (protected/unprotected) depending upon who is seeking to punish it or how severe the punishment may be, will eliminate certainty in the law and create a chilling effect upon both speech and discipline.”).

¹²⁵ *See note 116, supra.* The majority opinion cites only an “in-school suspension” of an indeterminate length. While this is certainly nothing to scoff at, it clearly does not rise to the level of an expulsion as seen in other violent student expression cases.

have.¹²⁶ Therefore, the seriousness of school discipline in all situations should be at least considered before summarily dismissing its consequences by implication.

While the Wisconsin Supreme Court's majority opinion attempted to balance concerns regarding school violence and the rights guaranteed under the Constitution, one dissenting justice struck a decidedly reactionary tone as he began his opinion by listing school shooting deaths from 1993 to 1999.¹²⁷ The dissent found the student to be "a troubled young man"¹²⁸ and would have upheld his juvenile adjudication, arguing that his colleagues misapplied the true threat doctrine¹²⁹ and inappropriately cherry-picked through the facts to find that the story was protected speech.¹³⁰

In addition to calling for deference to school administrators,¹³¹ the dissent also argued for placing threatening and violent student speech outside of the boundaries of the First Amendment as "incendiary *per se*," much like shouting "fire" in a crowded theatre or making a joke about terrorism at an airport.¹³² The dissenting justice tied his belief in this categorical exemption to First Amendment protection to the popular conception of widespread school violence as he argued that "[t]oday our country is consumed by the outbreak of violence in public schools" and

¹²⁶ In this case, the student was adjudicated delinquent and ordered to be placed under "formal supervision" for a year. 626 N.W.2d at 731. This contrasts with his in-school suspension. *Id.* If the school had formally expelled the student or suspended him for an extended period, this school discipline would have rivaled the juvenile court's punishment in terms of adverse effects.

¹²⁷ *See id.* at 749-50 (David T. Prosser, J., dissenting).

¹²⁸ *Id.* at 751.

¹²⁹ *Id.* at 754 ("The majority's analysis is confusing. As a result, it is not clear what impact the court's decision will have on safety and discipline in Wisconsin schools.").

¹³⁰ *See id.* at 755 ("It is quite wrong for this court to sift through the factual circumstances, minimizing the factors that are present and emphasizing factors that are not there.").

¹³¹ *Id.* at 758 ("Macabre writings may reflect a harmless fantasy life. Then again, they may be a true threat. The facts are best determined by fact-finders on the scene, not appellate judges.")

¹³² *Id.* at 762. The dissent similarly noted that "[i]ntentional bomb scares also fall outside protected speech." *Id.*

that therefore “[t]hreats of violence in schools must be taken seriously.”¹³³ As the dissent contended, the nature of the contemporary school environment when coupled with, as the justice saw it, the relatively low value of violent student speech¹³⁴ meant that schools should have *carte blanche* authority to punish and otherwise censor such student expression. However, this belief that violent student speech should be categorically exempt from First Amendment protection goes against current Supreme Court trends to limit expression automatically excluded from constitutional protection.¹³⁵

In addition to using state law and the true threat doctrine, at least one court has addressed a somewhat novel approach in the context of student expression to address claims resulting from violent non-sponsored curricular speech. In *Cox v. Warwick Valley Central School District*, the Second Circuit decided a case in which a middle school student wrote a story for class that detailed what he would do if he only had 24 hours to live.¹³⁶ The story the student eventually turned in described his escapades in “getting drunk, smoking, doing drugs, and breaking the law” and concluded with the student “taking cyanide and shooting himself in the head in front of his friends at the end of the 24 hours.”¹³⁷ After the story was handed in, the student’s teacher gave it to the school’s principal who “immediately” took the student out of class to discuss the contents of the story.¹³⁸ The student, after assuring the principal the story was merely fiction and that he had no intentions to harm himself or others, was then sent given an in-school suspension as the

¹³³ *Id.* at 761 (citation omitted). *See also id.* (“Almost inevitably these threats produce fear among students and teachers. They inflict harm and impair the atmosphere for learning.”). *But see* Chapter 2, *supra* (summary of literature suggesting that schools are actually a relatively safe environment).

¹³⁴ *See* 626 N.W. 2d at 761 (“Threats of violence against students, teachers, or administrators in schools are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. They materially disrupt classwork, and therefore are not immunized by the constitutional guarantee of freedom of speech.”) (internal quotations, citations omitted).

¹³⁵ *See* Chapter 4, *supra*.

¹³⁶ 654 F.3d at 270.

¹³⁷ *Id.*

¹³⁸ *Id.*

principal evaluated the situation.¹³⁹ Concluding that there was no immediate threat to the school, the principal sent the student home and no further discipline was imposed.¹⁴⁰

School officials, however, decided to report the student's parents to New York Child and Family Services, alleging that the student's parents were neglectful due to their lack of concern over both the story and their son's other assorted behavioral issues.¹⁴¹ The state agency, in turn, suggested that the student receive a psychiatric evaluation or the parent's might otherwise lose custody of their son.¹⁴² The parents complied with the agency's request, but they decided to home-school their son for the rest of the year after the agency's investigation concluded the original report by the principal was "unfounded."¹⁴³ The parents then sued the principal and the school district claiming the student's First Amendment rights were violated specifically by the principal acting in retaliation for the student's story.¹⁴⁴

In reviewing the district court's summary judgment decision for the principal and the school district, the Second Circuit stated that to prove a First Amendment retaliation claim, plaintiffs must show that: "(1) his speech or conduct was protected by the First Amendment; (2) the defendant took an adverse action against him; and (3) there was a causal connection between this adverse action and the protected speech."¹⁴⁵ Naturally, the student's parents argued his story

¹³⁹ Id. at 271.

¹⁴⁰ Id.

¹⁴¹ Id. The principal's phone call to Child and Family Services was summarized and included in the court's opinion: "13 yr old [student] has been repeatedly writing in his journal violent homicidal and suicidal imagery while in school. He has also participated in acts of vandalism and brought dangerous objects into school such as fireworks and pieces of metal. [Student] recently expressed suicidal thoughts and had a very descriptive plan for doing it in that he would take his favorite weapon, a ruger place it in his mouth with a cyanide pill and shoot himself and everyone would party for a week. The school recommended to the parents that they seek a psychiatric evaluation for their son but they have refused to do so. The parents are minimizing the child's thoughts and behaviors and state that this is just fiction and all a misunderstanding. It is believed the child is a danger to himself and other[s] at this point. The parents are failing to provide a minimal degree of care to their son." Id.

¹⁴² Id.

¹⁴³ Id.

¹⁴⁴ Id.

¹⁴⁵ Id. at 272.

was protected by the First Amendment.¹⁴⁶ The adverse action connected to that speech, they argued, was the decision to both place the student in in-school suspension and make the report to Child and Family Services.¹⁴⁷ These arguments were unsuccessful, however, as the Second Circuit upheld the district court's grant of summary judgment.¹⁴⁸

In coming to its conclusion, the court sidestepped the issue of whether the student's story was protected by the First Amendment to find simply that none of the principal's actions constituted retaliation.¹⁴⁹ While admitting there was "no clear definition of 'adverse action' in the school context,"¹⁵⁰ the court applied an objective standard focused on determining whether a defendant's actions would deter others from exercising constitutionally protected rights.¹⁵¹ The court also noted that this test for an adverse action was "a highly context-specific" examination and was therefore to be applied "in light of the special characteristics of the school environment."¹⁵² In applying an adverse action standard, the court noted the difficult position of teachers and administrators as they "have multiple responsibilities: teaching, maintaining order, and protecting troubled and neglected students."¹⁵³ Furthermore, "[i]n their various roles, school administrators must distinguish empty boasts from serious threats, rough-housing from bullying, and an active imagination from a dangerous impulse."¹⁵⁴ To sort through those possible threats, the court contended that school administrators must be allowed to conduct an investigation, even

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 273.

¹⁵⁰ *Id.* See also *id.* (noting that "First Amendment student speech cases ordinarily involve explicit censorship or avowedly disciplinary action by school administrators" and retaliation was therefore a somewhat unusual issue in the student speech setting).

¹⁵¹ See *id.* (defining an adverse action as "conduct that would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights") (quoting *Zelnik v. Fashion Inst. of Tech.*, 464 F.3d 217, 225 (2d Cir. 2006)).

¹⁵² *Id.* (quoting *Tinker*, 393 U.S. at 506).

¹⁵³ *Id.* The court also noted the mandatory reporting requirement imposed on teachers and other school officials.

¹⁵⁴ *Id.* at 274.

when that inquiry results in a student that “is separated, interviewed, or temporarily sequestered to defuse a potentially volatile or dangerous situation.”¹⁵⁵ Thus, as the court determined, “the temporary removal of a student from regular school activities in response to speech exhibiting violent, disruptive, lewd, or otherwise harmful ideations is not an adverse action for purposes of the First Amendment absent a clear showing of intent to chill speech or punish it.”¹⁵⁶ Without this ability to temporarily remove a student to assess a situation, the court argued that simply “[a] school cannot function.”¹⁵⁷

With those principles established, the court concluded that there was no adverse action as the principal’s decision to remove the student to in-school suspension was only “a precautionary measure to ensure that ambiguous student expression did not portend disruption or violence.”¹⁵⁸ Similarly, the principal’s decision to call Child and Family Services “was a protective — not disciplinary — act” and could not serve as the basis for a retaliation claim.¹⁵⁹ Therefore, in *Cox*, the Second Circuit made it clear that investigatory efforts in violent non-sponsored curricular speech were due “unusual deference” and could not be considered adverse action without “a clear showing of retaliatory or punitive intent.”¹⁶⁰

Collectively, these cases — *Demers*, *In re Ryan D.*, *In re Douglas D.*, and *Cox* — stand for the proposition that student speech jurisprudence is not the exclusive means of analysis in cases concerning violent non-sponsored curricular student speech. While the true threat doctrine appears to be a focus in juvenile adjudications, *Demers* demonstrates that it can be used in school

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *See id.* (“Although a student and his parents might perceive such removal as ‘disciplinary’ or ‘retaliatory,’ its objective purpose is protective. It affords the administrators time to make an inquiry, to figure out if there is danger, and to determine the proper response: discipline, a benign intervention, or something else. A school cannot function without affording teachers and administrators fair latitude to make these inquiries.”).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

discipline cases as well, even as the judge in the case declined to state whether student speech jurisprudence or the true threat doctrine was appropriate for the case.¹⁶¹ *In re Ryan D.* and *In re Douglas D.* additionally show the state's difficult burden in building a true threat argument where a student willingly turned in an assignment as a part of regular coursework. Finally, *Cox* is important as it distinguishes between appropriate measures designed to enable school safety and those actions intended to punish speech, as the Second Circuit gave schools a wide latitude for the former and suggested a prohibition on the latter.

These cases employed a distinctly different form of analysis as compared to the previously discussed court decisions using the *Tinker* standard.¹⁶² Yet the *Tinker* cases and the true threat and other doctrine cases used a legal framework that was clearly established and explained in the text of the various court opinions. This clarity, however, is not a constant in the area of violent non-sponsored curricular speech as Part I.b.3 will show.

3. Cases using unclear or incomplete means of analysis

Although most cases involving violent non-sponsored curricular student speech are clear in their legal analysis, two cases decided in the federal district courts — *Emmett v. Kent School District No. 415*¹⁶³ and *D.F. v. Board of Education of Syosset Central School District*¹⁶⁴ — employed a legal framework that was less explicit as compared to previously discussed cases. However, *Emmett* and *D.F.* demonstrate that while the facts are often similar in violent non-sponsored curricular speech cases, the legal analysis employed can be vastly different and unfortunately unclear or incomplete.

¹⁶¹ 263 F. Supp. 2d at 202. See also note 63, *supra* (questioning the appropriateness of the judge in refusing to decide which case law was suited for *Demers*).

¹⁶² See Part I.B.1, *supra*.

¹⁶³ 92 F. Supp. 2d 1088 (W.D. Wash. 2000).

¹⁶⁴ 386 F. Supp. 2d 119 (E.D.N.Y. 2005).

In *Emmett*, a federal district court in Washington state was tasked with deciding the fate of a student who had been disciplined by his school after creating a website that featured mock obituaries of his friends and asked website visitors to vote on the subject of the next obituary.¹⁶⁵ The website, though, was inspired by a creative writing assignment for class in which students were to write similarly fictional obituaries.¹⁶⁶ After the website was sensationalized on local television news as a “hit list,” the student was given an emergency expulsion that was later modified to a five-day suspension.¹⁶⁷ The district court, however, enjoined the school from enforcing the suspension as the student won on a motion for a preliminary injunction.¹⁶⁸

In evaluating the student’s likelihood of succeeding on the merits at trial, the district court noted first that “[t]he First Amendment provides some, but not complete, protection for students in a school setting.”¹⁶⁹ The court then discussed the relevant student speech jurisprudence, beginning with *Tinker* before moving on to *Fraser* and *Hazelwood*.¹⁷⁰ Especially relevant to *Emmett*, the court noted that in *Fraser*, Justice William Brennan suggested in his concurring opinion that the student could not have been punished for his sexually explicit speech had it been given off-campus instead of delivered in a school assembly.¹⁷¹ Applying the Supreme Court’s student speech precedents, the district court found that the student’s website “was not at a school assembly, as in *Fraser*, and was not in a school-sponsored newspaper, as in

¹⁶⁵ 92 F. Supp. 2d at 1089.

¹⁶⁶ *Id.* See also notes 13-14 and accompanying text, *supra* (explaining why the website in *Emmett* should be considered non-sponsored curricular speech).

¹⁶⁷ 92 F. Supp. 2d at 1089.

¹⁶⁸ *Id.* at 1090.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* See also *Fraser*, 478 U.S. at 688 (Brennan, J., concurring).

[*Hazelwood*].”¹⁷² Yet despite these references to *Fraser* and *Hazelwood*, a serious discussion of *Tinker* and its application in *Emmett* was nowhere to be found in the court’s opinion.¹⁷³

Rather than applying *Tinker*, the court appeared to focus on its notion that the website “was not produced in connection with any class or school project”¹⁷⁴ — thereby failing to recognize the website’s origins in a class assignment. The court observed that while “the intended audience was undoubtedly connected” to the school, the website was “entirely outside of the school’s supervision or control,”¹⁷⁵ and, as the court concluded, it represented “out-of-school” speech not subject to school discipline.¹⁷⁶

In addition to finding the website was “out-of-school” speech, the court also noted, without further discussion, the school’s lack of evidence that “the mock obituaries and voting on this web site were intended to threaten anyone, did actually threaten anyone, or manifested any violent tendencies whatsoever.”¹⁷⁷ Without any evidence as to the threatening nature of the website, the court determined that the student’s suspension could not be sustained based on the violent content of the website despite the “acutely difficult position” of administrators following incidents of school violence.¹⁷⁸ The absence of evidence as to any true threat represented by the website, when “combined with the . . . out-of-school nature of the speech,” gave the student a substantial likelihood of succeeding on the merits of his case at trial, thereby resulting in the court’s decision to grant an injunction in his favor.¹⁷⁹

¹⁷² 92 F. Supp. 2d at 1090.

¹⁷³ The court mentioned *Tinker* only to state the general holding (that “students do not abandon their right to expression at the schoolhouse gates, but that prohibition of expressive conduct is justifiable if the conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school”) and to note that *Fraser* and *Hazelwood* “defined the limits” of *Tinker*. *Id.* (internal quotation omitted).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 1090.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

While the court’s eventual determination in *Emmett* is easy enough to understand, the decision still lacks a complete discussion of the true threat doctrine in addition to the absence of an explanation why *Tinker* does not apply. Limiting the application of *Tinker* is necessary¹⁸⁰ — especially where online speech is concerned — but the opinion should have explained *exactly* why *Tinker* did not apply despite the audience’s connection to the school. The *Emmett* court’s outcome was ultimately preferable, but given the tie to the student’s education, the reasoning should have been different.¹⁸¹ If nothing else, the court could have done more to establish a clear procedure for determining when *Tinker* does and does not apply in instances of online student speech.¹⁸²

Where *Emmett* was merely incomplete, the analysis by the federal district court in *D.F.* was unfortunately unclear. In that case, a 12-year-old sixth grade student wrote for a class journal a story fashioned in the style of a horror movie.¹⁸³ The story featured a protagonist who stabbed “bad kids” and decapitated others, kissed one character, and observed characters having sex.¹⁸⁴ The student first read his story without permission to others in his class, but when he asked his teacher to read aloud to classmates, the teacher wanted to read the story first.¹⁸⁵ Upon reading the story, the teacher brought it to the attention of the principal, who decided to suspend the student for five days.¹⁸⁶ After a disciplinary hearing in which the presiding officer determined the “story was designed to place individuals in fear of bodily harm,” the suspension

¹⁸⁰ See Chapter 6, *infra*, for discussion of on/off-campus distinction and the limitation of school jurisdiction over student speech.

¹⁸¹ See Part III, *infra*, for discussion of proposed standard for non-sponsored curricular speech.

¹⁸² See Chapter 6, *infra*, for discussion of online student speech.

¹⁸³ 386 F. Supp. 2d at 123.

¹⁸⁴ *Id.* The court noted that “[s]ome” of the characters were named after actual students. *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

was increased to 30 days.¹⁸⁷ The student, however, appealed the school’s decision in federal court, alleging violations of his constitutional rights.¹⁸⁸

In granting the school’s motion to dismiss the case and therefore uphold the 30-day suspension, the court explained first that “[f]reedom of speech . . . is not an unfettered right for any U.S. citizen.”¹⁸⁹ The court then noted that true threats — that speech serving as a “serious expression of an intent to cause present or future harm” as the court defined it — may be properly prohibited.¹⁹⁰ Additionally, the court observed that student speech rights are limited, consistent with *Tinker*, where such expression would “materially or substantially interferes with the requirements of appropriate discipline in the operation of the school” or “substantially interfere with the work of the school or impinge upon the rights of other students.”¹⁹¹ The court also summarized the holdings of *Fraser* and *Hazelwood* as allowing administrators to censor student speech that is “inconsistent with [the school]’s basic educational mission,” vulgar, or school-sponsored.¹⁹²

Applying these relevant principles, the court concluded that the student’s story was unprotected speech as “a minor and a student, is not entitled to unbridled First Amendment protection in the school setting.”¹⁹³ Exclusively applying student speech jurisprudence, the court found that

[t]he story, with its graphic depictions of the murder of specifically named students and sex between named students, may materially interfere with the work of the school by disturbing the students and teachers. For example, at one point in the story, the murderer kicks

¹⁸⁷ Id. at 124 (quoting Def. Hankin’s Ex. D at 200-02).

¹⁸⁸ Id.

¹⁸⁹ Id. at 125.

¹⁹⁰ Id.

¹⁹¹ Id. (quoting *Smith v. Mount Pleasant Pub. Schs*, 285 F. Supp. 2d 987, 993 (E.D. Mich. 2003)).

¹⁹² Id.

¹⁹³ Id.

a girl named “Shanna” in the mouth and Shanna responds by kissing the murderer while blood is “pouring out of her mouth.”¹⁹⁴

Here the court’s analysis is unclear. By referencing a possible disturbance in the school, the court implicates *Tinker*, but by focusing on the graphic and sexual nature of the story, the court’s discussion implies a *Fraser*-based reasoning. This distinction is important as school discipline need not be premised on an actual or potential disruption under *Fraser*, whereas *Tinker* requires something more than “undifferentiated fear or apprehension of disturbance.”¹⁹⁵ Therefore, the court’s decision very well could have been premised upon *Tinker* (assuming there was relevant evidence of a disruption or a reasonable fear thereof) or *Fraser* (if the sexual content of the story was objectionable enough), but logically, it cannot be based on both decisions.

While the student speech analysis was unclear at best, the court’s use of the true threat doctrine was remarkably incomplete. In analyzing the story under the true threat framework, the court determined that “the story constitutes a true threat of violence as it *describes* a student killing other real-life students.”¹⁹⁶ The court went on to frame the problem with the story in light of school violence, writing that the court was “well aware of the legacy of fear and panic that recent acts of devastating school violence have wrought in this country” and that “[s]chools must be able to protect their student bodies against such acts and be able to provide a modicum of security for their parents and students.”¹⁹⁷

Any discussion of the specifics of the true threat doctrine is startlingly absent as the court simply concluded, much as the *Demers* court did,¹⁹⁸ that the story was a true threat without undertaking any real analysis or offering any explanation of its reasoning aside from the general

¹⁹⁴ *Id.* at 125-26.

¹⁹⁵ *Tinker*, 393 U.S. at 508.

¹⁹⁶ 386 F. Supp. 2d at 126 (emphasis added).

¹⁹⁷ *Id.*

¹⁹⁸ See notes 68-70, *supra*, and accompanying text.

observations regarding school violence. Compounding this problem was the fact that the court was particularly unskilled in its word choice as it argued that the story “describes” a violent incident. A true threat, by its very definition, must amount to more than a simple description of violence or otherwise many fiction writers would be subject to criminal prosecution.¹⁹⁹ Tying a description of violence to “the legacy of fear and panic” generated by acts of school violence does not meet the legal threshold necessary to exclude the student’s story from First Amendment protections. Thus the *D.F.* court fails to adequately address whether the student’s story was indeed a true threat.

Yet this failure is merely symptomatic of a larger concern in many of the cases to address violent non-sponsored curricular student speech in that the analysis is simply incorrect. Some courts that apply *Tinker* incorrectly consider the potential harm resulting from a school shooting (instead of the specific disruption caused by violent student speech) when deciding cases, while other courts using *Tinker* engage in elaborate speculation to uphold school discipline.²⁰⁰ Analysis under the true threat doctrine is similarly poor, as courts either fail to truly consider the objective perspective of a student speaker or simply find that violent student speech represents a true threat without any support for that conclusion.²⁰¹ However, the most notable omission from the legal analysis in most of these cases is a consideration of the educational issues implicated when a school or the state punishes a student speaking in furtherance of education.

¹⁹⁹ See *Virginia v. Black*, 538 U.S. 343, 359-60 (2003) (“True threats’ encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur. Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.”) (citations omitted) (internal quotations omitted).

²⁰⁰ See Part I.b.1, *supra*.

²⁰¹ See Part I.b.2, *supra*.

Therefore a critical analysis of these cases reveals that courts apply vastly different standards even as the facts — in that they are examples of violent student speech integrally related to education — are remarkably similar. Furthermore, these cases have not been identified by courts as a discrete class of cases deserving of a specialized analysis; rather, these cases are firmly planted in the post-Columbine, post-Virginia Tech, post-Newtown mindset of heightened deference to school administrators and an understandable preoccupation with school safety.

Thus Part I has focused on describing how these cases *are* decided, including some examination of the perceived shortcomings of current legal analysis. From looking at how these examples of violent non-sponsored curricular student speech have been analyzed under current case law, it is clear that neither *Tinker* nor the true threat doctrine are adequate solutions to the unique issues involved with this type of expression not sponsored by schools but still integral to education. In an effort to remedy this doctrinal problem, Part II begins this chapter's examination of the normative ideal in trying to answer how these cases *should* be decided.

II. Eliminating current case law options for addressing violent non-sponsored curricular speech

As Part I detailed, this chapter seeks to define and clarify the proper regulation of violent non-sponsored curricular student speech, a subset of student speech that has yet to be substantively identified and addressed by the Supreme Court. Part II will specifically explain why current case law as applied fails to address this area of student speech, identifying, in turn, deficiencies with the true threat doctrine, *Morse* and *Fraser*, *Tinker*, and *Hazelwood*. By eliminating all of these possible doctrinal solutions, only then is it clear that a new standard for non-sponsored curricular student speech is necessary.

a. Why the true threat doctrine is not an appropriate approach

As demonstrated with *In re Douglas D.*, *Demers, D.F.*, and *In re Ryan D.*, the true threat doctrine has been used by courts to analyze cases of violent non-sponsored curricular student speech. However, each of the decisions demonstrated either a difficulty in proving the presence of a true threat where a student is turning in a class assignment, as in *In re Ryan D.* and *In re Douglas D.*, or simply poor analysis on the part of the court, such as the *Demers* court deciding without further explanation that the student “should have concluded that his drawing and note would be considered a threat to the school”²⁰² and the federal district court in *D.F.* concluding the story in that case was a true threat only because “it describes a student killing other real-life students.”²⁰³ The distinction between the four cases is seen not only in the outcome — with *In re Ryan D.*²⁰⁴ and *In re Douglas D.*²⁰⁵ overturning juvenile adjudications and *Demers*²⁰⁶ and *D.F.*²⁰⁷ upholding school discipline — but also in the seriousness and thoroughness of the true threat analysis. Where courts seriously consider the issues involved in applying the true threat doctrine in the area of non-sponsored curricular student speech, the natural outcome should be to find for a student and establish the absence of a true threat.

A commonsense examination of threats, creativity, and education led the *In re Ryan D.* and *In re Douglas D.* courts to their respective determinations regarding the absence of a true threat. As the Court of Appeal of California noted in *In re Ryan D.*, a “criminal threat . . . is a specific and narrow class of communication” and “[o]rdinarily, a person wishing to threaten another would not do so by communicating with someone in a position of authority over the

²⁰² *Demers*, 263 F. Supp. 2d at 202.

²⁰³ *D.F.*, 386 F. Supp. 2d at 126.

²⁰⁴ *In re Ryan D.*, 123 Cal. Rptr. 2d at 202.

²⁰⁵ *In re Douglas D.*, 626 N.W.2d at 742.

²⁰⁶ *Demers*, 263 F. Supp. 2d at 203.

²⁰⁷ *D.F.*, 386 F. Supp. 2d at 126.

person making the threat.”²⁰⁸ Therefore, for a student to turn in a painting both for a grade and with the intention of threatening someone else in the school community — as the state alleged in *In re Ryan D.* — it “would be a rather unconventional and odd means of communicating a threat.”²⁰⁹

Rather than relying on the nature of threats, the Wisconsin Supreme Court based its decision in *In re Douglas D.* more on the specific elements of the story and the class assignment.²¹⁰ In coming to its decision, the court noted that the story was written in the third person, contained “hyperbole and attempts at jest,” and attempted to conform to the parameters of the teacher’s assignment.²¹¹ More generally, however, the story was written in the context of a creative writing class — a class where, as the court observed, “teachers and students alike should expect and allow more creative license — be it for better or, as in this case, for worse — than in other circumstances.”²¹²

In fully applying the true threat doctrine, both the Court of Appeal of California and the Wisconsin Supreme Court essentially came to the same conclusion: Logically, it makes little sense to find a true threat where a student turns in a creative work that is a part of the school curriculum — either because that does not satisfy the typical norms of a true threat or because creativity demands some leeway when it comes to student expression.

However, that is not to assert that a student assignment can *never* be a true threat. As Florida State University neared a berth in the 2013 national college football championship game with star quarterback Jameis Winston implicated in a sexual assault, sports website Deadspin published an essay from an FSU English instructor that examined the relationship between

²⁰⁸ *In re Ryan D.*, 123 Cal. Rptr. 2d at 200.

²⁰⁹ *Id.*

²¹⁰ *In re Douglas D.*, 626 N.W.2d at 741.

²¹¹ *Id.*

²¹² *Id.*

academics and major college athletics.²¹³ For the purposes of a discussion on violent non-sponsored curricular speech, the essay contained a cogent example of what could be a true threat in the context of a class assignment:

Before Jameis, there was the gay-basher. His teacher, Robert, was also one of Florida State's superstars, a professor in training with a pile of prestigious awards and grants. He is also gay, a fact that "any of my students are gonna figure out pretty quickly," he says. The defensive back took his required writing class a few summers back, and they met early in the course for a one-on-one conference to discuss an assigned essay exploring a significant personal moment in the students' lives.

"It was just me and him in my windowless office on the fourth floor of an empty campus building," Robert says. The player submitted his essay and went down the hall for a drink, while Robert read it and promptly "freaked out."

The paper was "a very graphic, very detailed, very proud telling of how he basically got his high school classmates together to beat the shit out of this 'fag'"—a word used often in the work—"and literally kick him in the teeth to teach him a lesson." They were sick of their mark "acting like a girl," Robert recalls, and so they went about punching him in the face, emptying his gumline. The tone of the player's essay was that "he was very proud of himself. He had taken the initiative to organize this beating."

Robert panicked. The essay's victim "talked sexually, had tight clothes, and had feminine features—some of which could be certainly be said of me," he says. "Why would he give that to me? I took it in the moment as a personal threat."

When the player returned, Robert faked getting an important text and begged out of the conference, then ran down to a mentor's office to report the paper. The situation was handled well, he said: He never had to see that student again. Still, he had no clue as to the player's motives — or his rehabilitation.²¹⁴

This example shares some definite commonalities with *In re Douglas D.*, the Wisconsin case regarding a student who wrote a short story about a student who "came to class & in his coat he consoled a machedy" and cut off his teacher's head.²¹⁵ Both the FSU assignment and the

²¹³ Adam Weinstein, *Jameis Winston Isn't the Only Problem Here: An FSU Teacher's Lament*, DEADSPIN (Nov. 21, 2013, 2:43 PM), <http://deadspin.com/jameis-winston-isnt-the-only-problem-here-an-fsu-teac-1467707410>

²¹⁴ *Id.*

²¹⁵ *In re Douglas D.*, 626 N.W.2d at 731.

assignment in *In re Douglas D.* were completed as a part of a class assignment, and they were given directly to the person they purportedly threatened. Both stories as well employed identifiable characteristics of the individual arguably targeted, with the story in *In re Douglas D.* referencing a teacher by the name of “Mrs. C”²¹⁶ and the FSU essay describing the beating of a homosexual.²¹⁷

A key difference, however, is the specific context: the story in *In re Douglas D.* was a work of fiction²¹⁸ as compared to the personal essay describing an actual event in the FSU example.²¹⁹ In addition to being fiction, the story in *In re Douglas D.* was less believable as a threat because it contained elements of hyperbole and humor.²²⁰ However, the essay detailed in the Deadspin post is different because it described something that happened, so it can necessarily transmit an implied message of “this might happen to you as well.” While such a threat may have been present in *In re Douglas D.*,²²¹ in the FSU story it is stark, real, and much closer to a legal consideration of what a threat should be: “[a] communicated intent to inflict harm or loss on another or on another’s property, especially one that might diminish a person’s freedom to act voluntarily or with lawful consent.”²²² Still, without knowing more about the specific situation that was described at FSU or the student’s intentions in writing the story, it is hard to label the student’s essay a true threat. It, however, does come a great deal closer to the legal, objective

²¹⁶ Id. at 730-31. The student’s English teacher “commonly referred to herself as ‘Mrs. C.’ in class. Id. at 730.

²¹⁷ See Weinstein, *supra* note 213. The essay described the beating of a homosexual high school student, and it was then given to a homosexual college instructor. Id. By his own description, the instructor’s students “figure out pretty quickly” his sexual orientation. Id.

²¹⁸ See *In re Douglas D.*, 626 N.W.2d at 730 (establishing the rules of the assignment).

²¹⁹ See Weinstein, *supra* note 213.

²²⁰ See *In re Douglas D.*, 626 N.W.2d at 730-31. See also id. at 741 (explaining the court’s reasoning in determining the story was not a true threat).

²²¹ The state argued the student’s “threat to Mrs. C is direct and clear: If she disciplines him again, he intends to injure her.” Id. at 740. Additionally, the Wisconsin Supreme Court concluded, “[w]e do not doubt that the story was a result of [the student’s] anger at having been removed from class.” Id. at 741. The court, however, did not address the conditional nature of the alleged threat.

²²² This is one possible definition of a threat as defined by Black’s Law Dictionary. Garner, *supra* note 70.

standard of what a true threat should be than any of the stories or artistic creations described in *In re Douglas D.*, *Demers, D.F.*, and *In re Ryan D.*

The true threat doctrine is simply a poor methodological fit for the area of violent non-sponsored curricular speech. As the Court of Appeal of California noted, the notion of a student turning in an assignment both to threaten and for normal academic credit is hard to reconcile with traditional ideas of threatening and menacing communication.²²³ Furthermore, as the Wisconsin Supreme Court concluded, curricular speech requires “more creative license” and that a “boy’s impetuous writings do not necessarily fall from First Amendment protection due to their offensive nature”²²⁴ — determinations that serve as a sharp contrast to the *D.F.* court’s decision that a student’s story represented a true threat simply because it described violence against other students.²²⁵ Additionally, while courts applying the true threat doctrine in juvenile adjudications may appear to be dissimilar from courts applying the true threat doctrine in examining school discipline, for the purposes of true threat analysis they are the same, as the legal context should be irrelevant when considering whether communication is a true threat. In other words, the determination of a true threat for school discipline is the same as the determination of a true threat for criminal punishment.²²⁶

The true threat doctrine, therefore, is usually inappropriate where violent non-sponsored curricular speech is concerned. The application of this test — in which a positive result renders speech unprotected both inside and outside of school grounds — should properly be limited to

²²³ See *In re Ryan D.*, 123 Cal. Rptr. 2d at 200.

²²⁴ *In re Douglas D.*, 626 N.W.2d at 741.

²²⁵ *D.F.*, 386 F. Supp. 2d at 126.

²²⁶ To phrase the point yet another way, expression cannot be both a true threat for the purposes of school discipline and not a true threat for criminal prosecution. See *In re Douglas D.*, 626 N.W.2d at 743 (suggesting, in a case where a student’s story was not a true threat for the purposes of a juvenile adjudication, that school discipline was justified by the “offensive, crass insult” posed by the student’s story and hinting at *Fraser* analysis).

instances where either an intent to threaten is obvious on the face of the creative work or the communication more closely resembles a traditional threat.

b. Why *Morse* and *Fraser* should not apply

In evaluating whether *Morse* and *Fraser*, two decisions arguably more narrow than *Tinker* and *Hazelwood*, should apply in instance of violent non-sponsored curricular speech, the major issues to be resolved are whether the permissible prohibition of sexually explicit speech on school grounds in *Fraser* extends to violent speech in the classroom and whether *Morse* articulates a new standard of constitutional censorship premised on school safety. To be consistent with the principles of the First Amendment, however, the answer to both of these questions must be no — the doctrinal solution to violent non-sponsored curricular speech cannot come from either *Fraser* or *Morse*.

In addressing how *Fraser* and *Morse* could be applicable where violent speech is concerned, it is important to first note that — despite the 20 years separating the decisions — *Fraser* and *Morse* are operationally quite similar. Both involve deciphering speech with vague or multiple interpretations and “rummaging through message content for an impermissible meaning,” as Professor Clay Calvert phrased it.²²⁷ The two decisions, therefore, embrace a “meanings-based” approach to censorship and represent a break from the methodology seen in *Tinker*, a decision that was premised on the actual effects of speech.²²⁸

Continuing the commonalities, both decisions have also seen lower courts broadly interpret the principles contained in them. Where the decisions differ, however, is exactly where the expansive interpretation comes into play as lower courts have broadened what is offensive

²²⁷ 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, 133 (2012).

²²⁸ See *id.* (“*Fraser* and *Morse* embrace a meanings-based methodology that permits censorship based purely upon the resolution of the meaning of a message — regardless of its likely or actual disruptive effect among students — and whether, in turn, that meaning contradicts some aspect of a school's educational mission.”).

for the purposes of *Fraser* while other decisions have held that *Morse* enables school administrators to act where speech poses a harm to the wellbeing of students.²²⁹

Turning first to the proper application of *Fraser*, it is important to understand how the decision mechanically works. As Professor Calvert explained, the “*Fraser* formula” is an examination of “[w]hether student message X conveys a disfavored and inappropriate meaning Y that conflicts with educational mission Z.”²³⁰ This inquiry is a two-step process that requires first an inquiry into what the meaning of a given student message may be and then a determination of “whether that meaning conflicts with some aspect of a school's educational mission.”²³¹ If strictly interpreted and limited to its facts, *Fraser* would apply only to on-campus spoken speech before a captive audience at a school assembly where such speech conveys “a sexually vulgar, lewd, or indecent connotation that allegedly overwhelms any political meaning, while simultaneously glorifying male sexuality in such a way that could well be seriously damaging to its less mature audience.”²³²

Yet where courts find in *Fraser* “an underlying theme around the issue of well-being that goes beyond a mere Victorian sensibility of offensiveness”²³³ the scope of the Court’s decision is broadened to cover other types of speech that might not be compatible with a school’s mission. Under such an interpretation, “*Fraser* permits stifling any manner and any mode, spoken or printed, of any plainly offensive expression, sexual or *otherwise*, that conflicts with society's

²²⁹ See, e.g., Christopher Cavaliere, Note, *Category Shopping: Cracking the Student Speech Categories*, 40 STETSON L. REV. 877, 882 (2011) (explaining the expansive interpretation of *Fraser* that creates a “nebulous category” of speech subject to censorship); Clay Calvert, *Misuse and Abuse of Morse v. Frederick by Lower Courts: Stretching the High Court’s Ruling Too Far to Censor Student Expression*, 32 SEATTLE UNIV. L. R. 1, 3 (describing the interpretation of *Morse* that allows for the censorship of speech that “threatens a Columbine-style attack on a school”) (internal quotation omitted).

²³⁰ Calvert, *supra* note 227, at 134.

²³¹ *Id.*

²³² *Id.* at 146 (internal quotation omitted).

²³³ Francisco M. Negron, Jr., *A Foot in the Door? The Unwitting Move Towards a “New” Student Welfare Standard in Student Speech After Morse v. Frederick*, 58 AM. U.L. REV. 1221, 1233 (2009).

‘interest in teaching students the boundaries of socially appropriate behavior.’”²³⁴ This broader view of the holding from *Fraser* enables censorship of almost any disfavored speech, and such speech need not be sexually explicit to fall under an expanded interpretation, as the Sixth Circuit found when it determined a ban on religiously offensive Marilyn Manson t-shirts on school grounds to be constitutional under *Fraser*.²³⁵

For the purposes of analyzing violent non-sponsored curricular student speech, the question is whether this broad interpretation of *Fraser* could cover violence as well. As previously discussed, courts have hinted that *Fraser* may apply where students produce violent expression in the classroom, as the Wisconsin Supreme Court suggested that, where a student’s story depicted his teacher’s decapitation, it represented “an offensive, crass insult” and that “[s]chools need not tolerate this type of assault to the sensibilities of their educators or students.”²³⁶ Similarly, the D.F. court referenced the “graphic depictions of the murder of specifically named students” and the “sex between named students” while suggesting a hybrid *Tinker/Fraser* analysis.²³⁷

Despite this limited embrace of the reasoning shown in *Fraser* to address violent non-sponsored curricular speech, it is important to note two key limitations on extending *Fraser*’s application into the realm of violent classroom speech. First, in *Morse*, the Supreme Court expressly limited the application of *Fraser*, as Chief Justice John Roberts wrote that the earlier

²³⁴ Calvert, *supra* note 227, at 147.

²³⁵ See *Boroff v. Van Wert City Bd. of Ed.*, 220 F.3d 465 (6th Cir. 2000). School administrators in *Boroff* found a student’s t-shirts celebrating rock group Marilyn Manson to be offensive “because the band promotes destructive conduct and demoralizing values that are contrary to the educational mission of the school.” *Id.* at 469. As per one example cited by the Sixth Circuit in its discussion and subsequent affirmation that *Fraser* was controlling, one shirt included a depiction of a “three-headed Jesus” alongside the words “See No Truth. Hear No Truth. Speak No Truth.” *Id.* *Fraser*, therefore, was interpreted by the Sixth Circuit to cover not only sexually offensive speech but religiously offensive speech as well.

²³⁶ *In re Douglas D.*, 626 N.W.2d at 743.

²³⁷ *D.F.*, 386 F. Supp. 2d at 125-26. See also notes 193-195 and accompanying text, *supra* (explaining why the court’s approach was logically inconsistent).

decision “should not be read to encompass any speech that could fit under some definition of ‘offensive.’”²³⁸ Second, in considering the original facts of *Fraser*, it is worth noting that the speech at issue in the case was determined to be “an elaborate, graphic, and explicit sexual metaphor” by the Court, a metaphor that caused the *Fraser* majority to fear for those students who were only “on the threshold of awareness of human sexuality.”²³⁹ Therefore, *Fraser* should properly be considered as a case regarding only sexually explicit speech and thus falling in line with other Supreme Court decisions that simply treat sexual speech differently when compared to other types of speech.²⁴⁰ Together, these two points suggest that the proper application of *Fraser* is limited only to sexually explicit speech and not other speech, such as violent student expression, that might otherwise be offensive in the school setting.

However, even as the *Morse* Court attempted to limit the application of *Fraser*, the opinion in *Morse* would be subject to its own expansive interpretation. Despite the initial assessments that suggested *Morse* would be limited to speech advocating drug use and therefore limited to the facts of the case,²⁴¹ language in both the Court’s opinion and especially language

²³⁸ *Morse*, 551 U.S. at 409. As the Chief Justice continued, “After all, much political and religious speech might be perceived as offensive to some. The concern here is not that Frederick’s speech was offensive, but that it was reasonably viewed as promoting illegal drug use.” *Id.* See also Calvert, *supra* note 227, at 146 (“The Supreme Court’s ruling in *Morse* began to rein in the potential reach of *Fraser*, at least as applied to ‘offensive’ expression.”).

²³⁹ *Fraser*, 478 U.S. at 678,

²⁴⁰ Compare *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986) (finding sexually explicit student speech unprotected in the school setting) and *F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (1978) (upholding F.C.C. indecency regulations under theory of broadcast communication pervasiveness and need to protect children from age-inappropriate speech) and *Ginsberg v. New York*, 390 U.S. 629 (1968) (creating a variable definition of obscenity as to minors and allowing states to further insulate them from age-inappropriate sexual speech) with *Brown v. Ent. Merch. Ass’n*, 559 S. Ct. 1448 (2010) (finding violent video games to be protected speech under the First Amendment and that California law banning their sale to minors was not sufficiently tailored to pass strict scrutiny) and *Winters v. New York*, 337 U.S. 507 (1948) (finding violent books and magazines to be protected expression). See also Chapter 4, *supra*.

²⁴¹ See Calvert, *supra* note 229, at 2 (2008) (explaining the initial belief that *Morse* was a limited opinion, suggesting “[f]or instance, John W. Whitehead, president of the Rutherford Institute, told the Washington Post that ‘the decision should have a limited effect because it applies only to student speech that promotes illegal drug use.’ Similarly, Susan Goldammer, an attorney for the Missouri School Boards’ Association, observed that ‘[t]he court explains this decision is narrowly tailored toward illegal drugs.’ In fact, the author of this law journal article,

in a concurring opinion written by Justice Samuel Alito paved the way for a broad interpretation of the Court’s decision that lower courts have used in instances of violent student speech.²⁴²

According to Francisco M. Negron, Jr., if confined explicitly to the “four corners of the majority’s opinion,” *Morse* would only “at best provide an exception to *Tinker* that would be strictly limited to those situations in which a student engages in speech or expression that promotes the use of illegal drugs.”²⁴³ Lower courts, however, have broadly interpreted *Morse* to permit “school administrators to sidestep, avoid, and otherwise dodge the application of the *Tinker* standard when the student speech threatens mass violence.”²⁴⁴ The expansion of *Morse*, as Negron argues, began with the majority’s opinion as it used words such as “safeguard” and “danger” when discussing illegal drug use in public schools, thus beginning the process of “carving out a new sphere for school action around student speech.”²⁴⁵

However, the language in the majority opinion is just the beginning for the broadest interpretation of *Morse* as Justice Alito, with his discussion of schools as “places of special danger” and the possible “threat to the physical safety of students,”²⁴⁶ provided an “unwitting”

along with a colleague, opined in an August 2007 commentary that ‘the case may be considered a minor victory for schools — limited to the narrow circumstances of curtailing decidedly pro-drug messages that lack a political component.’ In a nutshell, the *Morse* ruling appeared relatively inconsequential for future student expression battles, cabined by its peculiar facts.”).

²⁴² See, e.g. *id.* at 7 (explaining how Justice Alito’s concurring opinion is used to broadly interpret *Morse*); Negron, *supra* note 233, at 1223-24 (pointing out how language in the majority’s opinion can be used to argue for a broader interpretation of the decision).

²⁴³ Negron, *supra* note 233, at 1240-41.

²⁴⁴ Calvert, *supra* note 229, at 4 (citing the Fifth Circuit’s decision in *Ponce v. Socorro Indep. Sch. Dist.*).

²⁴⁵ See Negron, *supra* note 233, at 1223-25. See also R. George Write, *Post-Tinker*, 10 STAN. J.C.R. & C.L. 1, 8 (2014) (“This language does not suggest a narrow scope for *Morse*-type exceptions to *Tinker*. And *Morse* does not provide a rationale for distinguishing among important interests, or in particular for subordinating some, but not other, important interests to the interest in unrestricted student speech.”).

²⁴⁶ *Morse*, 551 U.S. at 424 (Alito, J., concurring) (“[A]ny argument for altering the usual free speech rules in the public schools cannot rest on a theory of delegation but must instead be based on some special characteristic of the school setting. The special characteristic that is relevant in this case is the threat to the physical safety of students. School attendance can expose students to threats to their physical safety that they would not otherwise face. Outside of school, parents can attempt to protect their children in many ways and may take steps to monitor and exercise control over the persons with whom their children associate. Similarly, students, when not in school, may be able to avoid threatening individuals and situations. During school hours, however, parents are not present

aid to the creation of a new student welfare standard.²⁴⁷ Thus through the lens of Justice Alito’s concurring opinion, what was originally a decision regarding pro-drug advocacy has become, as Professor Calvert states, “much more fundamentally and generally, about two critical and inextricably intertwined concerns in school settings — *safety* and *danger*.”²⁴⁸

However, just because some courts have used *Morse* to decide cases of violent student expression,²⁴⁹ it does not necessarily mean this expansion of the decision is appropriate. As Professor Calvert argues, the harm posed by the use of illegal drugs is simply different than the harm posed by school violence and makes for a poor analogy.²⁵⁰ Yet the strongest argument for against using Justice Alito’s concurrence in applying *Morse* to violent speech is the simple observation by Professor Calvert that even if the justice “had articulated a new standard for regulating violent expression in public schools, such a test would have constituted mere *dicta* because the case in *Morse* had nothing to do with violent expression.”²⁵¹

to provide protection and guidance, and students' movements and their ability to choose the persons with whom they spend time are severely restricted. Students may be compelled on a daily basis to spend time at close quarters with other students who may do them harm. Experience shows that schools can be places of special danger.”)

²⁴⁷ Justice Alito’s assistance to the creation of this new standard is said to be “unwitting” because he began his concurring opinion by expressing his desire to narrow the majority’s decision. *See, e.g.*, *id.* at 422 (“I join the opinion of the Court on the understanding that (1) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (2) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as ‘the wisdom of the war on drugs or of legalizing marijuana for medicinal use.’); Negron, *supra* note 233, at 1226 (stating that Justice Alito’s opinion “may have the unwitting effect of recognizing the very student welfare standard it sought to contain”); Chapter 3, *supra*.

²⁴⁸ Calvert, *supra* note 229, at 7 (emphasis in original).

²⁴⁹ *See id.* at 12-21 (discussing courts that have used *Morse* to decide cases of violent student expression).

²⁵⁰ *See id.* at 16 (“But such an extrapolation from *Morse* of a new censorship rule centering on ‘physical safety’ and ‘danger’ is off-base and misguided. Why? Because the locus of the harm is very different with illegal drug use than it is with violence. In a nutshell, the problem with illegal drug use by a high school student involves *harm to self* — harm to the student who engages in the illegal conduct. In contrast, the problem with illegal violence committed by a high school student involves *harm to others* — the students who fall victim to the actor that engages in the violent conduct. Put differently, the use of illegal drugs threatens the physical safety of the individual students who engage in the dangerous conduct themselves: drugs are dangerous to those who use them.”) (emphasis in original).

²⁵¹ *Id.* at 10.

The application of *Morse* has been limited in the area of violent non-sponsored curricular speech primarily because most of the cases discussed in Part I predate the Supreme Court’s most recent student speech decision. However, two post-*Morse* cases cite the decision only for general principles,²⁵² as *Cuff* was analyzed under *Tinker*²⁵³ and the *Cox* court did not use student speech jurisprudence to decide its case.²⁵⁴ Therefore, at least in the examples of violent non-sponsored curricular speech, there does not appear to be an embrace of an expanded interpretation of *Morse*.

In conclusion, *Fraser* — and by extension *Morse* — represent a danger to the First Amendment because they do not rely on the actual harms cause by speech in determining whether speech should be censored, and therefore, these decisions should be carefully limited in their application in lower courts.²⁵⁵ The standard in *Fraser* should be left to govern only sexual expression, an area that has been distinguished from other types of speech by the Supreme Court. And finally, the opinion in *Morse* should be read as addressing only that student speech which can reasonably be understood as advocating the use of illegal drugs. Neither standard is controlling nor appropriate in the area of violent non-sponsored curricular speech.

c. Why *Tinker* is not controlling

As discussed in Part I, courts have used *Tinker* to decide cases of violent non-sponsored curricular speech, but the application in these cases has often left something to be desired intellectually, with some courts using the harm from a possible incident of school violence to

²⁵² See, e.g., *Cuff*, 677 F.3d at 114 (citing other lower court decisions under *Morse* that “have allowed wide leeway to school administrators disciplining students for writings or other conduct threatening violence”); *Cox*, 654 F.3d at 272-73 (citing *Morse* for general student speech principles such as “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings”).

²⁵³ See *Cuff*, 677 F.3d at 113 (establishing *Tinker* as controlling).

²⁵⁴ See *Cox*, 654 F.3d at 273 (concluding case should be decided based on First Amendment retaliation claim).

²⁵⁵ See Calvert, *supra* note 227, at 172 (“Viewed at a macro-level, *Fraser*'s embrace of the principle that the meaning of a message, standing alone and without proof of any harm caused by it, can lead to its censorship directly conflicts with the heart of modern First Amendment theory, which holds that society must tolerate some level of demonstrable harm.”).

satisfy the rigors of the *Tinker* test instead of considering the actual or hypothetical harm from student speech.²⁵⁶ In considering whether *Tinker* should apply in these cases, it is important to first note that the iconic decision has been somewhat marginalized by the Supreme Court cases that followed it.²⁵⁷ With *Tinker* well on its way to being confined to its facts, perhaps the best way forward is to make another exception to the decision and find that, once again, a new standard is needed to address a particular problem in student speech.

After the Court elected to create fact-based exceptions to *Tinker* in *Fraser*, *Hazelwood*, and *Morse*, it is clear the decision is waning in importance.²⁵⁸ What is not so clear, however, is exactly how *Tinker* should be applied in the post-*Morse* student speech landscape. As Christopher Cavaliere notes, courts generally take one of three views of *Tinker*: looking at the decision as “just another category of unprotected speech,” “a general rule that protects student speech unless one of the other three categories apply,” or a view “that *Tinker* may specifically protect political speech.”²⁵⁹ Thus the first two categories operate by positioning *Tinker* as either one of four possible options in a court’s arsenal or the default rule if *Fraser*, *Hazelwood*, or *Morse* do not apply due to the factual circumstances of the case.²⁶⁰ Leaving *Tinker* as a default rule seems unsatisfactory in a world where the Supreme Court has so thoroughly chipped away

²⁵⁶ See Part I.b, *supra*.

²⁵⁷ See, e.g., Perry A. Zirkel, *The Rocket’s Red Glare: The Largely Errant and Deflected Flight of Tinker*, 38 J.L. & EDUC. 593, 597 (2009) (calling *Tinker* “practically revers[ed] or, at least, effectively compartmentaliz[ed]”); Clay Calvert, *Tinker’s Midlife Crisis: Tattered and Transgressed But Still Standing*, 58 AM. U.L. REV. 1167, 1169 (2009) (arguing that *Tinker* is “overshadowed” by *Morse* and currently being “relegated use only in those cases that mirror or closely parallel its facts”).

²⁵⁸ See *id.* at 1173 (“The most obvious indicator of *Tinker*’s decline is that, in each of the three subsequent Supreme Court decisions involving student expression rights, the Court chose: (1) not to apply *Tinker*; (2) to carve out fact-specific exceptions to *Tinker*; and (3) to rule in favor of school officials and against students.”).

²⁵⁹ Cavaliere, *supra* note 229, at 886. See also Matthew Sheffield, Note, *Stop with the Exceptions: A Narrow Interpretation of Tinker for All Student Speech Claims*, 10 CARDOZO PUB. L. POL’Y & ETHICS J. 175, 177 (2011) (arguing that *Tinker* was meant to apply only where a “student was expressing an opinion on an issue of political significance” or “when the school was discriminating against the student solely based upon disagreement with the student’s viewpoint”).

²⁶⁰ See Cavaliere, *supra* note 229, at 887-91.

at the decision. In other words, *Tinker* would be a fine default rule where it was the *only* rule. Framing *Tinker* as a rule protecting only political speech seems needlessly narrow and fraught with the additional problem of deciding what is and what is not political speech. The best answer for *Tinker* is Cavaliere's first category:²⁶¹ *Tinker*, therefore, should have situations where it does apply and situations where it distinctly *does not* apply.

In answering the question of when *Tinker* should apply, it is important to consider the facts of the case. *Tinker*, fundamentally, was about taking an external issue — in the form of a protest over the Vietnam War — and bringing it into the school environment by having students wear the now famous black armbands.²⁶² The protest at issue in *Tinker* did not have its genesis on campus; rather, it was first imagined by a group of parents and students in an off-campus meeting.²⁶³ Therefore presumably, the Vietnam War had nothing to do with any of the ongoing studies at the Des Moines high school, making the armbands noncurricular speech. The Court, however, did not make this distinction, choosing instead to broadly affirm the First Amendment right of students after discussing the foundational cases that made such a right possible:

The principle of these cases is not confined to the supervised and ordained discussion which takes place in the classroom. The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without "materially and substantially interfer[ing] with the requirements of appropriate

²⁶¹ See *id.* at 887-88 ("*Tinker's* disruptive speech is merely one among the four different types of speech that a school may permissibly regulate."). Deciding that this is the proper interpretation of *Tinker*, however, requires more subtlety than leaving the decision to govern only "disruptive speech."

²⁶² See *Tinker*, 393 U.S. at 504.

²⁶³ See *id.*

discipline in the operation of the school” and without colliding with the rights of others.²⁶⁴

So with the Court not making a distinction in the origin of the message or its connection to the school’s curriculum, a distinction made today is therefore somewhat artificial. Yet this distinction is critical in determining *Tinker*’s true place after the trifecta of cases that followed in its wake. *Tinker*, at its core, permits a student to express noncurricular speech so long as that speech does not interfere with the workings of the school. It thus allows for the black armband on the playground, the lunchroom, and even the classroom. What *Tinker* does not specifically consider, however, is what happens when the black armband is worn or discussed in the context of a history or current events course.

In his *Hazelwood* dissent, Justice William Brennan attempted to reconcile the *Tinker* standard with allowing schools to control student speech in the course of a school’s curriculum. Arguing that the decision in *Hazelwood* was unnecessary and that *Tinker* could have easily resolved the problem at issue, Justice Brennan wrote:

Under *Tinker*, school officials may censor only such student speech as would “materially disrupt[t]” a legitimate curricular function. Manifestly, *student speech is more likely to disrupt a curricular function when it arises in the context of a curricular activity — one that “is designed to teach” something — than when it arises in the context of a noncurricular activity.* Thus, under *Tinker*, the school may constitutionally punish the budding political orator if he disrupts calculus class but not if he holds his tongue for the cafeteria. That is not because some more stringent standard applies in the curricular context . . . It is because student speech in the noncurricular context is less likely to disrupt materially any legitimate pedagogical purpose.²⁶⁵

²⁶⁴ *Id.* at 512-13.

²⁶⁵ *Hazelwood*, 484 U.S. at 283 (Brennan, J., dissenting) (emphasis added).

When Justice Brennan noted that “student speech is more likely to disrupt a curricular function when it arises in the context of a curricular activity,”²⁶⁶ he was undoubtedly correct, but his reasoning fails to account for student speech *related* to the curricular activity. Indeed, as Justice Abe Fortas wrote for the majority in *Tinker*, “Any departure from absolute regimentation may cause trouble . . . Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance.”²⁶⁷ But, to borrow Justice Brennan’s calculus example, how do we account for the disturbance that comes when a student accurately notes that his teacher made an error when finding a derivative? Or, to return to *Tinker*, how do we analyze the disturbance that arises when a student voices opposition to the Vietnam War during a 1965 lesson on current events? Furthermore, what happens when a student’s violent short story, poem, or any creation that follows all prescribed elements of an assignment emotionally disturbs an English class or its teacher? *Tinker* views the presence of a disruption in the school setting as a binary question — either there is a disruption (meaning the student’s speech can be censored) or there is not a disruption (meaning the student is allowed to speak). Yet the standard does not consider that in some instances, a disturbance is simply the natural result of the educational process.

Ultimately, the applicability of *Tinker* to non-sponsored curricular speech should be decided by two important points: that (1) *Tinker* is fundamentally a question of noncurricular speech and (2) the standard’s failure to adequately account for what amounts to a positive disturbance in the learning process. Again, *Tinker* would be a wonderful standard in a world where it could be interpreted fairly and consistently,²⁶⁸ and it existed as the only word from the

²⁶⁶ *Id.*

²⁶⁷ *Tinker*, 393 U.S. at 508.

²⁶⁸ See, e.g., Calvert, *supra* note 257, at 1188 (“The *Tinker* test itself has multiple flaws that harm its effectiveness and, concomitantly, has led to its misuse and abuse. As aptly recognized by Professor Mark Yudof, current

Supreme Court on the matter of student speech. But since it has been so eroded by *Fraser*, *Hazelwood*, and *Morse*, it must now be limited in its application to instances where it is fundamentally appropriate — namely situations of noncurricular speech. Therefore, *Tinker* should not be the standard by which cases of violent non-sponsored curricular speech cases are decided.

d. Why *Hazelwood* is not controlling

As discussed in the introduction to this chapter, *Hazelwood* would be a logical fit for these cases aside from its requirement that speech falling under the scope of the decision be both curricular in nature and sponsored by a school.²⁶⁹ For the cases discussed in Part I, the ties to curriculum and education are fairly evident in stories written for class,²⁷⁰ artwork either created

president of the University of California: ‘When I was a law professor, I used to ask my students the following questions: What counts as a disruption? How much disruption will outweigh the assertion of the right? How are these interests balanced? Is this rule, with its emphasis on identifying disruption in schools, a rule at all, or is it just an invitation to judges to assert their personal ideologies and persuasions?’”); R. George Wright, *Post-Tinker*, 10 STAN. J.C.R. & C.L. 1, 12 (2014) (“A final, largely recently developed limitation on *Tinker* is the sensible desire to broadly interpret, if not expand, the *Tinker* ‘disruption’ prong. While the *Tinker* standard in general has been and remains somewhat unclear, the ‘disruption’ prong does tend to conjure up mental images of something like an angry hallway confrontation, if not a physical altercation, or threat thereof.”). *See also* id. at 25 (suggesting that “at this point in our history, it is implausible that *Tinker*, along with its refinements, qualifications, and limitations, amounts to the only constitutionally permissible approach to student speech, as the public schools seek to better and more cost-effectively discharge their vital and multi-faceted basic mission.”).

²⁶⁹ *See Hazelwood*, 484 U.S. at 270-71 (“The question whether the First Amendment requires a school to tolerate particular student speech — the question that we addressed in *Tinker* — is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators’ ability to silence a student’s personal expression that happens to occur on the school premises. The latter question concerns educators’ authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.”). *See also* id. at 273 (“[W]e hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”).

²⁷⁰ *See, e.g.*, *In re Douglas D.*, 626 N.W.2d 725 (Wisc. 2001); *D.F. v. Syosset Cent. Sch. Dist.*, 386 F. Supp. 2d 119 (E.D.N.Y. 2005); *Cox v. Warwick Valley Cent. Sch. Dist.*, 654 F. 3d 267 (2nd Cir. 2011).

for class or commissioned by a teacher,²⁷¹ a poem submitted to a teacher for critique,²⁷² and a website that had its start with an in-class writing assignment.²⁷³ All of these examples are deeply tied to the instructional duty of the school and are therefore types of speech schools should nurture and guide as part of their educational mission — thus making this speech inherently curricular. The question of sponsorship, however, is more difficult to answer, but the most logical solution, after examining *Hazelwood*, is that sponsorship requires more than a mere connection to the school. This conclusion, when combined with the observation that *Hazelwood* fails to make an adequate distinction between educational and punitive measures, suggests that *Hazelwood* cannot properly address the issues surrounding violent non-sponsored student speech.

In *Hazelwood*, the Court distinguished student speech that a school must “tolerate” from student speech that a school must “affirmatively . . . promote,” with the former category of speech being governed by *Tinker* and the latter falling under *Hazelwood*.²⁷⁴ Speech falling under *Hazelwood* was further defined as “school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.”²⁷⁵ As the Court argued, teachers and administrators had greater authority to exercise control over this *Hazelwood* category of curricular speech “to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to

²⁷¹ See, e.g., *In re Ryan D.*, 100 Cal. App. 4th 854 (2002); *Cuff v. Valley Cent. Sch. Dist.*, 677 F.3d 109 (2nd Cir. 2012); *Boman v. Bluestem Unified Sch. Dist.*, 200 U.S. Dist. LEXIS 5389 (2000); *Demers v. Leominster Sch. Dept.*, 263 F. Supp. 2d 195 (2003).

²⁷² See *LaVine v. Blaine School District*, 257 F.3d 981 (9th Cir. 2001).

²⁷³ See *Emmett v. Kent Sch. Dist.*, 92 F.Supp.2d 1088 (W.D. Wash. 2000).

²⁷⁴ *Hazelwood*, 484 U.S. at 270-71.

²⁷⁵ *Id.* at 271.

the school.”²⁷⁶ But a mere connection to education and learning was not enough to trigger *Hazelwood* for the Court, which held that the speech in question must also be reasonably perceived as bearing the “imprimatur” of the school.²⁷⁷

“Imprimatur,” from the Latin for “let it be printed,” was originally a license required for publication, and today, it is also defined as “[a] general grant of approval.”²⁷⁸ Thus the inquiry into whether speech bears the “imprimatur” of the school seeks to answer, in essence, whether the student speech at issue might reasonably be perceived as carrying the official banner of the school.²⁷⁹ With the examples given by the Court in *Hazelwood*, the issue of imprimatur seems intuitive, as the Court cites school publications and theatrical productions as two expressive activities that would naturally bear the seal of the school.²⁸⁰ Lower courts have also found art installations²⁸¹ and commencement speeches²⁸² to be types of student expression that generally bear the school’s imprimatur — the installations because of their fixation to school walls and speeches due to the vetting and approval process of most commencement speakers. As the Tenth Circuit concluded in *Fleming v. Jefferson County School District*, “[e]xpressive activities that do not bear the imprimatur of the school could include a variety of activities conducted by outside groups that take place on school facilities after-school, such as club meetings” where “expressive activities that the school allows to be integrated permanently into the school environment and

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ Garner, *supra* note 70.

²⁷⁹ See Samuel P. Jordan, Comment, *Viewpoint Restrictions and School-Sponsored Student Speech: Avenues for Heightened Protection*, 70 U. CHI. L. REV. 1555, 1560-61 (2003) (“[A] school’s promotion of speech introduces the possibility that the expression will be attributed to the school itself. Speech that bears the imprimatur of the school resembles official speech, leaving the school free to employ reasonable measures to guard against misattribution.”).

²⁸⁰ See *Hazelwood*, 484 U.S. at 271.

²⁸¹ See, e.g., *Fleming v. Jefferson County Sch. Dist.*, 298 F.3d 918 (10th Cir. 2002); *Bannon v. Sch. Dist. of Palm Beach County*, 387 F.3d 1208 (11th Cir. 2004).

²⁸² See, e.g., *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219 (10th Cir. 2009); *A.M. v. Taconic Hills Cent. Sch. Dist.*, 510 Fed. Appx. 3 (2nd Cir. 2013).

that the students pass by during the school day come much closer to reasonably bearing the imprimatur of the school.”²⁸³

But where does this leave in-class assignments as far as bearing the imprimatur of the school? In *Settle v. Dickson County School Board*, the Sixth Circuit upheld a summary judgment decision in favor of a school district where a student complained that her First Amendment rights were violated when she was not allowed to write a research paper on Jesus Christ.²⁸⁴ The majority easily brushed aside the student’s claim in favor of broadly affirming a teacher’s right to assign grades,²⁸⁵ but in her concurring opinion, Judge Alice M. Batchelder took a more nuanced view of the student’s First Amendment claim.²⁸⁶ As the judge argued, the facts in *Settle* could not “be made to fit within the framework of cases such as *Hazelwood* and *Tinker*,” suggesting that the question of a student’s speech rights in a curricular assignment without school sponsorship were a distinctly different issue not answered by Supreme Court jurisprudence.²⁸⁷ *Tinker* did not apply, the judge reasoned, because “[a] research paper is not an expression of opinion, and the restriction of choice of topic is not readily analogous to the kind of pure expression of student opinion, that happened to take place in the classroom, that the

²⁸³ 298 F.3d at 925. *Fleming* is somewhat notable in the context of a discussion of student speech and the surrounding anxiety regarding school violence as the case stems from an art project at Columbine High School after the 1999 shooting. *Id.* at 920-21. The project allowed students and community members to paint tiles to that would then be installed as part of the “reconstruction” process. *Id.* at 921.

²⁸⁴ 53 F.3d 152, 153 (6th Cir. 1995). The case was framed as matter of student speech instead of a religious claim, as the court explained: “Although this paper topic concerns religious subject matter, the plaintiff does not bring her case under the Free Exercise Clause or the Establishment Clause of the First Amendment. Instead, she has chosen to challenge [the teacher’s] rejection of her topic as restricting her rights of free speech under the First Amendment.” *Id.*

²⁸⁵ *See id.* at 155-56 (“Teachers may frequently make mistakes in grading and otherwise, just as we do sometimes in deciding cases, but it is the essence of the teacher’s responsibility in the classroom to draw lines and make distinctions -- in a word to encourage speech germane to the topic at hand and discourage speech unlikely to shed light on the subject. Teachers therefore must be given broad discretion to give grades and conduct class discussion based on the content of speech. Learning is more vital in the classroom than free speech.”). *See also id.* at 155 (“Grades are given as incentives for study, and they are the currency by which school work is measured.”).

²⁸⁶ *See id.* at 156-59 (Batchelder, J., concurring).

²⁸⁷ *Id.* at 158.

Supreme Court addressed there.”²⁸⁸ Similarly, the facts in *Settle* were different from *Hazelwood* because there was “no way to make a colorable claim that this paper is speech which might be viewed by the community as bearing the imprimatur of the school,” a determination that Judge Batchelder argued “was central to the Supreme Court’s holding in *Hazelwood*.”²⁸⁹ As she further concluded, “Certainly not all student speech in the classroom bears the imprimatur of the school.”²⁹⁰

Aside from the questionable proposition that student assignments can even carry the implicit sign of approval from a school, student speech in such cases is much easier for a school to disassociate itself from, a point that then-Judge Samuel Alito made in his dissent in *C.H. v. Olivia*.²⁹¹ In *Olivia*, an *en banc* Third Circuit split and thereby affirmed a district court decision dismissing a student’s First Amendment claim after his Thanksgiving poster was removed from a hall display due to a religious theme.²⁹² In his dissent, Judge Alito argued that “nothing in *Hazelwood* suggests that its standard applies when a student is called upon to express his or her personal views in class or in an assignment,”²⁹³ an observation that again emphasizes the importance of the imprimatur requirement. Additionally in the case of a student assignment, the danger to the school of having a student’s speech misattributed to the administration is much less because if “anyone might have reasonably interpreted the display of [the student’s] poster in the hall as an effort by the school to endorse Christianity or religion, the school could have posted a sign explaining that the children themselves had decided what to draw.”²⁹⁴

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ 226 F.3d 198 (3rd Cir. 2009).

²⁹² *Id.* at 200-01. The poster indicated the student was “thankful for Jesus.” *Id.* at 201.

²⁹³ *Id.* at 213 (Alito, J., dissenting).

²⁹⁴ *Id.* at 212-13.

Thus using Alito’s logic and the examples cited in *Hazelwood*, a student’s assignment is different from a school newspaper or a school play because (1) the assignment does not carry the imprimatur of the school and (2) even if the assignment was attributable to the school, the administration could easily distance itself from a student’s speech. *Hazelwood*, therefore, would be inapplicable where a student was expressing a personal opinion during the course of an assignment.²⁹⁵

Still, however, some courts broadly interpret or ignore the imprimatur requirement or otherwise fail to apply *Hazelwood* correctly, resulting in a departure from the text of the decision and an expansion in its application.²⁹⁶ As just one example of this misapplication, the Sixth Circuit stated in *Curry v. Hensiner* that *Hazelwood* grants schools “greater latitude to restrict . . . speech” where student expression is “school-sponsored speech, such as a newspaper, or speech made as part of a school’s curriculum.”²⁹⁷ That “either or proposition” is clearly incorrect where the Supreme Court specified that for *Hazelwood* to apply, student speech must be both sponsored — in terms of bearing the school’s imprimatur — and connected to the school’s curriculum.²⁹⁸

If more courts followed a similar interpretation to *Hazelwood*, then the question of violent non-sponsored curricular speech would at least have a clear (albeit incorrect) answer as the curricular nature of the cases discussed in Part I would automatically bring them under *Hazelwood* even though the speech in question lacked the imprimatur of the school. However, as Judge Batchelder astutely noted in *Settle*, student speech as communicated in assignments “fall(s) somewhere in between *Hazelwood* and *Tinker* as a form of student expression allowed

²⁹⁵ See *id.* at 213.

²⁹⁶ See Jordan, *supra* note 279, at 1569 (arguing that faulty analysis leads to an increase in the application of *Hazelwood* to the detriment of student speech rights).

²⁹⁷ *Curry v. Hensiner*, 513 F.3d 570, 577 (6th Cir. 2008).

²⁹⁸ See *Hazelwood*, 484 U.S. at 270-71 (explaining the elements of school-promoted student speech).

under the school curriculum but not sponsored or endorsed by the school.”²⁹⁹ But this positioning of non-sponsored curricular expression as somewhere between *Hazelwood* and *Tinker* presupposes a neat and orderly spectrum of protection for student rights where that is not entirely accurate.

At its inception, the *Tinker* standard was deployed to address the intersection of noncurricular speech and noncurricular punishments, meaning responses by school administrators to student speech that are generally punitive and unrelated to curriculum or education.³⁰⁰ *Hazelwood*, conversely, examines curricular speech and the curricular response from a school.³⁰¹ However, most of the violent non-sponsored student speech cases examined in this chapter represent curricular speech that was met with a noncurricular response in the form of a punitive suspension or even criminal charges against a student. Specifically examining the typical response levied against a student in cases of violent non-sponsored curricular speech, it is therefore difficult to say that *Tinker* offers more protection than *Hazelwood*, especially where the general application of *Tinker* results in perfunctory analysis cloaked in the worries of school violence and deference to school administrators. But that is not to say that an expansion of *Hazelwood* would cure all ills in this area. Where courts have found a “legitimate pedagogical concern in avoiding the disruption to the school's learning environment” to justify *Hazelwood* censorship,³⁰² it is not hard to envision a student suspension upheld under an expanded *Hazelwood* as a writer of violent fiction or an artist creating violent compositions would simply

²⁹⁹ 53 F.3d at 158 (Batchelder, J., concurring).

³⁰⁰ See *Tinker*, 393 U.S. at 504. The students were not allowed to attend school so long as they were wearing the protest armbands. It is doubtful this response was designed to teach anything to the students.

³⁰¹ See *Hazelwood*, 484 U.S. at 263-64. The First Amendments rights of the students in *Hazelwood* may have been violated, but their punishment (in that two pages were removed from the school newspaper) was designed in some way, perhaps, to teach. See *id.* at 272 (explaining that a school may censor sponsored, curricular speech where it is “ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences”).

³⁰² *Bannon v. Sch. Dist. Of Palm Beach County*, 387 F.3d at 1217 (citing *Fleming*, 298 F.3d at 934).

be a distraction and subsequent disruption in the learning environment. An expansion of *Hazelwood*, therefore, is unsuitable for the purposes of addressing the problem of violent non-sponsored student expression because it does not expressly protect students against punitive disciplinary measures.

Thus *Hazelwood* joins the true threat doctrine, *Fraser*, *Morse*, and, finally, *Tinker* as doctrinal approaches to violent non-sponsored curricular speech as possible solutions that fail to adequately address the First Amendment issues that arise when a student is disciplined for violent speech that is associated with a school's curriculum but not reasonably interpreted as coming from the school itself. A new standard, therefore, is needed to govern this particular subset of student speech — a standard that will be explained in Part III.

III. A standard for non-sponsored curricular speech

This chapter proposes the following standard for violent non-sponsored curricular speech: In instances where non-true threat violent student speech is curricular in nature and not sponsored by the school, the First Amendment forbids punitive discipline by school administrators. Rather, the only remedies for teachers and administrators in these cases should be pedagogical and therapeutic counter speech from school officials designed to teach and counsel — rather than punish — students. This Part will explain the operation of this new standard and examine the many options left to school administrators when their ability to punitively suspend or even expel students is no longer constitutional.

As Judge Batchelder speculated in her concurrence in *Settle*, the First Amendment protection for a student's assignment would necessarily fall between *Tinker* and *Hazelwood*.³⁰³ Following this line of analysis, Adam Hoising argued that such a standard “must fall somewhere between *Tinker*'s full protection and *Hazelwood*'s rational-basis protection. Thus, some form of

³⁰³ 53 F.3d at 158 (Batchelder, J., concurring).

intermediate protection, perhaps?”³⁰⁴ Again, however, the best possible solution does not necessarily have to fall between those two decisions in a straight line. Therefore, the proposed standard for violent non-sponsored curricular speech borrows elements from both decisions. From *Tinker*, the standard takes a relatively pro-student approach to school speech as it is built on the assumption that student First Amendment rights are critical to education³⁰⁵ and the fostering of a new generation of citizens. Conversely, the standard takes from *Hazelwood* the implicit understanding that schools are a place for education and that administrators must be in charge of the curriculum and learning.

The operation of the standard is designed to be straightforward. If a school administrator is presented with a piece of violent non-sponsored curricular student speech — as discussed, this will generally be an assignment in the form of a story, poem, or other creative work — the administrator may first ascertain whether the work, and by extension the student, represents a threat. This investigation should be guided by common sense principles regarding threats: Was the speech communicated directly to the target of the perceived threat? Was it a conditional threat designed to motivate the recipient? How specific was the threat? Were there any mitigating elements (such as parody, hyperbole or sarcasm) to suggest there was no intent to threaten? In short, this is a highly factual examination designed only as preliminary step; if it appears to truly represent a threat, it may be examined using the true threat analysis and then subsequently the *Tinker* doctrine if the speech is constitutionally protected.³⁰⁶ Either the

³⁰⁴ Adam Hoelsing, “School Sponsorship” and Hazelwood’s Protection of Student Speech: Appropriate for All Curriculum Contexts?, 4 NEB. L. REV. BULL. 1, 22 (2012).

³⁰⁵ *Contra Settle*, 53 F.3d at 156 (“Learning is more vital in the classroom than free speech.”).

³⁰⁶ See Chapters 6 and 7, *infra*, for a discussion of the true threat/*Tinker* process.

substantive appearance of a true threat³⁰⁷ or the lack of a connection to education removes the speech in question from this admittedly permissive standard and again places it in the realm of true threat analysis and *Tinker*.

If the violent non-sponsored curricular student speech at issue is not a threat, then the school may deal with it as it sees fit consistent with the educational principles contained in *Hazelwood*. The only limitation on this authority is that the school must confront curricular speech with a curricular response — i.e. some type of pedagogical counter speech rather than a strictly disciplinary measure.

This proscription on a disciplinary response is premised on two points. First, the state should be unable to punish speech that it, in effect, commissioned, as a matter of fundamental fairness. Second, granting schools *Hazelwood* authority over speech not covered by the decision should come with the implied (but not expressed) restriction to a curricular response contained in the decision. The Wisconsin Supreme Court illustrated the natural tension in using *Hazelwood* to discipline students when it argued that

[S]chools may discipline student speech that is, for example, ungrammatical, poorly written, or inadequately researched. While few people likely question this authority, it is important to note that even this type of discipline—be it correcting a typographical error, having a student rewrite a particular assignment, or the like—infringes to some extent upon otherwise protected speech. Nevertheless, when examined in light of the special characteristics of the school environment, this speech, like speech that more dramatically interferes with a school's educational mission, may be disciplined without contravening the First Amendment.³⁰⁸

Correcting student speech that is “ungrammatical, poorly written, or inadequately researched” is simply a function of teaching, but it is *teaching* and not *discipline* as the court framed it.

³⁰⁷ The natural inclination of many in the school setting will be to read true threats into expression where they may not be present. However, a student’s intent should be at the forefront of this consideration. See also notes 213-222, *supra* (explaining plausible situation where a student assignment may be a true threat).

³⁰⁸ *In re Douglas D.*, 626 N.W.2d at 743 n.17 (citing *Hazelwood*, 484 U.S. at 271).

Discipline is punitive, and there is little punitive intent behind a teacher's red ink. As Jonathan Pyle noted, "Detention and suspension are unusual repercussions for failure to recite the Gettysburg Address correctly. The educational process would not seriously be harmed if teachers were constrained to teach subject matter with grades and maintain order with the discipline code."³⁰⁹ *Hazelwood* is premised on the notion of education rather than punitive discipline, and therefore, any similar curricular speech standard must reflect this fundamental reality.

So if a school cannot suspend, expel, or otherwise punitively react to violent non-sponsored curricular speech, what can it do? In short, a school can engage in any pedagogical or therapeutic counter speech that it finds necessary to address the situation. Generally, counter speech is the idea that whenever speech is feared for its potential negative effects, the proper solution is not to silence the speech but to respond to it with more speech.³¹⁰ In the school setting, if violent student speech is feared, then the proper constitutional response is to reply to that speech with the best pedagogical counter speech tool available: a grade. As the Sixth Circuit argued in *Settle*, "Grades are given as incentives for study, and they are the currency by which school work is measured."³¹¹ Therefore, if teachers and administrators find a student's assignment to be impermissibly violent, then the school should simply assign a grade that reflects that displeasure. Under such an outcome, the school is allowed to voice its opinion of the impropriety of violent expression in the school setting, and the student is given an opportunity to learn that expression often has consequences.

However, in some instances a school may not wish to reflect its displeasure with a grade or it may be unable to do so in those situations where the student expression at issue is not a

³⁰⁹ Jonathan Pyle, Comment, *Speech in Public Schools: Different Context or Different Rights?*, 4 U. PA. J. CONST. L. 586, 610 (2002).

³¹⁰ See Clay Calvert, Off-Campus Speech, *On-Campus Punishment: Censorship of the Emerging Internet Underground*, 7 B.U. J. SCI. & TECH. L. 243, 286 (2001).

³¹¹ 53 F.3d at 155.

formalized assignment.³¹² In those cases, a school can still counsel a student without the formal structure of the grading process. In *LaVine*, for example, a student's violent poem was given to his teacher for evaluation outside of the formal curriculum of the school.³¹³ Instead of punishing the student with an "emergency expulsion,"³¹⁴ the teacher and other school officials could have told the student that, while violence is often commonplace in poetry and art, the inclusion of a school shooting fantasy into a poem is inappropriate where students, teachers, and other members of the school community are generally afraid of school violence. Furthermore, the school administrators could have prompted the student to seek counseling or other help for his emotional state. In essence, they could have acted as educators and leaders and taught the students they sought to punish.

Violent student speech may indeed be inherently unsettling in the school environment, but the answer to this dilemma should never be a punitive response. Where violent student speech is curricular in nature, both its ties to education and the First Amendment should insulate that speech from a purely disciplinary response. However, there is no constitutional right implicated where a school responds to violent curricular student speech with a failing grade. Indeed, if schools are to "teach by example the shared values of a civilized social order"³¹⁵ by instructing students that violent imagery has no place in the post-Columbine American school,

³¹² See, e.g., *Emmett v. Kent Sch. Dist.*, 92 F.Supp.2d 1088 (W.D. Wash. 2000) (where the student speech was a website inspired by course assignments); *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981 (9th Cir. 2001) (where the student speech was a poem given to a teacher for evaluation).

³¹³ *LaVine v. Blaine Sch. Dist.*, 257 F.3d at 984.

³¹⁴ See *id.* at 983 ("Although this is a close case in retrospect, we conclude that when the school officials expelled [the student] they acted with sufficient justification and within constitutional limits, not to punish [the student] for the content of his poem, but to avert perceived potential harm."). As per this exigency, the student missed a total of 17 days of class. *Id.* at 986. It is difficult to say for certain how long it takes to determine whether a student is a threat, but a 17-day suspension is presumptively punitive rather than precautionary. See *Cox v. Warwick Valley Cent. Sch. Dist.*, 654 F.3d at 274 (where a student was determined to not be a threat in a single day).

³¹⁵ *Fraser*, 478 U.S. at 683.

then grades are the most effective and appropriate tool by which to truly teach such a lesson.

IV. Conclusion

If Part III's standard for violent non-sponsored curricular speech was applied to the previously discussed cases, many of the decisions would see a reversal in favor of student plaintiffs. *LaVine* would certainly be such a reversal as it is difficult to argue how a 17-day emergency expulsion is anything but a punitive response to student curricular speech.³¹⁶ Similarly in *Cuff*, a five-day suspension was certainly punitive where the school did not attempt to ascertain whether the student's astronaut drawing represented a threat, as such a failure to investigate represents a tacit acknowledgement that the student's speech was mere creative expression in the course of a school assignment.³¹⁷

Cox, however, represents a course of action taken by school administrators that would be fully upheld under the new standard.³¹⁸ When a teacher was concerned about a student's "casual description of illegal activity, violence, and suicide" in an assignment for class, the teacher passed her concerns along to the principal, who then took the student into an in-school suspension room while the principal "considered whether [the student] posed an imminent threat to himself or others, and whether he should be disciplined for his essay."³¹⁹ After the principal decided the student was not threat, he was returned to class, and the matter was over.³²⁰

Using disciplinary measures to punish violent student speech is not only inconsistent with some of the fundamental principles of education, but it is also incompatible with the logical reality of the school setting. If the student suspensions discussed in this chapter were premised

³¹⁶ See notes 309-311 and accompanying text, *supra*.

³¹⁷ See *Cuff*, 677 F.3d at 111-12.

³¹⁸ See *Cox*, 654 F.3d 267.

³¹⁹ *Id.* at 270-71.

³²⁰ *Id.* at 271. The school additionally placed a call to the New York Department of Child and Family services. *Id.* This decision, while perhaps unnecessary, represented true care and concern for the student.

on protecting members of the school community, there are two important faults with that reasoning. The first is that discipline applied in this setting could have a chilling effect on other students who might seek to express themselves using violent imagery. If the concept of leakage — meaning that students who seek to harm others often detail their plans before an episode of violence³²¹ — is to be believed, then chilling violent student speech would only suppress a potential warnings of an attack. The second logical problem with this application of discipline is that, as Richard Salgado wrote, “[e]xpelling or suspending a student does not preclude the student from returning to campus with a loaded gun.”³²² School discipline in these cases is simply not making any school any safer.

The cases discussed in this chapter may represent examples of speech with independent marginal value, but that value becomes magnified when violent speech is used by a student in the process of education. These cases, in essence, matter, and they matter despite our squeamishness with the idea of school violence; they matter because education and the First Amendment matter. As a dissenting circuit court judge in *Cuff* argued,

While the concept of irony may seem well beyond the ken of an average ten-year-old, young children routinely experiment with the seeds of satire. They learn by fumbling their way to finding the boundaries between socially permissible, and even encouraged, forms of expression that employ exaggeration for rhetorical effect, and impermissible and offensive remarks that merely threaten and alienate those around them.

This young boy's drawing was clearly not some subtle, ironic jab at his school or broader commentary about education. It was a crude joke. But the First Amendment should make us hesitate before silencing students who experiment with hyperbole for comic effect, however unknowing and unskillful that experimentation may be.³²³

³²¹ See Chapter 2, *supra*.

³²² Richard Salgado, Comment, *Protecting Student Speech Rights While Increasing School Safety: School Jurisdiction and the Search for Warning Signs in a Post-Columbine/Red Lake Environment*, 2005 B.Y.U.L. REV. 1371, 1413 (2005).

³²³ *Cuff*, 677 F.3d at 124 (Pooler, C.J., dissenting).

CHAPTER 6

VIOLENT NONCURRICULAR STUDENT SPEECH

This chapter continues an examination of violent student speech by focusing specifically on student speech that has no relationship to education. While Chapter 5 addressed speech that was turned in for a grade or had some other tie to education, this chapter takes up violent noncurricular student speech, or speech that a school must simply “tolerate”¹ as independent student expression that happens to take place on campus. However, the question of what student speech is properly considered to be on-campus has become a much more difficult issue in the late twentieth and twenty-first centuries as students take to the Internet and other forms of electronic media to express opinions about friends, teachers, and administrators. This rise in online communication overlaps with the post-Columbine era of concerns regarding school violence, thus creating a heightened desire on the part of school administrators to control violent student speech in an era where their legal ability to do so is questionable in a way not seen in 1969 when *Tinker* was decided by the Supreme Court.²

¹ *Hazelwood*, 484 U.S. at 270-71 (contrasting the speech covered by *Tinker* as speech a school must “tolerate” as opposed to speech a school must “affirmatively . . . promote”).

² In 1969 and the years following, the matter of on-campus speech seemed relatively straightforward as compared to today and the Internet, but courts did examine whether “underground” student newspapers produced off campus could affect campus in a way that *Tinker* prohibited. See Part II, *infra*. See also John T. Ceglia, Comment, *The Disappearing Schoolhouse Gate: Applying Tinker in the Internet Age*, 39 PEPP. L. REV. 939, 940 (2012) (“[T]he schoolhouse gate delineation has been well-established and easily applied by courts and school administrators alike. But the advent of computer technology, and particularly the Internet, has upended what were formerly simple delineations. As the Internet permeates further and further into the daily lives of Americans, it continues to blur the once well-established separations between home and work, and school and play.”) (footnotes omitted).

This chapter will begin by examining the *Tinker* standard in Part I, looking at its application generally, its relationship with the “true threat” doctrine and violent student speech, and, finally, reaffirming that *Tinker* controls in cases of violent noncurricular student speech. Part I will thus clarify the doctrinal relationship between *Tinker* and the true threat doctrine, establishing that the two means of analysis are not simply an “either/or” proposition as some courts have found.³ Rather, the two can work together in some circumstances in which violent student speech is transmitted in a threatening manner or can easily be seen as a literal threat. In these situations, courts can use the true threat doctrine and *Tinker* to evaluate student speech to give schools, in essence, two bites at the violent student speech apple.

Part II addresses the question of whether schools *can* act to censor or punish student speech where such speech is created off campus. This Part will clarify what *Tinker* does and does not do — in that it does not establish a test for on-campus speech — in addition to looking at post-*Tinker* cases that examined “underground” student newspapers. This Part will then examine how various courts have decided cases where schools seek to extend their authority into online speech.

Part III examines the question of whether schools should act against violent noncurricular student speech. This Part argues that school authority to act should be considered on a spectrum ranging from speech regarding literal school violence, to figurative depictions of violence, and finally, speech depicting violence in the abstract. Where the violent speech can be taken literally by a reasonable outside observer, this should empower schools to act decisively. However, this authority should be curtailed — both by school administrators and by courts — where speech ranges into the figurative and the abstract.

³ See *Demers v. Leominster Sch. Dept.*, 263 F. Supp. 2d 195, 202 (D. Mass. 2003) (“Without deciding which standard is appropriate, I will analyze this matter under both [true threat and *Tinker*].”).

Finally, this chapter concludes with Part IV.

I. *Tinker*: the controlling standard in violent noncurricular student speech

Although there may not be complete unanimity among courts that have addressed the issue, the best and most logical standard for violent noncurricular student speech is the one originally articulated by the Court in *Tinker v. Des Moines Independent School District*.⁴ In *Tinker* — the seminal “black armband” Vietnam War protest case⁵ — the Court established that student speech was protected in the school setting so long as it did not “materially and substantially interfer[e] with the requirements of appropriate discipline in the operation of the school” or “collid[e] with the rights of others.”⁶ While the “rights of others” prong was an invention of the majority largely ignored until it was revitalized by contemporary lower court decisions,⁷ the material and substantial disruption language was borrowed from *Burnside v. Byars*,⁸ a 1966 Fifth Circuit decision that upheld the First Amendment right of high school students in Mississippi to wear buttons advocating the civil rights movement.⁹

By examining *Burnside* and other lower court cases decided in the wake of *Tinker*, the true impact and meaning of a decision with few clear terms becomes clear. With a better understanding of *Tinker* and its application to violent noncurricular student speech, the legal issues in such speech are more easily separated from the emotional instinct to protect students at the cost of speech that is not a real danger to them or others.

a. Defining *Tinker*

⁴ 393 U.S. 503 (1969).

⁵ See Chapters 2 and 4, *supra*, for a full discussion of *Tinker*. See also Chapter 5 (discussing the decision’s subsequent limitations and narrowed applicability).

⁶ *Tinker*, 393 U.S. at 513.

⁷ See generally Ceglia, *supra* note 2 (explaining the “rights of others” prong of *Tinker*). But see Clay Calvert, *Tinker’s Midlife Crisis: Tattered and Transgressed But Still Standing*, 58 AM. U.L. REV. 1167, 1191 (2009) (arguing that the “rights of others” prong should be “abandoned” as it could be applied in a speculative nature and result in viewpoint-based discrimination against political speech).

⁸ 363 F.2d 744 (5th Cir. 1966).

⁹ See *id.* at 746-47.

In *Burnside*, the Fifth Circuit carefully balanced the needs of a functioning school against the First Amendment rights of its students.¹⁰ The “freedom buttons” the students wore to class were, as the Fifth Circuit argued, distinctly different than “those activities which inherently distract students and break down the regimentation of the classroom such as carrying banners, scattering leaflets, and speech-making, all of which are protected methods of expressions, but all of which have no place in an orderly classroom.”¹¹ The court found that there was simply no evidence to conclude the buttons were a distraction and that their “mere presence” was not enough to “warrant their exclusion from school premises unless there [was] some student misconduct involved.”¹² Despite the court’s holding in favor of student speech, the Fifth Circuit was sure to put its decision into context as it announced its standard:

We wish to make it quite clear that we do not applaud any attempt to undermine the authority of the school. We support all efforts made by the school to fashion reasonable regulations for the conduct of their students and enforcement of the punishment incurred when such regulations are violated. Obedience to duly constituted authority is a valuable tool, and respect for those in authority must be instilled in our young people.

But, with all of this in mind, we must also emphasize that school officials cannot ignore expressions of feelings with which they do not wish to contend. They cannot infringe on their students' right to free and unrestricted expression as guaranteed to them under the First Amendment to the Constitution, where the exercise of such rights in the school buildings and schoolrooms do not materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.¹³

Thus *Tinker*’s roots lie in a case that seriously considered the nature of student expression in the institutional setting, as it attempted to define the permissible limits of the former in order

¹⁰ See *id.* at 748-49 (discussion of whether the buttons impermissibly disrupted the activities of the school).

¹¹ *Id.* at 748.

¹² *Id.*

¹³ *Id.* at 749.

for the latter to effectively function.¹⁴ However in *Burnside*, the Fifth Circuit merely hinted at how its “material[] and substantial[]” interference standard might operate.¹⁵ In *Tinker*, though, the Supreme Court gave even less of an insight into the new constitutional standard for student speech, suggesting primarily that a school must be able to show that “its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”¹⁶ As the Court held, if a school could not show that its actions were so properly motivated and there was no evidence to show that the proscribed student speech would otherwise cause a material and substantial interference with the necessary discipline in the school, then the regulation could not survive under the First Amendment.¹⁷ While the Court added the “rights of others” prong as it restated the new standard later in the opinion,¹⁸ it did little else to clarify how *Tinker* would operate and left key terms such as “disruption” undefined.¹⁹

When taken together, *Burnside* and *Tinker* “give little assistance” as to the operation of the material and substantial disruption standard,²⁰ but lower courts have attempted to further

¹⁴ See *id.* at 748 (suggesting a balancing test between the First Amendment and the “duty of the state to further and protect the public school system”).

¹⁵ The Fifth Circuit discussed school regulations in terms of whether they were “reasonable.” See *id.* (“It is not for us to consider whether such rules are wise or expedient but merely whether they are a reasonable exercise of the power and discretion of the school authorities.”). Some regulations, such as “assigning students to a particular class, forbid[ing] unnecessary discussion in the classroom and prohibit[ing] the exchange of conversation between students,” were presumptively reasonable as they were “necessary for the orderly presentation of classroom activities.” *Id.* Therefore, in considering *Burnside*, one logical interpretation of the Fifth Circuit’s test would be an examination of whether a school’s regulation was a reasonable use of school authority designed to prevent a material and substantial disruption to the school. If the proposed regulation was more like one designed for orderly administration or it preserved the classroom as a place for learning (as did the rules given as examples by the court), then it would withstand constitutional scrutiny.

¹⁶ *Tinker*, 393 U.S. at 509.

¹⁷ *Id.*

¹⁸ See *id.* at 513.

¹⁹ See, e.g., Calvert, *supra* note 7, at 1188 (2009); R. George Wright, *Post-Tinker*, 10 STAN. J.C.R. & C.L. 1, 12 (2014) (noting lack of definition for key terms in *Tinker*).

²⁰ *Karp v. Becken*, 477 F.2d 171, 174 (9th Cir. 1973).

define and operationalize *Tinker*'s holding. As an example of such an attempt to define *Tinker*, the Ninth Circuit made three important observations when it applied the decision in 1973:

First, the First Amendment does not require school officials to wait until disruption actually occurs before they may act. In fact, they have a duty to prevent the occurrence of disturbances. Second, *Tinker* does not demand a certainty that disruption will occur, but rather the existence of facts which might reasonably lead school officials to forecast substantial disruption. And finally, because of the state's interest in education, the level of disturbance required to justify official intervention is relatively lower in a public school than it might be on a street corner.²¹

In short, administrators need not wait for a breakdown in the social order of a school before they are enabled to act under *Tinker*,²² and an actionable disturbance in the school setting may be of a lower magnitude than a similar disturbance elsewhere. Still, as courts found shortly after *Tinker*, even a “reasonably forecast disruption” cannot serve as a “*per se* justification” for the censorship of student speech.²³ School action, under the terms of *Tinker*, must be based on more than the “mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint”²⁴ — in essence for schools to act, “there must be demonstrable factors that would give rise to any reasonable forecast by the school administration of ‘substantial and material’ disruption of school activities[.]”²⁵ So while *Tinker* does not require an actual disturbance before administrators are allowed to constitutionally act, it requires more than a vague assertion or mere trepidation of disturbance — a point often lost when *Tinker* is applied in instances of violent student expression.

²¹ *Id.* at 175.

²² See *Tinker*, 393 U.S. at 514 (referencing the “forecast” of “substantial disruption of or material interference with school activities”). See also *Shanley v. Northeast Indep. Sch. Dist., Bexar County, Tex.*, 462 F.2d 960, 970 (5th Cir. 1972) (“It is not necessary that the school administration stay a reasonable exercise of restraint ‘until disruption actually occur[s].’”)(quoting *Butts v. Dallas Indep. Sch. Dist.*, 436 F.2d 728, 731 (5th Cir. 1971)).

²³ See *Shanley*, 462 F.2d at 974 (suggesting that students who “reasonably exercise their freedom of expression” should not be punished where in-school disruptions “can be wholly without reasonable or rational basis”).

²⁴ *Tinker*, 393 U.S. at 509.

²⁵ *Shanley*, 462 F.2d at 974. See also *id.* at 970 (“[T]he board cannot rely on *ipse dixit* to demonstrate the ‘material and substantial’ interference with school discipline.”).

b. *Tinker* and true threat

A similar source of confusion in the area of violent student speech is how *Tinker* and the true threat doctrine coexist doctrinally. Courts have alternately viewed *Tinker* and true threat as an interchangeable means of addressing violent student speech,²⁶ *Tinker* as a constitutionally “safe” means of dealing with speech that may not have constitutional protection,²⁷ and as a possible threat in student expression simply serving as the disruption under *Tinker* analysis.²⁸ This variable and unpredictable approach is inconsistent with both basic First Amendment principles and a sensible reading of *Tinker* as *Tinker* presumes First Amendment protection for speech²⁹ where the finding of a true threat removes the constitutional shield from any expression.

A recent student speech dispute can serve as useful analogy to demonstrate the incongruity of the either/or approach where *Tinker* and the true threat doctrine are applied to violent student speech. Robert Marucci, an 18-year-old senior at Cocoa High School in Cocoa, Florida, became an actor in online gay pornography to support his family.³⁰ When students found Marucci’s work and began to circulate presumably explicit pictures using their smartphones, the school suspended Marucci.³¹ The student, however, was eventually allowed to return to class, and no legal dispute resulted from either his job or the school’s decision to discipline him.³² If a

²⁶ See *Demers v. Leominster Sch. Dept.*, 263 F. Supp. 2d 195, 202 (D. Mass. 2003).

²⁷ See *Wynar v. Douglas County Sch. Dist.*, 728 F.3d 1062 (9th Cir. 2013).

²⁸ See *Cuff v. Valley Cent. Sch. Dist.*, 677 F.3d 109 (2nd Cir. 2012).

²⁹ See *Tinker*, 393 U.S. at 506 (“First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”).

³⁰ Kyle Munzenrieder, *Florida high school student suspended for starring in bareback gay porn*, MIAMI NEW TIMES (Jan. 21, 2014, 10:28 AM), http://blogs.miaminewtimes.com/riptide/2014/01/florida_high_school_student_su.php

³¹ *Id.*

³² See Irving DeJohn, *Florida teenage gay porn star will return class after suspension*, NEW YORK DAILY NEWS (Jan. 21, 2014, 12:31 PM), <http://www.nydailynews.com/news/national/gay-porn-star-coming-back-school-article-1.1586492#ixzz2yK3Pby7D>

legal dispute had arisen and assuming Marucci's work approached obscenity,³³ it seems highly unlikely that a court would premise the student's discipline on *Tinker* (or *Fraser* for that matter) or state obscenity law as if it were a toss-up question. Intuitively, that would be rejected as an incorrect means of analysis as either the pornography is protected First Amendment expression or it is obscenity and unprotected as a matter of law. Likewise, violent student speech in the noncurricular school setting is either expression bearing a true threat (meaning it is without First Amendment protection) or it is protected expression merely taking place in the school setting and therefore subject to the *Tinker* material/substantial disruption standard.

In some cases, however, the true threat doctrine and *Tinker* can be applied together in order to grant deference to school administrators in cases of violent student speech that most classically resemble threatening speech. Where student speech appears to resemble a threat — such as when creative expression is communicated directly to the possible object of a threat or when expression can be plainly interpreted as a literal threat by an outside observer — it is only logical to subject that speech to true threat analysis. However, not all violent student speech fits this category of threatening expression, so the decision to apply the true threat doctrine must be a factual and principled determination.

True threat and *Tinker* can work together in a two-step approach. First, violent student speech that appears to be threatening in nature is subjected to a rigorous application of the true

³³ The student's work appeared to be within the acceptable boundaries of Florida obscenity laws. See Stacey Barchenger, *Florida porn actor returning to high school classes*, USA TODAY (Jan. 21, 2014, 6:39 PM), <http://www.usatoday.com/story/news/nation/2014/01/21/gay-porn-high-school-suspension/4727861/> ("Because Marucci is an adult, he did not appear to violate obscenity laws, Assistant State Attorney Wayne Holmes said. 'We're basically in a society today where consenting adults can do what consenting adults want to do,' Holmes said, adding that the community standard for what is obscene has changed with the increased use of technology and the Internet. 'What 30, 40, or 50 years ago may have been a crime, you can now go to a local movie theater and see.'").

threat doctrine using the relevant principles outlined by the Supreme Court in *Watts v. U.S.*³⁴ and *Virginia v. Black*.³⁵ Second, if that student expression fails to qualify as a true threat, then it may also be subject to analysis under *Tinker* using the material/substantial disruption standard — assuming, however, that the violent speech in question has an adequate enough connection to campus to be considered student speech.³⁶

This approach has two distinct advantages. First, like the hypothetical regarding student speech and obscenity, this approach to true threat and *Tinker* recognizes that in some instances student speech is a true threat and should be treated as such. This arrangement therefore spares obviously threatening speech cases such as where a student discusses his plans for a school shooting as in *Wynar*³⁷ from being subjected to *Tinker* analysis, thereby relieving *Tinker* of the need to analyze constitutionally unprotected speech, a burden it was never designed to shoulder.

The second advantage to this two-step approach is that it grants school administrators a great deal of authority — and therefore deference — in punishing threatening student speech. In cases where a threat is obvious and literal on the face of student expression, administrators should be empowered to act quickly, and positioning *Tinker* as a backstop to the true threat doctrine enables a wide swath of administrative authority while remaining true to First Amendment principles. This doctrinal approach is a permissive one for schools as it allows administrators two opportunities to justify adverse disciplinary action due to violent student speech: Simply put, if a school cannot show why student speech should be stripped of

³⁴ 394 U.S. 705 (1969) (*per curiam*).

³⁵ 538 U.S. 343 (2003). See Chapter 7, *infra*, for a discussion of *Watts* and *Black*.

³⁶ See Part II, *supra* (exploring limits of school authority and efforts to determine what is off-campus speech).

³⁷ See *Wynar*, 728 F.3d 1062, 1065-66 (detailing student's Internet postings where he described plans to commit a school shooting).

constitutional protection under the true threat doctrine, it may then attempt to justify punishment under the *Tinker* standard.³⁸

Again, this approach is designed to balance somewhat countervailing interests: speech rights of students and the ability of administrators to act quickly against threatening student expression. By applying the true threat doctrine against only student expression that is truly threatening in some manner and by supplementing its application with *Tinker*, these interests can be balanced appropriately and in a manner consistent with the First Amendment and the principles originally established in *Tinker*.³⁹

c. *Tinker*: the standard for violent noncurricular student speech

A final point regarding *Tinker* and violent noncurricular student speech is that the 1969 decision — not *Fraser* or *Morse* — is conclusively the standard by which these cases should be decided. *Fraser* applies specifically to sexually explicit speech, a point the Supreme Court reaffirmed in *Morse*.⁴⁰ Therefore, authority to censor violent noncurricular student speech cannot be premised on the idea that violence in the abstract is as damaging to a school’s educational mission⁴¹ as sexually explicit expression. Similarly, *Morse* cannot be read as endorsing administrative action when violent student speech is seen as a threat, and this is because neither

³⁸ In this instance, however, the articulated disruption under *Tinker* must be the school community’s reaction to the speech and not a future violent act committed by the student speaker. See *Cuff*, 677 F.3d 109, 122 (Pooler, C.J., dissenting) (“The school in *Tinker* was not worried that the armbands might signal a desire on the part of the students wearing them to lash out violently against their classmates, but rather just the opposite — that other students might lash out at them. Put simply, *Tinker* held that a school may restrict speech that itself has the potential to cause a substantial disruption. In other words, *Tinker* requires a causal link between the speech that school officials want to suppress and the substantial disruption that they wish to avoid.”) (citation omitted).

³⁹ See Chapter 7, *infra*, for a discussion on threatening expression in the school setting and a detailed analysis of the true threat doctrine.

⁴⁰ See *Morse*, 551 U.S. at 409 (“Petitioners urge us to adopt the broader rule that Frederick’s speech is proscribable because it is plainly ‘offensive’ as that term is used in *Fraser*. We think this stretches *Fraser* too far; that case should not be read to encompass any speech that could fit under some definition of ‘offensive.’ After all, much political and religious speech might be perceived as offensive to some.”) (citation omitted).

⁴¹ See *Fraser*, 478 U.S. at 681 (describing the objective of public education as the teaching of “fundamental values necessary to the maintenance of a democratic political system”) (quoting *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979)).

Morse nor the concurring opinion by Justice Samuel Alito develops a coherent standard to examine school action to censor noncurricular violent student speech.⁴²

Therefore, *Tinker* — with its core principle that noncurricular student speech is protected unless it causes a material or substantial disruption in the school — is the standard that should decide the cases discussed in this chapter. The key question, however, is where a school’s authority under *Tinker* ends and where a student’s unabridged right to expression as a private citizen begins.⁴³

II. Examining school authority to act against off-campus and online speech under *Tinker*

Until *Morse*, no Supreme Court decision even hinted that school authority over student speech could extend into the off-campus realm.⁴⁴ Rather, *Tinker* established a dichotomous world where expression by a student was fully protected outside the “schoolhouse gate” and subject to the material/substantial disruption standard inside of it.⁴⁵ However, *Tinker* only assumed this on-campus/off-campus distinction;⁴⁶ it did nothing to explain how to figure out

⁴² See Clay Calvert, *Misuse and Abuse of Morse v. Frederick by Lower Courts: Stretching the High Court's Ruling Too Far to Censor Student Expression*, 32 Seattle Univ. L. R. 1, 10 (2008) (stating that even if Justice Alito “had articulated a new standard for regulating violent expression in public schools, such a test would have constituted mere *dicta* because the case in *Morse* had nothing to do with violent expression). See also *id.* at 16 (explaining that a leap from *Morse*’s focus on pro-drug advocacy to applying the case in cases of violent speech is “off-base and misguided”); Chapter 2, *supra*; Chapter 5, *supra*.

⁴³ See Alexander G. Tuneski, Note, *Online, Not on Grounds: Protecting Student Internet Speech*, 89 VA. L. REV. 139, 162 (2003) (noting that, under *Tinker*, “students away from school have all of the constitutional rights of adults”).

⁴⁴ See, e.g., *Morse*, 551 U.S. at 401 (“[W]e agree with the superintendent that Frederick cannot stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school. There is some uncertainty at the outer boundaries as to when courts should apply school speech precedents, but not on these facts.”) (internal quotation and citations omitted); Tuneski, *supra* note 43, at 159 (writing before *Morse* that “no Supreme Court decision explicitly states that off-campus speech is subject to the substantial disruption test enunciated in *Tinker v. Des Moines Independent Community School District*”). See also notes 128-138, *infra*.

⁴⁵ See Tuneski, *supra* note 43, at 160 (“The overall tone of *Tinker* thus strongly respected the expressive rights of students outside of the special context of the school environment.”).

⁴⁶ See *id.* at 147.

when the speech of a young adult becomes student speech.⁴⁷ Simply put, *Tinker* does not contain a test for determining whether expression is student speech as the decision addresses only speech clearly on campus and under the purview of school administrators.

Yet this question of what is and what is not student speech is an important one. If it is ignored or otherwise marginalized — if all expression by a public school student is simply seen as subject to the authority of school administrators — then courts run the risk of tacitly approving the “mission creep”⁴⁸ of schools as they seek to expand authority into off-campus settings where they are no longer assumed to have expertise.⁴⁹ Therefore, a clear distinction must exist between student speech and non-student speech.⁵⁰

Much as lower courts were forced to define the substantive terms contained in *Tinker*, they also had to explore the fundamental question of how far administrative authority extended outside of campus — first with cases in the 1970s involving “underground” student newspapers and later in the 1990s and 2000s as students began creating webpages, YouTube videos, and other forms of online expression. In examining cases from both of these eras, it is clear that courts in the pre-*Fraser/Hazelwood/Morse* environment were generally more skeptical of school

⁴⁷ See Calvert, *supra* note 7, at 1177 (“[T]he Supreme Court in *Tinker* only considered, in its explicit reasoning, on-campus scenarios and on-campus locations during school hours when adopting its substantial-and-material disruption test.”).

⁴⁸ “Mission creep” is defined as “the changing of goals, objectives, and deployment duration in the middle of a military mission.” Scott R. Tkacz, Note, *In Katrina’s Wake: Rethinking the Military’s Role in Domestic Emergencies*, 15 WM. & MARY BILL OF RTS. J. 301, 328, n. 187 (2006). Outside of the military context, mission creep is more broadly the enlarging of one’s task beyond what was originally intended. In the school setting, mission creep would be defined as school administrators — clearly tasked with controlling the on-campus environment — extending themselves into the off-campus realm.

⁴⁹ See *Thomas v. Bd. of Ed., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1051 (noting that school administrators are “generally unversed in difficult constitutional concepts such as libel and obscenity” that might be faced as they extend authority beyond the school realm).

⁵⁰ See, e.g., Vivian Lei, Note, *Students’ Free Speech Rights Shed at the Cyber Gate*, 16 Rich. J.L. & Tech. 1, P36 (2009) (arguing that “a clear line must be drawn between on-campus and off-campus speech”); Tuneski, *supra* note 43, at 141 (stating that “in order to adequately protect off-campus speech, courts must make a clear distinction between on-and off-campus expression”).

authority to punish expression, while courts in the Internet age have been more deferential to school authority.

a. School authority and off-campus speech

In the formative years after *Tinker*, some of the first lower court cases to flesh out how far student speech doctrine extended focused on “underground” student newspapers, publications unaffiliated with a school that can often “be critical of school officials and policies, use strong language and include articles on sensitive or controversial issues.”⁵¹ Courts deciding cases regarding underground newspapers in the decade after *Tinker* were generally suspicious of attempts to extend school authority outside of the “schoolhouse gate,” but other courts, seemingly embracing the point of view espoused in Justice Hugo Black’s dissent in *Tinker*,⁵² viewed the editors of such publications as those who “blatantly and deliberately flout school regulations and defy school authorities.”⁵³

1. Underground student newspapers

Sullivan v. Houston Independent School District, first decided by the U.S. District Court for the Southern District of Texas in 1969,⁵⁴ was an early application of *Tinker*⁵⁵ that set boundaries on how far school administrators could go to punish off-campus speech — even when that speech somehow found its way to campus. The newspaper in *Sullivan* began with a series of disputes where high school students, described as “typical young American men of high

⁵¹ SPLC Guide to Surviving Underground: A Legal Manual for Publishers of Independent Student Newspapers, STUDENT PRESS LAW CENTER, (2001), <http://www.splc.org/knowyourrights/legalresearch.asp?id=40>

⁵² See *Tinker*, 393 U.S. at 518 (Black, J., dissenting) (“And I repeat that if the time has come when pupils of state-supported schools, kindergartens, grammar schools, or high schools, can defy and flout orders of school officials to keep their minds on their own schoolwork, it is the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary. The next logical step, it appears to me, would be to hold unconstitutional laws that bar pupils under 21 or 18 from voting, or from being elected members of the boards of education.”).

⁵³ *Sullivan v. Houston Indep. Sch. Dist.*, 475 F.2d 1071, 1076 (5th Cir. 1973) (*Sullivan II*).

⁵⁴ *Sullivan v. Houston Indep. Sch. Dist.*, 307 F. Supp. 1328 (S.D. Tex. 1969) (*Sullivan I*).

⁵⁵ The district court’s decision was delivered on November 17, 1969 — less than nine months after *Tinker* was decided by the Supreme Court.

moral character”⁵⁶ by the court, believed that school administrators had treated them unfairly.⁵⁷ To voice their opinions regarding these disputes, the students created a newspaper that was printed in a local university’s print shop.⁵⁸ The students researched and wrote articles off-campus,⁵⁹ and they instructed other students assisting in the distribution of the finished product to “not hand out the paper on school grounds or during school hours.”⁶⁰ Still, the paper was eventually found in various points around campus⁶¹ in addition to showing up in classrooms, where teachers confiscated copies after some (but not all) student readers caused a disruption by silently reading or laughing at the paper during class.⁶² As copies of the newspaper made their way into the hands of teachers and then administrators, the principal “resolved that the students responsible would be expelled immediately.”⁶³ After the principal discovered the identities of the students who created the newspaper, they were indeed expelled — even after the students promised to stop all activities regarding the newspaper.⁶⁴

In appealing their expulsions in federal court, the students argued that the decision to impose such discipline because of the newspaper represented an unconstitutional infringement of

⁵⁶ *Sullivan I*, 307 F. Supp. at 1332.

⁵⁷ *See id.* at 1331-33. These disputes included an unwritten disciplinary code and other regulations that were inconsistently enforced. *Id.* at 1332. To protest these slights, students organized a rally that was disrupted by school coaches who “threw books around the park, ripped up students’ notebooks and accused students of being Communists and Fascists.” *Id.* After the rally, a *Sullivan* plaintiff wore a small American flag as a protest to school, where he was told to “remove the flag upon penalty of suspension from school.” *Id.*

⁵⁸ *Id.* at 1332-33.

⁵⁹ *Id.* at 1333.

⁶⁰ *Id.*

⁶¹ The paper was found in stacks in one bathroom, as well as being hidden in a paper towel dispenser and a sewing machines. *Id.* at 1334.

⁶² *Id.* at 1334. “Teacher Don Ellisor found a student reading the *Pflashlyte* during class when she should have been working on an assignment. He took up the paper without disrupting the class. An English instructor, Mrs. Jeannine Wallace, had to take up papers from two students who were reading it during class. One student had laughed out-loud as she read and the teacher felt the need to take the paper from her. Mrs. Wallace had in the past taken up copies of the school sponsored news-paper, *The Torch*, which students read in class. Mrs. Wallace also noticed somewhat more congestion in the halls as students made their way from one class to another.”

⁶³ *Id.* at 1335.

⁶⁴ *See id.*

their First Amendment rights.⁶⁵ After granting the students a preliminary injunction preventing both their expulsions and discipline resulting from future off-campus publications,⁶⁶ the federal district court took up the merits of the case by first explaining the implications of *Tinker*, noting that the decision “makes it abundantly clear that students do not shed their constitutional rights when they enter the high school campus” and that the Supreme Court “very clearly applie[d] the [F]irst [A]mendment in its full force to the high school campus.”⁶⁷ *Tinker*, as the district court characterized the decision, allowed for schools to “control those activities which related to or affect education,” a restriction that the court favorably compared with regulations preventing public demonstrators from interfering with traffic.⁶⁸ Thus, as the district court concluded, “freedom of speech . . . may be exercised to its fullest potential on school premises so long as it does not unreasonably interfere with normal school activities,” but that freedom of speech does not include the right to “read newspapers during class periods” or the right to “loud speeches or discussion . . . in the halls during class time.”⁶⁹

With *Tinker* explained, the district court then turned to the question of school authority over the off-campus activities of students.⁷⁰ The court began by explaining that “[i]t is not clear whether the law allows a school to discipline a student for his behavior during free time away

⁶⁵ See *id.* at 1336.

⁶⁶ *Id.* at 1336-37.

⁶⁷ *Id.* at 1339.

⁶⁸ See *id.* (noting that the limitations on student speech are “closely analogous to the limitations that have been placed on demonstrations and pickets. Though they are exercising first amendment rights, demonstrators will not be allowed to interfere with normal automobile or pedestrian traffic on public streets or sidewalks because it is also a fundamental right of every citizen to travel free from unreasonable physical interference by others. Traffic is properly regulated by the police because it is said to be a legitimate interest of the public as a whole.”).

⁶⁹ *Id.* at 1340. The court noted that a student’s freedom of speech included the “publication and distribution of newspapers” but limited that right with the observation that school administrators can “regulate the times and places within the school building at which papers may be distributed.” *Id.*

⁷⁰ See *id.*

from the campus.”⁷¹ The court, however, was skeptical of extending school authority into the off-campus realm, arguing that such an extension made “little sense” because

[s]chool officials may not judge a student's behavior while he is in his home with his family nor does it seem to this court that they should have jurisdiction over his acts on a public street corner. A student is subject to the same criminal laws and owes the same civil duties as other citizens, and his status as a student should not alter his obligations to others during his private life away from the campus.⁷²

Thus the district court appeared to argue for two distinct spheres of authority: the on-campus environment governed by school administrators and the off-campus world controlled by other civil and criminal authorities. However, instead of clarifying this distinction or illuminating when student speech becomes completely protected off-campus expression, the court weakened its argument by speculating that “misconduct by students during non-school hours and away from school premises could, in certain situations, have such a lasting effect on other students that disruption could result during the next school day.”⁷³ While it backtracked from this speculation,⁷⁴ the court missed the opportunity to make a clear and effective argument for a definitive on/off campus distinction.

The court’s most glaring failure, however, came where it applied the principles in *Tinker* to the facts of *Sullivan*. After discussing the possibility of whether any school could discipline students for off-campus behavior, the court concluded that “[h]owever, under any circumstances, the school certainly may not exercise more control over off-campus behavior than over on-campus conduct.”⁷⁵ Furthermore, as the court found, “[s]erious disciplinary action concerning

⁷¹ Id.

⁷² Id. at 1340-41.

⁷³ Id. at 1341.

⁷⁴ See id. at 1341 (“Perhaps then administrators should be able to exercise some degree of influence over off-campus conduct. This court considers even this power to be *questionable*.”) (emphasis added).

⁷⁵ Id.

[F]irst [A]mendment activity *on or off campus* must be based on the standard of substantial interference with the normal operations of the school.”⁷⁶ From those two observations, the district court simply proceeded with a standard application of *Tinker*, meaning the court examined whether the student newspaper caused a disruption on campus.⁷⁷

That, however, was the fatal flaw of *Sullivan*, at least as far as establishing the line between on-campus and off-campus speech was concerned. By noting that the school’s authority to punish off-campus speech could be no greater than the authority to punish on-campus speech and then undertaking analysis under *Tinker*,⁷⁸ the district court in essence rendered the newspaper on-campus speech and thus exiled to *dicta* its earlier discussion regarding the impropriety of a school’s off-campus authority. The district could have easily determined that the newspaper represented off-campus speech⁷⁹ and found that expelling the students represented an unconstitutional extension of the school’s authority, but the court did not do so. While the court found that the newspaper did not disrupt the school in a manner forbidden by *Tinker* and that the expulsions were therefore unconstitutional,⁸⁰ the decision did little to crystalize an on/off campus distinction, despite the court’s language to the contrary.

On appeal to the Fifth Circuit, *Sullivan* did even less to establish the boundaries of school administrative authority. After the district court’s decision in *Sullivan I*, a permanent injunction

⁷⁶ *Id.* (emphasis added).

⁷⁷ *See id.* at 1341-42.

⁷⁸ *See id.* at 1341.

⁷⁹ Even though the court noted that “[b]oth boys were off-campus” when they distributed their papers, this does not appear to factor into the court’s analysis as it conducts a rather straightforward application of *Tinker*. *Id.* at 1342. *See id.* at 1341. (“The crucial issue, then, is a factual question: did these two students materially and substantially interfere with the requirements of appropriate discipline in the operation of Sharpstown Junior/Senior High School?”).

⁸⁰ *Id.* at 1342 (“The manner in which the paper was distributed by these two students could by no stretch of the imagination be said to have created a state of ‘turmoil.’ Both boys were off-campus, they did not hand out papers during school time and they even went so far as to encourage students not to take the paper into the school building and to keep it out of sight if they did so. . . . It appears that [the students] were disciplined because school officials disliked the *Pflashlyte*’s contents. The Constitution prohibits such action.”).

was levied against the school that prevented the administration “from promulgating or enforcing any regulation dealing with the production or distribution of written materials by tenth, eleventh, and twelfth grade students” unless the rule met certain specifications established by the court.⁸¹ Instead of appealing the district court’s decision, the school administration gave a “biracial committee of students, school officials, parents, attorneys, and representatives of other interested groups” the task of formulating a new rule regulating the distribution of student publications.⁸² The new rule established by the group applied to “all publications, not sponsored by the school, which were to be distributed on the campus or off campus in a manner calculated to result in their presence on the campus” and required prior submission of all such publications to the principal.⁸³ The principal was given one working day to review submitted publications and reject them for libel, obscenity, or the advocacy of disobedience to school rules or criminal laws.⁸⁴ The principal, however, was not allowed to reject a publication for “the expression of any idea, popular or unpopular.”⁸⁵

Sullivan II focused on the application of the school district’s new rule to a different underground student newspaper at another of the district’s schools.⁸⁶ In *Sullivan II*, a high school

⁸¹ *Sullivan II*, 475 F.2d at 1073. The court required the following conditions of school rules regarding publications: “(1) The rule must be specific as to places and times where possession and distribution of published materials is prohibited. (2) The rule must be understandable to persons of the age and experience of covered students. (3) The rule must not prohibit or inhibit conduct which is orderly, peaceful and reasonably quiet and which is not coercive of any other person's right to accept or reject any written material being distributed subject to the rule. (4) The rule may prohibit such distribution at times and in places where normal classroom activity is being conducted. Such rule may not prohibit such distribution at other times and places unless such prohibition is necessary to prevent substantial and material interference with or delay of normal classroom activity or normal school function. . . . (5) The rule must not subject any covered student to the threat of discipline because of the reaction or the response of any other person to the written material, provided, however, that defendants and their successors in office may prohibit distribution of obscene material or of libelous material for which a cause of action may exist in some person.” *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *See id.* at 1074.

junior stood “near” an entrance to campus and sold copies of his unauthorized newspaper.⁸⁷ The school’s principal purchased a copy and found that it contained “several . . . instances of coarse language.”⁸⁸ The student was asked to stop selling the paper because he was in violation of the prior submission rule, but he refused.⁸⁹ The principal then decided to suspend the student for the continued sale of the newspaper, and when the student was informed of the suspension, he shouted “I don’t want to go to this goddamn school anyway” and slammed the door of the principal’s office. During the course of his suspension, the student returned to campus “several times” to talk to teachers and continued to sell his newspaper. When he was shown a copy of the prior submission rule, the student “shouted the common Anglo-Saxon vulgarism for sexual intercourse in apparent reference” to the principal.⁹⁰

After the student’s semester-long suspension for both violating the prior submission rule and his use of profanity was upheld by the school district’s assistant superintendent, the student and his father pursued an appeal in federal court asking that the school district be found in contempt for violating *Sullivan I*’s permanent injunction.⁹¹ The Fifth Circuit, however, upheld the student’s suspension and furthermore declined to evaluate the school’s discipline under *Tinker*.⁹² As the Fifth Circuit argued in its decision, the student’s “conduct . . . outweigh[ed] his claim of First Amendment protection, and gave school officials sufficient grounds for disciplining him.”⁹³ Thus, the student’s “flagrant disregard of established school regulations, his

⁸⁷ Id.

⁸⁸ Id. The lone example cited in the Fifth Circuit’s opinion was a letter bearing the caption “High Skool is F . . . ed.”
Id.

⁸⁹ Id.

⁹⁰ Id. (internal quotation omitted).

⁹¹ Id. at 1074-75. See also notes 81-85 for details on the permanent injunction resulting from *Sullivan I*.

⁹² See *Sullivan II*, 475 F.2d at 1077. (“Today we merely recognize the right of school authorities to punish students for the flagrant disregard of established school regulations; we ask only that the student seeking equitable relief from allegedly unconstitutional actions by school officials come into court with clean hands.”).

⁹³ Id. at 1075. The “conduct” cited by the court included the student’s refusal to end sales of his newspaper, his return to campus during his suspension, and his use of profanity. Id.

open and repeated defiance of the principal's request, and his resort to profane epithet" meant the school was free to suspend him despite the fact that his newspaper and related actions "*did not* materially and substantially disrupt school activities."⁹⁴

While the plaintiff in *Sullivan II* was certainly less sympathetic than the students in *Tinker* and his actions admittedly complicated the case, the Fifth Circuit did not explain in any detail exactly why *Tinker* no longer applied. The court's opinion also left intact a school rule that required the prior approval of off-campus student publications that were distributed "in a manner calculated to result in their presence on the campus."⁹⁵ In declining to apply *Tinker* and leaving in place a school rule that authorized even a modicum of off-campus school authority, the Fifth Circuit did nothing to clarify *Tinker*'s role in off-campus expression in *Sullivan II*.

Just a year prior to its decision in *Sullivan II*, the Fifth Circuit embraced the mode of analysis seen in the *Sullivan I* district court decision as it authored an opinion that simultaneously embraced student speech rights while avoided the difficult question of defining the limits of school authority.⁹⁶ In the Fifth Circuit's 1972 opinion in *Shanley v. Northeast Independent School District, Bexar County, Texas*, the court evaluated the constitutionality of suspensions levied against three students for distributing an underground student newspaper "near but outside the school premises" both before and after (but not *during*) class.⁹⁷ Furthermore, the court found "[t]here was absolutely no disruption of class that resulted from distribution of the newspaper, nor were there any disturbances whatsoever attributable to the distribution."⁹⁸ The students,

⁹⁴ Id. at 1076 (emphasis added).

⁹⁵ *Sullivan II*, 475 F.2d at 1073.

⁹⁶ See *Shanley v. Northeast Indep. Sch. Dist., Bexar County, Tex.*, 462 F.2d 960, 968 (5th Cir. 1972).

⁹⁷ *Shanley*, 462 F.2d at 964.

⁹⁸ Id. The subject matter of the newspaper was framed by the court as relatively tame: "The 'Awakening' contains absolutely no material that could remotely be considered libelous, obscene, or inflammatory. In fact, the content of this so-called 'underground' paper is such that it could easily surface, flower-like, from its 'underground' abode.

however, were disciplined for failing to comply with a school policy that required prior approval of “petitions or printed documents of any kind, sort, or type.”⁹⁹

In *Shanley*, the Fifth Circuit found that while a prior approval policy was not *per se* unconstitutional,¹⁰⁰ the school’s policy as written infringed on the First Amendment rights of students.¹⁰¹ The court, though, based its conclusion primarily on a *Tinker* analysis that found that there “were no disruptions of class; there were no disturbances of any sort, on or off campus” related to the newspaper.¹⁰² However, much like the district court decision in *Sullivan*, the Fifth Circuit in *Shanley* applied *Tinker* in such a way that assumed the newspaper was on-campus speech.¹⁰³ The Fifth Circuit similarly muddled the question of whether a school may act to silence expression outside of its physical confines as it speculated meekly that it was “not at all unusual to allow the geographical location of the actor to determine the constitutional protection that should be afforded to his or her acts” after declining to foreclose any school attempt to “regulate conduct that takes place off the school ground and outside school hours.”¹⁰⁴ This

As so-called ‘underground’ newspapers go, this is probably one of the most vanilla-flavored ever to reach a federal court.” *Id.*

⁹⁹ *Id.* at 964-65.

¹⁰⁰ *See id.* at 969. (“As long as the regulation for prior approval does not operate to stifle the content of any student publication in an unconstitutional manner and is not un-reasonably complex or onerous, the requirement of prior approval would more closely approximate simply a regulation of speech and not a prior restraint. Nor is there anything unconstitutional *per se* in a reasonable administrative ordering of the time, place, and manner of distributing materials on school premises and during school hours[.]”)

¹⁰¹ *See id.* at 975 (“[W]e are . . . compelled to declare the regulation in question facially unconstitutional as both overbroad and vague, and also as a denial of procedural due process.”).

¹⁰² *Id.* at 970.

¹⁰³ *See id.* at 968 (“[T]he authority of the school board to balance school discipline against the First Amendment by forbidding or punishing off-campus activity cannot exceed its authority to forbid or punish on-campus activity. Therefore, we must first examine the authority of the school board to order the actions of students *on* school grounds and *within* school hours.”) (emphasis in original).

¹⁰⁴ *Id.* at 974. The Fifth Circuit also specifically declined to issue an injunction preventing the school from stopping distribution of the newspaper “under any and all circumstances.” *Id.* at 975. *See also id.* (“As we have made clear in this opinion, the balancing of expression and discipline is an exercise in judgment for school administrations and school boards, subject only to the constitutional requirement of reasonableness under the circumstances. We decline to attempt to conjure and transcribe every possible permutation of circumstances regarding the distribution of the ‘Awakening’ and we have complete faith that the school board and the school administration will make every effort to abide by the Constitution.”).

observation was made, ironically enough, just before the court reiterated that the newspaper's distribution was "entirely off-campus and was effected only before and after school hours."¹⁰⁵

Of this small selection of cases to examine underground student newspapers, only one — *Thomas v. Board of Education, Granville Central School District*¹⁰⁶ — definitively added a layer of examination to *Tinker* in order to address off-campus speech.¹⁰⁷ In *Thomas*, four high school students decided to create a newspaper of "sexual satire" in the style of *National Lampoon*.¹⁰⁸ During the course of writing articles, the students sought advice from a teacher on "isolated" questions of grammar and typed the "occasional article" on campus grounds after classes were over.¹⁰⁹ However, after the school's assistant principal urged the students to keep the publication off campus and cited disciplinary action in similar circumstances against previous students, the writers of the new publication "assiduously endeavored" to remove ties between themselves and the school.¹¹⁰ While copies of the publication were printed and sold off campus, they were stored in a teacher's closet after he granted the students permission to do so.¹¹¹ Initially, sales of the publication passed without incident, but when the president of the local board of education learned of the newspaper, she spurred the school principal into conducting an investigation that resulted in suspensions and additional discipline for the students who created the publication.¹¹²

¹⁰⁵ Id. at 975.

¹⁰⁶ 607 F.2d 1043 (2nd Cr. 1979).

¹⁰⁷ See id. at 1050 (describing "independent, impartial decisionmaker" standard).

¹⁰⁸ Id. at 1045. The court described the publication's contents as "distasteful" and featuring "an editorial on masturbation and articles alluding to prostitution, sodomy, and castration." Id. at n. 3.

¹⁰⁹ Id. at 1045.

¹¹⁰ Id.

¹¹¹ Id.

¹¹² Id. at 1046. The full penalties included "(1) five-day suspensions to be reduced to three days if the student prepared an essay on 'the potential harm to people caused by the publication of irresponsible and/or obscene writing'; (2) segregation from other students during study hall periods, throughout the month of February and possibly longer if an acceptable essay were not submitted; (3) loss of all student privileges during the period of suspension; and (4) inclusion of suspension letters in the students' school files." Id.

The students, however, sued the school district and administrators alleging a violation of their First Amendment rights.¹¹³

In finding for the students, the Second Circuit made an initial and critical determination that *Thomas* represented “a factual context distinct from that envisioned in *Tinker* and its progeny,” in that the newspaper was “deliberately designed to take place beyond the schoolhouse gate.”¹¹⁴ Thus the court found the newspaper to be off-campus speech despite students using both school typewriters to produce some articles and a teacher’s closet to store finished copies of the publication — campus interactions that the court labeled as “*de minimis*.”¹¹⁵ Since the newspaper was off-campus speech in the court’s estimation, the Second Circuit stepped outside of the *Tinker* framework as “because school officials have ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith, their actions must be evaluated by the principles that bind government officials in the public arena.”¹¹⁶ These principles, the court argued, require that punishments for off-campus speech be consistent with the decisionmaking of an “independent, impartial” arbiter, which was ultimately a standard that the school in *Thomas* could not satisfy.¹¹⁷

In reaching its conclusion, the court noted that the average school official was hardly a neutral decision-maker since he “acts as both prosecutor and judge when he moves against student expression” and that “[h]is intimate association with the school itself and his understandable desire to preserve institutional decorum give him a vested interest in suppressing

¹¹³ *Id.*

¹¹⁴ *Id.* at 1050.

¹¹⁵ *Id.* As the court explained, “That a few articles were transcribed on school typewriters, and that the finished product was secretly and unobtrusively stored in a teacher’s closet do not alter the fact that *Hard Times* was conceived, executed, and distributed outside the school.” *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

controversy.”¹¹⁸ Possessed with such an authority, the court argued that it was would be “conceivable” that a school administrator attempting to suppress on-campus dissent might “consign a student to a segregated study hall because he and a classmate watched an X-rated film on his living room cable television.”¹¹⁹ Such action would intrude on parental authority and is properly prevented, the court asserted, because the First Amendment “forbids public school administrators and teachers from regulating the material to which a child is exposed after he leaves school each afternoon.”¹²⁰ As the court concluded, the distinction between on-campus and off-campus speech is vital to the First Amendment and an understanding of school authority because

[w]hen school officials are authorized only to punish speech on school property, the student is free to speak his mind when the school day ends. In this manner, the community is not deprived of the salutary effects of expression, and educational authorities are free to establish an academic environment in which the teaching and learning process can proceed free of disruption. Indeed, our willingness to grant school officials substantial autonomy within their academic domain rests in part on the confinement of that power within the metes and bounds of the school itself.¹²¹

Like previous cases, the Second Circuit, however, took what could have been a simple distinction between on-campus and off-campus speech and confused the issue. In a footnote, the court admitted that “[w]e can, of course, envision a case in which a group of students incites substantial disruption within the school from some remote locale.”¹²² However, such a scenario did not apply in *Thomas* “because, on the facts before us, there was simply no threat or forecast of material and substantial disruption within the school.”¹²³ This suggests that the Second

¹¹⁸ *Id.* at 1051.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 1052.

¹²² *Id.* at 1052 n. 17.

¹²³ *Id.*

Circuit’s “independent, impartial decisionmaker” analysis¹²⁴ might apply only in instances where administrators could not effectively point to a disruption in the school, meaning that *Tinker* would still apply if a school could argue a plausible disruption.

Between that note and the newspaper’s subject matter perhaps suggesting a contemporary analysis under *Fraser*,¹²⁵ it is difficult to estimate the current precedential value of *Thomas*. However, *Thomas* is important because it both recognized the critical distinction between on-campus speech and off-campus speech and attempted to address the legal status of off-campus speech regulation. *Sullivan I* and *Shanley* may have also been decided with the notion that school authority must have a definitive limit,¹²⁶ but only *Thomas* explored the analysis of off-campus speech without conflating such analysis with *Tinker*. Furthermore, the principles contained in the “independent, impartial decisionmaker” standard — that school authority should be judged objectively and subject to much more scrutiny when it extends off-campus — are illustrative when considering what authority a school should have when it acts against violent student speech originating from an off-campus location.¹²⁷

2. Off-campus speech and the modern era: *Morse*

¹²⁴ See *id.* at 1051.

¹²⁵ A concurring opinion in *Thomas* foreshadowed *Fraser* by arguing that “nothing in *Tinker* suggests that school regulation of indecent language must satisfy the criterion of a predictable disruption.” *Id.* at 1055 (Newman, C.J., concurring). *But see Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205 (3rd Cir. 2011); *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3rd Cir. 2011) (declining to extend *Fraser* to off-campus speech).

¹²⁶ *Sullivan I* and *II*, *Shanley*, and *Thomas* also illustrate that the problem of defining school authority is not exclusive to the Internet age. See Part II.b., *infra*.

¹²⁷ *But see Fenton v. Stear*, 423 F.Supp. 767, 772 (W.D. Penn. 1976) (concluding that “when a high school student refers to a high school teacher in a public place on a Sunday by a lewd and obscene name in such a loud voice that the teacher and others hear the insult it may be deemed a matter for discipline in the discretion of the school authorities. To countenance such student conduct even in a public place without imposing sanctions could lead to devastating consequences in the school.”). The student in *Fenton* referred to a teacher as a “prick” off-campus and on a Sunday. *Id.* at 769. In that case, the district court avoided any discussion of *Tinker* and sanctioned the school’s actions as necessary to avoid “devastating consequences.” *Id.* at 772. This approach would suggest more deference and authority to school administrators in cases of violent student expression. However, logically, the “devastating consequence” from most instances of violent student expression is not an incident of violence.

While *Morse* was not decided on the issue of whether the infamous “BONG HiTS 4 JESUS” banner was off-campus speech,¹²⁸ the Supreme Court’s abbreviated discussion of the issue demonstrates the general deference afforded to school administrators in determining the extent of their authority.¹²⁹ In just 169 words,¹³⁰ the Court’s majority opinion written by Chief Justice John Roberts dismissed the student’s argument that his banner — displayed on grounds outside of campus — represented off-campus speech. In doing so, Chief Justice Roberts cited the fact that the Olympic torch relay occurred “during normal school hours” and that it was sanctioned by the school principal as a social event or class trip.¹³¹ The chief justice also suggested that it was a school event because “[t]eachers and administrators were interspersed among the students and charged with supervising them” and “[t]he high school band and cheerleaders performed.”¹³² Thus, as Chief Justice Roberts concluded, the student could not “stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school.”¹³³

However, the chief justice failed to include some relevant facts in the discussion of whether Joseph Frederick’s banner was truly subject to school authority. As the Ninth Circuit pointed out in its opinion, Frederick never made it to school on the day of the torch relay, so while other students were dismissed from class to watch the torch pass through Juneau, Frederick merely met his friends across the street from the school.¹³⁴ Furthermore, Chief Justice Roberts, in

¹²⁸ See 551 U.S. at 393 (citing the definitive issue in the case as “whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use”).

¹²⁹ See *id.* at 400-01.

¹³⁰ This word count omits all citations. Even with citations, the discussion represented only two paragraphs in the Court’s opinion. See *id.*

¹³¹ *Id.* at 400. The chief justice also noted that the school district’s rules note that students on such trips are “subject to district rules for student conduct.” *Id.* at 400-01 (quoting App. to Pet. for Cert. 58a).

¹³² *Id.* at 401.

¹³³ *Id.* (quoting App. to Pet. for Cert. 63a).

¹³⁴ See *Frederick v. Morse*, 439 F.3d 1114, 1115 (9th Cir. 2006).

laying out the facts earlier in the Court’s opinion, described the setting before the relay as an unruly one: “Not all the students waited patiently. Some became rambunctious, throwing plastic cola bottles and snowballs and scuffling with their classmates.”¹³⁵ This environment does not sound like one where “[t]eachers and administrators were interspersed among the students and charged with supervising them” and falls short of the traditional field trip image the chief justice tried to craft as he argued the banner clearly fell under the school’s ambit. While those two facts alone are hardly dispositive, their absence and the brevity of the Court’s analysis suggest that the majority was simply uninterested in using *Morse* to seriously examine the limits of school authority. As Chief Justice Roberts concluded, “There is some uncertainty at the outer boundaries as to when courts should apply school speech precedents, but not on these facts.”¹³⁶ According to Erin Reeves, *Morse*, therefore, represents something of a missed opportunity, as the Court “glossed over” the on-campus or off-campus issue and “simply agreed with the school superintendent . . . that the Torch Relay was a school-sanctioned activity.”¹³⁷

The “outer” boundary, however, should not be as vexing as the chief justice made it out to be. Ultimately, the proposition is a simple one: School authority over students must end at some point and give way to parental authority and the individual rights of the child. But defining that point and competently limiting school authority can indeed be difficult, as demonstrated by the underground student newspaper cases. The newspaper cases also show that the question of the physical and temporal limitation on school authority has existed for nearly the entirety of *Tinker*’s lifespan.¹³⁸ However, the debate over the extent of school authority certainly grew more

¹³⁵ *Morse*, 551 U.S. at 397.

¹³⁶ *Id.* at 401 (citation omitted).

¹³⁷ Erin Reeves, Note, *The “Scope of a Student”: How to Analyze Student Speech in the Age of the Internet*, 42 GA. L. REV. 1127, 1148 (2008).

¹³⁸ See note 55, *supra* (noting that *Sullivan I* was decided shortly after *Tinker*).

visible with the rise of online communication and the violent and sometimes threatening student speech that came with the new medium.

b. School authority and online speech

In order to examine the question of whether a school can act against violent online student speech, it is important to first see how courts have generally examined the propriety of school authority over online speech using two inexorably linked cases:¹³⁹ *J.S. v. Blue Mountain School District*¹⁴⁰ and *Layshock v. Hermitage School District*.¹⁴¹ From there, this part will examine instances in which schools prevailed in cases regarding online violent student speech and contrast those cases with ones in which students succeeded.

1. Online student speech generally: *J.S.* and *Layshock*

J.S. and *Layshock*, two of the most notable online student speech cases, were decided on the same day by *en banc* panels of the Third Circuit¹⁴² on essentially the same facts: student plaintiffs were disciplined after creating fake MySpace profiles¹⁴³ that incurred the wrath of school administrators.¹⁴⁴ The cases also had similar outcomes as the students prevailed. However, even with these similarities, the decisions relied on somewhat differing interpretations of *Tinker*'s applicability to online speech. Thus, where these cases could have created a measure

¹³⁹ The two cases were both based on similar facts, decided by the Third Circuit on the same day, and denied certiorari by the Supreme Court on the same day. See notes 142-145, *infra*.

¹⁴⁰ 650 F.3d 915 (3rd Cir. 2011).

¹⁴¹ 650 F.3d 205 (3rd Cir. 2011).

¹⁴² The two cases were also denied certiorari by the Supreme Court in the same decision. See *Blue Mt. Sch. Dist. v. J.S.*, 2012 U.S. LEXIS 726 (U.S. 2012).

¹⁴³ As the court explained in *Layshock*, "MySpace is a popular social-networking website that allows its members to create online 'profiles,' which are individual web pages on which members post photographs, videos, and information about their lives and interests." *Layshock*, 650 F.3d at 208 (internal quotation omitted).

¹⁴⁴ See *J.S.*, 650 F.3d at 920-21; *Layshock*, 650 F.3d at 207-08.

of certainty in the law, they only added to the general confusion in the area of online student speech.¹⁴⁵

In *J.S.*, an eighth grade student who had never been disciplined outside of a dress code infraction created a fake MySpace profile designed to lampoon her middle school principal.¹⁴⁶ The profile, created at the student's home, did not identify the principal by "name, school, or location" but it did use his official picture from the school district's website.¹⁴⁷ The text of the profile, as described by the Third Circuit, "rang[ed] from nonsense and juvenile humor to profanity and shameful personal attacks aimed at the principal and his family," with the worst of these attacks suggesting sexual impropriety.¹⁴⁸ A day after the profile was posted on MySpace, *J.S.* made it private — meaning that only she and her online friends could access it — after several students told her the profile was funny.¹⁴⁹ The private status of the profile, when combined with the school's policy of blocking access to MySpace, meant that the caricature of the principal was inaccessible from school grounds.¹⁵⁰ The principal, however, learned of the

¹⁴⁵ See Lindsay J. Gower, Note, *Blue Mountain School District v. J.S. ex rel. Snyder: Will the Supreme Court Provide Clarification for Public School Officials Regarding Off-Campus Internet Speech?*, 64 ALA. L. REV. 709, 710, 723 (noting online student speech is a "confusing area of law" and that "[c]ourts . . . vary in their tests for when off-campus speech will be subject to a *Tinker* analysis, although many agree that speech originating off campus can become subject to *Tinker* if it can be considered 'on campus.'").

¹⁴⁶ *J.S.*, 650 F.3d at 920.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* The court opinion excerpted the profile's "About me" section and serves as a general example of the profile's content and tone: "HELLO CHILDREN[,] yes. it's your oh so wonderful, hairy, expressionless, sex addict, fagass, put on this world with a small dick PRINCIPAL[.] I have come to myspace so i can pervert the minds of other principal's [sic] to be just like me. I know, I know, you're all thrilled[.] Another reason I came to myspace is because - I am keeping an eye on you students (who[m] I care for so much)[.] For those who want to be my friend, and aren't in my school[,] I love children, sex (any kind), dogs, long walks on the beach, tv, being a dick head, and last but not least my darling wife who looks like a man (who satisfies my needs) MY FRAINTRAIN." *Id.* at 921. The court stated that "[t]hough disturbing . . . the profile was so outrageous that no one took its content seriously." *Id.* See also *id.* at 921 ("The School District points to no evidence that anyone ever suspected the information in the profile to be true."). Thus the profile compared similarly to the infamous parody ad at the center of *Hustler v. Falwell* that depicted the Rev. Jerry Falwell as drinking and engaging in sexual relations with his mother in an outhouse. See *Hustler v. Falwell*, 485 U.S. 46, 50 (1988) (stating that the *Hustler* ad "could not reasonably have been interpreted as stating actual facts").

¹⁴⁹ *J.S.*, 650 F.3d at 921.

¹⁵⁰ *Id.*

profile when he was informed of its existence by another student, but he was only able to view it when he requested a physical print out of the page.¹⁵¹ Ultimately, the principal decided the profile was a “false accusation about a staff member of the school” under the student-parent handbook and a copyright violation of the school’s computer policy¹⁵² —offenses that, according to the principal, merited a 10-day out-of-school suspension for J.S. and a friend.¹⁵³

In finding that the suspension was an unconstitutional infringement on J.S.’s free speech rights, the Third Circuit held that (1) *Tinker* controlled the outcome of the case¹⁵⁴ and that (2) the student prevailed because the fake profile did not cause a disruption of the school environment¹⁵⁵ and any fears of a possible disruption were unreasonable.¹⁵⁶ Even though the school argued that the profile “was accusatory and aroused suspicions among the school community about [the principal’s] character because of the profile’s references to his engaging in sexual misconduct,”¹⁵⁷ the court found that such a belief could not serve as the basis for a reasonable forecast of disruption under *Tinker* because “[t]he profile was so outrageous that no one could have taken it seriously, and no one did.”¹⁵⁸ Since there was no actual disruption and no

¹⁵¹ Id. As the court noted, “the only printout of the profile that was ever brought to school was one brought at [the principal’s] specific request.” Id.

¹⁵² Id.

¹⁵³ Id. at 922. As the principal testified at trial, similar 10-day suspensions were given to students who brought knives, razors, alcohol, or marijuana to school. Id. at 922, n. 2.

¹⁵⁴ Id. at 926 (“[W]e will assume, without deciding, that *Tinker* applies to J.S.’s speech in this case.”). The court devotes the majority of its analysis to *Tinker* but also refutes the notion that the school’s actions could be supported by *Fraser* as well. See id. at 931-32.

¹⁵⁵ See id. at 928. (“There is no dispute that J.S.’s speech did not cause a substantial disruption in the school. The School District’s counsel conceded this point at oral argument[.]”). At trial, however, the school district asserted several possible disruptions, including “general ‘rumblings,’” students talking in class about the profile over the objections of their teacher (an “exchange that lasted five or six minutes”), students reporting the profile to a teacher after class, and a school counselor being forced to reschedule appointments to meet with the principal and J.S. about the profile. Id. at 922-23. As the court concluded, “Thus, beyond general rumblings, a few minutes of talking in class, and some officials rearranging their schedules to assist [the principal] in dealing with the profile, no disruptions occurred.” Id. at 929.

¹⁵⁶ See id. at 928. (“The facts in this case do not support the conclusion that a forecast of substantial disruption was reasonable.”)

¹⁵⁷ Id. at 930. See also note 148, *supra* (detailing sexual nature of the fake MySpace profile).

¹⁵⁸ Id. at 930.

reasonable chance that whatever false accusation might have been contained in the profile could disrupt the school, the student prevailed in a more or less traditional application of *Tinker*.¹⁵⁹

In deciding the case, however, the Third Circuit specifically avoided the threshold question of whether the school had the authority to punish the student for an off-campus Internet posting. As the court stated in a footnote, “The appellants argue that the First Amendment ‘limits school official[s]’ ability to sanction student speech to the schoolhouse itself.’ While this argument has some appeal, we need not address it to hold that the School District violated J.S.’s First Amendment free speech rights.”¹⁶⁰ Yet the court cautioned that a victory for the school in *J.S.* would “significantly broaden school districts’ authority over student speech and would vest school officials with dangerously overbroad censorship discretion”¹⁶¹ — thus signifying the court’s apprehension of off-campus school authority. Furthermore, the court rejected the school’s alternate reliance on *Fraser* to punish the sexually-themed profile, stating that the “argument fails at the outset because *Fraser* does not apply to off-campus speech.”¹⁶² So while the Third Circuit recognized the danger of expanding school authority, the majority did so in a way that

¹⁵⁹ Id. at 931 (“The facts simply do not support the conclusion that the School District could have reasonably forecasted a substantial disruption of or material interference with the school as a result of J.S.’s profile. Under *Tinker*, therefore, the School District violated J.S.’s First Amendment free speech rights when it suspended her for creating the profile.”). *But see* id. at 946 (Fisher, C.J., dissenting) (arguing that, in essence, the hurt feelings of teachers and administrators represented a disruption in the school setting as harassment “may cause teachers to leave the school and stop teaching al-together, and those who decide to stay are oftentimes less effective”). The dissent also took the curious stance of arguing that it was not the role of judges to “determine how schools should treat accusations of sexual misconduct and personal attacks on school officials.” Id. at 948. Rather, the dissent argued that “[s]chool administrators, not judges, are best positioned to assess the potential for harm in cases like this one[.]” Id. Thus it was the position of the dissent — after applying the facts of *J.S.* — that school officials who have been personally insulted by student speech are best situated to inflict punishment upon those students.

¹⁶⁰ Id. at 926, n. 3 (majority op., quoting Appellants’ Br. 25).

¹⁶¹ Id. at 933.

¹⁶² Id. at 932.

“expressly [left] open” the question of whether *Tinker* applied to off-campus speech according to a concurring opinion.¹⁶³

However, the court used a decidedly different approach to determine *Layshock*, a case paired with *J.S.* at nearly every step as they were granted *en banc* review together, argued on the same day, and decided “simultaneously” by the Third Circuit.¹⁶⁴ The facts in *Layshock* are quite similar to those seen in *J.S.* in that a student created a fake MySpace profile that lampooned his high school principal.¹⁶⁵ As in *J.S.*, the profile was created off-campus and used the principal’s official school picture.¹⁶⁶ The content of the MySpace profile in *Layshock* was somewhat different as it was based on a fake survey premise, with the student supplying a variety of questions and answers:

 Birthday: too drunk to remember
 Are you a health freak: big steroid freak
 In the past month have you smoked: big blunt3
 In the past month have you been on pills: big pills
 In the past month have you gone Skinny Dipping: big lake, not big
 dick
 In the past month have you Stolen Anything: big keg
 Ever been drunk: big number of times
 Ever been called a Tease: big whore
 Ever been Beaten up: big fag
 Ever Shoplifted: big bag of kmart
 Number of Drugs I have taken: big¹⁶⁷

The profile soon had an impact on campus. After the profile was created, the student made no effort to keep it private, and it “spread like wildfire” to reach “most, if not all” of the

¹⁶³ Id. at 936 (Smith, C.J., concurring). Circuit Judge Smith’s opinion, which garnered five members of the 14-judge *en banc* court, argued that extending *Tinker* to cover off-campus speech represented “a precedent with ominous implications.” Id. at 939. The opinion cautioned that such an extension “would empower schools to regulate students’ expressive activity no matter where it takes place, when it occurs, or what subject matter it involves — so long as it causes a substantial disruption at school.” Id.

¹⁶⁴ *Layshock*, 650 F.3d at 219 (Jordan, C.J., concurring).

¹⁶⁵ Id. at 207 (majority op.).

¹⁶⁶ Id. at 207-08. The profile was created at the student’s grandmother’s house during “non-school hours.” Id. at 207.

¹⁶⁷ Id. at 208. The student’s answers were premised on the “big” theme because his school principal was “apparently a large man.” Id.

high school student body.¹⁶⁸ Other students soon made additional parody profiles, and “[e]ach . . . was more vulgar and more offensive” than the student’s original creation. The student also used a classroom computer to display his parody profile to others.¹⁶⁹ All of the parody profiles prompted the school to limit Internet access for students to the library and computer labs where users could be supervised.¹⁷⁰

Approximately a week after it was created, the school administration determined that the student “might” have created one of the fake profiles.¹⁷¹ After the student admitted creating one of the profiles, he was given a 10-day out-of-school suspension, placed in an alternative education program for the rest of the school year, banned from all extra-curricular activities, and prevented from taking part in his graduation ceremonies.¹⁷² In suing to overturn the school’s disciplinary actions, the student and his parents won a summary judgment motion on their First Amendment claims — a decision the school district subsequently appealed.¹⁷³

In upholding summary judgment for the student,¹⁷⁴ the Third Circuit made an important observation early in its analysis in that the school district was not appealing the district court’s determination that there was not “a sufficient nexus between [the student’s] speech and a substantial disruption of the school environment.”¹⁷⁵ This meant that the school, on appeal, was not arguing that the student’s discipline could be upheld under *Tinker*.¹⁷⁶ Instead, the school district argued that there was a “sufficient nexus” between the “vulgar and defamatory profile”

¹⁶⁸ Id.

¹⁶⁹ Id. at 209.

¹⁷⁰ Id.

¹⁷¹ Id. at 209. School officials learned on December 21 that the student may have created one of the profiles. Id. The profile was created between December 10 and 14. Id. at 207.

¹⁷² Id. at 210.

¹⁷³ Id. at 211.

¹⁷⁴ Id. at 219.

¹⁷⁵ Id. at 214 (quoting 496 F. Supp. 2d at 600).

¹⁷⁶ Id.

that enabled the school district to discipline the student under *Fraser*.¹⁷⁷ The nexus existed, as the school contended, because the profile originated on-campus as the student “misappropriated” the picture of the principal from the school website, the profile was accessed on school grounds, and it was “reasonably foreseeable” that the profile would come to the attention of school officials.¹⁷⁸ So unlike *J.S.*, there was no *Tinker* analysis undertaken in *Layshock* — rather, it was a question of whether the MySpace profile was on-campus speech and to what extent the student’s punishment was consistent with *Fraser*.

In addressing the on-or-off-campus speech issue, the court quickly rejected the school’s attempt to portray the use of the principal’s picture as forging the necessary “nexus” between the speech and campus in order to punish the speech. “The argument,” as the court found, “equates [the student’s] act of signing onto a web site with the kind of trespass he would have committed had he broken into the principal’s office or a teacher’s desk; and we reject it.”¹⁷⁹ After dismissing the school’s nexus argument, the court then approvingly cited *Thomas* and stated that the majority “agree[d] with the analysis” contained in the 1979 case.¹⁸⁰ Thus, the Third Circuit found that the MySpace profile was off-campus speech:

Accordingly, because the School District concedes that [the student’s] profile did not cause disruption in the school, we do not think that the First Amendment can tolerate the School District stretching its authority into [the student’s] grandmother’s home and reaching [the student] while he is sitting at her computer after school in order to punish him for the expressive conduct that he engaged in there.¹⁸¹

Thomas, however, was premised on a complete break from *Tinker* in that the Second Circuit found that an off-campus underground student newspaper was “a factual context distinct

¹⁷⁷ Id. (quoting District’s Br. at 9).

¹⁷⁸ Id. See also Chapter 2, *supra* (explaining “reasonably foreseeable” standard in online student speech).

¹⁷⁹ *Layshock*, 650 F.3d at 215.

¹⁸⁰ Id. at 216.

¹⁸¹ Id. (emphasis added).

from that envisioned in *Tinker* and its progeny.”¹⁸² Therefore, the fact that the school district readily admitted there was no disruption in the school environment is not relevant (at least in light of *Thomas*) to the discussion of whether it had the authority to sanction off-campus speech. Yet the Third Circuit emphasized this point as it reiterated its conclusion, arguing that “[w]e need not now define the precise parameters of when the arm of authority can reach beyond the schoolhouse gate because . . . the district court found that [the student’s] conduct did not disrupt the school, and the District does not appeal that finding.”¹⁸³ Again, *Tinker* analysis presumes that speech is subject to school authority. Any analysis regarding the propriety of that authority should be done outside the confines of *Tinker*; if an individual’s expression is properly determined to be student speech, then — and only then — the seriousness of any disruption can be considered.

Between *J.S.* and *Layshock* — two cases on essentially the same facts decided by the same court on the same day — there was only one point of agreement that actually brought clarity to student speech jurisprudence: *Fraser*, as the Third Circuit found in both cases, cannot be used to enable the discipline of off-campus speech.¹⁸⁴ The cases, less helpfully, also did their best to avoid the question of whether *Tinker* applies to off-campus speech, with *J.S.* specifically avoiding the issue¹⁸⁵ and *Layshock* relying on the district court’s opinion that precluded most analysis under *Tinker*.¹⁸⁶ However, when expanding to the concurring opinions in both cases, whatever agreement to be found on the question of *Tinker* and off-campus speech falls away as concurring opinions in *J.S.* and *Layshock* reached contradictory results, with Circuit Judge Smith

¹⁸² *Thomas*, 607 F.2d at 1050.

¹⁸³ *Layshock*, 650 F.3d at 219.

¹⁸⁴ See *J.S.*, 650 F.3d at 932; *Layshock*, 650 F.3d at 219.

¹⁸⁵ See *J.S.*, 650 F.3d at 926, n. 3.

¹⁸⁶ See *Layshock*, 650 F.3d at 219.

warning of the “ominous implications” of extending *Tinker* in concurring in *J.S.*¹⁸⁷ while Circuit Judge Jordan argued in a *Layshock* concurring opinion that “[w]e cannot sidestep the central tension between good order and expressive rights by leaning on property lines.”¹⁸⁸

Writing in 2003, Alexander Tuneski found there were three basic approaches employed by courts to deal with *Tinker* and the problem of online speech: treating Internet speech as on-campus when it is viewed on-campus; finding online speech protected because it occurred off-campus; and applying “substantial disruption test under all circumstances, even if the internet speech is deemed to have taken place off-campus.”¹⁸⁹ Applying these categories to the Third Circuit’s decisions, it seems as if *Layshock* was based, more or less, on the second approach, while *J.S.* applied the substantial disruption test even as the speech was deemed to be off-campus. The point, though, is not to cabin these decisions within Tuneski’s framework; rather, it is to show what little courts have done in the intervening decade to definitively address *Tinker*’s place in a world of online speech. While courts certainly have a variety of options in deciding how to define *Tinker*’s jurisdiction,¹⁹⁰ those options do not matter if courts cannot commit to the principle of limiting the application of *Tinker* exclusively to on-campus speech.

Ultimately, *J.S.* and *Layshock* represent examples of “indisputably vulgar . . . and nonsensical”¹⁹¹ speech that at its worst could only offend the school administrators that served as the targets of the fake MySpace profiles. However, immature jokes are not the only form of

¹⁸⁷ *J.S.*, 650 F.3d at 939 (Smith, C.J., concurring).

¹⁸⁸ *Layshock*, 650 F.3d at 221 (Jordan, C.J., concurring). *See also id.* at 220-21 (“For better or worse, wireless internet access, smart phones, tablet computers, social networking services like Facebook, and stream-of-consciousness communications via Twitter give an omnipresence to speech that makes any effort to trace First Amendment boundaries along the physical boundaries of a school campus a recipe for serious problems in our public schools. *Tinker* teaches that schools are not helpless to enforce the reasonable order necessary to accomplish their mission.”).

¹⁸⁹ Tuneski, *supra* note 43, at 153.

¹⁹⁰ *See Gower, supra* note 145, at 723-26 (explaining geographic, foreseeability, sufficient nexus, and purposeful direction and dissemination standards for determining *Tinker*’s on/off-campus boundary).

¹⁹¹ *J.S.*, 650 F.3d at 929.

online student expression — a fact proven by several court cases that address online violent student speech.

2. Online violent student speech

With the background principles demonstrated in the struggles to define off-campus speech for the purposes of underground student newspapers and the continued difficulty in addressing online student speech, this chapter now turns to an examination of cases regarding online violent student speech — beginning first with four cases where schools prevailed in constitutional challenges to student discipline and concluding with a look at two cases where students were successful in overturning disciplinary sanctions.

i. School victories in online violent student speech

In instances where schools have been successful in student challenges regarding discipline for online violent student speech, courts have used either a “sufficient nexus” or a “reasonably foreseeable” standard in order to determine whether *Tinker* applies before then moving on to the substantial/material disruption examination. “Sufficient nexus,” as defined by Lindsay Gower, allows for the regulation of online student speech when that speech can be definitively tied to campus in some way, such as speech targeting a school or its personnel that is accessed on campus by its originator or speech that is causally related with a disruption.¹⁹² Although the sufficient nexus standard as a threshold question can be more protective of student speech than a simple application of *Tinker*,¹⁹³ it can also seem like circular reasoning when it is used to justify school intervention due to a disruption.¹⁹⁴ This appearance of circular reasoning is

¹⁹² See Gower, *supra* note 145 at 725.

¹⁹³ Harriet A. Hader, Note, *Supervising Cyberspace: A Simple Threshold for Public School Jurisdiction Over Students’ Online Activity*, 50 B.C. L. REV. 1563, 1583 (2009).

¹⁹⁴ Again, both sufficient nexus and “reasonably foreseeable” operate as standards to answer the question of whether *Tinker* applies. If the sufficient nexus between speech and a school campus is proven by a disruption caused on campus by the speech, then such a standard seems to render the application of *Tinker* a *fait accompli*.

only amplified with the “reasonably foreseeable” standard, a formulation that allows for schools to exercise jurisdiction over online student speech when it is “reasonably foreseeable” that speech “would come to the attention of school authorities”¹⁹⁵ — a determination that is invariably made after some disturbance has already occurred at a school. Additionally, some courts apply a version of the standard that examines whether it was reasonable for a school to forecast a disruption because of online speech.¹⁹⁶ Thus when what should be a threshold jurisdictional question simply becomes another means of applying *Tinker*, it is little surprise that courts in these cases ultimately uphold school discipline.

In *J.S. v. Bethlehem Area School District*,¹⁹⁷ the Pennsylvania Supreme Court used the sufficient nexus standard¹⁹⁸ in deciding that a school’s decision to discipline a student for a “derogatory, profane, offensive and threatening” website¹⁹⁹ was constitutional.²⁰⁰ The “threatening” nature of the website was crystalized in a page that asked “Why Should She Die?” in reference to the student’s algebra teacher and implored readers to “[t]ake a look . . . at the reasons I gave then give me \$ 20 to help pay for the hitman.”²⁰¹ The website also featured a drawing of the teacher “with her head cut off and blood dripping from her neck.”²⁰²

¹⁹⁵ See *Wisniewski v. Bd. of Ed. of the Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 39 (2007) (defining the “reasonably foreseeable” standard).

¹⁹⁶ See *O.Z. v. Bd. of Trustees of the Long Beach Unified Sch. Dist.*, 2008 U.S. Dist. LEXIS 110409, *9 (C.D. Cal. 2008). See also Gower, *supra* note 145 at 724.

¹⁹⁷ 807 A.2d 847 (Penn. 2002).

¹⁹⁸ See *id.* at 865 (defining the sufficient nexus standard as one “where speech that is aimed at a specific school and/or its personnel is brought onto the school campus or accessed at school by its originator, the speech will be considered on-campus speech”).

¹⁹⁹ *Id.* at 851.

²⁰⁰ *Id.* at 869.

²⁰¹ *Id.* at 851.

²⁰² *Id.*

After deciding first that the webpage did not represent a true threat,²⁰³ the court then addressed the matter of whether the school had the authority to sanction a student for creating a website off-campus. In finding that the school did indeed have the authority to do so, the court pointed to several facts that justified a sufficient nexus between the website and the school — specifically that the student accessed the website at school and showed it to another student.²⁰⁴ The student, as the court argued, “facilitated the on-campus nature of the speech by accessing the web site on a school computer in a classroom, showing the site to another student, and by informing other students at school of the existence of the web site.”²⁰⁵ Furthermore, the court noted, the website was “aimed not at a random audience, but at the specific audience of students and others connected with this particular School District.”²⁰⁶ The court thus found that the targeted nature of the speech in addition to accessing the speech on campus meant that there was a sufficient nexus between the website and the speech to render the student’s off-campus site on-campus speech for the purposes of *Tinker*.²⁰⁷ Once *Tinker* was deemed controlling, the court found a sufficient disruption to justify the discipline levied against the student by pointing to the emotional and physical toll the website had on the student’s algebra teacher.²⁰⁸

²⁰³ Id. at 859 (“Cognizant of the narrowness of the exceptions to the right of free speech, and the criminal nature of a true threat analysis, we conclude that the statements made by J.S. did not constitute a true threat, in light of the totality of the circumstances present here. We believe that the web site, taken as a whole, was a sophomoric, crude, highly offensive and perhaps misguided attempt at humor or parody. However, it did not reflect a serious expression of intent to inflict harm. This conclusion is supported by the fact that the web site focused primarily on [the teacher’s] physique and disposition and utilized cartoon characters, hand drawings, song, and a comparison to Adolph Hitler. While [the teacher] was offended, certain others did not view it as a serious expression of intent to inflict harm.”).

²⁰⁴ Id. at 865.

²⁰⁵ Id.

²⁰⁶ Id. As the court elaborated, teachers “were the subjects of the site.” Id. “Thus, it was inevitable that the contents of the web site would pass from students to teachers, inspiring circulation of the web page on school property.” Id.

²⁰⁷ Id.

²⁰⁸ Id. at 869. After viewing the site, the teacher “was frightened, fearing someone would try to kill her.” Id. at 852. She experienced “stress, anxiety, loss of appetite, loss of sleep, loss of weight, and a general sense of loss of well being as a result of viewing the web site.” Id. Due to this emotional reaction, she was unable to teach the rest of the school year, and the school was forced to employ a series of substitute teachers that “disrupted the

While the Pennsylvania Supreme Court used the sufficient nexus standard to decide the matter of *Tinker*'s applicability in *J.S.*, at least three federal courts have employed the "reasonably foreseeable" standard during the process of ultimately upholding school discipline against violent online speech. In *Wisniewski v. Board of Education of the Weedsport Central School District*,²⁰⁹ the Second Circuit found that a student's online instant messenger avatar that depicted a teacher's shooting²¹⁰ was subject to discipline under *Tinker* because it was "student conduct that pose[d] a reasonably foreseeable risk" of rising to the attention of school authorities.²¹¹ The student in *Wisniewski* communicated online via AOL Instant Messenger,²¹² a program that allowed users to display a "buddy icon" to online friends.²¹³ The student's buddy icon was "a small drawing of a pistol firing a bullet at a person's head, above which were dots representing splattered blood" and below the drawing were the words "Kill Mr. VanderMolen," who was the student's English teacher.²¹⁴ After the icon came to the attention of school administrators, the student was suspended from school for a semester.²¹⁵

educational process of the students." *Id.* The court also pointed to other facts which tended to show a disruption: "Students were also adversely impacted. Certain students expressed anxiety about the web site and for their safety. Some students visited counselors. The web site was a 'hot' topic of conversation even prior to faculty discovery. Finally, among the staff and students, there was a feeling of helplessness and low morale. The atmosphere of the entire school community was described as that as if a student had died. Finally, the disruption also involved parents. Certain parents understandably voiced concerns for school safety and questioned the delivery of instruction by substitute teachers." *Id.* at 869.

²⁰⁹ 494 F.3d 34 (2nd Cir. 2007).

²¹⁰ *Id.* at 35-36.

²¹¹ *Id.* at 38.

²¹² *See id.* at 35 ("Instant messaging enables a person using a computer with Internet access to exchange messages in real time with members of a group (usually called 'buddies' in IM lingo) who have the same IM software on their computers. Instant messaging permits rapid exchanges of text between any two members of a 'buddy list' who happen to be online at the same time.").

²¹³ *See id.* at 35-36 ("The AOL IM program, like many others, permits the sender of IM messages to display on the computer screen an icon, created by the sender, which serves as an identifier of the sender, in addition to the sender's name. The IM icon of the sender and that of the person replying remain on the screen during the exchange of text messages between the two 'buddies,' and each can copy the icon of the other and transmit it to any other 'buddy' during an IM exchange.").

²¹⁴ *Id.* at 36.

²¹⁵ *Id.*

In determining the constitutionality of his suspension, the Second Circuit focused more on the jurisdictional issue rather than the question of whether the icon caused a material disruption in the school.²¹⁶ After establishing that the off-campus and online nature of the student's speech did "not necessarily insulate him from school discipline," the court noted that it was split "as to whether it must be shown that it was reasonably foreseeable that [the student's] IM icon would reach the school property or whether the undisputed fact that it did reach the school pretermits any inquiry as to this aspect of reasonable foreseeability."²¹⁷ Therefore, there was some preference on the three-judge panel for a rule that would have made *any* speech that found its way to campus in some form student speech, but the court applied the reasonably foreseeable standard more narrowly, concluding that "it was reasonably foreseeable that the IM icon would come to the attention of school authorities and the teacher whom the icon depicted being shot."²¹⁸ Furthermore, the court noted that a student's intent had no bearing on the question of reasonable foreseeability, thereby enabling discipline "whether or not [the student] intended his IM icon to be communicated to school authorities[.]"²¹⁹

While *Wisniewski* defined a more or less logical standard, other cases would apply reasonably foreseeable in a distinctly different manner. In *O.Z. v. Board of Trustees of the Long Beach Unified School District*,²²⁰ the U.S. District Court for the Central District of California found that a school district's disciplinary actions against a student were justified because it was

²¹⁶ As to the question of a disruption, the Second Circuit argued that "there can be no doubt that the icon, once made known to the teacher and other school officials, would foreseeably create a risk of substantial disruption within the school environment." *Id.* at 40. The court also noted that the teacher was "distressed" by the icon, *Id.* at 36, but that observation did not appear to factor into the court's analysis. *See also id.* at 40 (stating that "the risk of substantial disruption is not only reasonable, but clear").

²¹⁷ *Wisniewski*, 494 F.3d at 39.

²¹⁸ *Id.* at 40.

²¹⁹ *Id.*

²²⁰ 2008 U.S. Dist. LEXIS 110409 (C.D. Cal 2008).

“reasonable . . . for school officials to forecast substantial disruption of school activities.”²²¹ In *O.Z.*, a student and a friend created a slideshow (which was eventually posted to YouTube²²²) that was “essentially a dramatization of the murder” of the student’s English teacher.²²³ The slideshow included vulgar comments regarding the teacher’s appearance, pictures of the teacher, and “a butcher knife lunging at [the teacher’s] character from the camera’s point of view.”²²⁴ The slideshow, created and published online during spring break, went unnoticed for approximately two months before the teacher found it after “decid[ing] to ‘Google’ her name to see if any information could be obtained.”²²⁵ The teacher then informed the school principal, who decided to first suspend and then transfer the student.²²⁶

In upholding the discipline, the district court cited to *Wisniewski* as a “very similar” case,²²⁷ but the court applied the “reasonably foreseeable” standard much differently than the Second Circuit. Instead of arguing that it was reasonably foreseeable that the YouTube video would come to the attention of school administrators (as the Second Circuit contended in *Wisniewski*²²⁸), the district court argued that *Tinker* applied because “it would appear *reasonable*, given the violent language and unusual photos depicted in the slide show, for school officials to forecast substantial disruption of school activities.”²²⁹ However, this is not so much answering a jurisdictional question as it is simply applying *Tinker*, as the court argued that the student’s

²²¹ *Id.* at *9.

²²² As explained by the U.S. District Court for the Southern District of New York, “YouTube . . . has rapidly grown to become the leading provider of streaming video service on the Internet. In July 2008 almost 91 million unique visitors to its website watched five billion videos, constituting 44% of all videos viewed on the Internet in the United States during that month. These videos are streamed on demand and without charge.” *U.S. v. ASCAP*, 616 F. Supp. 2d 447, 449 (S.D.N.Y., 2009).

²²³ *O.Z.*, 2008 U.S. Dist. LEXIS at *2.

²²⁴ *Id.* at *3.

²²⁵ *Id.*

²²⁶ *Id.* at *3-4.

²²⁷ *Id.* at *6.

²²⁸ See *Wisniewski*, 494 F.3d at 38-39.

²²⁹ *O.Z.*, 2008 U.S. Dist. LEXIS at *9 (emphasis in original).

slideshow “did reach [the teacher] and the school principal” and that “[t]herefore, although [the student] created the slide show off-campus, it created a foreseeable risk of disruption within the school.”²³⁰

Despite its approving citation, the district court’s approach in *O.Z.* represented a distinct break from *Wisniewski*. Where the *Wisniewski* court was at least split on the idea that any student speech once found by an administration was subject to its authority,²³¹ that is, in essence, the position adopted by the *O.Z.* court. The slideshow, as the court argued, was “a foreseeable risk of disruption” due to its content.²³² But the slideshow’s existence was not widespread knowledge at school, and it was not broadly circulated. It was merely one video posted to YouTube — a website that sees 100 hours of video uploaded every minute and more than 1 billion unique visits a month²³³ — that was discovered by chance. Such chance is hardly foreseeable, as without the teacher’s Google search, the video could have gone undiscovered. If it could have persisted as a non-issue — as it did for the two months between its creation and its discovery — then it makes little sense to argue that the video represented a foreseeable risk of disruption.

Rather, the court could have asserted that the speech was subject to the school’s discipline under the “sufficient nexus” standard and that there was an actual disruption on campus due to the teacher’s reaction to the video.²³⁴ It is unclear from the court’s opinion whether there was a sufficient actual disruption to justify discipline,²³⁵ but this approach would

²³⁰ *Id.* at 11.

²³¹ See note 217 and accompanying text, *supra*.

²³² *O.Z.*, 2008 U.S. Dist. LEXIS at *11.

²³³ Statistics, YOUTUBE, <http://www.youtube.com/yt/press/statistics.html>

²³⁴ As the court noted, the teacher “feared for her safety and became physically ill” due to the YouTube video. *O.Z.*, 2008 U.S. Dist. LEXIS at *10. It is not clear from the court’s opinion whether other students knew of the slideshow.

²³⁵ See *id.* and previous note.

have been more methodologically sound in contrast to the questionable reasoning employed by the *O.Z.* court.²³⁶

However, the U.S. District Court for the Northern District of Mississippi followed the reasoning in *O.Z.* rather than that in *Wisniewski* in deciding *Bell v. Itawamaba County School Board*.²³⁷ In *Bell*, a high school senior recorded a rap song that accused two coaches at the school of sexual impropriety,²³⁸ and the song was subsequently “published for over 1,300 friends on Facebook.com and for an unlimited audience on YouTube.com.”²³⁹ The song also referenced violence toward the coaches, as the court suggested the

two most threatening lyrics [are] (1) “looking down girls' shirts / drool running down your mouth / messing with wrong one / going to get a pistol down your mouth” and (2) “middle fingers up if you can't stand that nigga / middle fingers up if you want to cap that nigga.”²⁴⁰

Once the school became aware of the song, the student was removed from class for a meeting with the principal, district superintendent, and school board attorney — a meeting during which the attorney “accused him of making threats and false allegations.”²⁴¹ The student

²³⁶ The court’s decision is premised on the reasonable forecast of a disruption. *Id.* at *11. This potential disruption is characterized by the court as the specter of “anything . . . happen[ing]” to the teacher, a “physical attack” by the student, or “ridicule directed at [the teacher] by other students.” *Id.* at *10. The video was not treated as a threat (negating the first two possible disruptions), and it seems that the Constitution should require more than the idea of possible “ridicule” before pure speech is punished. Therefore, in *O.Z.*, the arguments for a possible disruption — on the facts contained in the district court’s opinion — are relatively unpersuasive.

²³⁷ 859 F. Supp. 2d 834 (N.D. Miss. 2012).

²³⁸ As described by the court, the song “contained lyrics stating that Coach Wildmon is a ‘dirty ass nigger,’ is ‘fucking with the whites and now fucking with the blacks,’ is a ‘pussy nigger,’ is ‘fucking with the students he just had a baby,’ and is ‘fucking around cause his wife ain’t got no titties.’ The song also states that Coach Wildmon tells female students they ‘are sexy’ and the reason that the singer . . . quit the basketball team is because Coach Wildmon ‘is a pervert.’” *Id.* at 839, n. 3.

²³⁹ *Id.* at 836.

²⁴⁰ *Id.* at 840.

²⁴¹ *Id.* at 836.

was ultimately suspended for seven days and transferred to an alternative school for the rest of the semester.²⁴²

In upholding the school's discipline,²⁴³ the court observed that *Tinker* "specifically ruled that off-campus conduct causing material or substantial disruption at school can be regulated by the school."²⁴⁴ The court reached this conclusion from a passage in the Supreme Court's opinion that noted that "conduct by a student, in class or out of it which for any reason ... materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech."²⁴⁵ However, a more reasonable reading of *Tinker* suggests that the passage cited by the *Bell* court "refers to other parts of campus within the schoolhouse gates, not to areas outside the school grounds altogether."²⁴⁶ On the basis of that misconception, the court distilled the matter of the constitutionality of the schools punishment into two questions: whether the student's "song caused or tended to cause a material and/or substantial disruption at school" and "whether it was reasonably foreseeable to school officials that the song would cause a material and/or substantial disruption at school."²⁴⁷

The first question is clearly a traditional application of *Tinker*, while the second, much like the *O.Z.* court's application, is a fundamental misunderstanding of the question of whether a school's authority should apply in a given situation. In essence, the *Bell* court's formulation is nothing more than applying *Tinker* twice as the word "tended" in its first inquiry implies

²⁴² *Id.*

²⁴³ *See id.* at 841 ("The court finds that [the student's] song caused a material and/or substantial disruption and it was reasonably foreseeable that such a disruption would occur. The song is not protected by the First Amendment, and the school did not err in punishing [the student] for publishing it to the public.").

²⁴⁴ *Id.* at 837-38.

²⁴⁵ *Id.* at 837 (quoting *Tinker*, 393 U.S. at 506).

²⁴⁶ Tuneski, *supra* note 43, at 160. As Tuneski further noted, the sentence in *Tinker* "appears in a paragraph that is clearly geared towards protecting rather than restricting speech." *Id.*

²⁴⁷ *Bell*, 859 F. Supp. 2d at 839.

speculation as to whether speech would cause a disruption — the very focus of its second question. Much like in *O.Z.*, the more consistent and logical approach to *Bell* would have been to rely on a different jurisdictional threshold question (either sufficient nexus or reasonably foreseeable as applied in *Wisniewski*) and simply examine the disruption that did occur on campus because of the YouTube video.²⁴⁸

The plaintiffs in *J.S.*, *Wisniewski*, *O.Z.*, and *Bell* all lost their legal challenges to school discipline that resulted from online violent student speech. Whether they should have lost is debatable, but what is clear is that the *O.Z.* and *Bell* courts seriously confused the issue of school jurisdictional authority. The “sufficient nexus” standard as seen in *J.S.* may be vague, but at least it attempts to answer the question of whether a school has authority over online speech. That stands in contrast to the “reasonably foreseeable” standard as employed by courts in *O.Z.* and *Bell*. In deciding whether a school should have the authority to punish a student for online and admittedly off-campus speech, the question of jurisdiction is an important one, and it should not be merged with the ultimate investigation into whether there was a disruption on campus because of the speech.

Tinker should be limited and controlled in such a way that there is a preliminary inquiry into whether it even applies in a given situation. If the speech is not clearly student in nature, then *Tinker* — and the full authority that comes with the school in the case of a material/substantial disruption — should not be brought to bear upon otherwise protected expression. Therefore, it should be of little surprise that when courts seriously consider the question of school jurisdiction, students can prevail even in cases of violent student speech.

ii. Student victories in online violent student speech

²⁴⁸ See *id.* at 840 (framing the actual disruption in the school as a coach receiving a text message informing him of the video, a coach asking students whether they had watched the video, a coach feeling threatened due to the video, and two coaches asserting that their “teaching style[s] [had] been adversely affected”).

In contrast to the previously discussed cases, courts that have sided with students in disputes over online violent student speech have focused both on the off-campus nature of such speech and the absence of an actual disturbance rather than a school's reasonable forecast of a potential disruption.

In *Emmett v. Kent School District No. 415*,²⁴⁹ the U.S. District Court for the Western District of Washington simply said that a student's website featuring mock obituaries of fellow students²⁵⁰ was "entirely outside of the school's supervision or control" even as "the intended audience was undoubtedly connected" to the school.²⁵¹ While the court did not elaborate on why the website was outside of the school's control,²⁵² it distinguished the website from student speech seen in *Fraser* and *Hazelwood*, arguing that the site "was not at a school assembly" and "not in a school-sponsored newspaper," respectively.²⁵³ Furthermore, the court found that the website was not "intended to threaten anyone," it did not "actually threaten anyone," and it did not "manifest[] any violent tendencies whatsoever" — a conclusion that suggests the court viewed the website as fully protected speech under the First Amendment that merely had a connection to the student's school. This connection, however, was not enough in the court's view to overcome the speech's protected status and its "out-of-school nature."²⁵⁴

In ruling for a student in a dispute over a violent website in *Mahaffey v. Alrich*,²⁵⁵ the U.S. District Court for the Eastern District of Michigan based its decision on both the geographic

²⁴⁹ 92 F. Supp. 2d 1088 (W.D. Wash. 2000).

²⁵⁰ *Id.* at 1089. This case has previously been discussed as an example of violent curricular student speech. *See also* Chapter 5, *supra*.

²⁵¹ *Id.* at 1090.

²⁵² The court alternately referred to the website as "entirely outside of the school's supervision or control" and "out-of-school." *Id.* While this suggests a geographic boundary, the court is not specific in its conclusion.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ 236 F. Supp. 2d 779 (E.D. Mich. 2002).

limits of a school's authority²⁵⁶ and the lack of an on-campus disturbance caused by the student's speech.²⁵⁷ The student's website, titled "Satan's web page," declared that it had "no purpose" as it listed "people I wish would die" and "people that are cool."²⁵⁸ Near the bottom of the webpage, the student gave out "SATAN'S MISSION FOR YOU THIS WEEK," which implored visitors to

Stab someone for no reason then set them on fire throw them off of a cliff, watch them suffer and with their last breath, just before everything goes black, spit on their face. Killing people is wrong don't do It [sic]. unless [sic] Im [sic] there to watch. Or just go to Detroit. Hell is right in the middle. Drop by and say hi.²⁵⁹

Another student's parent informed the local police about the website, and the police then told the school. The student admitted to creating the website and also told investigators that school computers "may have been used" in putting the website together.²⁶⁰ While police ultimately decided against criminal charges for the student,²⁶¹ the school district suspended him.²⁶²

In its analysis of the student's First Amendment claim, the district court began by reciting relevant principles from *Tinker*, noting that the case "dealt with student activities that occurred on school property."²⁶³ The court then distinguished the facts in *Tinker* from the student's website, finding that "the evidence simply does not establish" that any activity regarding the

²⁵⁶ See id. at 784.

²⁵⁷ See id. at 785, 786.

²⁵⁸ Id. at 781-82. According to the student, he created the website "for laughs" because he and his friends "were bored" and "wanted something to do." Id. at 781.

²⁵⁹ Id. at 782.

²⁶⁰ Id. (quoting Defs.' Ex. Z).

²⁶¹ While the court's opinion is not clear on this point, police involvement seemed to end after the preliminary complaint and subsequent investigation.

²⁶² *Mahaffey*, 236 F. Supp. 2d at 782. The student, threatened with expulsion, transferred to another school district before he and his parents decided to seek readmission at the school that suspended him. Id. at 782-83. Even after the threatened expulsion was replaced with a semester-long suspension, the student decided to remain at his new school and graduated a year early after skipping the 11th grade. Id. at 783.

²⁶³ Id.

website took place on campus.²⁶⁴ The court noted that, while the student suggested that he “may have” used school computers to work on his website, the school “did not investigate this statement any further by examining school computers, or by any other means.”²⁶⁵

But the court hedged on the question of whether *Tinker* truly applied, stating that “[e]ven assuming that the conduct in question did occur on [school] property” the school could only punish the student upon a showing of a material/substantial disruption. However, the court found that “there [was] no evidence that the website interfered with the work of the school.” Therefore, it was a lack of an actual disruption in the school — and not a limitation of the school’s jurisdiction — that served as the basis for the court’s decision. Yet to further accentuate the protected nature of the speech, the court also determined that it did not represent unlawful advocacy²⁶⁶ or a true threat.²⁶⁷ Still, as the court concluded, disciplinary action due to the website “without any proof of disruption to the school or on campus activity in the creation of the website was a violation of Plaintiff’s First Amendment rights”²⁶⁸ — a holding that again reflects an uncertainty regarding the boundaries of *Tinker*.²⁶⁹

As seen in *Emmett* and *Mahaffey*, when courts seriously consider whether violent online speech is truly student speech, pro-student and pro-speech outcomes are possible. However, the

²⁶⁴ Id. at 784.

²⁶⁵ Id.

²⁶⁶ See id. at 785.

²⁶⁷ Id. at 786 (“[A] reasonable person in Plaintiff’s place would not foresee that the statements on the website would be interpreted as a serious expression of an intent to harm or kill anyone listed on the website. Plaintiff’s listing of names under the heading ‘people I wish would die,’ did not constitute a threat to the people listed therein anymore than Plaintiff’s listing of names under the heading ‘people that are cool,’ make those listed therein ‘cool.’ The website and the statements contained thereon do not constitute a threat and are, therefore, protected speech.”).

²⁶⁸ Id.

²⁶⁹ The court’s holding would have been more definitive had it based its opinion exclusively on the absence of a disruption or on the off-campus nature of the speech, as either conclusion could have served as the grounds for the court’s decision.

Internet “is no longer a collection of static pages of HTML”²⁷⁰ as it was when those two district court cases were decided. Now, the Internet is interactive with services like YouTube and is truly everywhere, as smartphones and other devices enable users to stay connected away from the traditional desktop computer.²⁷¹ It was in this newer, more connected web environment that *O.Z.* and *Bell* were decided. While those courts did not premise their decisions on the interconnectivity of modern digital media, this will likely be a key concern for courts in the future as they struggle to answer the question of whether there can be *any* off-campus speech in a world where most students carry the Internet in their pockets.

But the difficulties in defining the limits of *Tinker* are hardly new. As seen in *Sullivan*, *Shanley*, and *Thomas*, courts have been unable to draw a clear line in the sand for the purposes of school jurisdiction as applied to student speech.²⁷² Still, minors must have the ability to engage in some speech that is not subject to school authority,²⁷³ and courts should work to both uphold that right and to limit in a consistent and principled way the authority of school administrators to the confines of the schoolhouse gate.

III. On-campus violent student speech and the reasonable exercise of school authority

In contrast to previously discussed cases, in many instances under *Tinker*, the question of if a school has jurisdictional authority over speech is self-evident — meaning that the speech was on-campus and the only real matter is whether there was a material/substantial disruption caused by the student’s speech. In cases of violent student speech, courts are generally receptive to

²⁷⁰ Tim O’Reilly & John Battelle, *Web Squared: Web 2.0 Five Years On*, WEB 2.0 SUMMIT 2 (2009), available at http://assets.en.oreilly.com/1/event/28/web2009_websquared-whitepaper.pdf.

²⁷¹ See generally *id.*

²⁷² See Part II.a.1, *supra*.

²⁷³ See Chapter 4, *infra*, for discussion on the free speech rights of minors generally.

school arguments regarding the seriousness of actual or potential disruptions.²⁷⁴ In some instances, this deference is warranted, especially where violent student speech resembles a plan of attack or hints at the seriousness of a student's intentions. However, some cases represent a clear overreach in the guise of security. Thus, deference should be granted along a spectrum, with the least amount of judicial inquiry and broadest grant of authority to schools in cases of literal violent speech, more judicial inquiry into violent student speech cases involving figurative speech, and the greatest skepticism and least amount of school authority in cases where violence is mentioned only in the abstract.

a. Literal violent student speech

After the shooting at Columbine High School and other high-profile tragedies, schools began to focus on student depictions of violence as a means of forecasting future incidents of violence.²⁷⁵ While this attention to student speech resulted in an increased scrutiny of violent student art work, the extra attention makes the most sense with literal violent student speech — meaning student speech outside the context of poetry, art, or any other clearly creative context. In this area, when on-campus student speech begins to closely resemble true threats or illegal advocacy, school authority should be nearly at its zenith.²⁷⁶ However, this authority should still be exercised in a manner consistent with the Supreme Court's jurisprudence on advocacy and with careful consideration of whether a student intended to communicate the expression in question. The latter issue is especially important as schools run the risk of punishing “thought

²⁷⁴ See R. George Wright, *Doubtful Threats and the Limits of Student Speech Rights*, 42 U.C. DAVIS L. REV. 679, 715 (2009) (“[I]n the post-Columbine era, the meaning and rigor of the *Tinker* disruption standard has in practice significantly changed, even if the test remains formally unchanged. This shift in substance may or may not be justified. Either way, however, we are better off explicitly admitting such a judicial shift. Transparency and candor require no less.”).

²⁷⁵ Barbara J. Brunner, Note, *The Right to Write? Free Expression Rights of Pennsylvania's Creative Students After Columbine*, 107 DICK. L. REV. 891, 891-92 (2003).

²⁷⁶ School authority to address student speech issues connect with the specter of violence is at its absolute maximum when student speech is unambiguously threatening. See Chapter 7, *infra*.

crimes” for the sake of school safety²⁷⁷ when students have no intention of communicating their violent thoughts to anyone.²⁷⁸

Advocacy of illegal action was a central issue in *Pangle v. Bend-Lapine School District*.²⁷⁹ In that case, the Court of Appeals of Oregon found that a underground student newspaper’s “advocacy of acts such as bomb threats, interfering with the public address system, poisoning and harassment of school personnel and explosions on school grounds is a form of expression that extends beyond mere protest”²⁸⁰ and was thus subject to punishment under *Tinker*.²⁸¹ The underground student newspaper at issue in *Pangle* was distributed on campus²⁸² and featured articles critical of both “the school environment fostered by teachers and the school administration” and the administration’s “handling of a student event.”²⁸³ However, the newspaper also included a list of “TOP TEN THINGS”²⁸⁴ that were to be used against the “‘forces that be’ in our society”²⁸⁵ — a set of directives that included suggestions to poison teachers, spread noxious smells on campus, glue locks, use fireworks on campus, make bomb threats, hack the school’s intercom system, and use the names and addresses of teachers to reply

²⁷⁷ Louis P. Nappen, Note, *School Safety v. Free Speech: The Seesawing Tolerance Standards for Students' Sexual and Violent Expressions*, 9 TEX. J. ON C.L. & C.R. 93, 119 (2003).

²⁷⁸ This does not preclude any therapeutic measures designed to help — rather than punish — students. See Chapter 5, *supra*.

²⁷⁹ 10 P.3d 275 (Ore. 2000).

²⁸⁰ *Id.* at 287.

²⁸¹ *Id.*

²⁸² *Id.* at 277. While the majority opinion does not devote attention to this issue, the newspaper was presumably subject to discipline under *Tinker* because it was distributed on campus. *But see id.* at 289 (Armstrong, J., concurring in part and dissenting in part) (“The only on-campus activity was distributing the newspaper. Nothing about the newspaper even suggests that it was an official school publication — if anything, it screams its unofficial nature — and no reasonable person could believe that it spoke for the school or the district.”); *id.* at 290 (suggesting student was suspended because the language of the newspaper was “vulgar and threatening” and that the school district’s actions were therefore premised on *Fraser*); *id.* at 291 (“Given the climate in the country in December 1965, when the students in *Tinker* wore their armbands, I suspect that their actions were at least as disconcerting as were [the student’s] actions in this case.”).

²⁸³ *Id.* at 281 (majority op.).

²⁸⁴ *Id.*

²⁸⁵ *Id.* at n. 9.

to personal ads.²⁸⁶ For many of the items on the list, the student provided information, like the location of the public address system's wiring and a list of the addresses and telephone numbers of "every teacher, disciplinary bastard, cook and janitor,"²⁸⁷ that would enable a reader to carry out the suggestions contained in the article.²⁸⁸ After a student was determined to be responsible for distributing the newspaper, writing articles and aiding in its production,²⁸⁹ he was suspended and subsequently recommended for an expulsion.²⁹⁰

After the student and his parents sued the school district alleging a violation of his First Amendment right, the trial court found the discipline constitutional under *Tinker* because the newspaper was "intended to materially and substantially interfere with the school's operation."²⁹¹ The Court of Appeals of Oregon upheld the trial court's decision as it concluded the student "advocated specific methods for causing personal injury, property damage and the disruption of school activities," and the school district could have reasonably concluded the newspaper would substantially interfere with school operations.²⁹²

The decision justifying the school's actions is consistent with the Supreme Court's jurisprudence regarding advocacy to illegal action, a doctrine with an origin in various Communism scares and effectively settled with the Court's 1969 decision in *Brandenburg v. Ohio*.²⁹³ With *Whitney v. California*²⁹⁴ in 1927, the Court began its exploration in advocacy by upholding a conviction under a California law that criminalized the organization of, or

²⁸⁶ Id. at 281-82.

²⁸⁷ Id. at 282.

²⁸⁸ See id. at 281-82.

²⁸⁹ Id. at 277.

²⁹⁰ Id. at 277-78.

²⁹¹ Id. at 278 (quoting trial court decision).

²⁹² Id. at 286.

²⁹³ 395 U.S. 444 (1969) (*per curiam*).

²⁹⁴ 274 U.S. 357 (1927).

membership in, any group that argued for “a change in industrial ownership or control” by means of violence.²⁹⁵ In its opinion, the Court noted its deference to California’s determination that

to knowingly be or become a member of or assist in organizing an association to advocate, teach or aid and abet the commission of crimes or unlawful acts of force, violence or terrorism as a means of accomplishing industrial or political changes, involves such danger to the public peace and the [security] of the State, that these acts should be penalized in the exercise of its police power.²⁹⁶

The court then likened the prohibited political affiliation to “criminal conspiracy” and found it was “clear” that “united and joint action involves even greater danger to the public peace and security than the isolated utterances and acts of individuals.”²⁹⁷ Therefore, as the court concluded, “We cannot hold that . . . those persons are protected from punishment . . . who abuse [free speech, assembly, and association] rights by joining and furthering an organization thus menacing the peace and welfare of the State.”²⁹⁸

However, it was the concurring opinion by Justice Louis Brandeis²⁹⁹ that “laid out the protectionist analysis of the constitutionality of convictions for unlawful advocacy”³⁰⁰ and argued that the standard for advocacy should be the Court’s “clear and present danger” test as originally formulated in *Schenck v. U.S.*³⁰¹ As Justice Brandeis argued, the state may silence speech to protect itself “from destruction or from serious injury, political, economic or moral.”³⁰² The necessity to act, Justice Brandeis explained, “does not exist unless speech would produce, or

²⁹⁵ Id. at 359 (quoting California’s Criminal Syndicalism act). This was an obvious reference to Communism.

²⁹⁶ Id. at 372.

²⁹⁷ Id.

²⁹⁸ Id.

²⁹⁹ See id. at 372-80 (Brandeis, J., concurring). Justice Brandeis concurred in the Court’s decision because of a procedural matter and not the merits of the case. Id. at 380. (“We lack here the power occasionally exercised on review of judgments of lower federal courts to correct in criminal cases vital errors, although the objection was not taken in the trial court. This is a writ of error to a state court. Because we may not enquire into the errors now alleged, I concur in affirming the judgment of the state court.”).

³⁰⁰ Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CALIF. L. REV. 1159, 1170 (1982).

³⁰¹ 249 U.S. 47 (1919).

³⁰² *Whitney*, 274 U.S. at 373 (Brandeis, J., concurring).

is intended to produce, a clear and imminent danger of some substantive evil which the State constitutionally may seek to prevent[.]”³⁰³

The Court clarified the advocacy doctrine as applied to speech arguing for the violent overthrow of the U.S. government with two cases in the 1950s. In the first case, *Dennis v. U.S.*,³⁰⁴ the Court upheld the conviction of a defendant prosecuted under the Smith Act, a federal law criminalizing actions related to the advocacy of “the overthrow or destruction of any government in the United States by force or violence.”³⁰⁵ After pronouncing that “speech is not an absolute” and “to those who would paralyze our Government in the face of impending threat by encasing it in a semantic straitjacket we must reply that all concepts are relative,”³⁰⁶ the Court then applied the clear and present danger test.³⁰⁷

Adopting a formulation from Chief Judge Learned Hand, the Court phrased the test as an inquiry into “whether the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.”³⁰⁸ The Court found the government’s prosecution was justified using this analysis because it framed the defendants as engaged in “a highly organized conspiracy”³⁰⁹ to advocate for the overthrow of the government. Where such a plot exists, the Court argued, it is the mere “existence of the conspiracy which creates the danger.”³¹⁰ As the Court concluded, the government need not wait for would-be

³⁰³ *Id.*

³⁰⁴ 391 U.S. 494 (1951).

³⁰⁵ *Id.* at 496 (quoting Smith Act).

³⁰⁶ *Id.* at 508.

³⁰⁷ *See id.* at 508-10.

³⁰⁸ *Id.* at 510.

³⁰⁹ *Id.* at 511.

³¹⁰ *Id.*

conspirators to act before the state moves against them: “If the ingredients of the reaction are present, we cannot bind the Government to wait until the catalyst is added.”³¹¹

In *Yates v. U.S.*,³¹² another Smith Act case, the Court backed away from this broad governmental authority to act against free speech and association rights in the name of unlawful advocacy as it overturned the convictions of 14 Communist Party members.³¹³ In *Yates*, the Court phrased the legal issue before it as a question of “whether the Smith Act prohibits advocacy and teaching of forcible overthrow as an abstract principle, divorced from any effort to instigate action to that end, so long as such advocacy or teaching is engaged in with evil intent.”³¹⁴ In deciding that simple teaching was outside of the proscribable limits of the Smith Act and therefore constitutionally protected speech, the Court drew a distinction between “advocacy, even though uttered with the hope that it may ultimately lead to violent revolution” and “concrete action to be regarded as . . . indoctrination preparatory to action[.]”³¹⁵ Thus, as the Court explained, “The essential distinction is that those to whom the advocacy is addressed must be urged to *do* something, now or in the future, rather than merely to *believe* in something.”³¹⁶

Finally, in *Brandenburg v. Ohio*, the Court recast illegal advocacy as a call to immediate rather than somewhat speculative action.³¹⁷ In *Brandenburg*, the Court overturned the criminal conviction of a Ku Klux Klan leader captured by television camera as he said, “We’re not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it’s possible that there might have to be some revengeance

³¹¹ *Id.*

³¹² 354 U.S. 298 (1957).

³¹³ *Id.* at 301-03.

³¹⁴ *Id.* at 318.

³¹⁵ *Id.* at 321-22.

³¹⁶ *Id.* at 324-25 (emphasis in original).

³¹⁷ See *Brandenburg*, 395 U.S. at 447.

taken.”³¹⁸ The defendant was found guilty of violating the Ohio Criminal Syndicalism Statute, a law similar to the one at issue in *Whitney*.³¹⁹

However, in *Brandenburg*, the Court described *Whitney* as “thoroughly discredited” decision.³²⁰ Instead, as the Court argued, later cases like *Dennis*

fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing *imminent lawless action* and is likely to incite or produce such action.³²¹

“Imminent lawless action” became the operable phrase from *Brandenburg* and the standard for incitement and advocacy. *Brandenburg* did not expressly replace the clear and present danger test, but the opinion at least seems to incorporate the test by reference.³²² Furthermore, the opinion left open the question of what exactly is “imminent.”³²³ Still, *Brandenburg* strikes a better balance than *Dennis* or *Yates* between the needs of the state and the needs of the individual because — no matter how indefinite “imminent” may be — the standard still calls for action in the near future before speech can be proscribed. That focus is a stark contrast to the permissibility of earlier decisions that allowed for Communists to be jailed simply for believing in the tenet central to their political philosophy.

With the principles of *Brandenburg* and other advocacy cases established, the verdict for the school in *Pangle* is easily justifiable. As the *Pangle* trial court concluded, the student’s newspaper was designed to disrupt the school environment because it “actively promote[d]

³¹⁸ *Id.* at 446.

³¹⁹ *Id.* at 447. *See also* note 295, *supra*.

³²⁰ *Brandenburg*, 395 U.S. at 447.

³²¹ *Id.* (emphasis added).

³²² *See* Redish, *supra* note 300, at 1174-75 (“At no point did the opinion refer to the clear and present danger test by name, but it appeared to incorporate its meaning by finding the standard to be that ‘the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.’”) (quoting *Brandenburg*, 395 U.S. at 447).

³²³ Redish, *supra* note 300, at 1175.

chaos.”³²⁴ This danger of chaos was stoked by the student’s suggestion to “[f]eed . . . Visine to someone” because it will “send them to the bathroom almost instantly” — a prompt that was only one suggestion on his top ten list.³²⁵ As soon as the student began to distribute his paper on campus, it represented a danger to the basic operation of the school and the well-being of teachers and others. In short, it represented a threat of imminent lawless action, the type of threat actionable under *Brandenburg* and certainly sanctionable under *Tinker*.

Yet *Pangle* represents more of an exception than a rule. In most instances, violent student speech will fall far short of illegal advocacy, much as such speech falls short of the true threat standard. Still, schools are undoubtedly leery of appearing weak or indecisive where speech resembles a literal call to action or attack. However, in these cases, it is important to determine whether a student had any intention to communicate their literal writings as there surely cannot be any advocacy without someone serving as a willing advocate. The student in *Pangle* certainly intended to disseminate his message by assisting in the distribution of the newspaper,³²⁶ but that intent has not been shared by all student speakers disciplined for violent student speech.

Two cases from the federal circuit courts of appeal — *Ponce v. Socorro Independent School District*³²⁷ and *Boim v. Fulton County School District*³²⁸ — illustrate the importance of requiring intent to disseminate communication before a student can be punished. In *Ponce*, the Fifth Circuit upheld the discipline of a student who “kept an extended notebook diary” that detailed his creation of a “pseudo-Nazi group” at his high school that then perpetrated several crimes including attacks on minorities, arson, and animal abuse.³²⁹ The notebook also contained

³²⁴ *Pangle*, 10 P.3d at 278 (quoting trial court decision).

³²⁵ *Id.* at 281-82.

³²⁶ *Id.* at 277.

³²⁷ 508 F.3d 765 (5th Cir. 2007).

³²⁸ 494 F.3d 978 (11th Cir. 2007).

³²⁹ *Ponce*, 508 F.3d at 766.

the group’s plot to commit a “[C]olumbine shooting” attack on the school.³³⁰ After the notebook’s author showed another student what he had written, that student then told a teacher about the notebook.³³¹ The teacher, after waiting a day, then told the school’s principal, who called the author to his office, searched his backpack, and found the notebook.³³² The notebook was confiscated, but the student was released “back into the general student population.”³³³ However, when the principal read the notebook several times after taking it home, he decided that the writing constituted a “terroristic threat” to the school, and he suspended the student for three days and suggested a transfer to an alternative educational program.³³⁴

In upholding the discipline, the court relied on Justice Alito’s concurring opinion in *Morse* — an opinion that, in the words of the Fifth Circuit, explained “why some harms are in fact so great in the school setting that requiring a school administrator to evaluate their disruptive potential is unnecessary.”³³⁵ As the court argued, “The speech in question here is not about violence aimed at specific persons, but of violence bearing the stamp of a well-known pattern of recent historic activity: mass, systematic school-shootings in the style that has become painfully familiar in the United States.”³³⁶ The court thus relied on the fears of Columbine to justify its decision, stating that it would have been “untenable” for a “reasonable school official” to not act after finding the student’s diary. As the court concluded, “Our recent history demonstrates that threats of an attack on a school and its students must be taken seriously.”³³⁷

³³⁰ *Id.*

³³¹ *Id.*

³³² *Id.*

³³³ *Id.* at 767.

³³⁴ *Id.*

³³⁵ *Id.* at 770. *See also* Chapters 2 and 5, *supra* (explaining why Justice Alito’s concurring opinion is an inappropriate standard for violent student speech).

³³⁶ *Id.* at 770-71.

³³⁷ *Id.* at 771.

The *Ponce* court's fears and the fears of administrators are certainly understandable in the wake of school shootings across the country, but suspending a student for three days did little to prevent any sort of violence at the school.³³⁸ Still, there was likely a rational argument to be made under *Tinker* that once the student disclosed his notebook to another, school administrators could reasonably forecast a disruption in the school environment. Such a disruption would not be based on the possible school shooting; rather, it would be the fears in the school community over a shooting. This argument is more rational, avoids appealing to the deep-seated fears of school violence, and relies on established Supreme Court precedent rather than an irrational reading of an opinion that was designed to enable student speech rather than prohibit it.³³⁹

Again, this disruption argument relies on a student sharing the notebook with others purposefully, an act that was absent in *Boim*. The facts in *Boim* were similar to those in *Ponce* as a student was disciplined due to writings contained in a personal notebook.³⁴⁰ In *Boim*, a student loaned a notebook to a friend, who was then observed writing in the notebook by an art teacher.³⁴¹ The friend was asked to cease writing in the notebook, but he persisted.³⁴² When the art teacher asked the friend to hand over the notebook, the friend gave the notebook back to the student, and the art teacher then asked the student for the notebook.³⁴³ The student initially refused to hand over the notebook but then acceded to the art teacher's demand — but only to give the teacher what amounted to a decoy notebook.³⁴⁴ The art teacher persisted and was

³³⁸ This is not to say that there should not have been any intervention at all. See Chapter 5, *supra* (advocating therapeutic rather than disciplinary measures in instances of violent student speech).

³³⁹ By its own terms, Justice Alito's concurring opinion was designed to limit the scope of *Morse*, not broaden it. See Chapter 2, *supra*.

³⁴⁰ See *Boim*, 494 F.3d at 980-81.

³⁴¹ *Id.* at 980.

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ *Id.*

eventually given the original notebook. In it, the art teacher found a partitioned section marked “Dream,” which contained a short story:

As I walk to school from my sisters [sic] car my stomach ties itself in knots. [sic] I have nervousness tingling [sic] up and down my spine and my heart races. No one knows what is going to happen. I have the gun hidden in my pocket. I cross the lawn and head [sic] to my locker on A hall. Smiling sweetly to my friends hoping they don't notice the cold sweat that has developed on my forehead [sic]. I'm walking up to the front office when the bell rings for class to start. So afraid that I think I might pass out. I ask if my mother dropped off a book I need. No. My first to [sic] classes pass by my heart thumping so hard I'm afraid every one can hear it. Constantly I can feel the gun in my pocket. 3rd period, 4th, 5th then 6th period [sic] my time is coming. I enter the class room my face pale. My stomach has tied itself in ___ knots ___ be able to untie them. Then he starts taking role. Yes, my math teacher. I loathe [sic] him with every bone in my body. Why? I don't know. This is it. I stand up and pull the gun from my pocket. BANG the force blows him back and every one in the class sit [sic] there in shock. BANG he falls to the floor and some one lets out an ear piercing scream. Shaking I put the gun in my pocket and run from the room. By now the school police officer is running after me. Easy I can out run him. Out the doors, almost to the car. I can get away. BANG this time a shot was fired at me. I turn just in time to see the bullet running at me. Almost like its [sic] in slow motion. Then, the bell rings, I pick my head off my desk, shake my head and gather up my books off to my next class.³⁴⁵

The art teacher believed the story was “planning in disguise as a dream” and took the notebook to the school's disciplinarian.³⁴⁶ The student was initially suspended before being eventually expelled.³⁴⁷

In upholding the school's actions, the Eleventh Circuit argued that there was no First Amendment right to yell “fire” in a crowded theater, make false statements regarding a bomb on an airplane, or for a student to “knowingly make comments, whether oral or written, that reasonably could be perceived as a threat of school violence, whether general or specific, while

³⁴⁵ Id. at 980-81.

³⁴⁶ Id. at 981.

³⁴⁷ Id. at 982.

on school property during the school day.”³⁴⁸ After the court concluded the school did not infringe on the student’s First Amendment rights, the court wrote that “[w]e can only imagine what would have happened if the school officials, after learning of [the student’s] writing, did nothing about it and the next day [the student] did in fact come to school with a gun and shoot and kill her math teacher.”³⁴⁹

The *Boim* court, like the *Ponce* court, signaled support for a standard built on *Morse*; however, the *Boim* court argued it was the majority’s limitation on student speech promoting illegal drugs and not Justice Alito’s concurring opinion that should serve as the basis for a standard governing violent student speech.³⁵⁰ As the Eleventh Circuit contended, the rationale of protecting students “applies equally, if not more strongly, to speech reasonably construed as a threat of school violence.”³⁵¹

Strikingly, the court found that it was “immaterial” that the student did not purposely disseminate her story to others. Rather, the court contended that it was her failure to maintain “strict control over the notebook” that “increased the likelihood to the *point of certainty* that the narrative would be seen by others, whether by other students or a teacher.”³⁵² This, of course, ignores the fact that the passage in the notebook would have remained a non-issue if not for the art teacher’s insistence that he be given the notebook.³⁵³ The court might have characterized a reasonable interpretation of the story “as a threat of physical violence against her sixth-period

³⁴⁸ *Id.* at 984.

³⁴⁹ *Id.* Again, it is unclear exactly how suspending the student made her math teacher safer, as there is little preventing a suspended student from returning to campus. See *Sullivan II*, 475 F.2d at 1974 (describing suspended student’s return to campus).

³⁵⁰ See *id.*

³⁵¹ *Id.*

³⁵² *Id.* at 985 (emphasis added).

³⁵³ See notes 341-344 and accompanying text, *supra*.

math teacher,³⁵⁴ but that view ignores the fact that until it was communicated against the student's will, it was simply a written passage in a notebook. It was, until the teacher confiscated it, nothing more than an idea. And as Justice Thurgood Marshall wrote in *Stanley v. Georgia*, "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."³⁵⁵

The *Boim* court argued that "it is imperative that school officials have the discretion and authority to deal with incidents" that involve violent student speech,³⁵⁶ and that very well may be true. *Pangle*, for example, is a case that required swift action from school administrators, as all can agree that teachers and administrators should not be subject to poisoning from students.³⁵⁷ But if student speech is going to be punished with the understanding that such action is being taken to protect the school, then the speech should actually pose a threat to those in the school community. The student newspaper in *Pangle*, with its advocacy of any number of disturbing and disruptive acts, certainly posed a threat. The student notebooks in *Ponce* and especially *Boim* were problems of a far smaller magnitude.

b. Figurative violent student speech

Not confined solely to the classroom, school campuses also see figurative forms of violent student speech, meaning that instead of communicating in clear written prose, students in these examples express themselves with violent poems, rap songs, and art. In these cases — as with literal violent student speech — it is important to note whether student speakers are

³⁵⁴ *Boim*, 494 F.3d at 985.

³⁵⁵ *Stanley v. Georgia*, 394 U.S. 557, 565 (1969).

³⁵⁶ *Boim*, 494 F.3d at 984.

³⁵⁷ See *Pangle*, 10 P.3d at 281-82 (suggestion that students should poison school officials with Visine). See also Katie Kindelan, *Woman Admits to Poisoning Boyfriend with Visine Drops*, ABC NEWS (Aug. 14, 2012 11:03 A.M.), <http://abcnews.go.com/blogs/headlines/2012/08/woman-admits-to-poisoning-boyfriend-with-visine-drops/> (describing Visine poisoning as resulting in "symptoms such as nausea, vomiting and blood pressure and breathing problems").

communicating their violent speech directly to others. This observation is important — as a matter of fairness — because if creative speech is punished as a threat, then it should at least somewhat resemble a threat.

1. Violent poems

In *D.G. and C.G. v. Independent School District No. 11 of Tulsa County Oklahoma*,³⁵⁸ the U.S. District Court for the Northern District of Oklahoma granted a student a preliminary injunction against a lengthy suspension after finding that her violent poem that referenced a teacher’s murder was protected speech.³⁵⁹ The poem was created after an in-class dispute in which the student felt she was unfairly accused of disrupting the class.³⁶⁰ After she was separated from the rest of the students, she wrote a poem to “express her frustrations” with being in the teacher’s class:

Killing Mrs. [Teacher]
I hate this class it is hell
Every day I can’t wait for the bell,
I bitch and whine until it is time,
For me to get in the hall.
Back in the day,
I would sit and pray
to see if I may
Run away (from this hell)
Now as the days get longer
My yearning gets stronger
To kill the bitcher.
One day when I get out of jail
Cuz my friends paid my bail.
And people will ask why.
I’ll say because the Bitch had to die!
By [Student]³⁶¹

³⁵⁸ 2000 U.S. Dist. LEXIS 12197 (N.D. Okla. 2000).

³⁵⁹ *Id.* at *15.

³⁶⁰ *Id.* at *3.

³⁶¹ *Id.*

The poem was eventually found on the floor of another classroom, and it was given to the assistant principal, who then decided to suspend the student pending a formal disciplinary process.³⁶² The formal process resulted in the student’s suspension for the remainder of the then-current school semester and the entirety of the following semester — a punishment that the student and her parents sought to enjoin in federal court.³⁶³

In evaluating the constitutionality of the student’s punishment, the district court first examined whether the poem represented a true threat under the “reasonable speaker” standard.³⁶⁴ Because the court concentrated on the student’s “intent and state of mind in writing the poem,” it found the poem was not a true threat.³⁶⁵ Because she wrote only to “express her anger and frustration” rather than “with the intent of putting teachers in fear by making them think it was a genuine threat,” the court concluded the poem was indeed not a true threat. In further support of this conclusion, the court noted that the school district did not treat the poem as a threat, waiting six days after the discovery of the poem to act against the student and the student was allowed to return to her teacher’s class after she admitted responsibility for the poem.³⁶⁶

After finding the poem constitutionally protected speech, the court then moved to a student speech analysis in order to determine whether, despite its status, the poem could still be punished as disruptive speech under *Tinker*.³⁶⁷ The school district conceded that the poem did not actually cause a disruption, but it argued that the district’s “no tolerance” policy regarding threats would be irreparably harmed if the student’s poem was not punished. The court, however,

³⁶² Id. at *4-5.

³⁶³ Id. at *5.

³⁶⁴ Id. at *12 (“The Courts have set forth an objective test for determining whether a threat is a ‘true threat’ and, thus, falls outside the protection of the First Amendment: ‘whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault.’”) (quoting *United States v. Orozco-Santillan*, 903 F.2d 1262 (9th Cir.1990)).

³⁶⁵ Id. at *13-14.

³⁶⁶ Id. at *14.

³⁶⁷ Id. at *14-15.

dismissed this argument, stating that it “cannot hold water against the rights found in the First Amendment.”³⁶⁸ As the court concluded,

It is impossible to have a “no tolerance” policy against “threats” if the threats involve speech. A student cannot be penalized for what they are thinking. If those thoughts are then expressed in speech, the ability of the school to censor or punish the speech will be determined by whether it was (1) a “true” or “genuine” threat, or (2) disruptive of the normal operation of the school.³⁶⁹

Accordingly, since there was no true threat and no disruption of the school, the school’s decision to impose a lengthy suspension could not be sustained under the Constitution.³⁷⁰

In another case involving violent poetry, the Supreme Court of California similarly found for a student, but the case, *In re George T.*,³⁷¹ only overturned a juvenile adjudication due to the absence of a true threat.³⁷² In that case, a 15-year-old honors English student approached a classmate and handed her two poems with a note that read “These poems describe me and my feelings. Tell me if they describe you and your feelings.”³⁷³ The only poem the student read was titled “Faces”:

Who are these faces around me? Where did they come from? They would probably become the next doctors or loirs or something. All really intelligent and ahead in their game. I wish I had a choice on what I want to be like they do. All so happy and vagrant. Each original in their own way. They make me want to puke. For I am Dark, Destructive, & Dangerous. I slap on my face of happiness

³⁶⁸ *Id.* at *15.

³⁶⁹ *Id.*

³⁷⁰ The court suggested that a shorter suspension given during the course of an investigation could have been upheld. *See id.* at *18 (“When the . . . administration read the poem in this case, if the meaning of it was not self-evident to them, they were certainly justified in investigating to determine if the poem represented a genuine threat to faculty and student safety. A suspension on a short-term basis until the circumstances could be investigated would have been justified under the law. However, once the administration gathered the facts, and the context of the poem became clear, there simply was no longer a factual basis for believing that the poem constituted any sort of threat. At that point, if the speech does not fall under the restrictions available for ‘school sponsored’ events, or if it doesn’t substantially disrupt the operation of the school, it is protected by the First Amendment.”).

³⁷¹ 93 P.3d 1007 (Cal. 2004).

³⁷² *See id.* at 1017-18.

³⁷³ *Id.* at 1009.

but inside I am evil!! For I can be the next kid to bring guns to kill
students at school. So parents watch your children cuz I'm
BACK!!³⁷⁴

The student was frightened, gave the poems back to the author, and “immediately left the campus in fear.”³⁷⁵ The author then more or less repeated this process of giving his poems out with two more students, one of whom was a friend who he had occasionally discussed poetry with.³⁷⁶ One of these students only read the poem later but “became terrified and broke down in tears, finding the poem to be a personal threat to her life” when she did read it.³⁷⁷ The first student who read ‘Faces’ e-mailed her English teacher about the poem, and the teacher then contacted the school’s principal and police.³⁷⁸ Law enforcement officials who went to the writer’s home and found another violent poem³⁷⁹ believed the poetry constituted a threat and filed a petition in juvenile court that eventually resulted in a 100-day commitment to custody in juvenile hall for the student and a determination that he was a ward of the court.³⁸⁰ The student appealed the decision and argued there was not enough evidence to show he made criminal threats, but the California Court of Appeal upheld the juvenile court’s judgment.³⁸¹

The Supreme Court of California, however, overturned the decision and found that the student’s poems were not a true threat.³⁸² In applying a multi-factor analysis,³⁸³ the Court found

³⁷⁴ Id.

³⁷⁵ Id.

³⁷⁶ Id. at 1009-10.

³⁷⁷ Id. at 1011.

³⁷⁸ Id. at 1010.

³⁷⁹ The second poem was titled “Faces in My Head”: “Look at all these faces around me. They look so vagrant. They have their whole lives ahead of them. They have their own indivisaulity. Those kind of people make me wanna puke. For I am a slave to very evil masters.I have no future that I choose for myself. I feel as if I am going to go crazy. Probably I would be the next high school killer. A little song keeps playing in my head. My daddy is worth a dollar not even 100 cents. As I look at these faces around me I wonder why r they so happy. What do they have that I don't. Am I the only one with the messed up mind. Then I realize, I'm cursed!!” Id. at 1010.

³⁸⁰ Id. at 1012.

³⁸¹ Id.

³⁸² See id. at 1017-18.

that the poems were both too ambiguous to transmit a threat³⁸⁴ and that the surrounding circumstances “fail[ed] to show that, as a threat, it was sufficiently unequivocal to convey to [the students] an immediate prospect that [the author] would bring guns to school and shoot students.”³⁸⁵ Because the poems were “not an unequivocal threat,”³⁸⁶ the student’s juvenile adjudication could not stand under state criminal law.

Still, the court expressed sympathy with the school’s position. “Following Columbine . . . and other notorious school shootings,” the court wrote, “there is a heightened sensitivity on school campuses to latent signs that a student may undertake to bring guns to school and embark on a shooting rampage. Such signs may include violence-laden student writings.”³⁸⁷ But, as the court cautioned, “[e]nsuring a safe school environment and protecting freedom of expression, however, are not necessarily antagonistic goals.”³⁸⁸ To justify its proposition that expression and safety are not an either/or dichotomy, the court noted the “school personnel were amply justified in taking action” after e-mail and phone conversations between the first student to read “Faces” and the English teacher.³⁸⁹

But would that acceptance of the actions undertaken by officials have extended to upholding any school discipline levied against the student? While the court noted succinctly that

³⁸³ See *id.* at 1012 (“The prosecution must prove ‘(1) that the defendant ‘willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another per-son,’ (2) that the defendant made the threat ‘with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,’ (3) that the threat--which may be ‘made verbally, in writing, or by means of an electronic communication device’--was ‘on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,’ (4) that the threat actually caused the person threatened ‘to be in sustained fear for his or her own safety or for his or her immediate family’s safety,’ and (5) that the threatened person’s fear was ‘reasonabl[e]’ under the circumstances.’”) (quoting *People v. Toledo*, 26 Cal. 4th 221, 227-28 (2001)).

³⁸⁴ *Id.* at 1017.

³⁸⁵ *Id.* at 1018.

³⁸⁶ *Id.*

³⁸⁷ *Id.* at 1019.

³⁸⁸ *Id.*

³⁸⁹ *Id.*

question was “not the issue before us,”³⁹⁰ a *Tinker* disruption argument can easily be made from the factual record. The student intentionally distributed his poetry to multiple students — two of whom were instantly afraid upon reading one of his poems.³⁹¹ Their fear was real and certainly disruptive to the school environment.

Just as the California Supreme Court declined to extend to poems a “very strong presumption that they are not true threats,”³⁹² so too is it impossible to find that all forms of poetry are outside of the reach of school discipline. Rather, it is important to undertake an inquiry into how those poems were distributed on campus and what effect they had upon the school community. In *D.G. and C.G.*, there was little to no interruption in the normal events of campus. With *George T.*, however, there was a much more clear sense of disruption in the school. That difference between the cases is an important one and suggests that where school discipline was unconstitutional in *D.G. and C.G.*, it could have been permissible for the student in *George T.*

2. Rap songs

While rap is thematically similar to poetry, courts that have examined violent rap songs composed by students have generally been less accommodating to speech rights. This is perhaps owing to the more graphic nature of these rap songs as compared to the poems in the previous section.

³⁹⁰ *Id.*

³⁹¹ *See id.* at 1009-10.

³⁹² *Id.* at 1018, n. 9 (internal quotation omitted). *See also id.* (“No bright-line rule may be drawn that adequately distinguishes a poem such as the one involved in the present case (or even poems of Plath, Lowell, and Berryman) from a ‘poem’ that conveys a threat, such as, ‘Roses are red. Violets are blue. I’m going to kill you, and your family too.’”).

In *Jones v. State*,³⁹³ the Arkansas Supreme Court decided a case quite similar to *In re George T.* in that the state sought to sustain a juvenile adjudication on the basis of a figurative violent work, but *Jones* and *George T.* have two key differences: *Jones* stemmed from a rap song³⁹⁴ and the state prevailed rather than the student.³⁹⁵ In *Jones*, a 15-year-old high school student became mad at a friend during class³⁹⁶ and wrote the following song about her:

I hope you remember this day, cuz you'll forever be the cause of
my violence and rage,
You steadily rejected me, now I'm angry and full of fucking
misery,
You try to be judgmental telling me to act right. Before you take
the speck from my eye, take the fucking board from your eye,
I didn't do nothing to deserve this, and now I'm stressed, and when
I'm stressed, I'm at my best,
I'm a motherfuckin murderer, I slit my mom's throat and killed my
sister. You gonna keep being a bitch, and I'm gonna cliche [click],
My hatred and aggression will go towards you, you better run
bitch, cuz I can't control what I do. I'll murder you before you can
think twice, cut you up and use you for decoration to look nice,
I've had it up to here bitch, there's gonna be a 187 on your whole
family trik [trick],
Then you'll be just like me, with no home, no friends, no money,
You'll be deprived of life itself, you won't be able to live with
yourself,
Then you'll be six feet under, beside your sister, father, and
mother,
You'll be in hell, and I'll be in Jail, but I won't give a fuck cuz we
all know I've been there before,
Goodbye forever my good friend. I'll see you on judgement day
when I'm punished for my sin.³⁹⁷

³⁹³ 64 S.W.3d 728 (Ark. 2002).

³⁹⁴ Id. at 730.

³⁹⁵ Id. at 736.

³⁹⁶ Id. at 730. The two had an existing platonic relationship where the male student “[o]n occasion” would give his female friend poems, notes, and rap songs for her to read. Id. The dispute that gave rise to the rap song at issue centered around the female friend’s refusal to take more notes in class from the student because she “wanted to pay attention in class.” Id.

³⁹⁷ Id. As the court noted in a footnote, the student’s mother was not dead — although he had previously told his friend she died in a car accident. Id. at n.1.

The student handed his friend the rap song in a later period, and he laughed as his friend read the song.³⁹⁸ She, however, asked to be excused from class, after which she went to the principal's office to show him the note and the song.³⁹⁹ The principal then called the police, who began an investigation that eventually resulted in a juvenile court petition because of the student's "act of terroristic threatening."⁴⁰⁰ The juvenile court judge found the student's rap song unprotected speech under the "fighting words" doctrine⁴⁰¹ and sentenced the student to seven days in custody and 24 months of supervised probation.⁴⁰²

On appeal, the Arkansas Supreme Court properly considered whether song represented a true threat and used the multi-factor examination established by the Eighth Circuit in *U.S. v. Dinwiddie*⁴⁰³ to examine the rap song. In applying the *Dinwiddie* factors,⁴⁰⁴ the court found that the friend's reaction to the song was "immediate and unequivocal."⁴⁰⁵ Furthermore, the threat was "not conditional" and it was communicated directly to the friend.⁴⁰⁶ Finally, even though the student had not made similar statements in the past, the friend knew he had the capacity to harm her because "he had been in and out of juvenile detention facilities for various offenses," and

³⁹⁸ *Id.*

³⁹⁹ *Id.* at 731.

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.* at 733. "Fighting words," as defined by the Supreme Court in *Chaplinsky v. New Hampshire*, are words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." 315 U.S. 568, 572 (1942). While there's at least an argument to be had over whether "bitch" is a fighting word in the proper context, the rest of the song — if it was to be stripped of constitutional protection — had to be analyzed under the true threat doctrine. To hold that the student's song was constitutionally unprotected under the fighting words doctrine was an error by the juvenile judge. See *Jones*, 64 S.W.3d at 737 (citing "fighting words" as the "wrong reason" for deciding the case).

⁴⁰² *Id.* at 732.

⁴⁰³ 76 F.3d 913 (8th Cir. 1996).

⁴⁰⁴ See *id.* at 925 ("When determining whether statements have constituted threats of force, we have considered a number of factors: the reaction of the recipient of the threat and of other listeners; whether the threat was conditional; whether the threat was communicated directly to its victim; whether the maker of the threat had made similar statements to the victim in the past; and whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence. This list is not exhaustive, and the presence or absence of any one of its elements need not be dispositive.").

⁴⁰⁵ *Jones*, 64 S.W.3d at 736.

⁴⁰⁶ *Id.*

thus the friend could reasonably be “convinced that his juvenile record indicated a criminal disposition to make good his threat.”⁴⁰⁷ In short, as the court concluded, “a reasonable person in [the friend’s] position would have taken the rap song as a true threat.”⁴⁰⁸

In another case arising from Arkansas, the Eighth Circuit Court of Appeals similarly found in *Doe v. Pulaski County Special School District*⁴⁰⁹ that writings in the style of a rap song were a true threat as it upheld an expulsion levied against a student. *Doe* involved a somewhat complicated set of facts between three students: J.M., K.G., and D.M.⁴¹⁰ J.M., a male, and K.G., a female, dated during their seventh-grade year, and D.M. was J.M.’s “best friend.”⁴¹¹ During the summer vacation after seventh grade, K.G. broke up with J.M., and as a response, he wrote two “violent, misogynistic, and obscenity-laden rants” that expressed a desire to “molest, rape, and murder” K.G.⁴¹² While he was inspired by his favorite musical artists like Eminem, Juvenile, and Kid Rock, J.M. found that his rants could not be matched with music, so he signed them as letters and left them at home.⁴¹³

However, J.M.’s friend D.M. eventually found the letters and asked for permission to read them, a request which was granted by J.M.⁴¹⁴ At that point, either D.M. or J.M. told K.G. of the existence of the letters,⁴¹⁵ and after K.G. requested his help, D.M. surreptitiously stole the letters from J.M.’s room without his permission and delivered them to K.G. at school.⁴¹⁶ K.G.

⁴⁰⁷ Id.

⁴⁰⁸ Id.

⁴⁰⁹ 306 F.3d 616 (8th Cir. 2002).

⁴¹⁰ Id. at 619.

⁴¹¹ Id.

⁴¹² Id.

⁴¹³ Id.

⁴¹⁴ Id.

⁴¹⁵ Id. At trial, there was a factual dispute between J.M. and K.G. Id. J.M. testified that D.M. told K.G. about the letters, while K.G. contended that J.M. “told her that another boy had written a letter that stated she would be killed.” Id.

⁴¹⁶ Id. at 619-20.

then read the letters in gym class in the presence of other students.⁴¹⁷ One of those students in the gym class then told the school's resource officer, who found K.G. crying in the gym.⁴¹⁸ School officials conducted an investigation and, after an initial suspension, determined J.M. to be guilty of "making terrorizing threats against others" and expelled him.⁴¹⁹

In its *en banc* opinion, the Eight Circuit emphasized that its true threat examination rested on the reasonable recipient standard and *Dinwiddie* factors,⁴²⁰ and it summarized its definition of a true threat as "a statement that a reasonable recipient would have interpreted as a serious expression of an intent to harm or cause injury to another."⁴²¹ Before it directly applied this standard, the court noted the importance of the intent to communicate in true threat analysis as "the speaker must have intentionally or knowingly communicated the statement in question to someone before he or she may be punished or disciplined for it."⁴²² If this intent to communicate standard was waived, the court warned, "the purported threat would run afoul of the notion that an individual's most protected right is to be free from governmental interference in the sanctity of his home and in the sanctity of his own personal thoughts."⁴²³

Yet the court cautioned that transmission to a third party satisfied the intention to communicate — thus J.M. was determined to have the requisite intent when he allowed D.M. to read the letter.⁴²⁴ As the court concluded, "One can hardly say, based on J.M.'s willingness to let D.M. read the letter and his overt discussion of the letter and its contents with K.G. and K.G.'s

⁴¹⁷ Id. at 620.

⁴¹⁸ Id.

⁴¹⁹ Id.

⁴²⁰ Id. at 622-23.

⁴²¹ Id. at 624.

⁴²² Id.

⁴²³ Id. (citing *Stanley*).

⁴²⁴ Id. See also id. at 624-25 ("J.M.'s decision to let D.M. read the letter is even more problematic for J.M. given his testimony that he knew there was a good possibility that D.M. would tell K.G. about the letter because D.M. and K.G. were friends. J.M. also discussed the letter in more than one phone conversation with K.G., and J.M. admitted to K.G. that he wrote the letter and that it talked of killing her.") (citation omitted).

best friend, that J.M. intended to keep the letter, and the message it contained, within his own lockbox of personal privacy.”⁴²⁵ Although the majority found that J.M. intended to communicate the message, one dissenting justice argued forcefully that it was still private:

J.M. never intended anyone to see his letter. He wrote it in the privacy of his bedroom and placed it on his shelf away from the eyes of others. When D.M. found the letter, J.M. immediately grabbed it from him, indicating that he did not want to publicize his private writings. J.M. gave in and unwisely allowed D.M. to read it, but he refused to let D.M. have a copy of the letter. Furthermore, D.M. had to steal the letter to deliver it to K.G. J.M. never gave D.M. his permission to show the letter to anyone. D.M. understood at all times that the letter was never meant for K.G.'s viewing. I reject the majority's conclusion that J.M. intended to communicate the letter.⁴²⁶

With the issue of intent settled, the court quickly determined that the letters represented a true threat.⁴²⁷ It was a threat because, as the court found, “[m]ost, if not all, normal thirteen-year-old girls (and probably most reasonable adults) would be frightened by the message and tone of J.M.'s letter and would fear for their physical well-being if they received the same letter.”⁴²⁸ The court explained that the letter “exhibited J.M.’s pronounced, contemptuous and depraved hate” for K.G., who he described as “a ‘bitch,’ ‘slut,’ ‘ass,’ and a ‘whore’ over 80 times in only four pages.”⁴²⁹ But name calling was not the worst part of J.M.’s writing, as the court described its “most disturbing aspect” as two passages in which J.M. wrote “that K.G. should not go to sleep because he would be lying under her bed waiting to kill her with a knife.”⁴³⁰ The realism of this last threat was heightened in the eyes of the court because J.M. portrayed himself “as a tough guy,” boasted of being a gang member, and once shot a cat while

⁴²⁵ Id. at 625.

⁴²⁶ Id. at 629 (Heaney, C.J., dissenting).

⁴²⁷ See id. at 625 (majority op.).

⁴²⁸ Id.

⁴²⁹ Id.

⁴³⁰ Id.

he was speaking with K.G. on the phone.⁴³¹ Thus, according to the court, K.G.'s fear that J.M. might indeed attempt to kill her was reasonable upon "[v]iewing the entire factual circumstances surrounding the letter," and the school's decision to expel him was constitutional.⁴³²

Dissenters in *Doe* argued that the majority failed to consider the entire factual record when examining the reasonability of K.G.'s belief that the letter was a threat. Both dissenting justices pointed out the fact that the county attorney declined to press charges in the case.⁴³³ One dissenter noted that "J.M. apologized to and hugged the girl and her mother at the church they attend together before the school board voted to expel him."⁴³⁴ Still, it was the majority's determination that won the day and resulted in J.M.'s expulsion from school.

Contrary to J.M.'s outcome, at least one student plaintiff has been successful in a rap-centric case seeking to overturn school discipline.⁴³⁵ In *Latour v. Riverside Beaver School District*, the U.S. District Court for the Western District of Pennsylvania issued a preliminary injunction⁴³⁶ in favor of a student who had been expelled for recording four rap songs.⁴³⁷ Only one song mentioned another student, but all were presumably violent, as two were titled "Murder, He Wrote" and "Massacre."⁴³⁸

In issuing the injunction, initially determined that the songs did not represent a true threat. First, the court noted that evidence showed that the songs were "written in the rap genre and that rap songs are 'just rhymes' and are metaphors. Thus, while some rap songs contain

⁴³¹ Id. at 625.

⁴³² Id. at 626-27.

⁴³³ See id. at 629 (Heaney, C.J., dissenting); id. at 636 (McMillian, dissenting) ("If anything, the statement was arguably a police matter, for which, I note, the local prosecuting attorney refused to issue any charges.").

⁴³⁴ Id. at 629 (Heaney, C.J., dissenting).

⁴³⁵ See *Latour v. Riverside Beaver Sch. Dist.*, 2005 U.S. Dist. LEXIS 35919 (W.D. Penn. 2005).

⁴³⁶ Id. at *8.

⁴³⁷ Id. at *1-2.

⁴³⁸ Id.

violent language, it is violent imagery and no actual violence is intended.”⁴³⁹ Second, the court found there was no evidence that the student communicated the songs directly to the other student mentioned in the song, and there was similarly no evidence that the student felt threatened.⁴⁴⁰ Finally, the court concluded that the school’s true threat argument was hampered by its failure to conduct any investigation into the songs.⁴⁴¹

With the songs determined to be protected speech, the court then examined whether they caused a disruption under *Tinker*.⁴⁴² Testimony by school officials suggested there was no disruption, and the court found there was no evidence “that copies of the songs were sold in school or otherwise distributed in school, no fights in the hallways about the songs, and no evidence that the classroom instruction was disrupted.”⁴⁴³ The only evidence of a disruption that was argued by the school — and subsequently dismissed by the court — was a fear that students might withdraw from the school because of the songs and that students wore t-shirts in support of the student after he was expelled.⁴⁴⁴ As the court argued, the t-shirts were a result of the discipline — not the speech — and combined with the potential withdrawals, “even if they were a result of the songs, these incidents do not rise to the level of a substantial disruption.”⁴⁴⁵ Because the songs were not a true threat and there was no actual disruption at the school, the court granted the student’s motion for an injunction preventing his expulsion.⁴⁴⁶

The student in *Jones* directly and purposefully communicated his song to its subject. The student in *Doe* did not similarly do so, but he arguably did write in more violent and fearsome

⁴³⁹ Id. at *4.

⁴⁴⁰ Id.

⁴⁴¹ See id. at *5 (noting that the school did not search the student’s locker for weapons, refer the student to counseling, talk to the student or his parents, or talk to the student mentioned in one of the songs).

⁴⁴² See id. at *5-7.

⁴⁴³ Id. at *6. The songs were sold off-campus or distributed online. Id. at *4.

⁴⁴⁴ Id. at *7.

⁴⁴⁵ Id.

⁴⁴⁶ Id.

terms. The student in *Latour* was simply an aspiring musician who would argue years after his court case that had “‘Murder He Wrote’ . . . been a short story instead of a rap song, . . . he probably never would have been expelled or arrested.”⁴⁴⁷ Perhaps the only clear principle distillable from the three is that it is difficult to peer into the mind of a reasonable person confronted with a violent rap song written about them, and that perhaps the true threat doctrine is not the best tool to address these cases.

3. Visual art

While most cases over violent student art have involved curricular speech,⁴⁴⁸ at least one violent student art case featured a noncurricular drawing that was determined to be outside of the reach of the school’s authority under *Tinker*.⁴⁴⁹ In *Porter v. Ascension Parish School Board*, a then 14-year-old student sketched a drawing of his school “under a state of siege by a gasoline tanker truck, missile launcher, helicopter, and various armed persons.”⁴⁵⁰ The drawing also depicted a brick being thrown at the school principal in addition to various racial epithets and obscenities.⁴⁵¹ The student showed the drawing to his mother, a brother, and a friend who was living in the student’s home.⁴⁵² The drawing was then placed in the student’s closet and forgotten for two years until the student’s brother found it and took it to school.⁴⁵³ The drawing was eventually confiscated by a bus driver and brought to the attention of school administrators, who decided to expel the student.⁴⁵⁴ The student and his mother sued the school district, claiming that

⁴⁴⁷ Eric Poole, *Anthony Latour: From ACLU client to intern*, ELLWOOD CITY LEDGER (June 25, 2012 12:23 A.M.), http://www.ellwoodcityledger.com/news/local_news/anthony-latour-from-aclu-client-to-intern/article_a1e4ac81-2f78-5eb8-b9f1-1602baeda00f.html.

⁴⁴⁸ See Chapter 5, *supra*.

⁴⁴⁹ See *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 615 (5th Cir. 2004).

⁴⁵⁰ *Id.* at 611.

⁴⁵¹ *Id.*

⁴⁵² *Id.*

⁴⁵³ *Id.*

⁴⁵⁴ *Id.* at 612.

his First Amendment rights were infringed, but the federal district court granted summary judgment to the school district.⁴⁵⁵

On appeal to the Fifth Circuit, the court found that the drawing did not represent school speech and was therefore not actionable under *Tinker*.⁴⁵⁶ As the court argued, the drawing was “completed in [the student’s] home, stored for two years, and never intended by him to be brought to campus.”⁴⁵⁷ Thus the drawing was “not exactly speech on campus or even speech directed at the campus,” as the court concluded.⁴⁵⁸

After the court determined the drawing was not subject to discipline under *Tinker*, it then turned to the issue of whether it could be a true threat.⁴⁵⁹ The court noted that the question of whether a speaker intended to communicate a threat was an important threshold issue, and that the absence of such an intent “obviates” the need to address whether the speech at issue was a true threat.⁴⁶⁰ The court then cited *Doe*, noting that the student in that case intentionally communicated the letters because he both “allowed his friend to read the letter knowing that his friend was also a close friend of his former girlfriend” and “discussed the letters with his girlfriend on the telephone on multiple occasions.”⁴⁶¹

Porter, however, was different than *Doe*, as the Eighth Circuit concluded, because the student in *Porter* “did not intentionally or knowingly communicate his drawing in a way sufficient to remove it from the protection of the First Amendment.”⁴⁶² The court admitted that the student showed his drawing to his mother, brother, and friend, but it also argued that this

⁴⁵⁵ *Id.* at 611.

⁴⁵⁶ *Id.* at 615.

⁴⁵⁷ *Id.*

⁴⁵⁸ *Id.*

⁴⁵⁹ *See id.* at 616-18.

⁴⁶⁰ *Id.* at 617.

⁴⁶¹ *Id.*

⁴⁶² *Id.*

display was “confined to his own home” and that “more than two years passed before the drawing serendipitously reached . . . campus.”⁴⁶³ This display was “wholly accidental and unconnected” to the later introduction to the school environment, and, as the court concluded, “[f]or such writings to lose their First Amendment protection, something more than their accidental and unintentional exposure to public scrutiny must take place.”⁴⁶⁴

Despite the court’s determination that the drawing was protected by the First Amendment and insulated from *Tinker*’s reach, the student still lost his case when the Eighth Circuit found that the school principal was entitled to qualified immunity.⁴⁶⁵ However, the case is useful for both its attempt to limit school authority in off-campus speech and its logical application of the true threat doctrine — two attributes missing in many cases addressing violent student speech. Figurative violent speech is especially difficult due to the conflicting means of true threat analysis, as different standards that seek to problem the mind of the “reasonable speaker” or the “reasonable listener” can lead to different results. But if true threat analysis can be limited in these cases to speech that is truly threatening rather than merely violent, then *Tinker* can be left as a means of analysis that will lead to more consistent results.

c. Abstract violent student speech

In seeking to protect students, teachers, and other members of the school community, administrators should have the most authority and discretion to punish speech that describes or

⁴⁶³ *Id.*

⁴⁶⁴ *Id.* at 617-18.

⁴⁶⁵ *Id.* at 620. “Qualified immunity” shields government actors from lawsuits over their official actions so long as they were acting within the scope of their authority and they did not violate established law. *See generally* Christopher Lyle McIlwain, *The Qualified Immunity Defense in the Eleventh Circuit and Its Application to Excessive Force Claims*, 49 ALA. L. REV. 941 (1998). If the law is not “clearly established,” the government official is entitled to qualified immunity. *Id.* at 954. As the *Porter* court concluded, “a reasonable school official facing this question for the first time would find no ‘pre-existing’ body of law from which he could draw clear guidance and certain conclusions. Rather, a reasonable school official would encounter a body of case law sending inconsistent signals as to how far school authority to regulate student speech reaches beyond the confines of the campus.” *Porter*, 393 F.3d at 620. In short, the student lost because courts have been unable to clearly define and limit the extent of school authority in off-campus speech.

plans a literal attack on the school or those individuals in the school setting. That authority should decrease where student speech is more expressive and figurative — in essence, where administrators must bring some element of interpretation into their analysis of student speech, they should have a decreased ability to act in the name of student safety. Finally, school authority and judicial deference should be at its nadir where student speech employs violence only in the abstract, meaning that violence is used merely as a theme and there is no reference to violence against a student or the school community. In this final category, there is simply no reason to justify the suppression of speech where administrators have no colorable claim for acting in the name of student safety.

The student's rap songs in *Latour* would have been a good example of this final category of on-campus violent speech had he not mentioned another student in one of the songs.⁴⁶⁶ In that situation, his songs "Massacre" and "Murder, He Wrote" would not have had any connection to the school community and their status as nothing more than "just rhymes"⁴⁶⁷ would have been self-evident for any reasonable observer.

An even better example of this category comes from *Miller v. Penn Manor School District*,⁴⁶⁸ a 2008 case decided by the U.S. District Court for the Eastern District of Pennsylvania. In *Miller*, a student was given a t-shirt by an uncle who was stationed in Iraq.⁴⁶⁹ The shirt was lettered with the phrase "Volunteer Homeland Security" and "display[ed] images of an automatic handgun" on the front.⁴⁷⁰ On the back, the shirt read "Special Issue-Resident-Lifetime License, United States Terrorist Hunting Permit, Permit No. 91101, Gun Owner-No

⁴⁶⁶ See *Latour*, 2005 U.S. Dist. LEXIS 35919 at *1-2.

⁴⁶⁷ *Id.* at *4.

⁴⁶⁸ 588 F. Supp. 2d 606 (2008).

⁴⁶⁹ *Id.* at 611.

⁴⁷⁰ *Id.*

Bag Limit” in letters that were imposed with another picture of a handgun.⁴⁷¹ On the first day the student wore the shirt to school, another student was made “uncomfortable” and decided to write a note to a teacher.⁴⁷² The student was told the shirt was “inappropriate” and violated school rules. A few days later, the student wore the shirt again and was told he would be sent to the principal’s office if he did so another time.⁴⁷³ When the student wore the shirt for a third time, the principal asked him to turn it inside out — a request that the student said was “bullshit.”⁴⁷⁴ The student was given two hours of detention for using an expletive but was not otherwise punished. However, the school board determined that because the shirt “did not constitute protected student expression under school district policy,” the student could not wear it at school, and his parents sued for his right to wear the t-shirt to school.⁴⁷⁵

In rejecting the First Amendment claim, the district court characterized the shirt as implying the student was “licensed to kill as many terrorists as he can conceivably hunt down.”⁴⁷⁶ Because the student — unlike his uncle — was a civilian, this meant that the shirt was a call to “vigilantism” and therefore “advocate[d] illegal conduct,” in the view of the district court. Such a message had “no place in a public school,” according to the court, and could be banned in the school environment.⁴⁷⁷ The court also concluded specifically that this authority was not premised on any showing of a disruption because the shirt carried a “message of use of force, violence and violation of law in the form of illegal vigilante behavior” instead of any protected political opinion.⁴⁷⁸

⁴⁷¹ Id.

⁴⁷² Id.

⁴⁷³ Id at 612.

⁴⁷⁴ Id.

⁴⁷⁵ Id. at 613.

⁴⁷⁶ Id. at 625.

⁴⁷⁷ Id.

⁴⁷⁸ Id.

While the court was not explicit on why the shirt fell outside of speech protected under *Tinker*, the opinion referenced Justice Alito’s concurring opinion in *Morse* and also mentioned that “a substantial interest resides in public schools to discourage violence both in the school setting as well as in the community at large as part of the District's overall educational mission.”⁴⁷⁹ The latter suggests thinking more akin to *Fraser* than *Morse* — especially in light of the reference to a school’s “educational mission” — but either justification was incorrect.⁴⁸⁰

The *Miller* court proclaimed that there was no “constitutional right to wear clothing which advocates violence in public schools,”⁴⁸¹ but there was no advocacy in the case — at least not in the legal sense. In truth, the court’s decision represented nothing more “than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint,”⁴⁸² and it enabled state censorship where there was no real justification for it.

Students face real dangers, and schools have a responsibility to keep them safe. But disciplining t-shirts and rap songs are doing nothing to improve safety. The First Amendment — not to mention reason — requires a greater obligation and an actual attempt to balance the various concerns at play instead of defaulting to censorship.

IV. Conclusion

When violent student speech takes place on campus and is unrelated to a student’s education, *Tinker* remains the proper standard for balancing the free expression rights of the student and the concerns of the school. *Tinker* is certainly not without its faults, as its terms can be vague and it cannot be used to decide on its own terms whether speech by a minor is properly

⁴⁷⁹ *Id.* at 627.

⁴⁸⁰ See Chapter 5, *supra* (explaining why *Fraser* and *Morse* do not apply to violent student speech).

⁴⁸¹ *Miller*, 588 F. Supp. 2d at 627.

⁴⁸² *Tinker*, 393 U.S. at 509.

considered as student speech.⁴⁸³ The latter has been an especially difficult problem for courts to address, as struggles in the immediate post-*Tinker* era to define and limit school authority have persisted into the twenty-first century Internet age.⁴⁸⁴ Furthermore, courts must do more in this area to limit school authority exclusively to instances where administrators can truly act in the best interests of student safety, and the true threat doctrine should only be used in cases where speech is indeed threatening, rather than simply violent, in nature.

Tinker may be a relic of the 1960s and weakened by the Supreme Court decisions that followed it, but it is still relevant today. To be effective, however, it must be applied in a principled and consistent manner that respects all types of speech — even that speech that happens to be violent in nature.

⁴⁸³ See Part I, *supra*.

⁴⁸⁴ See Part II, *supra*.

CHAPTER 7

THREATENING STUDENT SPEECH

This chapter will conclude the substantive examination of violent student speech by focusing on the true threat doctrine and how it has (1) evolved, (2) how it is applied in cases of creative violent speech, and (3) how it is applied to student speech. Thus this chapter will seek to explore the basic principles of the true threat doctrine and how it is applied to speech outside of the school setting under the basic idea that what constitutes a true threat *inside* of a school should be substantively the same as what constitutes a threat *outside* of a school.

Part I will begin by attempting to define what is a true threat. From there, the section will examine how the Supreme Court's true threat jurisprudence developed in *Watts v. U.S.*,¹ *Rogers v. U.S.*,² and *Virginia v. Black*.³

Part II will examine the doctrinal split that emerged after *Watts* as the federal circuit courts of appeal began to coalesce around either a "reasonable speaker" or "reasonable listener" standard. This part will also speculate that the "test split" is less important than the "intent split," a disagreement in the circuit courts as to whether an individual must have a subjective intent to threaten before speech is actionable.⁴

¹ 394 U.S. 705 (1969) (*per curiam*).

² 422 U.S. 35 (1975).

³ 538 U.S. 343 (2003).

⁴ See generally Jake Romney, Note, *Eliminating the Subjective Intent Requirement for True Threats in United States v. Bagdasarian*, 2012 B.Y.U.L. Rev. 639 (2012) (explaining subjective intent requirement).

Part III will examine the question of whether creative speech, as previously discussed in cases such as *In re Ryan D.*,⁵ *In re George T.*,⁶ *In re Douglas D.*,⁷ *Jones v. State*,⁸ and *Doe v. Pulaski County Special School District*,⁹ can also be threatening speech under the true threat doctrine. These previous cases are compared to three non-school cases in an effort to suggest that creativity does not insulate speech from a true threat determination.

Part IV will look exclusively at threatening speech in the school setting, contrasting violent creative speech examined under true threat with more unequivocally threatening speech. This section will argue (1) that there is a distinct difference between those two general categories and (2) that schools and law enforcement should focus their efforts on this second category. Courts should also confine the true threat doctrine to threatening speech because *Tinker* is well suited to address any concerns arising from creative speech that is communicated in a threatening manner.

This chapter will conclude in Part V.

I. Defining “true threats”

In attempting to define the breadth and scope of the true threat doctrine as it stands now, one useful place to start may be with legal dictionaries.¹⁰ Black’s Law Dictionary, “the most widely used law dictionary in the United States today,”¹¹ lists three possible definitions for the word “threat”: “[a] communicated intent to inflict harm or loss on another or on another’s property, esp. one that might diminish a person’s freedom to act voluntarily or with lawful

⁵ 123 Cal. Rptr. 2d 193 (Cal. App. 2002).

⁶ 93 P.3d 1007 (Cal. 2004).

⁷ 626 N.W.2d 725 (Wis. 2001).

⁸ 64 S.W.3d 728 (Ark. 2002).

⁹ 306 F.3d 616 (8th Cir. 2002).

¹⁰ See *U.S. v. Jeffries*, 692 F.3d 473, 483-84 (Sutton, C.J., dubitante) (beginning opinion with discussion of dictionary definitions of “threat” and “threaten”).

¹¹ Sarah Yates, *Black’s Law Dictionary: The Making of an American Standard*, 103 LAW LIBR. J. 175, 175 (2011).

consent,”¹² “an indication of an approaching menace,”¹³ and “[a] person or thing that might well cause harm.”¹⁴ The oldest American law dictionary,¹⁵ Bouvier’s, gives a more detailed description of what comprises a threat:

A contingent offer of injury or harm. A threat is a statement of some injury or other bad thing that will happen in the future, which is ordinarily not merely a prediction but a claim that is contingent on some state of affairs coming to pass or not coming to pass, the idea of the threatener being that the victim should cause the events to unfold as the threatener desires them.¹⁶

Finally, Barron’s Law Dictionary states that a threat is “a declaration of an intention or determination to inflict punishment, loss, or pain on another, or to injure another by some wrongful act.”¹⁷ Barron’s clarifies that “[a] threat may be made by means of innuendo or suggestion as well as by express language”¹⁸ but cautions that “[m]ere words, however violent, have been held not to amount to an assault.”¹⁹

While all three definitions seek to explain the nature of a threat, its inherent harm and make reference to “terroristic” threats²⁰ as a distinctly different concept, there are critical differences in the language. Black’s references the possibility that a threat may be used in a

¹² BRYAN A. GARNER ET AL., BLACK’S LAW DICTIONARY 757 (4th ed. Pocket W. Grp. 2011). “A kidnapper’s threats of violence.” Id.

¹³ Id. at 758. “[T]he threat of bankruptcy.” Id.

¹⁴ Id. “Mrs. Harrington testified that she had never viewed her husband as a threat.” Id.

¹⁵ Yates, *supra* note 11, at 178. By the time Henry Campbell Black first published his law dictionary in 1891, Bouvier’s had already been in press for more than 50 years and had gone through 14 editions. Id. at 179. However, judging by court citations, Bouvier’s began to fall out of favor with American jurists after the 1950s. Id.

¹⁶ STEVE SHEPPARD, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY 2011 1098 (Compact ed. Aspen Publishers 2011).

¹⁷ STEVEN H. GIFIS, LAW DICTIONARY 545 (6th ed. Barrons Educ. Series Inc. 2010).

¹⁸ Id. (citing *U.S. v. Marino*, 148 F. Supp. 75 (N.D. Ill. 1957)).

¹⁹ Id. (citation omitted).

²⁰ See, e.g., Garner, *supra* note 12, at 758 (defining a terroristic threat as “[a] threat to commit any crime of violence with the purpose of (1) terrorizing another, (2) causing the evacuation of a building, place of assembly, or facility of public transportation, (3) causing serious public inconvenience, or (4) recklessly disregarding the risk of causing such terror or inconvenience”); Sheppard, *supra* note 16, at 1098 (defining “terroristic threatening” as “a threat of harm with the intent of causing terror or panic or the intent either to retaliate against a government for its action or to coerce or induce government action”); Gifis, *supra* note 17, at 545-46 (noting that “words may constitute a terroristic threat when used to cause a building evacuation or serious public inconvenience, or when they communicate the possibility of violence and cause fear to the hearer”).

coercive manner,²¹ but Bouvier’s explicitly includes the idea that a threat can be made in order to force a listener to bend to the will of the speaker in order to avoid the contingent threat of harm.²² Barron’s neglects any reference to the possible contingent nature of threats but importantly specifies that not all violent speech can be a threat.

Defining a word like “threat” in the legal context, as evidenced by the various dictionary approaches, is not a simple or easily dismissed task. However, the job of separating a “threat” from a legally actionable “true threat” is more difficult.²³ While the Supreme Court created the notion of a “true threat” in *Watts v. U.S.*, it did little to define or explain the concept — leading ultimately to confusion and competing standards in lower courts.²⁴

a. *Watts v. U.S.*

In 1966, 18-year-old Robert Watts²⁵ attended a W.E.B. DuBois Club²⁶ meeting on the national mall that was organized to protest police brutality.²⁷ During the meeting, an infiltrating Army counterintelligence officer heard Watts, who was an African-American, say that

They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B J.²⁸

Watts also said that “[t]hey are not going to make me kill my black brothers.”²⁹ Watts’s remarks “were greeted by laughter and applause,”³⁰ but he was still arrested the following day for

²¹ See Garner, *supra* note 12, at 757.

²² See Sheppard, *supra* note 16, at 1098.

²³ See *In re Douglas D.*, 626 N.W.2d at 739.

²⁴ See Part II, *infra*, for discussion on the lower court split regarding appropriate true threat standard.

²⁵ *Watts*, 394 U.S. at 706.

²⁶ The club was sponsored by the American arm of the Communist Party. See *W.E.B. DuBois Clubs of America v. Clark*, 389 U.S. 309 (1967).

²⁷ *Watts v. U.S.*, 402 F.2d 676 (D.C. Cir. 1968).

²⁸ *Watts*, 394 U.S. at 706.

²⁹ *Id.*

³⁰ *Watts*, 402 F.2d at 681.

threatening the life of the president.³¹ Charged under 18 U.S.C. § 871(a), a federal statute that prohibited “knowing[] and willfull[]” threats against the president, president-elect, vice president, or vice president-elect,³² Watts was subsequently convicted in federal district court.³³

On appeal to the D.C. circuit, Watts’s conviction was affirmed.³⁴ The circuit court interpreted 18 U.S.C. § 871(a) as requiring the government to prove two elements to sustain a conviction: that the defendant “comprehends the meaning of the words uttered by him” and that the defendant “voluntarily and intentionally utters them as the declaration of an apparent determination to carry them into execution.”³⁵ Under this statutory interpretation, the court concluded, there was no requirement that the person uttering the threat had any intention of carrying it out, and that “[n]or is it a defense that the words were intended merely as a jest.”³⁶ The court also rejected Watts’s assertion that his speech was protected under the idea that it was only a conditional threat in that he would only shoot the president if given a gun and forced to fight.³⁷ As the court concluded, “The ‘condition’ of [Watts’s] submitting to induction into the Army does not negate the presence of apparent present intent since it is a matter within his control.”³⁸

³¹ Id. at 677.

³² Id. (quoting 18 U.S.C. § 871(a) (1964)).

³³ Id. at 678.

³⁴ Id. at 682, 686.

³⁵ Id. at 680.

³⁶ Id. See also id. at 681 (“[Watts] points out that his remarks were greeted by laughter and applause, and argues that this negates any acceptance by the listeners as a genuine threat. But it has not been unknown for laughter and applause to have sinister implications for the safety of others. History records that applause and laughter frequently greeted Hitler’s predictions of the future of the German Jews. Even earlier, the Roman holidays celebrated in the Colosseum [sic] often were punctuated by cheers and laughter when the Emperor [sic] gestured ‘thumbs down’ on a fallen gladiator.”).

³⁷ See id. at 677, 680.

³⁸ Id. at 680. The court also noted other instances where conditional threats against the president were found criminally liable. See id. at n. 8, 9.

The court similarly dismissed Watts’s First Amendment claim to his statement.³⁹ This claim failed, in the opinion of the court, because free speech rights were marginalized by the importance of the president’s safety. As the court argued,

No person in the world, perhaps, is so comprehensively guarded. Yet this intensive protection has not prevented the assassination of four Presidents. In our system, the safety of the Chief Magistrate of the nation is so crucial to the national welfare that, notwithstanding our traditional tolerance of uninhibited and even vicious criticism of a President, it was thought essential to make threats upon the life and safety of the President criminal acts. To appreciate the need to protect a President from danger or the inhibiting effect of threats, one only need recall the shock waves which rocked the entire world in November 1963 when a President was murdered. The enormous political, sociological, and economic consequences of that event are poignant reminders of the evil sought to be avoided by section 871.⁴⁰

Thus, as the court found, “[w]hen the interests to be protected are evaluated in the light of first amendment safeguards, the consequences here sought to be prevented afford a valid basis for reasonable limitation on speech.”⁴¹

A dissenting circuit court judge, however, would have decided the case on First Amendment grounds and argued that Watts’s conviction should have been overturned.⁴² Watts’s words, as the dissent concluded, were “most readily susceptible to the interpretation that they were a crude, even offensive, rhetorical device” and unable to be read “unambiguously as a serious threat against the president.”⁴³ In constructing 18 U.S.C. § 871(a), the dissent argued that, to protect a First Amendment interest in violent political speech, the statute required both a subjective intent to carry out the threat and an objective determination that “in the context and circumstances the statement unambiguously constituted a threat upon the life or safety of the

³⁹ Id. at 683.

⁴⁰ Id.

⁴¹ Id.

⁴² Id. at 693 (Wright, C.J., dissenting).

⁴³ Id.

President.”⁴⁴ Without the safeguard of the former, “wholly protected” statements under the First Amendment that “compass the violent end of the Chief Executive” would be subject to criminal prosecution⁴⁵ — an impermissible result under the Constitution, as the dissent found.

In a short *per curiam* opinion, the Supreme Court adopted some — but importantly not all — of the dissent’s reasoning as it overturned Watts’s conviction. The Court agreed that “[t]he nation . . . has a valid, even an overwhelming, interest in protecting the safety of its Chief Executive and in allowing him to perform his duties without interference from threats of physical violence,” but the Court also found that “[w]hat is a threat must be distinguished from what is constitutionally protected speech.”⁴⁶ In offering its interpretation of 18 U.S.C. § 871, the court did not accept or reject the circuit court dissent’s notion of a subjective intent to cause harm;⁴⁷ rather, the Court specified that the statute required “the Government to prove a true ‘threat.’”⁴⁸ While the Court gave no guidance as to how to determine a true threat, it found that Watts’s “political hyperbole” did not represent one as it was only “a kind of very crude offensive method of stating a political opposition to the President.”⁴⁹ As the Court concluded, “Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise.”⁵⁰

In his concurring opinion, Justice William Douglas tied 18 U.S.C. § 871 to the English Statute of Treasons, a law that made “compassing and imagining the death of the King” a

⁴⁴ *Id.* at 691. *But see* Mark Strasser, *Advocacy, True Threats, and the First Amendment*, 38 HASTINGS CONST. L.Q. 339, 345 (2011) (arguing that “[t]wo issues should not be conflated: (1) Did the person intend to make the threat?, and (2) Did the person intend to carry out the threat?”).

⁴⁵ *Watts*, 402 F.2d at 691 (Wright, C.J., dissenting).

⁴⁶ *Watts*, 394 U.S. at 707.

⁴⁷ *See* Strasser, *supra* note 44, at 345 (“Although taking no position on what the willfulness requirement entailed, the Court adopted part of Wright’s position by pointing out that the ‘statute initially requires the Government to prove a true ‘threat.’”).

⁴⁸ *Id.* at 708.

⁴⁹ *Id.*

⁵⁰ *Id.*

crime.⁵¹ He also likened the modern statute to the Alien and Sedition Acts⁵² from the early days of the American republic, as he wrote that “[t]he Alien and Sedition Laws constituted one of our sorriest chapters; and I had thought we had done with them forever.”⁵³ “Suppression of speech as an effective police measure in an old, old device,” Justice Douglas concluded, “outlawed by our Constitution.”⁵⁴

Watts, especially considered in light of Justice Douglas’s concurring opinion, represents a strong appreciation for political speech even in light of violent rhetorical flourishes. What *Watts* did not do, however, is define any standard for helping courts to determine the presence or absence of a true threat in violent speech.⁵⁵ This lack of guidance⁵⁶ would become apparent with a subsequent true threat case before the Court.

b. *Rogers v. U.S*

Early one morning, George Rogers, an alcoholic and unemployed carpenter, walked into a Holiday Inn coffee shop in Shreveport, La. and proclaimed that he was Jesus Christ.⁵⁷ As if that and his “loud and obstreperous manner” was not enough, he also told customers and waitresses that he was against President Nixon’s visit to China because the Chinese, in Rogers’s mind, had a bomb that only he knew about.⁵⁸ Because of this perceived danger, Rogers proclaimed that he was going to Washington to “whip Nixon’s ass” or “kill him in order to save the United

⁵¹ Id. at 709 (Douglas, J., concurring).

⁵² The Alien and Sedition Acts, passed in 1798, were an attempt by the dominant Federalists to rid themselves of political dissent by the Republican Party. See Akhil Reed Amar, *Some New World Lessons for the Old World*, 58 U. CHI. L. REV. 483, 502-03 (1991).

⁵³ *Watts*, 394 U.S. at 710 (Douglas, J., concurring).

⁵⁴ Id. at 712.

⁵⁵ The court hinted that it had “grave doubts” about whether a true threat determination required the subjective intent to carry out the underlying violent act. Id. at 708 (majority op.).

⁵⁶ See Jonnie Macke, Case Note, *The True Threat Doctrine as Misapplied in Doe v. Pulaski County Special School District*, 57 ARK. L. REV. 303, 318 (2004) (noting that in *Watts* “the seeds for the true-threat doctrine were planted without the Court establishing a bright-line test under which the doctrine could take root”).

⁵⁷ *Rogers*, 422 U.S. at 41 (Marshall, J., concurring).

⁵⁸ Id. at 41-42.

States.”⁵⁹ After the local police arrived to remove him from the Holiday Inn, an officer asked Rogers whether he had threatened the president.⁶⁰ Rogers then reiterated that he was opposed to Nixon’s visit to China, and that he was “going to Washington and . . . going to beat [Nixon’s] ass off.”⁶¹ “Better yet,” Rogers told the officer, “I will go kill him.”⁶² Rogers further clarified that he was going to walk to Washington to complete his mission “because he didn’t like cars.”⁶³

While Rogers was not arrested by the local police, they did report the incident to the Secret Service, who then had Rogers arrested and charged with violating 18 U.S.C. § 871(a).⁶⁴ Rogers’s trial lasted two days, and the jury began its deliberations on the afternoon of the second day.⁶⁵ After discussing the case for almost two hours, the jury sent the judge a note asking if the court would accept a verdict of “Guilty as charged with extreme mercy of the Court.”⁶⁶ The judge signaled that he would accept such a verdict, and five minutes later, the jury returned the verdict it suggested.⁶⁷

Rogers’s conviction, however, was overturned on appeal before the Supreme Court.⁶⁸ As Chief Justice Warren Burger wrote for the majority, the Court originally granted certiorari “to resolve an apparent conflict among the Courts of Appeals concerning the elements of the offense proscribed by § 871(a).”⁶⁹ However, after the Court heard arguments in *Rogers*, a majority of the justices focused on the impropriety of the judge’s decision to inform the jury he would accept a

⁵⁹ Id. at 42.

⁶⁰ Id.

⁶¹ Id.

⁶² Id.

⁶³ Id.

⁶⁴ Id. This was the same statute at issue in *Watts*. See notes 32, 35-36, *supra*.

⁶⁵ Id. at 36 (majority op.).

⁶⁶ Id.

⁶⁷ Id. at 37.

⁶⁸ Id. at 41.

⁶⁹ Id. at 36. See also Part II, *infra* (explaining circuit split emerging at the time of *Rogers*).

verdict of guilty with a recommendation of mercy.⁷⁰ As the chief justice concluded, the trial court “should have reminded the jury that the recommendation would not be binding in any way” in addition to including “the admonition that the jury had no sentencing function and should reach its verdict without regard to what sentence might be imposed.”⁷¹

Two justices, however, would have reached the merits of the case to overturn Rogers’s conviction. In a concurring opinion written by Justice Thurgood Marshall and joined by Justice Douglas, Justice Marshall argued that § 871 should only be constructed in a way “to proscribe all threats that the speaker intends to be interpreted as expressions of an intent to kill or injure the President.”⁷² Justice Marshall, therefore, advocated for a two-step approach in true threat cases: a first step where the government had to prove that the defendant intended to make a threatening statement and a second step in which it had to be proven that the statement was “in fact threatening in nature.”⁷³ This approach, as Justice Marshall wrote, was in contrast to the “objective construction” used in Rogers’s trial that only required a showing that “a reasonable man in [the speaker’s] place would have foreseen that the statements he made would be understood as indicating a serious intention to commit the act.”⁷⁴ Thus according to Justice Marshall, the objective interpretation “embodie[d] a negligence standard” and “charge[d] the defendant with responsibility for the effect of his statements on his listeners.”⁷⁵ Furthermore, without the intent requirement, Justice Marshall argued that there was “a substantial risk of conviction for a merely crude or careless expression of political enmity.”⁷⁶

⁷⁰ See *id.* at 40.

⁷¹ *Id.*

⁷² *Id.* at 47 (Marshall, J., concurring).

⁷³ *Id.*

⁷⁴ *Id.* at 43-44.

⁷⁵ *Id.* at 47.

⁷⁶ *Id.* at 44.

Although Justice Marshall’s two-step formulation was neither rejected nor adopted by the Court,⁷⁷ it still attempted to “raise[] the bar so that an individual who had negligently failed to perceive how her statement might be understood would not be found to have made an actionable threat,” according to Professor Mark Strasser.⁷⁸ More generally, Justice Marshall “believed his particular subjective test struck the proper balance between regulating threatening speech and protecting the values embodied in the First Amendment,” as Paul T. Crane argued.⁷⁹ As Justice Marshall himself wrote, his approach was an effort to ward off “mischief in future prosecutions,”⁸⁰ yet few courts agreed with his position⁸¹ until the Supreme Court began a subtle but important doctrinal shift with *Virginia v. Black*.

c. *Virginia v. Black*

In *Black*, the Supreme Court was faced with a constitutional challenge to a Virginia law that prohibited “any person . . . with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place.”⁸² Additionally, under the law, the mere act of burning a cross was *prima facie* evidence of an intent to intimidate for the purposes of the statute, meaning that *any* cross burning on either someone else’s property, a highway, or another public place was a violation of the law.

⁷⁷ See Strasser, *supra* note 44, at 348 (“A few points might be made about the exchange between the Rogers majority and concurrence. First, the Court did not adopt Justice Marshall’s view, although it also did not offer any reasons to reject it. One cannot tell whether the Court disagreed substantively with the position offered by Justice Marshall or whether, instead, the majority simply saw no reason to reach the substantive issues, given the procedural error that had occurred.”).

⁷⁸ *Id.* at 349.

⁷⁹ Paul T. Crane, Note, “*True Threats*” and the Issue of Intent, 92 VA. L. REV. 1225, 1241 (2006).

⁸⁰ Rogers, 422 U.S. at 48 (Marshall, J., concurring).

⁸¹ See Crane, *supra* note 79, at 1242 (“Although many commentators would follow Justice Marshall’s lead, few courts did the same.”).

⁸² *Black*, 583 U.S. at 348.

The three defendants in *Black* were convicted after two separate and unrelated cross-burning incidents.⁸³ The first such incident involved a dispute between neighbors that began with a complaint over backyard target shooting and ended with two defendants attempting to burn a cross on an African-American neighbor's yard.⁸⁴ The second was a Ku Klux Klan rally attended by 25 to 30 people where a cross was burned on private property with the owner's permission.⁸⁵ All defendants were found guilty under the cross-burning ban, but after consolidating the cases on appeal, the Supreme Court of Virginia found the statute to be unconstitutional.⁸⁶ The law was invalid, the court argued, because it only targeted cross burning "because of its distinctive message."⁸⁷ The court also found the law to be unconstitutional due to the *prima facie* evidence provision that could chill otherwise protected speech.⁸⁸

The Supreme Court found the state law to be facially unconstitutional as applied to the Klan rally cross burning and affirmed the lower court's decision for that defendant, but the Court remanded the case for further proceedings for the two other defendants.⁸⁹ In Justice Sandra Day

⁸³ *Id.*

⁸⁴ *Id.* at 350.

⁸⁵ *Id.* at 348. The other defendants in *Black* — those who burned a cross in a neighbor's yard — were not affiliated with the Klan. *Id.* at 350.

⁸⁶ *Id.* at 351.

⁸⁷ *Id.* (internal quotation omitted).

⁸⁸ *Id.* (internal quotation omitted).

⁸⁹ *Id.* at 367. ("The *prima facie* evidence provision in this case ignores all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate. The First Amendment does not permit such a shortcut. For these reasons, the *prima facie* evidence provision, as interpreted through the jury instruction and as applied in Barry Black's case, is unconstitutional on its face. We recognize that the Supreme Court of Virginia has not authoritatively interpreted the meaning of the *prima facie* evidence provision . . . [and] we refuse to speculate on whether any interpretation of the *prima facie* evidence provision would satisfy the First Amendment. Rather, all we hold is that because of the interpretation of the *prima facie* evidence provision given by the jury instruction, the provision makes the statute facially invalid at this point. We also recognize the theoretical possibility that the court, on remand, could interpret the provision in a manner different from that so far set forth in order to avoid the con-situational objections we have described. We leave open that possibility. We also leave open the possibility that the provision is severable, and if so, whether Elliott and O'Mara could be retried under § 18.2-423.")

O'Connor's opinion for the Court,⁹⁰ the justice discussed at length the history of cross burning as a means of communication, noting that it started in the 14th century as a way for Scottish tribes to communicate to each other before it was appropriated by the Ku Klux Klan and became "inextricably intertwined" with the history of the group.⁹¹ Despite the fact that the Klan's association with cross burning originated in an apocryphal book,⁹² Justice O'Connor wrote that cross burnings soon became "a tool of intimidation and a threat of impending violence" with the Klan's resurgence after 1915.⁹³ After Justice O'Connor listed historical examples of cross burnings at synagogues, churches, a housing project, and a union hall,⁹⁴ the justice concluded that "[t]hese cross burnings embodied threats to people whom the Klan deemed antithetical to its goals. And these threats had special force given the long history of Klan violence."⁹⁵

However, in contrast to burning a cross as a threat, Justice O'Connor noted that the act has also served as a "potent symbol[] of shared group identity and ideology."⁹⁶ In this context, the justice argued, a burning cross was used alternately as the climax of a rally, a symbol of protest in response to both state efforts to curb the Klan's activities and integration, a tool for recruiting, and a means of announcing political support for Richard Nixon.⁹⁷ Even with these other more political uses, "the burning of a cross is a symbol of hate," as the justice concluded.⁹⁸ In short, as Justice O'Connor found, "while a burning cross does not inevitably convey a

⁹⁰ Justice O'Connor commanded a majority of the Court in Parts I (establishing the facts), II (discussing the history of cross burning), and III (discussing First Amendment jurisprudence generally and the Court's decision in *R. A. V. v. City of St. Paul*, 505 U.S. 377 (1992), specifically). In Parts IV (deciding the constitutional status of the Virginia law's *prima facie* evidence provision) and V (the Court's conclusion), Justice O'Connor only had a plurality of her fellow justices.

⁹¹ *Black*, 538 U.S. at 352.

⁹² *Id.* at 353. However, "[w]hen D.W. Griffith turned [the] book into the movie *The Birth of a Nation* in 1915, the association between cross burning and the Klan became indelible." *Id.* at 353-54.

⁹³ *Id.* at 354.

⁹⁴ *Id.* at 354-55.

⁹⁵ *Id.* at 355.

⁹⁶ *Id.* at 356.

⁹⁷ *See id.* at 356-57.

⁹⁸ *Id.* (internal quotation omitted).

message of intimidation, often the cross burner intends that the recipients of the message fear for their lives.”⁹⁹

However, because cross burning does not *always* serve as a means to intimidate others, this meant that the *prima facie* evidence provision was unconstitutional as applied to the Klan cross burning.¹⁰⁰ The provision, as Justice O’Connor concluded, “ignore[d] all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate.”¹⁰¹ Thus, the “shortcut” provision of the law that was designed to enable prosecution of cross burning without a specific showing of the intent to intimidate was unconstitutional.¹⁰²

Intent figured heavily in the outcome in *Black*, but it was also important in the Court’s examination of true threats. As Justice O’Connor discussed the Court’s speech jurisprudence, the justice defined a true threat as

encompass[ing] those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats “protects individuals from the fear of violence” and “from the disruption that fear engenders,” in addition to protecting people “from the possibility that the threatened violence will occur.” Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.¹⁰³

While that discussion was “very brief,”¹⁰⁴ it set into motion a disagreement in the circuit courts over what level of intent was required for a true threat to be legally proscribable, with the Ninth

⁹⁹ Id. at 357.

¹⁰⁰ See id. at 367.

¹⁰¹ Id.

¹⁰² Id.

¹⁰³ Id. at 359-60 (quoting *R. A. V.*, 505 U.S. at 388).

¹⁰⁴ *U.S. v. Parr*, 545 F.3d 491, 500 (7th Cir. 2008). See also *Crane*, *supra* note 79, at 1260 (“The Court’s opinion takes up six United States Reports pages discussing the history of cross burning, four pages analyzing the statute in light

and possibly Seventh Circuits believing that a specific and subjective intent to threaten was required before speech could be punished as a true threat while other circuits continue to use only an objective true threat test.¹⁰⁵ The Court’s objective with this passage is certainly unclear to an extent,¹⁰⁶ but reading it in light of the holding in *Black* suggests that a subjective intent to threaten should be required before speech is criminally actionable. It was, after all, a “shortcut” through the question of intent that the Court found objectionable in *Black*, and the Court’s treatment of the *prima facie* evidence provision could certainly be analogized to other true threat cases. Furthermore, the idea of requiring a subjective intent to threaten before a finding of a true threat is not an absurd proposition, because Justice Marshall suggested it was the proper way to balance safety and the First Amendment in his concurring opinion in *Rogers*.

Still, with *Black*, the Court opened the door to lower court confusion, much as it had done more than three decades earlier with *Watts*.

II. Lower courts and true threats: Defining a standard in the absence of guidance

Because the Court did not establish a test for true threats in *Watts* and only hinted at a standard in *Black*, “[s]tate and lower federal courts have been trying to make sense of this area of the law, sometimes seeking to refine what the Court has said and sometimes striking out on their own,” as Professor Strasser wrote. Confusion in the true threat doctrine began shortly after *Watts* when the Ninth Circuit — in another application of 18 U.S.C. § 871 — found four months after *Watts* in 1969 that a true threat against the president represented unprotected speech only where “a reasonable person would foresee that the statement would be interpreted by those to whom the

of *R.A.V.* and its statements on content discrimination, five pages scrutinizing the constitutionality of the *prima facie* provision, and a single paragraph examining the meaning of true threats.”)

¹⁰⁵ See Part II, *infra*.

¹⁰⁶ See Crane, *supra* note 79, at 1256-61 (suggesting there are three possible interpretations for the passage: endorsing an objective test, endorsing the subjective intent requirement, and minimizing the paragraph to mere *dicta*).

maker communicates . . . as a serious expression of an intention to inflict bodily harm upon or to take the life of the President[.]”¹⁰⁷ The Ninth Circuit’s formulation — or the reasonable speaker test as it came to be called — focused on what the speaker should have known or understood at the time the supposed threat was made. In contrast, when the Fourth Circuit developed a standard in 1973 that focused on whether “an ordinary, reasonable recipient” would interpret communication as a threat,¹⁰⁸ the reasonable listener standard emerged as a doctrinal alternative.

Thus the circuit split was evident only four years after *Watts*, and it went unresolved when the Court avoided the issue in *Rogers* in 1975.¹⁰⁹ Because the Court avoided the merits in *Rogers*, the lower courts were left without guidance as to the proper test, but the circuits eventually aligned with either the reasonable speaker or the reasonable listener. In Paul Crane’s survey of the landscape, he found that the First, Second, Third, Sixth, Seventh, Ninth, and Tenth Circuits have employed the reasonable speaker test, while the Second,¹¹⁰ Fourth, Seventh, Eighth, and Eleventh Circuits have used the reasonable listener test.¹¹¹ Ultimately, both tests are objective in nature but the “focus of their disagreement is on the appropriate vantage point” with

¹⁰⁷ *Roy v. U.S.*, 416 F.2d 874, 877-78 (9th Cir. 1969).

¹⁰⁸ *U.S. v. Maisonet*, 484 F.2d 1356, 1358 (4th Cir. 1973).

¹⁰⁹ See Part I, notes 69-76, *supra*.

¹¹⁰ The Second Circuit is apparently “in conflict with itself” as panels in the circuit have used both standards. Anna Boksenbaum, Note and Comment, *Shedding Your Soul at the Schoolhouse Gate: The Chilling of Student Artistic Speech in the Post-Columbine Era*, 8 N.Y. CITY L. REV. 123, 138 (2005). *But see* Mary Jo Roberts, Case Note, *Porter v. Ascension Parish School Board: Drawing in the Contours of First Amendment Protection for Student Art and Expression*, 52 LOY. L. REV. 467, 482-83 (2006) (suggesting the Second Circuit follows a hybrid approach where “the court employs a reasonable listener test, while also analyzing whether the listener believed that the threat would be imminently carried out”).

¹¹¹ Crane, *supra* note 79, at 1244-47. *But see, e.g.*, Roberts, *supra* note 110, at 482-83 (finding that the First, Third, Sixth, Seventh, and Ninth Circuits have adopted the reasonable speaker test; the Fourth, Fifth, Eighth, and D.C. Circuits have embraced the reasonable listener test; the Second Circuit has established a hybrid approach; and the Eleventh Circuit has declined to signal a preference between the two main tests); Boksenbaum, *supra* note 110, at 138 (listing the First, Second, and Ninth Circuits as reasonable speaker courts and the Fourth, Second, and Seventh Circuits as reasonable listener courts).

concerns over either a speaker-based or listener-based perspective resulting in different conclusions, as Professor Strasser wrote.¹¹²

Whether the objective test split is important is certainly debatable,¹¹³ but the post-*Black* split on subjective intent is clearly more critical to the development of true threat law and First Amendment jurisprudence.¹¹⁴ This second split, focusing on whether the Constitution requires Justice Marshall's standard of first finding a subjective intent to threaten before proceeding to an objective analysis of whether the speech was threatening, goes to the heart of what should be punishable speech. Therefore, it is this second, more recent split and not the reasonable speaker/reasonable listener distinction that serves as the most urgent matter to be addressed in true threat jurisprudence.

a. Development of the reasonable speaker test and adoption of the subjective intent requirement

In *Roy v. U.S.*, the Ninth Circuit became the first circuit to adopt the reasonable speaker test¹¹⁵ when it upheld a conviction under 18 U.S.C. § 871, the same federal statute barring threats against the life of the president at issue in *Watts and Rogers*.¹¹⁶ The defendant in *Roy* was a private in the U.S. Marine Corps unhappy with a decision to reassign him to school rather than

¹¹² Strasser, *supra* note 44, at 374-75 (internal quotation omitted).

¹¹³ Compare *id.* at 375 ("It is simply unclear whether the difference between the perceptions of the reasonable statement maker and those of the reasonable recipient would yield a different result in many cases.") and Roberts, *supra* note 110, at 483 ("The failure of courts to agree on which test to apply to the true threat doctrine has not proven to be critical in the student speech context, as many have concluded that the differences between the reasonable-listener and reasonable-speaker tests are an inconsequential academic debate. Critics point out that in most instances no matter which test is utilized, the result will be the same.") with Boksenbaum, *supra* note 110, at 138 ("In the school context, the tests yield significantly different results for students and teachers.") and Alex J. Berkman, Comment, *Speech as a Weapon: Planned Parenthood v. American Coalition of Life Activists and the Need for a Reasonable Listener Standard*, 29 *TOURO L. REV.* 485, 511 (2013) (stating that the reasonable listener standard is preferable because it "provides plaintiffs with a standard that looks to the impact of a statement in context based on how it affects those targeted by it, rather than a standard that is largely subject to the political and religious views of the region or state in which a claim is brought.").

¹¹⁴ Strasser, *supra* note 44, at 376.

¹¹⁵ Crane, *supra* note 79, at 1244.

¹¹⁶ See Part I, *supra*.

deploy him to Vietnam.¹¹⁷ On the night before President Johnson was scheduled to visit the defendant's base, he joked around with other Marines in the barracks "how they were going to get [President Johnson] with cannons and how everybody was going to shoot them off."¹¹⁸ The defendant then walked outside to a pay telephone and told the operator, according to her testimony, to "Tell the President he should not come aboard the base or he would be killed."¹¹⁹ The operator became afraid and held the line so she could receive any other calls from the same telephone.¹²⁰ Soon after his first call, the defendant attempted to make another call, one in which he gave the operator his name in order to make a collect call.¹²¹ The defendant was arrested later that night.¹²²

On appeal before the Ninth Circuit, the defendant argued the phone call lacked both the requisite threat and willfulness for the threat statute and that there was insufficient evidence to support his conviction.¹²³ After finding the conversation constituted a threat for the purpose of the statute,¹²⁴ the court then turned to the statute's requirement that a threat be "wilfully" made in order for a speaker to be criminally liable.¹²⁵ As the court found, the statute had three possible purposes: preventing assaults against the president, preventing statements that would incite others to harm the president, and preventing the "detrimental effect upon presidential activity and

¹¹⁷ *Roy*, 416 F.2d at 875.

¹¹⁸ *Id.*

¹¹⁹ *Id.* The defendant testified that he said, "Hello, baby. I hear the president is coming to the base. I am going to get him." *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* "The operator recognized his voice as the voice that had made the threat. She asked him if he knew the name of the person who had just left the telephone booth. Roy gave her a fictitious name. He testified that he also told her at that time that the statement about the President was a joke and that she should forget about it. The operator testified that she did not hear him say it was a joke." *Id.* at 875-76.

¹²² *Id.* at 876.

¹²³ *Id.*

¹²⁴ *See id.* ("The trial court was . . . reasonable in interpreting the statement 'I am going to get him' to indicate a threat to take the life of or to inflict bodily harm upon the President. We must therefore reject Roy's argument that the words used did not constitute a threat within the language of the statute.").

¹²⁵ *Id.* at 876-77.

movement that may result simply from a threat upon the president's life."¹²⁶ Because Congress chose not to specifically premise liability under 18 U.S.C. § 871 on an assault, attempted assault, conspiracy, incitement, or inducement, the court argued that it was the "detrimental effect" caused by threats that was the real purpose for the statute.¹²⁷ Since the statute was premised on preventing the "restrictive effect upon the free exercise of presidential responsibilities," this meant that no intent to actually carry out harm was needed for criminal liability.¹²⁸ Therefore, the court found that the statute's willfulness requirement meant

only that the defendant intentionally make a statement, written or oral, in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm upon or to take the life of the President, and that the statement not be the result of mistake, duress, or coercion.¹²⁹

In applying its newly formed standard to the case at hand, the court found that "[w]hether Roy acted from an intention to assault the president or from youthful mischief, he necessarily set in motion emergency security measures that might have impeded the president's activities and movement" — in essence, "the kind of mischief which the statute was designed in part to prevent."¹³⁰ The defendant was guilty, as the court concluded, because "one could not reasonably expect" that Roy's later claim that the first telephone was a joke could "eliminate the mischief created" by the threatening call.¹³¹

¹²⁶ *Id.* at 877.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 878-77.

¹³⁰ *Id.* at 878.

¹³¹ *Id.*

Despite a footnote that suggested the court did not see a free speech issue in the case,¹³² *Roy* quickly became a standard adopted in other circuits for evaluating the constitutionality of true threat convictions.¹³³ Within the Ninth Circuit, the test remained relatively unchanged until 2002 when an *en banc* court decided *Planned Parenthood of the Columbia/Williamette Inc. v. Advocates for Life Ministries*,¹³⁴ a civil dispute otherwise known as the “Nuremberg Files” case.¹³⁵ *Planned Parenthood* involved an application of the Freedom of Access to Clinics Entrances Act, a federal law that granted a civil cause of action against someone who by “threat of force . . . intentionally . . . intimidates . . . any person because that person is or has been . . . providing reproductive health services.”¹³⁶ Several doctors and two reproductive health clinics sued the American Coalition of Life Activists, Advocates for Life Ministries, and individuals associated with the pro-life groups for two potentially threatening forms of communication: a series of “GUILTY” and “WANTED” posters depicting the doctors along with their work and home addresses¹³⁷ and a website that listed “abortionists” in different fonts depending on whether they were still working, injured by pro-life activists in extremist attacks, or murdered.¹³⁸ The posters were similarly connected to the deaths of abortion providers, with at least three abortion doctors being murdered after they were shown on a poster.¹³⁹

¹³² See *id.* at 879 n. 17 (“*Roy* does not contend on appeal that the conviction infringes on his First Amendment rights. Unlike the situation in *Watts v. United States*, there does not appear to be a free speech issue in this case.) (citation omitted). Presumably, this refers to the political nature of the speech in *Watts* as compared to the “youthful mischief” in *Roy*.”)

¹³³ See *Crane, supra* note 79, at 1244 (“The Sixth Circuit quickly followed suit in adopting the reasonable speaker test, and the Second, Third, Seventh, and Tenth Circuits were not far behind. Notably, each of these circuits traced their reasonable speaker roots back to *Roy*.”).

¹³⁴ 290 F.3d 1058 (9th Cir. 2002).

¹³⁵ See Eugene Volokh, *Menacing Speech, Today and During the Civil Rights Movement*, <http://www2.law.ucla.edu/volokh/nurember.htm> (applying “Nuremberg Files” name to Ninth Circuit panel decision).

¹³⁶ *Planned Parenthood*, 290 F.3d at 1062 (quoting 18 U.S.C. § 248(a)(1) and (c)(1)(A)).

¹³⁷ See *id.* at 1064-65 (describing the posters).

¹³⁸ *Id.* at 1065.

¹³⁹ *Id.* at 1063-64.

As the record suggested, the ACLA was well aware of the effect that the wanted posters had on abortion doctors, with one supporter suggesting that “it is clear to all who possess faculties capable of inductive analysis: he was bothered and afraid” after a doctor quit following his depiction on a poster.¹⁴⁰ Similarly, one doctor testified that

[t]he fact that wanted posters about these doctors had been circulated, prior to their assassination, and that the — that the posters, then, were followed by the doctor’s assassination, emphasized for me the danger posed by this document, the Deadly Dozen List, which meant to me that — that, as night follows day, that my name was on this wanted poster . . . and that I would be assassinated, as had the other doctors been assassinated.¹⁴¹

The doctors and abortion service providers sued the groups responsible for the posters and the website under FACE.¹⁴² Applying the reasonable speaker true threat test, the district court construed FACE as prohibiting threats that “a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm.”¹⁴³ Using that definition of a threat, the jury found the pro-life activists liable and returned a verdict in excess of \$100 million in favor of the doctors,¹⁴⁴ and the court additionally enjoined the ACLA from publishing posters or other documents threatening the plaintiffs.¹⁴⁵

A Ninth Circuit panel, however, overturned the jury’s verdict.¹⁴⁶ In the circuit court’s view, the district court applied FACE in such a way to render ACLA liable “for putting the doctors in harm’s way by singling them out for the attention of unrelated but violent third

¹⁴⁰ *Id.* at 1065.

¹⁴¹ *Id.* at 1066.

¹⁴² *Id.* at 1062.

¹⁴³ *Id.*

¹⁴⁴ *See id.* at 1066 n. 4 (listing individual compensatory and punitive damage awards). *See also* Volokh, *supra* note 135 (stating the award was “over \$100 million”).

¹⁴⁵ *Planned Parenthood*, 290 F.3d at 1066.

¹⁴⁶ *Id.* at 1063.

parties,” which was protected First Amendment expression in contrast to “directly threatening harm itself.”¹⁴⁷ The Ninth Circuit panel found that ACLA’s posters and the Nuremberg Files website could not be construed as an authoritative statement of harm from ACLA to abortion doctors who continued providing services, and because of that finding, the jury’s verdict could not stand.¹⁴⁸

Yet in an *en banc* rehearing, the Ninth Circuit reversed the panel’s decision and reinstated the jury’s verdict. Contrary to the panel’s decision, the full court found that it was irrelevant that the posters and the website did not threaten harm directly from ACLA.¹⁴⁹ Rather, as the court concluded, it was the group’s intent to threaten the doctors and clinics that was key for the purposes of FACE. Because, as the court wrote, “ACLA was not staking out a position of debate but of threatened demise,” the posters and the website represented a true threat despite lacking the possibility of direct harm from ACLA.¹⁵⁰

In arriving at its conclusion, the Ninth Circuit employed the reasonable speaker test, but it did so with an important difference:

FACE itself requires that the threat of force be made with the intent to intimidate. Thus, the jury must have found that ACLA made statements to intimidate the physicians, reasonably foreseeing that physicians would interpret the statements as a serious expression of ACLA’s intent to harm them because they provided reproductive health services.¹⁵¹

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *See id.* at 1088.

¹⁵⁰ *Id.* at 1088. *See also id.* at 1087 (explaining that “[t]he posters are a true threat because, like Ryder trucks or burning crosses, they connote something they do not literally say, yet both the actor and the recipient get the message. To the doctor who performs abortions, these posters meant ‘You’re Wanted or You’re Guilty; You’ll be shot or killed.’ This was reinforced by the scorecard in the Nuremberg Files. The communication was not conditional or casual. It was specifically targeted.”).

¹⁵¹ *Id.* at 1063.

The Ninth Circuit thus read into FACE a requirement for subjective intent to threaten; however, the court argued that the intent requirement was merely “subsumed within the statutory standard of FACE itself, which requires that the threat of force be made with the intent to intimidate.”¹⁵² In its discussion of an appropriate standard for the case, the court noted that it had been “urged to adopt a subjective intent requirement for FACE,” but since it found such a requirement already in the statute, the court declined to “engraft another intent requirement onto the statute.”¹⁵³

So in *Planned Parenthood*, a pre-*Black* true threat case, the Ninth Circuit adopted a standard that appeared to be similar to Justice Marshall’s formulation in *Rogers*: an examination of a would-be defendant’s subjective intent to threaten before an objective determination of whether the communication could be interpreted as threatening. While the Ninth Circuit argued that the intent requirement was statutorily specified and therefore specifically limited to FACE, other courts in FACE cases did not view subjective intent as a requisite for liability.¹⁵⁴

After *Black*, however, the subjective intent requirement was no longer limited to FACE in the Ninth Circuit. In *U.S. v. Cassel*,¹⁵⁵ the Ninth Circuit attempted to address the intent requirement in light of *Black*, *Planned Parenthood*, and other possibly conflicting cases.¹⁵⁶ The defendant in *Cassel* was charged with interfering with a federal land sale under 18 U.S.C. § 1860¹⁵⁷ after telling a potential buyer that he would burn, steal, or vandalize anything left on the property.¹⁵⁸ After his conviction, Cassel argued on appeal that the federal statute was

¹⁵² Id. at 1076.

¹⁵³ Id.

¹⁵⁴ See Part II.b., *infra*.

¹⁵⁵ 408 F.3d 622 (9th Cir. 2005).

¹⁵⁶ See id. at 627-32.

¹⁵⁷ See id. at 626 (“18 U.S.C. § 1860 punishes, in relevant part, ‘whoever, by intimidation . . . hinders, prevents, or attempts to hinder or prevent, any person from bidding upon or purchasing any tract of’ federal land at public sale.”).

¹⁵⁸ Id. at 625. Cassel’s property was bordered by several lots owned by the federal Bureau of Land Management — lots that the government attempted to sell. Id. at 642. However, “Cassel apparently liked his privacy, though, and was not about to let neighbors move in without doing what he could to stop them.” Id.

constitutionally invalid because it lacked protection for speech that was not subjectively intended to be threatening.¹⁵⁹

In overturning Cassel’s conviction,¹⁶⁰ the Ninth Circuit largely agreed with his position in that it concluded an “intent to intimidate is necessary and . . . the government must prove it in order to secure a conviction.”¹⁶¹ The court devoted much of its discussion to the question of what intent was required for criminal liability under the true threat doctrine, and it noted that the circuit’s “own cases . . . have not been entirely clear or consistent on that question.”¹⁶² In order to demonstrate that lack of clarity, the court cited *Roy* for the proposition that negligence was sufficient to obtain a criminal conviction and *U.S. v. Gilbert*¹⁶³ as suggesting intent was required. To further emphasize the lack of clarity as to the intent question, the court cited *Planned Parenthood* as a case that “advocate[d] both positions within the confines of a single opinion.”¹⁶⁴

Yet instead of “delv[ing] deeper into the vagaries of our own case law,” the court pointed to *Black* as a case that was both more recent and one that “laid great weight on the intent requirement.”¹⁶⁵ After citing the Court’s definition of true threats from *Black*,¹⁶⁶ the court concluded that “[t]he clear import of this definition is that only *intentional* threats are criminally

¹⁵⁹ See *id.* at 626 n. 1.

¹⁶⁰ *Id.* at 638.

¹⁶¹ *Id.* at 632.

¹⁶² *Id.* at 628.

¹⁶³ 813 F.2d 1523 (9th Cir. 1987) (upholding a provision of the Fair Housing Act that criminalized speech that “willfully” intimidated individuals in relation to racial discrimination in housing).

¹⁶⁴ *Cassel*, 408 F.3d at 629-30. The court argued *Planned Parenthood* was unclear because the court found in that case that FACE “does not require intent or ability to *carry out* the threat.” *Id.* (characterizing the holding of *Planned Parenthood*) (emphasis in original). Additionally, the *Planned Parenthood* court also wrote that “the only intent requirement for a true threat is that the defendant intentionally or knowingly communicate the threat.” *Id.* (quoting *Planned Parenthood*, 290 F.3d at 1075). However, the *Cassel* court correctly noted that *Planned Parenthood*’s holding was based on a determination that FACE required “an explicit requirement of intent to threaten.” *Id.*

¹⁶⁵ *Id.* at 630, 631.

¹⁶⁶ *Black*, 538 U.S. at 359-60. See also notes 46-48 and accompanying text, *supra*.

punishable consistently with the First Amendment.”¹⁶⁷ Because eight justice agreed in *Black* that intent was a necessary element of a criminal threat,¹⁶⁸ the court found that it was “bound to conclude that speech may be deemed unprotected by the First Amendment as a ‘true threat’ only upon proof that the speaker subjectively intended the speech as a threat.”¹⁶⁹ Since the jury instructions in Cassel’s trial failed to note that the government had to prove he intended to threaten the potential land buyer, his conviction was invalid.¹⁷⁰

The *Cassel* court was careful to limit its application of an intent requirement because the court argued it was “not faced with the question of what effect our holding has on other specific statutes that we have previously held do not require the government to prove subjective intent.”¹⁷¹ A Ninth Circuit panel seized on this language in *U.S. v. Romo*¹⁷² as it found that the government did not have to prove a subjective intent to threaten when the defendant was accused of threatening the president under 18 U.S.C. § 871.¹⁷³

Thus, after *Romo*, the Ninth Circuit developed something of an intra-circuit split: FACE cases and 18 U.S.C. § 1860 prosecutions required a subjective intent to threaten, while other cases, such as the ubiquitous 18 U.S.C. § 871 prosecution, did not require such a showing. The circuit attempted to resolve this confusion in *U.S. v. Bagdasarian*,¹⁷⁴ an appeal of a criminal conviction that stemmed from two 2008 online message board posts that seemed to threaten the

¹⁶⁷ *Cassel*, 408 F.3d at 631 (emphasis in original).

¹⁶⁸ *See id.* at 632 (“[E]ight Justices agreed that intent to intimidate is necessary and that the government must prove it in order to secure a conviction.”). The court surveyed the various opinions in *Black* as to the prima facie evidence requirement and found that eight justices (all aside from Justice Clarence Thomas) found intent as a necessary component for criminal liability. *See id.* at 632-33.

¹⁶⁹ *Id.* at 633.

¹⁷⁰ *Id.* at 638.

¹⁷¹ *Id.* at 633 n.8.

¹⁷² 413 F.3d 1044 (9th Cir. 2005).

¹⁷³ *Id.* at 1051 (citing *Roy* as the appropriate means of analysis).

¹⁷⁴ 652 F.3d 1113 (9th Cir. 2011).

life of then-Sen. Barack Obama.¹⁷⁵ The defendant, Bagdasarian, joined a financial message board on Yahoo! that discussed stocks and insurance conglomerate American International Group.¹⁷⁶ Late on the night he joined the message board, he posted two messages: “Re: Obama fk the nigger, he will have a 50 cal in the head soon” and a second 20 minutes later that read “shoot the nig country fkd for another 4 years+, what nig has done ANYTHING right???? Long term???? never in history except sambos.”¹⁷⁷ While he claimed to be intoxicated at the time of his postings,¹⁷⁸ the threats were still reported to the Secret Service, and the agency subsequently began an investigation.¹⁷⁹

A month after his postings, agents interviewed the defendant at his home, where he admitted to making the message board remarks.¹⁸⁰ The agents also found a gun on a shelf, and after a search warrant was obtained, the Secret Service found six more weapons, including a rifle and the .50 caliber ammunition Bagdasarian referenced in his post.¹⁸¹ Additionally, agents recovered an Election Day email on Bagdasarian’s computer with the subject “Re: And so it begins.”¹⁸² The text of the email read

“Pistol??? Dude, Josh needs to get us one of these, just shoot the nigga’s car and POOF!” The email provided a link to a webpage advertising a large caliber rifle. Another email that Bagdasarian sent the same day with the same subject heading stated, “Pistol . . . plink plink plink Now when you use a 50 cal on a nigga car you get this.” It included a link to a video of a propane tank, a pile of debris, and two junked cars being blown up.¹⁸³

¹⁷⁵ Id. at 1115.

¹⁷⁶ Id.

¹⁷⁷ Id.

¹⁷⁸ Id. Between his threatening posts, Bagdasarian posted another message that concluded with “burp more VINOOOOOOOO.” Id. at n. 10. He also responded to a user noting that his posts had been reported by writing, “Listen up crybaby ole white boy, I was drunk.” Id.

¹⁷⁹ Id. at 1115-16.

¹⁸⁰ Id. at 1116.

¹⁸¹ Id.

¹⁸² Id.

¹⁸³ Id.

At the conclusion of the Secret Service investigation, Bagdasarian was arrested and charged with two counts — one for each message board posting — of violating 18 U.S.C. § 879(a)(3),¹⁸⁴ a statute that criminalizes threats to kill or do bodily harm to a major presidential candidate.¹⁸⁵

In its examination of the case, the Ninth Circuit “began by clearing up the perceived confusion as to whether a subjective or objective analysis is required when examining whether a threat is criminal under various threat statutes and the First Amendment.”¹⁸⁶ The court argued that the either/or choice between subjective and objective standards represented “a false dichotomy.”¹⁸⁷ Instead, as the court clarified, “[t]he issue is actually whether, as to a threat prosecuted under a particular threat statute, *only* a subjective analysis need be applied or whether *both* a subjective and an objective analysis is required.”¹⁸⁸ A subjective analysis was therefore required in *all* cases because the court determined that *Black* “commanded” a “constitutional inquiry” into whether a speaker subjectively intended speech to be a threat.¹⁸⁹ The only difference between threat statutes, the court concluded, was that some statutes required an objective test in addition to the subjective examination, while some statutes needed only the subjective inquiry.¹⁹⁰

In applying its newly formulated standard to Bagdasarian, the Ninth Circuit found that he had neither the subjective intent to threaten nor could the message board postings be objectively “interpreted by those to whom the maker communicates the statement as a serious expression of

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 1115.

¹⁸⁶ *Id.* at 1116-17.

¹⁸⁷ *Id.* at 1117.

¹⁸⁸ *Id.* (emphasis added).

¹⁸⁹ *Id.* at 1118. As the court concluded, “[T]he subjective test set forth in *Black* must be read into all threat statutes that criminalize pure speech.” *Id.* at 1117.

¹⁹⁰ *Id.* at 1117.

an intention to inflict bodily harm on or to take the life of [Obama].”¹⁹¹ Because the message board postings “[did] not convey the notion that Bagdasarian himself had plans to fulfill the prediction that Obama would be killed,” they could not serve as a subjective declaration of his intent to harm the presidential candidate.¹⁹² Similarly from an objective perspective, the plain meanings of “Re: Obama fk the niggas, he will have a 50 cal in the head soon” and “shoot the nig” did not constitute a threat;¹⁹³ the financial message board was “a non-violent discussion forum that would tend to blunt any perception that statements made there were serious expressions of intended violence;”¹⁹⁴ and neither his weapons nor his emails could be used as evidence to prove that others might have reasonably interpreted his postings as threats because the message board users did not know about them at the time of Bagdasarian’s emails.¹⁹⁵ Since the government could show neither a subjective intent to threaten nor that the postings were objectively viewed as threatening, Bagdasarian’s postings were “protected speech under the First Amendment” and his conviction was therefore unconstitutional.¹⁹⁶

The Ninth Circuit fundamentally altered its true threat jurisprudence with *Bagdasarian*. Before the case, the circuit’s position on the subjective intent requirement was unclear; after *Bagdasarian*, the court’s declaration that “the subjective test set forth in *Black* must be read into all threat statutes that criminalize pure speech”¹⁹⁷ could not be more definitive. Other circuits

¹⁹¹ Id. at 1118, 1123.

¹⁹² Id. at 1122.

¹⁹³ Id. at 1119. “The ‘Obama fk the niggas’ statement is a prediction that Obama ‘will have a 50 cal in the head soon.’ It conveys no explicit or implicit threat on the part of Bagdasarian that he himself will kill or injure Obama. Nor does the second statement impart a threat. ‘[S]hoot the nig’ is instead an imperative intended to encourage others to take violent action, if not simply an expression of rage or frustration. The threat statute, however, does not criminalize predictions or exhortations to others to injure or kill the President. It is difficult to see how a rational trier of fact could reasonably have found that either statement, on its face or taken in context, expresses a threat against Obama by Bagdasarian.” Id.

¹⁹⁴ Id. at 1121.

¹⁹⁵ Id. at 1122.

¹⁹⁶ Id. at 1123-24.

¹⁹⁷ Id. at 1117 (emphasis added).

have been less willing to adopt such an expansive interpretation of *Black*,¹⁹⁸ but at least the Seventh Circuit has been receptive to the argument as it suggested “that an entirely objective definition is no longer tenable” after *Black*.¹⁹⁹ Other circuits, however, continue to use only the reasonable speaker test or its doctrinal alternative, the reasonable listener test.²⁰⁰

b. Development of the reasonable listener test and rejection of the subjective intent requirement

Beginning with the Fourth Circuit’s articulation of the standard in 1973 with *U.S. v. Maisonet*,²⁰¹ the reasonable listener test developed alongside the reasonable speaker test, but it was never as widespread as the reasonable speaker test.²⁰² In *Maisonet*, a case evaluating a criminal conviction that resulted from a threatening letter,²⁰³ the Fourth Circuit found that

Even when the defense is based on a claim of first amendment rights, . . . [w]hether a letter that is susceptible of more than one meaning — one of which is a threat of physical injury — constitutes a threat must be determined in the light of the context in which it was written. If there is substantial evidence that tends to show beyond a reasonable doubt that an ordinary, reasonable recipient who is familiar with the context of the letter would interpret it as a threat of injury, the court should submit the case to the jury.²⁰⁴

¹⁹⁸ See Part II.b, *infra*.

¹⁹⁹ *Parr*, 545 U.S. at 500.

²⁰⁰ See Part II.b, *infra*.

²⁰¹ 484 F.2d 1356 (4th Cir. 1973).

²⁰² *Crane*, *supra* note 79, at 1246.

²⁰³ *Maisonet* was convicted on a charge of carrying a dangerous weapon as a prior felon. *Maisonet*, 484 F.2d at 1357. While he was imprisoned on that charge, he mailed a letter to his sentencing judge that read “I may have to do all my ten (10) years, but if I ever get out of here and nothing happen to me while I am in here, you will never be able to be prejudice and racist against another Puerto Rican like me.” *Id.* The letter was addressed to the judge at his home. *Id.* The defendant was charged and convicted of violating 18 U.S.C. § 876, a federal statute that prohibited mailing a letter “containing . . . any threat to injure the person of the addressee.” *Id.*

²⁰⁴ *Id.* at 1358.

Therefore, the reasonable listener test had three important points from its beginning: a clear grounding in the Constitution as a protection for First Amendment rights,²⁰⁵ a requirement that speech be evaluated in the context that it was written, and the perspective of the “ordinary, reasonable recipient.”²⁰⁶

The test was adopted by the Second, Seventh, Eighth, and Eleventh Circuits,²⁰⁷ with subsequent courts tweaking the standard created by the Fourth Circuit. One such important innovation came with the Eighth Circuit’s opinion in *U.S. v. Dinwiddie*,²⁰⁸ a 1996 case that gave courts guidance on how to apply the objective reasonable listener standard.²⁰⁹ In *Dinwiddie*, the Eighth Circuit evaluated the constitutionality of a criminal conviction under FACE,²¹⁰ the same statute at issue in *Planned Parenthood*.²¹¹ Unlike the Ninth Circuit in *Planned Parenthood*, the Eighth Circuit used only the objective reasonable listener standard in *Dinwiddie*, as it found that courts interpreting a threat under FACE had to decide “whether the recipient of the alleged threat could reasonably conclude that it expresses ‘a determination or intent to injure presently or in the future.’”²¹² The court then combined important findings from three other Eighth Circuit cases into one paragraph that synthesized the circuit’s true threat jurisprudence:

When determining whether statements have constituted threats of force, we have considered a number of factors: the reaction of the

²⁰⁵ See *Crane*, *supra* note 79, at 1247 (noting that the *Maisonet* court “did consider the First Amendment implications of its approach” in contrast to *Roy* and the reasonable speaker test).

²⁰⁶ *Maisonet*, 484 F.2d at 1358.

²⁰⁷ *Crane*, *supra* note 79, at 1246.

²⁰⁸ 76 F.3d 913 (8th Cir. 1996).

²⁰⁹ See *id.* at 925.

²¹⁰ See *id.* at 917 (explaining FACE and its provisions).

²¹¹ See Part II.a., *supra*. The statutory provision at issue in both cases was the same. In *Dinwiddie*, however, the defendant was criminally prosecuted in contrast to the civil penalties at issue in *Planned Parenthood*. See *Dinwiddie*, 76 F.3d at 916 (explaining that FACE provided for civil and criminal penalties for anyone who “by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services”) (quoting 18 U.S.C. § 248(a)(1)).

²¹² *Id.* at 925 (quoting *Martin v. U.S.*, 691 F.2d 1235, 1240 (8th Cir. 1982)).

recipient of the threat and of other listeners, whether the threat was conditional, whether the threat was communicated directly to its victim, whether the maker of the threat had made similar statements to the victim in the past, and whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence. This list is not exhaustive, and the presence or absence of any one of its elements need not be dispositive.²¹³

The *Dinwiddie* court thus aided the development of true threat jurisprudence by actually grounding its analysis²¹⁴ in an easily understood list of factors rather than an amorphous phrase like “reasonable listener.” In *U.S. v. Hart*,²¹⁵ the Eighth Circuit demonstrated how *Dinwiddie* could be applied in other cases. The court in *Hart* evaluated a criminal conviction under FACE for a man who parked Ryder rental trucks in the driveways of two different Little Rock, Ark. abortion clinics shortly before President Clinton was set to visit the city.²¹⁶ While the defendant, a pro-life activist,²¹⁷ offered “no legitimate reason” for leaving the trucks at the clinics,²¹⁸ the trucks represented a clear allusion to the Oklahoma City bombing, an event which had occurred only two years prior to the defendant’s symbolic threat.

On appeal, Hart argued the government’s evidence was insufficient to support his conviction,²¹⁹ but the Eighth Circuit, again applying only the objective reasonable listener test,²²⁰ found that the trucks represented a true threat.²²¹ As the court stated, the question was “whether the jury reasonably could have believed that parking the Ryder trucks in the clinic driveways, in light of the surrounding circumstances, constituted a ‘true threat.’”²²² In turn, the presence or

²¹³ *Id.* (citations omitted).

²¹⁴ *See id.* at 925-26 (noting that the defendant communicated her threats directly to an abortion doctor and that he responded by wearing a bullet-proof vest).

²¹⁵ 212 F.3d 1067 (8th Cir. 2000).

²¹⁶ *Id.* at 1069.

²¹⁷ *Id.*

²¹⁸ *Id.* at 1072.

²¹⁹ *Id.* at 1070-71.

²²⁰ *Id.* at 1071.

²²¹ *Id.* at 1072.

²²² *Id.*

absence of a true threat was to be determined under the reasonable listener standard and the factors illuminated in *Dinwiddie* and listed by the *Hart* court.²²³ After applying the *Dinwiddie* factors, the court concluded that Hart's verdict was based upon a reasonable finding of a true threat because the clinic workers reacted to the trucks as if they contained bombs and were therefore perceived as threats.²²⁴ As the court concluded, "Hart's conviction is not based on the mere presence of a Ryder truck at each clinic. Rather, his conduct violated the statute because of the particular manner and context in which he parked the trucks."²²⁵

While the Eighth Circuit's approach in *Dinwiddie* has been generally limited to the geographic confines of the Eighth Circuit,²²⁶ it has been adopted by some courts outside of the circuit as a helpful mode of analysis.²²⁷ Again, the factors cited in *Dinwiddie* did not fundamentally alter or replace the reasonable listener test. Instead, they merely provided guidance in applying the test.

After *Black*, the Eight Circuit continued to employ only the objective reasonable listener test²²⁸ in contrast to the Ninth Circuit's gradual adoption of a requiring a subjective standard in

²²³ See *id.* at 1071 (listing *Dinwiddie* factors).

²²⁴ *Id.* at 1072.

²²⁵ *Id.* at 1073.

²²⁶ See, e.g., *D.J.M. v. Hannibal Pub. Sch. Dist.*, 647 F.3d 754 (8th Cir. 2011); *Doe v. Pulaski County Special Sch. Dist.*, 306 F.3d 616 (8th Cir. 2002); *U.S. v. Hart*, 212 F.3d 1067 (8th Cir. 2000); *Jones v. State*, 64 S.W.3d 728 (Ark. 2002).

²²⁷ See *U.S. v. McMillan*, 53 F. Supp. 2d 895 (N.D. Miss. 1999) ("Therefore, if the standards set forth in *Dinwiddie* are to be followed, a federal court must analyze an alleged threat of force in the light of its entire factual context, taking into consideration such factors as: the reaction of the recipient of the threat and of other listeners; whether the threat was conditional; whether the threat was communicated directly to its victim; whether the maker of the threat had made similar statements to the victim in the past; and whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence. Upon consideration of these factors, and any others the court may find relevant or probative, the court then must decide whether the recipient of the alleged threat could reasonably conclude that it expresses 'a determination or intent to injure presently or in the future.' This court finds the *Dinwiddie* factors offer a reasonable template for the analysis of the instant case, both as to whether *McMillan's* utterances constitute contempt of the Consent Decree and as to whether there has been a violation of FACE . . . [.]” See also *U.S. v. Henry (In re White)*, 2013 U.S. Dist. LEXIS 133148 (E.D. Va. 2013); *New York v. Operation Rescue Nat’l*, 2000 U.S. Dist. LEXIS 20059 (W.D.N.Y. 2000) (citing *Dinwiddie* in connection to true threat factors).

²²⁸ See *U.S. v. Mabie*, 663 F.3d 322 (8th Cir. 2011).

all cases.²²⁹ In *U.S. v. Mabie*,²³⁰ the Eighth Circuit expressly rejected the adoption of a subjective intent standard²³¹ as it interpreted *Black* narrowly and confined the case to its holding.²³² The circuit again rejected an expansive interpretation of *Black* in *U.S. v. Nicklas*²³³ after it noted that a defendant arguing for a subjective intent standard did so with a “deck of circuit precedent stacked heavily against him.”²³⁴

Similarly, other circuits also rejected the broad interpretation of *Black* and the Ninth Circuit’s approach. In *U.S. v. Jeffries*,²³⁵ after a defendant sought a subjective intent requirement based on *Black*, the Sixth Circuit argued that the Court’s decision “does not work the sea change that [the defendant] proposes.”²³⁶ The First Circuit also rejected the notion that *Black* substantively changed the law in the area of true threats.²³⁷ In *U.S. v. Clemens*, the First Circuit upheld a criminal conviction for a defendant found guilty of sending a threatening email and forwarding the same email to another person.²³⁸ In affirming the conviction, the court specified that the circuit’s standard remained an objective reasonable speaker test despite the Supreme

²²⁹ See Part II.a., *supra*.

²³⁰ 663 F.3d 322 (8th Cir. 2011).

²³¹ *Id.* at 333 (“The government need not prove that Mabie had a subjective intent to intimidate or threaten in order to establish that his communications constituted true threats. Rather, the government need only prove that a reasonable person would have found that Mabie’s communications conveyed an intent to cause harm or injury.”).

²³² See *id.* at 332 (“Notably, the *Black* Court did not hold that the speaker’s subjective intent to intimidate or threaten is required in order for a communication to constitute a true threat. Rather, the Court determined that the statute at issue in *Black* was unconstitutional because the intent element that was included in the statute was effectively eliminated by the statute’s provision rendering any burning of a cross on the property of another prima facie evidence of an intent to intimidate.”).

²³³ 713 F.3d 435 (8th Cir. 2013).

²³⁴ *Id.* at 439.

²³⁵ 692 F.3d 473 (6th Cir. 2012).

²³⁶ *Id.* at 479.

²³⁷ See *U.S. v. Clemens*, 738 F.3d 1 (1st Cir. 2013).

²³⁸ See *id.* at 5. The email contained a warning to “be sure and watch your backside” because “God may step up to the plate at any moment.” *Id.* The defendant further explained in the email that “I got this feeling someone’s going to get hurt REAL BAD. And it ain’t gonna be me.” *Id.* The message was forwarded to another individual with an additional warning: “You all might be digging yourself a grave.” *Id.*

Court's decision *Black*.²³⁹ The court also summarized other decisions that viewed *Black* narrowly as reasoning that the Court's decision

had no occasion to distinguish between subjective and objective standards for construing threats because (1) the Virginia law at issue required subjective intent; and (2) the prima facie evidence provision that the Court invalidated had no standard at all for intent, allow[ing] convictions based solely on the fact of cross burning itself.²⁴⁰

As the court concluded, "Most circuits have rejected [the defendant's] arguments and this court has applied an objective defendant vantage point standard post-*Black*. Absent further clarification from the Supreme Court, we see no basis to venture further and no basis to depart from our circuit law."²⁴¹

On at least one occasion, the Fourth Circuit attempted to distinguish *Black* from typical true threat cases.²⁴² In that case, *U.S. v. White*, the court heard the appeal of a white supremacist charged with making threats to four different individuals or groups: an email to a bank employee that alluded to a judge whose parents had been murdered,²⁴³ racist packages to plaintiffs in a housing discrimination lawsuit that included a letter that noted how white supremacist "patience with you and the government that coddles you runs thin,"²⁴⁴ a message left with a university administrative assistant to tell a superior that "people that think the way she thinks, we hunt down and shoot,"²⁴⁵ and a website advising that a Canadian human rights attorney "should be drug out into the street and shot."²⁴⁶ Although a jury convicted him on all four counts, the district

²³⁹ See *id.* at 12. See also *id.* at 6 (describing the "circuit's objective test under which a statement is a threat if the sender should have reasonably foreseen that the recipient would interpret it as such").

²⁴⁰ *Id.* at 11.

²⁴¹ *Id.* at 12 (citations omitted).

²⁴² See *U.S. v. White*, 670 F.3d 498, 511 (4th Cir. 2012).

²⁴³ *Id.* at 502-03.

²⁴⁴ *Id.* at 503.

²⁴⁵ *Id.* at 504.

²⁴⁶ *Id.* at 506.

court granted a motion for acquittal as to the website charge because “no rational finder of fact could have found that *a reasonable recipient* of the communications . . . would have considered the communication to be a serious expression of an intent to commit an act of unlawful violence[.]”²⁴⁷ The defendant appealed the denial of his motions to acquit for the other charges, while the government appealed the decision to grant an acquittal on the website charge.

The Fourth Circuit agreed with the district court’s decision as it upheld the convictions and the lone acquittal.²⁴⁸ In doing so, it first addressed *Black* and determined that the decision, in addition to the statutory language in 18 U.S.C. § 875(c)²⁴⁹ at issue in *White*, did not “lead to the conclusion that *Black* introduced a specific-intent-to-threaten requirement . . . and thus overruled our circuit’s jurisprudence, as well as the jurisprudence of most other circuits.”²⁵⁰ This was because, as the court argued, the *Black* Court “gave no indication it was redefining a general intent crime such as § 875(c) to be a specific intent crime. It was defining the necessary *elements* of a threat crime in the context of a criminal statute punishing intimidation.”²⁵¹ The *White* court also argued that the Supreme Court gave an implicit endorsement of an objective true threat test when it focused “on the *effect* of the threat on the recipient.”²⁵² Finally, the *White* court distinguished the cross burning at issue in *Black* from the average true threat, writing that

cross burning can be protected speech, and therefore it must be accompanied by an intent to intimidate to be the subject of a constitutionally acceptable criminal statute. A true threat to injure a person, however, standing alone, is not protected speech and can be the subject of a constitutionally acceptable criminal statute that

²⁴⁷ *Id.* at 507 (emphasis in original).

²⁴⁸ *See id.* at 512-15 (discussing the court’s reasoning for each count).

²⁴⁹ *See id.* at 501 (describing the statute as “prohibiting interstate communications containing threats to injure a person”).

²⁵⁰ *Id.* at 508.

²⁵¹ *Id.* at 509.

²⁵² *Id.* (citing *Black*’s observation that “[a] prohibition on true threats protects individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur”) (emphasis in original).

requires only . . . general intent[.]²⁵³

More broadly, the Fourth Circuit argued that an objective reasonable recipient standard fully protected “wayward statements of jest or political hyperbole.”²⁵⁴ This is because, as the court stated, “any such statements will, under the objective test, always be protected by the consideration of the context and how a reasonable recipient would understand the statement.”²⁵⁵ Thus, in the Fourth Circuit’s view, there was simply no need to introduce the requirement of intent into any statute criminalizing speech because First Amendment concerns are adequately served by the objective reasonable listener test. However, as previously discussed, the Ninth Circuit has found that *Black* specifically and the Constitution generally call for an intent requirement in all criminal threat statutes.²⁵⁶ This is not a minor difference, and the emerging circuit split on the question of intent and true threats is incredibly important for violent student speech and student speakers.²⁵⁷

c. Why the lower court chaos and competing standards matter for students

In *In re George T.*,²⁵⁸ the Supreme Court of California overturned the juvenile adjudication of a student accused of threatening students with poetry.²⁵⁹ In arriving at its decision, the court applied state case law that required the government to show five elements in order to make a criminal threat conviction:

- (1) that the defendant willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,
- (2) that the defendant made the threat with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,
- (3) that the threat — which may be

²⁵³ Id. at 511.

²⁵⁴ Id. at 509.

²⁵⁵ Id.

²⁵⁶ See Part II.a., *supra*.

²⁵⁷ See Part II.c, *infra*.

²⁵⁸ 93 P.3d 1007 (Cal. 2004).

²⁵⁹ See id. at 1009. See also Chapter 6, *supra*.

made verbally, in writing, or by means of an electronic communication device — was on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, (4) that the threat actually caused the person threatened to be in sustained fear for his or her own safety or for his or her immediate family's safety, and (5) that the threatened person's fear was reasonabl[e] under the circumstances.²⁶⁰

California case law, therefore, mandated a mix of both subjective and objective elements. Factors three and five appear to be objective in nature because they examine the reasonable listener's perspective in addition to what should have been a reasonable response to the threat in light of the circumstances. Factors one, two, and four appear to be subjective and fact-based because they inquire as to the intent of the speaker or the subjective reaction of the listener. The court focused on the third factor — the “unequivocal” nature of the threat — since it determined the poems were not a threat because the poems did not convey to their recipients an “immediate prospect that [the writer] would bring guns to school and shoot students.”²⁶¹

Because the state was required to prove all five elements under California case law, the absence of a single element was fatal to the government's case. While it did not decide *In re George T.*, the subjective intent of the speaker — the second factor that inquired as to whether “the defendant made the threat with the specific intent that the statement ... is to be taken as a threat, even if there is no intent of actually carrying it out”²⁶² — could have been an important issue in the case. When he was asked about his intent in writing the line “For I can be the next kid to bring guns to school and kill students,” the juvenile defendant gave an interesting answer

²⁶⁰ *In re George T.*, 93 P.3d at 1012 (internal quotations omitted).

²⁶¹ *Id.* at 1018.

²⁶² *Id.* at 1012 (internal quotations omitted).

that illuminates the central problem when a subjective intent to threaten not required for criminal liability:

The San Diego killing was about right around this time. So since I put the three Ds — dark, destructive, and dangerous — and since I said — “I am evil,” and since I was talking about people around me — faces — how I said, like, how they would make me want to — did I say that? — well, even if I didn’t — yeah, I did say that. Okay. So, um, I said from all these things, it sounds like, for I can be the next Columbine kid, basically. So why not add that in? And so, “Parents, watch your children, because I’m back,” um, I just wanted to--kind of like a dangerous ending, like a — um, just like ending a poem that would kind of get you, like, — like, whoa, that’s really something.²⁶³

It is clear from the juvenile’s statement that he intended to instill fear in his readers but he aimed to do so in a way no different than horror master Edgar Allen Poe²⁶⁴ or contemporary writers such as Stephen King.²⁶⁵ By using the off-limits imagery of Columbine, the young poet wanted to scare his readers, or he at least wanted them to think about his shocking choice of words. Or perhaps he was simply a teenage boy seeing to attract members of the opposite sex. Whatever the case might have been, he did not possess a subjective criminal intent to threaten because he merely wanted readers to absorb and ponder his poem. He was not, in accordance with the traditional concept of a threat,²⁶⁶ attempting to frighten them into action; rather, he was attempting to frighten them into an appreciation of his work. The former is punishable using almost any standard of true threat examination — and rightly so. The latter is only protected

²⁶³ Id. at 1011-12. The “San Diego killing” was a shooting at Santana High School in Santee, California that killed two students and wounded 13 more. Id. at 1012 n. 4.

²⁶⁴ See Warren Beck, *Faulkner’s Point of View*, 30 THE ENGLISH JOURNAL 347, 348 (1941) (“The essence of Poe’s frightful fiction is unreality, product of a morbid taste for prearranged nightmares and self-induced hallucinations, that narcissism of the imagination which is the seamy side of romanticism.”).

²⁶⁵ See Library Life, *Stephen King Tells Library Audience: “I’m Warped,”* 14 AMERICAN LIBRARIES 488, 489 (1983) (describing King appearance at a library where the author told the crowd “I’m warped” and “I like to scare people” when asked why he writes horror fiction).

²⁶⁶ See Part I, *supra* (examining various definitions of a threat).

from the criminalization of pure speech when courts require a subjective finding of intent to threaten.

If an objective reasonable listener standard was the only means of analysis in *In re George T.*, the juvenile defendant's adjudication would have almost certainly survived court scrutiny. For example, if *Dinwiddie* is to be believed as a helpful guide to the reasonable listener test, two of its factors — “the reaction of the recipient of the threat” and “whether the threat was communicated directly to its victim” — would have been damning to the juvenile's appeal because he gave his poems directly to others who were afraid²⁶⁷ and cried upon reading them.²⁶⁸ Likewise, because he had some understanding of the nature of Columbine and what it meant in the school setting, most courts would conclude that he should have known that anyone who read the poems would be in literal fear for their life, meaning that the defendant could have also been adjudicated delinquent using the reasonable speaker standard.

Therefore, without the complex and multifactor analysis under California state jurisprudence, the outcome of *In re George T.* would have been quite different. While the juvenile defendant in the case benefited directly from the requirement that speech unequivocally be understood as a threat, had the poem contained more literal prose and therefore less ambiguity, the lack of a subjective intent to threaten could have served as a vital defense. Other defendants and civil plaintiffs, however, have not had the benefit of similar speech protections.

Ultimately, that is why the circuit split in true threat law matters. As commentators have argued, the reasonable speaker/reasonable listener debate is one best left for academics because the practical application of the distinctions between the objective tests is unclear.²⁶⁹ However, as *In re George T.* demonstrates, the question of subjective intent — especially as applied to violent

²⁶⁷ *In re George T.*, 93 P.3d at 1010.

²⁶⁸ *Id.* at 1011.

²⁶⁹ See note 113, *supra*.

creative speech — cannot be so easily dismissed. When speech is creative in nature but still falls under the shadow of true threat law, the speaker’s intent should be the primary consideration in determining whether the speech is criminally actionable. Otherwise, both the political hyperbole protected in *Watts* and the Stephen Kings of the classroom²⁷⁰ are subject to an undue and unconstitutional burden. As Circuit Judge Jeffrey Sutton wrote in a special opinion in *U.S. v. Jeffries*,

Allowing prosecutors to convict without proof of intent reduces culpability on the all-important element of the crime to negligence. That after all is what an objective test does: It asks only whether a reasonable listener would understand the communication as an expression of intent to injure, permitting a conviction not because the defend-ant intended his words to constitute a threat to injure another but because he should have known others would see it that way. The reasonable man rarely takes the stage in criminal law.²⁷¹

III. True threats and creative speech

In comparing cases discussed in previous chapters that were decided on the true threat doctrine to cases discussed so far in this chapter such as *Watts*, *Rogers*, *Black*, *Roy*, *Planned Parenthood*, *et al.*, one distinction is clear: The cases in Chapters 5 and 6 involved creative student speech — whether it was a painting,²⁷² a story,²⁷³ poetry,²⁷⁴ or rap song²⁷⁵ — whereas the cases in this chapter focus on more direct threats to the life and safety of the president, abortion doctors, and others involved in various disputes. Therefore, at least one preliminary question

²⁷⁰ See J. Madison Davis, *The Murderous Women of Oz*, 80 WORLD LITERATURE TODAY 9, 9 (describing Australian author Tara Moss as having written “Stephen King-style horror stories” for school classmates when she was 10 years old).

²⁷¹ 692 F.3d at 484-85 (Sutton, C.J., *dubitante*). A *dubitante* opinion, a judicial rarity, shows that a judge had serious doubts in a point of law but refused to authoritatively find it incorrect. Jason J. Czarnecki, Essay, *The Dubitante Opinion*, 39 AKRON L. REV. 1, 2 (2006). The term “can best be seen as a level of agreement between fully joining the majority opinion and a concurrence.” *Id.* at 4.

²⁷² See *In re Ryan D.*, 123 Cal. Rptr. 2d 193 (Cal. App. 2002). See also Chapter 5, *supra*.

²⁷³ See *In re Douglas D.*, 626 N.W.2d 725 (Wisc. 2001). See also Chapter 5, *supra*.

²⁷⁴ See *In re George T.*, 93 P.3d 1007 (Cal. 2004). See also Chapter 6, *supra*.

²⁷⁵ See *Doe v. Pulaski County Special Sch. Dist.*, 306 F.3d 616 (8th Cir. 2002); *Jones v. State*, 64 S.W.3d 728 (Ark. 2002). See also Chapter 6, *supra*.

when considering the true threat doctrine and its application to student speech might be whether student creative speech is unfairly targeted as compared to speech not subject to the jurisdiction of school administrators. If there were an absence of “adult” creative speech prosecuted under the true threat doctrine, then one might rightly conclude that creative student speech is being unjustly singled out. Yet, in examining the limited case law on the issue, it becomes clear that there are some instances where adults have been found criminally liable for creative speech under true threat analysis.²⁷⁶ However, that criminal liability — or absence thereof — has generally been premised on an examination of whether the speech in question was truly threatening in the literal sense of the word.

a. Overview of previously discussed student true threat cases

To briefly summarize the previously examined creative student speech cases decided primarily with the true threat doctrine:

- *In re George T.*: A juvenile was adjudicated delinquent after he wrote poems that referenced the possibility he might be “the next kid to bring guns to kill students at school.”²⁷⁷ After analyzing the case with both objective and subjective standards,²⁷⁸ the Supreme Court of California reversed the adjudication,²⁷⁹ concluding the poems were not “sufficiently unequivocal to convey . . . an immediate prospect that [the writer] would bring guns to school and shoot students.”²⁸⁰
- *In re Ryan D.*: A juvenile was adjudicated delinquent after he painted a picture of a police officer being shot in the back of the head and submitted the project for a grade.²⁸¹ The

²⁷⁶ See Part III.b, *infra*.

²⁷⁷ 93 P.3d. at 1009.

²⁷⁸ *Id.* at 1012.

²⁷⁹ *Id.* at 1012.

²⁸⁰ *Id.* at 1018.

²⁸¹ 123 Cal. Rptr. 2d at 195.

officer had previously cited the student for marijuana possession.²⁸² Although the Court of Appeal of California found the painting to be “intemperate” and a demonstration of “extremely poor judgment,”²⁸³ the court reversed the adjudication.²⁸⁴ After the court applied the same factors used in *In re George T*,²⁸⁵ it concluded that “the painting did not convey a gravity of purpose and immediate prospect of the execution of a crime that would result in death or great bodily injury” to the officer.²⁸⁶

- *In re Douglas D.*: After writing a story for a class assignment that suggested he was going to cut his teacher’s head off with a “machedy,”²⁸⁷ a minor was found guilty of disorderly conduct and adjudicated delinquent.²⁸⁸ The Supreme Court of Wisconsin, however, reversed the decision as it found the story was protected by the First Amendment.²⁸⁹ Applying a standard that asked whether “a speaker would reasonably foresee that a listener would reasonably interpret” speech as “a serious expression of a purpose to inflict harm,”²⁹⁰ the court found that the student’s story was not a true threat because it was written in the context of a creative writing class, composed in the third person, contained obvious elements of “hyperbole and attempts at jest,” and the student appeared to be following the guidelines of the class assignment.²⁹¹

²⁸² *Id.*

²⁸³ *Id.* at 202.

²⁸⁴ *Id.* at 195.

²⁸⁵ *See id.* at 197 (listing the five requirements to prove a criminal threat under California state true threat jurisprudence).

²⁸⁶ *Id.* at 199.

²⁸⁷ 626 N.W.2d at 731.

²⁸⁸ *Id.* at 730.

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 739.

²⁹¹ *Id.* at 740.

- *Jones v. State*: Based on a felony offense of “terroristic threatening in the first degree,”²⁹² a juvenile was adjudicated delinquent after giving a friend lyrics to a rap song that threatened to “murder you before you can think twice, cut you up and use you for decoration to look nice.”²⁹³ On appeal, the Supreme Court of Arkansas affirmed the juvenile judge’s decision²⁹⁴ because it found that the rap song represented a true threat to the recipient of the lyrics.²⁹⁵ In reaching its decision, the court applied the Eighth Circuit’s *Dinwiddie* factors²⁹⁶ and noted the recipient’s reaction to the lyrics, the non-conditional nature of the threat, its direct communication, and the recipient’s belief that the writer had the capacity to carry out his threats.²⁹⁷
- *Doe v. Pulaski County Special School District*: A student was expelled after a letter that described “how he would rape, sodomize, and murder”²⁹⁸ a former girlfriend was taken from his house²⁹⁹ and delivered to the subject of his “lyrics similar in theme to the more vulgar and violent rap songs performed by controversial ‘rappers’ such as Eminem, Juvenile, and Kid Rock[.]”³⁰⁰ A federal district court ordered the student returned to school, and an Eighth Circuit panel affirmed.³⁰¹ The Eighth Circuit in an *en banc* decision, however, reversed and upheld the student’s expulsion.³⁰² The expulsion was justified, the court concluded, because the letter and its would-be song lyrics represented

²⁹² 64 S.W.3d at 729.

²⁹³ *Id.* at 730.

²⁹⁴ *Id.* at 737.

²⁹⁵ *Id.*

²⁹⁶ *See id.* at 736 (listing the *Dinwiddie* factors and stating that they “govern [the Eighth Circuit’s] review of whether a threat is true or hyperbolic”). *See also* notes 213-214 and accompanying text, *supra*.

²⁹⁷ *Jones*, 64 S.W.3d at 736.

²⁹⁸ 303 F.3d at 619.

²⁹⁹ *Id.* at 619-20.

³⁰⁰ *Id.* at 619.

³⁰¹ *Id.*

³⁰² *Id.*

a true threat.³⁰³ In applying the *Dinwiddie* factors, the court determined the letter was a true threat since it (1) warned the female not go to sleep because the writer would be hiding under her bed with a knife and (2) the writer failed to “alleviate . . . concerns” about the letter.³⁰⁴

Again, these cases all contained an expressive element in poetry, prose, or art beyond a simple threat to kill or injure, which is a distinction that sets them apart from the majority of true threat case law. However, that creative element alone has not been enough to insulate a handful of adult defendants from federal prosecution.

b. Adult creative speech and true threats

In *U.S. v. Alkhabaz*,³⁰⁵ the Sixth Circuit examined the boundaries of what could be considered threatening speech in the context of fantasy writings.³⁰⁶ The defendant in *Alkhabaz* began an online friendship that revolved around the email exchange of violent sexual fantasies that involved the rape and torture of women.³⁰⁷ For two months, the email exchanges continued until the defendant posted a story “describing the torture, rape, and murder” of a woman with the same name of a University of Michigan classmate to an online message board for sexual discussions.³⁰⁸ The university was informed by a concerned message board user, and it began an

³⁰³ Id. at 626-27.

³⁰⁴ Id. at 625-26.

³⁰⁵ 104 F.3d 1492 (6th Cir. 1997).

³⁰⁶ See generally id.

³⁰⁷ Id. at 1493. The emails were dark and violent sexual fantasies. While the majority opinion includes little of the content, the dissent in the case included most — if not all — of the text of the email exchange. See id. at 1499-1501 (Krupansky, C.J., dissenting). The email supporting the first count against the defendant was comparatively mild: “I highly agree with the type of woman you like to hurt. You seem to have the same tastes I have. When you come down, this'll be fun! Also, I've been thinking. I want to do it to a really young girl first. 13 or 14. There innocence makes them so much more fun — and they'll be easier to control. What do you think? I haven't read your entire mail yet. I've saved it to read later, in private. I'll try to write another short phantasy and send it. If not tomorrow, maybe by Monday. No promises.” Id. at 1499.

³⁰⁸ Id.

investigation³⁰⁹ that eventually resulted in the involvement of law enforcement and the defendant’s indictment under 18 U.S.C. § 875(c), a federal law prohibiting “interstate communications containing threats to kidnap or injure another person.”³¹⁰ Based on the emails between Alkhabaz and his friend, a superseding indictment was brought against the defendant, but the district court threw out the second indictment, finding that the emails were not true threats and were therefore protected speech.³¹¹

On appeal, the Sixth Circuit rejected the government’s attempt to have the indictment reinstated and agreed with the district court’s decision that the emails were protected speech.³¹² The court first observed that there were three component elements to § 875(c): “a transmission in interstate [or foreign] commerce,” “a communication containing a threat,” and “a threat to injure [or kidnap] the person of another.”³¹³ It was the second element — whether there was a communication containing the threat — that “raise[d] several issues” that the court found important to address.³¹⁴ In order to determine exactly the communication criminalized by § 875(c), the court attempted to “consider the nature of a threat.”³¹⁵ As the court observed, “At their core, threats are tools that are employed when one wishes to have some effect, or achieve some goal, through intimidation. This is true regardless of whether the goal is highly reprehensible or seemingly innocuous.”³¹⁶ The court then attempted to define the essence of a threat by listing possible goals of intimidating communication, such as extortion or coercion,

³⁰⁹ Id. at 1498 (Krupansky, C.J., dissenting).

³¹⁰ Id. at 1493 (majority op.).

³¹¹ Id.

³¹² Id.

³¹³ Id. at 1494.

³¹⁴ Id.

³¹⁵ Id. at 1495.

³¹⁶ Id.

advancing a political goal, or merely creating a prank.³¹⁷ Yet, as the court argued, even in the case of a bomb threat prank, a threat still exists “because the threatening party is attempting to create levity (at least in his or her own mind) through the use of intimidation.”³¹⁸ Thus the commonality between all of the goals cited by the court was a combination of an action in communicating the message and a criminally liable state of mind.³¹⁹

Therefore, as the court concluded, for speech to be criminally prosecutable under § 875(c), a “communication containing a threat” had to be defined by two key elements: a reasonable person’s understanding that the statement was “a serious expression of an intention to inflict bodily harm” to serve as the criminally liable state of mind and a reasonable person’s perception that the speech was “being communicated to effect some change or achieve some goal through intimidation” that functioned as the criminally liable act.³²⁰ Importantly, the court noted that it was not expressing a subjective standard as it cited prior case law supporting only an objective standard. Determinations of whether speech was “a serious expression of an intention to inflict bodily harm” and whether it was “being communicated to effect some change or achieve some goal through intimidation” were therefore to be made “objectively” and “from the perspective of the receiver.”³²¹

Critically for creative speech, the court’s interpretation of § 875(c) meant that for a crime to actually occur, a reasonable person would have to interpret a poem, painting, or other creative speech as intending to effect a change or obtaining some goal through intimidation. In *Alkhabaz*, this requirement served to be the undoing of the criminal indictment against the defendant, since

³¹⁷ See *id.*

³¹⁸ *Id.*

³¹⁹ See *id.* The court used the legal terms *mens rea* and *actus reus*, meaning state of mind and criminal act respectively.

³²⁰ *Id.*

³²¹ *Id.* at 1495-96.

the court found that no reasonable person would view the emails as an attempt to reach an objective via intimidation.³²² Rather, as the court concluded, the defendant and his friend “sent e-mail messages to each other in an attempt to foster a friendship based on shared sexual fantasies.”³²³ Under such a circumstance, the court reasoned that there simply could not be criminal liability under § 875(c).

Fifteen years after *Alkhabaz* in 2012, the Sixth Circuit again addressed issues surrounding the intersection of creative speech and true threats as the court examined “the first reported case of a successful § 875(c) prosecution arising from a song or video.”³²⁴ In *U.S. v. Jeffries*, the defendant was arrested and charged with violating the federal interstate threat statute after posting a song to YouTube that threatened to “kill” and “come after” the presiding judge in the defendant’s custody dispute.³²⁵ The song, titled “Daughter’s Love,” contained “sweet passages about relationships between fathers and daughters” in addition to complaints about the defendant’s ex-wife, lawyers, and the legal system.³²⁶ But importantly, the song contained numerous threats of violence, and it was posted online only five days before a scheduled hearing to reevaluate the defendant’s visitation rights.³²⁷ Furthermore, the song implied that there would be adverse consequences for the judge if the defendant could no longer see his daughter.³²⁸ After the song was uploaded to YouTube, the defendant shared the link on Facebook with 29 other users, including a state representative, a television station, and a fathers’ rights organization.³²⁹ The link was accompanied in some instances with messages such as “Give this . . . to the judge,”

³²² *Id.* at 1496.

³²³ *Id.*

³²⁴ *U.S. v. Jeffries*, 692 F.3d 473, 482 (6th Cir. 2012).

³²⁵ *Id.* at 475-76.

³²⁶ *Id.* at 475.

³²⁷ *Id.*

³²⁸ *See id.* The song included the lines “And when I come to court this better be the last time. / I’m not kidding at all, I’m making this video public. / ‘Cause if I have to kill a judge or a lawyer or a woman I don’t care” and “Take my child and I’ll take your life.” *Id.*

³²⁹ *Id.* at 477.

“Give this to the Judge for court,” and “Tell the judge.”³³⁰ Law enforcement was informed as to the video’s existence, and the defendant was subsequently charged and convicted under § 875(c).³³¹

In its decision, the Sixth Circuit declined to apply a subjective intent standard³³² and instead reaffirmed the circuit’s commitment to a reasonable listener standard.³³³ In doing so, the court argued that the objective reasonable listener standard was protective of speech “because, instead of ignoring context, it forces jurors to examine the circumstances in which a statement is made: A juror cannot permissibly ignore contextual cues in deciding whether a reasonable person would perceive the charged conduct as a serious expression of an intention to inflict bodily harm.”³³⁴

With the defendant’s argument for subjective intent rejected, the court then turned to the question of whether the video represented sufficient evidence of a criminal threat.³³⁵ The court characterized the video as one where the defendant “repeatedly” said he would kill the presiding judge “if things do not go his way in the upcoming custody/visitation hearing.” As the court concluded of the video, “[t]he threats are many, and a jury reasonably could take them as real[.]”³³⁶ And unlike the sexual fantasy emails in *Alkhabaz*, the court found that the video “had

³³⁰ Id. at 482.

³³¹ Id. at 477.

³³² Id. at 481.

³³³ Id. at 480.

³³⁴ Id.

³³⁵ See id. at 481-83.

³³⁶ Id. at 481. The court restated the most threatening lines from the song: “When I come to court this better be the last time”; “Take my child and I’ll take your life”; “I killed a man downrange in war. I have nothing against you, but I’m tellin’ you this better be the last court date”; “So I promise you, judge, I will kill a man”; “And I guarantee you, if you don’t stop, I’ll kill you”; “So I’m gonna f somebody up, and I’m going back to war in my head. So July the 14th is the last time I’m goin’ to court. Believe that. Believe that, or I’ll come after you after court”; “Cause you don’t deserve to be a judge and you don’t deserve to live. You don’t deserve to live in my book”; “And I hope I encourage other dads to go out there and put bombs in their goddamn cars. Blow ‘em up”; and “There went your f in’ car. I can shoot you. I can kill you.” Id.

an objective” of “getting the judge to ‘do the right thing July 14th.’”³³⁷ Because the presentation of the song was serious and he distributed the video and additionally urged others to do the same, the court agreed that a rational juror could conclude that the video was “a serious expression of an intention to inflict bodily harm . . . communicated to effect some change or achieve some goal.”³³⁸

Thus, as the *Jeffries* court concluded, the videotaped performance of a song could satisfy the *Alkhabaz* requirements.³³⁹ The *Jeffries* court explained that while the medium for a threat was not dispositive, it was certainly informative because

the method of delivering a threat illuminates context, and a song, a poem, a comedy routine or a music video is the kind of context that may undermine the notion that the threat was real. But one cannot duck § 875(c) merely by delivering the threat in verse or by dressing it up with political (and protected) attacks on the legal system.³⁴⁰

Finally, the Third Circuit found in 2013 that rap lyrics composed and posted to Facebook could serve as the basis for a criminal conviction much like the defendant’s song in *Jeffries*.³⁴¹ In that case, *U.S. v. Elonis*, the defendant was charged with five counts of violating § 875(c) for a series of Facebook postings that threatened former customers and coworkers, his wife, law enforcement, a kindergarten class, and an FBI agent.³⁴² The postings began shortly after the defendant’s wife left him,³⁴³ which resulted in a deteriorating performance at work,³⁴⁴

³³⁷ *Id.* (quoting defendant’s song lyrics).

³³⁸ *Id.* (quoting *Alkhabaz*, 104 F.3d at 1495).

³³⁹ *See id.* at 481-82.

³⁴⁰ *Id.* at 482. *But see Planned Parenthood*, 290 F.3d at 1102 (Berzon, C.J., dissenting) (suggesting that political speech should be protected under the First Amendment even when the speech has violent themes).

³⁴¹ *See U.S. v. Elonis*, 730 F.3d 321 (3rd Cir. 2013), *cert. granted*, 2014 U.S. LEXIS 4183 (U.S., June 16, 2014).

³⁴² *Id.* at 326.

³⁴³ *Id.* at 324.

³⁴⁴ *Id.* (explaining how “supervisors observed Elonis with his head down on his desk crying” and how the defendant was “sent home on several occasions because he was too upset to work”).

questionable judgment,³⁴⁵ and his eventual termination.³⁴⁶ After he was fired from his position as a supervisor and technician at an amusement park, he wrote a post on Facebook that referenced “sinister plans” for the park and became count one in his eventual indictment.³⁴⁷ The defendant’s ire then turned toward his ex-wife,³⁴⁸ and several violent Facebook posts resulted in a protection order against him. After the protection order was issued, the defendant posted again on Facebook in a thinly-veiled attack on the order and his ex-wife that resulted in count two of the indictment:

Did you know that it’s illegal for me to say I want to kill my wife?
It’s illegal.
It’s indirect criminal contempt.
It’s one of the only sentences that I’m not allowed to say.
Now it was okay for me to say it right then because I was just telling you that it’s illegal for me to say I want to kill my wife.
I’m not actually saying it.
I’m just letting you know that it’s illegal for me to say that.
It’s kind of like a public service.
I’m letting you know so that you don’t accidentally go out and say something like that
Um, what’s interesting is that it’s very illegal to say I really, really think someone out there should kill my wife.
That’s illegal.
Very, very illegal.
But not illegal to say with a mortar launcher.
Because that’s its own sentence.
It’s an incomplete sentence but it may have nothing to do with the sentence before that.
So that’s perfectly fine.
Perfectly legal.

³⁴⁵ Id. (noting sexual harassment claims levied against the defendant).

³⁴⁶ Id. (explaining the defendant’s termination after making a threatening comment on a Facebook photo of a woman who had filed a sexual harassment against him).

³⁴⁷ Id. The post ranted about “[m]oles” and stated that “Didn’t I tell ya’ll I had several? Ya’ll saying I had access to keys for the fucking gates, that I have sinister plans for all my friends and must have taken home a couple. Ya’ll think it’s too dark and foggy to secure your facility from a man as mad as me. You see, even without a paycheck I’m still the main attraction. Whoever thought the Halloween haunt could be so fucking scary?” Id.

³⁴⁸ Id. “Elonis also began posting statements about his estranged wife, Tara Elonis, including the following: ‘If I only knew then what I know now, I would have smothered your ass with a pillow, dumped your body in the back seat, dropped you off in Toad Creek, and made it look like a rape and murder.’ Several of the posts about Tara Elonis were in response to her sister’s status updates on Facebook. For example, Tara Elonis’s sister posted her status update as: ‘Halloween costume shopping with my niece and nephew should be interesting.’ Elonis commented on this status up-date, writing, ‘Tell [their son] he should dress up as matricide for Halloween. I don’t know what his costume would entail though. Maybe [Tara Elonis’s] head on a stick?’”

I also found out that it's incredibly illegal, extremely illegal, to go on Facebook and say something like the best place to fire a mortar launcher at her house would be from the cornfield behind it because of easy access to a getaway road and you'd have a clear line of sight through the sun room.

Insanely illegal.

Ridiculously, wrecklessly [sic], insanely illegal . . .³⁴⁹

Counts three and four arose in posts that threatened that the defendant had “enough explosives to take care of the state police and the sheriff’s department” and that he was “checking out and making a name for myself / Enough elementary schools in a ten mile radius to initiate the most heinous school shooting ever imagined / And hell hath no fury like a crazy man in a kindergarten class[.]”³⁵⁰ Importantly for the question of creative speech, the defendant’s fifth count came from a Facebook post with rap-style lyrics directed at the FBI agents who were investigating his earlier writings:

You know your shit’s ridiculous
when you have the FBI knockin’ at yo’ door
Little Agent Lady stood so close
Took all the strength I had not to turn the bitch ghost
Pull my knife, flick my wrist, and slit her throat
Leave her bleedin’ from her jugular in the arms of her partner
[laughter]
So the next time you knock, you best be serving a warrant
And bring yo’ SWAT and an explosives expert while you’re at it
Cause little did y’all know, I was strapped wit’ a bomb
Why do you think it took me so long to get dressed with no shoes
on?
I was jus’ waitin’ for y’all to handcuff me and pat me down
Touch the detonator in my pocket and we're all goin’
[BOOM!]³⁵¹

At trial, the defendant’s ex-wife testified that he “rarely listened to rap music” and that she had never seen him write lyrics in during their seven-year marriage.³⁵² Furthermore, she

³⁴⁹ Id. at 324-25. The post concluded with a crude text illustration of the house, the best place to fire a mortar, and the easiest way to flee from the house. Id. at 325.

³⁵⁰ Id. at 325-26.

³⁵¹ Id. at 326. Prior to this final post, FBI agents had interviewed Elonis at his home. Id.

testified that “the lyric form of the statements did not make her take the threats any less seriously.”³⁵³

The jury convicted the defendant on all charges aside from the first count related to his first Facebook post regarding the amusement park.³⁵⁴ On appeal, the Third Circuit upheld the defendant’s convictions. In its decision, the court did not reference either *Alkhabaz*³⁵⁵ or the lyrical nature of some of the posts.³⁵⁶ Instead, the court interpreted the threats literally and, consistent with not relying on the logic from *Alkhabaz*, did not require a showing that the posts were designed to further some goal or achieve an objective. As the court concluded regarding the fifth count, the Facebook post most like rap that threatened FBI agents,

It was possible for a reasonable jury to conclude that the statement “the next time you knock, best be serving a warrant [a]nd bring yo’ SWAT and an explosives expert” coupled with the past reference to a bomb was a threat to use explosives against the agents “the next time.” Indeed, the phrase “the next time” refers to the future, not a past event. Accordingly, a reasonable jury could have found the statement was a true threat.³⁵⁷

Again, if songs, poems, and stories written by adults were easily dismissed by law enforcement and courts as not true threats, it would be easy to conclude that similar student works were being unfairly targeted in the school setting. However, as this handful of cases shows, stories and songs are not ignored by federal law enforcement when it comes to the issue of criminal threats. Some courts, though, have been careful to examine potentially threatening

³⁵² *Id.* at 325.

³⁵³ *Id.*

³⁵⁴ *Id.* at 327.

³⁵⁵ The Third Circuit was not bound by *Alkhabaz*, a Sixth Circuit decision. However, it certainly could have added insight to the decision.

³⁵⁶ The court only mentioned the ex-wife’s testimony as to the lack of the defendant’s prior use and enjoyment of rap music. *See id.* at 325. The lyrical nature of the threats did not factor into the court’s analysis.

³⁵⁷ *Id.* at 334-35.

creative speech for an additional motive or purpose as they return to an examination of what makes a threat a threat.

c. True threats and creative student speech: A possible application

While Chapter 5 argued that violent non-sponsored curricular student speech should be judged under a standard more accommodating of speech and student educational interests, it did leave open the possibility that some speech would best be suited for true threat analysis and less protection.³⁵⁸ One possible example of such curricular speech deserving more scrutiny was seen in *Commonwealth v. Milo M.*,³⁵⁹ a case decided by the Supreme Judicial Court of Massachusetts.

In *Milo M.*, the high court of Massachusetts heard an appeal of a 12-year-old juvenile adjudicated delinquent after the student drew two pictures at school.³⁶⁰ The first drawing was made outside of his classroom in a hallway while he was waiting for the school principal to talk to him about something that happened the previous day.³⁶¹ This drawing, which was confiscated and shown to the juvenile's teacher,³⁶² depicted the juvenile pointing a gun at his teacher, who is shown as crying and begging, "Please don't kill me."³⁶³ After the first drawing was taken away, the juvenile returned to the classroom, took a piece of paper, and created a second drawing.³⁶⁴ The second drawing was much like the first as it showed the juvenile shooting his teacher, but it additionally depicted the teacher urinating on herself in extreme fear.³⁶⁵ When he was finished with the second drawing, the juvenile returned to the classroom, held up the picture, and said to

³⁵⁸ See Chapter 5, *supra*.

³⁵⁹ 740 N.E.2d 967 (Mass. 2001).

³⁶⁰ *Id.* at 969.

³⁶¹ *Id.*

³⁶² *Id.*

³⁶³ *Id.* at 972.

³⁶⁴ *Id.* at 969.

³⁶⁵ *Id.* at 972.

his teacher in a “defiant” tone, “Do you want this one too?”³⁶⁶ The teacher, who had been given the first drawing by a colleague, was afraid and refused to walk near the juvenile.³⁶⁷ After another student took the second drawing and gave it to the teacher, she became “apprehensive” and “afraid for her safety.”³⁶⁸ The juvenile was sent home and suspended because of the drawings, and he was eventually charged under Massachusetts General Law c. 275, § 2 for threatening his teacher.³⁶⁹ At a hearing, the juvenile was adjudicated delinquent only on the basis of the second drawing because the trial judge found that the first drawing could not constitute a threat because it was not communicated by the juvenile to the teacher.³⁷⁰

On appeal, the Massachusetts high court affirmed the juvenile’s adjudication.³⁷¹ In applying state case law, the court found that for a threat to be criminally actionable, it had to evidence both “an expression of intention to inflict a crime on another” and “an ability to do so in circumstances that would justify apprehension on the part of the recipient of the threat.”³⁷² Thus, under Massachusetts law, the state had to show that the drawing demonstrated the juvenile’s intention to harm his teacher and that the circumstances surrounding the threat could objectively cause fear in a reasonable recipient.³⁷³ The court found that the second drawing met both of those requirements.³⁷⁴ In determining that the drawing showed the juvenile’s intent to harm his teacher, the court pointed to three important facts: the content of both drawings that

³⁶⁶ Id. at 969.

³⁶⁷ Id.

³⁶⁸ Id.

³⁶⁹ Id. The law specified that “[i]f complaint is made to any such court or justice that a person has threatened to commit a crime against the person or property of another, such court or justice shall examine the complainant and any witnesses who may be produced, on oath, reduce the complaint to writing and cause it to be subscribed by the complainant.” Id. at n.1.

³⁷⁰ Id. at n.2.

³⁷¹ Id. at 969, 975.

³⁷² Id. at 969.

³⁷³ See id. at 970 (framing the state’s true threat inquiry as “objective[]”).

³⁷⁴ Id. at 972.

“[made] the juvenile’s intent to harm . . . clear,” the presence of multiple drawings,³⁷⁵ and his “very angry demeanor and defiant manner” toward his teacher when he held out the second drawing to her.³⁷⁶ Similarly, the court concluded the teacher’s fears were “quite reasonable and justified” when given the juvenile’s aggressive attitude,³⁷⁷ his perceived ability to carry out the threat presently or in the future,³⁷⁸ and the “climate of apprehension concerning school violence.”³⁷⁹

Ultimately, it was the juvenile’s demeanor and aggressive actions that distinguished *Milo M.* from a case like *In re Douglas D.*, a similar juvenile proceeding over what was determined to be protected speech. In *Douglas D.*, the student had disciplinary problems,³⁸⁰ but they were prior to the student writing a story about decapitating his teacher that was turned in for a class assignment.³⁸¹ However, nothing about the student’s behavior in that case suggested he was a threat to the safety of his teacher. However, in *Milo M.*, the student’s aggressive actions represented a malevolent disruption to the classroom and the wellbeing of his teacher. To put it another way, at some point when coupled with the right (or perhaps wrong) actions, speech ceases to function only as an expressive activity and becomes the sort of thing best handled by disciplinary regulations and criminal statutes. The student in *Douglas D.* is on one side of that line, while the student in *Milo M.* is on the other.

Therefore, in examining creative student speech under the true threat doctrine, two important factors for consideration emerge. As suggested in *Alkhabaz*, a true threat draped in a

³⁷⁵ *Id.* While the trial court concluded the first drawing could not be a true threat, that determination “did not diminish its evidentiary value.” *Id.* at n.6.

³⁷⁶ *Id.* at 972.

³⁷⁷ *Id.* at 973.

³⁷⁸ *Id.*

³⁷⁹ *Id.* at 974.

³⁸⁰ *In re Douglas D.*, 626 N.W.2d at 730 (noting that the student was talking and disrupting class before he was sent into the hall to begin his story).

³⁸¹ *See id.* at 730-31 (quoting story).

poem, story, or song should at least resemble the common, plain English definition of a threat in that the speech attempts to use intimidation to further some goal. Outside of the appearance of a motivation behind the threat, courts should also examine the manner in which the alleged threat was transmitted. The difference between meekly handing in an assignment and defiantly flouting a threat before a teacher can determine to a great extent whether an objective threat exists.

Yet in *Riehm v. Engelking*,³⁸² the Sixth Circuit failed to take note of the key difference between violent speech and threatening speech as it affirmed summary judgment for a school district in a lawsuit that began with a series of violent creative writing assignments.³⁸³ In *Riehm*, a 17-year-old high school student submitted an assignment that his teacher found offensive.³⁸⁴ In response, the student wrote a second essay that derided his teacher as “Mrs. Cuntchenson,” an “old fashioned, narrow minded, uncreative, paranoid, . . . jealous” English teacher.³⁸⁵ After the first two essays were discussed in a parent-teacher conference, the student wrote a third story titled “Bowling for Cuntchenson,” a piece that described a student narrator shooting the “bitch” Mrs. Cuntchenson and tasting “her blood, her blood that I had spilt.”³⁸⁶ The student, consistent with the rules of the creative writing class, placed the third essay in his personal folder that was kept in a classroom filing cabinet.³⁸⁷ When the teacher read the story three months after the student put it in his folder, the teacher “felt threatened, scared and hurt.”³⁸⁸ She then gave the

³⁸² 538 F.3d 952 (8th Cir. 2008).

³⁸³ See *id.* at 958-59.

³⁸⁴ *Id.* at 959. The story described a student “who had a nocturnal emission, fell and penetrated his anus on a toy, slipped on his own blood and was run over by a bus, which collapsed his head ‘in a red misty explosion.’” *Id.* at 958-59. The moral of the story, according to the student, was “don’t have wet dreams or you’ll die a horrible death.” *Id.* at 959.

³⁸⁵ *Id.*

³⁸⁶ *Id.* The story went into graphic detail while describing the shooting: “In an instant a red mist was produced from the wound, followed by a stead [sic] flow of blood, tissue, and bone fragments. I felt the warm mist speckle onto my face. The splatter distance was incredible.” *Id.*

³⁸⁷ *Id.*

³⁸⁸ *Id.* at 960.

essay to the school principal, and together, they took the story to local law enforcement.³⁸⁹ Social services then filed court petitions that resulted in the student’s emergency placement in an adult psychiatric ward approximately 150 miles from his home.³⁹⁰

Yet despite a finding that the student suffered from “adjustment disorder,” the hospital staff concluded he was not a danger to himself or others.³⁹¹ After he was released, the student and his mother sued the school district and school officials over his involuntary committal.³⁹² The federal district court, however, granted the school’s motions for summary judgment and dismissal of the lawsuit.³⁹³

On appeal, the Eighth Circuit upheld the summary judgment and rejected the student’s argument that his hospital confinement was in retaliation for his essay.³⁹⁴ Rather, the court found that the essay — despite the fact that it remained in a filing cabinet for three months before the teacher read it — represented a true threat because the essay was both given “directly” to the teacher and it was submitted on campus.³⁹⁵ Instead of referencing *Alkhabaz* or at least employing the decision’s logic,³⁹⁶ the court focused on the first essay’s “troublesome descriptions,” the

³⁸⁹ *Id.*

³⁹⁰ *Id.* at 960-61.

³⁹¹ *Id.* at 961.

³⁹² *Id.*

³⁹³ *Id.*

³⁹⁴ *Id.* at 963.

³⁹⁵ *Id.* at 964.

³⁹⁶ *Alkhabaz*, as a Sixth Circuit decision, was not binding on the *Riehm* court. Also, the two cases could be distinguished because — at least in some sense — the story in *Riehm* was given directly to the teacher in contrast to the fantasy emails in *Alkhabaz* that were shared only between individuals. However, *Alkhabaz* is still useful for the proposition that a fictionalized threat should, in essence, should still function to further some other purpose. In *Riehm*, it could be argued that the purpose or goal for the student was simply to intimidate his teacher. However, a complete evaluation the student’s work suggests that he was rebelling against his teacher’s attempts to remove the sex and violence from the student’s stories. *See id.* at 958-59 (detailing first story and student’s response to his teacher’s critiques). While it is certainly within the teacher’s prerogative to assign a less-than-desired grade to such work, the legal system should not be the first recourse for schools confronted with violent student work without some further proof that the work was intended as a threat. *See Chapter 5, supra.*

second essay's criticism of the teacher, and the third essay's graphic depictions of violence.³⁹⁷ As the court concluded,

This lengthy essay describing an obsession with weapons and gore, a hatred for his English teacher with a similar name who had been critical of his prior essays, a surprise attack at a high school, and the details of his teacher's murder and the narrator's suicide lead to the inescapable conclusion that it was a serious threat directed at [the teacher]. Although the third essay was allegedly written months earlier, . . . [the teacher] reacted immediately after she received it, and she quite reasonably felt personally threatened.³⁹⁸

In comparing *Riehm* and *In re Douglas D.*, the only substantive difference between the two cases is that the writing in *Riehm* was of a much more graphic and florid nature, but that distinguishes the cases only in matters of degree and not fundamental principles. By focusing on the “gruesome detail”³⁹⁹ contained in the story, the Eighth Circuit in essence punished the student in *Riehm* for writing too well. The First Amendment, however, demands more principled results, and while the student's fate might have been the same using the two-step analysis seen in *Alkhabaz*, the Eighth Circuit owed him at least something more than the undiscerning examination it provided. *Alkhabaz* is certainly no cure-all but it — when coupled with an examination of how the alleged threat was transmitted⁴⁰⁰ — can help safeguard creative violent speech.

IV. True threats and threatening speech

While the creative speech cases discussed in Part III are somewhat open to interpretation as expressions of intention to do harm, there is distinguishable set of cases that present a much clearer vision of what exactly a threat is. In these cases where a threat is presented plainly

³⁹⁷ *Riehm*, 538 F.3d at 964.

³⁹⁸ *Id.*

³⁹⁹ *Id.*

⁴⁰⁰ This would mainly be a question of conduct surrounding the transmission of the threat, seeking to determine whether the student was physically defiant or aggressive (as in *Milo M.*) or whether the student simply turned an assignment using specified procedures (as in *Riehm* and *In re Douglas D.*).

without any fictional or creative elements, the only question in many instances is whether the speaker was joking or expressing some other form of hyperbole. Otherwise, the expression in these cases is generally clear and aligns more closely with the traditional concept of threatening speech.

a. *State v. Chung: Threatening speech in the school setting*

State v. Chung,⁴⁰¹ a case decided by the Supreme Court of Hawaii, is helpful in illustrating what a traditional threat case looks like in the school environment. In *Chung*, a high school teacher⁴⁰² was arrested and charged with two counts of making terroristic threats and one count of threatening to use a firearm⁴⁰³ after talking to four colleagues about his intentions to shoot the school's principal and himself.⁴⁰⁴

The teacher in *Chung* had multiple conversations with other school employees, but they were all similar in nature, with the defendant telling one fellow teacher that “[A] day doesn’t pass that [I] don’t feel like killing myself. . . . I think I’ll bring a gun[;] I’ll shoot the principal and shoot myself.”⁴⁰⁵ The defendant told another teacher he was taking “much medication” before he showed his coworker a pistol and two clips of ammunition and said he was going to kill the principal.⁴⁰⁶ A third teacher testified that, in another conversation, Chung brandished an ammunition clip and said “if the principal was going to go and if he had to go with him[,] he would.”⁴⁰⁷ On the same day as that conversation, the defendant spoke to a fourth teacher and

⁴⁰¹ 862 P.2d 1063 (Haw. 1993).

⁴⁰² See id. at 1067 (noting his employment).

⁴⁰³ Id. at 1066.

⁴⁰⁴ See id. at 1067-68 (detailing multiple conversations about the defendant’s desire to shoot the principal).

⁴⁰⁵ Id. at 1067.

⁴⁰⁶ Id.

⁴⁰⁷ Id. at 1068.

again expressed his intention to both shoot the principal and kill himself.⁴⁰⁸ Chung was arrested the next day at the school with a pistol and ammunition in his possession.⁴⁰⁹

On appeal, Chung argued that he never threatened the principal because he did not communicate his threats directly to the principal.⁴¹⁰ Although an intermediate appeals court agreed with the position and dismissed Chung's indictment,⁴¹¹ the Hawaii Supreme Court reversed the decision, finding instead that, in his conversations with other teachers, Chung "consciously disregarded a substantial and unjustifiable risk that [the principal] might also learn of the threat and be terrorized thereby."⁴¹² Furthermore, the court argued that any reasonable person would conclude Chung's statements represented true threats:

Chung repeatedly expressed to his colleagues the intention of shooting or killing [the principal]. He did so at the school that [the principal] administered. He displayed a handgun and/or ammunition when he uttered his threats. Finally, the threats were sufficiently unequivocal, un-conditional, immediate, and specific as to convey a gravity of purpose and an imminent prospect of execution[.]⁴¹³

The Eighth Circuit cited *Chung* approvingly⁴¹⁴ in its decision in *Doe v. Pulaski County Special School District*, a case that upheld a student's expulsion after a letter describing the rape, murder, and sodomy of his girlfriend was stolen from his home and shared with her.⁴¹⁵ The question of whether the student had actually communicated his threat was central in *Doe*,⁴¹⁶ and the Eighth Circuit used *Chung* for the proposition that a threat need not be communicated to its would-be target to still function as a threat. However, the dissent in *Doe* questioned the

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.*

⁴¹¹ *Id.*

⁴¹² *Id.* at 1072,

⁴¹³ *Id.* at 1073.

⁴¹⁴ *Doe*, 306 F.3d at 624.

⁴¹⁵ *Id.* at 619.

⁴¹⁶ *See id.* at 624-25 (concluding the student shared the letter with a third party when he discussed the letter with his ex-girlfriend and allowed his friend to read it). *See also* Chapter 6, *supra*.

majority's reliance on *Chung*, pejoratively dismissing the “decade-old” case⁴¹⁷ as one that the court was not bound to follow.⁴¹⁸ Indeed, it is unclear how the finer points of *Chung* apply in strictly student speech because obviously the teacher was just that — a teacher — and not a student.

Still, *Chung* is illustrative of what a traditional true threat case should look like in the school environment. The defendant, with his persistent talk of suicide and murder, was clearly disturbed, and he repeatedly produced a handgun to indicate he was serious about his threats. As the Hawaii Supreme Court suggested,⁴¹⁹ any reasonable person in the same position as *Chung*'s coworkers would have acted against the defendant to safeguard the school and its personnel. Yet the facts of *Chung* — multiple threatening conversations and a firearm to back up the defendant's threat — are rarely replicated by students in such an overwhelming fashion. Therefore, *Chung* stands at the extreme end of the spectrum, with any cases approximating its facts calling for swift school action and little judicial second-guessing. However, other cases falling well short of the facts from *Chung* suggest a more probing inquiry before subjecting students to state criminal penalties or severe school punishment.

b. Threatening student speech

In the post-Columbine/Virginia Tech/Newtown landscape, a threat of a school shooting represents the sum of all fears for teachers, school administrators, and parents.⁴²⁰ Yet by placing the language and terms of Columbine outside of the boundaries of acceptable debate, it can often encourage students to communicate either direct or off-hand threats of school shooting attacks. Courts have used various approaches in dealing with cases that most closely approximate the

⁴¹⁷ *Id.* at 629 (Heaney, C.J., dissenting).

⁴¹⁸ *Id.* at 630.

⁴¹⁹ *See Chung*, 862 P.2d at 1073.

⁴²⁰ *See Chapter 2, supra.*

facts from *Chung*, but one approach missing in at least two of these cases — *Wynar v. Douglas County School District*⁴²¹ and *D.J.M. v. Hannibal Public School District*⁴²² — is a direct and definitive application of the true threat doctrine.

In *Wynar*, the Ninth Circuit heard an appeal of the semester-long suspension of a student who sent multiple instant messages from his home computer that threatened a shooting attack on the school.⁴²³ The student, who collected firearms,⁴²⁴ sent messages to friends that read “i just cant decide who will be on my hit list I and that’s totally deminted and it scares even my self,” “she only reads my messages and sometimes doesnt even do that. / shes #1 on (the day of the attack),” and “that stupid kid from vtech. he didnt do shit and got a record, i bet i could get 50+ people / and not one bullet would be wasted.”⁴²⁵ The student’s friends who received the messages were concerned and eventually told school administrators, who contacted police.⁴²⁶ While no criminal charges were filed against the student, the school suspended him for a semester.⁴²⁷ The student’s father sued the school and other officials, alleging a violation of the student’s First Amendment rights among other claims.⁴²⁸ The federal district court, however, granted the school’s motion for summary judgment.⁴²⁹

The Ninth Circuit affirmed the district court’s decision, thereby leaving the student’s suspension in place.⁴³⁰ In deciding the case, the court acknowledged “the challenge for administrators” in addressing off-campus student speech in 21st century with students “instant messaging, texting, emailing, Twittering, Tumblring, and otherwise communicating

⁴²¹ 728 F.3d 1062 (9th Cir. 2013).

⁴²² 647 F.3d 754 (8th Cir. 2011).

⁴²³ *Wynar*, 728 F.3d at 1065-66.

⁴²⁴ *Id.* at 1065.

⁴²⁵ *Id.* at 1065-66.

⁴²⁶ *Id.* at 1066.

⁴²⁷ *Id.*

⁴²⁸ *Id.*

⁴²⁹ *Id.* at 1067.

⁴³⁰ *Id.* at 1072.

electronically . . . about subjects that threaten the safety of the school environment.”⁴³¹ The court then undertook a detailed discussion of the permissible reach of school administrators⁴³² before settling on a standard that allowed school administrators to take action regarding “off-campus student speech that meets the requirements of *Tinker*” when they were presented with “an identifiable threat of school violence.”⁴³³ In applying *Tinker* to the instant messages, the court concluded that

the harm described would have been catastrophic had it occurred. The messages suggest a fascination with previous school shootings. [The student] explicitly invoked the deadliest school shooting ever by a single gunman and stated that he could kill even more people without wasting a single bullet. The given date for the event — April 20 — implicitly invoked another horrific mass school shooting — the massacre at Columbine.⁴³⁴

While a school shooting would undoubtedly be tragic and fundamentally disruptive to the school setting and community at large, *Tinker* was simply not formulated to address the issues surrounding school violence because the 1969 case is concerned only with the harm resulting *from* speech, not with any other threat posed by a student.⁴³⁵ Therefore, *Tinker* is a poor doctrinal fit for a case where a student evidences a preoccupation with school violence. Instead, the obvious solution was to simply apply the true threat doctrine to find the instant messages in *Wynar* unprotected speech as a matter of law.

The *Wynar* court, however, declined to analyze the case from a true threat perspective, arguing that “[b]ecause we conclude that even if [the messages were] protected speech, the school actions were justified, we need not resolve the question whether the messages were a true

⁴³¹ *Id.* at 1064.

⁴³² *See id.* at 1067-69.

⁴³³ *Id.* at 1069.

⁴³⁴ *Id.* at 1071.

⁴³⁵ *See* Chapter 5, *supra*.

threat in the civil context presented here.”⁴³⁶ While that might appear to be a more sound constitutional footing, it makes no practical sense.⁴³⁷ Few would argue with the school’s actions because the student showed himself to be a threat to the school community, and under any true threat test,⁴³⁸ the messages would have been unprotected speech. In short, a threat by any other analysis is still a threat; true threat analysis can handle the intricacies and nuances of threatening speech and *Tinker* cannot.

Not only can true threat doctrine competently address issues in cases of threatening student speech, but in some instances, it may even be more protective of speech. In *State v. Kilburn*,⁴³⁹ the Supreme Court of Washington overturned the criminal conviction of a student convicted on felony harassment charges after telling another student that “I’m going to bring a gun to school tomorrow and shoot everyone and start with you . . . maybe not you first.”⁴⁴⁰ While the guilty verdict was upheld by an intermediate appellate court, the Washington Supreme Court reversed the lower court’s decision because it found that the trial court had failed to consider the context surrounding the student’s remarks.⁴⁴¹

As the high court noted, the recipient of the student’s comments testified at trial that the two were talking and laughing “as they often did at the end of the school day” when the remarks were made.⁴⁴² Furthermore, the student was reading a book with “military men and guns on

⁴³⁶ *Wynar*, 728 F.3d at 1070 n. 7 (internal quotation omitted).

⁴³⁷ See also, e.g., *D.J.M. v. Hannibal Public Sch. Dist.*, 647 F.3d 754 (8th Cir. 2011) (affirming student’s suspension under both true threat and *Tinker* after he threatened via instant messages to shoot students on several occasions); *In re Saad-El-Din v. Steiner*, 103 A.D.3d 73 (N.Y. Sup. Ct. App. Div. 2012) (upholding student’s suspension under *Tinker* after he threatened to blow up the school and told students “[d]on’t come to school on Friday”).

⁴³⁸ See Part II, *supra*.

⁴³⁹ 84 P.3d 1215 (Wash. 2004).

⁴⁴⁰ *Id.* at 1217.

⁴⁴¹ *Id.* at 1224.

⁴⁴² *Id.*

it,⁴⁴³ suggesting the remarks were made in some context other than a pure threat, and the recipient testified that the student “started to laugh or giggle as if he was were not serious” when he made his threat.⁴⁴⁴ “These facts all suggest,” as the court concluded, “that a reasonable person in [the student’s] position would foresee that his comments would not be interpreted seriously.”⁴⁴⁵

In *Kilburn*, the Washington Supreme Court undertook a detailed analysis of the facts⁴⁴⁶ before concluding that the student’s speech failed to meet the state’s objective reasonable speaker standard.⁴⁴⁷ *Tinker* analysis, on the other hand, may have simply led the court to conclude that a student was concerned enough to report the threat⁴⁴⁸ and the school suffered a disturbance as a result of it; in other words, a threat of a school shooting could be *ipso facto* a material/substantial disturbance for the purposes of *Tinker*. Again, however, a proper and detailed true threat inquiry can guard against the vagaries of *Tinker*⁴⁴⁹ in threatening student speech.

Much as the *Kilburn* court examined the factual record to find that the student’s threat was nothing more than a joke, the Supreme Court of New Hampshire similarly concluded that when a student remarked that he “might shoot up the school” if his English teacher did not hug him,⁴⁵⁰ the statement could not constitutionally support a disorderly conduct charge. In *State v. McCooey*, the New Hampshire court found that, where a state statute required a disturbance of

⁴⁴³ *Id.*

⁴⁴⁴ *Id.* (internal quotation omitted).

⁴⁴⁵ *Id.*

⁴⁴⁶ *See id.*

⁴⁴⁷ *See id.* at 1219-20 (explaining state’s true threat standard)

⁴⁴⁸ *See id.* at 1217 (“K.J. immediately told a friend about Kilburn’s statement but did not tell her teacher because she did not know what to do. She thought Kilburn might have been joking, but she was not sure. K.J. went home and continued to think all that after-noon and into the evening about what Kilburn had said, and the more she thought about it the more she became afraid that Kilburn was serious.”).

⁴⁴⁹ *See* Chapter 6, *supra* (discussing undefined terms in *Tinker*).

⁴⁵⁰ *State v. McCooey*, 802 A.2d 1216, 1216 (N.H. 2002).

“the orderly conduct of business in any public or governmental facility” before criminal liability could be imposed for disorderly conduct, the prosecution could produce no evidence of a disruption after the student’s remark.⁴⁵¹ While the trial court found there was a disruption because “time and attention of the faculty and administration was taken to deal with the incident and police presence at the school drew students’ attention,” the high court argued that the state could not show that either the student’s teacher or the principal had to stop their usual duties to tend to the matter and that only one student testified that she “noticed” the police.⁴⁵² Furthermore, as the court argued, the teacher’s testimony that students in her class did not respond to the remark “tended to show there was no disruption.”⁴⁵³

Still, not all courts have been receptive to student claims that threatening speech was merely a joke or hyperbole. In *Lovell v. Poway Unified School District*,⁴⁵⁴ the Ninth Circuit reversed a district court’s decision and found that a student’s statement to a school counselor that “If you don’t give me this schedule change, I’m going to shoot you” was unprotected speech under the First Amendment.⁴⁵⁵ Central to the case was a dispute over what was exactly said as the student “was frustrated and irritable” while she was trying to request changes to her class schedule.⁴⁵⁶ The school counselor stated that the student said “If you don’t give me this schedule change, I’m going to shoot you,” while the student argued that she actually said “I’m so angry I could just shoot someone.”⁴⁵⁷ While the court stated that if the student’s version of the events

⁴⁵¹ Id. at 1217.

⁴⁵² Id.

⁴⁵³ Id.

⁴⁵⁴ 90 F.3d 367 (9th Cir. 1996).

⁴⁵⁵ Id. at 368-69.

⁴⁵⁶ Id. at 369.

⁴⁵⁷ Id. at 369 n.1.

were correct, the question would be “closer,”⁴⁵⁸ it still determined that the statement, per the school counselor’s testimony, represented a true threat.⁴⁵⁹ As the court concluded,

. . . there is no question that any person could reasonably consider the statement “If you don't give me this schedule change, I'm going to shoot you,” made by an angry teenager, to be a serious expression of intent to harm or assault. A reasonable person in these circumstances would have foreseen that [the counselor] would interpret that statement as a serious expression of intent to harm. This statement is unequivocal and specific enough to convey a true threat of physical violence. This is particularly true when considered against the backdrop of increasing violence among school children today.⁴⁶⁰

Thus the Ninth Circuit found that, unlike the *Kilburn* and *McCooey* courts, there was no room for hyperbole in the modern school setting, and the court’s reasoning evokes a dim and dark picture of schools beset by violence. But that line of thinking must be contained and controlled lest it lead to ludicrous results such as those seen in *S.G. v. Sayreville Board of Education*.⁴⁶¹ In that case, the Third Circuit upheld the suspension of a five-year-old kindergarten student who said “I’m going to shoot you” to a friend during a playground game of cops and robbers.⁴⁶² The suspension was justified, the court concluded, because “where the school officials determined that threats of violence and simulated firearm use were unacceptable, even on the playground, the balance tilts in favor of the school’s discretionary decision-making.”⁴⁶³

⁴⁵⁸ *Id.* at 373.

⁴⁵⁹ *Id.* at 372.

⁴⁶⁰ *Id.*

⁴⁶¹ 333 F.3d 417 (3rd Cir. 2003).

⁴⁶² *Id.* at 418-19.

⁴⁶³ *Id.* at 422. *See also id.* at 423 (justifying the suspension under *Fraser*). *But see* Chapter 5, *supra* (arguing *Fraser* does not govern cases of violent student speech).

Yet the drive to keep pretend threats (as in *S.G.*) and violent imagery (as in the t-shirt in *Miller v. Penn Manor School District*⁴⁶⁴) out of the nation's classrooms does nothing to keep schools, students, and administrators safe. Rather, these instance of administrative overreach can serve only as a distraction from real measures to prevent school violence and needlessly punish children. Some student speech, such as the instant messages in *Wynar*, is indeed a true threat, and it should be treated as such. But distinguishing on a consistent basis what is and what is not a threat in the school setting seems to be an impossible task for the nation's courts.

V. Conclusion

In *Johnson v. New Brighton Area School District*,⁴⁶⁵ the federal District Court for the Western District of Pennsylvania upheld the 10-day suspension of a student⁴⁶⁶ who jokingly threatened to “pull[] a Columbine” after students continued to call him “Osama.”⁴⁶⁷ A teacher who overheard the statement thought that, even if he was joking, the student should have been unable to avoid punishment because “kids nowadays try to get out of everything.”⁴⁶⁸ The court agreed with the sentiment (although perhaps not the reasoning) as it found that the mere mention of Columbine could be a true threat:

In today's society, the term “Columbine,” connotes death as a result of one or more students shooting other students and school staff. Therefore, when a student uses that term, and, from the school's viewpoint, utters the term with malice or anger while within the confines of the school yard, it can readily be viewed at a minimum as “fighting words” or a “true threat” or “advocating conduct harmful to other students.”⁴⁶⁹

⁴⁶⁴ 588 F. Supp. 2d 606 (E.D. Penn. 2008). See Chapter 6, *supra*.

⁴⁶⁵ 2008 U.S. Dist. LEXIS 72023 (W.D. Penn. 2008).

⁴⁶⁶ *Id.* at *27.

⁴⁶⁷ *Id.* at *3. The nickname was given to the student, who was not of Middle Eastern descent or Muslim, by a motivational speaker at an assembly. *Id.* at *2.

⁴⁶⁸ *Id.* at *4 (quoting docket entry no. 35-6, depo. p. 28-29).

⁴⁶⁹ *Id.* at *27-28.

Aside from the lamentable conflation of three different speech doctrines, there is another reason the court's opinion is disappointing. At its core — by positioning “Columbine” as a forbidden word — the opinion is arguing for a *per se* rule in the school environment that would find *any* mention of school violence to be unprotected speech. As the dissent in *In re Douglas D.* argued,

Because of the epidemic of violence in public schools, threats against students, teachers, and administrators in a school setting should not be afforded First Amendment protection. Based upon a “falsely shouting fire in a theatre” or “panic” analysis, school threats are incendiary *per se*. Whether these threats also violate some criminal statute depends upon the evidence in each situation.⁴⁷⁰

If this were adopted as a majority position, it would remove all consideration and analysis from most violent student speech cases. Cases like *Wynar*, with its talk of guns and attack dates, would be treated the same as *McCooey*, the case where a student “threatened” to shoot his teacher if she did not give him a hug. Decisions would be easy, but the constitutional right to free speech would wilt and wither.

Properly analyzing a student threatening speech case in the post-Columbine world is difficult. Federal courts cannot seem to agree on what the standard for true threat examination should be,⁴⁷¹ and the last time the Supreme Court weighed in on the issue, it only complicated the matter more.⁴⁷² Analyzing creative student speech that appears to threaten violence only makes the matter more troublesome. But, as shown by the Supreme Court of Washington in *State v. Kilburn*, it is possible that threatening student speech can be rationally and dispassionately examined.

⁴⁷⁰ 626 N.W.2d at 762 (Prosser, J., dissenting).

⁴⁷¹ See Part II, *supra*.

⁴⁷² See Part I, *supra*.

Some violent student speech, such as that seen in *Wynar*, should be addressed by schools and perhaps even law enforcement in an attempt to keep schools safe. But that does not necessarily mean that all violent student speech — even speech that threatens “pull[ing] a Columbine”⁴⁷³ — should become extinct in the school setting.

⁴⁷³ 2008 U.S. Dist. LEXIS 72023 at *3.

CHAPTER 8

CONCLUSION

This chapter will begin by returning to the research questions first posed in Chapter 1. The chapter will then conclude the work in Part II by making five broad conclusions that serve as this work's contribution to the literature: the important distinction between curricular and noncurricular speech; the similarly critical distinction between violent and threatening speech; a plea to focus on efforts that make students better instead of measures that make schools *seem* safer; a request to repair student speech jurisprudence and bring order to the true threat doctrine; and a suggestion that courts stop the mission creep of schools and administrators by limiting judicial deference to their decisions.

I. Research questions

1. What is the current state of Supreme Court jurisprudence regarding a child's First Amendment rights inside and outside of the school environment?

As discussed in Chapter 4, a child has the same First Amendment rights as those of an adult outside of the school setting. Inside a school, however, those rights are somewhat limited, beginning first with the mandate that, in order to be constitutionally protected, student speech cannot cause a material/substantial disruption to the school. Exceptions to this rule include little

or no constitutional protection for student speech that is sponsored by the school and integrated into the curriculum and student speech that is sexually lewd or endorses illegal drugs.¹

2. What insight can decisions outside of student speech jurisprudence provide to the analysis of violent student speech?

As discussed in Chapter 4, cases such as *Ginsberg v. New York*² and *F.C.C. v. Pacific*³ show that the government has a special place as a guardian as the morality of children. That special place, however, does not extend to violence, as shown in decisions such as *Winters v. New York*⁴ and *Brown v. Entertainment Merchants Association*.⁵ Therefore, where a proclivity toward the censorship of sexualized speech in the school setting might be supported by broader case law,⁶ there is no such support for the suppression of violent student speech.

3a. How are violent non-sponsored curricular student speech cases decided?

3b. How should courts decide violent non-sponsored curricular student speech cases?

As outlined in Chapter 5, violent non-sponsored curricular speech cases are currently decided with a variety of doctrinal approaches including *Tinker*, the true threat doctrine, and mixed (and often unclear) analysis. However, as suggested by the framework outlined in both the text of Chapter 3 and its accompanying chart, a new standard is needed to govern these factual situations where a student completes an assignment in the course of his education. Such a standard would operate much like *Hazelwood* in that administrators would have a wide latitude to pass judgment on student speech. However, that authority would be constrained with the requirement that school action in such cases not be an exercise of punitive discipline. This

¹ These “exceptions” are a product of the *Fraser*, *Hazelwood*, and *Morse* line of student speech cases. See Chapter 4, *supra*.

² 390 U.S. 629 (1968).

³ 438 U.S. 726 (1978).

⁴ 333 U.S. 507 (1948).

⁵ 131 S.Ct. 2729 (2011).

⁶ Such censorship is also (obviously) supported by *Fraser*. See Chapter 4, *supra*.

standard would not apply to cases in which a student turns in an assignment in a threatening manner or the assignment appears on its face to be a literal threat of violence.⁷

4a. How are violent noncurricular student speech cases decided?

4b. How should courts decide violent noncurricular student speech cases?

As discussed in Chapter 6, *Tinker* remains the proper standard for violent noncurricular student speech cases. However, as outlined by the framework for this study,⁸ two preliminary questions are important to these cases: whether the student speech in question is properly considered as a true threat and whether the speech is actually student speech and subject to the authority of the school. As discussed in Chapter 6, these questions — especially the issue of school jurisdiction — are often ignored or given little attention.

5a. How are threatening student speech cases decided?

5b. How should courts decide threatening student speech cases?

As discussed in Chapter 7, cases involving threatening student speech must be examined with the principles of the true threat doctrine as outlined by both the Supreme Court and important lower court decisions. However, some cases that are properly considered under the true threat doctrine are being evaluated under *Tinker*, which is an illogical approach. Instead, student speech that is transmitted in a threatening manner or that appears to be a threat of literal violence should be considered under the true threat doctrine. As the study's framework suggests,⁹ if such speech is not a true threat under the law, the constitutionality of school discipline can then be considered under the *Tinker* standard.

⁷ See Chapters 5 and 7 for discussion of actual and hypothetical situations where student assignments could properly be considered true threats.

⁸ See chart in Chapter 3, *supra*.

⁹ See *id.*

6. What is the proper balance between judicial intervention and deference to school administrators?

As outlined below in Part II.e, we must strike a balance between student rights and the ability of schools to function in an orderly fashion.¹⁰ That balance, however, does not and cannot involve the complete abrogation of judicial authority in regard to student rights. The legal system has — and always will be — the proper forum when schools and administrators violate the constitutional rights of students.

II. General conclusions

a. The distinction between curricular and noncurricular speech

In *Hazelwood*, the Supreme Court established a difference between student speech a school must “affirmatively . . . promote” and speech a school must only “tolerate.”¹¹ At its core, this is a natural distinction in the school setting: Some speech is simply essential to the business of the school, while other speech is less important to the educational process. But *Hazelwood* established a rigid (or at least what should have been interpreted as rigid) set of requirements before its expansion of administrative authority applied. For schools to exercise their enhanced abilities to censor speech “that is . . . ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences,”¹² the speech had to be a part of the school’s curriculum¹³ and it had to bear the school’s “imprimatur.”¹⁴ The former is relatively self-evident, but the latter, as seen in the Court’s examples of school publications and theatrical productions, requires some demonstrative form of sponsorship by the

¹⁰ See Part II.e, *infra*.

¹¹ *Hazelwood*, 484 U.S. at 270-71.

¹² *Id.* at 271.

¹³ *Id.* “[A]ctivities” are a part of the school’s curriculum “whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.” *Id.*

¹⁴ *Id.*

school that could lead “students, parents, and members of the public” to conclude the speech was endorsed by the school.¹⁵

As Chapter 5 proposed, in some circumstances,¹⁶ speech is part of the school’s curriculum but not sponsored by the school administration. In these cases, neither *Tinker* nor *Hazelwood* clearly controls. Thus, as Chapter 5 argues, there should be a separate standard for non-sponsored curricular speech. Under this standard, schools would be unable to punitively discipline students for non-sponsored curricular speech; instead, schools would be limited to therapeutic or curricular responses to student speech. This standard is designed to enhance and protect the student’s interest to an education, but it does not protect a student from punishment when making threats.¹⁷ However, a true threat in curricular speech is a rare occurrence,¹⁸ and mere violent imagery cannot serve as a reason to remove student speech from this protective standard.

This standard is needed to protect violent non-sponsored curricular student speech because such speech is often punished under *Tinker*.¹⁹ Absent content that rises to the level of a true threat, such violent speech serves a variety of purposes under the First Amendment, from allowing students to express discontent and strife to simply enabling self-expression.²⁰ When coupled with a student’s interest to an education, this suggests that non-sponsored curricular speech should be extensively protected despite any violent content.

b. The distinction between violent and threatening speech

¹⁵ *Id.*

¹⁶ This is usually — but not always — student assignments. See Chapter 5, *supra* (arguing that a student’s independent interest in learning or education should also be included in the consideration of school curriculum).

¹⁷ See Chapter 7, *supra*.

¹⁸ See, e.g., Chapter 5, *supra* (discussing hypothetical essay); Chapter 7, *supra* (discussing aggressive actions in submitting student drawing in *Milo M.*).

¹⁹ See, e.g., *Lavine v. Blaine Sch. Dist.*, 257 F.3d 981 (9th Cir. 2001) (upholding emergency expulsion of a student who gave a teacher a poem to critique); *Cuff v. Valley Cent. Sch. Dist.*, 677 F.3d 109 (2nd Cir. 2012) (upholding suspension of a student who expressed a desire for his school to blow up).

²⁰ See Chapter 1, *supra*.

As Chapter 6 demonstrates, there is a wide range of violent non-curricular student speech found in public schools, as the spectrum spans from prose that can resemble a plan of attack, to poetry and visual art, to mere references to violence. Additionally, as demonstrated in Chapter 7, even speech that appears to be threatening can simply be a joke or other form of hyperbole. However, there is a critical distinction between *violent* speech and *threatening* speech — the latter can be the proper cause for civil and criminal punishment, while the former, as demonstrated by Chapter 4, is fully protected expression under the Constitution.

As part of a class assignment, the student in *Cuff* wrote that he wished to “Blow up the school with the teachers in it.”²¹ The wish, written as a joke that caused classmates to laugh,²² was certainly violent, but it was not a threat. As the Sixth Circuit found in *Alkhabaz*, a threat is generally made on the speaker’s part to advance a goal.²³ While there was evidence to suggest the student in *Cuff* had behavioral issues,²⁴ there was simply no proof to show that the student attempted to use the drawing to intimidate or otherwise influence his teacher. Yet the Second Circuit treated it as threatening speech:

School administrators also have to be concerned about the confidence of parents in a school system’s ability to shield their children from frightening behavior and to provide for the safety of their children while in school. B.C.’s “wish,” being known by many students, could easily have become known to a number of parents who could reasonably view it as something other than a contribution to the marketplace of ideas. While parents do not have the right to monitor student speech, they could reasonably be concerned about the safety of their children in the present circumstances. A failure of the appellees to respond forcefully to

²¹ *Cuff*, 677 F.3d at 111.

²² *Id.*

²³ *See U.S. v. Alkhabaz*, 104 F.3d 1492 (6th Cir. 1997). *See also* Chapter 7, *supra*.

²⁴ *See id.* (“Prior to September 2007, B.C. had also been disciplined by teachers and school administrators for misbehavior in and around school. B.C. testified that he had been to Principal Knecht’s office and Assistant Principal Malley’s office on a few occasions prior to the astronaut drawing incident. Knecht and Malley also confirmed B.C.’s involvement in numerous altercations during recess, pushing and shoving in the hallways, and rough play at school.”).

the “wish” might have led to a decline of parental confidence in school safety with many negative effects, including, e.g., the need to hire security personnel and even a decline in enrollment.²⁵

Where mere violent speech is treated as threatening speech, the issue becomes clouded under a false choice between protecting speech and protecting children from harm. In comparing *Cuff* to *Wynar*,²⁶ the difference is clear: one student wrote of an abstract idea while another discussed targets, guns, and an attack date. Thus *Cuff* represented violent speech, while *Wynar* was a case of threatening speech. The difference might be subtle, but it is important because the discipline in *Wynar* can easily be justified on a need to protect students. However, there is no such justification for the discipline in *Cuff*.

If the specter and looming shadow of Columbine is to be invoked in the name of punishing speech,²⁷ then a plausible threat should exist to support that censorship. Without that threat, the backdrop of school violence serves only to emotionally cloud free speech issues.

c. Focus on helping students, not punishing speech

As Richard Salgado correctly noted, “Expelling or suspending a student does not preclude the student from returning to campus with a loaded gun.”²⁸ Therefore, if students are suspended or expelled because of violent speech, then schools are not being made any safer with such discipline. Students who are arrested or otherwise detained are eliminated as threats, yes, but in many cases, students who engage in violent speech are not criminally disciplined. The student in *Cuff*, for example, was suspended for six days.²⁹ How was the school any safer during

²⁵ *Id.* at 115.

²⁶ See *Wynar*, 728 F.3d 1062 (9th Cir. 2013). See also Chapter 7, *supra*.

²⁷ See Chapter 2, *supra*.

²⁸ Richard Salgado, Comment, *Protecting Student Speech Rights While Increasing School Safety: School Jurisdiction and the Search for Warning Signs in a Post-Columbine/Red Lake Environment*, 2005 B.Y.U.L. REV. 1371, 1413 (2005).

²⁹

his absence? More importantly, how was the school still safe after his return from the suspension?

Obviously, school discipline in these cases is imposed only to show disapproval with the speech and to rid the school environment of distractions. Yet *Tinker*, by its very terms, allows for school action only where speech causes a disruption in the school environment. But as Professor R. George Wright explained, *Tinker* is expanded in these situations to spare “[s]chool officials, teacher, and fellow students [from] daily reminders of the threat.”³⁰

Instead of punishing speech, administrators should work to help those student speakers who, through their use of violent speech, show some sign of emotional or mental disturbance. Again pointing to the student in *Cuff*, how did his suspension help him learn or grow as a student? If nothing else, it taught him to keep his violent thoughts to himself, an unfortunate result considering Chapter 1’s argument that violent speech can serve as a peaceful outlet. Rather than punishing the student in *Cuff* and others like him, schools should seek to get to the root of why these students are engaging in violent speech. For some, it may simply be a creative outlet,³¹ but for others, it might be a sign of more serious issues. Since punishment in many cases literally does nothing to make schools safer, school should instead focus on counseling and reaching out to the speakers they might otherwise suspend or expel.

d. Repair student speech jurisprudence and bring order to the true threat doctrine

As Chapter 4 concluded, the Supreme Court’s student speech jurisprudence has been in a confusing state of flux since the Court’s decision in *Fraser* began to chip away at *Tinker*’s dominant position in student speech. With *Fraser*, *Hazelwood*, and *Morse* all weakening the decision to some extent, *Tinker*’s applicability is now in question, leading Justice Clarence

³⁰ R. George Wright, *Doubtful Threats and the Limits of Student Speech Rights*, 42 U.C. DAVIS L. REV. 679, 698 (2009).

³¹ See Chapter 7, *supra* (discussing future “Stephen Kings” of the classroom).

Thomas — who argued that *Tinker* was wrongly decided and “without basis in the Constitution”³² — to conclude that “our jurisprudence now says that students have a right to speak in schools except when they do not.”³³ As stated in Chapter 5, due to this erosion, *Tinker* should now be employed only in cases of noncurricular speech. This, however, is not an optimal situation: In a perfect world, *Tinker* could be used as a standard to judge all student speech cases, but with the Supreme Court’s subsequent decisions, *Tinker*, it seems, has been destined to the death of a thousand cuts. Additionally, as examined in Chapter 6, *Tinker*’s role in the 21st century is yet to be fully understood, because many courts still struggle to identify the point where a school’s jurisdiction ends in a world of online student expression.

Therefore, with online student expression still a vexing question and *Tinker*’s viability in doubt, the Supreme Court must act to address these important questions. In its next student speech case, the Court must either affirm *Tinker*, or it must create a new student speech standard that governs all cases because student speech jurisprudence cannot logically and efficiently persist with yet another exception to *Tinker*.

Similarly, the Supreme Court will eventually have to address the emerging circuit split regarding the necessary intent for criminal conviction under federal threat statutes. As Chapter 7 concluded, the Ninth Circuit is the only circuit that requires a subjective intent to threaten in *all* criminal threat cases. This, unlike the debate between the reasonable speaker and the reasonable listener standard, represents a fundamental difference among the circuits, and it must be definitively addressed by the Supreme Court.

³² *Morse*, 551 U.S. at 410 (Thomas, J., concurring).

³³ *Id.* at 418.

The Court made indeed bring substantive change to the area after it decided to grant certiorari³⁴ to the defendant in *U.S. v. Elonis*,³⁵ the Facebook threat case discussed in Chapter 7. In its order granting review of the case, the Court specifically asked the parties to brief the question of whether the federal statute at issue in *Elonis* requires a subjective intent to threaten, a directive that shows the Court is at least contemplating bringing clarity to the current circuit split.³⁶

In short, because true threats and student speech are invariably intertwined in violent student speech, the subject will remain a complex issue with varying approaches and results until the Supreme Court addresses both doctrines at a fundamental level.

e. Stop mission creep and limit judicial deference

In arguing that it was unwise to grant administrators the power to censor off-campus speech, the Second Circuit wrote in *Thomas v. Board of Education, Granville Central School District* that

[t]he risk is simply too great that school officials will punish protected speech and thereby inhibit future expression. In addition to their vested interest and susceptibility to community pressure, they are generally unversed in difficult constitutional concepts such as libel and obscenity. Since superintendents and principals may act arbitrarily, erratically, or unfairly, the chill on expression is greatly exacerbated.³⁷

That decision served to prevent the school from exercising authority over an underground newspaper produced by students and stopped the “mission creep” of school administrators into off-campus speech. The decision stood for the idea that the free expression rights of minors meant something, even if the newspaper in question was “saturated with distasteful sexual satire,

³⁴ 2014 U.S. LEXIS 4183 (U.S., June 16, 2014).

³⁵ 730 F.3d 321 (3rd Cir. 2013).

³⁶ See 2014 U.S. LEXIS 4183 (U.S., June 16, 2014).

³⁷ *Thomas*, 607 F.2d at 1051. See also Chapter 6, *supra*.

including an editorial on masturbation and articles alluding to prostitution, sodomy, and castration.”³⁸ But the newspaper, as the court concluded, was outside of the school’s authority — an authority that must have an end because students outside of the “schoolhouse gate”³⁹ have the same First Amendment rights as any other person in the United States.⁴⁰

Therefore, it is critical for courts to constructively limit the reach of school administrators. Teachers and school officials are not bad people — in fact, they do admirable work in often adverse circumstances, and their jobs are made easier in homogenous, distraction-free settings, making it only natural for them to silence student dissent. Yet the Constitution does not allow for the censorship of student speech based only on a “distraction.”⁴¹

However, not all courts are receptive to student speech claims. As one federal district court judge argued,

This Court should not be a haven for complaints by students and their parents against actions taken by school officials in their extremely difficult task of educating and controlling the irresponsible behavior of their students. As is often the case, as it is here, these types of conflicts are better handled within the educational system and not in the federal trial and appellate courts.⁴²

While the judge wrote in a 2005 case, his opinion harkens back to Justice Hugo Black’s angry, ill-tempered dissent in *Tinker*:

Turned loose with lawsuits for damages and injunctions against their teachers as they are here, it is nothing but wishful thinking to imagine that young, immature students will not soon believe it is their right to control the schools rather than the right of the States that collect the taxes to hire the teachers for the benefit of the pupils. This case, therefore, wholly without constitutional reasons in my judgment, subjects all the public schools in the country to

³⁸ Id. at 1045 n.3.

³⁹ *Tinker*, 393 U.S. at 506.

⁴⁰ See Chapter 4, *supra*.

⁴¹ See generally Wright, *supra* note 30.

⁴² *D.F. v. Syosset Cent. Sch. Dist.*, 386 F. Supp. 2d 119, 131 (2005). See also Chapter 5, *supra*.

the whims and caprices of their loudest-mouthed, but maybe not their brightest, students. I, for one, am not fully persuaded that school pupils are wise enough, even with this Court's expert help from Washington, to run the 23,390 public school systems in our 50 States.⁴³

Justice Black's vision of a nation's schools governed by unruly students never came to pass, but it did establish the false choice of having either free expression or order in public schools. Yet student speech cannot be simplified to a choice between freedom and control. As the Court explained in *Cohen v. California*,⁴⁴ "[T]he immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve."⁴⁵ Simply put, students have free speech rights because that is what the Constitution requires.

The question of student speech rights is admittedly more complicated in the wake of Columbine and other incidents of school violence.⁴⁶ But that does not mean courts can forsake reason and logic in favor of emotion. Writing in a dissent in *Doe v. Pulaski County Special School District*,⁴⁷ Circuit Judge Gerald Heaney argued in favor of a student plaintiff who had been expelled after a threatening letter was taken from his home by a friend and given to his ex-girlfriend:

There is something fundamentally wrong with our system of justice if we willingly revoke a non-offending teenager's privilege to attend public school, particularly where an alternative school is available, and where the responsible school authority recommended the alternative school as a constructive way to handle the matter. J.M., of all people, belongs in school. It does not pass unnoticed by this court that teachers and administrators in

⁴³ *Tinker*, 393 U.S. at 525-26 (Black. J., dissenting).

⁴⁴ 403 U.S. 15 (1971).

⁴⁵ *Id.* at 24-25.

⁴⁶ See Chapter 2, *supra* (detailing post-Columbine efforts to censor student speech).

⁴⁷ 306 F.3d 616 (8th Cir. 2002) (upholding student expulsion). See also Chapter 6, *supra*.

today's world are expected to undertake greater responsibilities than what the one-room schoolhouse teacher shouldered. Educators serve as surrogate parents, psychologists, social workers, and security guards, above and beyond their normal teaching responsibilities. They are charged with the duties of creating a safe learning environment, teaching clear communication, and protecting students' constitutional rights. It is clear that we as parents, neighbors, members of religious communities, political leaders, and members of the court cannot alienate teachers and administrators as they grapple with issues of violence in the classroom. It is not acceptable, however, to lower the bar for what constitutes a true threat and expel a "good kid" with a good scholastic record when other remedies are available.⁴⁸

The sympathy in Judge Heaney's dissent is palpable and understandable. Most of the students who engage in violent speech pose no threat to teachers, classmates, or themselves. Instead, they are simply artists, writers, jokesters, or misguided souls in need of attention and help. They deserve that help, and when schools do not give it to them, they should have the recourse of the courts. That is, after all, why courts exist: To give aid to the powerless.

Again, the speakers in violent student speech cases are not evil and few deserved the punishment they received. David Riehm was a 17-year-old high school student in a creative writing class when he wrote a story detailing the bloody death of a character whose life ended "in a red misty explosion."⁴⁹ After his teacher suggested the story was offensive, he wrote a second story that said his teacher believed that "[i]f a particular student writes about a violent or gory story, then of course [she] automatically assume[s] that they have a problem with obsessive focus on sex and potty language."⁵⁰ A third story described the violent shooting death of his teacher and resulted in David's involuntary psychiatric detention.

⁴⁸ Id. at 635 (Heaney, C.J., dissenting).

⁴⁹ *Riehm v. Engelking*, 538 F.3d at 958-59. See also Chapter 7, *supra*.

⁵⁰ Id. at 959.

After his release — and after the litigation in *Riehm v. Engelking* in which the Eighth Circuit affirmed the dismissal of his claims against the school⁵¹ — David went on to study at the University of Wisconsin-Milwaukee.⁵² Eventually, he made it to California, where he co-founded his own media production company, Loony Bin Media.⁵³ With a career in media and the creative arts, Riehm at least anecdotally shows that many students who engage in violent speech do so not to threaten or menace but to express themselves creatively.

Yet the simple fact that many of these students are ultimately harmless is lost as schools and courts continue to conflate violent speech with threatening speech. In doing so, student speech rights are unfairly abridged, especially when students are punished for violent curricular speech. Barring Supreme Court intervention, future research should be dedicated to exploring solutions outside of *Tinker* to address the problems in regulating online student speech. Research should also focus more on the various state law true threat standards and how individual states are different rather than concentrating on the federal circuit split. Such research will also be shaped by the Court's eventual decision in *Elonis*.

In conclusion, we must begin to move beyond the fear perpetuated by Columbine and other incidents of school violence. Schools should be safe, and everything should be done to make them safer. However, actions that censor and punish only violent student speech cannot be justified by an appeal to the necessity of safety. True threats in the school setting must be dealt with, but to do so, we must first understand what they are — and they are not simply violent speech.

⁵¹ Id. at 969.

⁵² David Riehm, LinkedIn Profile, <http://www.linkedin.com/pub/david-riehm/19/8a/342>

⁵³ Id.