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School Speech v. School Safety: In the Aftermath of Violence on School Campuses Throughout This Nation, How Should School Officials Respond to Threatening Student Expression?

Richard V. Blystone

SCHOOL SPEECH V. SCHOOL SAFETY: IN THE AFTERMATH OF VIOLENCE ON SCHOOL CAMPUSES THROUGHOUT THIS NATION, HOW SHOULD SCHOOL OFFICIALS RESPOND TO THREATENING STUDENT EXPRESSION?

Richard V. Blystone[*]

I. INTRODUCTION

The First Amendment is sometimes considered a "safety valve."[1] Through expression, one's frustration is less likely to resonate. What about student expression? What should a teacher or principal do if they are exposed to student expression that suggests that a student is going to engage in violent behavior—a poem wherein a student discusses raping a classmate, a song that contains lyrics that portray a teacher's head being struck with a sledgehammer, or a painting that depicts a school decimated by an explosion? Are students who convey themselves in this manner simply expressing their artistic tendencies, joking around, or is there real cause for concern?

In the wake of an epidemic of violence in this nation's schools, it is imperative that we discuss alternatives to the present approach of how schools handle potentially dangerous student expression. Part I of this article will address some of the difficulties school administrators and teachers face when weighing students' First Amendment freedoms against a school's fundamental interest in providing a secure

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[*] The author, J.D., 2005, Nova Southeastern University, is an associate with Moran & Shams, P.A., in Orlando, Florida. He would like to specially thank Professor Ronald Benton Brown, Assistant Professor Stephanie Aleong, and Jennifer Kopf for their guidance and contributions on this project.

1. *E.g.* Eisner v. Stamford Bd. of Educ., 314 F. Supp. 832, 836 (D.Conn. 1970).

environment that is conducive to learning. Part II of this article addresses national statistics on school violence. Part III of this article addresses "leakage"—the concept that students often leave clues that forecast that they plan to engage in future violent acts. Part IV of this article addresses the true threat doctrine; and the author explains that upon establishing that student expression represents a true threat, school administrators can and must act quickly and decisively to preempt future violence, even where a student has engaged in otherwise protected speech. Part V of this article introduces the *Tinker* standard and its progeny, which provide an alternative basis for intervention against students who engage in threatening expression. Part VI of this article addresses due process concerns implicated by documenting school records, suspending, or expelling students who engage in threatening or disruptive expression. The author will then conclude by arguing that given the violent landscape, school teachers, faculty, and administrators should be given the broadest discretion permissible under the law to intervene when student speech is perceived as threatening or disruptive.

II. THE INCIDENCE OF SCHOOL VIOLENCE

National statistics indicate that the incidence and severity of school violence is something with which we should be vitally concerned. In 2004-2005, there were thirty-nine school-related violent deaths.[2] In 2001, two million nonfatal acts of school violence were directed at students between twelve and eighteen years of age; and between 1997 and 2001, teachers were the victims of approximately 473,000 violent crimes.[3] But this is nothing new. In fact, a school safety survey conducted by the National Institute of Education in 1978 revealed that nearly 13% of the approximately 55,000 students and teachers surveyed were victimized in a given month.[4]

Though the incidence of school violence has always been a matter of concern, the method of violence occurring in schools

2. Nat'l Sch. Safety & Sec. Servs., School-Associated Deaths: 2004–4005, http://www.schoolsecurity.org/trends/school_violence04-05.html (last visited May 30, 2007).

3. J.F. DEVOE ET AL., U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUSTICE, NCES 2004–004, INDICATORS OF SCHOOL CRIME AND SAFETY: 2003, at v, ix (2003).

4. David C. Anderson, *Curriculum, Culture, and Community: The Challenge of School Violence*, 24 CRIME & JUST. 317, 320–21 (1998).

has drastically changed. In many respects, the use of handguns has replaced name-calling and fist-fighting. In 1988, a deranged man in Stockton, California killed five children and injured twenty-nine others when he fired an assault rifle into a schoolyard.[5] In 1998, two middle school students carried out a deadly shooting spree at their school in Jonesboro, Arkansas, which left four of their peers murdered.[6] The nation wept after two teenagers walked into Columbine High School on April 20, 1999 and slaughtered one teacher and twelve classmates.[7] In 2005, a high school student went on a rampage at Red Lake High School in Minnesota, leaving eight more of this nation's youth slain.[8] And as this article was being edited, Cho Seung-Hui took the lives of at least thirty-two people on the campus of Virginia Tech, in what is considered the deadliest school shooting in United States history.[9]

III. LEAKAGE

In the aftermath of occurrences such as these, the Department of Education, the Secret Service, and the Federal Bureau of Investigation undertook a study of school violence to provide guidance in future threat assessment.[10] While no single perpetrator profile was identified, the FBI did confirm that students often left clues in the form of letters, essays, poems, stories, song lyrics or drawings, which for lack of a better term, foreshadowed their violent acts.[11] The FBI referred to these indicia of violence as "leakage;" and reported that since Columbine, careful response to leakage has foiled

5. *Id.* at 319.

6. *See* Kenneth Heard, *Killer's Essay Haunts Westside Teacher*, ARK. DEMOCRAT-GAZETTE, June 6, 1999, at A1.

7. *See* Troy Eid, Chief Counsel to Colorado Governor Bill Owens, Remarks at News Conference on the Law and the Columbine High School Shooting (Aug. 13, 1999) (transcript available at 1999 WL 612147).

8. *See* Mara Gottfried & Shannon Prather, *'A Deep, Deep Pain': Community Grieves for Those Lost After School Shooting Leaves 10 Dead: School Shooting Stun Red Lake*, GRAND FORKS HERALD, Mar. 23, 2005, at A1.

9. Liza Porteus, *Federal Officials: At Least 32 Dead after Virginia Tech University Shooting*, FOXNEWS.COM, Apr. 16, 2007, http://www.foxnews.com/story/0,2933,266310,00.html.

10. *See* Sarah E. Redfield, *Threats Made, Threats Posed: School and Judicial Analysis in Need of Redirection*, 2003 BYU EDUC. & L.J. 663, 712 (2003).

11. *Id.*

several intended school killings.[12]

One legal implication of leakage is that if schools do punish a student for speech that is indicative of future violent or disruptive behavior, the student may allege that his or her First Amendment rights were violated.[13] In turn, schoolteachers and administrators often suggest that there is nothing they can do about student speech that concerns them unless and until a student or teacher is explicitly threatened.[14] For instance, Professor Lucinda Roy of Virginia Tech relayed her concerns to campus police after Cho Seung-Hui "displayed anti-social behavior in her class and handed in disturbing writing assignments."[15] She later commented that authorities "hit a wall" in terms of what they could do since Seung-Hui had not made a "viable threat to himself or others."[16] One possibility would have been to suspend Seung-Hui after he turned in the disturbing writing assignment as a sort of "cooling off period" or so that he could be referred to a mental health practitioner for an evaluation. This issue then becomes whether a perpetrator such as Seung-Hui would have a viable basis to assert a First Amendment violation on the basis that he was suspended as a result of what he expressed.

To withstand students' First Amendment claims, school boards must show one or more of the following: (1) the student speech constituted a "true threat";[17] or (2) by engaging in threatening or disruptive speech, the student substantially or materially interfered with the workings of the school;[18] or that (3) the student speech impinged upon the rights of other students to be secured and let alone;[19] AND that (4) where practicable, the school board adhered to procedural guidelines prior to suspending or expelling the student, or documenting his or her permanent record.[20]

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12. *Id.*

13. Anne Dunton Lam, *Student Threats and the First Amendment*, SCH. L. BULL., Spring 2002, at 1, 2.

14. Matt Apuzzo, *Va. Tech Stunned by Images of Gunman*, ABC NEWS, Apr. 19, 2007, http://abcnews.go.com/US/wireStory?id=3055894.

15. *Id.*

16. *Id.*

17. Watts v. United States, 394 U.S. 705, 708 (1969).

18. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969).

19. *Id.* at 508.

20. *See* Goss v. Lopez, 419 U.S. 565, 572 (1975).

IV. TRUE THREATS

A. When Uttered in a School Setting, True Threats Are Unprotected by the First Amendment

Although the First Amendment ensures that Congress "shall make no law . . . abridging the freedom of speech," there are several classes of communication that fall outside First Amendment protection.[21] Some examples of unprotected speech include obscenity, child pornography, libel, and "fighting words."[22] Threats of violence are also unprotected. This "protect[s] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur."[23] Perhaps nowhere is the need to protect individuals from threats of violence more necessary than on school grounds.

1. The schoolhouse gate

Although students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[24] the rights of school children within the school environment are not "automatically co-extensive with the rights of adults in other settings."[25] Schools need not tolerate speech that is inconsistent with the school's educational mission,[26] that is vulgar and offensive to the fundamental values of education,[27] that substantially interferes with the work of the school,[28] or which impinges upon other students' rights.[29] Thus, there is certainly a basis to temper student speech in the school

21. U.S. CONST. amend. I.

22. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (noting that there are certain types of speech, including expression, "which by their very utterance inflict injury or tend to incite an immediate breach of the peace" for which "the prevention and punishment . . . has never been thought to raise any constitutional problems").

23. R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 388 (1992); *see* Watts v. United States, 394 U.S. 705, 707 (1969).

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

25. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986).

26. *Id.* at 685.

27. *Id.* at 685–86.

28. *See Tinker*, 393 U.S. at 509.

29. *Id.*

setting.[30] In fact, "[t]he concern for student safety is particularly high now in view of recent episodes of school violence" and "[w]hen a school district learns of a potential threat by a student, it not only has a right but a duty to investigate the circumstances."[31]

2. Non-arbitrary intrusion on First Amendment freedoms

Even in the face of episodes such as Columbine and Virginia Tech, administrators do not have unbridled discretion to respond to student expression that alerts them to the possibility of future violence. Courts are unlikely to uphold a school's decision to suspend, expel, or document a student's permanent record unless the student speaker has communicated a "true threat."[32] The seminal Supreme Court case that established the true threat doctrine was *Watts v. U.S.*[33] In *Watts*, the defendant was arrested during a public rally near the Washington Monument after he unwittingly stated to an undercover Army Intelligence Corps officer that "if they ever make me carry a rifle the first man I want to get in my sights is L.B.J."[34] On the basis of his statement, the jury found Watts guilty of committing a felony for "knowingly and willfully threatening the President" of the United States.[35] By a two-to-one vote, the United States Court of Appeals for the District of Columbia Circuit affirmed the trial court's decision.[36] However, the Supreme Court reversed.[37] In reversing the conviction, the Court announced four factors that must be considered by courts in their determination of whether

30. *See, e.g.*, Chaplinsky v. New Hampshire, 315 at 573 (stating that threatening expression is "of such slight social value . . . that any benefit derived from it is clearly outweighed by the social interest in order and morality").

31. Boman v. Bluestem Unified Sch. Dist. No. 205, No. 00-1034-WEB, 2000 U.S. Dist. LEXIS 5389, at *12 (D. Kan. Jan. 28, 2000); *see also* D.G. v. Indep. Sch. Dist., No. 00-C-0614-E, 2000 U.S. Dist. LEXIS 12197, at *12 (N.D. Okla. Aug. 21, 2000) (arguing that whether a true threat exists should be decided against the backdrop of violence in schools today).

32. *In re* Douglas D., 626 N.W.2d 725, 739–40 (Wis. 2001); *see also* Watts v. U. S., 394 U.S. 705, 708 (1969); Virginia v. Black, 538 U.S. 343, 359 (2003) (discussing the *Watts* definition of "true threat").

33. *Watts*, 394 U.S. at 706.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 706, 708.

a true threat exists. The four factors are the reaction of the listener, the conditional nature of the threat, the extent to which one's speech is mere political hyperbole, and the overall context and background circumstances of the expression.[38]

B. Applying Watts to the School Setting

The determination of what constitutes a true threat is arguably more complicated in a school setting than in other settings due to the variety of information that school officials have at their disposal. Factors that school officials might consider before acting on a perceived threat include the age and maturity of the student speaker, his or her past academic record, whether the expression was directly communicated to the object of the threat or some third person, whether the speaker intended to carry out his or her threat, other instances of school violence in the community, and whether the recipient's response to the expression was reasonable. However, various legal questions can arise about the extent to which these factors can and should be considered.

1. The reasonableness standard

Since *Watts*, courts have struggled to find a workable standard of the true threat doctrine, which can easily be applied in a school setting. For example, the Seventh Circuit focuses on "whether a reasonable speaker would foresee that the recipient of [his or her] words would take the statement seriously."[39] Conversely, courts such as the Fourth and the Fifth Circuit assess whether a true threat exists according to how a "reasonable recipient" would view the expression.[40] Perhaps this is an illusory distinction. It appears that regardless of how it applies the test, each Circuit gives some consideration to the perspective of both the speaker and the recipient. Inevitably, a juror will consider both whether he would have feared for his personal safety under the circumstances, and whether he would expect someone to be legitimately frightened if he had uttered the same words as the

38. *Id.* at 707–08.

39. United States v. Saunders, 166 F.3d 907, 913 (7th Cir. 1991); *see also* United States v. Pacione, 950 F.2d 1348, 1355 (7th Cir. 1991).

40. United States v. Roberts, 915 F.2d 889, 891 (4th Cir. 1990); United States v. Daugenbaugh, 49 F.3d 171, 173–74 (5th Cir. 1971).

defendant. Often the most difficult aspect of applying the reasonableness standard to school speech, regardless of how it is interpreted, is determining what constitutes "reasonable" from the perspective of a school-aged child or adolescent.

2. The ambiguities of intent

It is clear that threatening expression "intentionally or knowingly communicated" to the object of the threat loses First Amendment protection.[41] Some courts have also held that threatening expression loses protection where it is communicated to a third party rather than to the object of the threat. For instance, in *Doe v. Pulaski County Special School District*, a middle school student drafted letters wherein he expressed a desire to molest, rape, and murder his ex-girlfriend.[42] The student did not give a copy of the letters to his ex-girlfriend.[43] However, some weeks later, the student's friend found one of the letters and told other students about it.[44] Eventually, the student's ex-girlfriend learned of the letter through a third party, became upset, and notified school officials.[45] Her school principal recommended that the author of the letters be expelled for violating a school district rule that prohibited students from making terrorizing threats.[46] The Eighth Circuit held that the letters did in fact constitute a true threat. In making its determination, the court considered the issue of whether there was sufficient evidence of intent to communicate the threat where the author simply allowed a friend to read the letter, but did not give the letter to his ex-girlfriend. The court concluded that this was sufficient because the author knew his friend was likely to tell the ex-girlfriend about the letter's content.[47]

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41. Porter v. Ascension Parish Sch. Bd., No. 04-30162, 2004 U.S. App. LEXIS 25550, at *15 (5th Cir. Dec. 10, 2004); Doe v. Pulaski County Special Sch. Dist., 306 F.3d 616, 624 (8th Cir. 2002) (en banc).

42. *Id.* at 619.

43. *Id.*

44. *Id.*

45. *Id.* at 620.

46. *Id.*

47. *Id.* at 624; *see also* U. S. v. Crews, 781 F.2d 826, 831–32 (10th Cir. 1986) (affirming conviction where defendant made statement to a third party, threatening to kill the President of the United States).

In addition to the above, the Supreme Court has held that the originator of the threat need not actually intend to carry out their threat, or have the means or ability to carry out their threat, in order to be prosecuted for making a threat.[48] As an example, in *Schenck v. United States*, Justice Holmes discussed a hypothetical involving a patron who walks into a crowded theater and falsely shouts, "Fire!"[49] He then determined that falsely shouting "Fire!" in a crowded theater was not protected speech.[50] The basis of his determination was that it did not matter that the speaker had no intention to set the theater ablaze because by uttering the word "Fire!" he or she would necessarily create a clear and present danger, which would make the other theater patrons feel unsafe.[51]

The same can be said of a student who wears a t-shirt, writes a poem, draws a picture, or drafts song lyrics that convey to another student or teacher that they should fear for their personal safety. Once the speaker's message is conveyed, whatever the form, the damage is done, especially in a closed setting such as a school. More than in other settings, a threat conveyed on a school campus can have long-lasting effects because at school, the recipient of the expression cannot simply leave the premises and is likely to run across the speaker the next day or sometime in the very near future. The recipient's only practical recourse may be to notify a teacher and hope that action is taken.

3. The conditional nature of the threat

Courts also consider the conditional nature of a threat in determining whether a true threat exists, and whether a school official has acted properly.[52] By definition, something that is conditional is "contingent upon some event or action."[53] The rationale behind applying this factor to true threat analyses is that where a speaker premises his or her threat upon the occurrence of some other event, the threat is less likely to

48. Schenck v. U. S., 249 U.S. 47, 52 (1919); *see also* Virginia v. Black, 538 U.S. 343 (2002).

49. *Schenck*, 249 U.S. at 52.

50. *Id.*

51. *Id.*

52. Watts v. United States, 394 U.S. 705, 707 (1969).

53. Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & POL'Y 283, 340 (2001).

materialize.[54] As such, a conditional threat is deemed less likely to constitute a viable danger.[55] However, "conditionality" is a somewhat muddled distinction. Arguably, threats are by their very nature conditional.[56] Because of this, whether a threat is conditional can be a difficult factor for school administrators to interpret.[57] Imminence of a threat or the likelihood that a threat will be carried out is not often clearly defined, especially in an atmosphere involving teenagers or young school children.

4. Form of the expression

"[A] threat must be distinguished from . . . constitutionally protected speech."[58] It is impermissible to punish students for innocuous talk, attempts at jest, or speech that conveys mere political hyperbole.[59] For example, in *In re Douglas D.*, Douglas D. wrote a story in his creative writing class that described a student cutting off his teacher's head with a machete.[60] Douglas D. turned the story in to his teacher, who feared for her safety and reported the incident.[61] The state of Wisconsin ultimately prosecuted and convicted Douglas D. under a disorderly conduct law.[62] The Wisconsin Supreme Court overturned the Wisconsin Court of Appeals conviction on the grounds that the story contained "hyperbole and attempts at jest" and should not have been taken seriously.[63] For instance, Douglas D. had indicated to the court that when used in the poem, the title "Mrs. C" stood for the fact that his teacher was a "crab."[64] However, in a very spirited dissent, Wisconsin Supreme Court Justice Prosser responded to the hyperbole and

54. *Id.* at 341.

55. *See id.*

56. Matthew G. Martin, Comment, *True Threats, Militant Activists, and the First Amendment*, 82 N.C. L. REV. 280, 285 (2003).

57. *See, e.g.*, Rothman, *supra* note 53, at 340.

58. Watts v. United States, 394 U.S. 705, 707 (1969).

59. U. S. v. Miller, 115 F.3d 361, 363 (6th Cir. 1997). However, even ambiguous statements may be a basis for violation of a criminal-threat statute. *See In re* Ryan D., 123 Cal. Rptr. 2d 193, 198 (2002) ("To constitute criminal threat, a communication need not be *absolutely* unequivocal, unconditional, immediate and specific.").

60. *In re* Douglas D., 626 N.W.2d 725, 730–31 (Wis. 2001).

61. *Id.* at 731.

62. *Id.*

63. *Id.* at 741.

64. *Id.*

jest argument by citing an incident in Winterstown, Pennsylvania, which occurred while *In re Douglas D.* was pending, where a man did in fact injure nine people at school with a machete.[65] Justice Prosser went on to state, "Macabre writings may reflect a harmless fantasy life. Then again, they may be a true threat."[66] The essence of Justice Prosser's dissent was that schools themselves, not courts, should be the ones to interpret a student's expression and determine how to treat it.[67]

Students, like just about anyone else, usually express themselves in the form with which they feel most comfortable. If a student is an artist who likes drawing cartoons, he or she may use that medium to express rage. If a student is a writer, he or she may draft a fictional children's story to indicate angst. Teachers and faculty members are in the best position to determine whether a true threat exists. It is they who have relevant knowledge of how a particular student behaves from day to day.[68] School officials also have the advantage of familiarity with a student's record, family situation, and other aspects of a student's life that may help them to more accurately interpret potentially threatening behavior.[69] School officials should be permitted to take expression in any form seriously, and to intervene, even if it is not clear from the form

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65. *Id.* at 756 (Prosser, J., dissenting) (citing Peter Jackson, *Machete Attack at School Injures 3 Adults, 6 Children*, PITTSBURGH POST-GAZETTE, Feb. 3, 2001, at A1).

66. *Id.* at 758 (Prosser, J., dissenting).

67. *Id.* at 762.

68. School administration must be afforded substantial authority to deal with threatening behavior. *See* Epperson v. Arkansas, 393 U.S. 97, 104 (1968) ("By and large, public education in our Nation is committed to the control of state and local authorities."); *see also* LaVine v. Blaine Sch. Dist., 257 F.3d 981, 992 (9th Cir. 2001) (reviewing with deference schools' decisions in connection with the safety of their students, even when freedom of expression is involved); In re *Douglas D.*, 626 N.W.2d at 758 (Prosser, J., dissenting) (arguing that school discipline generally should remain the prerogative of our schools and that "the facts are best determined by fact-finders on the scene, not appellate judges"). In *Wood v. Strickland*, 420 U.S. 308, 326 (1975) (citation omitted), the Supreme Court stated:

> Given the fact there was evidence supporting the charge against respondents, the contrary judgment of the Court of Appeals is improvident. It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion. Public high school students do have substantive and procedural rights while at school. But, Section 1983 does not extend the right to relitigate in federal court evidentiary questions arising in school disciplinary proceedings . . . .

69. *See* In re *Douglas D.*, 626 N.W.2d at 752–53 (Prosser, J., dissenting).

of the expression that a student is harboring true violent intentions.

C. Documenting Threatening Expression

If students are punished for engaging in threatening expression, one avenue of recourse is to petition a court to enjoin their school district from referring to the incident in their permanent school record.[70] Courts are likely to grant injunctive relief if the school is unable to show that the expression constituted a true threat or if the student is able to show that the school failed to adhere to procedural guidelines prior to documenting the incident.[71] But granting students relief such as this could have disastrous results. Documentation does more than deter or punish the implicated student; it also ensures that educators, school psychologists, and parents are informed that the student in question might have social or behavioral issues that should be addressed.[72] As a student advances in grade level or changes schools, a record of prior behavior forewarns school administrators to take any deviant behavior seriously.[73] If courts make a habit of enjoining schools from documenting student records, the result is that school boards, principals, and teachers will be dissuaded from keeping thorough records, which will only increase the likelihood that future indications of violence will go unnoticed.

V. *TINKER* AND ITS PROGENY

The true threat doctrine set forth in *Watts* provides only

70. *See* Lavine v. Blaine Sch. Dist., 257 F.3d 981, 992 (9th Cir. 2001); Boim v. Fulton Co. Sch. Dist., No. Civ.A.1:05CV2836MHS, 2006 WL 2189733, at *2, 5 (N.D. Ga. 2006); Ponce v. Socorro. Indep. Sch. Dist., 432 F. Supp.2d 682, 687 (W.D. Tex. 2006).

71. *See LaVine*, 257 F.3d at 992 (noting that once the school had permitted the student to "return to classes and had satisfied itself that [the student] was not a threat to himself or others," the maintenance of negative documentation in the student's file was no longer appropriate); *see also* Goss v. Lopez, 419 U.S. 565, 567, 572 (1975) (affirming district court's order "enjoining the [school] administrators to remove all references to such suspensions from the students' records" because students "were temporarily suspended from their high schools without a hearing either prior to suspension or within a reasonable time thereafter").

72. *See* Lisa M. Pisciotta, *Beyond Sticks & Stones: A First Amendment Framework for Educators Who Seek to Punish Student Threats*, 30 SETON HALL L. REV. 635, 667 (2000).

73. *Id.*

one basis for upholding a school official's decision to punish a student for engaging in threatening expression. In *Tinker v. Des Moines Independent School District*, the Supreme Court delineated another. Specifically, it held that expression that substantially and materially disrupts a school environment is also unprotected by the First Amendment.[74] To illustrate what constitutes a "substantial and material interference," the *Tinker* Court compared two cases from the Fifth Circuit. In *Burnside v. Byars*, the Fifth Circuit enjoined a high school from enforcing a regulation that forbade students from wearing "freedom buttons."[75] On the same day, in *Blackwell v. Issaquena County Board of Education*, the same panel declined to enjoin enforcement of the same regulation at a different school.[76] The difference was that the school board in *Blackwell* showed that the students wearing freedom buttons caused a disturbance in the school by harassing students who chose not to wear the buttons.[77] The showing of harassment was the key.[78] Drawing the *Tinker* holding out to its logical conclusion, it appears that expression that targets a person or group of persons, as opposed to open-ended statements against society, for instance, is more likely to cause a punishable substantial or material disruption.[79]

A. The Practical Erosion of the Tinker *Standard*

As courts started to apply *Tinker*, it became clear that additional guidance was needed. In *LaVine v. Blaine School District*, the Ninth Circuit provided some much needed latitude to school officials. James LaVine, an eleventh grade student, wrote a poem entitled "Last Words," which involved his examination of the thought processes of a student who murders his classmates.[80] The poem read in pertinent part as follows:

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74. 393 U.S. 503, 505 (1969); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988).

75. 363 F.2d 744, 746 (5th Cir. 1966).

76. 363 F. 2d 749, 750 (5th Cir. 1966) (Freedom buttons depicted a black and white hand joined together and the word "SNCC," which stood for Student Nonviolent Coordinating Committee).

77. *Id.* at 753–54.

78. *See id.*

79. LaVine v. Blaine Sch. Dist., 257 F. 3d 981, 989 (9th Cir. 2001) (quoting Karp v. Becken, 477 F.2d 171, 175 (9th Cir. 1973)).

80. *Id.* at 983.

> I pulled my gun, from its case, and began to load it. I remember, thinking at least I won't, go alone, as I, jumpped [sic] in, the car, all I could think about, was I would not, go alone. As I walked, through the, now empty halls, I could feel, my hart [sic] pounding. As I approached, the classroom door, I drew my gun and, threw open the door, Bang, Bang, Bang-Bang. When it was all over, 28, were, dead . . . .[81]

The Ninth Circuit held that the Blaine School District did not violate LaVine's First Amendment rights when it expelled him on an emergency basis after LaVine showed his teacher the poem.[82] It concluded that it was sufficient that the poem contained images of violent death, suicide, and the shooting of fellow students.[83] The principal of James LaVine's school had appropriately considered LaVine's "suicidal ideations, disciplinary history, family situation, recent break-up with his girlfriend," and a recent school shooting in a nearby city before deciding to expel him.[84] In essence, the *Lavine* court adopted a "totality of the circumstances" approach for evaluation of schools' decisions and stated specifically that school officials should not be required to wait until disruption occurs before they may act.[85]

One cannot help but wonder what would have happened if the "totality of the circumstances test" was applied in the cases of Columbine or Virginia Tech. That said, the test has been met with some criticism.[86] The argument is that allowing school authorities to use the totality of the circumstances approach

81. *Id.*

82. *Id.* at 992.

83. *Id.* at 990.

84. *Id.* at 991.

85. *Id.* at 989 90 ("When the school officials made their decision not to allow [student] to attend class on Monday morning, they were aware of a substantial number of facts that in isolation would probably not have warranted their response, but in combination gave them a reasonable basis for their actions."); *see also In re* A.S., 626 N.W.2d 712, 720 (Wis. 2001) (schools can forecast the likelihood of disruption based upon past experience in the school, current events influencing student activities and behavior, and other instances of actual or threatened disruption relating to the expression in question).

86. LaVine v. Blaine Sch. Dist., 279 F.3d 719, 724 (9th Cir. 2002) (Kleinfeld, J., dissenting) ("The panel decision creates a new First Amendment rule: where school officials perceive a major social concern about school safety, they may punish school children whose speech gives rise to a concern that they may be dangerous to themselves or others, even though the speech is not a threat, disruptive, defamatory, sexual, or otherwise within any previously recognized category of constitutionally unprotected speech.").

provides them with too much power. For instance, some scholars are concerned with the fact that school officials might abuse their discretion by manufacturing a set of circumstances that would somehow warrant the imposition of a punishment against a student who, for example, hands in a suspicious writing assignment, which could arbitrarily encroach upon that student's First Amendment rights.[87] However, given that students are dying at alarming rates in egregious fashion, it does not appear that faculty members have the luxury of waiting to act. To put it another way, the damage one overzealous principal could do is certainly outweighed by the havoc left by one student gunman.

B. Students' Right to Education Should Not Be Obstructed

The Supreme Court has repeatedly expressed its concern over the right of students "to be secure and to be let alone" and to be given the freedom and ability to learn.[88] In *Keyishian v. Board of Regents*, it held that "students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding."[89] Justice Brennan spoke of a student's right to learn as being an integral part of the educational system.[90] Justice Fortas stated that these rights are held by the student and are not to be impinged upon by other students.[91] In *Ambach v. Norwick*, Justice Powell stressed the importance of public schools in preparing children for "participation as citizens, and in the preservation of the values" of a democratic system.[92] And in *Board of Education v. Pico,* Justice Brennan noted that there is a substantial community interest in the promotion of respect for authority and for traditional social, moral, and political values, and this interest is best represented by the school board in their capacity to teach and discipline students.[93]

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87. David L. Hudson, *Fear of Violence in our Schools: Is "Undifferentiated Fear" in the Age of Columbine Leading to a Suppression of Student Speech?*, 42 WASHBURN L.J. 79, 80–81 (2002).

88. *Id.* at 508.

89. Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (quoting Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957)).

90. *Id.*

91. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969).

92. Ambach v. Norwick, 441 U.S. 68, 76 (1979).

93. Bd. of Educ. v. Pico, 457 U.S. 853, 864 (1982).

If handled appropriately, school administrators' response to expression that impinges upon the rights of other students will illustrate to students that interference with the school's most basic values will not be tolerated. This necessarily reinforces the ideal that students must consider what they say in the context of their environment and the listeners who may be affected. To that end, courts should give their "full support and approval to the actions of school administrators who take appropriate action to protect and educate their students in a disciplined environment that is safe and conducive for learning."[94]

VI. DUE PROCESS CONCERNS

The right to a public education is a property interest protected by the Due Process Clause and may not be taken away as a result of a student's misconduct without providing minimal procedural safeguards.[95] Accordingly, school officials are subject to due process claims if they fail to put procedural safeguards in place. Adequate process requires at a minimum that students facing suspension for engaging in threatening or disruptive expression be given some kind of notice and afforded a hearing.[96] Notice and opportunity to be heard should generally occur prior to the student's removal from school.[97] In cases where prior notice and a hearing are not practicable or feasible, the removed student should be given notice of a hearing as soon as possible.[98]

VII. CONCLUSION

"The first job of law is to provide freedom from violence and the fear of violence that kills civilization at its roots."[99] The mere "discomfort and unpleasantness that always accompany an unpopular viewpoint" are not sufficiently disruptive to constitute a substantial interference, but true threats of

94. Porter v. Ascension Parish Sch. Bd., 301 F. Supp. 2d 576, 589 (D. La. 2004).

95. Goss v. Lopez, 419 U.S. 565, 574 (1975).

96. *See* Goss, 419 U.S. at 579 (citing Mullane v. Cent. Hanover Trust Co., 339 U.S. 306, 313 (1950)).

97. *Id.* at 582–83.

98. *Id.*

99. ALFRED H. KNIGHT, THE LIFE OF THE LAW 4 (1996).

violence, material disruption, or speech that impinges upon the rights of other students strike at the heart of basic educational tenets.[100] To deny school authorities the broadest discretion possible to intervene against a student who engages in threatening or disruptive expression is not only dangerous, but it is also reasonably likely to cause more lawsuits. With no clear indication in the law that school administrators have the broadest discretion available to them, punished students are more likely to sue their local school board on the basis that their First Amendment rights were violated.

More lawsuits, however, will not improve the environment in today's schools.[101] As Chief Judge Wilkinson of the Court of Appeals for the Fourth Circuit has noted, educators should be freed from the burden of litigation and provided with a greater role in the administration of their schools.[102] Adolescents are still learning responsibility, civility, and maturity, and consequently, need to grow into their constitutional rights.[103] Students like Columbine killer Eric Harris, who declared on his web site, "I am the law. If you don't like it, you die,"[104] and Cho Seung-Hui, who stated in his media manifesto, "Oh the fun I could have had mingling among you hedonists, being counted as one of you, if only you didn't [expletive] the living [expletive] out of me,"[105] "fail to realize that "responsibilities go hand in hand with rights, and the former must be learned before the latter can ever be enjoyed."[106]

Schools are charged in large part with instilling the values that Judge Wilkinson described.[107] They must also be concerned with the responsibility of keeping children safe while on school grounds, during school hours. To undertake these responsibilities, the First Amendment should take a back seat while teachers and administrators are given the broadest

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100. Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 509 (1969); *see* Watts v. United States, 394 U.S. at708.

101. *See* Chief Judge J. Harvie Wilkinson, United States Court of Appeals for the Fourth Circuit, Remarks at News Conference on the Law and the Columbine High School Shooting (Aug. 13, 1999) (transcript available at 1999 WL 612147).

102. *Id.*

103. *Id.*

104. *See* Eid, *supra* note 7.

105. Manifesto, Cho Seung-Hui (Apr. 16, 2007), *available at* http://www.msnbc.msn.com/id/18186053/.

106. *See* Wilkinson, *supra* note 101.

107. *Id.*

discretion permissible under the law to discipline students and document their behavior. Frankly, this also means that courts should be removed from the disciplinary process whenever possible. Teachers and school administrators are in the best position to make these determinations. After all, if the alternative to giving schools more discretion is that more school children will be lost to violence, we really don't have a choice!