

Fear of Violence in Our Schools: Is “Undifferentiated Fear” in the Age of Columbine Leading to a Suppression of Student Speech?

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Suppression of speech may reduce security as well as liberty.¹

But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority’s opinion may inspire fear. . . . But our Constitution says we must take this risk; and our history says that it is this sort of hazardous freedom — this kind of openness — that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.²

In the landmark case of *Tinker v. Des Moines Independent School District* the U.S. Supreme Court ruled that “undifferentiated fear or apprehension” could not swallow freedom of expression in public high schools.³ In this case, several students wore black armbands to protest U.S. involvement in the Vietnam War — a controversial event of its time. The Supreme Court ruled that public school students had the right to freedom of speech and could not be punished for their speech unless the school officials could reasonably forecast that the speech would cause a substantial disruption of school activities or invade the rights of others.⁴

In the present day, some school administrators forget the spirit of *Tinker* and censor student expression based on “undifferentiated fear.” Even the attorney who argued *Tinker* before the U.S. Supreme Court thinks the high court would decide *Tinker* differently today.⁵ Some school administrators evidently have ignored the lessons of more than thirty years ago. In Texas, high school administrators suspended Jennifer Boccia for wearing black armbands to mourn the victims of Columbine High School in Littleton, Colorado, and to protest

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1. *Lavine v. Blaine Sch. Dist.*, 279 F.3d 719, 729 (9th Cir. 2002) (Kleinfeld, J., dissenting from denial of en banc review).

2. *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 508-09 (1969).

3. *Id.*

4. *Id.*

5. David Hudson, *On 30-Year Anniversary, Tinker Participants Look Back at Landmark Case* (Feb. 24, 1999), at <http://www.freedomforum.org/templates/document.asp?documentID=10386> (quoting Dan Johnston, who argued the case for the students before the Supreme Court and said: “The real question now is whether the present-day Supreme Court would reach the same decision, I think the answer is probably not.”).

some draconian school policies.⁶ Louisiana high school officials engaged in similar behavior, ordering a student not to wear black armbands.⁷

But, arguably the greatest current threat to student speech now comes from the understandable preoccupation with safety concerns. Littleton, Colorado! Pearl, Mississippi! Springfield, Oregon! Fayetteville, Tennessee! The names reverberate through the country's collective conscience, causing pain and horror. Only the horror of September 11, 2001, inflicted greater pain on the country's psyche in the past decade.

Bomb threats,⁸ graphic violent drawings,⁹ online assaults,¹⁰ suicide poems,¹¹ violent rap songs!¹² Public school administrators across the country have had to deal with student expression dealing with violence.

Certainly, school safety is vital to the educational environment. Author Alfred Knight has written: "The first job of law is to provide freedom from violence and the fear of violence that kills civilization at its roots."¹³ But, some school administrators have responded in this the age of Columbine with overreaction. They silence any student speech that seems dangerous, controversial, or weird.¹⁴ In perhaps the most egregious example, a thirteen-year-old child from Texas spent six days in jail because he wrote a Halloween horror story for his English class that featured death.¹⁵ An honor roll middle-school student received a three-day suspension for doodling a picture of "two teachers with arrows through their heads."¹⁶

6. See David Hudson, *Free-Speech Experts Describe Texas Student-Rights Case as 'Tinker Revisited'* (July 22, 1999), at <http://www.freedomforum.org/templates/document.asp?documentID=10760>.

7. See *ACLU Challenges Louisiana School's Ban on Armbands as Violation of Students' First Amendment Rights* (Nov. 1, 1999), at <http://www.aclu.org/news/1999/n110199a.html>.

8. See *State In re R.T.*, 781 So. 2d 1239 (La. 2001).

9. See *Commonwealth v. Milo M.*, 740 N.E.2d 967 (Mass. 2001).

10. See *J.S. v. Bethlehem Area Sch. Dist.*, 757 A.2d 412 (Pa. Commw. Ct. 2000). Interestingly, the judge who decided this case before the Court of Common Pleas, a level below the Commonwealth Court, wrote a law review article on the topic of students' Internet speech. See Robert E. Simpson, Jr., *Limits on Students' Speech in the Internet Age*, 105 *DICK. L. REV.* 181 (2001).

11. See *Lavine v. Blaine Sch. Dist.*, 257 F.3d 981 (9th Cir. 2001).

12. See *Jones v. State*, 64 S.W.3d 728 (Ark. 2002).

13. ALFRED H. KNIGHT, *THE LIFE OF THE LAW* 4 (Crown Publishers, Inc. 1996).

14. See Jon Katz, *Schools' Solution to Violence: Silence the Weird* (Nov. 4, 1999), at <http://www.freedomforum.org/templates/document.asp?documentID=11414> ("Why are schools adopting increasingly draconian measures to silence the non-normal, becoming more repressive and fearful even though violence in schools and among the young in general has been dropping sharply for years?").

15. See *Kid's Scary Story Becomes Crime Scene in Adults' Mind* (Nov. 5, 1999), at <http://www.freedomforum.org/templates/document.asp?documentID=4620>.

16. Associated Press, *Girl Doodles Her Way Into 3-Day Suspension* (May 5, 2002), available at <http://www.freedomforum.org/templates/document.asp?documentID=16187>.

Charles Haynes has written: “In this pressure-cooker, post-Columbine era, more and more schools are taking the path of least resistance: Clamp down on student expression, police the halls and avoid controversy and conflict at all costs.”¹⁷

In short, the Columbine tragedy has caused many school administrators to suppress students’ constitutional rights for safety concerns. Fear over safety has led to a suppression of constitutional rights.¹⁸ Zero tolerance has spread from drugs and weapons to controversial student speech.¹⁹

Many commentators question the policy of silencing any student speech deemed controversial. Commentators argue that silencing students only breeds greater alienation, resentment, and underground rage.²⁰ These commentators stress that the better solution is to open the channels of communication with young people rather than alienate them through policies of distrust.²¹

This article will first briefly recap the legal landscape for student expression in public schools. Then, the article examines several recent cases dealing with student expression that school officials deemed threatening. The article examines the courts’ emphasis on school violence and how that has affected the courts’ analysis. Finally, the article summarizes the legal principles that can be gleaned from the recent cases involving supposedly threatening student expression. The author urges school officials to think carefully before overreacting and disciplining students with draconian punishments.

I. THE *TINKER* STANDARD

The starting point for student free-expression remains the *Tinker* case. The case began in December 1965 when a group of adults and students in Des Moines, Iowa, decided to protest U.S. involvement in

17. Charles Haynes, *Recognizing Students’ Rights Makes for Safer Schools* (Sept. 2, 2001), at <http://www.freedomforum.org/templates/document.asp?documentID=14778>.

18. See generally 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 (2000); Patrick Richard McKinney II, Note, *On the School Board’s Hit List: Community Involvement in Protecting the First and Fourth Amendment Rights of Public School Students*, 52 HASTINGS L.J. 1323 (2001).

19. See generally Lynda Hils, “Zero Tolerance” for Free Speech, 30 J.L. & EDUC. 365 (2001). For an incisive article about zero tolerance policies in general, see Alicia C. Insley, *Suspending and Expelling Children From Educational Opportunity: Time to Reevaluate Zero Tolerance Policies*, 50 AM. U. L. REV. 1039 (2001).

20. Calvert, *supra* note 18, at 768 (“Students who are taught that freedom of speech means very little and can be sacrificed cavalierly will be less appreciative of its values and, perhaps, less likely to assert themselves . . . in our already participation-poor democracy.”). See generally Dean Schabner, *Zero for Conduct: ‘Zero Tolerance’ Sends a Strong Message, But Is It the Right One* (May 9, 2002), at http://abcnews.go.com/sections/us/DailyNews/zero_tolerance020508.html; Haynes, *supra* note 17.

21. See Hils, *supra* note 19, at 373.

Vietnam.²² Several students planned to wear black armbands as part of this protest.

School officials learned of the plan and quickly passed a no-armband rule.²³ They prevented the wearing of school armbands even though they allowed students to wear other controversial symbols, such as the Iron Cross.²⁴

School officials suspended the students for violating a hastily enacted no-armband policy. The students challenged the action in federal court. A federal court sided with the school officials, reasoning that the school officials were justified in fearing that the armbands would cause a disruption.²⁵

In a landmark opinion, the U.S. Supreme Court reversed, by a vote of 7-2, and declared that school officials violated the students' First Amendment rights. In oft-cited language, the Court wrote that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."²⁶ The court established the *Tinker* standard: "[T]he record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances . . . on the school premises in fact occurred."²⁷

Other portions of the *Tinker* opinion read like a paean to student free-speech rights.

- "In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students."²⁸
- "In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate."²⁹
- "[O]ur history says that it is this sort of hazardous freedom — this kind of openness — that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society."³⁰

Still, other portions of the opinion indicate that the Supreme Court was more concerned with discrimination against a particular political viewpoint. "Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid

22. *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 504 (1969).

23. *Id.*

24. *Id.* at 510.

25. *Id.* at 508.

26. *Id.* at 506.

27. *Id.* at 514.

28. *Id.* at 511.

29. *Id.*

30. *Id.* at 508-09.

material and substantial interference with schoolwork or discipline, is not constitutionally permissible.”³¹

Most legal commentators believe that *Tinker* stands “as the high-water mark [of] student First Amendment rights.”³² For example, Kevin O’Shea, publisher of the monthly legal tract for attorneys and educators *First Amendment Rights in Education*, writes:

The *Tinker* opinion effectively launched the modern era of First Amendment rights in the public education setting because it imposed a clear burden on school officials who would seek to restrict student expression: they would be required to establish that the speech in question would create a material and substantial interference with the educational environment or the rights of others.³³

II. *FRASER*

The 1980s witnessed the rise of a more conservative Supreme Court and the devolution of students’ rights. The Supreme Court’s next student free-expression case came seventeen years later in *Bethel School District No. 403 v. Fraser*.³⁴ In this decision, Matthew Fraser, a high school junior, gave a speech before the student assembly nominating a fellow classmate for an elective office. The speech contained numerous sexual references.

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 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.³⁵

The day after his speech, an assistant principal called Fraser into her office and notified him that he had violated the school’s “disruptive-conduct” rule.³⁶ The rule provided: “Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures.”³⁷

When Matthew Fraser filed his lawsuit, he and his attorney relied on the *Tinker* precedent. They argued that Fraser’s speech did not

31. *Id.* at 511.

32. David L. Hudson, Jr., *Censorship of Student Internet Speech: The Effect of Diminishing Student Rights, Fear of the Internet and Columbine*, 2000 L. REV. MICH. ST. U. DET. C. L. 199, 202 (2000); see also *Broussard v. Sch. Bd. of Norfolk*, 801 F. Supp. 1526, 1534 (E.D. Va. 1992) (“*Tinker* . . . is the high-water mark for public school students’ First Amendment rights.”).

33. Kevin O’Shea, *A Troubling Trend*, FIRST AMENDMENT RTS. IN EDUC., (First Amendment Rts. in Educ. Project, Birmingham, Mich.), Sept. 2000, at 16.

34. 478 U.S. 675 (1986).

35. *Id.* at 687.

36. *Id.* at 679.

37. *Id.* at 678.

cause a substantial disruption. According to the Ninth Circuit, Bethel school officials simply could not carry their burden of showing that the speech caused a disruption.³⁸

The Supreme Court reversed the Ninth Circuit and set up a balancing test: “The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society’s countervailing interest in teaching students the boundaries of socially appropriate behavior.”³⁹

The Court wrote that “it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse.”⁴⁰ The Court also gave less respect to student rights in general, writing: “The constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.”⁴¹

The Court noted a “marked difference” between the political speech at issue in *Tinker* and the “sexual content” of Fraser’s speech.⁴² The Court seemed to ignore the fact that Fraser’s speech was political — it was a speech nominating a fellow classmate for a student government position.⁴³

Jeff Haley, Fraser’s attorney, points out the irony of the Court’s decision — Matthew Fraser’s speech was a *political* speech.⁴⁴ In his speech, he nominated a student for an elective office. According to Haley, Fraser’s speech was more obviously political to an outside observer than even *Tinker*’s armband.⁴⁵ Fraser himself, looking back fifteen years later, says: “There should be a heightened level of protection for speech in a student assembly. If there is any hour in the entire year that is entitled to the protections of the First Amendment, it should be when students give nominating speeches for political offices.”⁴⁶

Fraser believes the *Fraser* decision overruled *Tinker*. “The decision effectively overruled *Tinker*. *Tinker* may still be good law de jure, but it has been de facto obliterated.”⁴⁷ The case certainly em-

38. *Fraser v. Bethel Sch. Dist.* No. 403, 755 F.2d 1356, 1359 (9th Cir. 1985).

39. *Fraser*, 478 U.S. at 681.

40. *Id.* at 683.

41. *Id.*

42. *Id.* at 680.

43. See David Hudson, *Matthew Fraser Speaks Out on 15-Year-Old Supreme Court Free-Speech Decision* (Apr. 17, 2001), at <http://www.freedomforum.org/templates/document.asp?documentID=13701>.

44. Telephone interview with Jeffrey T. Haley, Cooperating Attorney, ACLU (Apr. 12, 2001).

45. *Id.* Haley, who is still “technically” a cooperating attorney with the ACLU, agrees that in the context of school-sponsored speech, student speech for government offices should receive the highest level of First Amendment protection. *Id.*

46. Hudson, *supra* note 43.

47. *Id.*

powered school officials with more authority to regulate student expression that is vulgar, lewd, or plainly offensive.

III. HAZELWOOD

Two years later, the Court further narrowed the *Tinker* decision in a high school press case, *Hazelwood School District v. Kuhlmeier*.⁴⁸ In *Hazelwood*, the school principal objected to two student stories in the school newspaper that dealt with teen pregnancy and the impact of divorce upon teenagers. The principal asserted that he had control over the newspaper, which was produced as part of a high school journalism class.

The students argued that the *Tinker* standard should apply. According to their view, the principal could not censor the articles unless he could reasonably forecast a substantial disruption of school activities.⁴⁹ Attorneys for the school district argued that school officials had greater control over the curriculum.⁵⁰

The Supreme Court sided with the school officials and established the *Hazelwood* standard: “[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.”⁵¹

Many lower courts have applied the *Tinker*, *Fraser*, and *Hazelwood* trilogy as follows:

- *Hazelwood* applies to school-sponsored student speech.⁵²
- *Fraser* applies to vulgar and lewd student speech. Most courts tend to apply *Fraser* to all student speech that is vulgar and lewd.⁵³ A few courts have said that *Fraser* applies to only vulgar student speech that is school-sponsored.⁵⁴ Unfortunately, a few courts have extended *Fraser* to ban almost any offensive student speech.⁵⁵
- *Tinker* applies to all student-initiated speech that does not otherwise fall into *Fraser*.⁵⁶

48. 484 U.S. 260 (1988).

49. See David Hudson, *Cathy Cowan Reflects on Her High School Journalism Fight in Hazelwood Case* (Dec. 27, 2001), at <http://www.freedomforum.org/templates/document.asp?documentID=15516>.

50. *Id.*

51. *Hazelwood*, 484 U.S. at 273.

52. See, e.g., *Henerey ex. rel. Henerey v. City of St. Charles*, 200 F.3d 1128 (8th Cir. 1999); *McCann v. Fort Zumwalt Sch. Dist.*, 50 F. Supp. 2d 918 (E.D. Mo. 1999).

53. See, e.g., *Heller v. Hodgin*, 928 F. Supp. 789 (S.D. Ind. 1996); *Broussard v. Sch. Bd. of Norfolk*, 801 F. Supp. 1526 (E.D. Va. 1992).

54. See, e.g., *D.G. v. Indep. Sch. Dist. No. 11*, No. 00-C-0614-E, 2000 U.S. Dist. LEXIS 12197 (N.D. Okla. Aug. 21, 2000); *McIntire v. Bethel Sch. Indep. Sch. Dist. No. 3*, 804 F. Supp. 1415 (W.D. Okla. 1992).

55. See, e.g., *Boroff v. Van Wert Bd. of Educ.*, 220 F.3d 465 (6th Cir. 2000).

56. See, e.g., *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992).

IV. STUDENT SPEECH THAT IS THREATENING

While the *Tinker*, *Fraser*, and *Hazelwood* trilogy govern the vast portion of First Amendment jurisprudence involving public schools, there are other applicable lines of cases, including the true threat cases.

The U.S. Supreme Court has ruled that true threats receive no First Amendment protection.⁵⁷ Unfortunately, the Court did not apply a definitive test for determining whether speech constitutes a true threat, political hyperbole, or another form of protected speech.⁵⁸ As a result, the lower courts have adopted a variety of tests to determine whether speech constitutes a true threat.⁵⁹

Some courts have determined that speech constitutes a true threat “if a reasonable person would foresee that an objective rational recipient of the statement would interpret its language to constitute a serious expression . . . that the message conveys a ‘true threat.’”⁶⁰

In *Lovell v. Poway Unified School District*, the Ninth Circuit determined that a student could be punished for telling her school guidance counselor that she would shoot her if she did not change her schedule.⁶¹ The Ninth Circuit determined that the student’s “statement is unequivocal and specific enough to convey a true threat of physical violence. . . . particularly . . . when considered against the backdrop of increasing violence among school children today.”⁶²

This has become the norm across many school districts: courts will analyze student speech against the “backdrop of increasing violence.”⁶³ Sometimes, this makes sense when the student speech is unequivocal and clearly is a true threat.⁶⁴ But, sometimes school administrators overreact out of what Justice Abe Fortas in *Tinker* called “undifferentiated fear.”⁶⁵ The cases below show several examples of such overreaction.

57. See *Watts v. United States*, 394 U.S. 705 (1969).

58. Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL’Y 283, 288 (2001) (“Even though the Supreme Court has made clear that true threats are punishable, it has not clearly defined what speech constitutes a true threat.”).

59. See *id.*

60. *United States v. Miller*, 115 F.3d 361, 363 (6th Cir. 1997).

61. 90 F.3d 367 (9th Cir. 1996).

62. *Id.* at 372.

63. See *infra* note 172.

64. See *In re Kyle M.*, 27 P.3d 804 (Ariz. Ct. App. 2001).

65. *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 508 (1969).

*A. Examining the Case Law*1. *Lavine v. Blaine School District*⁶⁶

James Lavine, then an eleventh grade high school student, wrote a poem on his own time and submitted it to his English teacher. The teacher agreed to review it and thanked him for writing it.

Entitled “Last Words,” Lavine’s poem examined the thought processes of a student who shot and killed his classmates. Lavine said he wrote the poem to “understand the phenomenon” of school shootings in places such as Springfield, Oregon.⁶⁷ The poem read in part:

As each day passed,
I watched,
love sprout, from the most,
unlikely places,
which reminds,
me that,
beauty is in the eye’s,

. . .

I pulled my gun,
from its case,
and began to load it.
I remember,
thinking at least I won’t,
go alone,
as I,
jumped in,
the car,
all I could think about,
was I would not,
go alone.
As I walked,
through the,
now empty halls,
I could feel,
my heart pounding.
As I approached,
the classroom door,
I drew my gun and,
threw open the door,
Bang, Bang, Bang-Bang.
When it was all over,
28 were,
dead, . . .⁶⁸

The morning after he wrote this poem, Lavine showed it to his mother. She warned him not to show the poem to anyone because

66. 257 F.3d 981 (9th Cir. 2001).

67. *Id.*

68. *Id.* at 983.

“with everything that was on the news . . . whoever read it might overreact.”⁶⁹

The poem alarmed his English teacher who thought that he might harm himself or other students. She showed the poem to a school psychologist. The psychologist was also concerned, especially because two years earlier, Lavine had confided to that school psychologist that he had thought about suicide.⁷⁰

In addition, the psychologist knew that Lavine had a domestic disturbance with his father and had recently broken up with his girlfriend. The psychologist showed the poem to the vice-principal. The vice-principal contacted the local police department.⁷¹ Law enforcement went to the Lavine family farm to evaluate Lavine. A deputy sheriff interviewed Lavine and reported his findings to the state psychiatrist. The psychiatrist determined there was no need to confine Lavine involuntarily.⁷²

The principal, however, decided to “emergency expel” Lavine until he was analyzed directly by a mental health professional.⁷³ The principal wrote a letter to Lavine’s parents that said their son had written a poem “which implied extreme violence to our student body.”⁷⁴

A school psychologist examined Lavine. After three sessions, the psychologist pronounced him safe to return to school. The school allowed Lavine to return, after missing seventeen days of school.⁷⁵

Lavine and his father then sued the school in federal court, contending that the school had violated Lavine’s First Amendment rights. A federal district court ruled in favor of Lavine.⁷⁶ The federal district court judge determined that although the school district had a “compelling interest in ensuring the safety of the students and staff,” the school’s actions in expelling Lavine were not justified.⁷⁷ She concluded that the school district’s “reaction went well beyond that which was permissible under the circumstances.”⁷⁸

69. *Id.* at 984.

70. *Id.*

71. *Id.* at 985.

72. *Id.* at 986.

73. *Id.* (citing WASH. ADMIN. CODE § 180-40-295 (2002) (empowering school districts to immediately expel students who pose “an immediate and continuing danger” to students or school personnel)).

74. *Id.*

75. *Id.*

76. *Lavine v. Blaine Sch. Dist.*, No. C99-1074R, 2000 U.S. Dist. LEXIS 18989 (W.D. Wash. Feb. 24, 2000).

77. *Id.* at *8.

78. *Id.* at *12.

The Ninth Circuit reversed. The court determined that under *Tinker* the school officials could reasonably forecast that the poem would constitute a substantial disruption.⁷⁹

The court held that the *Tinker* standard must be applied looking at the totality of the circumstances. “When the school officials made their decision not to allow [Lavine] to attend class on Monday morning, they were aware of a substantial number of facts that in isolation would probably not have warranted their response, but in combination gave them a reasonable basis for their actions,” the Ninth Circuit wrote.⁸⁰

These facts included Lavine’s previous conversations with the school counselor where he revealed that he had thought of suicide, a domestic dispute between James and his father, his recent break-up with his girlfriend, and past disciplinary incidents.⁸¹

Then, the appeals court bluntly stated that it relied on the content of the poem. “‘Last Words’ is filled with imagery of violent death and suicide,” the court wrote. “Even in its most mild interpretation, the poem appears to be a ‘cry for help’ from a troubled teenager contemplating suicide.”⁸²

The Ninth Circuit concluded: “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.”⁸³

The appeals court acknowledged that Lavine’s mother may have been prescient in saying that school officials would overreact, but the appeals court said it must accord deference to school officials on safety issues. “School officials have a difficult task in balancing safety concerns against chilling free expression,” the court wrote. “This case demonstrates how difficult that task can be.”⁸⁴

Lavine petitioned the Ninth Circuit for en banc review, which was denied. Three judges dissented from the denial of full panel review.⁸⁵ Judge Andrew J. Kleinfeld wrote the primary dissent. He used colorful language to make his point that the *Lavine* decision distorted the *Tinker* doctrine.

After today, members of the black trench coat clique in high schools in the western United States will have to hide their art work. They

79. *Lavine*, 257 F.3d at 989.

80. *Id.*

81. *Id.*

82. *Id.* at 990.

83. *Id.*

84. *Id.* at 992.

85. *Lavine v. Blaine Sch. Dist.*, 279 F.3d 719 (9th Cir. 2002).

have lost their free speech rights. If a teacher, administrator, or student finds their art disturbing, they can be punished, even though they say nothing disruptive, defamatory or indecent and do not intend to threaten or harm anyone. School officials may now subordinate students' freedom of expression to a policy of making high schools cozy places, like daycare centers, where no one may be made uncomfortable by the knowledge that others have dark thoughts, and all the art is of hearts and smiley faces. The court has adopted a new doctrine in First Amendment law, that high school students may be punished for non-threatening speech that administrators believe may indicate that the speaker is emotionally disturbed and therefore dangerous.⁸⁶

Judge Kleinfeld reiterated that the panel made new ground at the expense of James Lavine. "The panel decision creates a new First Amendment rule: where school officials perceive a major social concern about school safety, they may punish school children whose speech gives rise to a concern that they may be dangerous to themselves or others, even though the speech is not a threat, disruptive, defamatory, sexual, or otherwise within any previously recognized category of constitutionally unprotected speech."⁸⁷

According to Kleinfeld, the *Lavine* decision turns a public high school into a "constitutional black hole, where freedom of speech exists only to the extent that administrators are comfortable with it."⁸⁸

At least one legal commentator agrees that the panel's decision in *Lavine* is constitutionally suspect. Shannon McMinimee argues persuasively that the Ninth Circuit confused the true threat jurisprudence with the *Tinker* standard.⁸⁹ She points out that the Ninth Circuit over-focused on the student's personal life and school shootings around the country.⁹⁰

James Lavine appealed the Ninth Circuit's decision to the U.S. Supreme Court, and was denied certiorari on June 28, 2002.⁹¹

2. *Boman v. Bluestem Unified School District No. 205*⁹²

High school senior Sarah Boman, an accomplished artist, created a poster containing a poem of "compulsive and repetitive art." The poem, written in concentric circles, dealt with an individual upset over the killing of his dog.

86. *Id.* at 720-21 (Kleinfeld, J., dissenting).

87. *Id.* at 724 (Kleinfeld, J., dissenting).

88. *Id.* at 725 (Kleinfeld, J., dissenting).

89. See Shannon M. McMinimee, Note, *Lavine v. Blaine School District: Fear Silences Student Speech in the Ninth Circuit*, 77 WASH. L. REV. 545 (2002).

90. See *id.* at 572-73.

91. *Lavine v. Blaine Sch. Dist.*, 122 S. Ct. 2663 (2002) (*United States Reports* citation was not available at time of publication).

92. No. 00-1034-WEB, 2000 U.S. Dist. LEXIS 5389 (D. Kan. Jan. 28, 2000) (order granting preliminary injunction); No. 00-1034-WEB, 2000 U.S. Dist. LEXIS 5297 (D. Kan. Feb. 14, 2000) (order granting permanent injunction).

The poem read:

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?⁹³

Compulsive and repetitive art often relates obsessive or deranged thought patterns.⁹⁴ Evidently, some school officials were afraid Sarah Boman was dangerous. Boman hung her unsigned artwork on a school door. A school employee noticed the artwork and gave it to the principal. The principal believed some of the statements in the poem were threatening. He suspended Boman for five days and recommended a long-term suspension/expulsion hearing.⁹⁵

A hearing officer heard testimony in the case. He recommended that school officials allow Boman to return to school because he determined the poem was not a threat. The board of education ignored the hearing officer's findings and suspended Boman for the remainder of the school year. The board's motion required a psychologist to determine if she was a threat to herself or other students.⁹⁶

Boman sued in federal court, contending that the board's actions violated her First Amendment rights. The federal district court sided with her. The court recognized that if Boman's poem was a genuine threat, the school officials were justified. "Clearly, if she had intended this poster to convey a genuine threat, or even if she put the poster up with the intent of putting students in fear by making them think it was a genuine threat, the court believes that the school district could appropriately punish her for willfully violating the school's rule against intimidating behavior."⁹⁷

But, the court noted that Boman had a background as an art student and no prior discipline problems, and that the poem was simply a work of fiction and not a threat.⁹⁸

The court noted that the school principal had a duty to investigate whether the poster was a threat, especially "in view of recent

93. *Boman*, 2000 U.S. Dist. LEXIS 5389, at *2.

94. *Id.*

95. *Id.* at *3.

96. *Id.* at *6 n.2.

97. *Id.* at *10.

98. *Id.* at *12.

episodes of student violence.”⁹⁹ The judge went so far as to say that the original five-day suspension may well have been appropriate. But, the judge said that once the school district examined the facts, it should have become clear that there was no basis for believing Boman’s artwork to be a threat.¹⁰⁰

Legal commentators blasted the expulsion of Sarah Boman.¹⁰¹ These commentators are correct. The *Boman* case is the poster child for the irrational school administrator engulfed in “undifferentiated fear.”

3. *D.G. v. Independent School District*¹⁰²

A high school teacher believed that a student was talking in her class during the presentation of a movie. The teacher ordered the student to move to a separate part of the room.¹⁰³ Frustrated by what she felt was a wrongful accusation, the student wrote a poem:

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!¹⁰⁴

The student gave the poem to her friend. Her friend put the poem in her backpack. However, later in the day, the poem was found on the floor of another teacher’s classroom. Someone gave a copy of the poem, along with a drawing of the teacher by the student’s friend, to the assistant principal.¹⁰⁵ The principal allowed the student to return to class but suspended her six days later.

School officials contended the poem violated the school’s “zero tolerance” policy regarding threats. The student’s father went to

99. *Id.*

100. *Id.*

101. See Calvert, *supra* note 18, at 757 (“One must wonder about the intellectual capabilities of educators who are unable to distinguish imaginative poetry from true threats and attacks.”).

102. No. 00-C-0614-E, 2000 U.S. Dist. LEXIS 12197 (N.D. Okla. Aug. 21, 2000).

103. *Id.* at *2.

104. *Id.* at *3.

105. *Id.* at *4.

school to protest the suspension. The school later informed the student's parents that the student was suspended for the remainder of the school year. The suspension was later modified to an in-school "alternative placement" in which the student was separated from her classmates and could not participate in extracurricular activities.¹⁰⁶

The student, through her father, sued in federal court, contending her First Amendment rights had been violated. A federal district court examined whether the school officials could punish the student for the poem as a true threat or a substantial disruption of school activities.

The court first cited the objective test for determining whether speech constitutes a true threat: "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."¹⁰⁷

The court also noted that "[i]n light of the violence prevalent in schools today, school officials are justified in taking very seriously student threats against faculty or other students."¹⁰⁸

The school officials admitted that they did not believe that the student wrote the poem as a true threat against the teacher. In fact, the student never intended for anyone to see the poem other than one friend. The court also noted that a psychologist who examined the student reported that the student did not write the poem as a genuine threat but only as a way to vent her frustration.¹⁰⁹

Next, the court examined whether school officials were justified under the *Tinker* standard in punishing the student. The school argued that any act of student disrespect that goes unpunished will cause a substantial disruption. The court rejected that argument, saying that it "simply cannot hold water against the rights found in the First Amendment."¹¹⁰ The court reasoned that the poem simply did not cause a substantial disruption justifying a suspension.¹¹¹

The court noted that a short-term suspension would have been proper until school authorities gathered the relevant facts. But, the court emphatically declared that once such fact gathering was completed, the facts clearly showed the poem was not a threat.¹¹²

106. *Id.* at *7-8.

107. *Id.* at *12 (citing *United States v. Orozco-Santillan*, 903 F.2d 1262, 1265 (9th Cir. 1990)).

108. *Id.* at *13.

109. *Id.* at *14.

110. *Id.* at *15.

111. *Id.*

112. *Id.* at *18.

4. *State v. Douglas D.*¹¹³

An English teacher assigned a creative writing exercise to her eighth grade class. The teacher, identified in court papers as “Mrs. C.,” gave the students the freedom to pick their own topic.¹¹⁴ Rather than begin his assignment in class, student Douglas D. talked with friends and apparently disrupted class. Mrs. C sent him outside to complete his assignment.

At the end of class, Douglas D. handed in his assignment. His written work read:

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 din’t like it. That student was named Dick.

The next morning Dick came to class & in his coat he consoled [sic] a machedy. When the teacher told him to shut up he whiped it out & cut her head off.

When the sub came 2 days later she needed a paperclipp so she opened the droor. Ahh she screamed as she found Mrs. C’s head in the droor.¹¹⁵

Believing the story to be a threat, Mrs. C notified the school’s assistant principal. He called Douglas D. into his office where the student apologized. The principal then gave Douglas D. an in-school suspension.¹¹⁶

After completion of his suspension, Douglas returned to another English class. A month after the incident, the police filed a delinquency petition against Douglas, alleging that he had violated the state disorderly conduct statute that prohibits “abusive conduct under circumstances in which the conduct tends to cause a disturbance.”¹¹⁷

A district court determined that Douglas had violated the disorderly conduct law and sentenced him to formal supervision for one year.¹¹⁸ On appeal, the court affirmed, finding that Douglas’ written work constituted a true threat that did not deserve First Amendment protection.¹¹⁹

Douglas D. appealed to the Wisconsin Supreme Court, arguing that the disorderly conduct statute could not be applied to written work without violating the First Amendment.

113. 626 N.W.2d 725 (Wis. 2001).

114. *Id.* at 730.

115. *Id.* at 730-31.

116. *Id.* at 731.

117. *Id.*

118. *Id.*

119. *State v. Douglas D.*, No. 99-1767-FT, 1999 Wis. App. LEXIS 1333, at *8 (Wis. Ct. App. Dec. 14, 1999).

The state supreme court ruled that the First Amendment did not prohibit the state from applying the disorderly conduct statute to written work. In other words, the state high court determined that a student could violate the statute through written work only — but only if the written work constituted unprotected speech, such as obscenity, fighting words, or true threats.¹²⁰

The state supreme court cited precedent defining a true threat as a statement that:

[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.¹²¹

The high court said that to determine whether speech is a true threat, a court must consider the following factors:

[H]ow the recipient and other listeners reacted to the alleged threat, 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 on other occasions, and whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence.¹²²

The state contended the speech was a true threat because the story mirrored the actual events from class [that Mrs. C had kicked Douglas out of class] and Douglas gave the story directly to Mrs. C.¹²³

Douglas countered that the story was a fictional, creative writing exercise; he had never threatened the teacher in the past; and the teacher had no reason to believe that he was violent.¹²⁴

The court sided with the student, focusing on the fact that the context of the story came from a creative writing assignment. According to the court, during a creative writing class students and teachers “should expect and allow more creative license.”¹²⁵

The state high court noted the story was written in third person and contained “hyperbole and attempts at jest” such as saying “C” stood for “crab” and she became a teacher because she could beat children.¹²⁶

The high court concluded: “With this in mind, we conclude that Douglas’s story, although we find it to be offensive and distasteful,

120. *Douglas D.*, 626 N.W.2d at 735.

121. *Id.* at 739-40.

122. *Id.* at 740.

123. *Id.*

124. *Id.* at 740-41.

125. *Id.* at 741.

126. *Id.*

unquestionably is protected by the First Amendment. Our feelings of offense and distaste do not allow us to set aside the Constitution.”¹²⁷

The high court acknowledged the impact of school violence: “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.”¹²⁸

The high court noted that the First Amendment would not bar the school from imposing discipline upon Douglas. “This case reinforces our belief that while some student conduct may warrant punishment by both law enforcement officials and school authorities, school discipline generally should remain the prerogative of our schools, not our juvenile justice system.”¹²⁹

Judge Shirley Abramson concurred in the result, but reasoned that the state could not punish written work under the disorderly conduct statute. She also reasoned that expression could not constitute a true threat, unless there was a “specific intent to threaten.”¹³⁰ Three other judges wrote concurring opinions, disagreeing with the majority’s true threat analysis in some respect.

Judge David T. Prosser wrote a spirited dissent in which he cited the “disturbing backdrop of school violence.”¹³¹ Responding to the majority’s argument that certain elements of the student’s fictional piece were hyperbole, such as the use of the machete, Prosser cited a case from Winterstown, Pennsylvania, where a man injured nine people at a school with a machete.¹³²

“Macabre writings may reflect a harmless fantasy life,” the judge wrote. “Then again, they may be a true threat. The facts are best determined by fact-finders on the scene, not appellate judges.”¹³³

Prosser then compared the current day horrors of school violence with the epidemic of fires in theatres before Justice Oliver Wendell Holmes’ famous “falsely shouting fire in a theatre” language in *Schenck v. United States*.¹³⁴

In *Schenck*, Holmes wrote that “[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a thea-

127. *Id.* at 742.

128. *Id.* at 742 n.16.

129. *Id.* at 743.

130. *Id.* at 746 (Abramson, J., concurring).

131. *Id.* at 749 (Prosser, J., dissenting).

132. *Id.* at 756.

133. *Id.* at 758.

134. *Id.* at 760-61 (citing *Schenck v. United States*, 249 U.S. 47, 52 (1919)).

tre and causing a panic.”¹³⁵ Prosser compared the outbreak of fires in the early twentieth century to the outbreak of school violence today:

Today our country is consumed by the outbreak of violence in public schools. Threats of violence in schools must be taken seriously. Almost inevitably these threats produce fear among students and teachers. They inflict harm and impair the atmosphere for learning. Sometimes they create panic. ‘Panic’ is the word Justice Holmes used in *Schenck*. ‘Panic’ is the reaction Mrs. [C.] described when she received Douglas’s story. The potential for panic suggests an alternative analysis that the parties and the courts in this case have not explored.¹³⁶

He concluded: “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.”¹³⁷

5. *In re Ryan D.*¹³⁸

Peace officer Lori MacPhail, who was assigned to a California high school, noticed several students off-campus as she was driving to school. The peace officer questioned the students about why they were not at school. She also conducted a pat-down before driving the students back to school. She discovered that student Ryan D. possessed marijuana, and issued him a citation.¹³⁹

A month after this encounter, the student turned in a painting as a project for his art class. Ryan D.’s painting depicted a person in a green hooded sweatshirt shooting a handgun at the back of a female peace officer’s head. The painting showed blood and pieces of flesh coming out of the peace officer’s head. The painting also had the peace officer wearing badge number sixty-seven – MacPhail’s badge number.¹⁴⁰

The art teacher found the painting disturbing and scary. The art teacher took the painting to a school administrator, who informed MacPhail of the painting. The next day, an assistant principal confronted Ryan D. about the painting. The minor first said that the painting was a “general picture depicting his anger at police officers.”¹⁴¹ After further questioning, Ryan D. admitted the person in

135. 249 U.S. at 52.

136. *Douglas D.*, 626 N.W.2d at 761 (Prosser, J., dissenting).

137. *Id.* at 762 (Prosser, J., dissenting).

138. 123 Cal. Rptr. 2d 193 (Ct. App. 2002).

139. *Id.* at 196.

140. *Id.*

141. *Id.*

the painting was MacPhail and that he created the painting because he was angry at MacPhail for citing him.¹⁴²

MacPhail said she was “shocked” and “upset” at the painting. She stayed away from the school for a few days after being shown the painting.¹⁴³

Ryan D. was charged with violating a state anti-threat law, which provided:

Any person 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, shall be punished¹⁴⁴

A trial judge found Ryan D. guilty of making a criminal threat and made him a ward of the court. He was placed on home probation. The California appeals court reversed, finding 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 MacPhail.”¹⁴⁵

The appeals court emphasized the fact that the communication of the alleged threat was made through a painting. “But as the expression of an idea, a painting may make ‘extensive use of symbolism, caricature, exaggeration, extravagance, fancy, and make-believe.’” the court wrote. “A criminal threat, on the other hand, is a specific and narrow class of communication.”¹⁴⁶

The court noted that Ryan D. never showed the painting to MacPhail, but turned the painting in as a class project. The court noted that “[t]his would be a rather unconventional and odd means of communicating a threat.”¹⁴⁷ The court also pointed out that Ryan D. had no contact with MacPhail in the month between the citation and the painting.¹⁴⁸

The court wrote:

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 Officer MacPhail. Without

142. *Id.*

143. *Id.* at 197.

144. CAL. PENAL CODE § 422 (West 1999).

145. *In re Ryan D.*, 123 Cal. Rptr. 2d at 199.

146. *Id.* at 200 (citations omitted).

147. *Id.*

148. *Id.* at 201.

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.¹⁴⁹

The court concluded that the surrounding circumstances failed to show that Ryan D. intended to commit violence or “intended to convey *any* threat to Officer MacPhail.”¹⁵⁰ The court determined that the student could not have intended to convey a true threat when the student never communicated to the officer, but instead turned in an assignment in his art class.¹⁵¹

6. *Jones v. State*¹⁵²

Fifteen-year-old Blake Jones got upset with classmate and friend Allison Arnold because she would not respond to notes that he wrote her in class. He then wrote a rap song and gave it to Allison later in the school day. The rap song read:

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 cliché
[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.¹⁵³

In the past, Jones had written rap songs to Arnold that contained some violent language, but never one like this. She claimed she was

149. *Id.* at 202.

150. *Id.* (emphasis added).

151. *Id.*

152. 64 S.W.3d 728 (Ark. 2002).

153. *Id.* at 730 (alteration in original).

frightened and appalled because Jones knew where she and her family lived.¹⁵⁴ She knew that Jones had been away at juvenile detention facilities in the past.¹⁵⁵

Jones claimed that he told Arnold, "Don't take this serious."¹⁵⁶ Arnold denied that Jones made such a statement.¹⁵⁷ After receiving the rap song, Arnold showed it to the principal who called the police department.¹⁵⁸ Jones told the principal and police officer that he was simply "modeling his writing after [rap artist] Eminem" and was "writing to get his feelings out."¹⁵⁹

A prosecuting attorney filed delinquency charges against Jones for making a terroristic threat in violation of Arkansas law.¹⁶⁰ The juvenile judge determined that the rap lyrics constituted a threat. Jones was taken to the custody of the Department of Youth Services.¹⁶¹

Jones argued that the criminal conviction based on his rap lyrics violated the First Amendment, while the state argued the lyrics were a true threat. The state supreme court adopted the test for true threats outlined by the Eighth Circuit. The factors included:

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.¹⁶²

Applying these factors, the Supreme Court of Arkansas determined the lyrics were a true threat. The court noted that: Arnold reacted immediately to the letter, the threat in the song was not conditional, Jones gave the lyrics directly to Arnold, and Arnold believed that Jones' criminal history made him capable of violence.¹⁶³

The Arkansas Supreme Court distinguished the Eighth Circuit decision *Doe v. Pulaski County Special School District*, in which a three-judge panel determined that a school's expulsion of a student for writing a threatening rap song to his girlfriend was unconstitutional.¹⁶⁴

154. *Id.* at 730-31.

155. *Id.* at 730.

156. *Id.* at 731.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* (citing ARK. CODE ANN. § 5-13-301 (Michie 2002)).

161. *Id.* at 732.

162. *Id.* at 735 (quoting *United States v. Dinwiddie*, 76 F.3d 913, 925 (8th Cir. 1996) (citations omitted)).

163. *Id.* at 736.

164. 263 F.3d 833 (8th Cir. 2001), *vacated en banc* by 306 F.3d 616 (8th Cir. 2002).

The Arkansas high court noted that, in the *Doe* case, the student who wrote the letter never gave it to his ex-girlfriend. The ex-girlfriend also continued to see the student even after she learned of the content of the letter. The state high court noted that in contrast Jones gave his letter directly to Arnold, and Arnold's reaction was swift and immediate.¹⁶⁵

7. *Doe v. Pulaski County Special School District*¹⁶⁶

Junior high school student J.M. wrote a poem between the summer of his seventh and eighth grade years expressing his anger towards his former girlfriend K.G. The letter described how J.M. would rape, murder, and sodomize his former girlfriend. He modeled the letter after the rap lyrics of artists Eminem, Juvenile, and Kid Rock.¹⁶⁷

J.M. never gave the letter to K.M. However, the boy's friend D.M. found the letter in J.M.'s room and read it.¹⁶⁸ D.M., apparently at the urgings of K.G., later stole the letter from J.M.'s room and showed it to K.G.

When K.G. read the letter at school, she became upset. School officials expelled J.M. for making terroristic threats.¹⁶⁹ No criminal charges were ever filed against J.M. But, J.M.'s mother sued the school officials on his behalf in federal court, contending that the expulsion based on the contents of his private letter violated his First Amendment rights.¹⁷⁰ In November 2000, a federal district court judge held a bench trial and ruled in favor of J.M., finding that the private letter did not constitute a true threat.¹⁷¹

J.M. was reinstated to school and finished the school year without incident. However, the school board appealed. In 2001, a three-judge panel of the Eighth Circuit Court of Appeals affirmed the district court.¹⁷²

However, the Eighth Circuit granted en banc review and reversed by a 6-4 vote. The majority characterized the letter as "violent, misogynic and obscenity-laden."¹⁷³ The majority noted that the letter contained the "f-word" at least ninety times and frequently used such words as "bitch," "slut," "ass," and "whore" more than eighty times.¹⁷⁴

165. *Jones*, 64 S.W.3d at 736.

166. 306 F.3d 616 (8th Cir. 2002).

167. *Id.* at 619.

168. *Id.*

169. *Id.* at 620.

170. *Id.*

171. *Id.*

172. *Doe v. Pulaski County Special Sch. Dist.*, 263 F.3d 833 (8th Cir. 2001).

173. *Doe*, 306 F.3d at 619.

174. *Id.* at 625.

Judge David R. Hansen wrote the majority opinion for the full Eighth Circuit. He analyzed whether the letter was a true threat, applying the test of whether a reasonable recipient would interpret the material as a serious threat of harm.¹⁷⁵ Even though J.M. never gave the letter to K.G., the majority found it sufficient that he had allowed, over original protest, his friend D.M. to read the letter. The court reasoned that by allowing his friend to read the letter, J.M. had not intended to keep the letter “within his own lockbox of personal privacy.”¹⁷⁶ The majority then ruled that K.G., upon viewing the letter, would have reasonably interpreted the vile content as a threat.

Judge Gerald Heaney dissented. He argued that the proper analysis was to: (1) determine whether the letter was a true threat or protected speech and (2) then determine whether school officials could punish J.M. under the *Tinker* “substantial disruption” standard.¹⁷⁷

Heaney emphasized that no criminal charges were ever filed, J.M. had a good academic record, and J.M. saw K.G. without incident at school and church.¹⁷⁸ He characterized the controversy over the letter as a “teenage gossip-circle about a break-up”¹⁷⁹ and a “complicated tangle of teenage networking.”¹⁸⁰ The dissent rejected the characterization of the letter as a true threat because the letter was “disturbing but private” and J.M. never gave the letter to K.G.¹⁸¹ Judge Heaney then determined that the punishment of expulsion was simply too draconian and an “abuse of discretion.”¹⁸²

Judge Theodore McMillan penned a short dissent. He agreed with Heaney’s analysis that the letter was not a true threat. But he “question[ed] whether the school had any legitimate authority over such a statement.”¹⁸³

B. *Summarizing the Legal Principles*

Courts often ask whether student creative expression creates a substantial disruption under *Tinker* or is a true threat. If the creative expression is pervasively vulgar, then some courts might uphold a student suspension under the *Fraser* decision.

The cases examined above establish the following:

- Students face school penalties and/or criminal charges for their creative work.

175. *Id.* at 624.

176. *Id.* at 624-25.

177. *Id.* at 627 (Heaney, J., dissenting).

178. *Id.* at 628 (Heaney, J., dissenting).

179. *Id.* at 629 (Heaney, J., dissenting).

180. *Id.* at 631 (Heaney, J., dissenting).

181. *Id.* at 632 (Heaney, J., dissenting).

182. *Id.* at 635-36 (Heaney, J., dissenting).

183. *Id.* at 636 (McMillan, J., dissenting).

- School officials may punish students even for work that they create at home.¹⁸⁴
- Schools may deal out short-term suspensions until they investigate whether the student expression is a true threat.¹⁸⁵
- All courts post-Columbine are conscious of the backdrop of school violence. Most specifically state such in their opinions.¹⁸⁶ Most of these courts have factored this into their analysis.¹⁸⁷
- Schools have more authority to impose discipline upon students than the normal operation of the criminal law.¹⁸⁸
- If a student creative expression does not target a specific individual, it is unlikely to constitute a true threat or create a substantial disruption under Tinker.¹⁸⁹

Students are more likely to prevail in their First Amendment challenge or defense if their allegedly threatening expression is a creative class project.¹⁹⁰ However, if the student accompanies his creative writing project with an angry demeanor or other physical conduct, a court is far more likely to conclude that the student's expression, even if simply a drawing, constitutes a true threat.¹⁹¹

V. THE DANGERS OF OVERREACTING AND PUNISHING CREATIVE STUDENT SPEECH

The cases above show that students are being punished for their creative expressions in a variety of circumstances. Arguably, some of the students deserve to be punished;¹⁹² other punishments seem incredibly excessive.¹⁹³

School advocates may well cite their earnest desire to prevent another Columbine. Many of the cases discussed above certainly are permeated with a fear of such an occurrence. That thinking appears

184. See, e.g., *Doe v. Pulaski County Special Sch. Dist.*, 263 F.3d 833 (8th Cir. 2001).

185. See *supra* notes 100, 112 and accompanying text.

186. See, e.g., *Doe*, 306 F.3d at 626 ("We find it untenable in the wake of Columbine and Jonesboro that any reasonable school official who came into possession of J.M.'s letter would not have taken some action based on its violent and disturbing content."); *Lavine v. Blaine Sch. Dist.*, 257 F.3d 981, 983 (9th Cir. 2001) ("It arises against a backdrop of tragic school shootings, occurring both before and after the events at issue here, and requires us to evaluate through a constitutional prism the actions school officials took to address what they perceived was the student's implied threat of violent harm to himself and others."); *D.G. v. Indep. Sch. Dist.*, No. 00-C-0614-E, 2000 U.S. Dist. LEXIS 12197, at *18 (N.D. Okla. Aug. 21, 2000) ("The concern for faculty and student safety is particularly high in view of recent episodes of student violence in Colorado, Oklahoma and other states."); *State v. Douglas D.*, 626 N.W.2d 725, 737 (Wis. 2001) ("School violence is all too prevalent in our schools today. . . . Concomitantly, the threat of violence intrudes our children's places of learning.")

187. *McMinimee*, *supra* note 89, at 545 ("Recent school shootings have changed the way that school officials treat student expression.")

188. See, e.g., *In re Ryan D.*, 123 Cal. Rptr. 2d 193, 202 (Ct. App. 2002); *Douglas D.*, 626 N.W.2d at 743.

189. See, e.g., *Boman v. Bluestem Unified Sch. Dist.* 205, No. 00-1034-WEB, 2000 U.S. Dist. LEXIS 5389, at *12 (D. Kan. Jan. 28, 2000); *D.G.*, 2000 U.S. Dist. LEXIS 12197, at *12.

190. See, e.g., *Boman*, 2000 U.S. Dist. LEXIS 5389, at *1; *In re Ryan D.*, 123 Cal. Rptr. 2d 193.

191. See *Commonwealth v. Milo M.*, 740 N.E.2d 967 (Mass. 2001).

192. See, e.g., *Jones v. State*, 64 S.W.3d 728 (Ark. 2002).

193. See, e.g., *Boman*, 2000 U.S. Dist. LEXIS 5389, at *1.

to be what moved the Ninth Circuit in the *Lavine* decision: because 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.¹⁹⁴ One commentator has used the terms “monster hype” and “phantom epidemic” to describe the media’s infatuation with school violence.¹⁹⁵

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.¹⁹⁶ Consider the shark attack stories and the even more recent child abduction stories.¹⁹⁷

What may well be occurring is increased media reporting of the rare school shooting. Judge Kleinfeld wrote in his dissent: “There may well be, not an increase in school violence, but rather an increase in newspaper, magazine, and television stories about school violence, which has in fact been declining or steady in its frequency.”¹⁹⁸

Secondly, as so eloquently stated by Judge Kleinfeld, suppression of student speech may well lead to compromised security in some instances. “Allowing the school to punish a student for writing a poem about a school killer may foster school killings, drying up information from students about their own and other students’ emotional troubles.”¹⁹⁹ Others agree with this assessment, arguing that punishing students can sometimes be dangerous.²⁰⁰

Instead of overreacting and punishing all student speech, school officials need to take a step back and ask themselves whether the creative expression is really a threat deserving of harsh punishment or are they overreacting out of paranoia or fear? Sometimes, school officials seem to have lost good judgment in meting out very harsh pun-

194. Annie Woo, *Violence, Crime Declining at School*, THE SAFETY ZONE (Winter 1999), available at http://www.safetyzone.org/publications/zone4_story1.html.

195. Joel Best, *Monster Hype*, EDUCATION NEXT (Summer 2002), available at <http://www.educationnext.org/20022/50.html>.

196. See generally BARRY GLASSNER, THE CULTURE OF FEAR xx-xxii, 53-84 (Basic Books 1999).

197. John Stossel, *Extreme Reality: How Media Coverage Exaggerates Risks and Dangers* (July 12, 2002), at http://abcnews.go.com/sections/2020/DailyNews/2020_hype_020712.html.

198. *Lavine v. Blaine Sch. Dist.*, 279 F.3d 719, 728 (9th Cir. 2002) (Kleinfeld, J., dissenting from denial of en banc review).

199. *Id.* at 729.

200. See Hils, *supra* note 19, at 373 (“By punishing speech which does not rise to the level of a ‘true threat,’ not only do schools risk the possibility of infringing on the student’s First Amendment rights, but also they run the risk of actually stifling the voice of a potentially violent student.”).

ishments for relatively minor infractions.²⁰¹ When punishment is needed, a short-term suspension may be a far better option than expulsion.

School officials should be vigilant about safety concerns. But, they must make sure not to unnecessarily suppress student speech even in the age of Columbine. School safety “cannot be achieved by compromising the constitutional guarantees” of students.²⁰² Otherwise, Professor Erwin Chemerinsky’s warning will be true — that years after *Tinker*, “students do leave most of their First Amendment rights at the schoolhouse gate.”²⁰³

201. See Jessica Reaves, *When Doodling Turns Deadly . . .* (May 2, 2002), available at <http://www.time.com/time/columnist/reaves/article/0,9565,234978,00.html> (questioning whether school officials overreacted in suspending an honor roll student for doodling a hangman style figure of a teacher and substitute teacher).

202. W. David Watkins & John S. Hooks, *The Legal Aspects of School Violence: Balancing School Safety With Students’ Rights*, 69 *MISS. L.J.* 641, 642-43 (1999).

203. Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gate: What’s Left of Tinker*, 48 *DRAKE L. REV.* 527, 546 (2000).

