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# Student Expression in the Age of Columbine: Securing Safety and Protecting First Amendment Rights

David L. Hudson Jr.

*Belmont University - College of Law*

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# Student Expression in the Age of Columbine:

*Securing Safety and Protecting  
First Amendment Rights*

DAVID L. HUDSON JR.

**S**tudent Expression in the Age of Columbine is one in an ongoing series of First Reports, published by the First Amendment Center, on major First Amendment issues of our time.



David L. Hudson Jr. is a research attorney at the First Amendment Center. Hudson writes for [firstamendmentcenter.org](http://firstamendmentcenter.org) and for other publications devoted to First Amendment issues.

Hudson is a First Amendment contributing editor for the American Bar Association's *Preview of United States Supreme Court Cases*. His articles have been published in *The National Law Journal*, the *ABA Journal* and the *Tennessee Bar Journal*. He is a member of the First Amendment Lawyers Association.

Hudson graduated from Duke University in 1990 and obtained a law degree from Vanderbilt University Law School in 1994.

After working as a judicial law clerk, Hudson joined the First Amendment Center in 1995. He also teaches classes in constitutional law at Middle Tennessee State University and legal research and writing at Nashville School of Law.

Hudson has written several books, including *The Bill of Rights: The First Ten Amendments of the Constitution*, *The Fourteenth Amendment: Equal Protection Under the Law*, *The Rights of Students*, the First Amendment Center's *The Silencing of Student Voices: Preserving Free Speech in America's Schools* and *Open Government: An American Tradition Faces National Security, Privacy and Other Challenges*.

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*Securing Safety and Protecting First Amendment Rights*

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“Before I could see a reaction from the preps, the man had dropped his duffel bag, and pulled out one of the pistols with his left hand. Three shots were fired. Three shots hit the largest prep in the head. The shining of the streetlights caused a visible reaction off of the droplets of blood as they flew away from the skull. The blood spatters showered the preps buddies, as they were to paralyzed to run. ...

The man picked up the bag and his clips, and proceeded to walk back the way he came. ... He stopped, and gave me a look I will never forget. If I could face an emotion of god, it would have looked like the man. I not only saw in his face, but also felt emanating from him power, complacency, closure and godliness. The man smiled, and in that instant, thru no endeavor of my own, I understood his actions.”\*

— Columbine student Dylan Klebold  
in a creative writing exercise for school  
a month before the 1999 shooting<sup>1</sup>

“Columbine was a watershed event in which the number one ‘lesson learned’ is that school officials should be better trained and more alert to recognizing early warning signs of potential violence in students’ behavior.”

— Ken Trump, president of the National  
School Safety and Security Services<sup>2</sup>

\*Editor’s note: All students’ writings in this report are printed as they were written.

# Student Expression in the Age of Columbine: *Securing Safety and Protecting First Amendment Rights*

DAVID L. HUDSON JR.

## *I. Introduction*

### *The Columbine Factor*

Littleton, Colo., Pearl, Miss., Springfield, Ore., Fayetteville, Tenn., Jonesboro, Ark., and Red Lake, Minn. School shootings in these cities have seared the souls of our collective conscience, making us recoil in horror. The questions naturally come to us: How could this happen? What can school officials do to ensure this doesn't happen again?

Dylan Klebold and Eric Harris — the Columbine High School students-turned-mass murderers — may have signaled in their writings their propensity for violence. Klebold wrote for an English teacher a story so chilling that she showed it to a school counselor and called in the student's parents for a conference. She termed Klebold's story (quoted on the previous page) "cruel and disturbing." Harris operated a Web site that contained numerous rants about violence and mayhem. His site said such things as, "God, I can't wait until I can kill you people." Neighbors complained to police that Harris had threatened their son on the Internet. Klebold and Harris made a video titled "Hitman for Hire" at Columbine for a school project.

Ken Trump, president of the National School Safety and Security Services, said teachers and administrators should pay close attention to such warning signs. "Art teachers and English teachers are often in the best position to recognize early warning signs of potential violence as students who are troubled may communicate these 'red flags' in their drawings and writings," he said. "School officials should be alert to such communications and treat them seriously — meaning that they investigate further with an emphasis on providing support to students determined to be legitimately troubled prior to an incident occurring. Some initial concerns may turn out to be unfounded, but this cannot be determined if the initial signs are overlooked or dismissed."<sup>3</sup>

In this post-Columbine world, some school administrators have reacted swiftly to student expression that contains harsh language, violent themes or similar content. In the age of Columbine, zero tolerance has spread from drugs and weapons to controversial student speech. Students have been punished for dark poetry, rap songs, Halloween essays, doodles of teachers and students with sticks in their heads and other

material. In some cases, intervention was necessary, justified or wise. At other times, the fear for safety has led to the suppression of constitutional rights.<sup>4</sup> “There’s no question that we have seen a widespread crackdown on student expression in the post-Columbine period,” said First Amendment lawyer Kevin O’Shea.<sup>5</sup>

School officials have a primary duty to ensure a safe learning environment. Students cannot learn if they fear for their safety. Given incidents such as Columbine, shouldn’t school administrators pay close attention to any student expression deemed violent or unusual? “Courts must keep in mind that given Columbine, we must give school professionals the benefit of the doubt,” said Thomas Hutton, staff attorney with the National School Board Association.<sup>6</sup>

But the Columbine situation has led to some overreactions. Students have been suspended, expelled, sent to psychologists, even jailed. In some instances, particularly when a student has a history of violent conduct, the punishment may appear sound. But in other cases such judgments appear less so. A middle-school student in Texas spent several days in jail for a Halloween essay for which he received an “A” from his teacher.<sup>7</sup> An honors student in Kansas was expelled for writing a poem about seeking revenge against someone for killing her dog.<sup>8</sup> A student in Louisiana with no history of violence was punished for a 2-year-old drawing he created at home that showed his school under attack.<sup>9</sup>

“Of course there are overreactions,” Hutton said. “But that is the exception, the rarity. Sometimes it is only after the fact that it is clearly shown that the school response was an overreaction.”

When school officials punish students for their expressive materials, their writings and speech, the question becomes whether they are violating the First Amendment to the U.S. Constitution. The First Amendment protects expressive material. Poems, essays, diaries and writings on a Web site qualify as expression within the meaning of the First Amendment.

The quandary facing school officials is how to balance school safety with the duty to ensure the protection of students’ constitutional rights. “Unfortunately, there exists no clear calculus or formula for balancing these important and maybe conflicting duties,” said Todd DeMitchell, an education professor at the University of New Hampshire.<sup>10</sup>

Some argue that school officials are in the best position to gauge how to deal with controversial student expression. Others question the policy of silencing any student speech deemed controversial, arguing that silencing students can breed greater alienation and resentment. First Amendment Center Senior Scholar Charles Haynes has written: “In this pressure-cooker, post-Columbine era, more and more schools are

taking the path of least resistance: Clamp down on student expression, police the hall and avoid controversy and conflict at all costs.”<sup>11</sup>

This report highlights the case law surrounding students’ First Amendment rights, particularly as the law relates to “threatening” expression. The report discusses the legal landscape of student expression and examines several recent cases involving student “threats.” It offers examples of sound and unsound reactions to violent student expression. It relates the perspectives of several school-safety and school-law experts who speak about balancing students’ safety and constitutional rights. It seeks to provide school administrators, teachers and attorneys with a road map to this interesting but intricate area of law.

## II. *The Legal Landscape of Student Expression*

Until the middle of the 20th century, student First Amendment rights received short shrift in the courts. To many courts, students seemed to possess little if any free-expression rights. The few court cases dealing with students’ free-expression claims rejected them. For example, the Supreme Court of Wisconsin ruled in 1908 that school officials could suspend two students for ridiculing the principal in a poem published by a local newspaper. The court wrote that “such power is essential to the preservation of order, decency, decorum, and good government in the public schools.”<sup>12</sup>

The U.S. Supreme Court first recognized that public school students possessed some level of First Amendment rights in the 1943 flag-salute decision *West Virginia Board of Education v. Barnette*. The case concerned a West Virginia law that required public school students to salute the flag and recite the Pledge of Allegiance. If the students did not salute the flag, they could be suspended and their parents fined. A group of Jehovah’s Witnesses challenged the state law, saying a forced flag salute violated their freedom of conscience. They faced an uphill battle; in 1940, the Supreme Court had upheld a similar law in *Minersville School District v. Gobitis*.<sup>13</sup> The decision was criticized heavily.

Only three years later, the Court changed course in *Barnette*. The Court wrote that it must ensure “scrupulous protection of constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.”<sup>14</sup>

The trend toward greater respect for students’ First Amendment rights culminated in 1969 when the Supreme Court decided *Tinker v. Des Moines Indep. Comm. Sch. Dist.*<sup>15</sup> School officials in Iowa suspended several middle and high school students in Iowa for wearing black armbands to school to protest U.S. involvement in Vietnam. The school



officials had learned of the impending black-armband protest and passed a no-armband rule. The students — including John Tinker, Mary Beth Tinker and Christopher Eckhardt — wore the armbands anyway and received suspensions. In *Tinker*, the Court ruled in favor of the students on their First Amendment claims, writing that public school students do not “shed their constitutional rights to freedom of speech and expression at the schoolhouse gate.”<sup>16</sup>

The Court not only ruled in favor of the students but also established the so-called *Tinker* standard, which provided that school officials cannot censor student expression unless they can reasonably forecast that such expression will create a material interference or substantial disruption of the educational environment or invade the rights of others. The high court reasoned that school officials could not silence student expression simply because of “undifferentiated fear or apprehension.”<sup>17</sup>

The decision is viewed as the high-water mark of student rights. Eckhardt told the First Amendment Center 30 years after the decision: “What George (Washington) and the boys did for white males in 1776, what Abraham Lincoln did to a certain extent during the time of the Civil War for African-American males, what the women’s suffrage movement in the 1920s did for women, the *Tinker* case did for children in America.”<sup>18</sup>

### ***Fraser***

The Court that decided the *Tinker* case was called the Warren Court after then-Chief Justice Earl Warren. It decided cases in a time of social activism, and the Court itself was accused often by some critics of engaging in judicial activism or legislating from the bench.

Things were different in the 1980s. The Court — led by Warren Burger and William Rehnquist — gave less protection to student rights in general. This pattern was established by two decisions.

In the first decision, the Supreme Court ruled that school officials could prohibit student speech that was vulgar, lewd and plainly offensive in its 1986 decision *Bethel School District No 403 v. Fraser*.<sup>19</sup> The case involved a high school junior who gave a speech laced with sexual references before the student assembly in nominating a fellow classmate for an elective office. Matthew Fraser talked about this fellow classmate’s being “firm” and “taking it to the climax.” School officials suspended Fraser for several days even though his speech caused no real disruption.

The Supreme Court in *Fraser* set up a balancing test: “the freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against society’s countervailing interest in teaching students the boundaries of socially appropriate behavior.”<sup>20</sup>

The Court wrote that “it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse.”<sup>21</sup> The Court also gave less respect to student rights in general, writing: “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.”<sup>22</sup>

### ***Hazelwood***

Two years later, the Court further narrowed the *Tinker* decision in a high school press case, *Hazelwood School District v. Kuhlmeier*.<sup>23</sup> In *Hazelwood*, the school principal objected to two student stories in the school newspaper that dealt with teen pregnancy and the impact of divorce upon teenagers. The principal asserted that he had control over the newspaper, *The Spectrum*, which was produced as part of a high school journalism class. He ordered the articles excised. Several students sued, claiming a violation of their First Amendment rights. The students also contended that the newspaper was a public forum, a place where students made decisions about what to print generally free from administrative control.

The Supreme Court sided with the school officials and established the *Hazelwood* standard: “Educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are related to legitimate pedagogical concerns.”<sup>24</sup> The Court rejected the notion that *The Spectrum* was a public forum.

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

- *Tinker* applies to student-initiated speech that is not vulgar, lewd or plainly offensive (speech subject to the *Fraser* standard).<sup>25</sup>
- *Fraser* applies to vulgar and lewd student speech. Most courts tend to apply *Fraser* to all student speech that is vulgar and lewd. A few courts have said *Fraser* applies only to vulgar student speech that is school-sponsored.<sup>26</sup> A few courts have extended *Fraser* to ban almost any offensive student speech.<sup>27</sup>
- *Hazelwood* applies to school-sponsored student speech. The Supreme Court defined school-sponsored speech as “expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.”<sup>28</sup> These would include school plays, many school newspapers and school mascots.

### ***‘True Threat’ Line Of Cases***

Though the *Tinker*, *Fraser* and *Hazelwood* trilogy govern the majority of First Amendment jurisprudence involving public schools, there is another applicable line of cases dealing with student threats. These are called “true threat” cases.

The Supreme Court first held that true threats are not protected by the First Amendment in *Watts v. U.S.*<sup>29</sup> The case involved a political protester who said that if he had President Lyndon B. Johnson within his scope, he would shoot him. The Court determined that the speech was political hyperbole, not a true threat.

Unfortunately, the Court did not provide a clear definition for true threats. The result has been a hodgepodge of different tests in the lower courts. To add further confusion for school officials, the *Watts* case did not involve a public school or public school student.

Some courts have determined that speech constitutes a true threat “if a reasonable person would foresee that an objective rational recipient of the statement would interpret its language to constitute a ... ‘true threat.’”<sup>30</sup> Other courts, in the school context, employ a multi-factored test, such as: the reaction of the listeners to the threat; whether the threat was conditional; whether the speaker communicated the threat directly to the victim; whether the speaker had a history of making threats against the victim; and whether the recipient had a reason to believe that the speaker had violent tendencies.<sup>31</sup>

In addition, many other courts have mentioned that a true-threat analysis must be undergirded with the realization that school officials are living in an environment where threats to school safety are real, not imagined.

In *Lovell v. Poway Unified School District*, the 9th Circuit determined in 1996 that a student could be punished for telling her school guidance counselor that she would shoot her if she did not change her schedule.<sup>32</sup> The 9th Circuit found the student’s statement to be “unequivocal and specific enough to convey a true threat ... when considered against the backdrop of increasing violence among school children today.”<sup>33</sup>

In 2003, the U.S. Supreme Court decided another case outside the school context that dealt with true threats. In the cross-burning case *Virginia v. Black*, the Court ruled that the purpose of prohibiting true threats was to protect individuals “from the fear of violence” and “from the disruption that fear engenders.”<sup>34</sup> It remains to be seen how *Virginia v. Black* — which appears to place more emphasis on the fear of the listener — will affect and alter lower courts’ true-threat analyses.

### **Summary Of Legal Principles**

The legal landscape discussed above provides a road map for school administrators trying to decide whether student speech should receive First Amendment protection. This road map consists of several tests. These include the initial-threshold inquiry, the true-threat calculus, the *Tinker* substantial-disruption test and the *Fraser* test for lewd and vulgar student expression.

Is the student material “**speech or expression**” within the meaning of the First Amendment?

This is a threshold prong. If the expression conveys any type of particularized message, it is protected. This is generally an easy question with respect to student writing and speaking. A student poem or essay clearly qualifies as expressive. The closer cases involve types of nonverbal conduct or expressive conduct, such as sagging pants or purple-colored hair.

Is the student expression a **true threat**?

If the expression constitutes a true threat — an expression conveying a serious, unequivocal intent to cause harm — it receives no First Amendment protection.

Is the student expression **school-sponsored**?

If the student expression is school-sponsored — many class assignments, many school newspapers (if not a public forum), school plays — then the *Hazelwood* standard applies. That standard involves whether the school official has a legitimate educational reason for censoring the student expression.

Is the student expression **lewd, vulgar or plainly offensive**?

If the student expression is lewd, vulgar or plainly offensive, then it can be prohibited under the *Fraser* decision. This test clearly applies to student sexual speech, as in the *Fraser* case. It also applies to profanity. The divide in the courts is over the “plainly offensive” part of the *Fraser* test.

Is the student expression **substantially disruptive** within the meaning of *Tinker*?

If school officials can reasonably forecast that the student speech creates a substantial disruption or invades the rights of others, then they can constitutionally prohibit the expression. One caveat is that the courts have not explained at length the meaning of the “invades the rights of others” part of the *Tinker* test.

Many student-expression cases involving violence since Columbine do not involve school-sponsored speech (e.g., a school newspaper) and do not contain vulgar or lewd

speech (i.e., profanity or sexual innuendo). In these instances, the *Hazelwood* and *Fraser* cases are inapplicable. Thus, many of the cases proceed along the following lines of inquiry: (1) Does the material constitute a true threat? and (2) Even if it's not a true threat, can school officials prohibit the expression or punish the student on the basis of the *Tinker* substantial disruption standard?

### *III. Post-Columbine Case Examples: Division in the Courts*

Since the 1999 Columbine shooting, several appellate courts across the country have confronted cases involving student expression that school officials have deemed threatening. Some courts have applied a true-threat analysis. Others have applied a *Tinker* analysis. Still other courts have applied both lines of cases to determine whether there has been a First Amendment violation. The following are five case-examples in which courts have reached different outcomes on relatively similar fact patterns.

#### ***Lavine v. Blaine School District***<sup>35</sup>

Blaine, Wash., high school student James Lavine's 11th-grade English teacher encouraged her students to engage in creative writing on their own time. She offered to critique her students' work for them, hoping to kindle their interest. In 1998, James Lavine wrote a poem on his own time titled "Last Words." The poem depicted the mindset of a student who killed his classmates and teachers. Lavine said he wrote the poem to "understand the phenomenon" of school shootings in places such as Springfield, Ore.

His poem reads:

**As each day passed,  
I watched,  
Love sprout, from the most,  
Unlikely places,  
Wich [sic] reminds,  
Me that,  
Beauty is in the eye's,**

...

**I pulled my gun,  
From its case,  
And began to load it.**

**I remember,  
Thinking at least I won't,  
Go alone,  
As I,  
Jumped in,  
The car,  
All I could think about,  
Was I would not,  
Go alone,  
As I walked,  
[t]hrough the empty halls,  
I could feel,  
My hart 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.**

Lavine showed the poem to his mother, who urged him not to take it to school. She warned him that school officials could misinterpret the poem and overreact. However, Lavine took the work to school and showed it to his English teacher.

The poem alarmed the teacher, who thought that James might harm himself or other students. She showed the poem to a school counselor. The counselor-psychologist was also concerned, especially because two years earlier James had confided to her that he had thought about suicide.<sup>36</sup>

The counselor knew James had a domestic disturbance with his father and had recently broken up with his girlfriend. After the counselor showed the poem to the vice principal, he contacted the local police department. Law enforcement went to the Lavine's home to evaluate James. A deputy sheriff interviewed him and reported his findings to the state psychiatrist. The psychiatrist decided there was no need to confine James involuntarily.<sup>37</sup>

The principal, however, decided to "emergency expel"<sup>38</sup> James until he was analyzed directly by a mental-health professional. The principal wrote a letter to James' parents saying James had written a poem "which implied extreme violence to our student body."<sup>39</sup>

A different school psychologist next examined James. After three sessions, this

psychologist concluded that he was not a danger to himself or others. School officials allowed James to return to school. He had missed 17 days.<sup>40</sup>

James and his father then sued the school in federal court, contending that the school had violated the student's First Amendment rights. A federal district court ruled in James' favor, determining that the school's actions were not justified.<sup>41</sup> The court noted that the school had a "compelling interest in ensuring the safety of the students and staff," but reasoned that its reaction "went well beyond that which was permissible under the circumstances."<sup>42</sup>

School authorities successfully appealed to a federal appeals court. A three-judge panel of the 9th U.S. Circuit Court of Appeals ruled in 2001 that under *Tinker*<sup>43</sup>, the school officials could reasonably forecast that James' poem would constitute a substantial disruption.

The appeals court determined that an application of the *Tinker* standard required a court to examine the totality of the circumstances. "When the school officials made their decisions not to allow James to attend class on Monday morning, they were aware of a substantial number of facts that in isolation would probably not have warranted their response, but in combination gave them a reasonable basis for their actions," the 9th Circuit wrote.<sup>44</sup>

These facts included James' previous conversations with the school counselor, wherein he revealed that he had thought of suicide; a domestic dispute between James and his father; James' recent breakup with his girlfriend; and past disciplinary incidents.<sup>45</sup>

Then the appeals court bluntly stated that it relied on the content of James' poem. "Last Words' is filled with imagery of violent death and suicide," the court wrote. "Even in its most mild interpretation, the poem appears to be a 'cry for help' from a troubled teenager contemplating suicide."<sup>46</sup>

The 9th Circuit concluded: "Taken together and given the backdrop of actual school shootings, we hold that these circumstances were sufficient to have led school authorities reasonably to forecast substantial disruption of or material interference with school activities — specifically, that James was intending to inflict injury upon himself or others."<sup>47</sup>

The appeals court acknowledged that James' mother may have been prescient in saying that school officials would overreact, but the appeals court said it must accord deference to school officials on safety issues. "School officials have a difficult task in balancing safety concerns against chilling free expression," the court wrote. "This case demonstrates how difficult that task can be."<sup>48</sup>

Lavine petitioned the 9th Circuit for *en banc* review. Although the 9th Circuit denied review, three judges dissented.<sup>49</sup> Judge Andrew J. Kleinfeld said the majority had distorted the principles of *Tinker*:

After today, members of the black trench coat clique in high schools in the western United States will have to hide their art work. They have lost their free speech rights. If a teacher, administrator, or student finds their art disturbing, they can be punished, even though they say nothing disruptive, defamatory or indecent and do not intend to threaten or harm anyone. School officials may now subordinate students' freedom of expression to a policy of making high schools cozy places, like daycare centers, where no one may be made uncomfortable by the knowledge that others have dark thoughts, and all the art is of hearts and smiley faces. The court has adopted a new doctrine in First Amendment law, that high school students may be punished for non-threatening speech that administrators believe may indicate that the speaker is emotionally disturbed and therefore dangerous.<sup>50</sup>

Judge Kleinfeld wrote that the panel had created new law at James Lavine's expense: "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 might be dangerous to themselves or others, even though the speech is not a threat, disruptive, defamatory, sexual or

## THE CASE OF THE TWO-YEAR-OLD DRAWING

In April 1999, the nation mourned the events at Columbine High School in Littleton, Colo., in which students Eric Harris and Dylan Klebold opened fire on their classmates, teachers and others before turning the guns on themselves. Unfortunately, Columbine is not the only episode of school violence. In March 2005, a student in Red Lake, Minn., killed fellow students. School shootings also have occurred in recent years in Springfield, Ore., Paducah, Ky., and Jonesboro, Ark.

These incidents and others understandably have heightened school officials' concerns about ensuring a safe learning environment for their students. No one questions that school officials have a compelling interest in school safety. However, the quest for safety can lead to the trampling of student free-expression rights. In the age of zero tolerance, some students become victims of Columbine in another sense. "We are in a new paradigm of lockdown and surveillance," said John Whitehead, founder of the Rutherford Institute, a civil liberties group based in Virginia. "Zero tolerance has become the bureaucrat's dream. If a kid brings a pistol to school with the intent to harm, should school officials really treat him the same as a kid who accidentally has a box cutter? Should they be treated the same way? I don't think so."

One such student subjected to this "lockdown" mentality was Adam Porter. The Louisiana teen was expelled from school, charged with two felonies and thrown into jail for four days for a 2-year-old drawing that his younger brother inadvertently brought to school.

In 1999, 14-year-old Adam sketched a drawing of his school, East Ascension High, under attack by a missile launcher, armed individuals and explosives. The drawing also contained disparaging remarks about his principal and a racial epithet.



## THE CASE OF THE TWO-YEAR-OLD DRAWING

Adam showed the drawing to his mother, Mary LeBlanc. "I remember when Adam sketched the drawing in his bedroom," she said. "I asked him what he was doing and he said he was 'just playing.' I found it humorous, not a serious thing. I talked with him about it. He had no violent intent at all when he made the drawing. In fact, I forgot about it until two years later."

The sketchpad was thrown into a family closet, where it remained for two years until Adam's younger brother, Andrew Breen, discovered it in March 2001. Andrew drew a picture of an animal on it. Then he took the sketchpad on the school bus to show one of his teachers. On the bus, Andrew showed his drawing to a fellow student. Flipping through the pad, that student noticed Adam's 2-year-old drawing. The student showed the school bus driver.

Eventually, Andrew received a three-day suspension for bringing an inappropriate drawing to Galvez Middle School. Meanwhile, officials were contacted at the high school and informed of Adam's drawing. School officials searched Adam at school and found a box cutter. They then removed him from school.

Adam worked at a local grocery store and used the box cutter for his job. School officials thought he was a serious security risk.

"Adam spent four nights in jail," his mother said. "It was unbelievable. Adam never had discipline problems in school. The only complaint I ever received about him was that he sometimes made the other kids laugh, sort of like a class clown. He was one of the most docile kids in school."

Adam was allowed to re-enroll at an alternative school after his mother waived his right to a hearing on the expulsion proceedings. His mother

otherwise within any previously recognized category of constitutionally unprotected speech."<sup>51</sup>

According to Kleinfeld, the majority's decision turns a public high school into a "constitutional black hole, where freedom of speech exists only to the extent that administrators are comfortable with it."<sup>52</sup>

Kleinfeld added that the school district's actions, instead of making school safer, could actually make it more unsafe. He wrote:

As for the cure, there is no particular reason to think that punishing speech about school violence will reduce the amount of school violence. ... Suppression of speech may reduce security as well as liberty. Allowing the school to punish a student for writing a poem about a school killer may foster school killings, by drying up information from students about their own and other students' emotional troubles. If the students don't talk, the administrators and medical professionals won't find out about problems that speech might reveal.<sup>53</sup>

### ***Demers v. Leominster School Department***<sup>54</sup>

In 2000, a teacher ordered Michael Demers, a 15-year-old special needs student in Leominster, Mass., out of her English class for talking. Demers went to the classroom of another teacher, who asked Michael to draw how he felt about being kicked out of class. Demers drew a picture of the school surrounded by explosives. He also drew a picture of the superintendent of schools with a gun pointed at his head and explosives at his feet.

The teacher showed the drawing to the principal, who did nothing at that time. The next day Demers wrote “I want to die” and “I hate life” on a sheet of paper. This was shown to his English teacher. School officials called a meeting with Michael and his father. The officials agreed that the student could remain in school if he received a psychiatric evaluation, behaved properly and did his schoolwork. After Michael refused to attend the psychiatric evaluation, school officials suspended him for the remainder of the school year.

Michael sued, claiming he was unconstitutionally disciplined for the content of his First Amendment expression (his drawing). The school countered that the drawing was a true threat and that Michael was punished owing to several other factors, including his disciplinary record and prior acts of assaultive behavior.

In its 2003 opinion, a federal district court applied the true-threat doctrine, noting that it focuses on whether the speaker/creator reasonably should have foreseen that others would interpret his expression as a threat. The court pointed out that “there is no requirement that the speaker had the ability or actually intended to carry out the threat.”<sup>55</sup> The judge concluded that Michael should have known “that his drawing and note would be considered a threat to the school and to himself.”<sup>56</sup>

The court also applied the *Tinker* standard and referenced the *Lavine* case several times. “This case is unlike *Tinker*,” the court wrote. “It did not involve ‘silent, passive expression of opinion, unaccompanied by any disorder or disturbance.’”<sup>57</sup> The court concluded that school officials reasonably balanced school safety and free expression.

## THE CASE OF THE TWO-YEAR-OLD DRAWING

signed the waiver after being told by a school hearing officer that such school proceedings were regularly decided in the school’s favor. Adam attended the alternative school, later re-enrolled at Ascension and dropped out in March 2002.

At that time, Adam Porter and his brother sued Ascension Parish School Board, alleging numerous constitutional violations. Among their claims, the brothers asserted that school officials had violated their First Amendment rights by punishing them for the content of a drawing.

School officials countered that they could reasonably believe that the drawing constituted a true threat or that they could reasonably forecast that the drawing would create a substantial disruption of school activities.

### At federal trial court

U.S. District Judge Frank J. Polozola had Columbine on his mind when he issued his decision granting summary judgment to the school board. “School officials,” he wrote, “cannot operate in a vacuum or in a fantasy world and must be aware of the events occurring at other schools to properly protect their students and faculty.

“One of the keys to avoiding violence and disruption at schools is to be aware of acts which could cause such. Indeed, several of the opinions this Court relies on in this opinion mention Columbine and similar incidents in upholding the actions taken by the schools in other cases.”

Polozola determined that Adam’s drawing constituted a substantial disruption under the *Tinker* standard articulated by the U.S. Supreme Court in its 1969 opinion, *Tinker v. Des Moines Indep. Comm. Sch. Dist.* Polozola also held that Adam’s drawing constituted a true threat and, thus, received no First Amendment protection.

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Adam and his lawyer, Dan Scheuermann, had argued that the drawing could not constitute a true threat because Adam never intended to show it to anyone at school. "This does not and should not matter," Polozola wrote. "What does matter is that the drawing did end up in the hands of a student, a bus driver and school administrators, all of whom were justified in believing it was a threat to the safety of all of the EAHS school family and facilities."

The brothers contended they shouldn't be punished, because the drawing was created in the privacy of Adam's room. Polozola rejected this argument. "The key issue is whether the school administrators and students perceived the drawing (or gun) as a threat to their safety and security when it was discovered on the school campus or bus."

### Before the 5th Circuit

The plaintiffs then took their case to a three-judge panel of the 5th U.S. Circuit Court of Appeals. Scheuermann said that during oral arguments the justices appeared to believe that the school officials had overreacted. "The facts of the case would not warrant what the school board did," he said. "The chief judge, who was on the panel, referred to what the school officials did as a 'disaster.'"

In *Porter v. Ascension Parish School Board*, the 5th Circuit disagreed with the lower court that Adam's speech was a true threat or that it constituted a substantial disruption under *Tinker*. "Given the unique facts of this case, we decline to find that Adam's drawing constitutes student speech on school premises," Judge Patrick Higginbotham wrote for the panel. "Adam's drawing was completed in his home, stored for two years, and never intended by him to be brought to campus."

### *In Re George T.*<sup>58</sup>

A 15-year-old high school student, George T., handed a poem to three of his fellow students at school in March 2001. The poem, called "Faces," read:

**Who are these faces around me?  
Where did they come from? They  
would probably become the next  
doctors or loirs or something. All really  
intelligent and ahead in their game. I  
wish I had a choice on what I want to  
be like they do. All so happy and  
vagrant. Each original in their own  
way. They make me want to puke. For  
I am Dark, Destructive, & Dangerous. I  
slap on my face of happiness but  
inside I am evil!! For I can be the next  
kid to bring guns to kill students at  
school. So parents watch your children  
cuz I'm BACK!! by: Julius AKA Angel.**

Two of the three students interpreted the poem as a personal threat. One of the students showed it to a teacher, who viewed the poem similarly. The teacher called the principal, who contacted police. The police went to the student's house and arrested him for making criminal threats. A juvenile court found the student guilty of making threats against the two students and sentenced the student to 100 days in juvenile hall. A California appeals court affirmed the conviction.<sup>59</sup>

The student appealed to the California Supreme Court, which in July 2004 reversed the lower courts. The state high court focused on the language of the state's criminal-threat law, which requires the threat to be "unequivocal, unconditional, immediate and specific."

The state supreme court noted that the poem was “ambiguous” and did not fit the definition of a threat. “It does not describe or threaten future conduct since it does not state that the protagonist plans to kill students, or even that any potential victims would include Mary or Erin” (the two students who felt threatened).<sup>60</sup>

The court noted that there was no history of animosity between George T. and other students, and no threatening gestures accompanying the delivery of the poem. It observed that the themes expressed “are not unusual in literature.”<sup>61</sup> The court concluded: “Ensuring a safe school environment and protecting freedom of expression, however, are not necessarily antagonistic goals.”<sup>62</sup>

#### ***D.G. v. Independent School District***<sup>63</sup>

A high school teacher in Oklahoma in May 2000 believed that a student was talking in class during the presentation of a movie. The teacher ordered the student to move to a separate part of the room. Frustrated by what she felt was a wrongful accusation, the student wrote the following poem:

##### **Killing Mrs. [teacher’s name]**

**I hate this class it is hell  
Every day I can’t wait for the bell,  
I bitch and whine until it is time,  
For me to get in the hall.**

**Back in the day,  
I would sit and pray  
To see if I may  
Run away (from this hell)**

**Now as the days get longer  
My yearning gets stronger  
To kill the bitcher.**

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“Private writings made and kept in one’s home enjoy the protections of the First Amendment, as well as the Fourth,” the panel wrote. “For such writings to lose their First Amendment protection, something more than their accidental and unintentional exposure to public scrutiny must take place.”

However, the 5th Circuit still ruled in favor of the school officials by granting them qualified immunity. Qualified immunity is a doctrine that protects government officials from liability in civil rights actions when they do not violate clearly established principles of law. The panel wrote that a reasonable school official “facing this question for the first time would find no pre-existing body of law from which he could draw clear guidance and certain conclusions.”

Because of the “unsettled nature of First Amendment law as applied to off-campus student speech inadvertently brought on campus by others,” the court determined that the school officials did not violate clearly established constitutional rights.

Mary LeBlanc took little solace in the fact that the 5th Circuit found that Adam’s drawing had First Amendment protection. “To me it feels like a watered-down victory,” she said. “It is a victory in that the court ruled that Adam’s First Amendment rights were indeed violated. It is also a victory with respect to all children in the public school system. The court has established that the schools cannot punish children who find themselves in the same or comparable situations.

“The granting of qualified immunity is the only part of the ruling that seems to defy logic,” she added. “The very first thing we learn in studying the Constitution is that you cannot be punished for voicing your opinion, or otherwise expressing yourself. And the sanctity of the home is well

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established. It is not logical to believe that a rational adult — a school principal, no less — would not know this.”

Scheuermann agreed. “The decision means that students’ rights, at least in the 5th Circuit, are quite diminished,” he said. “It makes one wonder what school officials would have to do to somehow get the attention of the judicial branch of government.”

For this reason, the Rutherford Institute continued to fund the case in an unsuccessful attempt to bring it before the nation’s highest court. “The (Supreme) Court really needs to look at whether qualified immunity trumps First Amendment rights in these kinds of cases,” Whitehead said before the case was turned away in spring 2005.

To Scheuermann, the case “certainly can be viewed as an example of post-Columbine overreaction.”

But what of school officials’ duty to ensure that the school is safe? Shouldn’t the officials take a close look at any student writings or drawings that contain violence? Yes, said Scheuermann and Whitehead, but they added that school officials should not assume that any student writing or drawing that shows violent themes should be automatically punished or categorized as a true threat. Some such student expression simply does not constitute a threat.

“Art history is replete with artists who have used violence in their art to protest violence: from Picasso’s ‘Guernica,’ Goya’s ‘5th of May’ to Gericault’s ‘Raft of the Medusa,’” Scheuermann said. “Mel Gibson used much violence to portray the crucifixion of Jesus. Why couldn’t Adam Porter create a drawing with violent themes to protest Columbine?”

Today, Adam Porter has obtained his G.E.D. and,

**One day when I get out of jail  
Cuz my friends paid my bail.  
And people will ask why.  
I’ll say because the Bitch had to die!**<sup>64</sup>

The student gave the poem to her friend. Her friend put the poem in her backpack. However, later in the day, the poem was found on the floor of another teacher’s classroom. Someone gave a copy of the poem, along with a drawing of the teacher by the student’s friend, to the assistant principal.<sup>65</sup> The principal allowed the student to return to class but suspended her six days later.

School officials contended the poem violated the school’s zero-tolerance policy regarding threats. The student’s father went to school to protest the suspension. The school later informed the student’s parents that the student was suspended for the remainder of the school year.

The suspension was later modified to an in-school “alternative placement” in which the student was separated from her classmates and could not participate in extracurricular activities.<sup>66</sup>

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

The court first applied a true-threat analysis: “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.”<sup>67</sup>

The court also noted that “in light of the violence prevalent in schools today, school officials are justified in taking very seriously student threats against faculty or other students.”<sup>68</sup>

The school officials admitted that they did not believe that the student wrote the poem as a true threat against the teacher. In fact, the student never intended for anyone to see the poem other than one friend. The court also noted that a psychologist who examined the student reported that she did not write the poem as a genuine threat but only as a way to vent her frustration.<sup>69</sup>

Next, the court examined whether school officials were justified under the *Tinker* standard. The school argued that any act of unpunished student disrespect will cause a substantial disruption. The court rejected that argument, saying that it “simply cannot hold water against the rights found in the First Amendment.”<sup>70</sup> The court reasoned that the poem simply did not cause a substantial disruption justifying a suspension.<sup>71</sup>

Though it noted that a short-term suspension would have been proper until school authorities had gathered the relevant facts, the court declared in its August 2000 opinion that the facts clearly showed the poem was not a threat or a substantial disruption.<sup>72</sup>

### ***State v. Douglas D.***<sup>73</sup>

An English teacher in Wisconsin assigned a creative writing exercise to her 8th-grade students in October 1998. The teacher, identified in court papers as “Mrs. C,” gave the students the freedom to pick their own topic.<sup>74</sup> Rather than begin his assignment in class, student Douglas D. apparently disrupted class by talking. Mrs. C sent him outside to complete his assignment.

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according to his mother, is working in a four-year apprentice program to become a sheet-metal worker.

#### **The larger lesson?**

The larger lesson may be an unfortunate one — that public school students possess very few First Amendment rights in school. “We are in danger of creating a whole generation of students who don’t know much about the Constitution,” Whitehead said. “With cases like Adam Porter’s, it will be easier to sell to kids an authoritarian regime.”

“Everyone wants schools to be safe,” Whitehead said. “But when bad things happen, school officials are not focused on the problem in the right way. It is like if the police were trying to do all they could to focus on traffic violations and let all the drug dealers run free. School officials sometimes look for the wrong things.”

Perhaps Mary LeBlanc gave the most important reason that the Supreme Court should take this case. “A lesson I learned is that kids in public schools don’t have any First Amendment rights. They may think they do, but they don’t.

“Kids’ rights are slipping away in public schools, just as other rights are slipping away in society. And people often don’t seem to care or realize that it’s happening.”

On May 31, 2005, the U.S. Supreme Court declined to review Adam Porter’s case.

At the end of class, Douglas D. handed in his assignment:

**There on(c)e lived an ugly old woman her name was Mrs. C that stood for crab. She was a mean old woman that would beat children sensless. I guess that's why she became a teacher.**

**Well one day she kick a student out of her class & he din't like it. That student was named Dick.**

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

**When the sub came 2 days later she needed a paperclip so she opened the droor. Ahh she screamed as she found Mrs. C's head in the droor.<sup>75</sup>**

The teacher believed the story to be a threat and notified the school's assistant principal. He called Douglas D. into his office, where the student apologized. The principal then gave Douglas D. an in-class suspension.<sup>76</sup>

After Douglas D. served his suspension, he returned to another English class. Later, for reasons not explained in the state supreme court opinion, the police filed a delinquency petition against Douglas D., alleging that he had violated the state disorderly conduct statute that prohibits "abusive conduct under circumstances in which the conduct tends to cause a disturbance."<sup>77</sup>

A district court determined that Douglas D. had violated the disorderly conduct law and sentenced him to formal supervision for one year. On appeal, the state appeals court affirmed, finding that the student's written work constituted a true threat.<sup>78</sup> Douglas D. appealed to the Wisconsin Supreme Court, arguing that the disorderly conduct statute could not be applied to written work.

The Wisconsin Supreme Court ruled in May 2001 that the First Amendment did not prohibit the state from applying the disorderly conduct statute to written work.<sup>79</sup> In other words, the state high court determined that a student could convey a true threat in his written work.

The high court said that to determine whether speech is a true threat, a court must consider the following factors: How the recipient and listener reacted to the speech, whether the threat was conditional, whether the speech was communicated directly to the recipient by the speaker, whether the speaker had made similar comments to the

recipient in the past, and whether the recipient had reason to believe the speaker would commit violence.<sup>80</sup>

The state contended the speech was a true threat because: (1) the first two paragraphs of the story closely paralleled the events in class (Mrs. C kicking Douglas out of class); and (2) Douglas handed the story directly to Mrs. C.<sup>81</sup>

Douglas countered that (1) the story was a fictional, creative writing exercise; (2) he had never threatened the teacher in the past; and (3) the teacher had no reason to believe that the student was violent.<sup>82</sup>

The court sided with the student, focusing on the context of the expression as a creative writing project. According to the state supreme court, teachers “should expect and allow more creative license.”<sup>83</sup> The state high court also noted the story was written in third person and contained hyperbole and “attempts at jest” such as saying “C” stood for “crab” and she became a teacher because she could beat children.<sup>84</sup>

The state high court concluded: “With this in mind, we conclude that Douglas’s story, although we find it to be offensive and distasteful, unquestionably is protected by the First Amendment. Our feelings of offense and distaste do not allow us to set aside the Constitution.”<sup>85</sup>

The Wisconsin Supreme Court reasoned that it must not allow concern over headlines to affect its constitutional analysis: “this court must not succumb to public pressure when deciding the law. Headlines may be appropriate support for public arguments on the floor of the legislature, but they cannot support an abandonment in our courthouses of the constitutional principles that the judiciary is charged to uphold.”<sup>86</sup>

The court also reasoned that the First Amendment would not bar the school from imposing discipline upon Douglas D. “This case reinforces our belief that while some student conduct may warrant punishment by law enforcement officials and school authorities, school discipline generally should remain the prerogative of our schools, not our juvenile justice system.”<sup>87</sup>

Judge David T. Prosser wrote a spirited dissent in which he cited the “disturbing backdrop of school violence.”<sup>88</sup> Responding to the majority’s argument that the student’s writing was more hyperbole than threat, Prosser cited a case from Winterstown, Pa., where a man injured nine people at a school with a machete.<sup>89</sup>

Prosser then compared the current-day horrors of school violence with the epidemic of fires in theaters before Justice Oliver Wendell Holmes’ famous phrase — “falsely shouting fire in a theatre” — in the 1919 decision *Schenck v. United States*.<sup>90</sup>



“The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic,”<sup>91</sup> Holmes wrote in *Schenck*. Prosser compared the outbreak of fires in the early 20th century to the outbreak of school violence today:

Today our country is consumed by the outbreak of violence in public schools. Threats of violence in schools must be taken seriously. Almost inevitably these threats produce fear among students and teachers. They inflict harm and impair the atmosphere for learning. Sometimes they create panic. ‘Panic’ is the word Justice Holmes used in *Schenck*. ‘Panic’ is the reaction Mrs. C described when she received Douglas’s story. The potential for panic suggests an alternative analysis that the parties and the courts in this case have not explored.<sup>92</sup>

Prosser concluded: “Because of the epidemic of violence in public schools, threats against students, teachers and administrators in a school setting should not be afforded First Amendment protection. Based upon a ‘falsely shouting fire in a theatre’ or ‘panic’ analysis, school threats are incendiary *per se*.”<sup>93</sup>

#### *IV. Reflections and Recommendations on Balancing School Safety and Student Rights*

School officials do not have an easy task, as the previous case examples demonstrate. They operate in an environment in which one mistake in a threat assessment can have disastrous consequences. “The real challenge for school leaders is the belief that they must not be wrong about the credibility of a threat,” said Todd DeMitchell, a former teacher, principal and superintendent. “They can be wrong if there is no threat, but there is no room for a mistake if the threat is real. It is easier to take the heat for being overly protective than being lax.”<sup>94</sup>

The cases examined in the last chapter provide a legal framework for understanding how to address issues of school safety and student rights in public schools. Some key points to keep in mind:

- Students may face school penalties and/or criminal charges for their creative work.
- The courts are divided in how they apply the true-threat and *Tinker* substantial-disruption analyses.

- Many courts give considerable leeway to school officials to hand out short-term suspensions until they investigate whether an instance of student expression is a true threat.
- Post-Columbine, all courts are more conscious of the threat of school violence. Many courts specifically mention Columbine in their opinions.<sup>100</sup>
- If a student creative expression does not target a specific individual, it is less likely to constitute a true threat or create a substantial disruption under *Tinker*.<sup>101</sup>
- A student’s disciplinary history is often a key factor in the true-threat and substantial-disruption analyses.
- The reaction of the recipient of the student expression can also be a key determinant in whether the expression constitutes a true threat.
- Students are more likely to prevail in their First Amendment challenge or defense if their allegedly threatening expression is a creative class project. However, if the student accompanies his creative writing project with an angry demeanor or other physical conduct, a court is far more likely to conclude that the student’s expression, even if simply a drawing, constitutes a true threat.<sup>102</sup>

***Recommendations for Balancing Safety, First Amendment Rights***

Educators face a difficult challenge as they try to balance school safety with the need to protect students’ constitutional rights. At times, it appears the two goals conflict with one another. However, ACLU of Washington staff attorney Aaron Caplan said the apparent conflict is a “false dichotomy” — that school officials can do both.

Interviews with several experts revealed a variety of recommendations for school officials.

***I. School officials should consider a range of factors and options when dealing with violent-themed student expression.***

Every student is different. Most students who create forms of violent expression will not act out in a rampage like Klebold and Harris. School officials should evaluate the relevant facts and consider context before deciding on a course of action. There are many factors for school officials to consider before initiating their planned response. These include evaluating the student’s disciplinary history, relationship with fellow students and teachers, home life, the impact on the specific target of a perceived threat,

if applicable, and the reasons the student communicated the violent sentiment if reasonably ascertainable.

“Know the student and understand the circumstances of the communication,” DeMitchell said. “What is the history of the student? Has the student recently experienced a significant negative event? What do the friends of the student have to say about the student and the communication? What is the perception of the student’s teachers regarding the validity of the threat?”

In addition to the range of factors to consider, experts say school officials should consider a range of options. These include talking to the student, talking to the parents or guardians, involving the school counselor and, in more serious cases, involving a psychologist to evaluate the student.

“In certain situations where there is cause for real concern and some real evidence that the student has some problems, a psychological evaluation could be appropriate,” said Caplan, who has litigated many student-expression cases. “But it is not appropriate for school officials to make this mandatory at the drop of a hat. They shouldn’t immediately leap from one violent image or essay to mandatory psychological help.”

In many cases safety should trump freedom of speech. School officials would be negligent if they didn’t examine students’ violent expression. “All teachers, administrators and school support staff should be attentive to potential warning signs of threatening behavior,” said school-safety expert Ken Trump.

Caplan conceded that “schools do not have to ignore danger signs.”<sup>103</sup> He said that if a teacher or school counselor has reason to know that a student is troubled or dangerous, the school official should look into the matter.

“In tough situations, there is no formulaic approach,” said National School Board Association staff attorney Thomas Hutton. “These are professional judgment calls.” He said that the school’s approach has to be “contextual”: School officials have to consider many different factors. These, he said, should include other indicators and risk factors such as whether the student has been the target of bullies or has a difficult home life.

## ***II. School officials should avoid zero-tolerance policies that do not allow for some degree of discretion and flexibility.***

School administrators should realize that different responses may be required in different situations. There is no one-size-fits-all solution. Hutton said school boards should avoid enacting policies that don’t leave room for some discretion. “At NSBA we caution school boards against zero-tolerance policies that take away their discretion. It

is fine to call a policy ‘zero tolerance,’ but the school board policies must leave some room for common-sense decision making.”

According to Trump, “The key to balancing safety with First Amendment or any other rights is to have legally sound policies, reasonable and well-understood procedures, and well-trained school staff. In my 20-years plus of working in schools, the vast majority of educators I have worked with strive for firm, fair and consistent discipline applied with good common sense.”<sup>104</sup>

“Unfortunately, it is when the latter component — common sense — is missing that we tend to see anecdotal cases where students’ rights are violated or questionable disciplinary actions come into place,” Trump added.<sup>105</sup>

***III. School officials should develop a well-trained staff familiar with threat assessment. Schools should develop clearly understood written guidelines. A team approach is preferred.***

Trump said the first step in dealing with violent student expression is to develop a well-trained staff that understands the threat-assessment process. He wrote:

First and foremost, [schools need to] have a well-trained staff, legally sound policies, and clearly understood threat-assessment protocols/procedures. The specifics of each incident will vary, but a well-trained staff with clear guidelines will reduce the risks of subjective, inappropriate responses. We also stress the importance of adult school staff knowing their students, parents knowing their kids, and good communication among parents and school staff to provide a culture of support for students and to identify those needing special help before [children get] to the point where they are crying out for help in writings and drawings. These elements, combined with common sense, will go a long way.<sup>106</sup>

Trump said that a “team approach” can help address these challenges: “Many adults working with students have different slices of the overall picture of the student, and these pieces often do not come together until after a crisis. We want the adults who are familiar with a potentially troubled student to pull the pieces together, identify the potential problem, and provide intervention before a potential crisis occurs. The team approach to threat assessment helps facilitate this multi-perspective examination of the threat and, most importantly, the student involved.”

Experts also say school officials should make clear to students that they are taking their words, writings and drawings seriously. “The student code of conduct should lay out the

## HOW SAFE ARE SCHOOLS?

Columbine and other school shootings dominate the debate over school safety. No doubt violence in schools remains a concern. Law professor Sarah Redfield noted in a law review article that from July 1998 to June 1999, there were 47 violent deaths in schools. Thousands of kids have been expelled from school for bringing weapons onto school grounds.<sup>95</sup>

However, many experts argue that kids are safer in schools than they are any other place. They say it is not clear that there has been a marked increase in school violence. Some studies have shown that school violence is declining.<sup>96</sup>

The Center on Juvenile and Criminal Justice assessed data on school crime in its 2000 report, "School House Hype: Two Years Later." The center points out that schools are actually very safe places. The report found there was a 1 in 2 million chance that a child would die in school in 1998-99.<sup>97</sup>

The National Center for Education Statistics and the Bureau of Justice Statistics reported in 2004: "In each school year from July 1, 1992, to June 30, 2000, youth ages 5-19 were at least 70 times more likely to be murdered away from school than at school."<sup>98</sup>

"There is not a trend of increasing school violence," according to Dan Macallair, executive director of the Center on Juvenile and Criminal Justice. "Schools are the safest place for kids to be. More violence is committed against kids in the form of child abuse in family homes. Rather, our perceptions of increasing school violence are caused by increasing media attention. Columbine was a rare, isolated incident that has colored perception on the issue of violence in schools. While safety is an important concern, the fact remains that by and large schools are very safe places."<sup>99</sup>

rules for what expression is not tolerable and show the school's commitment to safety and how serious that commitment is," Hutton said. "It's just like in the airport, there are no jokes about bombs. Students need to understand what type of world we are living in."

"I always recommend establishing written guidelines at the school district level," said Kevin O'Shea, who has represented school districts in litigation. "I liken it to employment policies: In the workplace, written guidelines cover all sorts of potentially disruptive behavior. For the most part, employers with good policies can handle these occasions with little fanfare."

***IV. Day to day, schools must operate in a manner that respects student rights as officials strive to provide a safe environment.***

School officials must ensure a secure learning environment — and foster one that respects student rights. DeMitchell explained: "For me there are two core concepts that ground my decision making — I must take reasonable steps to keep my students safe, and I must provide an environment in which students are treated with the dignity and respect they deserve."

Programs that encourage schools to respect students' constitutional rights, such as the First Amendment Center's First Amendment Schools project, seem to have a positive effect.<sup>107</sup> John Stapelfeld, principal of Hudson High School in Hudson, Mass., reported good results in the three years that his school has participated as a First Amendment Project School. "The past three years participating in the First Amendment Schools project, I have observed

that students seem to be willing to discuss serious issues in an open forum that prevents physical confrontations,” he said. “The students seem more willing to discuss the issues rather than engage in shoving matches.”<sup>108</sup> Respecting student rights, he said, “takes the pressure off of them and makes it less likely that students will act out their frustrations.” The net effect, according to Stapelfeld, is that “students are more willing to talk about it, rather than fight about it.”

The question remains what school officials can do to serve both goals – ensuring safety and protecting freedom of expression. O’Shea said, “The two goals are entirely consistent.

“School officials need to learn all they can about the First Amendment and attendant legal requirements, however, before they decide how to balance safety and expression,” O’Shea added. “It takes a little more work, but in the long run it will save the schools (and students) a lot of unnecessary grief.”

“The problem we’re facing in terms of speech is that it may be true that with students who write or create violent images, there is a really small segment of those students who might commit violence,” Caplan said. “Do we then suddenly say ‘Use such violent expression as a [predictor] for future dangerousness?’”

Although the Center on Juvenile and Criminal Justice has stated that there is “no magic bullet for school safety,” creating “an atmosphere of nonviolence is crucial to making schools safer.”<sup>109</sup> School safety “cannot be achieved by compromising the constitutional guarantees” of students.<sup>110</sup>

Caplan agreed that merely punishing students does not make schools safer. “The punitive response creates a false sense of security,” he said. “It could just make the kid angrier and more resentful.” He also identified negative fallout from the expulsion/suspension response. “First it brands the kid [who] is expelled,” he said. “It also harms other kids. It reduces trust and potentially makes them feel that they’re next.”

Furthermore, silencing student expression — even expression that most of us don’t like — may be harmful. And, as stated by Judge Kleinfeld, suppressing student speech may well lead to compromised security in some instances: “Allowing the school to punish a student for writing a poem about a school killer may foster school killings, by drying up information from students about their own and other students’ emotional troubles.”<sup>111</sup> Others agree with this assessment, arguing that punishing students can sometimes be dangerous.<sup>112</sup>

If students feel they have no outlet, they may resort to more subversive, violent means of expressing themselves. Scholars have identified this view as the “safety valve” justification for free speech articulated by Justice Louis Brandeis in 1927 when he wrote that the framers of the Constitution “knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supported grievances and proposed remedies.”<sup>113</sup>

Kleinfeld said it more succinctly in the *Lavine* case: “Suppression of speech may reduce security as well as liberty.”<sup>114</sup>

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### **Endnotes**

- <sup>1</sup> Accessible at <http://www.boulderdailycamera.com/shooting/report/p10401-10500.pdf>  
For an informative site on the Columbine shooting, see writer Dave Culver’s Columbine Almanac at <http://blogs.salon.com/0001137/stories/2003/06/13/theColumbineAlmanac4SpecializedSites.html>
- <sup>2</sup> Interview, 7/05.
- <sup>3</sup> Id.
- <sup>4</sup> David L. Hudson Jr. “Fear of Violence in Our Schools: Is ‘Undifferentated Fear’ in the Age of Columbine Leading to a Suppression of Student Speech,” 42 *Washburn L.J.* 79 (2002).
- <sup>5</sup> Interview, 8/05.
- <sup>6</sup> Interview, 8/05.
- <sup>7</sup> Eugenia Harris, “Boy who wrote scary tale is out of jail, but not out of trouble,” First Amendment Center Online, 11/05/99, <http://www.firstamendmentcenter.org/news.aspx?id=8328>
- <sup>8</sup> *Boman v. Bluestem Unified School District No. 205*, 2000 U.S. Dist. LEXIS 5297 (D. Kan. Feb. 14, 2000).
- <sup>9</sup> *Porter v. Ascension Parish School Bd.*, 393 F.3d 608 (5th Cir. 2004).

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<sup>10</sup> Interview, 8/05.

<sup>11</sup> Charles Haynes, “Recognizing Students’ Rights Makes for Safer Schools” (9/2/01), First Amendment Center Online, <http://www.firstamendmentcenter.org/commentary.aspx?id=2291>

<sup>12</sup> *State v. District Board of Sch. Dist. No. 1*, 135 Wis. 619, 116 N.W. 232 (1908).

<sup>13</sup> 310 U.S. 586 (1940).

<sup>14</sup> 319 U.S. 624, 637 (1943).

<sup>15</sup> *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

<sup>16</sup> *Id.* at 506.

<sup>17</sup> *Id.* at 508.

<sup>18</sup> David L. Hudson Jr., “On 30-year anniversary, Tinker participants look back at landmark case,” First Amendment Center Online, 2/24/99, <http://www.firstamendmentcenter.org/analysis.aspx?id=5582>

<sup>19</sup> 478 U.S. 675 (1986).

<sup>20</sup> *Id.* at 681.

<sup>21</sup> *Id.* at 683.

<sup>22</sup> *Id.*

<sup>23</sup> 484 U.S. 260 (1988).

<sup>24</sup> *Id.* at 273.

<sup>25</sup> See e.g. *Chandler v. McMinnville School District*, 978 F.2d 524, 529 (9th Cir. 1992).

<sup>26</sup> See generally, David L. Hudson Jr. and John E. Ferguson Jr., “The Court’s Inconsistent Treatments of *Bethel v. Fraser* and the curtailment of students’ rights,” 36 *J. Marshall L. Rev.* 181 (2002).

<sup>27</sup> *Boroff v. Van Wert City Board of Education*, 220 F.3d 465 (6th Cir. 2000).

<sup>28</sup> *Hazelwood*, 484 U.S. at 271.

<sup>29</sup> 394 U.S. 705 (1969).

<sup>30</sup> *United States v. Miller*, 115 F.3d 361 (6th Cir. 1997).

<sup>31</sup> *Doe v. Pulaski County Special School District*, 306 F.3d 616, 623 (8th Cir. 2002).



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<sup>32</sup> 90 F.3d 367 (9th Cir. 1996).

<sup>33</sup> *Id.* at 372.

<sup>34</sup> *Virginia v. Black*, 538 U.S. 343, 360 (2003).

<sup>35</sup> 257 F.3d 981 (9th Cir. 2001).

<sup>36</sup> *Id.* at 985.

<sup>37</sup> *Id.* at 986.

<sup>38</sup> *Id.*, citing Wash. Admin. Code § 180-40-295 (empowering school districts to expel immediately students who pose “an immediate and continuing danger” to students, school personnel.)

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Lavine v. Blaine School District*, 2000 U.S. Dist. LEXIS 18989 (W.D. Wash.)(Feb. 24, 2000).

<sup>42</sup> *Id.* at \*12.

<sup>43</sup> 393 U.S. 503 (1969).

<sup>44</sup> 257 F.3d at 989.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 990.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 992.

<sup>49</sup> *Lavine v. Blaine School District*, 279 F.3d 719 (9th Cir. 2002).

<sup>50</sup> *Id.* at 720-721.

<sup>51</sup> *Id.* at 724.

<sup>52</sup> *Id.* at 725.

<sup>53</sup> *Id.* at 728-729.

<sup>54</sup> 263 F.Supp. 2d 195 (D. Mass. 2003).

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<sup>55</sup> Id. at 202.

<sup>56</sup> Id.

<sup>57</sup> Id.

<sup>58</sup> *In Re George T.*, 33 Cal.4th 620 (Cal. 2004).

<sup>59</sup> Id. at 629.

<sup>60</sup> Id. at 636.

<sup>61</sup> Id. at 638.

<sup>62</sup> Id. at 639.

<sup>63</sup> 2000 U.S. Dist. LEXIS 12197 (N.D. Okl.)(8/21/2000).

<sup>64</sup> Id. at \*3.

<sup>65</sup> Id. at \*4.

<sup>66</sup> Id. at \*7-8.

<sup>67</sup> Id. at \*12, citing *United States v. Orozco-Santillan*, 903 F.2d 1262 (9th Cir. 1990).

<sup>68</sup> Id. at \*13.

<sup>69</sup> Id. at \*14.

<sup>70</sup> Id. at \*15.

<sup>71</sup> Id. at \*15.

<sup>72</sup> Id. at \*18.

<sup>73</sup> 243 Wis. 204, 626 N.W.2d 725 (2001).

<sup>74</sup> Id. at 730.

<sup>75</sup> Id. at 730-31.

<sup>76</sup> Id. at 731.

<sup>77</sup> Id.

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<sup>78</sup> *State v. Douglas D.*, 2000 WI App. 32, 232 Wis. 2d 559, 608 N.W.2d 438, 1999 Wis. App. LEXIS 1333 (unpublished).

<sup>79</sup> *Douglas D.*, 626 N.W.2d at 735.

<sup>80</sup> *Id.* at 740.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 740-741.

<sup>83</sup> *Id.* at 741.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 742.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 743.

<sup>88</sup> *Id.* at 749 (J. Prosser, dissenting).

<sup>89</sup> *Id.* at 756.

<sup>90</sup> *Id.* at 760-761.

<sup>91</sup> 249 U.S. 47, 52 (1919)

<sup>92</sup> *Douglas D.*, 626 N.W. 2d at 761 (J. Prosser, dissenting).

<sup>93</sup> *Id.* at 762.

<sup>94</sup> Interview, 8/05.

<sup>95</sup> Sarah E. Redfield, "Threats Made, Threats Posed: School and Judicial Analysis in Need of Redirection," 2003 *BYU Educ. & L.J.* 663, 665.

<sup>96</sup> Annie Woo, "Violence, Crime Declining at School," *The Safety Zone*, Vol. 1, Issue 4 (Winter 1999), [http://www.safetyzone.org/pdfs/newsletters/newsletter\\_winter\\_99.pdf](http://www.safetyzone.org/pdfs/newsletters/newsletter_winter_99.pdf)

<sup>97</sup> "School House Hype: Two Years Later" (2000), <http://www.cjcj.org/pubs/schoolhouse/shh2pr.html>

<sup>98</sup> Devoe, J.F., et al. "Indicators of School Crime and Safety: 2004" (November 2004), U.S. Departments of Education and Justice, <http://nces.ed.gov/pubs2005/2005002.pdf>

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<sup>99</sup> Interview, 8/05.

<sup>100</sup> *Lavine*, 257 F.3d at 983 (“It arises against a backdrop of tragic school shootings, occurring both before and after the events at issue here, and requires us to evaluate through a constitutional prism the actions school officials took to address what they perceived was the student’s implied threat of violent harm to himself and others.”); *Douglas D.*, 626 N.W.2d at 737 (“School violence is all too prevalent in our schools today ... Concomitantly, the threat of violence intrudes our children’s places of learning.”); *D.G.*, at \*18 (“The concern for faculty and student safety is particularly high in view of recent episodes of student violence in Colorado, Oklahoma and other states.”).

<sup>101</sup> *D.G.* and *Boman*.

<sup>102</sup> See *Commonwealth v. Milo M.*, 433 Mass. 149, 740 N.E.2d 967 (2001).

<sup>103</sup> Interview, 8/05.

<sup>104</sup> Interview with Trump, 7/05.

<sup>105</sup> *Id.*

<sup>106</sup> Interview with Trump, 7/05.

<sup>107</sup> First Amendment Schools, <http://www.firstamendmentschools.org/about/aboutindex.aspx>

<sup>108</sup> Interview, 8/05.

<sup>109</sup> Center on Juvenile and Criminal Justice, “School House Hype: Two Years Later,” (2000).  
<http://www.cjcj.org/pubs/schoolhouse/shh2.html>

<sup>110</sup> W. David Watkins and John S. Hooks, “The Legal Aspects of School Violence: Balancing School Safety With Students’ Rights,” 69 *Miss. L.J.* 641, 642-643 (1999).

<sup>111</sup> *Id.*

<sup>112</sup> See *Hils*, *supra* n. at 373 (“By punishing speech which does not rise to the level of a ‘true threat,’ not only do schools risk the possibility of infringing on the student’s First Amendment rights, they also run the risk of actually stifling the voice of a potentially violent student.”).

<sup>113</sup> *Whitney v. California*, 274 U.S. 357, 375 (1927) (J. Brandeis, concurring).

<sup>114</sup> *Lavine v. Blaine School District*, 279 F.3d 719, 729 (Kleinfeld, dissenting from denial of *en banc* review).

## V. *Cases and Resources*

### **Cases**

*Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986)

U.S. Supreme Court rules that school officials did not violate the First Amendment rights of a student who was suspended for giving a vulgar speech before the student assembly. The Court determines that school officials can prohibit student speech that is vulgar, lewd or plainly offensive.

*Boman v. Bluestem Unified School District*, 2000 U.S. Dist LEXIS 5389 (D. Kan.)(1/28/00)

Federal district court rules that school officials overreacted by expelling an honors student for her poem titled “Who Killed My Dog?” The court determines that the poem was not a true threat.

*D.G. v. Independent School District*, 2000 U.S. Dist. LEXIS 12197 (N.D. Okla.)(8/21/00)  
Federal district court rules that school officials violated the First Amendment rights of a student when they suspended her for a poem that talked about the death of her teacher. The court rules that the poem was not a true threat and did not constitute a substantial disruption under *Tinker*. The court focuses on the fact that the student never distributed the poem.

*Doe v. Pulaski County Special School District*, 306 F.3d 616 (8th Cir. 2002)

Federal appeals court rules that a school could expel a student for his “violent” and “misogynic” letter that he never delivered to his ex-girlfriend. A “friend” of the student stole the letter and gave it to the girl. The appeals court still decides that the letter was a true threat.

*Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988)

U.S. Supreme Court rules that school officials can censor most school-sponsored student expression if they can articulate a reasonable educational reason for their actions. The case involved a principal censoring school newspaper articles on teen pregnancy and divorce.

*In Re Douglas D.*, 626 N.W.2d 725 (WI. 2001)

Wisconsin Supreme Court rules that a middle school student could not be criminally charged under disorderly conduct statute for his creative writing essay that allegedly threatened a teacher.

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*In Re George T.*, 33 Cal.4th 620, 93 P.3d 1007, 16 Cal. Rptr.3d 61 (2004)

California Supreme Court rules that a high school student did not make criminal threats in his “Dark Poetry.” The court said the poetry simply did not meet the definition of a true threat because it did not contain an unequivocal, immediate intent of harm.

*In Re Ryan D.*, 100 Cal.App.4th 854, 123 Cal.Rptr.2d 193 (2002)

California appeals court rules that a high school student did not make a criminal threat when he drew a painting of a student shooting a school resource officer. The court determines that the state could not show that the student “intended to convey any threat” to the officer.

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

Arkansas Supreme Court rules that a high school student’s rap song constituted a true threat.

*Lavine v. Blaine School District*, 257 F.3d 981 (9th Cir. 2001)

*Lavine v. Blaine School District*, 279 F.3d 719 (9th Cir. 2002)(*en banc* review denied)

Federal appeals court rules that school officials did not violate the First Amendment rights of a student when they emergency-expelled him because of his poem about a school shooter. The appeals court decides that under the totality of the circumstances, school officials could have reasonably forecast that the poem would create a substantial disruption within the meaning of the *Tinker* test.

*Lovell v. Poway Unified School District*, 90 F.3d 367 (9th Cir. 1996)

Federal appeals court rules that a high school student did convey a true threat when she told school counselor: “If you don’t give me this schedule change, I’m going to shoot you.”

*Porter v. Ascension Parish School Board*, 393 F.3d 608 (5th Cir. 2004)

Federal appeals court rules a student did not convey a true threat when his younger brother brought to school his 2-year-old drawing of his school under attack. However, the appeals court determines that school officials are entitled to qualified immunity because the legal landscape on student rights is not clear enough to warrant the imposition of liability in this case.

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

U.S. Supreme Court rules that school officials can censor student-initiated expression only if they can reasonably forecast that the student speech will cause a substantial disruption of school activities. The case involved students wearing black armbands to protest U.S. involvement in Vietnam.

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**Internet**

American Association of School Administrators  
[www.aasa.org](http://www.aasa.org)

American Civil Liberties Union (on Student Rights)  
[www.aclu.org/StudentsRights/StudentsRightsMain.cfm](http://www.aclu.org/StudentsRights/StudentsRightsMain.cfm)

Center on Juvenile and Criminal Justice  
[www.cjcj.org](http://www.cjcj.org)

First Amendment Center  
[www.firstamendmentcenter.org](http://www.firstamendmentcenter.org)

First Amendment Schools  
[www.firstamendmentschools.org](http://www.firstamendmentschools.org)

Hamilton Fish Institute  
[www.hamfish.org](http://www.hamfish.org)

National School Boards Association  
[www.nsba.org](http://www.nsba.org)

National School Safety Center  
[www.nssc1.org](http://www.nssc1.org)

National School Safety and Security Services  
[www.schoolsecurity.org](http://www.schoolsecurity.org)

Rutherford Institute  
[www.rutherford.org](http://www.rutherford.org)



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**First Amendment Center**

Gene Policinski  
EXECUTIVE DIRECTOR

John Seigenthaler  
FOUNDER

1207 18th Avenue South  
Nashville, TN 37212  
615/727-1600

1101 Wilson Boulevard  
Arlington, VA 22209  
703/528-0800

**[firstamendmentcenter.org](http://firstamendmentcenter.org)**

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