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I. INTRODUCTION

Adam Porter's little brother wanted to draw a llama.[1] He found a discarded drawing pad in the closet, drew the llama, and took it to school the next day to show his middle-school teacher.[2] An otherwise uneventful day at school transformed abruptly when another student flipped through the pad during the bus ride home and discovered a more provocative sketch drawn by Adam two years before: a crude rendition of the high school under siege by tanker truck, missile launcher, helicopter, and gunmen.[3] The student immediately alerted the bus driver, and the school suspended Adam's brother from school the next morning for possession of the picture.[4] Adam, however, suffered the most severe consequences.[5] Officials at East Ascension High School searched Adam, a junior, and recommended he be expelled.[6] He was also locked in jail four nights for "terrorizing the school."[7] More than three years later, in December 2004, the Fifth Circuit Court of Appeals declared Adam's sketch fully protected under the First Amendment.[8] In the time between

1. Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 611 (5th Cir. 2004), *cert. denied*, 125 S. Ct. 2530 (2005).

2. *Id.*

3. *Id.*

4. *Id.* at 611–12.

5. *Id.* at 612.

6. *Id.* The school officials' decision was supported, at least partially, by the discovery of a box cutter; a notebook with references to death, drugs, sex, and gangs; and a fake ID in Adam's backpack. *Id.* It is important to recognize, however, that the box cutter was for his after-school job, and that this event transpired before terrorists used box cutters in the September 11th hijackings—an event that heightened concern regarding the otherwise innocuous and mundane tool. Furthermore, the other items of concern in Adam's backpack were common to many teenagers. If every high school student possessing a fake I.D. was expelled, school overcrowding would be solved overnight. Nevertheless, school administrators clung to these otherwise insignificant discoveries in the attempt to justify their decision. *Id.*

7. *Id.* at 612.

8. *Id.* at 620.

the initial events and the Fifth Circuit's decision, school administrators forced Adam, under threat of expulsion, to enroll in a school for troubled students; he subsequently dropped out.[9] By the time the constitutional dust settled, it was too late for Adam Porter. The courts may have finally vindicated him, but his high school experience was by then just a memory.

School violence across the nation has created an atmosphere of fear, leaving administrators desperately searching for warning signs similar to those exhibited by past school shooters.[10] Caution is warranted,[11] and administrators must be empowered to act when they perceive that a danger exists,[12] for history shows that unaddressed or unrecognized warning signs can transform into tragedy.[13] But it is also important that

9. *Id.* at 612. Had Adam Porter originally drawn the sketch on school premises or instructed his brother to take it on campus, the outcome of the First Amendment analysis likely would have been very different. *See id.* at 617–20. Since the sketch was drawn off campus and never intentionally communicated, however, the court found that it was "outside the school" expression, was not a true threat, and consequently warranted First Amendment protection. *Id.* at 620. Unfortunately, that finding came several years after the events transpired and was largely a meaningless victory: Adam Porter's high school career had long since ended, and the principal who initiated the actions against him was shielded by qualified immunity. *See id.* at 611–12.

10. According to the Center for Disease Control, it is crucial that schools improve safety by "watching for signals that precede violent outbursts, paying close attention to threats, and learning to recognize and respond to bullying behavior." Press Release, United States Department of Education, Violent Deaths In or Near Schools Are Rare (Dec. 4, 2001), http://www.ed.gov/news/pressreleases/2001/12/12042001.html. Over fifty percent of the incidents of school violence the CDC studied were preceded by signals such as "a note, threat, journal entry, or other action." Mark Anderson et al., *School-Associated Violent Deaths in the United States, 1994–1999*, 2001 JAMA 2695, 2701; *see also* Tyson Lewis, *The Surveillance Economy of Post-Columbine Schools*, 25 REV. EDUC. PEDAGOGY & CULT. STUD. 335 (2003) (discussing the various security changes implemented in schools in response to Columbine). As an example of signs exhibited before the Red Lake shootings, shooter Jeffrey Weise made numerous postings to neo-Nazi websites and expressed an obsession with school shootings. Heron Marquez Estrada et al., *An Internet Trail of a Boy's Death Wish*, MINN. STAR TRIB., Mar. 24, 2005, *available at* http://www.startribune.com/stories/462/5310301.html.

11. *See generally* Joseph Lintott, Note, *Teaching and Learning in the Face of School Violence*, 11 GEO. J. ON POVERTY L. & POL'Y 553 (2004).

12. Preventing school violence is undoubtedly a compelling interest. Preventing administrators from responding to threats to safety in the interest of students' First Amendment rights, which would essentially put unnecessary obstacles in administrators' paths, would be both counterproductive (school violence is at least as damaging to student freedom as administrator action) and irresponsible. This Comment endeavors to reach a solution that permits educators to insulate their schools against violence *without* further eroding speech rights.

13. Most recently, on March 21, 2005, sixteen-year-old Jeffrey Weise murdered his grandfather and another adult and then opened fire on his classmates at Red Lake High School in Minnesota, killing five students, a teacher, and a security guard and injuring several others. *School Gunman Stole Police Pistol, Vest*, CNN, Mar. 23, 2005, http://www.cnn.com/2005/US/03/22/school.shooting/index.html. Before the shooting rampage at Red Lake High School,

in the rush to prevent future violence administrators do not unnecessarily trample upon students' First Amendment speech rights.[14]

Since Columbine[15] and the school shootings that preceded and followed it,[16] courts addressing First Amendment protection on the

Jeffrey Weise posted online a disturbing violent flash animation depicting a shooting. *See School Killer's Animated Terror*, THE SMOKING GUN, http://www.thesmokinggun.com/archive/0323051weise1.html (last visited Nov. 3, 2005). Further, his personal website included video captures from "Elephant," a film about a school shooting. *Id.*

14. *See* David L. Hudson, Jr. & John E. Ferguson, Jr., *The Courts' Inconsistent Treatment of* Bethel v. Fraser *and the Curtailment of Student Rights*, 36 J. MARSHALL L. REV. 181, 181 (2002) (The "movement toward increasing censorship by school officials has only escalated after a series of school shootings, culminating in the tragedy at Columbine High School."); Robert D. Richards & Clay Calvert, *Columbine Fallout: The Long-Term Effects on Free Expression Take Hold in Public Schools*, 83 B.U. L. REV. 1089, 1091 (2003) ("[T]he events at Columbine gave high school administrators all the reasons—legitimate or illegitimate—they needed to trounce the First Amendment rights of public school students in the name of preventing violence.").

15. Eric Harris, eighteen, and Dylan Klebold, seventeen, stormed their high school, murdering a dozen classmates and a teacher and injuring twenty-three others. *Students Triumphant in Taking Back Columbine High*, CNN, Aug. 16, 1999, http://www.cnn.com/US/9908/16/columbine.shooting.06/index.html; *see also* Tom Kentworthy, *Up to 25 Die in Colorado School Shooting*, WASH. POST, Apr. 21, 1999, at A1 (describing "a shooting rampage on a scale unprecedented in an American school"); Dave Cullen, *Inside the Columbine High Investigation*, SALON, Sept. 23, 1999, http://www.salon.com/news/feature/1999/09/23/columbine/index.html.

16. Between 1996 and 2003, school shootings occurred in (chronologically listed and not comprehensive): Moses Lake, Washington (A fourteen-year-old shot a teacher and two students with a rifle.); Bethel, Alaska (A sixteen-year-old shot and killed his principal and a student, and two other students were injured.); Pearl, Mississippi (A sixteen-year-old killed his mother, then went to school and shot nine others; two died.); West Paducah, Kentucky (A fourteen-year-old shot eight students as they prayed in school; three died and one student was left paralyzed.); Stamps, Arkansas (An eighth-grader was arrested and charged as an adult after he confessed to shooting and wounding two of his fellow students as he hid in the woods outside of a high school.); Jonesboro, Arkansas (Two boys, ages eleven and thirteen, shot fourteen students and one teacher; the teacher and four of the students died.); Edinboro, Pennsylvania (A fourteen-year-old student shot a teacher to death at a graduation dance.); Pomona, California (A fourteen-year-old shot three boys; two died.); Fayettesville, Tennessee (An eighteen-year-old shot and killed a classmate just three days before graduation.); Springfield, Oregon (A fifteen-year-old shot and killed both parents before he went to school and opened fire in the cafeteria; two students were killed.); Columbia, South Carolina (A fourteen-year-old student was arrested after a school shooting that wounded a teacher and an elderly volunteer aid.); Richmond, Virginia (A fourteen-year-old student was charged as an adult for opening fire in a crowded high school hallway, wounding a teacher and a volunteer.); Conyers, Georgia (A fifteen-year-old wounded six classmates.); Fort Gibson, Oklahoma (A seventh-grader brought a handgun to school and opened fire; four students were wounded.); Lake Worth, Florida (A thirteen-year-old sent home from school returned with a handgun and killed a teacher.); Glendale, Arizona (A teenager held a teacher and thirty-two students hostage for an hour before surrendering.); Oxnard, California (A seventeen-year-old entered a school and took a girl hostage in an attempt to persuade police to shoot him; after the SWAT team arrived, he was shot dead.); Santee, California (A fifteen-year-old opened fire from inside a school bathroom, shooting fifteen and killing two.); El Cajon, California (Gunman injured three teens and two teachers at Granite Hills High School.); New

campuses of public schools[17] have repeatedly held that "[a] school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school."[18] A student's freedom of speech "in" school is less than his freedom of speech at home, work, a shopping mall, a movie theater, or virtually anywhere else "out" of school.[19] However, the line designating what constitutes out-of-school speech is jagged with exceptions and caveats.[20] In the absence of clear bright-line rules to

York, New York (A teenager wounded two students at Martin Luther King Jr. High School.); Dallas, Texas (A fifteen-year-old male high school student was shot as he and fellow students tried to wrestle a gun away from another fourteen-year-old student.); Seattle, Washington (A thirteen-year-old male fired a rifle in a middle school, injuring two students with broken glass, and then used the gun to kill himself.); Westminster, Colorado (A fourteen-year-old male freshman was taken into custody after several shots were fired in a high school courtyard.); Red Lion, Pennsylvania (A fourteen-year-old male junior high school student shot and killed his principal inside a crowded cafeteria and then killed himself with a second gun according to police.); Cold Spring, Minnesota (One student died and another was hospitalized after a shooting in a Minnesota high school; a teacher talked the student into surrendering.). Sch. Violence Res. Ctr., Nat'l Ctr. for Rural Law Enforcement, School Shootings Map and Descriptions from 1996–2003, http://www.svrc.net/ShootingsMap.htm#Fort%20Gibson (last visited Nov. 3, 2005).

17. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (upholding regulation of student speech that is related to school-sponsored activities); Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986) (upholding regulation of student speech that is lewd, vulgar, obscene, or plainly offensive); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (prohibiting viewpoint-specific regulations unless the regulated speech substantially interferes with the work of the school); Canady v. Bossier Parish Sch. Bd., 240 F.3d 437 (5th Cir. 2001) (upholding school regulations that further substantial government interests unrelated to the suppression of student expression).

18. *See, e.g.*, *Kuhlmeier*, 484 U.S. at 266 (citations omitted).

19. The Supreme Court has not specified how much authority a public school can assert over off-campus student expression, but it is a logical inference that when students are not in school, they are not students but, rather, general citizens. Consequently, they are governed by general principles of First Amendment jurisprudence, which does not distinguish between adults and minors. *See* Clay Calvert, *Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground*, 7 B.U. J. SCI. & TECH. L. 243, 271 (2001).

20. Specifically, questions loom regarding how to classify speech made or composed off campus and subsequently brought to campus by a third party. Many courts have ruled that expressions created off campus, and then intentionally brought on campus, or even intentionally communicated and subsequently brought on campus, are treated as in-school expression. *See* Doe v. Pulaski County Special Sch. Dist., 306 F.3d 616, 619–20, 627 (8th Cir. 2002) (upholding punishment of student for writing threatening letters later brought on campus by a friend without authorization from the student); LaVine v. Blaine Sch. Dist., 257 F.3d 981, 989 (9th Cir. 2001) (allowing expulsion of student on emergency basis for bringing on campus a violent poem that he had written off campus); Boucher v. Sch. Bd., 134 F.3d 821, 822–23, 827–28 (7th Cir. 1998) (disciplining student for an article printed in an underground newspaper that was distributed on campus); Sullivan v. Houston Indep. Sch. Dist., 475 F.2d 1071, 1072, 1075–77 (5th Cir. 1973) (upholding punishment of student for authoring article printed in underground newspaper distributed off campus but near school grounds). However, other courts have held that off-campus speech is

follow, teachers and administrators sometimes react out of fear and suppress speech that, in retrospect, should be protected. Additionally, the traditional legal framework for assessing threats is overinclusive[21] when dealing with student speech, overreacting to harmless speech and thus being spread so thin as to be unable to respond to legitimate dangers. Further, fearing punishment, many students choose to suppress their speech, thus concealing potential warning signs. As Columbine, Red Lake, and other tragedies have demonstrated, and as future tragedies may demonstrate, speech can be infringed, but violence is likely to continue. With greater student speech, a student contemplating violence will be more likely to express his feelings. Warning signs will surface and, with the appropriate guidelines in place, these signs can be dealt with. A danger known is much safer than a danger that goes unspoken until it is too late. In this regard, encouraging the open exchange of student speech is as vital to school safety as it is to First Amendment rights.

This Comment proposes two needed clarifications to balance educators' rights to maintain a secure environment and students' rights to express themselves by viewing school administrators' evaluations of student threats and warning signs as a two-step process: (1) use of a clear standard to determine whether student speech is within their jurisdiction (the on-campus/off-campus question),[22] and if so, (2) determination if student speech actually threatens school safety through application of specific guidelines modeled after those proposed by the United States

entitled to full First Amendment protection even when it makes its way onto school grounds without the assistance of the speaker. *See* Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 619 (5th Cir. 2004) (noting that some courts "have found that off-campus speech is entitled to full First Amendment protection even when it makes its way onto school grounds"), *cert. denied*, 125 S. Ct. 2530 (2005); Thomas v. Bd. of Educ., 607 F.2d 1043, 1050 (2d Cir. 1979) (holding that the limited abrogation of First Amendment rights is out of place with regard to off-campus speech); *see also Fraser*, 478 U.S. at 688 (Brennan, J., concurring) (arguing that a student punished for lewd comments made during a school-sponsored debate could not be punished had he "given the same speech outside of the school environment . . . simply because government officials considered his language to be inappropriate."); Richards & Calvert, *supra* note 14, at 1116–20 (challenging the jurisdiction of administrators over student speech occurring off campus and subsequently brought on campus by a third party without the communicator's permission).

21. It is overinclusive in the sense that it produces false warning signs for student speech, which though unsavory or even violent, ultimately poses little or no real danger to school safety.

22. Of course, not all off-campus, out-of-school speech—such as threats—is fully protected. However, the presumption in dealing with out-of-school speech, generally, is that it is fully protected and the burden, then, is to show that the speech in question represents an exception—such as threats or obscenity.

Secret Service.[23] Contrary to what many assume, greater speech rights for students and safer schools are complementary objectives, rather than mutually exclusive goals. By delineating clear boundaries for school authorities regarding permissible and restricted speech, thereby affording greater freedom to student speech, schools will attain a greater degree of security than is otherwise possible since the free flow of student speech will likely include warning signs that would otherwise go unspoken or remain underground for fear of punishment.

Part II.A of this Comment discusses the foundational case law established by the Supreme Court and circuit courts with regard to limited speech rights in public schools. Part II.B explores selected circuit and district court decisions addressing the on-campus/off-campus, in-school/out-of-school distinction—an important threshold distinction in determining if a school has jurisdiction. Part III analyzes (a) the failure of the traditional threat analysis in the student context, (b) the troubling changes that public schools have undertaken in response to school violence and the significance of warning signs, as attested to by past shootings, and (c) guidelines that have been proposed to determine when a danger truly exists. Part IV proposes two modifications to the current law and procedure regarding student speech that will serve to heighten school safety while protecting student speech rights: (a) bright line rules to distinguish on- and off-campus speech, and (b) effective guidelines to evaluate when a threat exists. This proposed balance includes acknowledging the difference between a threat—as defined purely in terms of speech—and a warning sign, and responding appropriately. Part IV.C briefly sets forth the safety benefits of these proposals, and Part V offers a brief conclusion.

II. THE EVOLUTION AND CONFUSION OF ON-CAMPUS, IN-SCHOOL SPEECH

A. Foundational Cases: Diminished Protection on Campus

The freedom of speech afforded to students on campus (or when attending a school-sponsored activity away from campus) is perhaps best described as an abbreviated version of the freedom of speech society

23. *See, e.g.*, ROBERT A. FEIN ET AL., U.S. SECRET SERV. & U.S. DEPT. OF EDUC., THREAT ASSESSMENT IN SCHOOLS: A GUIDE TO MANAGING THREATENING SITUATIONS AND TO CREATING SAFE SCHOOL CLIMATES (2002), *available at* http://www.secretservice.gov/ntac/ssi_guide.pdf.

typically enjoys.[24] This Section discusses the cases that have shaped the jurisprudence regarding student speech. While courts vary in referring to "on-campus" speech and "in-school" speech, the two are virtually synonymous for the purposes of this Comment: essentially, the school campus expands for free-speech purposes to include any school-sponsored activities, such as athletic events, even where the physical location would otherwise be deemed "off-campus."

Initially, courts recognized broad speech rights for students when off the school campus. Subsequent decisions, however, expanded the definition of "on-campus" and considerably eroded speech rights whenever the speech is construed as potentially causing a substantial disruption on campus—an elastic concept than can be stretched to include virtually any unpopular speech. Without a clear, firm test for what can potentially cause "substantial disruption," virtually any off-campus expression may be characterized and legally defined as on-campus expression.

The landmark case establishing the concept of on-campus speech[25] as a reduced form of traditional speech is *Tinker v. Des Moines Independent Community School District.*[26] Three students planned to protest the Vietnam War by wearing black armbands to school, prompting administrators to adopt a policy forbidding the armbands with the threat of suspension.[27] While overturning the school's policy, the Supreme Court famously declared that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[28] Despite that emphatic statement, the Court did indeed limit students' rights by holding that First Amendment protection does not extend to speech that materially disrupts class work or involves

24. "We have . . . recognized that the First Amendment rights of students in the public schools 'are not automatically coextensive with the rights of adults in other settings' . . . ." Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) (quoting Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 682 (1986)). For a discussion of the abbreviated First Amendment rights of students, see generally Leonard M. Niehoff, *The Student's Right to Freedom of Speech: How Much is Left at the Schoolhouse Gate?*, 75 MICH. B.J. 1150 (1996).

25. On-campus speech, for purposes of this Comment, encompasses school sponsored field trips, transportation, athletic events, and performances, in which the school's campus virtually travels with the student under the auspices of school sponsorship. The question this Comment grapples with is, instead, the rarer cases where the speech itself may drift into the school's domain without the knowledge or desire of the student speaker.

26. 393 U.S. 503 (1969).

27. *Id.* at 504.

28. *Id.* at 506.

substantial disorder.[29] In short, students do not shed their constitutional rights at the schoolhouse gate, with an added and very large caveat: "unless their speech causes disruption."

Alone, *Tinker* seems to hold that students' rights are fully protected unless school authorities reasonably believe that the student's expression will "substantially interfere with the work of the school or impinge upon the rights of other students."[30] However, subsequent cases have continued to chip away at the First Amendment's presence in schools by broadening the definition of what constitutes a free-speech exempted interruption. *Bethel School District v. Fraser* added another exception to students' speech rights in holding that schools can prohibit the use of vulgar and offensive language if the speech is inconsistent with the school's basic educational mission.[31] Two years later, *Hazelwood School District v. Kuhlmeier* added yet another exception by holding that otherwise protected student speech can be regulated if it arises in the context of school-sponsored activities[32] and the school's censorship is "reasonably related to legitimate pedagogical concerns."[33] This logic can be extended to encompass activities that, while technically "off campus," are nevertheless "in-school" activities, such as athletic events, field trips, and school bus rides home.

Most recently, in *Canady v. Bossier Parish School Board*,[34] the Fifth Circuit Court of Appeals limited the *Tinker* analysis as pertaining only to specific viewpoint regulation—those instances where a particular viewpoint is suppressed while other viewpoints go unchecked.[35] Under

29. *Id.* at 509 & n.3.

30. *Id.* at 509; *see also* Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966).

31. 478 U.S. 675, 685 (1986). In *Fraser*, a high school student delivered a speech containing offensive and vulgar sexual innuendos during a school assembly. *Id.* at 677–78. The Supreme Court held for the school district, finding that the vulgar speech could be prohibited. *Id.* at 683.

32. 484 U.S. 260, 262–64 (1988) (The activity was a school newspaper.).

33. *Id.* at 273. In *Kuhlmeier*, the school newspaper was publishing articles that dealt with teen pregnancy and the effect of divorce on students. *Id.* at 263. The principal of the school objected to this content and removed the pages dealing with that material—consequently removing other stories as well. *Id.* at 263–64 & n.1. The Court upheld the principal's actions. *Id.* at 273.

34. 240 F.3d 437 (5th Cir. 2001). In *Canady*, parents brought an action challenging a mandatory uniform policy imposed on all public schools within the district. *Id.* at 439.

35. *Id.* at 442 ("[*Tinker*] involves school regulations directed at specific student viewpoints."). Finding the *Tinker*, *Fraser*, and *Kuhlmeier* tests ill-suited to the case before it, the court adopted another test for generally applicable, viewpoint-neutral regulation, which indirectly suppresses speech on school campuses: an adaptation of the time, place, and manner analysis and the similar test outlined in *United States v. O'Brien*, 391 U.S. 367, 377 (1968), to a school setting. *Canady*, 240 F.3d at 442–43. Specifically, viewpoint regulation occurs when speech is suppressed not because of the general subject matter, but because of the specific viewpoint taken by the speaker;

Canady, a school policy regulating student speech—specifically their manner of dress while on a school's campus—survives constitutional scrutiny if (1) "it furthers an important or substantial government interest;" (2) "the interest is unrelated to the suppression of student expression;" and (3) "the incidental restrictions on First Amendment activities are no more than is necessary to facilitate that interest."[36]

A common denominator among these cases is the "in-school" component, whether on campus,[37] at an assembly or extra-curricular activity,[38] or in the school newspaper.[39] No Supreme Court case clearly answers whether a school can punish student speech that occurs off campus and away from a school-sponsored activity.[40] However, lower courts[41] and commentators[42] have suggested that student speech occurring off campus, without school affiliation, should be treated the same as any other fully protected speech since the First Amendment does not discriminate between young adults and adults.[43] If off-campus and out-of-school speech are entitled to the protection of the First Amendment—and there is no reason to think otherwise—the operative question becomes: what *is* "off-campus" or "out-of-school" speech? As the body of case law[44] addressing that question demonstrates, the answer is not clear.

for example, allowing speech about the war in Iraq, but singling out and suppressing any speech that expressly opposes the fighting.

36. *Canady*, 240 F.3d at 443. Such an analysis is very similar to the content-neutral analysis that would be applied in a traditional First Amendment context, interpreting the *Canady* test's third prong as analogous to narrow tailoring and the school as the government regulator. However, the *Canady* court gave little attention to whether this was the least restrictive alternative and if it was sufficiently narrowly tailored—important prongs in the non-school analysis. For example, in *Schneider v. New Jersey* the Court held that an anti-leafletting ordinance meant to prevent littering could be replaced by a ban on littering, which would be just as effective. 308 U.S. 147, 162 (1939).

37. *Tinker*, 393 U.S. 503; *Canady*, 240 F.3d 437.

38. Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986).

39. *Kuhlmeier*, 484 U.S. at 273.

40. Leora Harpaz, *Internet Speech and the First Amendment Rights of Public School Students*, 2000 BYU EDUC. & L.J. 123, 142. However, it seems logical that schools *can* take an interest in the welfare of students away from the school. This is an important distinction explored more in Part IV as an alternative to punishment.

41. *See, e.g.*, Thomas v. Bd. of Educ., 607 F.2d 1043, 1050, 1052 (2d Cir. 1979).

42. *See, e.g.*, Calvert, *supra* note 19, at 271; David L. Hudson, Jr., *Censorship of Student Internet Speech: The Effect of Diminishing Student Rights, Fear of the Internet and Columbine*, 2000 MICH. ST. L. REV. 199, 222.

43. *See* U.S. CONST. amend. I.

44. *See infra* Part II.B.

B. Where the Schoolhouse Gates End: The "In-School" and "Out-of-School" Distinction

A preliminary step in any school-speech analysis is determining whether the school actually possesses jurisdiction regarding the speech. This question hinges on whether or not the speech occurred on campus. This section discusses the development of and current confusion regarding this distinction.

1. The development of the distinction

A significant danger of wrongly classifying "out-of-school" speech as "in-school" speech is that out-of-school speech is subsequently stripped of many of the First Amendment protections it rightfully deserves. In *Thomas v. Board of Education*, the Court of Appeals for the Second Circuit emphatically held that speech occurring off campus is beyond the reach of school officials: "[O]ur 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."[45] The school in *Thomas* suspended students for publishing and distributing a magazine off campus that contained sexually graphic material.[46] The court reasoned that since school officials "ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith, their actions must be evaluated by the principles that bind government officials in the public arena."[47] In short, the magazine was purely off-campus speech, and the court held that a "student is free to speak his mind when the school day ends."[48] But in *Thomas*, the court's decision was made easier because none of the magazines actually reached campus; when speech created off campus is intentionally or unintentionally brought on campus,[49] the on-campus/off-campus distinction is blurred.[50] On one hand, the speech was born well outside

45. 607 F.2d at 1044–45.

46. *Id.* at 1045–46 & n.3.

47. *Id.* at 1050.

48. *Id.* at 1052. This idea is echoed by the *Canady* court which emphasized that students could wear attire of their own choice when away from school. Canady v. Bossier Parish Sch. Bd., 240 F.3d 437, 443 (5th Cir. 2001).

49. *See supra* notes 37–39 and accompanying text.

50. Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 618–19 (5th Cir. 2004), *cert. denied*, 125 S. Ct. 2530 (2005).

school premises—suggesting it is off-campus speech; on the other hand, the speech subsequently enters the school's domain. At that point, does the fundamental classification of the speech shift from off-campus speech to on-campus speech?

Many courts have applied standards developed in *Tinker* and its progeny to evaluate off-campus student speech subsequently brought on campus by someone other than the speaker.[51] Such cases have involved "underground" student newspapers distributed off campus,[52] student-run Web sites created using off-campus computers,[53] and writings brought on campus by students other than the original author.[54] The similarity in each of these cases is that the student's expression was brought on campus as a direct consequence of his desire to communicate that expression to someone who then brought it on campus.[55] For example, in *Boucher v. School Board*, an underground newspaper was distributed on campus,[56] and in *Sullivan v. Houston Independent School District*, a paper was distributed off campus but in very close proximity to the school.[57] An "on-campus" finding makes sense in both cases since the speaker clearly meant for his speech to be disseminated among the student body on school grounds.

In contrast, communication that was never actually brought to campus, or was brought to campus inadvertently without intent to communicate it, has generally been held to be off-campus speech and afforded full First Amendment protection.[58] In *Porter v. Ascension Parish School Board*, for example, Adam Porter showed his violent drawing of the school under siege only to family and a friend at home, and it was only by chance that his brother unwittingly took it on

51. *Id.* at 619.

52. *See* Boucher v. Sch. Bd., 134 F.3d 821, 822, 827–28 (7th Cir. 1998); Sullivan v. Houston Indep. Sch. Dist., 475 F.2d 1071, 1072, 1075–76 (5th Cir. 1973); Shanley v. Ne. Indep. Sch. Dist., 462 F.2d 960, 964, 970–75 (5th Cir. 1972); Bystrom v. Fridley High Sch., 686 F. Supp. 1387, 1389, 1392 (D. Minn. 1987).

53. *See* Emmett v. Kent Sch. Dist., 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000); Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1177, 1180–82 (E.D. Mo. 1998).

54. *See* Doe v. Pulaski County Special Sch. Dist., 306 F.3d 616, 619–20 (8th Cir. 2002); Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 448–49, 455 (W.D. Penn. 2001).

55. *See supra* notes 52–54.

56. 134 F.3d at 822–23.

57. 475 F.2d 1071, 1074 (5th Cir. 1973).

58. *See* Porter v. Ascension Parish Sch. Bd., 393 F.3d 608 (5th Cir. 2004), *cert. denied*, 125 S. Ct. 2530 (2005); Thomas v. Bd. of Educ., 607 F.2d 1043, 1044 (2d Cir. 1979); Klein v. Smith, 635 F. Supp. 1440 (D. Me. 1986).

campus.[59] The court held that the situation in *Porter* was off-campus expression.[60] In *Klein v. Smith*, a student gave "the finger" to his teacher in the parking lot of a restaurant while both were away from campus.[61] Again, the court held that it was off-campus expression.[62]

2. The problems inherent to the current distinction

The cases discussed above suggest an obvious distinction between on-campus and off-campus speech: *if the speech is made on campus or brought to campus according to the will of the speaker, it is on-campus speech and, thus, is afforded a lower level of free-speech protection*.[63] Unfortunately, no such bright-line rule actually exists. Many of the courts finding speech made off campus and later brought on campus to be on-campus speech have relied on the concept of *off*-campus speech producing *on*-campus effects rather than emphasizing whether the student intended that speech to actually reach campus.[64] Indeed, even in its broad defense of off-campus speech, the Second Circuit in *Thomas v. Board of Education* left open the possibility that school administrators could punish students who "incite[] substantial disruption within the school from some remote locale."[65] Less clear, however, is whether speech actually needs to make it on campus to "incite substantial disruption"[66] or whether speech that remains entirely off campus, but

59. *Porter*, 393 F.3d at 615.

60. *Id.*

61. 635 F. Supp. at 1441.

62. *Id.* Klein's expression was not in a fixed form and could not be subsequently brought onto campus, rendering the on-campus/off-campus distinction clearer than in the cases where an expression originates off campus yet eventually finds its way on campus. Unless photographed or otherwise recorded, making an obscene gesture—as he did—is not fixed in a transportable medium.

63. One could also reasonably add "speech relating to a class assignment" to this category. For example, if one student in a class takes a test early for personal reasons and later tells other students (while off campus) what is on the exam before they have taken it, a school could presumably discipline the student for that speech. Such speech directly undermines the core purposes of the school.

64. *See* Calvert, *supra* note 19, at 248–49.

65. 607 F.2d 1043, 1052 & n.17 (2d Cir. 1979). It seems implicit in the rule that such incitement would be accompanied by intentional communication by the speaker.

66. Many of the school shootings that have occurred suggest scenarios in which off-campus speech may indeed cause on-campus disruption, particularly communication plotting or encouraging school shootings. However, as we shall see in the later discussion, this can be analyzed best under true threat analysis.

affects students who themselves go on campus, falls under this umbrella.[67]

Given the duty of administrators to prevent disturbances,[68] *Tinker* allows school officials to act before disruption actually occurs.[69] Since forecasting such disruption in advance is unmistakably difficult to do, *Tinker* does not require certainty that disruption will occur. Instead, the existence of "facts which might reasonably lead school officials to forecast substantial disruption" is sufficient.[70] In the aftermath of Columbine, Red Lake, and other school shootings, much of what nervous educators perceive as potentially inciting "substantial disruption" may actually be harmless (while students posing a legitimate safety danger will conceal their speech or remain silent for fear of punishment).[71] Virtually anything can now set off warning lights—educators treat a satirical website parodying school administration[72] the same way they treat a legitimate danger. Consequently, without a clear test for what can potentially cause "substantial disruption," virtually any off-campus expression may be characterized and legally defined as *on-campus* expression.

Such a categorization is potentially overinclusive, and courts disagree about what to treat as on campus.[73] For example, in *Emmett v. Kent School District*, the federal district court held that a Web site created off campus—even though the intended audience was undoubtedly connected to the high school—was "entirely outside of the school's supervision or control."[74] Less than a year later, however, in *Killion v. Franklin Regional School District*, another district court rendered a decision incongruous with the others.[75] A student composed and distributed to his friends via email a top-ten list critical of a

67. An example of such speech might be the scenario discussed in footnote 63, where a student shares information about an exam.

68. *See generally* Alison Bethel, *Keeping Schools Safe: Why Schools Should Have an Affirmative Duty To Protect Students from Harm by Other Students*, 2 PIERCE L. REV. 183 (2004) (discussing duty to prevent school violence wherever possible); *see also infra* Part II.D.

69. Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 529 (9th Cir. 1992) (citing Karp v. Becken, 477 F.2d 171, 175 (9th Cir. 1973)).

70. *Karp*, 477 F.2d at 175 (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969)).

71. *See* discussion on post-Columbine paranoia *infra* Part III.

72. Emmett v. Kent Sch. Dist., 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000).

73. *See infra* notes 74–78 and accompanying text.

74. 92 F. Supp. 2d at 1090.

75. 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001).

teacher.[76] The court examined the list under the *Tinker* analysis since "the overwhelming weight of authority" had examined such speech under *Tinker*, and because the list "was brought on campus, albeit by an unknown person."[77]

Given the uncertainty among the courts as to whether the speaker must actually intend for the speech to make it onto campus—the students' actions in *Emmett* and *Killion* were virtually identical, but with contrasting outcomes—administrators lack clear guidance in determining what speech falls within their jurisdiction.[78] In the absence of clear, easy-to-follow guidelines, complete suppression of student speech unpopular with educators becomes the default. Troubled students, deprived of any acceptable outline to vent their frustrations, could hide their feelings, which could possibly lead to violence. The problem of ascertaining where a school's jurisdiction begins and ends is further exacerbated by the prevalent approach for evaluating potentially violent student speech: relying on traditional legal threat analysis and a general response procedure that favors punishment and suppression over help and encouragement.

III. THE FAILURE OF TRADITIONAL THREAT ANALYSIS AND THE IMPORTANCE OF WARNING SIGNS AND GUIDELINES TO EVALUATE WHEN A DANGER ACTUALLY EXISTS

Providing for school safety is, in some ways, a complex dance: on the one hand, it is necessary to allow enough freedom of speech to students so that they can express themselves adequately; on the other hand, however, it is critical that educators respond appropriately when warning signs suggest potential danger is on the horizon. Once the initial question of whether or not the school possesses jurisdiction is answered, the speech must be analyzed to determine if a danger exists. This Section discusses (A) traditional threat analysis—based on the intent and expectation of causing fear—and why such analysis is ineffective and overinclusive in addressing adolescent speech, (B) the important role of warning signs and the danger posed by zero-tolerance policies, and (C) guidelines developed to help determine when a legitimate danger exists.

76. *Id.* at 448–49.

77. *Id.* at 455.

78. Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 619–20 (5th Cir. 2004), *cert. denied*, 125 S. Ct. 2530 (2005). Clearly, off-campus speech must be dealt with differently than on-campus speech. However, if administrators have no certain way of distinguishing between the two types, they will likely treat all speech as on-campus speech under the "substantial disruption" theory.

A. The Failure of Traditional Threat Analysis in the School Context

In free-speech jurisprudence, various categories of unprotected speech exist, including incitement,[79] false statements of fact,[80] obscenity,[81] child pornography,[82] fighting words,[83] and threats.[84] "Threat" analysis is generally employed to determine whether student speech can be suppressed, but the very undertaking of such an analysis is rife with error. The traditional legal framework is designed around adult speech and does not accommodate adolescent speech. Consequently, it singles out speech that might be harmless (over-inclusiveness) while failing to include speech that, though falling short of a legal "threat" classification, provides warning signs of potential violence[85] and urgently needs to be dealt with (under-inclusiveness). This Comment contends that in cases of adolescent speech, it is necessary to supplant the traditional legal threat analysis with guidelines that accommodate the unique characteristics of youth. Instead of seeking a legal analysis to determine what speech can be punished, educators need to apply a qualitative analysis to determine which students need help.

In order to demonstrate the inadequacy of the traditional threat analysis, it is necessary first to explain the fundamentals of that analysis and how it has been applied—ineffectively—to adolescent speech.

1. Fundamentals of threat analysis

A genuine threat is not protected speech under the First Amendment.[86] Exactly what constitutes a genuine threat, however, as opposed to a harmless expression of frustration or anger, is a difficult

79. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969).

80. *See* N.Y. Times v. Sullivan, 376 U.S. 254 (1964).

81. *See* Miller v. California, 413 U.S. 15 (1973).

82. *See* Osborne v. Ohio, 495 U.S. 103 (1990); New York v. Ferber, 458 U.S. 747 (1982).

83. *See* Cohen v. California, 403 U.S. 15 (1971); Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

84. *See* NAACP v. Claiborne Hardware, 458 U.S. 886 (1982); Watts v. United States, 394 U.S. 705 (1969).

85. For example, before the shooting rampage at Red Lake High School, sixteen-year-old Jeffrey Weise posted online a disturbing violent flash animation depicting a shooting. *See School Killer's Animated Terror*, *supra* note 13. The flash animation would not satisfy any of the required prongs to be a threat, yet was nevertheless a very legitimate warning sign, which should have triggered a response.

86. *Watts*, 394 U.S. at 707–08.

distinction.[87] According to *Watts v. United States*, the threat must be a realistic, actual threat and not mere hyperbole.[88] In *Watts*, a protester declared that if the military made him "carry a rifle the first man [he] want[ed] to get in [his] sights [was] L.B.J."[89] Emphasizing the unique language of the political arena, the Supreme Court held that such an announcement amounted to no more than hyperbole[90] and, consequently, was protected speech outside the threat category.[91] The Court did not provide a more comprehensive definition of what a true threat[92] is until *Virginia v. Black* in 2003.[93]

Addressing threat doctrine in the context of cross burning, the *Black* Court defined true threats as encompassing "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[94] However, the Court noted that actual intent to carry out the threat is not required.[95] The only intent necessary is the "intent of placing the victim in fear of bodily harm or death."[96] As an initial threshold, the speaker must intend to convey the purported threat; the

87. This is especially true for school administrators unversed in the intricacies of First Amendment law.

88. *Watts*, 394 U.S. at 708.

89. *Id.* at 706.

90. As will be shown in subsequent analysis, just as the Court afforded particular consideration to hyperbole given the nature of the political arena, it would make sense to afford similar consideration to hyperbole given the nature of youthful communications.

91. *Watts*, 394 U.S. at 708.

92. *See* Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL'Y 283, 294–95 (2001); Lisa M. Pisciotta, Comment, *Beyond Sticks & Stones: A First Amendment Framework for Educators Who Seek To Punish Student Threats*, 30 SETON HALL L. REV. 635, 642–43 (2000).

93. 538 U.S. 343, 359–60 (2003).

94. *Id.* at 359.

95. *Id.* at 359–60 ("The speaker need not actually intend to carry out the threat.").

96. *Id.* at 360. *Watts*, with its exception for hyperbolic speech, assumes that hyperbolic speech is not intended to place the recipient in any such fear and does not have that effect on the recipient. This is a somewhat dubious distinction since the mere fact that speech is hyperbolic does not exonerate it from causing fear on the part of the recipient: "I'm going to rip your head off and gut you" certainly is no *less* fear-inducing than a less-hyperbolic "I'm going to inflict physical harm upon you." If anything, the hyperbolic speech will likely engender greater fear than more sedate expression. More likely, what the Court means, in distinguishing hyperbolic speech from other threats, is to exclude those instances in which the speaker has no intent to cause harm or even fear thereof, but speaks in terms that might be so construed if taken out of context. Context, in fact, is crucial: The phrase "I'm going to kill him," has very different meanings when spoken by an employee engaged in good natured pranks with a friend, than when uttered by a laid-off employee and directed towards the boss who decided his fate.

lack of intent to communicate the threat destroys the threat classification and renders the communication fully protected under the First Amendment.[97]

Unfortunately, *Black* failed to resolve a divide among the circuits regarding how best to parse true threats from protected speech once the threshold question of whether the speaker intended to communicate the speech is met.[98] Courts typically adopt an objective test focusing on whether a reasonable person would interpret the purported threat as a serious expression of intent to cause a present or future harm.[99] The courts disagree, however, as to the person from whose viewpoint the statement should be interpreted:[100] a reasonable person standing in the shoes of the speaker,[101] or a reasonable person standing in the shoes of the recipient.[102]

In *United States v. Dinwiddie*,[103] the Eighth Circuit, adhering to the reasonable recipient standard, set forth a list of factors regarding how a reasonable recipient would view a purported threat: (1) the reaction of those who heard the alleged threat; (2) whether the threat was conditional; (3) whether the person who made the 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.[104] In contrast, the Ninth Circuit has adhered to the reasonable *speaker* standard in defining a true threat test as "whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault."[105]

97. *Id.* at 359.

98. Doe v. Pulaski County Special Sch. Dist., 306 F.3d 616, 622 (8th Cir. 2002).

99. *Id.*

100. *Id.*

101. Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058, 1075 (9th Cir. 2002) (en banc).

102. United States v. Malik, 16 F.3d 45, 49 (2d Cir. 1994).

103. 76 F.3d 913 (8th Cir. 1996).

104. *Id.* at 925.

105. Lovell v. Poway Unified Sch. Dist., 90 F.3d 367, 372 (9th Cir. 1996) (quoting United States v. Orozco-Santillan, 903 F.2d 1262, 1265 (9th Cir. 1990)).

2. Struggles in applying the analysis to adolescent speech

Initially it makes sense, particularly in the school context, to follow the reasonable speaker approach given the risk that a speaker's constitutional rights may otherwise "turn on a recipient's unique sensitivity or characteristic that is, or may be, unknown to the speaker."[106] What defines a "reasonable recipient" in the educational context is debatable,[107] and it would be difficult for a student to know whether a given teacher or administration is particularly prone to fear of school violence. An excellent illustration of this concept is found in *LaVine v. Blaine School District.*[108]

In the summer before his junior year of high school, James LaVine wrote a poem, "Last Words," which was a first-person account of a violent high school shooting.[109] He showed the poem to his mother who warned him not to show it to any teachers because they might overreact.[110] James failed to heed his mother's advice, and several months later he showed the poem to his English teacher and asked her opinion.[111] Alarmed, she contacted a school counselor and set into motion a chain of events leading to James's emergency expulsion from school.[112]

The quick and decisive reaction by the administration to what, in retrospect, posed no actual danger demonstrates the problems of using a reasonable recipient standard in the school context.[113] Had the court

106. Doe v. Pulaski County Special Sch. Dist., 306 F.3d 616, 623 (8th Cir. 2002) (citing United States v. Fulmer, 108 F.3d 1486, 1491 (1st Cir. 1997)). However, applying the reasonable speaker test requires ascertaining the mindset of a reasonable teenager. Such a requirement may be difficult for courts: need the student take into consideration the heightened scrutiny of educators due to school shootings and violence? If so, might that produce self-censorship and a chilling effect on student speech?

107. The definition would hinge on various factors such as recent violence and the perceived threat, in general, to the school's safety.

108. 257 F.3d 981 (9th Cir. 2001). It is noteworthy that the events leading to this case occurred before Columbine, but after the series of school shootings that began putting administrators on edge.

109. *Id.* at 983–84.

110. *Id.* at 984.

111. *Id.*

112. *Id.* at 984–87.

113. Admittedly, even if the school *wrongly* perceived it as a threat, that serves only to show that *some* school administrators are not reasonable in their reactions to speech of this sort. However, this occurrence does serve to underscore the difficulty in determining what actually constitutes a "reasonable recipient." Some may argue that knowing that they could get kicked out of school for poems that could be perceived as threatening school violence could persuade students to avoid that

based its determination entirely upon the recipient's reaction, the speech would have been deemed a threat. It also acknowledged, however, the necessary discretion afforded to administrators in responding quickly given the grave danger that a slower response may create.[114]

Admittedly, the reasonable speaker standard is potentially problematic as well—what exactly is a reasonable teenager, if such a thing even exists? Must a "reasonable teenage speaker" take into consideration the potential overreaction of educators, as James LaVine's mother suggested when she warned him to not show his work to any teachers? If so, would this trigger undue self-censorship and a chilling effect on student speech? Topics susceptible to hypersensitivity in schools, such as death or conflict, are subjects that have been addressed in art and literature for centuries.[115] If students cannot address such topics[116] for fear of a teacher's reaction, speech rights are clearly implicated.[117] While it is true LaVine's rights in composing the poem were unaffected until he took the poem to school, it must be remembered that the best resource typically available to a teenager seeking to expand his or her creative abilities is the high school English teacher.

type of inflammatory material in schools. That is the very point of this analysis and Comment; however, the fact that a given material might be considered inflammatory does not mean that it is not protected speech. The recipient standard would result in unduly severe self-censorship for fear of punishment, restrict burgeoning artistic abilities, and suppress warning signs that *need* to be brought to the surface.

114. The court held that, given the risk of "substantial disruption of or material interference with school activities," the school's actions were justified. *LaVine*, 257 F.3d at 990–92.

115. One need only look to the works of Shakespeare, or paintings by the Old Masters, to confirm that death and conflict, along with love and God, have been primary themes of art for centuries.

116. Some may argue that while these topics may be legitimate artistic subjects, the treatment by the students is generally remarkably different than the more traditional, academically-sanctioned means of expression. This argument fails, however, because art, offensive to some, is often held up as genius by others. For example, one need look no further than the borderline pornographic photography of Robert Mapplethorpe and the often vulgar poetry of Allen Ginsburg.

117. Importantly, James LaVine presented his violent poem to his English teacher in a creative writing context. He had written a poem about a timely topic of interest to youth and sincerely sought feedback from a teacher he respected. If students cannot freely express themselves at the very least in what is an undeniably creative context, where can they express themselves? If a high school student were to write a scholarly research paper similar to this Comment, would that trigger an immediate response on the part of educators? The answer seems to be "perhaps," further establishing the problems of a chilling effect on speech that might result if we have to rely on the student gauging what reaction their communication will cause. Admittedly, this author's viewpoint is one which undeniably places great value on creativity and the importance of free speech to cultivate it. Other perspectives certainly exist, but are not treated in this Comment.

Two recent circuit cases attempted to clarify the true threat doctrine in the school setting but arrived at contrasting outcomes. In *Doe v. Pulaski County Special School District*, eighth grader Josh Mahan showed violent, misogynistic, "Eminem-like" rants against his ex-girlfriend to a friend who secretly stole the letters and shared them with the girlfriend while on campus.[118] The Eighth Circuit, in a sharply divided en banc decision overturning the panel decision, found that the letters constituted a true threat and were not protected.[119] The majority acknowledged that a speaker must intentionally or knowingly communicate a statement to someone before the speaker can be punished.[120] Finding that the standard is satisfied if the speaker communicates the statement "to the object of the purported threat *or* to a third party,"[121] the court found that Mahan manifested the intent to convey the threat by allowing his friend to read it.[122] The majority applied the reasonable recipient standard and found that the speech was a true threat given the impact it had on the ultimate recipient: the girl to whom the "threat" was directed.[123] This analysis was independent of the threshold question of whether the speech was on-campus (having been shown to the girl by a friend).

The Fifth Circuit's decision in *Porter v. Ascension Parish School Board*[124] is a stark contrast with *Pulaski*. In *Porter*, the facts of which served as the introduction of this Comment,[125] the Fifth Circuit held that since Adam Porter showed his violent drawing of the school under siege only to his mother, his younger brother, and a friend, all within the home,[126] he did not intentionally communicate the expression to anyone

118. 306 F.3d 616, 619–20 (8th Cir. 2002) (en banc). The Eighth Circuit decided the case shortly before the Supreme Court's ruling in *Black*, but has been cited by courts interpreting student speech in the time since *Black*. *See, e.g.*, Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 613, 617 (5th Cir. 2004), *cert. denied*, 125 S. Ct. 2530 (2005); Mahaffey v. Aldrich, 236 F. Supp. 2d 779, 786 (E.D. Mich. 2002).

119. *Pulaski*, 306 F.3d at 618, 626–27.

120. *Id.* at 624 (citing Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058, 1075 (9th Cir. 2002)).

121. *Id.* (citing United States v. Crews, 781 F.2d 826, 831–32 (10th Cir. 1986); Hawaii v. Chung, 862 P.2d 1063, 1071–73 (Haw. 1993)).

122. *Id.* at 624–25. The dissent argued that such logic "unreasonably stretches facts and law" and that Mahan did not intend to communicate the threat. *Id.* at 629 (Heaney, J., dissenting).

123. *Id.* at 624–26.

124. 393 F.3d 608.

125. *See supra* Part I.

126. 393 F.3d at 617.

else, and thus failed to meet that initial threshold.[127] In *Pulaski*, the expression was shared only with *one* friend, also within the home, yet the Eighth Circuit reached the opposite conclusion.[128]

Given the inconsistency of the Circuits in determining if a speaker has intentionally communicated a threat, school administrators lack a clear precedent upon which to model their own interpretation of what constitutes a threat.[129] Consequently, administrators are prone to classify virtually everything as a threat, regardless of its actual nature, and then allow the courts to sort it out later at the expense of taxpayers.[130] This is an inadequate remedy since students have only a finite time in high school. The immediate result of this trend is that students are stripped of First Amendment protections until courts restore their rights. An excellent example of this problem is embodied in the increased popularity of zero-tolerance policies in many schools.

B. Warning Signs and the Zero-Tolerance Policies That Risk Suppressing Them

One of the most significant developments affecting student speech rights is the increased adoption of "zero tolerance"[131] policies that empower school districts to automatically extend severe punishments in disciplining students for even a slight infraction of school rules regarding guns, alcohol, threats, and so forth.[132] Though they often relate to non-

127. *Id.* at 618.

128. *Pulaski*, 306 F.3d at 619, 624.

129. As seen in the discussion of on-campus and off-campus speech, administrators are again denied a clear rule to follow in that regard.

130. *See, e.g.*, Torsten Ove, *Court Rules School Policy Violates Pupils' Free Speech*, PITTSBURGH POST GAZETTE, Feb. 28, 2003, at E7 (describing a $60,000 settlement stemming from a lawsuit over student expression).

131. According to a recent A.B.A. Report,

> "Zero tolerance" is the phrase that describes America's response to student misbehavior. Zero tolerance means that a school will automatically and severely punish a student for a variety of infractions. While zero tolerance began as a Congressional response to students with guns, gun cases are the smallest category of school discipline cases. Indeed, zero tolerance covers the gamut of student misbehavior, from including "threats" in student fiction to giving aspirin to a classmate. Zero tolerance has become a one-size-fits-all solution to all the problems that schools confront. It has redefined students as criminals, with unfortunate consequences.

RALPH C. MARTIN, AM. BAR ASS'N, ZERO TOLERANCE POLICY: REPORT (2001), *available at* http://www.abanet.org/crimjust/juvjus/zerotolreport.html.

132. *See* Lynda Hils, *"Zero Tolerance" for Free Speech*, 30 J.L. & EDUC. 365 (2001); Margaret Graham Tebo, *Zero Tolerance, Zero Sense*, A.B.A. J., Apr. 2000, at 40, 40–46, 113.

speech behavioral elements exceeding the scope of this Comment, such policies illustrate one extreme approach in reaction to school violence.

In theory, a zero-tolerance policy for any speech considered to be threatening can help rid schools of potentially violent students.[133] Unfortunately, "these same policies [can] stifle a young voice that may be crying for help, or trying to show society its inadequacies, or merely expressing anger through creative expressions."[134] The American Bar Association officially opposes zero-tolerance policies as "one size fits all" policies that "eliminate the common sense that comes with discretion and, at great cost to society and to children and families, do little to improve school safety."[135] Such polices have enjoyed increasing popularity[136] despite the fact that homicides in school are, in fact, very rare events. A recent congressional report asserts that "[i]n the case of youth violence, it is important to note that, statistically speaking, schools are among the safest places for children to be."[137] In any given year, a student is three to four times more likely to be hit by lightning than to be the victim of violence in school.[138] Yet an atmosphere of fear has become pervasive in the nation's schools.[139] Fueled by media hype, fear of the unthinkable and, perhaps, a bit of guilt,[140] more parents are demanding that school boards implement strict policies to deal with kids

133. MARTIN, *supra* note 131.

134. Hils, *supra* note 132, at 365.

135. MARTIN, *supra* note 131.

136. The general idea seems to be that if any suggestion of violence is summarily cast out of the school environment, the school is that much safer. Unfortunately, this logic is flawed, as seen by the tragic events following Kip Kinkel's expulsion from high school, and other similar events. *See infra* notes 149–50 and accompanying text. Expulsion does not prevent a student from returning to campus with a weapon. In fact, as attested to by many school shootings such as Columbine, the shooters did not shoot in the midst of taking classes. Instead, the students typically began shooting as soon as they arrived on campus. *See, e.g.*, *supra* note 16.

137. Bipartisan Working Group on Youth Violence, 106th Congress, Final Report, Nov. 17, 1999, *available at* 9, http://www.house.gov/scott/bipartisan_working_group_youth_violence_106th_final.pdf. Further discussion of this actuality is provided by the A.B.A.:

> Nationwide, statistics gathered by the Justice Policy Institute and the U.S. Department of Education show that crime of all sorts is down at public schools since 1990—some studies say by as much as 30 percent. Less than 1 percent of all violent incidents involving adolescents occur on school grounds. Indeed, a child is three times more likely to be struck by lightning than to be killed violently at school.

MARTIN, *supra* note 131.

138. Johanna Wald, *The Failure of Zero Tolerance*, SALON, Aug. 29, 2001, http://www.salon.com/mwt/feature/2001/08/29/zero_tolerance/index.html.

139. *See generally* Lewis, *supra* note 10, at 336.

140. Many school shooters came from troubled homes or exhibited warnings signs that went unheeded by their parents.

who step out of line.[141] Unfortunately, the zero-tolerance policies being implemented across the country are snaring large numbers of regular kids in the broad nets designed to fish for safety threats.[142]

Significantly, many school shooters have exhibited warning signs in anticipation of the attacks.[143] One school shooter wrote a series of violent poems before actually committing violence:

> Am I insane
> To want to end this pain
> To want to end my life
> By using a sharp knife
>
> . . . .
>
> Am I insane
> Wanting to spill blood like rain
> Sending them all to Hell
> From humanity I've fell.[144]

The teacher who read the poetry recommended the student receive help, but the student did not receive help and subsequently killed two adults at his school.[145] Another troubled student wrote:

> "Murder"
> It's my first murder
> I'm at the point of no return

141. MARTIN, *supra* note 131.

142. *Id.* (quoting Tebo, *supra* note 132, at 40, 40–46, 113.). The A.B.A. Report includes various examples of students unjustly caught in the net of zero tolerance. The following are two such examples:

> In Ponchatoula Louisiana, a 12-year-old who had been diagnosed with a hyperactive disorder warned the kids in the lunch line not to eat all the potatoes, or "I'm going to get you." The student, turned in by the lunch monitor, was suspended for two days. He was then referred to police by the principal, and the police charged the boy with making "terroristic threats." He was incarcerated for two weeks while awaiting trial. . . . In Denton County, Texas, a 13-year-old was asked to write a "scary" Halloween story for a class assignment. When the child wrote a story that talked about shooting up a school, he both received a passing grade by his teacher and was referred to the school principal's office. The school officials called the police, and the child spent six days in jail before the courts confirmed that no crime had been committed.

Id.

143. *See* Sarah E. Redfield, *Threats Made, Threats Posed: School and Judicial Analysis in Need of Redirection*, 2003 BYU EDUC. & L.J. 663, 666.

144. *Id.* at 666–67.

145. *Id.* at 667.

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.[146]

The teacher who received this poem did not tell a counselor or an administrator about it. The student proceeded to shoot two students and a teacher at his middle school.[147] As evidenced by these instances and others like them,[148] warning signs do exist, and administrators would be remiss to ignore them. The appropriate reaction to a warning sign is counseling, investigation, and due caution, not punishment. Under a zero-tolerance policy, a student would be discouraged from letting any school officials see such work, thus limiting the school's ability to help.

In the instances above, the absence of a zero-tolerance policy encouraged the students to submit their work and, consequently, the warning signs surfaced. The problem came when the warning signs went unaddressed. Schools must encourage speech and be prepared to respond appropriately when warning signs appear. Had the appropriate authorities met with the students and their families and contextualized the poems, they could have learned of the legitimate danger and dealt with it, thereby averting tragedy. In contrast to these cases in which the warning signs surfaced, experience demonstrates that a zero-tolerance policy that immediately suspends or expels a student might not actually create a safer environment. Consider the following examples.

Kip Kinkel, a high school freshman, was immediately expelled from school after being caught storing a gun in his locker—a clear violation of his school's zero-tolerance policy.[149] He murdered both his parents that night and returned to school the next day, killing two classmates and wounding twenty-five others.[150] More than punishment when initially caught with the gun, Kip Kinkel needed help, counseling, and

146. *Id.* (quoting *Youth's Poems*, CINCINATTI POST, Web ed., Nov. 10, 1998, http://www.cincypost.com/news/1998/write111098.html.).

147. *Id.* at 668.

148. The recent shootings at Red Lake are a particularly disturbing and effective example. In the days following the shootings, various warning signs—from a shockingly violent flash animation the killer made, to his personal website that suggested school shootings in the near future, and his open admiration of Hitler and a previous school shooter—came to light, begging the question: how were these warning signs ignored?

149. Frontline, The Killer at Thurston High: Chronology, http://www.pbs.org/wgbh/pages/frontline/shows/kinkel/kip/cron.html (last visited Nov. 3, 2005).

150. *Id.*

intervention.[151] When the school took a hard-line stance with him, he reacted violently and the warning sign he exhibited remanifested itself as an attack. Granted, it is impossible to know whether the violence would still have occurred without the expulsion—it seems illogical to believe that the expulsion *caused* his reaction, rather than merely serving as the trigger for what had been long coming. However, the fact remains that Kinkel's actions presented the school with a clear warning sign, and the school still chose punishment over counseling. The end result was violence.

In contrast, a seventeen-year-old Arkansas honor student's college scholarship was endangered by a forty-five-day sentence to an alternative school when an arbitrary search of his car by school officials revealed no drugs, but a scraper and pocketknife that his father had inadvertently left the night before after fixing a mirror.[152] Despite his desperate father's pleas, the school system adamantly insisted on sustaining its zero-tolerance policy.[153] While both of these examples pertain to a zero-tolerance policy in the weapons context, the same basic idea is true in a speech context as well: zero tolerance is overinclusive so as to unduly punish the harmless, while failing to actually prevent violence.

C. Guidelines To Determine When Danger Exists

If traditional, legal threat analysis is inadequate, and zero-tolerance policies ineffective, the question becomes: how *should* risks be identified in schools? Steps have been taken to properly identify and respond to legitimate threats. The United States Secret Service and the United States Department of Education jointly produced *Threat Assessment in Schools: A Guide to Managing Threatening Situations and to Creating Safe School Climates* ("Guide").[154] As expected, the joint report upon which the Guide was based found that some school attacks may indeed have been preventable.[155] The resultant Guide represented a modification of the Secret Service threat assessment process—first pioneered as a way of assessing threats against the President of the United States and other protected officials[156]—based upon findings from the *Safe School*

151. Punishment was also certainly appropriate given that Kip Kinkel had a firearm on campus. However, even when punishment is appropriate, it should be accompanied by help.

152. Wald, *supra* note 138.

153. *Id.*

154. FEIN ET AL., *supra* note 23.

155. *Id.* at 4.

156. *Id.* at 4–5.

Initiative.[157] The Guide suggested eleven key questions to use in assessing a threat:

1. What are the student's motives and goals?
2. Have there been any communications suggesting ideas or intent to attack?
3. Has the subject shown inappropriate interest in [school attacks or attackers, weapons, or incidents of mass violence]?
4. Has the student engaged in attack related behaviors?
5. Does the student have the capacity to carry out an act of targeted violence?
6. Is the student experiencing hopelessness, desperation, and/or despair?
7. Does the student have a trusting relationship with at least one responsible adult?
8. Does the student see violence as an acceptable or desirable or the only way to solve problems?
9. Is the student's conversation and "story" consistent with his or her actions?
10. Are other people concerned about the student's potential for violence?
11. What circumstances might affect the likelihood of an attack?[158]

A key principle underlying these suggested questions is the importance of properly contextualizing each perceived threat or warning sign, rather than viewing the incident isolated from other potentially mitigating elements such as a happy home life, an even temperament, or strong adult role models.[159] It is important that school administrators deal with each event rationally on a case-by-case basis rather than by overreacting or applying the blanket response mandated by a zero-tolerance policy.[160] These proposed questions are not binding law,[161] and educators are under no legal duty to follow them. However, by using

157. *Id.* The *Safe School Initiative* was a joint study conducted by the Secret Service and the Department of Education. The study examined thirty-seven incidents of targeted school violence that occurred in the United States from December 1974 through May 2000 when researchers concluded their data collection. *Id.* at 11.

158. *Id.* at 63–66.

159. *Id.*

160. *See id.* at 32.

161. No court has yet adopted these rules in analysis.

questions such as these—as discussed in the following analysis[162]—and by doing so on a case-by-case basis, educators can make considerable strides towards improving school safety while continuing to protect student speech rights.

IV. BRIGHT-LINE RULES AND THREAT ASSESSMENT GUIDELINES

It is difficult to achieve a balance between the duty of educators to assure the safety of a school and the speech rights of students. The perception of school violence may be worse than the reality of school violence, but it is nevertheless a valid concern.[163] Many past shooters left warning signs,[164] and, in retrospect, some instances of violence were preventable.[165] The First Amendment should never be used to insulate legitimate threats or warning signs from appropriate response. Educators must respond quickly and decisively lest a warning sign be missed and another tragic act of violence occur. At the same time, however, it is important that students who pose no actual threat not be inadvertently caught up in an overly broad net meant to avert the next Columbine or Red Lake massacre. Consequently, school administrators' evaluations of student threats and warning signs should be viewed as a two-step process:
(1) determining whether it is within their jurisdiction (the on-campus/off-campus question), and if so, (2) determining if it actually threatens school safety.[166] These two clarifications of the law and procedure simplify the duty of violence prevention for educators, protect student speech, and—through the additional warning signs that will surface in the increased flow of student speech—provide for greater school safety.

162. *See infra* Part IV.

163. School shootings may indeed be rare in proportion to the total number of students attending American high schools. However, many other things, such as terrorist attacks, are similarly rare in proportion. Such a fact does not detract from the importance of preventing such attacks.

164. *See* Redfield, *supra* note 143, at 666.

165. *See* FEIN ET AL., *supra* note 23, at 4.

166. This is a subtle, but important, distinction; determining whether something actually "threatens school safety" is distinct from determining whether something is "a threat." A "threat," as it has been discussed here, is essentially a legal term only, separating a category of speech as less protected, regardless of whether or not it actually endangers safety. In contrast, something that actually threatens school safety is a very legitimate danger, often foreshadowed by warning signs. By focusing exclusively on the legal concept of a "threat," the real danger to schools is unaddressed. Many warnings signs, for example, might not actually be communicated intentionally and would thus evade a "threat" classification.

A. Bright Line Rules Distinguishing Between In-School/Out-of-School Speech

1. The proposal

The difference between "in-school" and "out-of-school" speech is simple, at least semantically, yet is prone to over-analysis: "in-school," or "on-campus," means that the speech is physically on campus or at a school-sponsored event, and "off-campus" means the speech is physically off campus, isolated from any school sponsored event.[167] On-campus speech is speech that occurs on campus or speech that is created in a fixed form—writing, drawings, and so forth—off campus and brought to campus according to the direct will of its creator.[168] This definition of on-campus speech excludes speech made in a tangible fixed form that remains off campus and speech brought to campus without its creator's direct intent.

2. How the bright-line distinction will affect the analysis and procedure for administrators addressing perceived dangers

Acknowledging the increasing prevalence of internet communication, school administrators should treat any electronic communications as off-campus speech unless its speaker downloads it on campus or encourages other students to do so.[169] This is the same standard described in *Thomas v. Board of Education*, which asserted "that the arm of authority does not reach beyond the schoolhouse gate."[170] The allowance for "substantial disruption within the school from some remote locale"[171] has extended the reach of the arm of school authority well beyond the schoolhouse gate and into students' homes.[172]

167. *See also* Thomas v. Bd. of Educ. 607 F.2d 1043, 1044 (2d Cir. 1979). *See generally* Calvert, *supra* note 19, at 271.

168. This is my own synthesis of the existing law, as discussed in Parts II.A and II.B, and how the law should be ideally.

169. Calvert, *supra* note 19, at 285.

170. 607 F.2d at 1044–45.

171. *Id.* at 1052 n.17.

172. By haphazardly characterizing otherwise obviously off-campus speech as "on-campus speech" because it might potentially trigger on-campus disruption, virtually any off-campus speech can be reclassified as on-campus. This is because, given the expansive definition of what is an objectively reasonable belief for an educator in the wake of school shootings, virtually any speech may be treated as possessing such threatening potential. For instance, giving "the finger" to a teacher off campus may so disturb the teacher that he or she is unable to adequately teach class, thus causing

Including the "substantial disruption within the school from some remote locale" concept in defining on-campus and off-campus speech is particularly problematic because of the post-Columbine climate of fear lingering in America's schools.[173] Educators are aware of the warning signs predicting previous school shootings[174] and are prone to interpret any hint of violence as foreshadowing on-campus violence, thus putting any speech at risk of creating "substantial disruption within the school." Such logic collapses the on- and off-campus distinction: if educators plausibly see any mention of violence as potentially causing on-campus disruption, the speech is susceptible to on-campus regulation, and student speech rights vanish.

Since on-campus speech is offered less protection than off-campus speech,[175] wrongly classifying off-campus speech deprives otherwise protected speech of the protection it deserves. [176] Lesser protection is based on the presumption that the school administration will not reach beyond school premises to exact punishment and that students are thus able to fully enjoy speech rights away from school.[177] This presumption is demonstrated, for example, in the context of school uniforms.[178]

In *Canady v. Bassier Parish School Board*, the Fifth Circuit noted that while "students are restricted from wearing clothing of their choice at school, [they] remain free to wear what they want after school hours."[179] If a school policy mandated specific student dress at *all* times, in or out of school, it would not pass constitutional muster.[180] Yet, with

on-campus disruption. Alternately, rumors of such an incident occurring could lead to a widespread lack of respect within the school for that teacher, again leading to disruption when the teacher is unable to control the classroom.

173. *See supra* note 10 and accompanying text. Such fear was no doubt reinvigorated by the Red Lake shootings.

174. *See* Redfield, *supra* note 143, at 666.

175. *See, e.g.*, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (upholding regulation of student speech that is related to school sponsored activities); Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986) (upholding regulation of student speech that is lewd, vulgar, obscene, or plainly offensive); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (prohibiting viewpoint-specific regulations unless the regulated speech substantially interferes with the work of the school); Canady v. Bossier Parish Sch. Bd., 240 F.3d 437 (5th Cir. 2001) (upholding regulations which further substantial government interest unrelated to the suppression of student expression).

176. *See supra* Part II.B.

177. *See supra* note 45 and accompanying text.

178. *See Canady*, 240 F.3d at 443.

179. *Id.*

180. Such a regulation would prevent students from expressing themselves through their attire, a practice which the *Canady* court assumed to be valid expression. *Id.* at 443.

regard to student speech, the "potential disruption" standard amounts to precisely such omnipresent enforcement. If school administrators regulate a student's off-campus expression as on-campus speech by virtue of "potential disruption," the in-school context will be extended to the out-of-school context and the student has no forum, on campus or off, to express himself.

Of course, freedom of speech is not absolute,[181] and a legitimate threat is not protected from prosecution,[182] whether on or off campus. When such speech exists entirely off campus, however, it should still be treated properly as off-campus speech[183] and be under the jurisdiction of law enforcement instead of school administration. The law provides remedies for threats made in any locale, and if the threat is legitimate, police can intervene.[184] Educators can, and should, still take nonpunitive steps to reach out to that student and prevent violence. They can allow off-campus law enforcement to address legitimate threats and use their unique vantage point as educators to help a student without resorting to punishment as a weapon. Consequently, a clear line of demarcation can be established between on-campus and off-campus speech that expressly designates speech neither created on nor intentionally brought to campus as off-campus speech.[185] Such a clarification will better enable educators to make quick, decisive appraisals of situations that arise[186] while sparing the school district the litigation expenses that could otherwise result.[187] A clear delineation of off-campus and on-campus speech—such as that proposed[188]—will better enable educators to delegate responsibility for threatening off-campus speech to appropriate law

181. *See supra* notes 86–105 and accompanying text.

182. *See supra* note 86 and accompanying text.

183. This does not mean that warning signs should be ignored. It merely means that if it is a threat, the police should be notified. If it is a warning sign, appropriate, nonpunitive steps should be taken to help the student and solve the problem. Punishment is not the cure for warning signs.

184. *See* Calvert, *supra* note 19, at 285 (articulating that "off-campus remedies exist for off-campus expression").

185. Punishing a student who cheats, for example, by sharing answers with his classmates, would not be implicated by this standard since such behavior would be punished as conduct—cheating—rather than as speech.

186. By applying clear standards to determine if the school has jurisdiction, administrators will be able to delegate off-campus enforcement to the police and focus their own time and resources on on-campus issues.

187. *Supra* note 130.

188. *See* Part IV.A. Speech that occurs on campus, or is created in a fixed form off campus and subsequently brought to campus according to the direct will of its creator, is on-campus speech.

enforcement agencies who can investigate further.[189] As a result, school resources will be available to address actual on-campus issues, rather than wasting time and effort unnecessarily policing off-campus activity.

Ideally, a clear definition of on-campus versus off-campus speech would be established via Supreme Court precedent.[190] In the absence of such a precedent, however, school districts—or even state legislatures—can proceed in establishing internal rules governing and defining the on-campus/off-campus distinction.[191] By establishing a clear definition that classifies speech neither created on nor intentionally brought to campus as off-campus speech, the district or legislature will be operating comfortably within the parameters already established by courts[192] that immunize the jurisdictional component of the school response against extensive litigation.[193] Educators will be better able to focus on the remaining speech that is properly classified as on-campus, which will lead to administrators missing fewer warning signs and paying more careful attention to troubled students. Of course, administrators will still need to evaluate that on-campus speech. It is in that regard that the implementation of threat assessment guidelines will be beneficial.[194]

189. Police agencies, unencumbered by the educational tasks faced by schools, can likely perform a more in-depth, comprehensive threat assessment. Furthermore, whereas students can be expelled or suspended without due process, any police action is subject to due process, assuring a greater protection of the students' rights.

190. As witnessed by the problems of dueling circuits, any judicial precedent short of the Supreme Court may merely add to the confusion faced by educators. *See supra* notes 73–78 and accompanying text (discussing the *Emmett* and *Killion* decisions).

191. Such internal rules have already been adopted with respect to zero-tolerance policies and other measures. See the discussion of zero-tolerance policies in Part III.

192. *See* Part II.B.

193. Contrast this with the litigation discussed throughout this Comment.

194. It would also be an excellent idea for law enforcement and courts to adopt similar guidelines in evaluating threats made by juveniles. Although beyond the scope of this Comment, the adoption of such policies would recognize the significant differences between adult and adolescent styles of communication. As discussed at greater length in the next Part, adolescent communication is inevitably colored by a variety of variables, ranging from popular culture to typical adolescent stresses, anxieties, and insecurities that accompany the teen years.

B. The Implementation of Threat Assessment Guidelines in Lieu of the Traditional "Threat" Analysis

1. The proposal

To properly evaluate student threats, a more comprehensive system of threat evaluation is needed.[195] An ideal policy or set of guidelines will resemble the eleven questions set forth by the Secret Service and Department of Education.[196] The questions represent a multi-faceted approach securely placing a student's expression within the larger context of his life rather than isolating the speech from all other variables and interpreting it through a prism darkened by fear of school violence. The inclusion of language addressing and acknowledging the inherently hyperbolic nature of adolescent speech as well as the influence of popular culture, particularly music, on their verbal expression would also

195. In addition to the Secret Service proposed questions, other approaches exist. The National School Safety Center created a profile of behaviors that could indicate a youth's propensity for violence against others based on characteristics of those who have already committed such crimes. *Checklist of Characteristics of Youth Who Have Caused School-Associated Violent Deaths*, National School Safety Center, http://www.nssc1.org/reporter/checklist.htm (last visited Nov. 3, 2005).

"The 20-item checklist includes drug abuse, tantrums, threats, depression, truancy, cruelty to animals and a fascination with weapons and violence that spills over into schoolwork." Mike Anton & Lisa Levitt Ryckman, *In Hindsight Signs of Danger Were Apparent*, ROCKY MTN. NEWS, May 2, 1999, at 4A. Such profiles, however, can be problematic since they often apply to many teenagers who never become violent—every loner sitting alone at lunch or heavy-metal fan dressed in black is not a potential shooter. A report by the U.S. Surgeon General asserts that "[n]o single risk factor or set of risk factors is powerful enough to predict with certainty that youths will become violent." U.S. DEP'T OF HEALTH & HUMAN SERVS., YOUTH VIOLENCE: A REPORT OF THE SURGEON GENERAL 61 (2001), *available at* http://www.surgeongeneral.gov/library/youthviolence/index.html.

The National Center for the Analysis of Violent Crime of the Federal Bureau of Investigation's Critical Incident Response Group also published its findings regarding threat evaluation. The report states in part,

> In the shock-wave of recent school shootings, [the severe] reaction may be understandable, but it is exaggerated—and perhaps dangerous, leading to potential underestimation 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."

Mary Ellen O'Toole, CRITICAL INCIDENT RESPONSE GROUP, THE SCHOOL SHOOTER: A THREAT ASSESSMENT PERSPECTIVE 5 (2000) *available at* http://www.fbi.gov/publications/school/school2.pdf. The report defines a true threat as "an expression of intent to do harm or act out violently against someone or something." *Id.* at 6. Unfortunately, such a simple definition would be just as problematic to free speech as the current approaches courts use. Further, it might be underinclusive regarding safety as it fails to consider other factors that indicate potential violence.

196. *See* FEIN ET AL., *supra* note 23, at 63–66.

be helpful.[197] The impact of violent music on adolescent *expression* is pertinent and also should be considered.[198] In short, all violence is not created equal. Educators and courts need a clear, uniform way to distinguish true threats and actual warning signs from violent yet harmless adolescent speech.

2. How it will affect the procedure and analysis

In order to explain how the guidelines will affect the procedure and analysis, one must look to the unique nature of adolescent speech. Most teenagers communicate differently than adults. The teen years are a difficult period punctuated with bouts of self-doubt, insecurity, and anger toward authority.[199] This phenomenon is emphasized by many teens' tendency to speak in hyperbole, characterizing each event in their lives as critical, pivotal, or otherwise earth-shattering.[200] Teens' verbal communication—both oral and written—is often colored by the media they consume.[201] "Today's lingo is largely a by-product of hip hop, filtered through rap music with the predictable undertow of anti-mainstream culture."[202] "Let's bounce" means "let's leave," jewelry is referred to as "bling bling," money as "chedda," and friends are "dawg[s]."[203] Given the increasingly violent tone of music,[204] the

197. *See infra* notes 200–09 and accompanying text.

The impact of music with lyrics promoting violence on adolescent behavior, though briefly discussed below, exceeds the scope of this Comment. *See, e.g.*, *An Examination of the Entertainment Industry's Efforts To Curb Children's Exposure to Violent Content: Hearing Before the Subcomm. on Telecommunications and the Internet of the Comm. on Energy and Commerce*, 107th Cong. (2001); U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 195, at 85–94; TELEVISION VIOLENCE AND PUBLIC POLICY (James T. Hamilton ed., 1998). *See generally* Robert Corn-Revere, *Regulating TV Violence: The FCC's National Rorschach Test*, COMM. LAW., Fall 2004, at 1.

198. *See, e.g.*, *infra* notes 200–09 and accompanying text.

199. *See* Kelly O'Rourke, *"I Have To Change!" The Role of the Adolescent in the Family*, *in* Yale-New Haven Teachers Institute, *in* CURRICULUM UNIT: THE FAMILY IN LITERATURE (1986), *available at* http://www.yale.edu/ynhti/curriculum/units/1986/1/86.01.07.x.html.

200. *See generally* Raymond W. Gibbs, *Irony in Talk Among Friends*, 15 METAPHOR & SYMBOL 5 (2000).

201. *See generally* Michael Newman, *I Represent Me: Identity Construction in a Teenage Rap Crew*, 44 TEX. LINGUISTIC FORUM 388 (2001), *available at* http://studentorgs.utexas.edu/salsa/salsaproceedings/salsa9/papers/newman.pdf.

202. *See* Jennifer Wells, *Generation Rap: A Pocket Lexicon of Teen Lingo*, TODAY'S PARENT, Aug. 2003, at 87, *available at* http://www.todaysparent.com/preteen/behaviordevelopment/article.jsp?content=20030708_110619_892.

203. *Id.*

persuasion of popular media on teens' thoughts inevitably injects an undercurrent of violence into many teens' communication—an undercurrent which, though probably just harmless imitation of their favorite musician, may alarm already nervous educators.

In the song *Kim*, popular rapper Eminem graphically depicted the fictional murder of his real-life wife.[205] Amidst the torrent of profanity riddled lyrics depicting the wife's violent death, Eminem included various disturbing references. For example:

> So now they both dead and you slash your own throat
> So now it's double homicide and suicide with no note
> . . . .
>
> You can't run from me Kim
> It's just us, nobody else!
> You're only making this harder on yourself
> Ha! Ha! Got'cha!
> [screaming]
> Ha! Go ahead yell!
> Here I'll scream with you!
> AH SOMEBODY HELP!
> Don't you get it b____, no one can hear you?
> . . . .
> You were supposed to love me
> [sound of Kim choking]
> NOW BLEED! B____ BLEED!
> BLEED! B____ BLEED! BLEED![206]

The album in which *Kim* appeared, *The Marshall Mathers LP*, sold nearly eight million copies, making it the second best selling album of 2000,[207] and won a Grammy award for best rap album.[208]

204. Rap music has grown increasingly violent over the past decades, evolving from relatively innocuous artists such as Grandmaster Flash and the Sugarhill Gang, to more sinister acts such as N.W.A. and 2Pac, to recent performers such as Eminem and 50 Cent, who often boasts of his violent background and the number of times he has been shot.

205. For a discussion of the song, see Toure, *Recordings: The Marshall Mathers LP*, ROLLING STONE, July 6, 2000, at 135 *available at* http://www.rollingstone.com/reviews/album/_/id/315749.

206. EMINEM, *Kim*, *on* THE MARSHALL MATHERS LP (Aftermath Records 2000). Lyrics are available at http://www.anysonglyrics.com/lyrics/e/eminem/kim.htm.

207. *Record Sales Up 4% in 2000—Despite Napster & MP3.com*, AVREV.COM, Jan. 3, 2000, http://www.audiorevolution.com/news/0101/03.soundscan.shtml. In total sales, Eminem trailed only teen-pop group 'N Sync. *Id.*

Not surprisingly, the lyrics of *Kim* are comparable to the letters written by eighth grader Josh Mahan in *Pulaski*.[209] Many of Mahan's lyrics, written during the summer of 2000[210] when Eminem's album ruled the music charts, are strikingly similar to *Kim*:

> My hatred and aggression will go towards you, you better run b____, 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. . . .[211]

While not savory, the lyrics reflect the musical tastes of a generation. Yet, despite this seemingly obvious imitation of a teenager's favorite musician, the school administration expelled Josh from school and the Eighth Circuit deemed the song a true threat.[212] Had an adult written such lyrics, as Eminem did, it might indeed be more appropriate to treat it as a valid threat. Of course, Eminem instead won a Grammy.[213] However, it would be reasonable to conclude that the eighth grader was merely frustrated by a breakup with his girlfriend and was expressing his feelings the best way he knew: rap, modeled after the example set by his role model, Eminem.[214] By all means, the song is reason for concern and should be given appropriate attention. But, it is important to acknowledge that Mahan's concept of socially acceptable communication was affected by the Eminem song. The dissent in *Pulaski* recognized this fact, writing that Josh Mahan

> thought Eminem's lyrics were the best source of inspiration for his catharsis. Today's teenagers witness, experience, and hear violence on television, in music, in movies, in video games, and for some, in abusive relationships at home. It is hardly surprising that such violence

208. *See* Grammy Awards Web Page, http://www.grammy.com/awards/search/index.aspx.

209. Doe v. Pulaski, 306 F.3d 616, 619, 625 (8th Cir. 2002).

210. *Id.* at 620.

211. Redfield, *supra* note 143, at 731 n.291 (quoting Jones v. State, 64 S.W.3d 728, 730 (Ark. 2002)).

212. *Pulaski*, 306 F.3d at 620, 626.

213. This discussion is not meant to suggest that the mere fact a potential threat is modeled after song lyrics should defeat the threat analysis. However, where a song is particularly popular—as *Kim* was—and the "threat" is obviously an imitation, it should certainly affect the analysis. Where in the past, youth might have modeled their musings over failed romance after Beatles or Billy Joel lyrics, today's generation instead turns to rap. Consequently, they are expressing their feelings in a decidedly more violent way—regardless of whether or not they actually intend to cause any harm.

214. This characterization parallels that set forth by the dissenting opinion in *Pulaski*. *See Pulaski*, 306 F.3d at 631 (Heaney, J., dissenting).

> is reflected in the way they express themselves and communicate with their peers, particularly where adult supervision is lacking.[215]

Of course, it would be a massive error to automatically exonerate any violent teenage speech as merely the imitation of popular music. Teenagers are not mindless drones simply repeating the lyrics they hear pumping out of their iPods; they know the music is violent. In many cases—though not necessarily all cases—they recognize the music might not be socially acceptable in all contexts. Nevertheless, the fact that Eminem and other popular performers express themselves violently certainly makes such expression more acceptable in the minds of some teenagers. Thus, it is also an error to automatically interpret such speech as a threat. The music that influences teenagers at least must be considered.

To avoid the misclassification of innocuous teenage communication as a threat, threat assessment guidelines should accommodate the unique nature of adolescent communication. The eleven key questions suggested by the Secret Service and Department of Education when assessing a threat allow for such an accommodation.[216] In contrast, as shown in the ensuing analysis, the five-factor test[217] proposed by the Eighth Circuit in *Dinwiddie* is too easily swayed by post-Columbine fears.[218] Consequently, the *Dinwiddie* test is more prone to a false positive. While these certainly are not the only two options, a comprehensive evaluation of all the possible approaches is impractical. Hence, *Dinwiddie* is used as an example of typical court approaches, and the Secret Service questions provide a superior option. The contrast of these two approaches[219] is illustrated by retrospectively applying both tests to three specific examples of varying threat: *Porter*,[220] *Pulaski*,[221] and the tragedy of

215. *Id.*

216. *See supra* note 158 and accompanying text.

217. *Supra note* 104 and accompanying text. The five factors are (1) the reaction of those who heard the alleged threat; (2) whether the threat was conditional; (3) whether the person who made the 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. United States v. Dinwiddie, 76 F.3d 913, 925 (8th Cir. 1996).

218. As previously discussed, this problem is also true with court approaches that look to the impact a reasonable speaker would foresee.

219. To simplify this analysis, I am using the *Dinwiddie* test with its five factors rather than the reasonable speaker tests. Regardless, I believe that the application of that approach would also succumb to the subjectivity inherent in this context.

220. 393 F.3d 608, 611 (5th Cir. 2004).

Columbine.[222] Admittedly, three cases is a very small sample from which to draw conclusions, and the analysis is inevitably affected by the actions of school officials.[223] Nevertheless, the following three cases provide at least a minimal framework through which to evaluate the different tests.

In *Porter*, most of the Secret Service questions[224] can be readily answered in the negative and, thus, the conclusion is easily reached that no threat existed. Adam's goals in drawing the imaginary siege of his school were likely to express his frustration with school and vent anger. There were no communications suggesting intent to attack, and Adam had not exhibited any interest in school attacks, weapons, or incidents of mass violence.[225] Adam had not engaged in attack-related behaviors. Although of adequate physical and mental capacities, according to the court proceedings, Adam had no access to weapons—aside from a box-cutter for his after-school job.[226] There was no indication of hopelessness, desperation, or despair, nor was there indication he saw violence as an acceptable way to solve problems. Adam had strong trusting relationships with adults. His depiction of events was inconsistent with his actions, and before the drawing surfaced, no one was concerned about his potential violence. By thus applying the Secret Service questions to Adam Porter's case, it is clear his drawing did not

221. 306 F.3d 616 (8th Cir. 2003).

222. *See supra* note 15.

223. In *Pulaski*, for example, the student was expelled from school after his speech was discovered—leaving unanswered the question of what might otherwise have happened.

224. Again, for the sake of convenience, the Secret Service questions are

1. What are the student's motives and goals?
2. Have there been any communications suggesting ideas or intent to attack?
3. Has the subject shown inappropriate interest in [school attacks or attackers, weapons, or incidents of mass violence]?
4. Has the student engaged in attack related behaviors?
5. Does the student have the capacity to carry out an act of targeted violence?
6. Is the student experiencing hopelessness, desperation, and/or despair?
7. Does the student have a trusting relationship with at least one responsible adult?
8. Does the student see violence as an acceptable or desirable or the only way to solve problems?
9. Is the student's conversation and "story" consistent with his or her actions?
10. Are other people concerned about the student's potential for violence?
11. What circumstances might affect the likelihood of an attack?

Supra note 158 and accompanying text.

225. *See Porter*, 393 F.3d at 611–12.

226. *Id.* at 612.

constitute a true threat to school safety. In contrast, the *Dinwiddie* test—with its emphasis on the perceptions of others—likely reaches a different conclusion.

While three of the factors of the *Dinwiddie* test would not be implicated—Adam had no history of making threats, did not communicate the threat directly, and the threat was not conditional—two important factors *would* be implicated: the reaction of those who heard the alleged threat and whether the recipient had reason to believe Adam had a propensity to engage in violence: in the wake of school shootings, the drawing itself provided sufficient reason to believe that its creator had a propensity for violence. Both of these factors are heavily influenced by the post-Columbine fears of educators.

Similar to Adam Porter, Josh Mahan's violent but harmless song lyrics in *Pulaski* would be spared extensive scrutiny and punishment under the Secret Service questions. His goal was likely to deal with anger and frustration stemming from a failed teenage romance.[227] He had neither engaged in nor shown interest in attacks. As a scrawny fourteen-year old without access to weapons, it can be argued Josh Mahan lacked the capacity to carry out attacks such as those described.[228] Virtually none of the other questions, applied to him, would suggest that he posed a legitimate threat. If nothing else, the obvious hyperbole of his lyrics should have lent additional credibility to the argument.[229] After all, Mahan boasted that he had already murdered his parents and, despite being a white youth in rural Arkansas, claimed to be a member of the Bloods, a predominately black gang.[230] While it could be argued that the lyrics represented a plan for who would be killed, it is too vague to maintain such a conclusion (there were no details such as when, or exactly how). Again, however, the same two *Dinwiddie* factors implicated in *Porter* are implicated here. Nervous educators could argue that since the song eventually reached the ex-girlfriend, direct communication took place.[231] Furthermore, given the context was a break-up, it could be reasoned the threat was conditional. Four of the five *Dinwiddie* factors would thus be implicated, resulting in a false positive in terms of threat assessment. Looking back in retrospect, however, as

227. *Pulaski*, 306 F.3d at 619.

228. *Id.*

229. *Id.* at 630 (Heaney, J., dissenting).

230. *Id.* at 631.

231. *Id.* at 624.

the dissent acknowledged, Josh Mahan did not pose a real threat to anyone.[232]

Applying the Secret Service questions to the Columbine shooters, Eric Harris and Dylan Klebold, the threat posed would be apparent immediately. As some observers noted, "the clues were there. The obsession with weapons, war and death. The endless rounds of bloody computer games. The vicious rantings on the Internet."[233] Their written communications crossed the line from expressing anguish to actually plotting the attack and setting forth detailed plans and goals of how many people would die.[234] While Harris and Klebold had not actually engaged in any attacks, they were enthralled with weaponry ranging from clubs and knives to pipe bombs and the guns they tried to purchase whenever possible.[235] Both young men threatened violence through the Internet and school assignments—violence was clearly an acceptable solution to them.[236] Interestingly, while the Secret Service questions would identify the pair as a risk, they would not necessarily be declared much more dangerous than Adam Porter under the *Dinwiddie* test.

Only three of the five factors in the *Dinwiddie* test are present in Harris and Klebold's case. The two factors implicated in *Porter* are also implicated for Harris and Klebold: the reaction of those who heard the alleged threat and whether the recipient had reason to believe the speaker had a propensity to engage in violence. Harris and Klebold had a history of making threats, but their threats were neither directly communicated nor conditional and, therefore, do not qualify as threats under this factor.[237] Consequently, applying the *Dinwiddie* analysis suggests a threat risk only marginally greater than that posed by Adam Porter and slightly lesser than that posed by heart-broken, rap-loving eighth grader Josh Mahan.

Of course, not all courts use the *Dinwiddie* test in evaluating threats.[238] However, the general principle illustrated by the application of *Dinwiddie* to the three cases above is that any test designed for adults—as most are—is inadequate when evaluating student threats in a school environment scarred by past violence. Further, reliance on a legal

232. *Id.* at 630 (Heaney, J., dissenting).

233. Anton & Ryckman, *supra* note 195.

234. *Id.*

235. *Id.*

236. *Id.*

237. *See id.*

238. *See supra* notes 126–28 and accompanying text.

definition of a true threat risks underinclusivity: teenage communications may fail the first threshold of intent to communicate, yet still be important warning signs that should be addressed. In short, it makes more sense—when dealing with teenage speech in the school context—to simply bypass the initial intent threshold to determine if speech constitutes a threat and focus instead on whether actual danger exists.

The current systems of threat evaluation used by courts are designed for a decidedly adult context, and because they neglect the existence of warning signs, the systems are woefully inadequate in the school context. The same problem is observed in educators who either model their own responses after the existing court approaches,[239] employ their own common-sense judgment colored by fear of school violence, or adopt the all-inclusive blanket approach of zero-tolerance policies.[240] The adoption of the Secret Service Guidelines will significantly improve educators' ability to identify when a true danger exists and respond effectively.

As with the on-campus/off-campus distinction, the best way to adopt a reasonable, youth-specific approach to threat appraisal is through binding court precedent.[241] In the absence of such precedent, however, legislatures and school districts have the ability to adopt clear guidelines administrators can follow.[242] Schools, administrators, and state and local governments have an interest in willingly adopting such policies because, in addition to preserving First Amendment rights, such policies also promise to be more effective in assuring school safety by encouraging speech—consequently increasing the opportunity to identify warning signs.[243]

C. Safety Benefits of These Proposals

By punishing speech that does not rise to the level of a "true threat," schools not only risk infringing on students' First Amendment rights but also risk stifling the voice of a potentially violent student. Threatening

239. *See supra* notes 129–30 and accompanying text.

240. *See supra* note 131.

241. *See supra* note 190 and accompanying text.

242. Similarly, law enforcement officials can also incorporate these principles into their own threat assessment process when dealing with youth.

243. *See supra* notes 106–30 and accompanying text. By producing false positives and failing to properly contextualize threats, other approaches risk excluding from scrutiny the most dangerous threats and focusing instead on non-threats. Further, zero-tolerance laws may be antithetical to the goal of school safety by suppressing warning signs that should be brought to the surface.

speech has little or no social value,[244] but some value exists in the warning of potential violence such speech provides. If a potentially violent student's voice is stifled by the threat of automatic punishment,[245] the risk of violence might worsen because the student may seek other methods of expression such as underground newspapers or Web sites, as was the case in the Red Lake shootings,[246] or the student simply might cease to outwardly express thoughts and feelings. Feelings of rage and angst might remain hidden until they make themselves known in more terrifying and tragic ways.

In contrast, if students are able to speak freely—like any adult—when away from school, and if their speech in school is not automatically subjected to punishment at the mere hint of frustration or anger, their communication with others will increase. With greater student speech, a student contemplating violence will be more likely to express his feelings. Warning signs will surface and, with the appropriate guidelines in place, can be dealt with. A danger known is much safer than a danger that goes unspoken until it is too late. In this regard, encouraging the open exchange of student speech is as vital to school safety as it is to First Amendment rights.

V. CONCLUSION

Balancing the need for school safety and the rights of students to express themselves is not an easy task. However, by implementing the suggested clarifications, safety and free speech can coexist and augment each other. Ultimately, this change consists of determining whether speech is on-campus or off-campus. By drawing this distinction tightly, educators will be able to focus on on-campus speech with greater diligence and resources, allowing law enforcement officials to properly regulate off-campus speech.

With their duties and responsibilities better defined, educators can then dedicate the necessary time and effort to evaluate each perceived danger carefully and on a case-by-case basis. While a blanket provision proclaiming zero tolerance may appeal to parents and educators initially,

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

245. See discussion of zero-tolerance policies in Part III.

246. For example, before the shooting rampage at Red Lake High School, sixteen-year-old Jeffrey Weise posted online a violent flash animation depicting a shooting. *See School Killer's Animated Terror*, *supra* note 13. The flash animation would not satisfy any of the required prongs to be a threat, yet it would serve as a legitimate warning sign, which would have triggered a response. The flash animation is one of several expressions of violence that Weise posted on an Internet site.

such a policy merely serves to suppress warning signs and protected speech alike. Such an approach offers little in terms of enhanced safety while eradicating the concept of student speech rights. Strong and decisive discipline is not necessarily the solution. Expelling or suspending a student does not preclude the student from returning to campus with a loaded gun. Rather, it serves to discourage open expression that can provide warning signs and thus an opportunity to prevent a violent outcome. As part of the evaluation process and subsequent response, it is critical that educators make sure troubled students receive the counseling and psychological help they need.[247] Effectively identifying warning signs will allow educators and law enforcement officials to respond accordingly by giving help and counseling to students and by lessening the possibility of violent outcomes. Rather than responding to school violence by stamping out all student speech rights, the more effective approach will encourage candid speech and effectively evaluate warning signs that surface in the flow of open communication.

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247. *See generally* Redfield, *supra* note 143.