Threats Made, Threats Posed School and Judicial Analysis in Need of Redirection

Sarah E. Redfield
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INTRODUCTION

Since the tragic school shootings that traumatized the nation, we have become consumed by a need to adequately address school violence. Schools have a role here and so do courts. Part 1 of this article reviews the context of increasing attention to threatening or violent speech in schools.¹ Part 2 reconsiders the classic Supreme Court cases on student speech and threatening speech within this context. Part 3 reviews subsequent civil and criminal case law from state supreme courts and lower federal courts. Against this legal background, Part 4 considers the current FBI and Department of Education research on school threat assessment, and relates this research to judicial opinion on threatening speech.

In Part 5, the article concludes that the current response to threatening speech in schools not only lacks cohesion, but also unnecessarily neglects relevant research that could be useful. Recent court cases suggest that the courts are largely out of touch with the real needs of threat assessment and of the schools' necessary response to stop violence. Specifically, the

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¹ The Federal Bureau of Investigation (FBI) defines threat as "an expression of intent to do harm or act out violently against someone or something." Threats can be spoken, acted, or symbolic; direct, indirect, veiled or conditional. Mary Ellen O'Toole, The School Shooter: A Threat Assessment Perspective 6, 7 (Critical Incident Response Group, Natl. Ctr. for the Analysis of Violent Crime, & FBI Acad.) (available at <http://www.fbi.gov/publications/school/school2.pdf>) (accessed June 5, 2002). This definition obviously differs from those used by the courts in defining a true threat, or the various threatening behaviors proscribed by statute. See discussion infra at Part 4.
courts fail to recognize the vital difference between a threat made and a threat posed. The factors that arise from school violence are complex and multifaceted, and judicial and school concerns in this area are not coterminous. This disparity of interests inhibits the real world application of threat assessment, and suggests the need for a jurisprudential approach—like the approach the courts have taken with the Fourth Amendment in school search cases—that is unique to schools. In response to this problem, the article suggests a matrix for analysis and a credible, defensible response to school threats, an approach that is consistent, but not equivalent to current jurisprudence.

PART 1. THE CONTEXT

Americans like to think of our schools as safe havens for our children. Yet, as a nation, we have been stunned by extraordinary occurrences of targeted violence in our schools.2 Grayson, Bethel, Pearl, Paducah, Edinboro, Springfield, Jonesboro, and Columbine.3 There is also evidence of less targeted, but nevertheless significant, daily violence and fear of violence in our schools.4 In 1999, for example, twelve to

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5. One example is presented by Santana High School outside San Diego. A 1997 survey on bullying there showed "50 percent of Santana's students said they did not feel safe while on campus, 35 percent had been a victim of verbal abuse, and 12 percent
eighteen year old students were victims of 2.5 million crimes at school,\(^6\) including 186,000 serious crimes of rape, robbery, and sexual and aggravated assault.\(^7\) From the period of July 1998 through June 1999, there were forty-seven violent deaths.\(^8\) Additionally, some 3,500 students were expelled from school for carrying guns and other types of firearms.\(^9\) The percentage of high school students who reported that they were "threatened or injured with a weapon on school property" has remained a steady 7 to 8 percent.\(^10\) Even more students are harassed and bullied.\(^11\) Data shows that 16.9 percent of students have been bullied on more than a single occasion,\(^12\) and five percent, or 1.1 million students, stay out of certain areas of their school.\(^13\)

The recent spate of school shootings has caused serious reflection and study searching for the precursors of violent behavior. One clear finding from this research gives significant context to the discussion of threatening speech: there are often


6. Kaufman et al., supra n. 4.

7. Id.

8. Id.


10. Vossekuil, supra n. 4, at 6. These deaths included thirty-eight homicides, six suicides, two killed by police, and one accident. Kaufman, et al., supra n. 4.


13. Kaufman et al., supra n. 4.
clues (though not necessarily directed threats) that precede the violence. The Centers for Disease Control (CDC) has reported that key among the things that schools can do to enhance safety is "watching for signals that precede violent outbursts, paying close attention to threats, and learning to recognize and respond to bullying behavior."14 According to the CDC, over half of the incidents of violence that they studied followed a danger-signal such as "a threat, note or journal entry."15 This was particularly true regarding suicide.16

One school shooter, for example, wrote a series of suicidal and homicidal poems prior to the attack:

Am I insane
To want to end this pain
To want to end my life


15. The recent shooting by a nursing student in Arizona offers continuing illustration of this. See e.g. David J. Cieslak, Shooter Well-Armed, Had Made Threat, Tucson Citizen 1A (Oct. 29, 2002).

16. The suicide cases offer another line of analysis beyond the general scope of this article. These cases are obviously relevant for their views on threatening harm to one's self. Many are negligence claims brought against the schools, typically for failure to warn. Some of them raise speech issues directly, e.g. Brooks v. Logan, 903 P.2d 73 (Idaho 1995) (when a student writes something threatening in her journal); Grant v. Bd. of Trustees, 676 N.E.2d 705, 706 (11th App. 1997) (tells other students he is going to kill himself); McMahon v. St. Croix Falls Sch. Dist., 596 N.W.2d 875 (Wis. App. 1999); Eisel v. Bd. of Educ., 597 A.2d 447 (Md. 1991) (tells a counselor or physician he is going to kill himself); Armijo v. Wagon Mound Pub. Sch., 159 F.3d 1253 (10th Cir. 1998); Hoefchner v. The Citadel, 429 S.E.2d 190 (S.C. 1993). See also e.g. Maxine Bernstein, Killer's Anger Described Through His Own Words, The Oregonian, (Nov. 3, 1999) (available at <www.oregonline.com/news/99/11/st110303.html>) (accessed July 1, 2002). The National Household Survey on Drug Abuse reports that in 2000, approximately three million young people considered suicide, of which thirty-seven percent actually attempted suicide. While early identification is the primary course of prevention, only thirty-six percent received any mental health treatment, and those were mostly from school counselors, school psychologists, and teachers. Natl. Household Survey on Drug Abuse, Substance Use and the Risk of Suicide Among Youths, The NHSDA Report (U.S. Dept. of Health & Human Servs. July 12, 2002) (available at <http://www.samhsa.gov/oas/2k2/suicide/suicide.htm>) (accessed Jan. 15, 2003).
By using a sharp knife  
Am I insane  
Thinking life is profane  
Knowing life is useless  
Cause my emotions are a mess  
Am I insane  
Thinking I’ve nothing to gain  
Considering suicide  
Cause love has died  
Am I insane  
Wanting to spill blood like rain  
Sending them all to Hell  
From humanity I’ve fell.

The teacher in this instance recommended that the student get help, but he never received it. The student attempted suicide, and then killed two adults at school saying he "hoped to be convicted of capital murder and executed by the state." 17

Another student wrote:

"Murder"

It’s my first murder  
I’m at the point of no return  
I look at his body on the floor  
Killing a bastard that deserves to die  
Ain’t nuthin’ like it in the world  
But he sure did bleed a lot. 18


In this case, the student's English teacher did not tell a counselor or an administrator about the composition. This student author had also told a friend that it would be cool to go on a killing spree just like the lead characters in the movie "Natural Born Killers." The student, Barry Loukaitis, subsequently shot two students and a teacher at Frontier Middle School in Moses Lake, Washington. One of the students was Manuel Vela Jr. who was apparently shot "in retaliation for months of [calling Loukaitis a] 'faggot.'"

The clues are there in these poems and other writings. The results in these instances graphically illustrate the need to understand the line between speech and threats, not only in legal and constitutional terms, but also in practical terms, so that we can protect schools and help disturbed students. We need to develop an ability, somehow, to distinguish between speech that constitutes a serious threat, and speech that is merely a cause for concern. An example of the need to distinguish between these kinds of speech is illustrated by the difference between the elementary student who draws a crude picture including a gun and blood, and the high school student who threatens to shoot up the school if his English teacher doesn't give him a hug.


20. Id.

21. See Katie Kerwin McRimmon, No Guarantee Children Won't Face Tragedy, Jeffco School Chief Says, Rocky Mtn. News (Denver, Colo.) 5A (Apr. 28, 2001) (Dylan Klebold's teacher had met with Dylan's parents and counselor about a violent essay he had written about a trench-coated killer); Kate Barlow, Parents, Schools Need to Read Signals of Youth Violence, The Hamilton Spectator A14 (Feb. 10, 2001).


23. St. v. McCooey, 802 A.2d 1216 (N.H. 2002). In McCooey, high school senior, John McCooey, said he might shoot up the school if his teacher did not give him a hug. The teacher said that she thought the statement was sarcastic, but reported it to the guidance counselor. Two police officers were called to the school to investigate the possible threat and interviewed the teacher, the principal, and the school resource officer. A search of John McCooey's house found no weapons, but John was arrested and charged with disorderly conduct, for which he was convicted in district court. The New Hampshire Supreme Court decided the case on the basis of insufficiency of the evidence without reaching the First Amendment claims.
In the instances of the poems and the violence they foreshadowed, adults knew about the threats. Adults and fellow students, however, may be unable to distinguish between serious threats and joking remarks. The difference between serious frustration that might lead to violence, and the general run of human frustration, may not always be clear. While adults often face this dilemma, it is actually other students who most often know that a threat has been posed. For example, Evan Ramsey, the killer of two in Alaska, told two friends about his plans. Evan now wishes that they had told others instead of encouraging him. From prison, he said that telling someone about his plans "would have been one of the best things a person could have done." For students, the inability to distinguish a real threat from jest or frustration is augmented by their reluctance to "rat" on or report friends. As a result, both students and adults fail to make reports and take appropriate steps to intervene before a troubled student acts out.


25. For example, the Louisiana Supreme Court recently considered a student's claim that his words were in jest. St. ex rel. RT, 781 S.2d 1239, 1242 (La. 2001) (discussed infra at n. 105). The Court noted the violent climate in schools, analogized to the airplane bomb-threat cases, but ultimately found that rationale unpersuasive. The Court put it this way: "It is regrettable that RT answered JW's question about a potential bombing as he did. It might be true, as he testified at trial, that he made the statement at issue because he was frustrated at having been asked all day long about whether he was going to blow up the school. Indeed, the trial judge may well have taken that into consideration in specifying that he serve his sentence in a non-secure setting. However, with the climate of fear already surrounding the school, and with RT's knowledge that people were especially in fear of him, it was particularly bad judgment to falsely confirm that he intended to blow up the school. It does not become more acceptable to yell 'fire' in a crowded theater because the offender does it out of anger, frustration, or because he has a bad day at the hands of others. The state has a legitimate interest in prohibiting false bomb threats." Id. at 1247. See also Jones v. St., 64 S.W.3d 728, 734 (Ark. 2002) (discussed infra at n. 221); In the Interests of C.C.H., 651 N.W.2d 702 (S.D. 2002).

26. See e.g. Bower, supra n. 14.


Because the perpetrators of school violence often do talk about their plans, and often do threaten to engage in violence, a school's response is literally vital. School officials must respond to threats and reports of threats appropriately; it is crucial that they "have a fair, thoughtful, and effective system to respond to whatever information students do bring forward." However, the formulation of effective responses that are within the constraints of the Free Speech clause remains an issue. As the Ninth Circuit remarked in a recent case concerning a student's poetry:

Although schools are being asked to do more to prevent violence, the Constitution sets limits as to how far they can go. Just as the Constitution does not allow the police to imprison all suspicious characters, schools cannot expel students just because they are "loners," wear black and play video games.

The justices who dissented from a denial of a request for reconsideration in this case cast the issue much more strongly:

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 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

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30. LaVine v. Blaine Sch. Dist., 257 F.3d 981, 987 (9th Cir. 2001), reconsideration en banc denied, 279 F.3d 719 (9th Cir. 2002), cert. denied, 2002 U.S. LEXIS 4948 (2002). In making this observation the Ninth Circuit cites to Kevin Fagan, Life Harder for Teen Outcasts: For Some Bay Area Kids, Times Are Tougher Since Littleton, S.F. Chron., A1 (May 7, 1999). See also RT, 781 S.2d 1239 (student fits black trench coat stereotype); In re McCoy, 742 N.E.2d 247, 248 (Ohio App. 2d Dist. 2000) (see discussion infra n. 31).
punished for non-threatening speech that administrators believe may indicate that the speaker is emotionally disturbed and therefore dangerous. 31

The dispute articulated within the Ninth Circuit opinion encapsulates the issue: somewhere along the spectrum of violence and the First Amendment, schools must draw the line defining speech that will be disciplined; and states must draw the line defining speech that will be prosecuted criminally. Often, neither line encompasses adequate threat assessment or response to a troubled student. Use of such an approach that is grounded in threat assessment research could avoid the kind of litigation that led to the Ninth Circuit split and could also help to define the parameters of constitutional analysis in this area. This article will look next at the Supreme Court's student and threatening speech jurisprudence, and at an illustrative set of state Supreme Court and lower federal court cases in this context. It will then continue with the FBI's currently recommended threat protocol, followed by a review of current case law in this context. Finally, it will examine a new paradigm for analysis that would incorporate threat

31. LaVine, 279 F.3d at 720-721 (Kleinfeld & Kozinski, JJ., dissenting). In support of this view of the post-Columbine judicial mentality regarding black-trenchcoat stereotype concerns, see In re McCoy, 742 N.E.2d at 248-249. Well before Columbine, Dawn McCoy, a talented artist, had developed a character she called Nigel. Nigel wore a black trench coat. Dawn had rendered him as a ceramic figurine and as a comic book character. When Xenia High School students constructed a large sympathy card to send to Columbine, Dawn drew Nigel on the Columbine card with a peace sign. When asked by school officials to remove the drawing from the Columbine card, Dawn did so. School officials also asked Dawn not to display her figurine. Although she agreed to this, she continued to show Nigel until it was confiscated the next day by the vice principal. In art class later that day, Dawn told friends that she was upset that the vice principal had taken Nigel away and "she wanted to wear a trench coat that had bombs in it *** and kill the faculty." When her classmates asked if she were serious, Dawn first said she was tired, then said nothing, then said maybe. Dawn's classmates reported that she appeared "angry and frustrated" and did not appear to be joking. When questioned by the vice principal, Dawn denied that she made the statements. The vice principal asked her to stay home the next day, which she did. According to school administrators, there was an "air of panic" in the school and, by the end of the week, some 300 students were absent. Dawn was adjudicated as delinquent on a charge of inducing panic, and was fined $75. In her defense, Dawn asserted that the panic was caused by other threats at the school and by the strong presence of police officers. On appeal, the Ohio court ruled that the evidence, that she told a classmate she would consider wearing a trench coat with bombs, was sufficient to meet the statutory requirements, and that her statement was a significant contribution to the state of panic at the school, making it inconsequential that it was admittedly one of several events that induced the panic at the school. Id. See also Ohio Rev. Code Ann. § 2917.31(A)(2) (West 2000).
assessment into the current protocol for school and judicial review.

PART 2. THE SUPREME COURT ON STUDENT SPEECH

The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech..."32 Like the speech of ordinary citizens, student speech has First Amendment protection:

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. This has been the unmistakable holding of this Court for almost 50 years.33

The contours of First Amendment speech protection in schools have been laid out in a set of three Supreme Court cases that are often referred to as "the trilogy:" Tinker v. Des Moines Community School District, from which this quote is taken, Bethel School District No. 403 v. Fraser,34 and Hazelwood School District v. Kuhlmeier.35 These three cases, all of which involved speech that took place on school premises, have been the guidepost for student speech analysis since they were decided (in 1969, 1986, and 1988, respectively).36 While

34. 478 U.S. 675 (1986).
36. Compare Thomas v. Bd. of Educ., 607 F.2d 1043 (2d Cir. 1979) (underground newspaper published and distributed off premises not subject to school discipline: "our willingness to defer to the schoolmaster's expertise in administering school discipline, rests, in large measure, upon the supposition that the arm of authority does not reach beyond the schoolhouse gate"); Klein v. Smith, 635 F. Supp. 1440, 1441 (D. Me. 1986) (student who gave teacher "the finger" in restaurant parking lot away from school and school hours entitled to First Amendment protection as against suspension for violation of school rule against "vulgar or extremely inappropriate language or conduct directed to a staff member") with Donovan v. Ritchie, 68 F.3d 14, 15 (1st Cir. 1995) ("shit list" developed off-premises and delivered at school subject to school discipline); Pangle v. Bend-Lapine Sch. Dist., 10 P.3d 275 (Or. App. 2000), review denied, 34 P.3d 1176 (Or. 2001) (off premises newspaper revealing school personnel names, addresses and the like and offering advice on poison, viruses, and other harmful activities, not protected by the First Amendment). The article in Outside!, which underlies the Pangle opinion is included in the Appendix. See generally Perry Zirkel, Disciplining Students
the trilogy’s fact patterns are far from today’s school environments, the precedent applies to new facts in new places.37

In Tinker, three students participated in a planned protest against the Vietnam War. The protest involved wearing black armbands on specified dates in December. With advanced knowledge of the planned protest, the area principals adopted a policy under which any student wearing an armband would be asked to remove it. If they did not do so, the student would be suspended until he or she returned to school without the armband.38 On December 16th, John Tinker and Christopher Eckhardt, fifteen and sixteen-year-old high school students, and John’s sister, Mary Beth, a thirteen-year-old junior high student, wore black armbands to school and were suspended. They returned to school after the New Year, which was the end of the planned protest period.39 In a civil rights suit brought against the Des Moines Independent Community School District, its school board, administrative officials and teachers, the students sought nominal damages and injunctive relief.40 At trial, the students testified that although they had known of the school policy, they had nevertheless worn the armbands to mourn for the Vietnam dead and to support the call from Senator Kennedy for the extension of the Christmas cease-fire.41 The district court dismissed the students’ complaint, finding that the school’s actions were constitutional. The Eighth Circuit, sitting en banc, was evenly divided, thus leaving the opinion of the district court in force.42 The Supreme Court, however, reversed, noting that “the wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in [the protest]. It was closely akin to ‘pure speech,’ which, we have repeatedly held, is entitled to

38. Tinker, 393 U.S. at 504.
39. Id.
41. Id. at 972.
42. Tinker, 393 U.S. at 505.
comprehensive protection under the First Amendment." The Court went on to find that there was "no evidence whatever" that the students' speech interfered with the school or with other students.

Expressly rejecting the district court's finding that the school action was justified because it was based on fear of disruption, the Supreme Court said, "undifferentiated fear or apprehension of disturbance" is simply "not enough to overcome the right to freedom of expression." Recognizing that while departure from the norm may readily cause fear or trouble, the Court weighed more heavily the free speech concerns, concluding that "we must take this risk" because "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." Against this history and standard, the Supreme Court established a benchmark of substantiality:

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.

This has become the grounding point for Constitutional analysis of school speech: whether or not the speech was actually or potentially, materially and substantially disruptive to the work of the school, and whether or not it interfered with the rights of other students.

43. Id. at 505–506.
44. Id. at 508.
45. Id.
46. Id.
47. Id. at 508–509.
48. Id. at 509 (quoting Burnside v. Byars, 363 F.2d at 749).
49. But see Erwin Chemerinsky, 2000 Constitutional L. Symposium, Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of Tinker? 48 Drake L. Rev. 527, 528 (2000); James M. Dedman IV, Student Author, At Daggers
In *Fraser*, the Supreme Court dealt with a different kind of student speech. Matthew Fraser gave a nomination speech involving extensive sexual metaphor and innuendo at an official high school assembly of some 600 students at Bethel High School. Matthew had previously discussed the speech with some of his teachers and been advised that it was a poor idea and that delivering it might result in serious consequences. Students reacted in a variety of ways to Matthew’s speech; some jeered, some were embarrassed and bewildered, and some made sexual gestures. A school rule provided that “conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures.” Under this rule, the assistant principal suspended Fraser for three days (of which he actually only served two) and removed his name from the list of possible graduation speakers. Fraser appealed this decision through the school review process, but the hearing officer also found the speech to be “indecent, lewd and offensive,” and upheld the school’s decision.

In a Section 1983 civil rights action alleging First Amendment and Due Process violations, the district court ruled for Fraser, finding that the school’s rule was too vague and overly broad and that his constitutional speech and due process rights had been violated. The Ninth Circuit affirmed,


50. *Bethel,* 478 U.S. 675. In his concurrence, Justice Brennan reproduces the speech, see id. at 687; the text is included infra in Appendix 1.

51. Id. at 678.

52. Id. The dissent quotes the Court of Appeals view on the impact: “The record now before us yields no evidence that Fraser’s use of a sexual innuendo in his speech materially interfered with activities at Bethel High School. While the students’ reaction to Fraser’s speech may fairly be characterized as boisterous, it was hardly disruptive of the educational process. In the words of Mr. McCutcheon, the school counselor whose testimony the District relies upon, the reaction of the student body ‘was not atypical to a high school auditorium assembly.’ In our view, a noisy response to the speech and sexually suggestive movements by three students in a crowd of 600 fail to rise to the level of a material interference with the educational process that justifies impinging upon Fraser’s First Amendment right to express himself freely.” Id. at 693–694 (Stevens, J., dissenting).

53. Id. at 678.

54. Id. Because of the district court’s order and a write-in campaign by other students, Fraser actually spoke at graduation. Id. at 679.

55. Id. at 678–679.

56. The court awarded Fraser $278, plus $12,750 in costs. *Fraser v. Bethel Sch.*
taking note that the school counselor characterized student response to Fraser's speech as "not atypical," and finding no evidence in the record that Fraser's speech "materially interfered with the activities at Bethel High School."57 The Supreme Court reversed, concluding that Fraser's lewd and offensive speech was easily distinguishable from the political speech in *Tinker*.

Compared to its approach in *Tinker*, the Court in *Fraser* cast the student speech in an entirely different light, by considering it against the backdrop of the whole purpose of public education.58 The Court noted that while such offensive speech might be protected for adults, it did not necessarily follow that such speech would be acceptable among students in school settings.59 Finding the speech here to be lewd and offensive (but otherwise less than obscene), with sexual content disturbing to some teachers and students, and particularly inappropriate where some students were only fourteen years old, the Court wrote, "Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse."60 The Court recognized the school's need to dissociate itself from speech such as Fraser's and held that it was well within its authority to do so by punishing Fraser. Distinguishing *Tinker* because there was nothing political in Fraser's speech, the Court concluded that the 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."61 The Court found that a mandatory high school assembly was "no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students." In such a setting, "it was perfectly appropriate for the school to dissociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education."62

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58. Id. at 681.
59. Id. at 682 (citing *Cohen v. Cal.*, 403 U.S. 15 (1971) (wearing jacket that said "F--- the Draft" in the courthouse)).
60. Id. at 683.
61. Id. at 685.
62. Id. at 685-686 (Marshall, J., dissenting). Justice Brennan, concurring, and Justice Marshall, dissenting, focused on the issue of disruption, with Brennan noting,
Fraser, thus, significantly narrowed the reach of Tinker. After Tinker and Fraser, the Supreme Court had discussed two distinct types of student speech: non-disruptive, pure political speech at school on one hand, and lewd speech at an official school assembly on the other. In Hazelwood, the third part of "the trilogy," the Supreme Court provided guidance for analyzing student speech expressed in a school newspaper. Again, the Court declined to follow the Tinker standard, establishing instead a less rigorous analysis for constitutional protection of speech in a forum that bears the school's imprimatur.

In Hazelwood, the court addressed a free speech claim involving two student articles written for the school newspaper – one on student pregnancy and the other on divorce and its impact on the school community. The newspaper was written in a school journalism class as part of the curriculum. Consistent with school policy, the teacher gave the page proofs to the principal who deleted the two stories and the pages where they would have run. Whole pages were deleted because the principal thought it too late to edit out just the questionable stories. The pregnancy story was deleted because the principal was concerned that students might be identified, even though not named, and because he was concerned about the sexual and birth control content and its possible effect on younger students. The divorce story was deleted because a student criticized her father by name. The district court found no First Amendment violation and held for the school; the Eighth Circuit reversed. The Supreme Court reversed again and upheld the school's decision.

In Hazelwood, the Supreme Court began its analysis by quoting Tinker to the effect that students cannot constitutionally be disciplined "merely for expressing their personal views on the school premises... unless school authorities have reason to believe that such expression will 'substantially interfere with the work of the school or impinge upon the rights of other students.'" The Court then recognized that limitations to this proposition are necessary to appropriately reflect the environment of schools. Students'

"in my view the School District failed to demonstrate that respondent's remarks were indeed disruptive."

64. Id. at 266.
speech rights in school are unique to the school setting; they are "not automatically coextensive with the first amendment rights of adults in other settings." Reviewing its precedent in *Fraser*, the Court recalled that the school could discipline a student for his lewd and sexual speech even though it was not obscene because the school was acting appropriately in seeking to "disassociate itself from the speech in a manner that would demonstrate to others that such vulgarity is wholly inconsistent with the 'fundamental values' of public school education." The Court also restated its role vis-a-vis the school board decision-makers: the school board is the primary place for decisions as to the appropriateness of speech, not the federal courts.

Against this pragmatic and doctrinal backdrop, the *Hazelwood* opinion first concluded that the school newspaper was part of the educational curriculum, not a public forum. Consequently, the principal's decision would not be subject to the kind of intense review accorded restrictions on speech in public forums. The Court then distinguished speech in *Hazelwood* from the type of speech in *Tinker*; the latter being student-initiated speech that occurs on school property, which must be tolerated unless substantially disruptive or interfering, and the former being speech that bears the school's imprimatur and is thus subject to school control. For such speech bearing the school's imprimatur, the school may legitimately exercise "greater control...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." To this end, there may be certain areas where school control of student speech would be justified, including school sponsorship of speech "that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or

65. *Id.*
66. *Id.* at 266–267.
67. *Id.* at 267.
68. *Id.* at 268–269.
69. *Id.* at 271 ("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.").
70. *Id.*
conduct otherwise inconsistent with the shared values of a civilized social order, or to associate the school with any position other than neutrality on matters of political controversy.\textsuperscript{71} 

\textit{Hazelwood}, thus, falls between \textit{Tinker} and \textit{Fraser}. Under \textit{Fraser}, schools can clearly regulate on-premise speech that is lewd and vulgar. After \textit{Hazelwood}, schools can regulate speech seen to have their imprimatur more strictly than other student speech. Here concerns about research, grammar, and content will be valid, though some level of judgment will be called for. While the Supreme Court has not added to its student speech jurisprudence\textsuperscript{72} since \textit{Hazelwood} in 1988, lower courts have decided many such cases, with differing results.\textsuperscript{73}

In addition to the true threats doctrine derived from the Supreme Court’s “trilogy,” the court has also identified other types of speech that are unprotected by the First Amendment, which are relevant to certain school speech cases. Not all speech is protected by the First Amendment.\textsuperscript{74} Obscenity,\textsuperscript{75} child pornography,\textsuperscript{76} libel,\textsuperscript{77} fighting words,\textsuperscript{78} incitement to violence,\textsuperscript{79} and true threats,\textsuperscript{80} for example, are not protected.\textsuperscript{81}

\textsuperscript{71} Id at 272 (internal punctuation and citations omitted).

\textsuperscript{72} This assumes a separate line of analysis for religious speech. See e.g. \textit{Santa Fe Indep. Sch. Dist. v. Doe}, 530 U.S. 290 (2000); see also Chemerinsky, supra n. 49, at 528.

\textsuperscript{73} Chemerinsky, supra n. 49, at 528-530.

\textsuperscript{74} See e.g. \textit{R.A.V v. St. Paul}, 505 U.S. 377, 383 (1992) (“We have recognized that "the freedom of speech" referred to by the First Amendment does not include a freedom to disregard these traditional limitations.").

\textsuperscript{75} See e.g. \textit{Miller v. Cal.}, 413 U.S. 15, 23-24 (1973).


\textsuperscript{77} See e.g. \textit{Beauharnais v. Ill.}, 343 U.S. 250, 257, 266 (1952) (statute prohibiting distribution of libelous pamphlet).

\textsuperscript{78} See e.g. \textit{Chaplinsky v. N.H.}, 315 U.S. 568, 571-572 (1942) (“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.").


\textsuperscript{81} See generally Clay Calvert & Robert D. Richards, \textit{Free Speech and the Right to Offend: Old Wars, New Battles, Different Media}, 18 Ga. St. U. L. Rev. 671, 675 (2002); Calvert, supra n. 37, at 246, 254, 263; Justin Myer Lichterman, Student Author, \textit{True
Of these exceptions, true threat analysis is potentially most relevant to school speech concerns. While the Supreme Court has recognized a threat as an exception to First Amendment protection, it has not yet provided a concrete method of analysis.

In Watts v. United States, the Supreme Court considered whether Watts should be convicted of knowingly and willfully threatening the President. At a rally at the Washington Monument, the eighteen-year-old Watts said:

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. They are not going to make me kill my black brothers.

Taken at its face value, Watts' comment constituted a threat. Notwithstanding, the court concluded that "[w]hat is a threat must be distinguished from what is constitutionally protected speech." Here the court found that the remarks were not a true threat, but political hyperbole.

Since Watts, the Court has left the development of true threat analysis to the circuit and state courts where the

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82. Recent school case analysis seems more focused on true threats, compare In re A.S., 626 N.W.2d at 719, with Jones 64 S.W.3d at 734 (discussing fighting words in context of criminal case regarding terroristic threatening).

83. Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists, 290 F.3d 1058, 1072 (9th Cir. 2002) ("The Supreme Court has provided benchmarks, but no definition"); see also, Doe v. Pulaski County Spec. Sch. Dist., 306 F.3d 616, 622 (8th Cir. 2002).

84. Watts, 394 U.S. at 706.

85. Id. at 707.

86. The Supreme Court may provide further guidance on threats in Black v. Commonwealth, 553 S.E.2d 738 (Va. 2001), in which certiorari has been granted. Black involves a First Amendment challenge by defendants convicted under a Virginia statute prohibiting cross burning with the intent to intimidate. See Va. Code Ann. § 18.2-423 (2002). The Virginia Supreme Court found for the defendants, concluding that the speech involved was symbolic expression protected under the First Amendment that could not be regulated based on content. The majority of the Virginia Supreme court rejected the true threat analysis.
results have not been consistent. The recent Eighth Circuit opinion in Doe v. Pulaski County Special School District,\(^87\) summarizes the true threat cases and concludes that "[a]ll the courts to have reached the issue have consistently adopted an objective test that focuses on whether a reasonable person would interpret the purported threat as a serious expression of an intent to cause a present or future harm."\(^88\) The courts are not aligned, however, in their view as to the perspective from which the threat should be analyzed. Specifically, some courts would focus on whether a reasonable person in the speaker’s position would foresee that the recipient would view the remarks as a threat, while others would focus on whether a reasonable person in the recipient’s position would perceive the remarks as a threat.

The Pulaski case involved an Eminem-type rap song written by an eighth grader while he was away from school premises during summer break.\(^89\) The rap song was written by J.M. to his ex-girlfriend, K.G.\(^90\) The song threatens rape, sodomy, and murder.\(^91\) A friend of J.M.’s saw the song, took a copy without J.M.’s permission, and gave K.G. a copy at school. Another friend of K.G.’s then reported to the school resource officer that K.G. was worried. The resource officer notified the principal who conducted his own investigation, including meeting with the students involved. The principal then suspended J.M. and recommended he be expelled for the rest of his eighth grade year for violating the school’s rule regarding terroristic threats.\(^92\) Following the school’s review procedure,

\(^87\) Pulaski, 306 F.3d at 622–623. See also Jones, 64 S.W. 3d at 734–735; C.C.H., 651 N.W.2d at 706. See generally Rothman, supra n. 81, at 287–289.

\(^88\) Pulaski, 306 F.3d at 622.

\(^89\) Id. at 619. The song is included in Appendix 1. See also Jones, 64 S.W.3d 728 (discussed infra, at n. 221) (violent rap song).

\(^90\) Such slighting behaviors are all too often the basis for threatening and violent response. Telephone interview with Nancy Bloomfield, School Psychologist (May 22, 2002).

\(^91\) Pulaski, 306 F.3d at 619.

\(^92\) Id. at 620. The school rule provided:

Rule 36. Terroristic Threatening—Threats of Serious Physical Injury or Property Damage/Threats to Teachers/Staff

Students shall not, with the purpose of terrorizing another person, threaten to cause death or serious physical injury or substantial property damage to another person or threaten physical injury to teachers or to school employees . . . Student will be suspended immediately and recommended for expulsion.
J.M. appealed this decision to the Director of Student Services, who recommended that J.M. be suspended from regular school, but be allowed to attend the district's alternative school for the semester. J.M. started at the alternative school and appealed the decision to the school board which not only extended the suspension to a full year, but also revoked the option to attend the alternative school.\(^{93}\)

J.M. then sued the school district challenging these decisions.\(^{94}\) The district court found the rap piece to be constitutionally protected and ordered the school district to revoke the expulsion.\(^{95}\) On appeal, a divided Eighth Circuit affirmed, finding that the rap song was not a true threat. The court found particularly compelling the fact that J.M. did not himself show the song to K.G., that K.G. didn't know of past events where J.M. had been violent, and that the two continued to see each other socially.\(^{96}\) However, in rehearing the case en banc, the Eighth Circuit upheld the school's decision to expel, explicitly adopting the reasonable recipient test.\(^{97}\) In reaching its conclusion, the Eighth Circuit observed that the speaker need not intend to communicate the threat or be capable of carrying out the threat, but must only be required to "intentionally or knowingly" communicate the remarks to someone, even a third party.\(^{98}\) The court found such an intent

\(^{93}\) Id. at 620; see also id. at 634–635 (Heaney, J., dissenting).

\(^{94}\) Id. at 620.

\(^{95}\) Id.

\(^{96}\) Doe v. Pulaski County Spec. Sch. Dist., 263 F.3d 833, 837–838 (8th Cir. 2001).

\(^{97}\) Pulaski, 306 F.3d at 624-627; compare Planned Parenthood, 290 F.3d 1058 (involving the prosecution of anti-abortion activists under the Freedom of Access to Clinics Entrances Act (FACE), 18 U.S.C. §§ 248(a)(1), (c) (West 2000)). In Planned Parenthood, abortion providers claimed that they had been targeted by the American Coalition of Life Activities and others and were threatened by posters calling them guilty of killing and crimes against humanity. The majority of the Ninth Circuit, sitting en banc and reviewing the matter de novo as a question of law, found these posters to be true threats and legitimately subject to government regulation. The majority describes its test as a "reasonable speaker" test: "a statement which, in the entire context and under all the circumstances, a reasonable person would foresee would be interpreted by those to whom the statement is communicated as a serious expression of intent to inflict bodily harm upon that person. So defined, a threatening statement that violates FACE is unprotected under the First Amendment." Id. at 1074, 1077 (emphasis added).

\(^{98}\) Pulaski, 306 F.3d at 624; see also Planned Parenthood, 290 F.3d at 1074 (intentionally communicating threat, not ability to carry out); but see Planned Parenthood, 290 F.3d at 1092 (Kozinski, J., dissenting) (regarding threats involving harm within the speaker's control; "From the point of view of the victims, it makes little difference whether the violence against them will come from the makers of the
to communicate here, thus making Doe “accountable if a reasonable recipient would have viewed the letter as a threat,” as did thirteen-year-old K.G. 99

In reaching its conclusion and by reviewing the precedent, the Eighth Circuit observed that as a practical matter, “the debate over the approaches appears to us to be largely academic because in the vast majority of cases the outcome will be the same under both tests.” 100 Noting that “only in the extremely rare case” would the results be different depending on whether a speaker or recipient-based test was used, the court reported that it had found “no case where such a situation has ever been presented.” 101 This observation that all the debate over a speaker/recipient focus for a test of true threats may be moot in the face of reality is further supported by the idea that whichever test the courts adopt, they also consider surrounding factors. That is, for example, a court using the recipient focus, also examines other factors, some of which involve the speaker. 102

Following the Eighth Circuit’s lead, combining the attributes that the majority of courts have addressed would suggest a test based on the standard of “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,” when considered in light of the surrounding circumstances including the perception of the listener. 103 Such a test for constitutionally unprotected

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100. Id. at 623.
101. Id. (emphasis added).
102. For example, the *Pulaski* court has identified a non-exhaustive list of factors that are relevant to whether a reasonable person would perceive an actual threat. Those factors include: 1) the reaction of those who heard the alleged threat; 2) whether the threat was conditional; 3) whether the person who made the alleged threat communicated it directly to the object of the threat; 4) whether the speaker had a history of making threats against the person purportedly threatened; and 5) whether the recipient had a reason to believe that the speaker had a propensity to engage in violence.

Id (citing *U.S. v. Dinwiddie*, 76 F.3d 913, 925 (8th Cir. 1996)); see also *C.C.H.*, 651 N.W.2d 702.

103. E.g. *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 372 (9th Cir. 1996) (emphasis added); see also *Milo M.*, 740 N.E. 2d 967; *D.L.D. v. St.*, 815 S.2d 746, 748 (2002) (continued conduct would likely substantially emotionally upset any normal person under the reasonable person standard under a credible threat analysis). Other
speech seems broad enough to encompass the other criteria we now recognize as valuable for threat assessment. Even such a combined view, however, focuses less on distinctions as to source and perception, and does not call adequate attention to many of the crucial factors. In today’s parlance, a more reality-based view that focuses more particularly on the contextual realities of today’s schools may be needed.

**PART 3. A MEDLEY OF OTHER STUDENT SPEECH CASES**

School speech cases since the Supreme Court “trilogy” run the gamut in terms of context and subject matter. There are cases involving spoken words. There are also cases iterations are discussed throughout the article. This rendition is offered as a basis for general discussion of how court tests relate to threat assessment methodology.

104. Threat cases arise in other contexts outside the realm of First Amendment speech, including Fourth, Fifth, and Fourteenth Amendment claims. See e.g. Edwards v. Rees, 883 F.2d 882 (10th Cir. 1989) (holding that constitutional rights were not violated when a student was interrogated for twenty minutes regarding a bomb threat); Williams ex rel. Allen v. Bd. of Educ., 186 F. Supp. 2d 808 (S.D. Ohio 2002) (dealing with Fourth Amendment probable cause issues arising out of police detentions for school-related threats); Brian A. v. Stroudsburg Area Sch. Dist., 141 F. Supp. 2d 502 (M.D. Pa. 2001) (holding that a student expelled for making a bomb threat (“There’s a bomb in this School bang bang!!) was not deprived of due process); In the Matter of the Expulsion of E.J. W. from Indep. Sch. Dist. No. 500, 632 N.W.2d 775 (Minn. App. 2001) (holding that a student has a due process right to know names of student witnesses in case of bomb threat written on bathroom mirror); Makemson v. Chesapeake Pub. Sch., 52 Va. Cir. 356 (2000) (administrative appeal on due process issues from school board expulsion under zero tolerance for bomb threat).

105. Such cases are discussed throughout the article. The Louisiana Supreme Court’s opinion on two incidents of threatening speech in the school context is illustrative. RT, 781 S.2d 1239. RT fit the stereotype of the Columbine shooters. He wore black, listened to heavy metal and had a delinquency record. Just after Columbine, classmates at this high school asked RT if he were going to blow up the school. RT replied that he was. Id. at 1241. He also had what a classmate described as an “offhand” conversation about shooting those people he didn’t like in the biology class and about how simple he thought it would be to do so or to carry out a shooting at group activities like graduation. Id. at 1242. At the time, his classmate did not report the conversation, and continued to sit next to RT. In other words, apparently they did not show immediate fear of RT. RT was subsequently charged with two criminal offenses, terrorist threatening, and communicating false information. In an analysis reminiscent of Tinker, the court found for the student since the state produced “no evidence that any statements made to this witness by RT could have caused any public disruption or could have caused fear in any person other than CM,” and she apparently was not frightened. Without evidence of “sustained fear,” the charge could not be upheld. Id. As to the bomb threat, however, the Louisiana Supreme Court concluded differently. Here all that was necessary was for the state to show that the words were said, of which there was ample evidence. Id. at 1243–1244. Here, in response to RT’s claim under the First Amendment, the court resolved the balance in favor of the state’s
ranging from t-shirts\textsuperscript{106} and uniforms,\textsuperscript{107} to artwork,\textsuperscript{108} newspapers,\textsuperscript{109} computer screens,\textsuperscript{110} and walls.\textsuperscript{111} The court has

legitimate interest in making bomb threats subject to criminal action, “notwithstanding that the crime is committed through the medium of speech.” \textit{Id.} at 1243; see also \textit{La. Rev. Stat.} §§ 14:40.1.A; 14:54-1.6 (1997).

\textbf{106}. \textit{E.g.} \textit{Chambers v. Babbitt}, 145 F. Supp. 2d 1068 (D. Minn. 2001) (holding that plaintiffs will likely to prevail on “Straight Pride” t-shirt). \textit{See also Sypniewski v. Bd. of Educ.}, 2002 U.S. App. 1.LEXIS 20814 (3d Cir. 2002) (upholding suspension for wearing Jeff Foxworthy t-shirt with redneck jokes under \textit{Tinker}-type analysis); \textit{Boroff v. Bd. of Educ.}, 220 F.3d 465 (6th Cir. 2000) (holding that school could prohibit Marilyn Manson t-shirts under a \textit{Bethel/Fraser-Hazelwood}-type analysis); \textit{Pyle v. So. Hadley Sch. Comm.}, 55 F.3d 20 (1st Cir. 1995) (holding that district court’s certification of state law question was warranted), certifying question to \textit{Pyle v. So. Hadley Sch. Comm.}, 667 N.E.2d 869 (Mass. 1996) (finding that under Massachusetts statutory law, public high school students had the freedom to engage in non-school sponsored expression that may have been reasonably considered vulgar but caused no disruption); \textit{Castorina ex rel. Rewt v. Madison County Sch. Bd.}, 246 F.3d 536 (6th Cir. 2001) (holding that wearing t-shirts with confederate flag is protected speech under a \textit{Tinker} analysis).


\textbf{108}. \textit{See e.g. Boman, infra n. 114; In re McCoy, 742 N.E.2d 247 (discussion, supra n. 31) (emphasis added); West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358 (10th Cir. 2000)} (upholding disciplinary action against student for drawing confederate flags where evidence of racial tensions in school).

\textbf{109}. \textit{Pangle}, 10 P.3d 275 (dealing with student articles containing a list of acts such as blowing up things, stink bombs, bomb threats, computer viruses, that the author would like to see happen to people who ran the school).

\textbf{110}. \textit{E.g.} \textit{J.S. v. Bethlehem Area Sch. Dist.}, 757 A.2d 412 (Pa. Cmmw. 2000) (dealing with a student created Internet website containing threatening and offensive speech); \textit{Emmett v. Kent Sch. Dist. No. 415}, 92 F. Supp. 2d 1088 (W.D. Wash. 2000) (discussed infra n. 269); \textit{St. v. Mortimer}, 542 S.E.2d 330 (N.C. App. 2001). \textit{Mortimer} is a computer screensaver case that is also a good illustration of the “perceived threat.” The incident in question in \textit{Mortimer occurred} in the immediate wake of the Columbine shootings, and at a point where rumors were rampant that Joshua’s high school would be bombed on May 4th. A student in keyboarding class discovered, also on May 4th, a screen saver that said, “the end is near.” Joshua told the police investigator that he had written the message but “didn’t mean anything by it. Joshua said he put it there for the meaning of the end of the school year or the end of time, or whatever.” On review for insufficient evidence, the North Carolina appeals court dismissed, finding that the message was not a threat, but only a statement that could perhaps be interpreted as threatening. The court noted that while people were justifiably afraid about what the words could mean, no one could articulate what they did mean. In fact,
also considered matters ranging from satire, to vicious or sexually oriented verbal attacks, to perceived threats.

several students testified that they didn't know what the words meant. In reaching its conclusion, the court particularly observed that it was "significant that [the] defendant was never connected with any of the alleged bomb threats at the school. There was no evidence [that the] defendant had any plans to physically injure anyone or damage school property. He had exhibited good behavior at the school prior to this incident. The arresting officer testified [that] he determined the message written on the computer was 'a prank.'" Id; see also Student Press L. Ctr., Student Sues School after Being Suspended for Comment about Columbine on Internet Discussion Board <http://www.splc.org/newsflash.asp?id=117> (Oct. 20, 1999) (accessed Jan. 15, 2003).

111. E.g. E.J.W., 632 N.W.2d 775 (mirror).

112. E.g. Emmett, 92 F. Supp. 2d at 1088-1089 (considering the expulsion/suspension for mock obituary website created at home by eighteen-year-old high school co-captain of the basketball team with 3.95 grade point average and no disciplinary record not upheld where court recognized the obituaries as "written tongue-in-cheek, inspired, apparently, by a creative writing class last year in which students were assigned to write their own obituary.").


114. Labeling a threat as a perceived threat begs the question and much of the legal analysis of the appropriate test to determine a true threat. Still, there are some cases where the school's reaction seems so much an overreaction that this terminology seems appropriate. See e.g. Boman v. Bluestem Unified Sch. Dist. No. 205, 2000 WL 297167 (D. Kan. 2000) (preliminary injunction) and Boman v. Bluestem Unified Sch. Dist. No. 205, 2000 WL 433083 (D. Kan. 2000) (permanent injunction). In Boman, Sarah Boman, a seventeen-year-old senior honor student at Bluestem High School created an unsigned poster for art class and hung it on the door in the school hallway. The poster was a spiral of calligraphy, a form called concrete poetry with words in a shape; the art was a depiction of a madman’s view about someone killing his dog. (The text and a graphic image of the poster are included in Appendix 1.) The principal said he found the poster threatening and suspended Sarah for five days, a suspension that was later extended for the rest of the school year, over eighty days. The school hearing officer found that Sarah thought of the poster as a work of art, that it was not uncommon for art projects to be unsigned, that no students were concerned or complained, that "the allegedly threatening language in the poster was not readily apparent, and that nothing in the poster directs a threat at any particular individual." Against the recommendation of the hearing officer that Sarah be reinstated, the school board said that Sarah could only return to school, on probation, after a satisfactory psychological evaluation. Boman, 2000 WL 297167. On First Amendment grounds, the court followed a Tinker analysis and ruled for Sarah, not finding a threat of, or actual, disruption. Id. at 4. See generally ACLU, ACLU Vons Legal Action Over Honor Student's Expulsion for Displaying Artwork <http://www.aclu.org/news/2000/n012000a.htm> (Jan. 20, 2000) (accessed Jan. 15, 2003); Compl., Boman v. Bluestem Unified Sch. Dist. No. 205 (D. Kan) in ACLU in the Courts, <archive.aclu.org/court/boman_complaint.html> (accessed June 2, 2003); Mark Walsh,
Teachers, administrators, fellow students, and schools and their facilities have all been targets.

When compared to the Free Speech difficulties that schools face today, the issues raised by Tinker, Fraser, and Hazelwood seem tame indeed. This is especially true as the Internet dramatically expands the geographical area and the potential recipients of troubling speech. With the ability to post and access speech from on and off school premises, schools are now faced with students' technological ability both to torment other students and to interfere with school activities.


115. See e.g. In the Interest of J.H., 797 A.2d 260, 261 (Pa. Super. 2002) (student telling teacher that "it would be the last thing [the teacher] ever did"); In re Ricky T., 165 Cal. Rptr. 2d 165 (Cal. App. 1st Dist. 2001) (student telling teacher that "I'm going to get you"); In re: Ingmar C., 2001 Cal. App. unpub. LEXIS 601 at 58 (Cal. App. 6th Dist. 2001) (unpublished opinion); Milo M., 740 N.E. 2d 967 (gory drawings of teacher) (discussion infra n. 125); J.S., 757 A.2d 412 (student website stating why teacher should die, and soliciting money for hit man). See also St. v. Avila, 10 P.3d 486 (Wash. 2000), review denied, 21 P.3d 290 (Wash. 2001) (student threatening to blow off teacher's head); Michael Easterbrook, Taking Aim at Violence, Psychol. Today (July 1, 1999) (high school student Aaron Leese saying, "Man, if I don't pass this class, I'm going to be mad enough to kill."); E-mail from Kathryn Sheridan, school teacher, to Sarah E. Redfield, author (June 19, 2002) (copy on file with the author).


121. See e.g. Coy v. Bd. of Educ., 205 F. Supp. 2d 791 (N.D. Ohio 2002) (middle school student suspended for using school computers to access a website containing a crude description of other students as "losers"); see also John Carvel, 'One in Four Teens' is Victim of Text Message Bullying, The Guardian (London), Guardian Home Pages 9 (Apr. 15, 2002); Susan H. Kosse, Student Designed Home Web Pages: Does Title
Tinker Court would put it, schools are now faced with vast new avenues for potential disruption. While the off-site origin of Internet speech distinguishes it somewhat from the nature and type of speech implicated in Tinker, the potential for disruption from off-site sources remains.

The Internet is an important part of our general concern about the violence that now engulfs schools. Today, this "virtual" dimension of school violence has added a whole new level of meaning to the idea of fear of disruption suggested by Tinker. The courts certainly recognize this violence. One court has even taken judicial notice of it, while others suggest that IX or the First Amendment Apply? 43 Ariz. L. Rev. 905, 905–906 (2001); Patt Morrison, Behind the Tragedy, the Despair of an Outcast, L.A. Times B1 (Mar. 7, 2001).

122. See e.g. Boucher v. Sch. Bd., 134 F.3d 821 (1997) (high school student expelled for publishing an underground newspaper column with instructions for hacking into school computers).

123. See e.g. Coy v. Bd. of Educ., 2002 WL 857595 at 6-7 (N.D. Ohio 2002) (using the Tinker standard to analyze a case involving a student website that was created off of school premises).

124. The Internet discipline cases provide an interesting subset of student speech. This article focuses on threatening speech on the Internet and elsewhere, but other free speech issues arise in other Internet contexts as well. Cases of offensive speech are common, where students criticize and mock their schools, administrators, teachers, and other students, and they have evoked both school disciplinary response and private litigation. See e.g. Beussink, 30 F. Supp. 2d 1175 (student punished for content of home-created web page); Coy, 205 F. Supp. 2d 791 (student punished for creating and accessing unauthorized website via school computer); Press Release, Am. Civ. Liberties Union, Washington Court Upholds Student Free Speech Rights on Internet (July 18, 2000) <http://www.aclu.org/news/2001/n022001a.htm1> (accessed Jan. 20, 2003) (high school student wins $10,000 for emergency expulsion for parody of school principal); see generally Melissa L. Gilbert, Student Author "Time-Out" for Student Threats: Imposing a Duty to Protect on School Officials, 49 UCLA L. Rev. 917 (2002); Kosse, supra n. 121; Louis John Seminski, Jr., Student Author, Tinkering With Student Free Speech: The Internet and the Need for a New Standard, 33 Rutgers L.J. 165 (2001); 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, 211–213 (2000); Calvert & Richards, supra n. 81, at 678, 685–686; Leora Harpaz, Internet Speech and the First Amendment Rights of Public School Students, 2000 B.Y.U. Educ. & L.J. 123 (2000); Garner K. Weng, Type No Evil: The Proper Latitude of Public Educational Institutions in Restricting Expressions of Their Students on the Internet, 20 Hastings Commun. & Ent. L.J. 751 (1998).

125. Milo M., 740 N.E. 2d at 973. In Milo M., the twelve-year-old student was suspended from school for three days for drawing a picture of shooting his teacher. He was adjudicated delinquent and sentenced to over five years of probation for violating Massachusetts criminal law against threatening. While not discussing the First Amendment directly, the Massachusetts Supreme Court particularly noted: "Finally, given the recent highly publicized school-related shootings by students, we take judicial notice of the actual and potential violence in public schools." Id. (emphasis added). The Court specifically listed the incidents at Moses Lake, Washington; Bethel, Alaska; Pearl, Mississippi; Paducah, Kentucky; Jonesboro, Arkansas; Edinboro, Pennsylvania;
the judicial observance of Columbine-like violence has gone too far.\footnote{In re: Douglas D., 626 N.W.2d 725, 747 (2001) (Crooks, J. concurring), (expressing opinion that the court cannot take judicial notice of "much of this information").}

These modern-day realities, made possible by advancements in technology, call more attention to the antiquated definitions of true threats and threat assessment and suggest that true threats in school, like other constitutional concepts, might need to be defined differently—with less concern for the fine points of constitutional analysis\footnote{Pulaski, 306 F.3d at 623.} and more focus on the particular factors that are relevant to the modern school environment.\footnote{The Court has certainly recognized this possibility regarding school searches, as well as school speech. See e.g. Bd. of Educ. v. Earls, 536 U.S. 822 (2002); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653–657 (1995); N.J. v. T.L.O., 469 U.S. 325, 356–340 (1985); Tinker, 393 U.S. 503; Wallace by Wallace v. Batavia Sch. Dist. 101, 68 F.3d 1010, 1013 (7th Cir. 1995) (noting the "unique constitutional position" of public school students).}

There is mounting evidence that violent students have given clues about their states of mind and that their intentions were "spoken," often in student writings, before many of the tragic school shootings. Thus, while the need to protect First Amendment rights of students surely remains, the need to identify and assess these warnings has become more compelling. The Ninth Circuit, in a case about a student poem written against the backdrop of school shootings, directly addressed the need to strike this tenuous balance between school officials' need to provide a safe school environment, and students' First amendment right to free expression:

This case has its genesis in a high school student's poem, which led to his temporary, emergency expulsion from school. It arises against a backdrop of tragic school

Fayetteville, Tennessee; Springfield, Oregon; Richmond, Virginia; and, Littleton, Colorado. \textit{Id.} With these incidents in mind, the court concluded that "although there is no evidence that the juvenile possessed an immediate ability to carry out the threat at the time he communicated the drawing to Mrs. F, this does not mean that the juvenile could not have carried out his threat at a later time." \textit{Id.} The relevant Massachusetts law provided, "If 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." \textit{Id.} at 969; \textit{see also} Mass. General Laws ch. 275, § 2; Jessica Portner, \textit{Violent Drawing Was a Real Threat, Mass. Court Rules, Educ. Week} (Jan. 17, 2001).
shootings, occurring both before and after the events at issue here, and requires us to evaluate through a constitutional prism the actions school officials took to address what they perceived was the student's implied threat of violent harm to himself and others. Given the knowledge the shootings at Columbine, Thurston and Santee high schools, among others, have imparted about the potential for school violence (as rare as these incidents may be when taken in context), we must take care when evaluating a student's First Amendment right of free expression against school officials' need to provide a safe school environment not to overreact in favor of either. Schools must be safe, but they are educational institutions after all, and speech—including creative writing and poetry—is an essential part of the educational fabric.

When student threats are subjected to the judicial process, there is a need for the type of care called for here by the Ninth Circuit. In broad terms, such cases have many facets and indeed many venues, and each requires the utmost care. Student threats can lead to criminal prosecution, and

129. It is helpful to understand the context of the school violence to which the court refers. The U. S. Secret Service and the U.S. Department of Education put it this way: "To put the problem of targeted school-based attacks in context, from 1993 to 1997 the odds that a child in grades nine through twelve would be threatened or injured with a weapon in schools were 7 to 8 percent, or one in thirteen or fourteen; the odds of getting into a physical fight at schools were 15 percent, or one in seven. In contrast, the odds that a child would die in school—by homicide or suicide are, fortunately, no greater than 1 in a million. In 1998, students in grades nine through twelve were the victims of 1.6 million thefts and 1.2 million nonfatal violent crimes, while in this same period sixty school-associated violent deaths were reported for this student population." Vossekuil et al., supra n. 3, at 6. Of course, the report goes on to note that "the impact of targeted, school-based attacks cannot be measured in statistics alone." Id. at 13.
130. LaVine, 257 F.3d at 983.
131. The reported cases are only a portion of the cases schools encounter. For articles containing a compilation of other such incidents reported in the press, see 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); McKinney, supra n. 3, at 1347; Kathleen Conn & Perry A. Zirkel, Legal Aspects of Internet Accessibility and Use in K-12 Public Schools: What Do School Districts Need to Know?, 146 Educ. L. Rep. 1, 15-16 (2000).
132. For example, federal law makes it a crime to threaten the President and to use the mail or interstate commerce for certain kinds of threats. See 18 U.S.C. § 115 (a) (2002) (making it a crime to threaten to assault, Kidnap, or murder, a United States official, a United States judge, a Federal law enforcement officer); 18 U.S.C. § 844 (e) (2002) (threats or conveyance of false information that is threatening through the use of the mail, telephone, telegraph, or other instrument of interstate or foreign commerce, or in or affecting interstate or foreign commerce); 18 U.S.C. § 871 (a) (2002)
can also serve as the basis for civil liability in tort\(^\text{133}\) and under statutory provisions.\(^\text{134}\) They also result in school disciplinary action, which may become the basis for civil litigation challenging school board decisions.\(^\text{135}\) In more particular terms, issues surrounding student threats may be reviewed not only directly on First Amendment speech grounds,\(^\text{136}\) but also on grounds such as testing the sufficiency of the evidence on various threat-related charges,\(^\text{137}\) or evaluating the remedies

\(^{133}\) See e.g. J.S., 757 A.2d 412, (school principal and math teacher who were featured on a student's "Teacher Sux" website filed civil suits against the student). There is also the possibility of a tort claim for a threat that causes severe emotional distress. See generally Rothman, supra n. 81, at 284.

\(^{134}\) See e.g. Svedberg v. Stamness, 525 N.W.2d 678 (N.D. 1994). Svedberg is a student lawsuit brought against another student under a North Dakota statute authorizing a restraining order against incessant taunting. The bullying, focused on the size of Svdeberg's ears, included verbal taunts, making snowmen in the town with large ears, and a threat to kill: "You had better watch it Dumbo or I will kill you." \textit{Id.} at 680. The trial court issued the restraining order, and the North Dakota Supreme Court upheld the decision. \textit{Id.} at 681–682. The statute, N.D. Cent. Code \textsection{} 12.1-31.2-01 (Supp. 1993), specifically stated that it did not apply to "constitutionally protected activity," \textit{id.} at 680-681, and defendant Stamness raised the First Amendment as a basis for excluding the evidence against him. The court reviewed the statute in light of the fighting words exception to the First Amendment, not the true threat doctrine. \textit{Id.} at 683–684. Determining first that the speech is to be measured as interpreted by a reasonable person of the same age as Svdeberg, the North Dakota Supreme Court found the speech and snow effigies to be fighting words unprotected by the First Amendment. The dissent took issue with the majority's characterization of the speech and behavior here as fighting words. Emphasizing that fighting words are not "those that simply inflict emotion injury but must be 'personally abusive epithets which . . . as a matter of common knowledge [are] inherently likely to provide violent reaction," \textit{Id.} at 686. (Levine, J., dissenting). The dissent found the matter to be one that is better left to parental and school intervention than to the courts. \textit{Id.} at 686–687 (Levine, J., dissenting).

\(^{135}\) The legal issues beyond First Amendment speech issues raised by discipline in these cases, such as issues of due process or process under 20 U.S.C. \textsection{} 1401 \textit{et seq.}, are beyond the scope of this article. It should be noted, however, that special education discipline raises distinct issues. See e.g. \textit{Rd. of Educ. v. L.H.}, 3 F. Supp. 2d 1299 (N.D. Ala. 1998) (fourteen-year-old mentally retarded defendants suspended under court order for violent disruptive behavior and threatening to bring gun to school).

\(^{136}\) See also supra n. 104 (discussing other threat cases arising outside the realm of the First Amendment).

\(^{137}\) See e.g. \textit{RT}, 781 S.2d 1239 (sufficient evidence for bomb threat, but not for
assessed. Which 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.\textsuperscript{140} Regardless of whether action is taken in a school disciplinary proceeding, or in a criminal proceeding, the state cannot constitutionally punish the speaker for speech that is protected by the First Amendment. Accordingly, cases heard in either venue call for constitutional free speech analysis. In the school disciplinary proceeding context, this tends to arise in reference to the substantial disruption standard enunciated in \textit{Tinker}.\textsuperscript{141} In the criminal context, it arises primarily in reference to the true threat analysis for speech that is not protected by the First Amendment (and thus appropriately subject to state control via its criminal statutes).\textsuperscript{142}

A handful of illustrative civil and criminal speech cases provide a context for analyzing judicial intervention in relation to threat assessment. The first group consists of four civil cases from the federal courts that illustrate an interesting combination of analyses. In \textit{La Vine}, the Ninth Circuit focused primarily on a \textit{Tinker}-type analysis to uphold the school's decision to suspend a student for a poem. In \textit{Lovell}, the Eighth Circuit used a true threat analysis to uphold the suspension of the student in a case where the evidence as to exactly what the student said was unclear. In \textit{D.G.}, the United States District Court for the Northern District of Oklahoma used both the

them dead. By dismissing this Complaint, I am not minimizing Ms. Conley's fears or declaring them to be an over-reaction. Rather, I am simply declaring that, when a student privately writes down such a death wish but does not act to communicate that wish to the teacher he may hate the teacher's remedies rest with the school administration, not a court of law." \textit{Id.} at 4 (internal citation omitted). See also Troy T., 766 N.E.2d 519 (holding that the evidence was sufficient to find that a student overheard at a shopping mall saying that he was going to "blow up, kill, blow up the jocks," and in school saying that he "wanted to gun them down like little dominoes," and "Oh, those dumb blondes, you know, they have to go too," constituted threats that were insufficient to support adjudication of delinquency.).


\textsuperscript{141.} \textit{E.g. La Vine}, 257 F.3d 981, discussed infra at Part 3(1); \textit{but see Lovell}, 90 F.3d 367, discussed infra at Part 3(2).

\textsuperscript{142.} In the context of criminal proceedings, of course, the first issues will necessarily be those of state law, with different criminal provisions coming into play: threatening, terrorist threatening, disorderly conduct, etc. For example, whether the state statute requires intent may be a question needing initial resolution. Some cases then reach the First Amendment analysis and some do not. \textit{Compare Douglas D.}, 626 N.W. 2d 725 (reaching analysis); \textit{C.C.H.}, 651 N.W.2d 702 (reaching analysis) \textit{with Milo M.}, 740 N.E. 2d 967 (not reaching analysis); \textit{In re B.R.}, 732 A.2d 633 (not reaching analysis); \textit{Goldwire}, 507 S.E.2d 209 (not reaching analysis).
Tinker-type and the true threat analyses sequentially to reject the school's decision to suspend a student for more than a semester.\textsuperscript{143}

The next group of cases, A.S. and Douglas D., were criminal cases decided at the same time by the Wisconsin Supreme Court. Analyzing the speech for its threatening content, in A.S., the court found that the First Amendment did not protect the student speech in question. In Douglas D., the court applied a Tinker-type analysis and found the student speech in question to be protected.\textsuperscript{144}

Taken together, this medley of cases highlights the types of questions that courts (and schools) ask in student speech and threat cases, and reveals not only a lack of cohesion from case to case, but also a lack of focus on vital factors. The next part of this paper reflects, in the context of current advice from the FBI on threat assessment, on the questions that these and other relevant cases raise, and concludes that the current judicial response is less than adequate. The last part recommends a new direction for reviewing and analyzing speech claims involving students in schools.

1. LaVine v. Blaine School District: Student Poem, Ruling for the School\textsuperscript{145}

Just after the school shooting in Thurston, Oregon, James LaVine wrote the poem "Last Words"\textsuperscript{146} about school shootings. The poem describes a school shooting that took place two years before, and then describes the shooter's subsequent suicidal plans. James showed the poem to his mother who advised him not to show it to anyone at school because they might overreact.\textsuperscript{147} Later that year, James showed the poem to Ms. Bleeker, his English teacher, and asked her opinion of it.\textsuperscript{148} Concerned, Ms. Bleeker shared the poem with the guidance


\textsuperscript{144} While the on-premises, off-premises nature of the speech may prove significant in the review of school disciplinary decisions, this does not appear to be an issue in the judicial review of criminal decisions. For example, in A.S., 626 N.W.2d at 715, the threat was made off-premises about harm at school; in RT, 781 S.2d 1239, the threat was made on the premises.

\textsuperscript{145} 257 F.3d 981.

\textsuperscript{146} Id. at 983–984; see also student poem Last Words, infra Appendix 1.

\textsuperscript{147} LaVine, 257 F.3d. at 984.

\textsuperscript{148} Id.
counselor, who in turn involved the vice principal. These school personnel met on a Saturday night to determine if James intended to be at that night’s school dance. Even though James had said he would not be attending the dance, they notified security to be on the alert.

That night, the vice principal also contacted the Blaine police, who put them in touch with Washington State’s Child Protective Services, which suggested they contact the Community Mental Health Crisis Line, which connected them with their on-call psychiatrist, Dr. Charles Dewitt. On Dr. Dewitt’s advice, the Blaine police talked to James at his home for evaluation purposes. To police, James indicated that he had never written anything like this before, and that he had no access to weapons. His mother confirmed that James had no access to weapons and said that she did not believe that he was a threat to himself or others. The police reported their conversations to Dr. Dewitt who concluded, “in [his] professional opinion on a more probable than not basis, based upon the information provided to me by the District and the law enforcement [officers] who had personally observed him, there were insufficient grounds for anyone to make a determination that James LaVine was in imminent danger of causing serious harm to himself and others.” James declined to submit voluntarily to a psychological evaluation, and the police concluded that they did not have probable cause for an involuntary commitment.

James’ background painted the picture of a troubled teenager. In addition to being involved in various disciplinary incidents at school, James had also discussed suicide with the school counselor. He had experienced difficulty with his family including a recent legal proceeding with his father, a

149. Id.
150. Id. at 985.
151. Id.
152. Id.
153. Id.
154. Id.
155. Id.
156. Id.
157. Id.
158. Id. at 984.
159. Id. The incident involved James parking his car where his father told him not to, the father throwing a rock at the car, and James calling the police. LaVine, 279
recent break up with his girl friend, and other discipline incidents at school. Two of the judges who heard the appeal to James' case characterized the boy this way: "All of us who remember high school recognize the picture, the sort of boy that the vice principal in charge of discipline keeps his eye on."

The next day, Sunday, the vice principal reported to the principal, who decided to "emergency expel" James, pursuant to a Washington regulation, because of the threatening content of the poem. The regulation provided for an emergency expulsion when the "superintendent or designee has good and sufficient reason to believe that the student's presence poses an immediate and continuing danger to the student, other students, or school personnel, or an immediate and continuing threat of substantial disruption of the educational process."

When the principal met with James and his father to tell them of the expulsion both James and his father became upset; James' father turned hostile, and James swore as he left the office. The decision was then confirmed by letter, which described James being expelled because of a paper given to his English teacher that "implied extreme violence to our student body."

James appealed the principal's decision to the school board and to the courts. During the school board proceedings, James' attorney negotiated with school officials for the boy's return to school based on James' obtaining a satisfactory psychological evaluation. James met three times with a psychiatrist, who recommended at the third visit that James be allowed to return to school, which he did. The court found this fact to be worth noting. Commending the school for allowing James to return to school rather than abandoning

F.3d at 721.

160. James' girlfriend's mother had reported this to the school, complaining that James was stalking her daughter. LaVine, 257 F.3d at 984.

161. Id. at 721. (Kleininski, J., Kozinski, J., & Reinjard, J., dissenting from denial of rehearing en banc).


163. LaVine, 257 F.3d at 986 n. 3; Wash. Admin. Code § 180-40-295.

164. LaVine, 257 F.3d at 986.

165. Id.

166. Id.

167. Id.

168. Id.
him, the court contrasted this response to another school's response in the case of Kip Kinkel. After being expelled from school, Kinkel killed his parents and two students, and wounded dozens of others.

The parties also negotiated in James' case that the letter to James from the school be rewritten to reflect the school's interest in safety rather than in disciplining James. Despite these adjustments, James and his family continued to pursue their lawsuit against the school district, the counselor, the vice principal, and the principal, for damages and for an order requiring removal of the emergency expulsion records from James' files. James claimed that the expulsion and maintenance of negative documents in his file violated his First Amendment rights. The district court found that the poem was the sole basis for the expulsion and that the poem was "not a sincere expression of intent to harm or assault." It further held that while a temporary suspension for a psychiatric

169. Id. at 990 n. 7. An FBI study on school violence reached a similar conclusion: "It is especially important that a school not deal with threats by simply kicking the problem out the door. Expelling or suspending a student for making a threat must not be a substitute for careful threat assessment and a considered, consistent policy of intervention. Disciplinary action alone, unaccompanied by any effort to evaluate the threat or the student's intent, may actually exacerbate the danger—for example, if a student feels unfairly or arbitrarily treated and becomes even angrier and more bent on carrying out a violent act."

170. LaVine, 257 F.3d at 990 n. 7. The court cites to an article in the Portland Oregonian. "After Kinkel was expelled from school for having a stolen gun in his locker on May 20, 1998, authorities released him into the care of his father. Back at their home, the boy waited for William Kinkel to get off the phone with a teacher before he sneaked up behind his father at a kitchen counter and blasted one .22-caliber bullet into the back of his head" ... Kinkel left a note on the living room coffee table, saying his parents could not have lived with the embarrassment of his expulsion. The next morning, Kinkel ... drove his mother's Ford Explorer to school. Armed with a 22-caliber rifle, a 9 mm pistol, and more than 1,000 rounds of ammunition, Kinkel fired more than 50 rounds before he was tackled in the cafeteria." Maxine Bernstein, Judge Sentences Kinkel to Life Behind Bars—112 Years Portland Oregonian (Nov. 11, 1999) (available at 1999 WL 28274894); see also Nadya Labi, Locking Up The Voices: A Teen Killer is Sent Away for Life. Was Justice Done?, Time Mag. 72 (Nov. 22, 1999).

171. LaVine, 257 F.3d at 986.

172. Id. at 986-987.

173. LaVine, 279 F.3d at 723.
examination was acceptable, the expulsion was not. The district court enjoined the school from maintaining any negative records regarding the incident in James' school file.

On appeal, the Ninth Circuit held that James' First Amendment rights were not violated. Recognizing first that deference was to be granted to the administrators in school situations, and noting that this was neither lewd speech nor school-sponsored speech, the court followed the Tinker analysis to find in favor of the school. In support of its decision for the school, the court considered the evidence of James' recent breakup with his girlfriend, his current difficulties with his father, his recent three-day absence from school, his prior disciplinary records (including a violent incident), and most importantly, his own imagery of killing and suicide in "Last Words." Against this background, and the background of other school shootings, the court found that the evidence was "sufficient to have led school authorities reasonably to forecast substantial disruption of, or material interference with, school activities—in other words, that James intended to inflict injury upon himself or others."

Weighing the evidence, the Ninth Circuit also found the difference between the more stringent standard for involuntary commitment and the standard the school would have to meet to be particularly persuasive. This, coupled with the deference that the court typically gives the school board, led the court to

174. Id.
175. Id. at 722.
176. LaVine, 257 F.3d at 989.
177. Id.
178. Id. at 989–990.
179. Id. at 990. The coupling of threats to others with suicidal behavior is, of course, reminiscent of the actual shootings at Columbine where twelve people were killed before the student killers also killed themselves. The Columbine killers did have a known history of threatening behavior. Both had previous legal issues for breaking into a car and stealing tools. They also had a website that revealed the rage the two felt towards Columbine classmates and their desire for revenge. Additionally, Eric Harris suffered from depression and obsessive-compulsive disorder and was prescribed Luvox, an anti-depressant. See Allison Sherry, Drug Firm Sued Over Columbine; Kin Target Antidepressant Used by Harris Denver Post B02 (Oct. 21, 2001) (available at 2001 WL 27669461). See generally McKinney, supra n. 3, at 1348–1349 and examples cited therein at nn. 144–155.
180. LaVine, 257 F.3d at 990.
181. Id. ("Indeed, because of the special circumstances of the school environment, the level of disturbance required to justify official intervention is lower inside a public school than it is outside the school.").
decide for the school on First Amendment grounds in what it described as a close case. Although the school also raised a true threat exception argument to First Amendment protection, having already decided in favor of the school under the disruption standard, the court did not reach the applicability of the true threat exception.

The Ninth Circuit did agree with James that the “negative documentation” of the incident should be removed from his files and, thus, affirmed the injunction against the school. Calling this a “permanent indictment,” the court acknowledged the initial need for documentation, but found no such need “after the perceived threat had subsided, the school had allowed James to return to classes and had satisfied itself that James was not a threat to himself or others.”

2. Lovell v. Poway Unified School District: Student Threat to Counselor, Ruling for the School

Lovell involved a threat made by a high school student, Sarah Lovell, to a school counselor, Linda Suokko, for which the student was suspended for three days. The incident in question occurred after Sarah had spent a difficult day being shuffled for hours between the guidance office and other administrative offices as she attempted to change her class schedule. At the last stage in the process, the guidance counselor told Sarah that she was not sure if the change could be made, and Sarah lost control. According to Sarah, she told Suokko, “I'm so angry, I could just shoot someone.” According to the counselor, when she replied that she was not used to “having people walking into my office and telling me they're going to shoot me,” Sarah responded, “I'm so angry I could shoot someone.” Sarah apologized, the class change was made, and Sarah left.

182. This close and hard-argued case produced a strongly divided court. See LaVine, 279 F.3d 719 (opinion on denial of reconsideration).
183. LaVine, 257 F.3d at 991–992.
184. 90 F.3d 367 (9th Cir. 1996).
185. Id. at 369.
186. Id.
187. Id.
188. Id. at 369 n. 1.
189. Id. at 369.
Later that day, the counselor reported the incident to the assistant principal, explaining that she felt threatened and was "concerned about some future reprisal."\(^{190}\) The relevant section of Suokko's student office referral stated:

When Sarah entered my counseling office, after seeing Scott Wright, Sarah stated, "... if you don't give me this schedule change, I'm going to shoot you!" I believe that the tone and manner conveyed by Sarah Lovell demonstrates possible future danger. I have witnessed Sarah's volatile nature, poor and lack of impulse control, and possible violent verbal tendencies. I am extremely concerned about Sarah's potentially explosive behavior.\(^{191}\)

At a meeting with the assistant principal and Sarah, Suokko described Sarah as "angry, serious and emotionally out of control when the statement was made."\(^{192}\) After a meeting with Sarah and her parents, the assistant principal suspended Sarah for three days.\(^{193}\) Initially, Sarah's parents intended to accept the suspension, but when they read the discipline referral form, they asked to have it removed from Sarah's file. When the school rejected their request, the Lovells challenged the school's actions in a lawsuit, alleging violation of Sarah's free speech and due process rights.\(^{194}\) The magistrate who heard the testimony could not determine whether Sarah's or Suokko's version of what happened was more credible.\(^{195}\) On the free speech claim, the district court held for the student. Using a true threat analysis, the Ninth Circuit, reviewed the question of law de novo and the factual findings under a clearly erroneous standard, and reversed the trial court's decision. The court ultimately sided with Suokko's version and specifically found that threats like this one were constitutionally unprotected under both federal and state law.\(^{196}\)

190. *Id.*
191. *Id.* at 370 n. 2
192. *Id.* at 369.
193. *Id.*
194. *Id.* at 370.
195. *Id.* at 369, 373 n. 6.
196. *Id.* at 371. Lovell's speech claims were brought under both federal and state laws, and the case raised issues whether they were the same, and should be reviewed under the same standard, since by statute, California provides that students' speech rights in school should be the same on-campus as off-campus. See *Lovell*, 90 F.3d at 374 (Noonan, J., concurring in part, dissenting in part). See also Cal. Educ. Code §
Following a true threat analysis, the court defined the question as whether a reasonable person in Sarah's position would have foreseen that the guidance counselor would have perceived her remarks to be threatening.197

Considering only Suokko's version of the facts for a moment, 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 Suokko 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. Furthermore, when considering the surrounding factual context, the magistrate judge focused too much on the actions taken or not taken by Suokko following Lovell's.198

The Ninth Circuit carefully reviewed both versions of the remarks,199 and easily found that in the counselor's version, Sarah's comments constituted a true threat. Because of the disputed evidence, however, the Ninth Circuit did not come to the same conclusion regarding Sarah's version of the remarks. The court noted, "When they are frustrated, people do utter expressions such as, 'I'm so frustrated I could just shoot someone.' It is not clear that one should foresee that such a statement will be interpreted as a serious expression of intent to harm." However, given the state of school violence today,200 and given the applicable burdens of proof and persuasion, Sarah did not prevail on this point.201

48950 (2003).

197. Lovell, 90 F.3d at 372.
198. Id. at 372–373 (paragraphing deleted).
199. Id. at 373.
200. Id. at 374.
201. Compare Lovell, 90 F.3d 367 (civil case) with In re Ricky T., 105 Cal. Rptr. 2d 165 (criminal case; "I'm going to get you" not sufficient for adjudication of delinquency under California terrorist threatening statute); J.H., 797 A.2d 260 (criminal case; "last thing you'll ever do"—is basis for violation of terroristic threatening statute).
3. D.G. v. Independent Sch. Dist. No. 11: Poem “Killing Mrs. [Teacher],” Ruling for the Student\textsuperscript{202}

\textit{D.G.} illustrates the use of both a \textit{Tinker}-type analysis and a true threat analysis.\textsuperscript{203} In \textit{D.G.}, there were some “bad feelings” between the student and teacher from a prior year. At the time of the incident, the eleventh-grade student was enrolled for a second time in the teacher’s class and found it frustrating.\textsuperscript{204} The spark for this particular confrontation arose when the teacher asked the student to move to a different part of the classroom because the student was talking. The student thought she was “wrongly accused” and wrote a poem entitled \textit{Killing Mrs. [Teacher]}.\textsuperscript{205}

The student and her close friend discussed the poem. The friend, during the same class, had drawn some stick figures showing the teacher hanging on a gallows with several smaller stick figures at the bottom. Both pieces of paper, the poem and the drawing, were in the friend’s backpack. They were subsequently found on the floor in another classroom and sent to the assistant principal.\textsuperscript{206} The assistant principal met with the student and allowed her to return to class; however, later that day, the student was suspended for the remainder of the school year and the first semester of the following year under the school’s zero tolerance policy. The suspension was initially to an in-house, alternative program called Oasis, where the student is allowed to attend school, but must complete assignments in an area separate from other students.\textsuperscript{207} In response to the school’s actions, the student and her parents sought preliminary and permanent injunctions, raising a civil rights claim on First Amendment grounds.

The Oklahoma District Court cited first to “the trilogy” of student speech cases, and then discussed the true threat doctrine. In the true threat context the court applied an objective test that focused on the speaker – in other words, “whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker

\textsuperscript{202} D.G., 2000 U.S. Dist. LEXIS 12197, at 1.
\textsuperscript{203} See also \textit{C.C.H.}, 651 N.W.2d 702 (using both analyses in a criminal case).
\textsuperscript{204} D.G., 2000 U.S. Dist. LEXIS 12197, at 2, 4.
\textsuperscript{205} The poem is included in Appendix 1.
\textsuperscript{207} Id. at 6–8 (later changed to an out-of-school suspension order).
communicates the statement as a serious expression of intent to harm or assault." The court then augmented its focus on the speaker by also considering "the entire factual context, including the surrounding events and the reaction of the listeners." The parties agreed that the student did not intend the poem as a threat and that the parties did not themselves consider it a genuine threat. Likewise, the consulting psychologist did not find that the student intended for the poem to be threatening, but was only a means of venting frustration. The consulting psychologist also reported that the student "did not appear to have a history of violence or the personality that would express its anger in violent actions." Finding that the student did not intend for the teacher to see the poem, and that it was not a true threat, the court then returned to the disruption standard. Reflecting on the effect of a zero tolerance policy in relationship to the Tinker standard, the court observed that it is "impossible to have a 'no tolerance' policy against 'threats' if the threats involve speech." In these instances, a zero tolerance policy must give way to Free Speech considerations: "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." Against this standard, the court found no true threat and no substantial disruption sufficient to support a suspension.

Lovell, LaVine, and D.G. are all civil cases, which deal with students who were troubled in different ways and degrees, and who had been disciplined at school for their speech. The criminal cases take disciplinary action away from the schools, and thrust it directly into the criminal justice system. Like the civil cases, the cases arising in the criminal context are illustrative both as to their fact patterns and as to their legal

208. Id. at 12 (citing U.S. v. Orozco-Santillan, 903 F.2d 1262 (9th Cir. 1990)).
209. Id.
210. Id. at 13-14.
211. Id. at 14.
212. Id. at 13-14.
213. Id. at 14-15.
214. Id. at 15-16.
215. Id. at 15.
analysis. At least six state supreme courts have reviewed questions related to threatening student speech and related violations of state criminal law.\textsuperscript{216} In these cases, the courts have explored the contours of the true threat doctrine as they attempt to narrowly construe state criminal statutes in a way that will withstand First Amendment scrutiny.\textsuperscript{217} Often, courts have to decide whether the threat was real or merely talking, trash talking, joking, or a manifestation of frustration. As one California juvenile delinquency decision put it:

It is this court's opinion that section 422\textsuperscript{218} was not enacted to punish an angry adolescent's utterances, unless they otherwise qualify as terrorist threats under that statute. Appellant's statement was an emotional response to an accident rather than a death threat that induced sustained fear. Although what appellant did was wrong, we are hesitant to change this school confrontation between a student and a teacher to a terrorist threat. Students that misbehave should be taught a lesson, but not, as in this case, a penal one.\textsuperscript{219}

Noticing the frustration, and the expressions of violence that often accompany it, the South Dakota Supreme Court put it this way:

Hostility and competition among our youth is natural. It happens in competitive sports; it happens in

\begin{footnotesize}
\textsuperscript{216} Jones, 64 S.W.3d 728; RT, 781 S.2d 1239; Milo M., 740 N.E. 2d 967; St. v. McCooey, 802 A.2d 1216; C.C.H., 651 N.W.2d 702; A.S., 626 N.W.2d 712; Douglas D., 626 N.W.2d 725. Four states have considered the First Amendment in these contexts, Arkansas, Louisiana, South Dakota, and Wisconsin. Because state criminal statutes differ from each other, generalizing is difficult. This article reviews the larger constitutional questions, but does not focus on statutory interpretation in the context of individual states.

\textsuperscript{217} E.g. Douglas D., 626 N.W.2d 725; In re Kyle M., 27 P.3d 804, 808 (2001).

\textsuperscript{218} California Penal Code section 422 (West 1999), provides:

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 punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison.

\textsuperscript{219} In re Ricky T., 105 Cal. Rptr. 2d at 171-172. See also In re: Ingmar C., 2001 Cal. App. LEXIS 601 at 58 (student drawings hanging teacher not criminal).
\end{footnotesize}
adolescent love affairs; it happens among siblings; it is an inevitable part of growing up. Many of the unkind words that stem from this hostility and competition may cause others uneasiness, but most of the words are protected by the First Amendment.

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. 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. 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.220

Given the need to discern between intent to threaten and intent to merely jest or talk big, two cases decided by the Wisconsin Supreme Court, In re: A.S. and In re: Douglas D., provide illustrative case law in the criminal context.221

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220. C.C.H., 651 N.W.2d at 707-708.

221. In re A.S., 626 N.W.2d 712; In re Douglas D., 626 N.W.2d 725. Cases from other state supreme courts provide similar analysis and results. For example, the Arkansas Supreme Court addressed threatening speech in Jones, 64 S.W.3d 728. Jones involved a criminal prosecution for terroristic threatening made by Blake Jones, a fifteen-year-old high school student, against Allison Arnold, also a fifteen-year-old high school student. The two students had been friends, Allison describing herself as wanting to give Blake hope. Allison had written to Blake while he was in juvenile detention, and Blake had shared some of his rap compositions with her. At one point at school, Allison refused to write notes to Blake during class. Blake later testified that he felt Allison was being "snobby towards him." In response, he then wrote a violent, threatening rap song and gave it to her. Blake claimed that he told Allison not to take the song seriously, but she denied this. Frightened, Allison took the song to the principal who called the police. During the police interview, Blake said he did not "understand why everyone was upset," offered to apologize, and admitted that he wrote the song "to get his feelings out." Blake later said in a written statement to the police, "I got mad and wrote a letter to express myself. It was a rap and pretty gruesome." Principal Wesson testified that Blake seemed to have no understanding that his writing could frighten or harm another person. Blake was charged under Arkansas law with terroristic threatening, a Class D felony, and adjudicated delinquent. The sentence was twenty-four months supervised probation plus seven days at the state's youth detention facility.
In re: A.S.: Threats Made at Youth Center Regarding Killing at Middle School, Ruling for the State

Thirteen-year-old A.S. was charged with disorderly conduct, based on a report to the local police made by another juvenile, A.H. A.H. reported that, at the local youth center, A.S. had threatened to "kill everyone at the middle school" in a shooting similar to Columbine. A.H. reported specific threats about a police officer, the assistant principal, and a social studies teacher, as well as a threat to rape M.P. who was a fellow student. A.H. indicated that A.S. was not laughing when he said these things. Other juveniles interviewed by the police confirmed A.H.'s statements. A.H. and M.L., another student who was present at the youth center at the time, reported that they were frightened by A.S's statements. M.L. reported that she told A.S. that she was frightened.

When the police interviewed him, A.S. admitted that he said "I'm going to take over the school like in Colorado," and made specific remarks about shooting the assistant principal after holding him down and having him count to ten, about raping M.P., and about hanging Officer O'Neill by her wrists, breaking her arms and legs, and then shooting her.

Based on his statements to others at the youth center, A.S. was charged under the Wisconsin statute that provides: "Whoever, 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." The Wisconsin circuit court dismissed the delinquency petition as without sufficient basis, finding A.S.'s comments to be "an extreme level of adolescent 'trash talking,' which produced no immediate disorder." On appeal, the Wisconsin appellate court reversed. The Wisconsin Supreme Court found that the disorderly conduct statute can apply to "speech alone" in appropriate circumstances, and

222. In re A.S., 626 N.W.2d 712. See also Dennis Chaptman, Court Sets Student Speech Limits, Milwaukee Journal Sentinel, 1A (May 17, 2001).
223. In re A.S., 626 N.W.2d at 715.
224. Id. at 716.
225. WI ST 947.01 (1996).
226. In re A.S., 626 N.W.2d at 716.
227. Here the Court observed that the regulation is directed not at the speech itself (speech unaccompanied by action and not unduly loud), but at the "harmful effects of
went on to consider whether A.S.'s speech was otherwise protected by the First Amendment\textsuperscript{228} and whether the disorderly conduct standard had been met by the facts of this case.

In addressing whether A.S.'s speech was otherwise protected by the First Amendment, the Wisconsin Supreme Court engaged in a true threat analysis to determine if the speech would be protected by the First Amendment, and thus not subject to the criminal statute. The court used the following definition of a true threat\textsuperscript{229} that focused first on the speaker:\textsuperscript{230}

\begin{quote}
a speaker would reasonably foresee
that a listener would reasonably interpret as a serious expression of purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech.
\end{quote}

It is not necessary that the speaker have the ability to carry out the threat.

In determining whether a statement is a true threat, the totality of the circumstances must be considered.\textsuperscript{231}

\begin{footnotesize}
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\item \textsuperscript{228} Id. at 718.
\item \textsuperscript{229} A.S. attempted to make a \textit{Brandenburg} argument that the "mere advocacy" of violence was protected if it did not incite violence, but the court found the \textit{Watts} true threat analysis more applicable. \textit{Id.}
\item \textsuperscript{230} Other state supreme courts have used similar though not identical tests. For example, in the \textit{Jones} case discussed previously, the Arkansas Supreme Court found the speech to be a true threat and unprotected under the Constitution. The Arkansas Supreme Court reviewed the various formulations of the true threat tests and reached a result similar to that of the Wisconsin Supreme Court in \textit{A.S.} and \textit{Douglas D.}, but more focused on the listener. The Arkansas court used "an objective test focusing on how a reasonable person would have taken the statement" plus the five factors developed in the Eighth Circuit: 1) the reaction of the recipient of the threat and of other listeners; 2) whether the threat was conditional; 3) whether the threat was communicated directly to its victim; 4) whether the maker of the threat had made similar statements to the victim in the past; and 5) whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence." Applying this test to the facts in \textit{Jones}, the Court first noted that Allison had reacted immediately, telling the principal and police officer that she was very frightened and that she "believed Jones was capable of carrying out the threat because he had a criminal record and knew where her family lived." Similarly, the Court found that the threat was unconditional and was given directly to Allison. Under these circumstances, "a reasonable person in Arnold's position would have taken the rap song as a true threat."
\item \textsuperscript{231} \textit{In re A.S.}, 626 N.W.2d at 720, see also \textit{Douglas D.}, 626 N.W.2d at 739–740
\end{itemize}
\end{footnotesize}
According to the court, surrounding circumstances include such factors as,

- How the recipient and other listeners reacted to the alleged threat,
- Whether the threat was conditional,
- Whether it 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. 232

In A.S.'s favor, the court weighed his age and relative immaturity, and the fact that the threats were not made directly to any of the people that he specifically mentioned in his statement. On the other side, the court referred to A.S.'s non-joking demeanor, to the fact that M.L. told A.S. that his remarks frightened her, and to A.S.'s references to Columbine. Based on this record, the Wisconsin Supreme Court concluded that A.S.'s remarks were not jokes or hyperbole, but true threats and that the petition was sufficient to show probable cause on the disorderly conduct charge for abusive and "otherwise disorderly" conduct. 233 The court also found that A.S.'s speech was "of the type that tends to cause or provoke a disturbance under the circumstances as they then existed." Noting again the post-Columbine atmosphere and the response of the students who heard the threats, the court found this element of the charge also adequately alleged. 234

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232. In re A.S., 626 N.W.2d at 720 (paragraphing supplied), see also Douglas D., 626 N.W.2d at 740. For a general discussion of the speaker/listener test see Rothman, supra n. 81, at 284.


234. Id. at 723.
5. In re Douglas D.: Threatening Composition, Ruling for the Student on the Criminal Offense

In Douglas D., an eighth grade student was charged with disorderly conduct and adjudicated delinquent under the same Wisconsin criminal statute at issue in A.S.

Douglas raised the First Amendment to defend his eighth grade creative writing assignment. The assignment was for an in-class writing to be entitled "Top Secret." Each student's work was to be part of a continuing story; Douglas was to write the first part, and three other students would finish the story. There were no other stated requirements. Douglas did not focus on the assignment, but instead talked and disrupted the class. To avoid further interruption of the class, Douglas' teacher, Mrs. C., told him to work in the hallway. At the end of the class period, he turned in this essay:

"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 conseled a machedy. 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 paperclipp so she opened the droor. Ahh she screamed as she found Mrs. C.'s head in the droor." 236

The teacher perceived this paper to be a threat to her, and reported it to the assistant principal immediately after class. When interviewed by the principal, Douglas apologized and said the story was not meant to be a threat. Douglas served an in-school suspension and then returned to a different English class. Simultaneously, the police filed a delinquency petition against Douglas, alleging that by submitting a "death threat" to Mrs. C., he had engaged in unlawful disorderly conduct, that was "abusive conduct under circumstances in which the conduct tends to cause a disturbance." 237 The student was adjudicated delinquent for this disorderly conduct by the trial court, and the decision was affirmed by the appeals court.

235. In re Douglas D., 626 N.W.2d 725.
236. Id. 730-731.
237. Id. at 731.
In a constitutional challenge,\textsuperscript{238} the Wisconsin Supreme Court, in a six to one decision, found the statute to be neither overly broad nor under inclusive.\textsuperscript{239} The Wisconsin court reasoned that Douglas could be convicted under this statute even if his wrongdoing was “purely written speech,”\textsuperscript{240} and even if the conduct was not actually disturbing; it is punishable so long as the conduct is “the type of conduct that tends to disturb others.”\textsuperscript{241} However, for the statute to be constitutionally applied to Douglas, the contested speech must be outside the protection of the First Amendment—in other words, a true threat.

As in A.S., the standard enunciated for true threat analysis was that “in light of all the surrounding circumstances, 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.”\textsuperscript{242}

Against this standard, the court noted that Douglas conveyed his story to the teacher and that the teacher said she was frightened. On the other side of the issue, the court noted that there was no evidence that Mrs. C. had been threatened in the past, or that she had reason to believe that Douglas had “a propensity to engage in violence.”\textsuperscript{243} In the context of an assignment in a creative writing class, Douglas’ story did not constitute a true threat:\textsuperscript{244} “a thirteen-year-old boy’s impetuous writings do not necessarily fall from First Amendment protection due to their offensive nature.”\textsuperscript{245}

238. Douglas claimed that the delinquency adjudication based on his story is a violation of his First Amendment rights and that the Wisconsin statute could not be properly construed to apply “purely written speech.” \textit{Id.} at 731.

239. \textit{Id.} at 734.

240. \textit{Id.} at 736.

241. \textit{Id.} at 738. The court finds that threatening a teacher at school is exactly such an offense. Citing at length from statistics and reports dealing with the prevalence of school violence, the Court states, “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,” regardless of whether the speech actually caused a disturbance. \textit{Id.} at 737–738.


244. \textit{Id.}

245. \textit{Id.}
Accordingly, the Wisconsin Supreme Court concluded as a matter of law that Douglas' essay about killing a teacher with a machete could not properly be prosecuted under the criminal disorderly conduct statute.246

The court took pains to point out that this did not mean that Douglas could not be disciplined by the school:

By no means should schools interpret this holding as undermining their authority to utilize their internal disciplinary procedures to punish speech such as Douglas's story. Although the First Amendment prohibits law enforcement officials from prosecuting protected speech, it does not necessarily follow that schools may not discipline students for such speech.247

In the context of school discipline, the court applied the analysis from the Supreme Court's school speech "trilogy," noting that in some instances, schools may discipline students where law enforcement would not be able to do so constitutionally. The court found that in such circumstances as existed here, apparently using the Hazelwood reasoning for the school's ability to apply standards for in-school speech, "[a]lthough the story is not a true threat, it is an offensive, crass insult to Mrs. C. Schools need not tolerate this type of assault to the sensibilities of their educators or students."248

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.

The next part of this paper discusses the FBI's view of assessment of students' statements in these troubling situations, and proposes some new direction for analysis.

246. Id. at 742.
247. Id. at 742. See also Crooks, N. Patrick, concurring, id. at 748.
PART 4. THREAT ASSESSMENT

In the wake of the school shootings that so shocked the country, the Department of Education, the Secret Service, and the Federal Bureau of Investigation (collectively, "the FBI") studied the circumstances surrounding the shootings in an effort to provide future guidance for threat assessment.\textsuperscript{249} While the FBI studies revealed no single profile, they did identify some common attributes among the students who commit targeted violence that suggest a call for heightened sensitivity regarding student speech. First, 17 percent of the school shooters directly threatened their specific targets.\textsuperscript{250} Second, many had shown an inability to cope with significant personal loss or failure, and almost all had suffered some sort of loss before the incident.\textsuperscript{251} Third, seventy-eight percent had previously threatened or attempted suicide.\textsuperscript{252} Finally, regardless of whether the students made direct threats or not, the incidents were planned, and were often known to someone else ahead of time. The FBI found that this "leakage" of information occurs in the form of "subtle threats, boasts, innuendos, predictions, or ultimatums" in "stories, diary entries, essays, poems, letters, songs, drawings, doodles, tattoos or videos."\textsuperscript{253} These "spoken" clues necessitate careful response; and in many instances since Columbine, such careful responses have successfully foiled intended school killings.\textsuperscript{254}

\textsuperscript{249} The studies focused on thirty-seven identified incidents of school shootings from 1974–2000. See O'Toole, supra n. 1. See also Bill Dedman, Examining the Psyche of an Adolescent Killer, Chi. Sun Times (Oct. 15, 2000); Anthony Chase, Violent Reaction—What Do Teen Killers Have In Common? In These Times, 25 (July 9, 2001); Meloy, J. Reid et al., Offender and Offense Characteristics of a Nonrandom Sample of Adolescent Mass Murderers, 40 J. of the Am. Acad. of Child and Adolescent Psych. 719 (June 2001).

\textsuperscript{250} Vossekuil et al., supra n. 3 at 18, 30.

\textsuperscript{251} Id. at 18, 27. Major losses included loss of loved one including romantic relationship, major illness, being fired. One of the school shootings involved a student who was laid off because he did not have a high school diploma. The student blamed the teacher who had failed him in a course his senior year. After being laid off, he killed that teacher and two students, holding six others hostage for ten hours. Many also had been the victims of bullying or injury by others. See also Michael S. Dorn & Brian Doss, Handling Bomb Threats 2 (LRP Pub. 2002).

\textsuperscript{252} Only 34 percent had been evaluated or diagnosed with mental disorders. Vossekuil et al., supra n. 3 at 25.

\textsuperscript{253} O'Toole, supra n. 1, at 16.

\textsuperscript{254} See generally Bower, supra n. 14 (reviewing foiled attempts).
The FBI reports emphasize that threat assessment needs to focus on whether a student actually poses a threat, not on whether a student makes a threat. The ability to make this distinction requires a focus on student behavior. The reports also indicate that "the person, the situation, the setting, and the target" should all be considered as part of a four-pronged analysis of the student's personality, family dynamics, school dynamics, and social dynamics. Specifically, effective threat assessment needs to address the student's

- Family/home situation, including present stability;
- Academic performance;
- Social networks;
- History of relationships and conflicts;
- History of harassing others or of being harassed by others;
- History of violence toward self and others;
- History of having been a victim of violence or bullying;
- Known attitudes toward violence;
- Criminal behavior;
- Mental health/substance abuse history;
- Access to and use of weapons;
- History of grievances and grudges;
- Nature and quality of current relationships and personal support;

255. O'Toole, supra n. 1, at 25.
256. Id. at 12, 36.
257. Id. at 10.
258. Id. at 59–60.
259. See also National Household Survey on Drug Abuse, Youth Violence Linked to Substance Use (Washington, DC Nov. 2001) ("Youths who reported participating in violence during the past year were more likely to use alcohol and illicit drugs during the past month than youths who did not report past year violence.") (available at <http://www.samhsa.gov/oas/2k2/YouthViol/YouthViol.htm>) (accessed July 16, 2002).
Recent losses or losses of status (shame, humiliation, recent breakup or loss of significant relationship);

Current grievances or grudges;

Perceptions of being treated unfairly;

Known difficulty coping with a stressful event(s);

Any "downward" progression in social, academic, behavioral, or psychological functioning;

Recent hopelessness, desperation, and/or despair, including suicidal thoughts, gestures, actions, or attempts; and

Pending crises or changes in circumstances.

In addition to developing a profile of the student's personal life, the FBI report also focuses on school dynamics and recommends a similar line of inquiry regarding information that is specifically available at school. The school analysis should consider the following questions:

Is the student well known to any adult at the school?

Has the student come to attention for any behavior of concern? If so, what (e-mail, website, posters, papers, rule-breaking, violence, harassment, adjustment problems, depression or despair, acting-out behavior, etc.)?

Has the student experienced serious difficulties or been in distress? Is there anyone with whom the student shares worries, frustrations, and/or sorrows?

Is there information that the student has considered ending his or her life?

Has the student been a victim and/or an initiator of hostile, harassing, or bullying behavior directed toward other students, teachers, or other staff?

Is the student known to have an interest in weapons? If so, has he or she made efforts to acquire or use weapons? Does the student live in
a home where there are weapons (whether or not the weapons are secured)?\textsuperscript{260}

Of particular note is the FBI's position on the relative value of interviews of others in assessing threats. The FBI finds value in consideration of whether the student has any strong relationship with adults who might have useful information.\textsuperscript{261} While other collateral interviews are recommended to gain information, it is only with the caution that credence not be given to answers when others are asked to "characterize the student or interpret meanings of communications that the student may have made." The FBI has found from its data that conclusions like "I think he's really dangerous" or "he said it with a smile, so I knew that he must be joking" are not accurate and may be misleading in assessing real threats.\textsuperscript{262}

The FBI analysis and recommended approach to threat assessment provides an insightful backdrop for review of the emerging case law on threatening student speech. When viewed through the lens of the FBI's threat assessment recommendations, the analysis and results of student speech cases are disturbingly incomplete.

Comparing La Vine to Lovell, in La Vine the court looked at external circumstances in the student's life beyond the context of his speech, while in Lovell, it did not. Specifically in La Vine, the court took into account that La Vine was recognized by the school as a student with known suicidal tendencies, and he had also recently experienced serious losses. Furthermore, the school's and the courts' method of analysis, as well as their results, are consistent with recommendations in FBI reports. The court considered, and included in its opinion, many external factors, such as the fact that James had previously spoken to the school counselor of suicide, that he had a discipline record including one incident of violence and one of insubordination, that he had recently had a confrontation with his father serious enough for James to call the police and result in James' temporarily living with his sister, and he had recently broken up with his girlfriend. The fact that James had written the poem the previous summer when school

\textsuperscript{260} Id. at 63.
\textsuperscript{261} Id. at 60.
\textsuperscript{262} Id. at 64. See also Timothy Egan, Santee is Latest Blow to Myth of Suburbia's Safer Schools, N.Y. Times A1 (Mar. 9, 2001); Chris Moran & Karen Kucher, Teens Caught Between Loyalty and Disclosure, S.D. Union-Trib. A7 (Mar. 6, 2001).
shootings were prominent in the news and showed it to his teacher in early October, perhaps, suggested planning. On the other side, there was no indication that James had been himself victimized or the subject of bullying at school. The vice principal described him as "a good kid, but... somewhat of a 'loner.'" In response to police questioning, James told authorities he often wrote poetry, had no particular explanation for why he wrote this one, and had no access to weapons. James' mother confirmed this. The police found no reason to commit James, and the consulting psychiatrist concluded similarly. Overall, if the analysis had been one of threat assessment, rather than disruption, the same result would have been supported. That is, if the FBI-type threat assessment were part of the likelihood of substantial disruption analysis, James’ speech still would not have been protected. Whether the threat assessment would have led to the same actual result in terms of evaluation and expulsion is less clear.

By comparison, Lovell does not conform to the threat assessment analysis that the FBI reports would seem to recommend. In this case, there is simply no discussion of Sarah’s background in terms of her personality, family, school, or social situation. Similarly, there is no discussion of suicidal tendencies or recent losses, no discussion of the existence of a history of violence or mental health problems, no discussion of possible access to weapons. Instead, the court focused only on the content and context of the present, current threat, and the perception of the person threatened. As such, the court relied solely on the factors and perceptions that the FBI found least reliable in terms of assessing whether the student actually poses a threat, and ignored the recommendation to consider the student’s specific circumstances. Had the court appropriately

263. LaVine, 257 F.3d at 985.

264. The justices who dissented from the en banc refusal to reconsider make the point that the school’s response was one of punishment, which in their view was an unconstitutional response, though they do support the suspension for psychiatric evaluation. LaVine, 279 F.3d at 723. The Mortimer case, 542 S.E.2d 880 (discussed supra at n. 110), also tracks the FBI questions fairly well.

265. The district court opinion reversed here actually focused more on some of the other factors that the FBI has identified, “The Court simply did not feel that there was the gravity of purpose and likelihood of execution, nor the intent to harm or assault to allow the imposition of discipline by way of suspension in this case. This decision is based upon the entire factual context in which the disputed statement was made by Sarah Lovell, including that fact that Sarah Lovell had spoken with Linda Suokko
weighed these factors in the balance, the result in Lovell might well have been different for Sarah. In other words, the Lovell opinion's analysis was more concerned with whether a threat was *made*, rather than whether one was *posed*. D.G. and several other discipline cases that are similar to Lovell, also focus primarily on the context of the student speech, and others' response to that speech.\(^{266}\)

The sample cases in the criminal context are similar in their lack of focus on whether or not a threat was actually *posed*. Throughout these opinions, the categories of concern identified by the FBI—student's personality, family, social, and school dynamics—were generally ignored. Arguably, had the information relevant to the FBI-type of analysis been considered, Douglas D.'s story would have been found to be a true threat and been responded to as such. Instead, in the context of the factors that it considered, the Wisconsin Supreme Court emphasized the fact that the speech was expressed in the framework of a creative writing assignment, without comparing this to the findings of a full examination of possible real-life consequences.\(^{267}\) Interestingly, the dissent in Douglas D. speaks specifically to the FBI threat analysis protocol, and draws attention to other aspects of Douglas' situation, including his prior record of delinquency and the testimony of his caseworker, that were not addressed by the majority.\(^{268}\)

Like the Wisconsin Supreme Court, other courts do not adequately focus on the student's background and circumstances.\(^{269}\) Often, this is because the schools have not

*several other times on the same day regarding the schedule change, and that Sarah Lovell in no way acted in a physically threatening manner.* Lovell v. Poway Unified Sch. Dist., 847 F. Supp. 780, 785 (S.D. Cal. 1994).

266. Two other lower court cases illustrate the same point, focusing primarily on the text of the student speech and the response of those around the speaker. Emmett, 92 F. Supp. 2d 1088; J.S., 757 A.2d 412. The zero-tolerance type cases, like Boman supra n. 114, are even less concerned with the kinds of issues identified by the FBI.

267. The other criminal cases discussed infra run similarly, with little if any focus on the factors defined in the FBI protocol.

268. *In re Douglas D.*, 626 N.W.2d at 750–751. *Jones*, 64 S.W.3d 728, RT, 781 S.2d 1239. *In re A.S.*, 626 N.W.2d, and certainly *Milo M.*, 740 N.E.2d 967, all discussed supra, are in line with the Douglas majority.

269. Though some courts do. These are more likely to find for the student, especially where that background shows a student with a good record academically and with regard to discipline problems. See e.g. Emmett, 92 F. Supp. 2d 1088. In Emmett, Nick Emmett sought and was granted a temporary restraining order, allowing him to return to school. Nick was an eighteen-year-old high school senior, Nick Emmett, had
done so either. While the more typical judicial inquiries may or may not have produced a rational result vis-à-vis precedent, they probably do not make for rational decisions regarding true threats in the real-world sense of the words. Instead, 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. Reflecting on the more worldly factors is well within the current judicially recognized parameters of contextual considerations, but the focus is not present.

Within this reality, it is preferable for schools and courts to look first to whether a threat is actually posed. Here, incorporating the FBI standards can lead to more predictable results than the typical judicial analysis. Under the objective test that many courts prefer, the first question would be whether a reasonable person would find the speech in question threatening.270 On the surface, certainly, such a question would fit both the judicial precedent and the FBI protocol. Some of the factors that courts have chosen to consider in this analysis include whether the threat was direct, whether the threat was communicated to the person threatened, whether the person threatened had reason to believe the threat could be carried out, and how that person reacted.271

Assuming this first criterion of whether a reasonable person would perceive a threat is met, the courts would typically proceed to a contextual analysis. The majority of courts tend to look here to the characterization of the threat by observers and others. To align with the FBI criteria, this

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270. Wisconsin has this in the basic test. See e.g. In re A.S., 626 N.W.2d 712. See also Douglas D., 626 N.W.2d 725, Lovell, 90 F.3d 367, and D.G., 2000 U.S. Dist. LEXIS 12197, all discussed supra in Part 4.

information may be considered, but should not be given undue weight. In this consideration of context, courts have occasionally considered whether the speaker has access to weapons, sometimes even finding so by inference. They have also considered the speaker's known history regarding violence, and perhaps other social or academic facts known to the recipient of the threat regarding the speaker. In accordance with the FBI report's recommendations, this factor should move to a priority place among the factors that schools and courts should consider in each case. Similarly, schools' and courts' attention should also focus on, and give weight to, whether the student is suicidal, and/or has suffered significant losses. The student's background, both in regard to relationships and stability, and their history of drug abuse, mental health, violence, bullying, and victimization should be considered. Based on the FBI's findings, consideration of these factors is more likely to identify situations where a threat is actually posed; but such consideration is neither universal nor mandated in current jurisprudence.

Using an augmented true threat analysis that focuses on whether a threat is actually posed would also facilitate school and judicial analysis of the First Amendment issues. Here courts generally use the Tinker analysis, which typically arises when the speech is not labeled with the school imprimatur or given at official school activities. However, a new approach for school disciplinary matters is suggested by an implicit reading of La Vine and other cases like Pangle or J.S. This new approach would adhere less closely to Tinker, and more closely to Fraser and Hazelwood. Fraser, after all, supports a school's ability to prohibit lewd and vulgar speech. It seems possible that today's courts could easily find a way to similarly categorize and prohibit speech that poses a threat. Similarly, Hazelwood identified categories of speech including speech advocating drug use, which schools can legitimately control. Again, speech that poses a threat of violence could readily become part of this list. Obviously, this alternative mode of

272. See Milo M., 740 N.E. 2d 967.

273. Some courts, like La Vine do consider such factors as the student's personality and social and family dynamics. Even La Vine, though, did not focus on the school dynamics, the fourth prong of the recommended FBI analysis.

274. See Pangle, 10 P.3d at 287.

275. Criticizing such an approach the Ninth Circuit dissenters in La Vine, term it a
analysis still leaves in question where to draw the line for constitutional protection. It also begs, somewhat, the question of the distinction, or lack thereof, between on and off-premises speech; but, especially in view of the Internet, on and off-premises speech is far more closely correlated today than previously. In any case, whether future student speech analysis follows the true threat doctrine as judicially developed thus far, or as suggested in this article, or whether it follows the *Tinker* disruption standard, the question of appropriate discipline and punishment remains.

**PART 5. CONCLUSIONS AND DIRECTIONS**

Threatening student speech occurs in many forms and in many contexts, thus calling forth many levels of response from school and state officials, as well as from the courts. Not surprisingly, schools and courts have addressed threatening speech in traditional ways. Students are suspended, sometimes expelled, sometimes required to have psychological evaluations, or otherwise detained before they can return to school. Students are also sometimes reported to the criminal justice system and sometimes prosecuted criminally for

new “First Amendment rule.” *LaVine*, 279 F.3d at 724.

276. *E.g.* Bloomfield, *supra* n. 90. *See e.g.* *LaVine*, 279 F.3d at 729. *See also Boman, supra* n. 114, where psychological examination was specifically at issue and the court here links the free speech issue to the requirement for such an exam before the student can return to school so that if it were not acceptable to restrict the student's speech under the First Amendment free speech standard, then not acceptable to require psychological evaluation. Others have suggested that there may be grounds for psychological evaluation, but not punishment. For further discussion of these issues *see* Easterbrook, *supra* n. 115 (discussion of Robby Stango who was forced to spend five nights in a psychiatric ward regarding poem, *Step to Oblivion*).

277. One often-described example is thirteen-year-old 7th grader Chris Beamon who wrote a horror story for a school assignment about being home alone and hearing noises. In Chris' story he "accidentally shot Mrs. Henry," whom he "thought... was a crook so I busted out with a 12 gauge (sic) and Ismael busted out with a 9 mm and we step (sic) off the porch and this bloody body dropped (sic) down in front of us and scared us half to death." Chris was arrested the day after he read his story to the class, was ordered held for ten days by the juvenile court, and actually spent five days in a juvenile facility at which point the charges were dropped. *See* Matthew B. Stannard, *Threats in Creative School Work Taken Seriously*, San Francisco Chron. A21 (Mar. 9, 2001); Carlos Illescas, *School Threats Now Taken Very Seriously But Some Complain Policies Impede Free Speech*, Denver Post, B1 (Nov. 22, 1999).

violation of state statutes that prohibit threat making.279 Where students raise First Amendment claims in response, the courts usually turn to either the disruption standard derived from *Tinker*, and thus afford significant protection to student speech, (or occasionally the less protective, inappropriate, imprimatur standard from *Hazelwood*), or to the true threat standard, which varies from jurisdiction to jurisdiction and offers no First Amendment protection. Given what we have recently learned from FBI reports about how targeted violence unfolds in schools, it appears that the current approach may be too narrow, or even misdirected. Instead, this potentially threatening student speech should be treated like other classes of student cases (like free speech or school searches)280 where the Constitutional standard, and indeed the courts' review of school decisions involving student speech, ought to be different for children in schools than it is for adults.

The Critical Incident Response Group of the FBI's National Center for the Analysis of Violent Crime makes the point that not all threats can be treated alike:

In the shock-wave of recent school shootings, this reaction may be understandable, but it is exaggerated—and perhaps dangerous, leading to potential underestimate of serious threats, overreaction to less serious ones and unfairly punishing or stigmatizing students who are in fact not dangerous. A school that treats all threats as equal falls into the fallacy formulated by Abraham Maslow: "If the only tool you have is a hammer, you tend to see every problem as a nail."281

Under the true threat analysis developed to date, most courts may be using only a hammer. Most look to how a

279. There are also two federal laws that may have some bearing on these incidents: The Gun Free Schools Act of 1994 stipulates that receipt of federal funds is conditionally based upon the state's adoption of a statute that compels expulsion for a specified time period for a student bringing a gun to school along with provisions for exception which are available through the case by case review granted to the local educational agency. 20 U.S.C. § 8921 (West 1999). The Safe Schools Act of 1994 was developed and implemented to assist schools in achieving Goal Six of the National Education Goals relating to eliminating drugs and violence in schools and strives to create a safe and violence free learning environment. 20 U.S.C. §§ 5961-5968 (West 1999).

280. See *Tinker*, 393 U.S. 503; *T.L.O.*, 469 U.S. 325.

281. O'Toole, supra n. 1, at 5–6; see also Vossekui et al., supra n. 3 at 36; Easterbrook, supra n. 115.
reasonable person perceives the speech—in other words, whether a reasonable person would foresee that the recipient would perceive the speech to be interpreted as threatening, or whether the recipient so perceived it. Most courts also look to the perception of the listener, either as a major requisite factor, or as part of the surrounding circumstances that it considers. To increase the likelihood of considering the specific and unique facts of every case, a wide interpretation of the surrounding circumstances or context factors is called for. Such an interpretation would not start with stereotypes such as “blanket characterizations, or student 'profiles'” that do not provide a reliable basis for making judgments about a threat posed by a particular student. Even worse, the use of profiles can shift attention away from more reliable facts and evidence about a student’s actual behavior, history, and communications.

In addition to rejecting stereotypes, the revised approach would be broad enough to encompass the threat assessment factors, but certainly would not so mandate. A balancing test gauged for schools and their safety would look something like this:

- Threat assessment procedure in place capable of addressing student, family dynamics, school dynamics, and social dynamics.

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283. For example, see *e.g. In re McCoy*, 742 N.E.2d 247; *Milo M*, 740 N.E. 2d 967; *RT*, 781 S.2d 1239; *Jones*, 64 S.W.3d at 734.

284. Fein *et al.*, *supra* n. 17, at 32.

285. O'Toole, *supra* n. 1, at 38–39. Some popular misconceptions are debunked by the known data, and school officials charged with assessing threats should not be taken in by what may have been the stereotypical view. For example, the age range of the school killers is eleven to twenty-one with most between thirteen and eighteen; 76 percent were white; 63 percent from two-parent families, only 5 percent with foster parents; 41 percent were doing well at school, and only 5 percent failing; 41 percent socialized with “mainstream students or were considered mainstream students,” though 34 percent were characterized as loners or described themselves as loners; 44 percent were involved in extracurricular activities; 63 percent had no discipline record, 27 percent had never been suspended, only 10 percent had ever been expelled, 73 percent showed no change in school behavior prior to the attack and a few showed improved academic and behavioral performance before the attack. Vossekuil *et al.*, *supra* n. 3, at 23-24.

- What was said?
- Did the speaker intend it to be threatening?
- Would a reasonable person have thought it would be interpreted as threatening?
- What is known about the speaker, in particular:
  - Is there evidence that the speaker has contemplated suicide?
  - Is there evidence that the speaker is under particular stress?
  - Is there evidence that the speaker has a trusting relationship with an adult(s)?
- What sources of information are available?
  - Trusting adult, preferred;
  - Student's history, family history;
  - Others exposed to student, but be mindful of unreliable characterizations.
- What is the appropriate response?
  - Further analysis, conversations or work with those close to student;
  - Further analysis, conversations or work with student;
  - Suspension pending psychological evaluation;
  - Alternative programming during suspension;
  - Other suspension for disciplinary purposes;
  - Other proactive intervention during suspension; or
  - Expulsion.

Use of such an analysis in schools could be accomplished through judicial opinion, just as the special circumstances in schools have justified a different search standard or a different
speech standard for students. Reference to, and incorporation of, such a real world oriented analysis would, like the Fourth Amendment student search cases, make the schools safer by focusing more attention on the unique circumstances that exist in each case, and might also result in schools paying more proactive attention to the students who most need their help.
APPENDIX 1: THE SPEECH

Fraser’s Speech

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.

Last Words

As each day passed,

I watched, love sprout, from the most,

unlikely places,

which reminds, me that,

beauty is in the eye’s, of the beholder.

As I remember,

I start to cry,

for I,

had learned,

this to late,

and now,

I must spend,

each day,

alone,


alone for supper,
alone at night,
alone at death.
Death I feel,
crawling down
my neck at,
every turn,
and so,
now I know,
what I must do.
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 all was over,
28 were,
dead,
and all I remember,
was not felling,
any remorse,
for I felt,
I was,
cleansing my soul,
I quickly,
turned and ran,
as the bell rang,
all I could here,
were screams,
screams of friends,
screams of co workers,
and just plain,
screams of shear horor,
as the students, found their,
slayen classmates,
2 years have passed, and
now I lay,
29 roses,
down upon,
these stairs,
as now,
I feel,
I may,
strike again.
No tears,
shall be shead,
in sarrow,
for I am,
alone,
and now,
I hope,
I can feel,
remorse,
for what I did,
without a shed,
of tears,
for no tear,
shall fall,
from your face,
but from mine,
as I try,
to rest in peace,

Bang!
"These are the top ten things I would like to see happen at school . . . to the people who 'run' it, or just some things to cause them Stryfe.

"What is wrong with school you may ask . . . ? I can't imagine too many people don't have their own individual responses to this question, but perhaps you would like to hear mine? Schools are a breeding ground for hatred and segregation. Students are persecuted by their peers, judged by their appearances and treated differently because of them. Cliques dominate their surroundings, and torment those who don't fit in . . . The teachers preach nothing more than conforming to the 'norm' and obeying authority when we reach the 'REAL WORLD', slowly destroying each young mind which enters the public school system . . ."

The top ten list included:

"... 8) Feed snakebite antidote or Visine to someone. The former will make a person vomit. (Make sure it is a harmless type . . . most are.) The Visine will send them to the bathroom almost instantly. It is one of the world's greatest laxatives ...

7) Deposit some very disgusting smelling liquid in the school commons. Some possible sources?

Dog training liquid: smells like concentrated piss
Cadaver scent: used for Search and Rescue, it is the smell of a dead human body. Call a chemical company (Need some company names? Just write us! We will get you some!) and tell them you are training a dog for search and rescue . . . it is a great smell . . .

Hydrogen Sulfide: what most stink bombs are composed of. The chemistry room has an abundance of this I am told . . .

6) A collection of teacher's signatures. They are not hard to obtain . . . teachers are usually pretty free with them. Progress reports, hall passes, anywhere. If a substantial list of them were established, it would be great to post around school!

5) Epoxy glue any lock you can come to, aside from lockers. It will cause a lot of Kaos among the teachers.

4) Blowing things up is always a great form of release . . . as long as people aren't endangered, life is good! How about toilets? Put calcium Carbide (sold as 'Gopher-Go' in some
places) in a gelatin capsule (available at any drug store ... dir cheap) and flush it. It causes a violent explosion when it hits water and some damage if it is flushed. Some other forms of exciting flushables? Firecrackers, balloons partly filled with air ... be creative! Express yourself!

"3) Bomb threats are great, aren't they? We get to leave early, and if it is after 2:00 we don't have to make the day up at the end of the year. Anyway, if you attempt to call in a bomb threat, be careful. I am told it is a federal offense ... not to scare anyone off. It would be great to have some more! However, don't be an IDIOT and tell everyone what it is you have done. Don't do it for the recognition, do it because you believe in the cause.

"2) How do you like the schools use of the intercom system? Would you like to adapt it to your own private intercom show? That would be nice! And definitely possible! Splicing communication wires isn't hard at all! All you need is alligator clips, wire, a stereo with a pre-recorded tape and a remote location to splice in at. Above the panels of the ceiling, you can find the wire to the PA system.

"1) PORN ADDS! We have all the phone numbers and addresses of the teachers in the Bend/LaPine school district at our disposal! Using them, it would be nice to place them in a wonderful homosexual personal add! ... or even replying to one with their name and number! If you would like any teachers number or address, please write us and we will get it to you!

Killing Mrs. {Teacher}^{290}

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)

^{290} D. G., 2000 U.S. Dist. LEXIS 12197 at 3.
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]

_Jones Rap_<sup>291</sup>

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 trick [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,

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291. _Jones_, 64 S.W.3d at 730.
Goodbye forever my good friend. I'll see you on judgement day when I'm punished for my sin"

*Milo M's Drawings*292
Juvenile's name deleted by the court.

Teacher's name deleted by the court.

Pissy Pants
Who Killed My Dog

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. 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?

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293. Boman, 2000 WL 297167 at 1. Artwork was excerpted from the ACLU site, ACLU Vows Legal Action, supra n. 114.
APPENDIX 2: FURTHER ONLINE RESOURCES TO PURSUE THESE TOPICS

General Resources

**United States Department of Education**
http://www.ed.gov/

**National School Safety Center**
This site provides statistical information and links to other sites and organizations.
http://www.nsscl.org

**National Center for Educational Statistics**
This site provides useful resources and information relative to educational research and improvement initiatives.
http://www.nces.ed.gov

**Education Week Online**
Education Week is a resource that covers education news. Their online edition provides up-to-date information regarding education cases and other important news.
http://www.edweek.org/

**Piper Resources**
This site is home to a comprehensive listing of state and local laws, federal and state government information, and useful links to other resources.
http://www.piperinfo.com/state/index.cfm

**National Association of Secondary School Principals. NASSP's New Searchable Publications Archive**
This online resource—a searchable publications archive—is home to every issue of *Principal Leadership* and *NASSP Bulletin* dating back to 1995.
http://www.nassp.org/
National Association of Elementary School Principals
The online center for educational research in areas pertinent to school leadership today.
http://www.naesp.org

NEAToday Online
The online center for topics in education from the National Education Association.
http://www.nea.org/neatoday/

Violence Prevention


Critical Incident Response Group & National Center for the Analysis of Violent Crime, Mary O'Toole, FBI, The School Shooter: A Threat Assessment Perspective

http://www.edweek.org/context/topics/issuespage.cfm?id=39
Other Resources

Foundation for Individual Rights in Education
FIRE, is a nonprofit educational foundation devoted to free speech, individual liberty, religious freedom, the rights of conscience, legal equality, due process, and academic freedom on our nation’s campuses.
http://www.thefire.org/issues/cu010901.php3

Freedom Forum
The Freedom Forum provides current news and perspectives with respect to the First Amendment including free speech, free press and free religion.
http://www.freedomforum.org/

Northwest Education Collaboration: Research
A network and resource center for family, school, community partnerships to improve family and child outcomes.
http://www.nwrel.org/cfc/frc/resrch4.html

Free Speech: Hate Speech
The very best in links about free speech, hate speech and speech codes.
http://www.civilliberty.tqn.com/cs/hatespeech

Rights Watch: Taking Threats Seriously
In the wake of recent school shootings, police and school officials are cracking down on students threatening violence.
http://www.nea.org/neatoday/9809/rights.html

National Threat Assessment Center
Secret Service Safe School Initiative
http://www.secretservice.gov/ntac_ssi.shtml

Bullying Among 9th Graders: An Exploratory Study
Every Child Learning: Safe and Supportive Schools
Gerald N. Tirozzi, Executive Director, NASSP, Vincent L. Ferrandino, Executive Director, NAESP.
http://www.principals.org/publicaffairs/views/every_child_lrnng.htm

Experts Ponder Sept. 11 Effect On School Violence
Darcia Harris Bowman, June 19, 2002.
http://www.edweek.org/ew/newstory.cfm?slug=41shoot.h21