

Volume 8 | Issue 1

---

Summer 2005

## Shedding Your Soul at the Schoolhouse Gate: The Chilling of Student Artistic Speech in the Post-Columbine Era

Anna Boksenbaum  
*CUNY School of Law*

Follow this and additional works at: <https://academicworks.cuny.edu/clr>



Part of the [Law Commons](#)

---

### Recommended Citation

Anna Boksenbaum, *Shedding Your Soul at the Schoolhouse Gate: The Chilling of Student Artistic Speech in the Post-Columbine Era*, 8 N.Y. City L. Rev. 123 (2005).  
Available at: [10.31641/clr080103](https://academicworks.cuny.edu/clr/10.31641/clr080103)

The CUNY Law Review is published by the Office of Library Services at the City University of New York. For more information please contact [cunylr@law.cuny.edu](mailto:cunylr@law.cuny.edu).

---

## Shedding Your Soul at the Schoolhouse Gate: The Chilling of Student Artistic Speech in the Post-Columbine Era

### Acknowledgements

Thanks to Professor Ruthann Robson, Elena Riverstone, my mother and research assistant, Erik Pitchal at Children's Rights Inc., Steve Mosqueda, and all my friends and family.

**SHEDDING YOUR SOUL  
AT THE SCHOOLHOUSE GATE:  
THE CHILLING OF STUDENT ARTISTIC SPEECH  
IN THE POST-COLUMBINE ERA**

*Anna Boksenbaum\**

INTRODUCTION

Of childhood, Edgar Allen Poe wrote this poem entitled, *Alone*:

From childhood's hour I have not been  
As others were; I have not seen  
As others saw; I could not bring  
My passions from a common spring.  
From the same source I have not taken  
My sorrow; I could not awaken  
My heart to joy at the same tone;  
And all I loved, I loved alone.  
Then- in my childhood, in the dawn  
Of a most stormy life- was drawn  
From every depth of good and ill  
The mystery which binds me still:  
From the torrent, or the fountain,  
From the red cliff of the mountain,  
From the sun that round me rolled  
In its autumn tint of gold,  
From the lightning in the sky  
As it passed me flying by,  
From the thunder and the storm,  
And the cloud that took the form  
(When the rest of Heaven was blue)  
Of a demon in my view.<sup>1</sup>

Poe, famous for the macabre poems and short stories he published as an adult, was obsessed with death and the details of death beginning in his early childhood. His obsession is evident in letters he wrote during his early years which “reflect an excessive delight in

---

\* Anna Boksenbaum, J.D. 2005, City University of New York Law School. Thanks to Professor Ruthann Robson, Elena Riverstone, my mother and research assistant, Erik Pitchal at Children's Rights Inc., Steve Mosqueda, and all my friends and family.

<sup>1</sup> EDGAR ALLEN POE, COMPLETE TALES AND POEMS OF EDGAR ALLEN POE (1849), available at [http://www.internal.org/list\\_book.phtml?bookID=9](http://www.internal.org/list_book.phtml?bookID=9) (last visited Dec. 8, 2004).

graphic, gory details.”<sup>2</sup> As a teenager, Poe was already writing poems, and he completed his first volume of poetry by age sixteen. He is not the only writer whose writing helped him cope with a painful childhood. Charles Bukowski’s biographer writes of Bukowski as a teenager, “[i]ndeed, suicide and self-destruction become major themes of Bukowski’s work: he referred to himself as ‘the suicide kid.’”<sup>3</sup> Like Poe and Bukowski, Eugene O’Neill began writing poetry in his teen years. One biographer writes, “It seems certain that the playwright’s adult writing grew out of and was an extension of the fantasizing, reading and writing that in childhood helped the boy withstand episodes of acute separation anxiety . . . .”<sup>4</sup>

These writers had difficult childhoods. Bukowski’s father was often drunk and abusive.<sup>5</sup> Poe’s parents died when he was a toddler leaving him to be raised by unwilling foster parents.<sup>6</sup> Eugene O’Neill was born in a hotel and spent his formative years traveling with the theater company that employed his parents. He was exposed to his mother’s drug addiction and his parents’ unsteady relationship until he was sent to boarding school where he began to drink heavily.<sup>7</sup>

As children these writers were probably not the most likeable students. Bukowski suffered from terrible feelings of insecurity, depression, and isolation.<sup>8</sup> Eugene O’Neill was already exhibiting the

---

<sup>2</sup> Karen Bernardo, *Edgar Allen Poe (1809-1849)*, at <http://www.storybites.com/poe.htm> (last visited Dec. 8, 2004).

<sup>3</sup> Writing and literature were extremely important to Charles Bukowski. Jack Foley, a book reviewer states, “Like other troubled adolescents, Bukowski took refuge in books. The local library provided him with ‘the only heaven I had ever felt.’” Bukowski’s biographer, Neeli Cherkovski further comments,

The books he read taught him that he had not given in to the norms of society, and was not diminished by his father’s cruelty. . . . An inner revolt had taken hold of him, ideas that would later surface in his writing, about how the entire structure of society was populated by smooth-talking phonies . . . he knew that his isolation would become his strength . . . he envisioned himself as the singular self, forging his own destiny.

Jack Foley, *Poetry Previews: Charles Bukowski*, available at <http://www.poetrypreviews.com/poets/poet-bukowski.html> (last visited Dec. 8, 2004) (quoting NEELI CHERKOVSKI, *BUKOWSKI: A LIFE* (1997)).

<sup>4</sup> STEPHEN A. BLACK, *EUGENE O’NEILL: BEYOND MOURNING AND TRAGEDY* 63, 64 (1999).

<sup>5</sup> See, e.g., Foley, *supra* note 3.

<sup>6</sup> See Qrisse’s Edgar Allan Poe Pages, *Edgar’s Childhood*, at <http://www.poedecoder.com/Qrisse/allans.html> (last visited Dec. 16, 2004).

<sup>7</sup> See Britannica Guide to the Nobel Prizes, *Eugene O’Neill, The Winners*, at [http://www.britannica.com/nobel/micro/438\\_61.html](http://www.britannica.com/nobel/micro/438_61.html) (last visited Dec. 16, 2004).

<sup>8</sup> See, e.g., Foley, *supra* note 3.

short temper and mood swings symptomatic of alcoholism in high school.<sup>9</sup> Poe played such realistic practical jokes involving death and dying that he truly frightened his friends and family.<sup>10</sup> Likeable or not, these writers used their pain to fuel their work, and as a result each has left an indelible mark on American literature and its readers. Poe channeled his childhood obsession with death and his own torment into a great literary talent which critics agree serves as the foundation for American horror.<sup>11</sup> Bukowski and O'Neill both reached into their most personal childhood suffering and used it to create uncomfortable, raw, and beautiful autobiographical poems, plays, short stories, and novels that have allowed readers to reflect on their own innermost conflict.

In 2000, James LaVine, a junior in high school, wrote this poem, entitled *Last Words* and shared it with his English teacher to get her feedback:<sup>12</sup>

As each day passed, I watched, love sprout, from the most, unlikely places, wich reminds, me that, beauty is in the eye's, of the beholder.

As I remember, I start to cry, for I, had leared, this to late, and now, I must spend,

each day, alone, alone for supper, alone at night, alone at death. Death I feel, crawling down, my neck at, every turn, and so, now I know, what I must do.

I pulled my gun, from its case, and began to load it.

I remember, thinking at least I won't, go alone, as I, jumppped 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 pounding.

As I approached, the classroom door, I drew my gun and, threw open the door,

BANG, BANG, BANG-BANG.

When it all was over, 28 were, dead, and all I remember, was not felling, any

remorce, for I felt, I was, clensing my soul,

I quickly, turned and ran, as the bell rang, all I could here, were screams, screams of friends, screams of co workers, and just

---

<sup>9</sup> BLACK, *supra* note 4, at 85.

<sup>10</sup> See Bernardo, *supra* note 2.

<sup>11</sup> National Park Service, *National Historic Site Park Brochure: Edgar Allen Poe*, at <http://www.nps.gov/edal/brochure.htm> (last visited Feb. 9, 2005).

<sup>12</sup> This poem and others included in this article are reproduced without spelling and grammar correction.

plain, screams of sheer horror, as the students, found their,  
slayen classmates,  
2 years have passed, and now I lay, 29 roses, down upon, these  
stairs, as now, I feel, I may, strike again.  
No tears, shall be shead, in sarrow, for I am, alone, and now, I  
hope, I can feel, remorse, for what I did, without a shed, of  
tears, for no tear, shall fall, from your face, but from mine, as I  
try, to rest in peace, BANG!<sup>13</sup>

Undoubtedly, James would have kept his work to himself if he had known that the poem would result in his emergency expulsion<sup>14</sup> from school, a lengthy court battle first over whether his poem was speech protected by the First Amendment, and then, once he returned to school, a fight regarding whether the incident should remain in his official disciplinary record.<sup>15</sup> Unfortunately, James's experience is not unique. In fact, compared to other students who have been permanently expelled and adjudicated delinquent for creating drawings and poems depicting violence in school, he suffered a relatively light punishment.

This Article discusses the future of student speech rights and artistic speech in general through six cases involving students who were punished with expulsion and delinquency proceedings for creating violent poems, stories, and drawings about school. It examines how the trend toward punishing students for creative speech may affect emerging young artists and the future of art in this country. It also examines the use of the events at Columbine High School as the backdrop for the development of such harsh school disciplinary actions. Ultimately, it hypothesizes that students may have a variety of reasons for creating artwork and poetry that depict violence, and exposes the unfairness of the assumption made by the courts and school administrators that students' sole motivation for such artwork is to threaten a future act of violence.

On April 20, 1999 Dylan Klebold and Eric Harris walked into Columbine High School and opened fire on teachers and classmates,<sup>16</sup> sending a wave of fear across the country and placing

---

<sup>13</sup> *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 983 (9th Cir. 2001).

<sup>14</sup> The court explains that emergency expulsion according to Washington Administrative Code may occur when the "superintendent . . . has good and sufficient reason to believe that the student's presence poses an immediate and continuing danger to the student, other students, or school personnel or an immediate and continuing threat of substantial disruption of the educational process. An emergency expulsion shall continue until rescinded by the superintendent or his or her designee." *LaVine*, 257 F.3d. at 985 n.3.

<sup>15</sup> *Id.* at 986.

<sup>16</sup> Mike Anton, *Death Goes to School with Cold, Evil Laughter*, DENVER ROCKY MOUN-

school violence under a nationwide magnifying glass. Despite solid statistics that youth violence, especially violence in school, fell significantly between 1992 and 2002,<sup>17</sup> the legacy of Columbine has cast a dark cloud over the nation's perception of the safety of public schools and the stability of the children who attend them.

One of the most insidious casualties of that day at Columbine High School is students' First Amendment right to creative expression in school. In the name of preventing another Columbine, increasingly inflexible school disciplinary policies have significantly chilled student speech rights.<sup>18</sup> Using the events at Columbine High School as justification, schools are treating artwork and drawings with violent content as if they are weapons and death threats, and taking extremely harsh disciplinary action against students who produce such work.<sup>19</sup>

In response to the intense media attention given to the school shootings in the mid-1990s, administrators and law enforcement under pressure to prevent similar incidents scrambled to create a profile of the typical "school shooter."<sup>20</sup> In 2000, the National Center for the Analysis of Violent Crime and the Department of Justice published a "checklist" of ways to identify a potential school shooter entitled "The School Shooter: A Threat Assessment Perspective."<sup>21</sup> Creation of violent writing and drawings made the

---

TAIN NEWS, Apr. 21, 1999, <http://denver.rockymountainnews.com/shooting/0421top00.html>; Christopher Anderson & Matt Sebastian, *Worst School Shooting in US History Kills Up to 25 in Littleton*, DAILY CAMERA, Apr. 21, 1999, <http://www.boulder.dailycamera.com/shooting/21lead.html>.

<sup>17</sup> Press Release, Bureau of Justice Statistics, Nation's School Crime Rate Continues to Decline (Nov. 29, 2004), at <http://www.justicepolicy.org/article.php?id=463> [hereinafter Nation's School Crime Rate Continues to Decline]; DEVOE, J.F. ET AL., U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUST., INDICATORS OF SCHOOL CRIME AND SAFETY: 2004 (2004), at <http://www.ojp.usdoj.gov/bjs/pub/pdf/iscs04.pdf>; U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUST., 1999 ANNUAL REPORT ON SCHOOL SAFETY 4 (1999), available at <http://www.ed.gov/PDFDocs/InterimAR.pdf> (statistics demonstrating a decline between 1993 and 1998).

<sup>18</sup> See *infra* Part IV.

<sup>19</sup> See *infra* Part II, IV.

<sup>20</sup> See Jennifer Brady & Linda Lumsden, *Profiling Students for Violence*, at <http://www.guidancechannel.com/ezone.asp?index=567%20&cat=13> (last visited Dec. 16, 2004) (quoting MARY ELLEN O'TOOLE, U.S. DEP'T OF JUSTICE, THE SCHOOL SHOOTER: A THREAT ASSESSMENT PERSPECTIVE (2000)).

<sup>21</sup> MARY ELLEN O'TOOLE, U.S. DEP'T OF JUSTICE, THE SCHOOL SHOOTER: A THREAT ASSESSMENT PERSPECTIVE (2000), available at <http://www.atapusa.org/downloads/fbiss.pdf> (last visited Dec. 16, 2004). This report denies that it is a checklist and even issues a cautionary statement that the list should not be used as such. However, the dissent to the decision in *In re Douglas D.* cites to this list and argues that Douglas's criminal conviction should have been upheld. This demonstrates how such a list of factors is easily transformed into a list of indicators. *In re Douglas D.*, 626 N.W.2d

list.<sup>22</sup> Since then, there have been legal challenges to the dramatic disciplinary actions taken against students whose artwork and writings depicted school violence.<sup>23</sup> Although some believe that a child should not spend ninety days in juvenile detention for handing another student a poem, the decisions in these cases illustrate that many school administrators and judges believe that a punitive response to student creative expression is both a permissible and justifiable restriction of students' First Amendment rights in school.<sup>24</sup>

This Article considers the ramifications of using Columbine as the backdrop for decisions regarding student speech rights in school. Recent decisions in which courts have sanctioned harsh punishment of students for writing and drawings containing violent images illustrate the extent to which courts are willing to infringe on students' free speech rights in the name of school security.<sup>25</sup> This Article cautions against the inclusion of creative expression such as writing and art in the categories of permissibly regulated student speech. Primarily, this Article suggests that student artwork be treated as art and afforded the constitutional protections that adult artwork enjoys. Further, it recommends that student artwork deserves a student-centered response and should be approached from a mental health rather than a punitive perspective.

The public focus on school security has led judges to use the "true threat" analysis of student speech that is violent in content. This analysis is used to determine whether a speaker intended to make an actual threat. As argued in Section V Part A, the use of

---

725, 752 (Wis. 2001) (Prosser, J., dissenting). As noted by Brady, *supra* note 20, one of the biggest problems with profiling is that experts do not agree on what factors are proper indicators that a student may become violent.

<sup>22</sup> O'TOOLE, *supra* note 21, at 16. The report discusses violent student artwork in the context of an emotional phenomenon it calls "leakage." "'Leakage' occurs when a student intentionally or unintentionally reveals clues to feelings, thoughts, fantasies, attitudes, or intentions that may signal an impending violent act. . . . They may be spoken or conveyed in stories, diary entries, essays, poems, letters, songs, drawings, doodles, tattoos, or videos. . . . Leakage can be a cry for help, a sign of inner conflict, or boasts that may look empty but actually express a serious threat. Leakage is considered to be one of the most important clues that may precede an adolescent's violent act. . . . [An] example of leakage could be recurrent themes of destruction or violence appearing in a student's writing or artwork. The themes may involve hatred, prejudice, death, dismemberment, mutilation of self or others, bleeding, use of excessively destructive weapons, homicide, or suicide." *Id.*

<sup>23</sup> See *infra* Part II.

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

<sup>25</sup> *Id.*

this analysis<sup>26</sup> to examine student artwork treats art as a weapon, impermissibly abrogates student speech rights in school, and teaches students that making art is a punishable crime. Such treatment of student art has the immediate effect of significantly chilling student expressive speech and narrows students' understanding of the definition and role of art and artists in society. Further, it is unnecessary to silence student artistic speech in order to maintain safety in the public schools. In fact, preventing students from venting natural adolescent anger and frustration may increase the risk that they will lash out in a violent manner. The solution to this problem is a change in the perspective of school administrators and courts. Violent artwork and writing is more effectively approached with a response that recognizes the therapeutic value of art as a mode of expression for children and respects the unique privileges afforded art under the First Amendment.<sup>27</sup>

There are a variety of reasons that courts and school administrators should implement an alternative to the true threat analysis when examining student artwork. Section II of this article examines the Supreme Court's current perspective on student speech rights, focusing on the conservative, school-centered direction the Court's decisions have taken since the 1980's. Section III presents several of the most recent cases involving students who have created artwork, stories, and poems that school officials believed were dangerous enough to warrant expulsion, and in some cases, the filing of delinquency petitions in juvenile court. Section III dissects what this article will call the "myth of Columbine." It questions the use of the mass violence at Columbine High School and other well-publicized incidents of school violence as an indicator of the status of the nation's public schools, as the "judicial backdrop" for the decisions, and as the justification for chilling student creative speech.

---

<sup>26</sup> The true threat analysis derives from the Supreme Court case *Watts v. United States*, 394 U.S. 705, 708 (1969), in which Watts was prosecuted for making a threat to harm the President of the United States. Since then, the analysis has been used in criminal cases as the basis for prosecutions for disorderly conduct, stalking, extortion, and threats against government officials like judges, law enforcement, and the President of the United States. *See infra* notes 62, 63. The cases in which students are referred to juvenile court for their artwork require the artwork to be a true threat in order for the conviction to stand. *See infra* Section V Part A. There are two different versions of the true threat analysis, covered in depth in Section II. Generally, the test focuses on whether the content of the speech is so strong that it could really inspire fear in the listener that it would be carried out. *See infra* Section II.

<sup>27</sup> *See infra* Section V Part B.

Section V discusses the impact of the decisions examined in Section II on individual students, student speech rights in general, and students' broader understanding of the role of art and artists in society. This section is divided into four subsections. Part A explores how the analysis of student creative expression under the true threat doctrine turns art into weaponry and ascribes an intent to children's drawings that is out of sync with current psychology about children and artwork. It also considers broader societal ramifications of treating children's artwork as a threat, and how such treatment teaches students at an early age that personal expression through art is a punishable activity, especially if the art's content is controversial or challenges the status quo. Part B examines how the cases expand the reach of the "substantial disturbance" doctrine, which courts use to decide whether a student's speech is protected by the First Amendment.<sup>28</sup> This doctrine, which asks whether speech has created a "substantial disturbance" to ordinary school discipline, has been broadened such that it allocates nearly absolute discretion to teachers and administrators to define what creative expression is acceptable. Part C considers what the courts fail to—that art is a non-violent way for students to express negative feelings and that it can be an incredibly powerful expressive tool. If properly treated, art could prevent violent outbursts like the ones so feared by school administrators. Finally, Part D proposes alternatives to understanding artwork as a statement of intent, including psychological and social reasons that children may create artwork that is violent in nature.

Section V proposes alternatives to the current judicial perspective on school safety and the reaction of school administrators to student artwork with violent content. It begins by suggesting that the courts afford student artwork the same constitutional protections accorded to adult artwork. Alternatively, should courts persist in applying the true threat doctrine, they should take into consideration the possibility that the work is jest, hyperbole, or merely innocuous.<sup>29</sup> Such a change in analysis is possible if courts discard the "myth of Columbine," recognize the numerous statistical reports that demonstrate that public schools are actually the safest places for children to be, and adopt a new backdrop for examining the disciplinary actions taken by school administrators. Finally, this Article suggests that sending a child who creates violent artwork to juvenile court is incredibly detrimental to the child's

---

<sup>28</sup> *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 509 (1969).

<sup>29</sup> *In re Douglas D.*, 626 N.W.2d 725, 739 (Wis. 2001).

well-being. Instead, mental health-centered, child-based approaches to particularly violent or disturbing artwork would help at-risk students, rather than re-traumatizing them or exacerbating the psychological disturbance that led them to create the artwork in the first place.

## II. STUDENT SPEECH WITHIN THE SCHOOLHOUSE GATES

Society relies on public schools to fulfill a variety of conflicting societal needs that extend far beyond the scope of academic education. The Supreme Court has alternatively treated schools as a marketplace of ideas,<sup>30</sup> a non-public forum under the heavy thumb of the school board and school administrators,<sup>31</sup> a training center for future participants in democracy,<sup>32</sup> and a moral training ground for young and impressionable minds.<sup>33</sup>

Recently, the discussion of schools as institutions with an edu-

---

<sup>30</sup> “The classroom is peculiarly the ‘marketplace of ideas.’ The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas. . . .” *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 512 (1969) (citing *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

<sup>31</sup> Both *Bethel School District No. 403 v. Fraser*, 473 U.S. 675 (1986), and *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), assert the primacy of the school board and the status of the school as non-public forum as necessary to support the educational mission of the school. The Court in *Bethel* explicitly states, “[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.” *Bethel*, 478 U.S. at 683. Interestingly, by deciding that public schools are not public forums for the purposes of First Amendment analysis, the Supreme Court prevented them from truly being public places, which, “time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions,” and placed great discretion in the hands of school officials to “impose reasonable restrictions on the speech of students, teachers, and other members of the school community.” *Kuhlmeier*, 484 U.S. at 265 (internal quotations and citations omitted). The *Kuhlmeier* Court also decided that *Tinker* would not apply when a school refuses to lend its “name and resources” to student expression so long as the school’s, “actions are reasonably related to legitimate pedagogical concerns. . . . This standard is consistent with our oft-expressed view that the education of the nation’s youth is primarily the responsibility of parents, teachers, and state and local school board officials, and not of federal judges.” *Id.* at 267, 273.

<sup>32</sup> In *Bethel*, the Court emphasizes, “that ‘[p]ublic education must prepare pupils for citizenship in the Republic . . . . It must inculcate the habits and manners of civility as values . . . indispensable to the practice of self-government in the community and the nation.’” *Bethel*, 478 U.S. at 681 (citations omitted). The court continues, “[i]n *Ambach v. Norwick*, we echoed the essence of this statement of the objectives of public education as the ‘inculcation of fundamental values necessary to the maintenance of a democratic political system.’” *Id.* (quoting *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979)).

<sup>33</sup> “The process of educating our youth for citizenship in public schools is not confined to the books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order.” *Bethel*, 478 U.S. at 683.

cational purpose has become overshadowed by school safety rhetoric. In fact, schools' function as a place of learning is markedly absent from the debate about school discipline. Rather, the events at Columbine High School and the "Zero Tolerance" philosophy<sup>34</sup> have become the focus of discussion.<sup>35</sup> The creative expression

---

<sup>34</sup> Zero tolerance policies, as enacted by public schools, provide automatic, predetermined punishments for any violation of certain school rules, irrespective of a legitimate explanation for the violation. They most commonly address the possession of drugs and weapons on school grounds. Zero tolerance was originally imported into schools by the 1994 Gun-Free Schools Act but gained momentum and popularity in the wake of Columbine. Fact Sheet, Building Blocks for Youth, at <http://www.buildingblocksforyouth.org/issues/zerotolerance/facts.html> (last visited Jan. 29, 2005). The Act provides, "[e]ach State receiving Federal funds under any subchapter of this chapter shall have in effect a State law requiring local educational agencies to expel from school for a period of not less than 1 year a student who is determined to have brought a firearm to a school, or to have possessed a firearm at a school, under the jurisdiction of local educational agencies in that State, except that such State law shall allow the chief administering officer of a local educational agency to modify such expulsion requirement for a student on a case-by-case basis if such modification is in writing." 20 U.S.C. § 7151. School zero tolerance policies are derived from mandatory sentencing guidelines originally enacted for adult offenders. Such schemes have generally been ruled to be too strict to survive constitutional scrutiny. Ralph C. Martin, *ABA Zero Tolerance Policy Report*, at <http://www.abanet.org/crimjust/jvjus/zerotolreport.html> (Feb. 2001). However, these policies are now extremely common in our nation's public schools. See Fact Sheet, Building Blocks for Youth, at <http://www.buildingblocksforyouth.org/issues/zerotolerance/facts.html>. The result of zero tolerance is that the definitions of "weapon" and "drug" have been so greatly expanded that students often find themselves unwittingly in violation of the policy. The creative expression cases are an excellent example of this because the courts are examining whether the artwork or writing is a weapon or a threat that puts them within the reach of the policy. The policy's automatic punishments do not distinguish between student offenses. This has led to many widely publicized incidents in which students have been expelled for completely innocent actions. Various examples include: a student expelled for using Listerine, which because of its alcohol content is a drug; a student expelled for bringing a manicure kit to school because the one-inch nail file is a "weapon;" and a school that refused to allow a young boy to have his inhaler at school because its contents were considered a "drug," which resulted in the boy's death. Martin, *supra*. Also disturbing is the documented discriminatory impact zero tolerance policies have had on students of color, who are more likely to be targeted than Caucasian students. See Kim Brooks, et al., *School House Hype: Two Years Later*, Section: Public Fear v. Reality: School Crime & Juvenile Arrest Date (Justice Policy Inst., Wash. D.C.), Apr. 2000, available at <http://www.justicepolicy.org> (on file with the New York City Law Review) [hereinafter *School House Hype*].

<sup>35</sup> As Sam Blank notes "public demands for effective measures aimed at curtailing youth violence have grown commensurately. At the state and national levels, the response from policymakers to the surge in youth violence has primarily come in the form of 'get tough' measures, including substantial increases in funding for law enforcement and corrections, and increased penalties for juveniles convicted of offenses involving the use of violence." Sam Blank, *Addressing Youth Violence in America's Schools*, at <http://www.guidancechannel.com/ezone.asp?index=1191&cat=13> (last visited Dec. 16, 2004). This is unfortunate in light of the fact that emphasizing discipline over education can actually result in more violent schools. A recent report by the National Center for Education statistics reveals that "[t]he percentage of students who princi-

cases examined in this Article illustrate the extent of the negative impact of the Columbine rhetoric on the First Amendment protections accorded to students. It is within the debate over school discipline that our societal and cultural attitudes about school and children are revealed in their most naked and sometimes ugly reality. Fundamentally, the debate over free speech in schools can be distilled to a debate over whether schools function primarily as a marketplace of ideas or a moral training ground. In the wake of Columbine and other incidents of large-scale school violence,<sup>36</sup> there is no question that the moral training ground function is increasingly obscuring the idea that schools should provide an open marketplace of ideas.

The Supreme Court in *Tinker v. Des Moines Independent School District* laid the constitutional foundation for students' First Amendment rights in school.<sup>37</sup> Its unequivocal statement that "[s]tudents or teachers [do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"<sup>38</sup> is a veritable mantra for those attempting to preserve freedom of expressive speech and conduct in the school setting. In 1969, the court in *Tinker* condemned the suspension of three students who wore black armbands to school to protest the war in Vietnam.<sup>39</sup> Categorizing the armbands as expressive speech, the Supreme Court set a high standard of justification for schools seeking to prohibit the expression of student ideas. The Court's test places the burden on the school to show that the student speech being regu-

---

pals felt considered academics to be very important was inversely related to the prevalence of violent and serious violent incidents. As the percentage of students who considered academics important increased, the likelihood of schools experiencing a violent or serious violent incident decreased." AMANDA K. MILLER & KATHRYN CHANDLER, NATIONAL CENTER FOR EDUCATION STATISTICS, VIOLENCE IN THE U.S. PUBLIC SCHOOLS 2000 SCHOOL SURVEY ON CRIME AND SAFETY 5 (2003), available at <http://nces.ed.gov/pubs2004/2004314.pdf> (last visited Dec. 16, 2004).

<sup>36</sup> On March 24, 1998, in Jonesboro, Arkansas, a teacher and four students were killed and ten students were injured when Mitchell Johnson, 13, and Andrew Golden, 11, shot at their classmates and teachers from the woods while everyone was outside during a false fire alarm. On December 1, 1997, at Heath High School in West Paducah, Kentucky, Michael Carneal, 14, opened fire on his fellow students during a prayer circle. He killed three and wounded five. Also widely covered by the media was the May 21, 1998, incident at Thurston High School in Springfield, Oregon in which Kip Kinkel, age 15, killed two students and wounded twenty-two when he opened fire in the school cafeteria. *A Time Line of Recent Worldwide School Shootings*, available at <http://www.infoplease.com/ipa/A0777958.html> (last visited Dec. 7, 2004).

<sup>37</sup> 393 U.S. 503, 506 (1969).

<sup>38</sup> *Id.*

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

lated “‘materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school’”<sup>40</sup> or “impinge[s] upon the rights of other students.”<sup>41</sup> The decision placed special emphasis on the nature of the armbands as quiet and peaceful vehicles of expression that created no tangible disturbance in the school setting.<sup>42</sup>

During the same time period, courts placed some restrictions on student speech that countered *Tinker’s* more liberal approach. For example, in 1973, the Ninth Circuit narrowly defined judicial deference to the discretion of school officials in *Karp v. Becken*, which explained that the responsibility to oversee school functioning “carries with it the inherent authority to prescribe and control conduct in the schools.”<sup>43</sup>

*Tinker’s* conception of a school as a “marketplace of ideas” has been dramatically narrowed in the past twenty years. Courts have increasingly used student challenges to restrictions on speech to further limit the right to free speech in the school environment. In 1986, the Court decided *Bethel School District No. 403 v. Fraser*,<sup>44</sup> in which a high school student was suspended from school for three days and barred from speaking at graduation for making a sexually suggestive nomination speech at a student election assembly.<sup>45</sup> *Bethel* carved out one of the most powerful exceptions from *Tinker* when it ruled that school administrators could regulate students’ school-sponsored speech if they believed it was lewd or obscene, and that such regulation was an acceptable restriction of

---

<sup>40</sup> *Id.* at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 508 (“The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners’ interfere, actual or nascent, with the schools’ work or of collision with the rights of other students to be secure and to be let alone.”).

<sup>43</sup> 477 F.2d 171, 174 (9th Cir. 1973).

<sup>44</sup> 478 U.S. 675, 683 (1986).

<sup>45</sup> *Bethel* revolves around a speech given by the respondent in support of another student’s candidacy for high school student government. Its content:

I know a man who is firm – he’s firm in his pants, he’s firm in his shirt, his character is firm – but most . . . of all, his belief in you, the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he’ll take an issue and nail it to the wall. He doesn’t attack things in spurts – he drives hard, pushing and pushing until finally – he succeeds. Jeff is a man who will go to the very end – even the climax, for each and every one of you. So vote for Jeff for A.S.B. vice-president – he’ll never come between you and the best our high school can be.

*Id.* at 687.

students' First Amendment rights.<sup>46</sup>

*Bethel* represented a new emphasis on the moral content of student speech. The Court's decision that sexually suggestive speech was unprotected by the First Amendment dealt a serious blow to *Tinker's* liberal approach, as it gave deference to school administrators to decide what kind of speech is permissible in school and gave schools responsibility for inculcating students into community morals and standards of behavior.<sup>47</sup>

Accompanying this new stance of moral judgment was a new emphasis on the need for discipline in the school setting and an increased deference to schools' decisions about appropriate conduct and moral character in the context of the community. Essentially, *Tinker's* balance between student rights to free speech and a school's interest in preventing chaos gave way to a new school-centered approach that no longer required the school to assert a tangible disruption. Rather, a threat to moral standards became a substantial disruption unprotected by the First Amendment.<sup>48</sup> As the Court stated, "[t]he process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order."<sup>49</sup> Another important aspect of the decision was its reliance on the fact that the student's speech took place at a school-sponsored event.<sup>50</sup> This distinction between the speech in *Tinker*, which was not part of an official school activity, and the curricular speech in *Bethel*, which occurred under the sponsorship of the school, has important implications in decisions like *Kuhlmeier*, the next important school case following *Bethel*.

*Bethel* paved the way for increased restrictions on school-sponsored student speech. Most notable is the decision in *Hazelwood School District v. Kuhlmeier*.<sup>51</sup> Journalism students at Hazelwood High School brought an action against the school for removing

---

<sup>46</sup> "Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse." *Id.* at 683.

<sup>47</sup> The court in *Bethel* states, "[t]he undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior." *Id.* at 681. The freedom to advocate unpopular views accorded by *Tinker* is now balanced against a moral code of socially appropriate behavior developed by school officials.

<sup>48</sup> "The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission." *Id.* at 683.

<sup>49</sup> *Id.* at 683.

<sup>50</sup> *Id.* at 677.

<sup>51</sup> 484 U.S. 260 (1988).

two pages of a newspaper they wrote in the school's journalism class.<sup>52</sup> The censored pages contained interviews with three pregnant teens who attended the school and an article that featured a student's experiences with her parents' divorce.<sup>53</sup> *Kuhlmeier* is interesting because of its reliance on the threat to the privacy interests of the students who served as the anonymous subjects of the censored articles.<sup>54</sup> By allowing the school's concern about protecting student privacy and shielding innocent younger students from inappropriate material to trump students' right to speak, the Court significantly increased school discretion to regulate student speech.<sup>55</sup> A school principal can now regulate speech he or she believes is obscene and also any speech deemed unfit for the ears of other students, even if the speech is essentially academic in nature.

The *Kuhlmeier* decision limited judicial review of school regulation of student speech. Further, the Court expanded the reach of moral judgment into such speech by establishing a special level of acceptable censorship within the school environment. As the Court explained "[a] school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school."<sup>56</sup>

Columbine and similar incidents have set the stage for the drastic restriction of *Tinker*. With the advent of zero-tolerance policies<sup>57</sup> and metal detectors in schools, police, handcuffs, and criminal charges have replaced the old remedies of suspension from school and activities. As the consequences for student misbehavior have dramatically increased, so has the level of fear and suspicion over student speech. The most recent decisions regarding student poems, stories, and paintings that were created about school depend on the precedent of limiting student speech. The cases involving students disciplined for artwork and stories have relied on a

---

<sup>52</sup> *Id.* at 262-64.

<sup>53</sup> *Id.* at 263.

<sup>54</sup> *Id.* at 264.

<sup>55</sup> *Id.* at 273 ("[W]e hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in their school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."). The Court also recognized that "[a] number of lower federal Courts have similarly recognized that educators' decisions with regard to the content of school-sponsored newspapers, dramatic productions, and other expressive activities are entitled to substantial deference." *Id.* at 273 n.7.

<sup>56</sup> *Id.* at 266 (citations omitted).

<sup>57</sup> *See supra* note 34.

hybrid of First Amendment true threat analysis<sup>58</sup> and traditional student speech analysis. Significantly, although courts consistently emphasize that students have reduced First Amendment rights in school<sup>59</sup> and a lesser right to free speech than adults, they liberally assign adult criminal sanctions to student speech.

Interestingly, the “curricular speech” distinction, defined in *Kuhlmeier*, is inverted in the creative expression cases. While the court in *Kuhlmeier* accorded great deference to the school because the speech at issue was curricular, the cases examining student artwork are more deferential to the student where artwork is curricular rather than independently executed.<sup>60</sup> However, this distinction does not insulate student creative expression from regulation made permissible by true threat analysis. Zero tolerance philosophy and the push to identify future mass shooters before they reveal themselves has brought true threat analysis into regular discourse about student’s creative activity.

The *Bethel/Kuhlmeier* standard, which is unique to schools, is relaxed in comparison to the true threat analysis originally laid out in *Watts v. United States*.<sup>61</sup> Since 1969 *Watts* has been applied primarily to threats made against the president, judges, police, and other public figures,<sup>62</sup> but also to prosecute stalkers and extortionists.<sup>63</sup> This kind of speech is unprotected by the First Amendment,<sup>64</sup> a premise that forms the basis for state laws forbidding terroristic

---

<sup>58</sup> See *infra* note 63.

<sup>59</sup> “We have nonetheless recognized that the First Amendment rights of students in the public schools are not automatically coextensive with the rights of adults in other settings, and must be applied in light of the special characteristics of the school environment.” *Kuhlmeier*, 484 U.S. at 266 (citing *Bethel Sch. Dist. No. 43 v. Fraser*, 478 US 675, 682 (1986) and *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 506 (1969)) (internal quotations omitted).

<sup>60</sup> See *infra* note 76.

<sup>61</sup> 394 U.S. 705 (1969).

<sup>62</sup> See *United States v. Schneider*, 910 F.2d 1569, 1571 (7th Cir. 1990) (Judge of the Illinois Circuit Court). See also *United States v. Mitchell*, 812 F.2d 1250, 1255 (9th Cir. 1987) (the President); *Watts*, 394 U.S. at 705 (the President).

<sup>63</sup> True threat cases involving stalking include *People v. Toledo*, 26 P.3d 1051, 1053 (Cal. 2001), in which the defendant, during a fight that involved a lot of destruction of property, told his girlfriend, “You know, death is going to become you tonight. I am going to kill you,” and then, holding scissors close to her neck, said “You don’t want to die tonight, do you? You’re not worth going to jail for,” and *People v. Allen*, 40 Cal. Rptr. 2d 7 (Cal. Ct. App. 1995), in which the defendant pointed a gun at the victim and her daughter and threatened to kill them. In *United States v. Reynolds*, the court found a true threat where the defendant told the victim he was going to “drop anthrax in your air conditioner.” 381 F.3d 404 (5th Cir. 2004). For extortion, see *United States v. Nishnianidze*, 342 F.3d 6 (1st Cir. 2003); *United States v. Morales*, 272 F.3d 284 (5th Cir. 2001).

<sup>64</sup> See, e.g., *United States v. Orozco-Santillan*, 903 F.2d 1262, 1265 (9th Cir. 1990).

and criminal threats. A threat is therefore construed as conduct rather than speech.<sup>65</sup>

Interpretation of the *Watts* true threat analysis varies from circuit to circuit. The First, Second, and Ninth Circuits have emphasized the foreseeable effect of the alleged threat by asking whether the defendant reasonably should have foreseen that the listener would interpret the statement as a threat.<sup>66</sup> The Ninth Circuit explained this standard in *United States v. Kelner* by clarifying that speech could be regulated “[s]o long as the threat, on its face and in the circumstances in which it was made is so unequivocal, unconditional, immediate and specific as to the person threatened, that they convey the gravity of purpose and imminent prospect of execution.”<sup>67</sup> Conversely, the Fourth Circuit, the Second Circuit (in conflict with itself),<sup>68</sup> and the Seventh Circuit have examined whether “the recipient could reasonably have regarded the defendant’s statement as a threat.”<sup>69</sup> Both tests require the examination of the totality of the circumstances in which the alleged threat was made.<sup>70</sup>

In the school context, the tests yield significantly different results for students and teachers. Under the *Kelner/Fulmer* test, which looks at whether or not the recipient’s interpretation of the statement as a threat was reasonable, a court would examine whether it is reasonable for a teacher to interpret a student’s drawings as a real threat to cause harm.<sup>71</sup> Conversely, the *Schneider/Malik/Maisonet* test examines whether the recipient’s perception of the statement as a real threat was reasonably foreseeable and holds the student accountable for the teacher’s reaction to his or her artwork.<sup>72</sup>

---

<sup>65</sup> See *Watts*, 394 U.S. at 707.

<sup>66</sup> See *Fulmer v. United States*, 108 F.3d 1486 (1st Cir. 1997); *United States v. Kelner*, 534 F.2d 1020 (2d Cir. 1976); *Orozco-Santillan*, 903 F.2d at 1262.

<sup>67</sup> *Kelner*, 534 F.2d at 1027.

<sup>68</sup> *United States v. Sovie*, 122 F.3d 122, 125 (2d Cir. 1997).

<sup>69</sup> *United States v. Schneider*, 910 F.2d 1569, 1570 (7th Cir. 1990). See also *United States v. Malik*, 16 F.3d 45, 48 (2d Cir. 1994); *United States v. Maisonet*, 484 F.2d 1356, 1358 (4th Cir. 1973).

<sup>70</sup> See *Fulmer*, 108 F.3d at 1494; *Watts*, 394 U.S. at 707. This emphasis on context means that the reliance on “in the wake of Columbine” evidence is crucial to Courts’ analysis of an alleged threat – both in the *Fulmer* and *Watts* context. If the context is that schools are dangerous places, and students are dangerous people, the courts’ analysis about both intent to threaten and whether a student may reasonably foresee that a teacher would interpret a drawing as a real threat of harm favors school administrators.

<sup>71</sup> See *Commonwealth v. Milo M.*, 740 N.E.2d 967, 970 (D. Mass. 2001).

<sup>72</sup> See *Demers v. Leominster Sch. Dep’t*, 263 F. Supp. 2d 195, 202 (D. Mass. 2003).

In conjunction with the reliance on the *Kelner/Fulmer*<sup>73</sup> true threat cases, courts evaluating school treatment of artwork as threat rely heavily on the Ninth Circuit decision *Karp v. Becken*.<sup>74</sup> To justify school disciplinary action based on artwork, *Karp* takes a narrow view of *Tinker*, focusing on the language in *Tinker* which allows school officials to act upon a “forecast of disruption.” *Karp* requires school officials “to prevent the occurrence of disturbances,”<sup>75</sup> rather than to consider whether the act at issue was a substantial disturbance.

The application of true threat analysis to the school environment has serious ramifications for student speech in public schools. Unlike *Bethel* and *Kuhlmeier*, which both remain grounded in the school’s “pursuit of the basic educational mission” as the important government interest justifying censorship of student speech, true threat analysis is based on the prevention of danger and violence in the school setting. True threat analysis shifts the context of the analysis of student speech from an academic or educational mission to school safety and discipline. If, as *Kuhlmeier* emphasizes, schools really do train participants in democracy, the trend toward suppressing student creative expression through such a serious legal test is particularly worrisome.

More specifically, by applying the true threat analysis to student creative speech—poems, stories, and drawings—courts and administrators have expanded the realm of punishable student speech to include artistic expression. Such creative speech is an especially valuable form of non-verbal expression for children, especially those at risk for a variety of negative behaviors associated with poverty, including drug use, delinquency, truancy, and gang violence. A brief overview of the most recent cases involving suspension and adjudication in juvenile court illuminates this disturbing new restriction on student creative expression in public schools.

### III. THE CREATIVE EXPRESSION CASES

Courts in various jurisdictions have issued conflicting decisions on whether student artwork expressing violent emotions is

---

<sup>73</sup> See *Fulmer*, 108 F.3d at 1494.

<sup>74</sup> See *Karp v. Becken*, 477 F.2d 171, 174 (9th Cir. 1973) (upholding a student’s constitutional right to attempt to distribute signs during a school walkout protesting the firing of an English teacher, but affirming the school’s right to take the signs away if they forecast a potential substantial disruption).

<sup>75</sup> *Id.* at 175.

protected by the First Amendment. The cases are of two kinds: (1) civil rights cases in which students have brought actions alleging that their First Amendment Rights have been violated by internal school disciplinary actions in response to their artwork, and (2) cases seeking to overturn delinquency adjudications which are based on artwork that is violent in content. These cases share a common theme. They treat artwork as an undertaking that is active and public enough to potentially cause a substantial disturbance to the school environment or actual physical injury.

Certain circumstances are particularly relevant to school-centered First Amendment jurisprudence. Courts pay particular attention to the location where the artwork/writing was created, and at whose bidding it was created. For example, a poem written by a student independently at home and then brought to school will be approached with more suspicion than a poem written as a creative writing assignment.<sup>76</sup> Whether the piece is from a first-person perspective or a third-person narrative may also be relevant. The courts have examined whether the character who acted violently is the student or a fictional character.<sup>77</sup> In addition, the reality of the events that take place in the artwork and the likelihood that they could be realized is relevant.<sup>78</sup> Finally, and most disturbingly, the personal background of the child consistently factors heavily into the analysis.<sup>79</sup> Ultimately, the nature of the analysis reflects the “terroristic threat” or “disorderly conduct” statute under which the child has been accused.

The cases also vary notably in that some are premised on the

---

<sup>76</sup> See generally *In re Douglas D.*, 626 N.W.2d 725, 741 (Wis. 2001) (giving more deference to writing in a creative writing class).

<sup>77</sup> *Id.* (“[Douglas’s story] is written in the third person, with no mention of Douglas.”).

<sup>78</sup> The dissent in *Douglas D.* even goes so far as to note that a machete attack is possible, and even a frequent form of violence, stating, “Inherent in the majority’s analysis is the notion that the depiction of a machete in the story as opposed to a firearm is too ‘creative’ to constitute a true threat. Unfortunately, the reality is that while this case was pending, a man attacked and injured nine people . . . with a machete.” *Id.* at 756 (Prosser J., dissenting). The dissent then lists two other incidents of machete violence, and adds a page long footnote that lists eleven newspaper articles about machete violence. *Id.* at 757 n.13. The dissent concludes, “The machete appears to be a particularly lurid weapon for inflicting injury. In short, there is no reason to dismiss the seriousness of the threat merely because it involves use of a machete.” *Id.* at 757.

<sup>79</sup> This may be most striking in *LaVine v. Blaine School District*, 257 F.3d 981, 984 (9th Cir. 2001), in which the court openly discusses information James shared with the school therapist including his suicidal thoughts, an incident in which his dad threw a rock at him, as well as a recent break-up with a girlfriend and allegations by her parents that James was stalking her.

school's internal disciplinary actions, whereas others challenge the involvement of the juvenile justice system in disciplinary action. Either punishment, when imposed upon a student for creative expression, has dangerous consequences for students' First Amendment rights.

Because these cases are principally about artwork, this Article will group them according to artistic medium. The students in *LaVine v. Blaine School District*,<sup>80</sup> *In re George T.*,<sup>81</sup> and *In re Douglas D.*<sup>82</sup> wrote poems that school officials believed to be threats. *In re Ryan D.*,<sup>83</sup> *Commonwealth v. Milo M.*,<sup>84</sup> *Demers v. Leominster School Department*,<sup>85</sup> and *Porter v. Ascension Parish School Board*<sup>86</sup> involve student drawings and paintings that caused serious alarm.

The cases that involve poetry form a cohesive group, within which there is some variation in poem tone and school disciplinary action. *In re George T.* and *LaVine* are the most similar because the defendants in both cases were teenage boys, the poems were brought to school voluntarily, and both poems contained language about bringing guns to school.<sup>87</sup> However, James LaVine was "emergency expelled" and then allowed to return to school after counseling,<sup>88</sup> whereas Julius, the defendant in *George T.*, was adjudicated delinquent for making criminal threats.<sup>89</sup>

---

<sup>80</sup> 257 F.3d 981, 981 (9th Cir. 2001).

<sup>81</sup> 126 Cal. Rptr. 2d 364 (Cal. Ct. App. 2003).

<sup>82</sup> 626 N.W.2d 725 (Wis. 2001).

<sup>83</sup> 123 Cal. Rptr. 2d 193 (Cal. Ct. App. 2002).

<sup>84</sup> 740 N.E.2d 967 (Mass. 2001).

<sup>85</sup> 263 F. Supp. 2d 195 (D. Mass. 2003).

<sup>86</sup> 301 F. Supp. 2d 576 (M.D. La. 2004).

<sup>87</sup> *George T.*, 126 Cal. Rptr. 2d at 367-70; *LaVine*, 257 F.3d at 983-86.

<sup>88</sup> *Id.* at 985-86.

<sup>89</sup> *George T.*, 126 Cal. Rptr. 2d at 377. This decision was reversed on July 22, 2004 by the Supreme Court of California. *In re George T.*, 16 Cal. Rptr. 3d 61 (2004). The court relies on a five-prong test developed by *People v. Toledo*, which requires specific intent that the statement be understood to be a threat. The elements are:

(1) that the defendant 'willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,' (3) that the threat—which may be 'made verbally, in writing, or by means of an electronic communication device'—was 'on its face and under the circumstances in which it [was] made . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,' (4) that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety,' and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances.

*Id.* at 67 (quoting *Toledo*, 26 Cal.4th at 227-228, and citing *People v. Bolin*, 18 Cal.4th

Fifteen-year-old Julius was convicted by the San Francisco juvenile court of making two criminal threats and sentenced to one hundred days in a juvenile detention center for handing his poem, entitled *Faces*, to two young women at his new high school.<sup>90</sup> Julius first showed the poem to Mary S., who was in his honors English class, and with whom his previous interactions had been limited to brief conversations.<sup>91</sup> He also gave a folded up copy of his poem to another student named Erin S. while they were all standing in the hallway.<sup>92</sup> She only pretended to read it and put it in her pocket where it remained forgotten. However, Mary read the poem immediately and believed it was a “death threat.”<sup>93</sup> She gave the poem to a teacher, and when Julius came to school the next Monday, the police were waiting for him.<sup>94</sup> The poem reads:

Faces  
 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!!<sup>95</sup>

The note was signed, “by Julius AKA Angel.” At the top of the page he had written, “These poems describe me and my feelings. Tell me if they describe you and your feelings.”<sup>96</sup>

Julius testified that he wrote *Faces* because he was having a bad day and that writing the poem was the only way for him to get those

---

297, 337-340 (1998)). Although the Court of Appeals has been recently overruled, this analysis and the punishment are still relevant to demonstrate the type of thinking and the structure courts apply to student expression cases.

<sup>90</sup> *George T.*, 126 Cal. Rptr. 2d at 368-69.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

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

<sup>94</sup> *Id.* at 369.

<sup>95</sup> *Id.* at 368.

<sup>96</sup> *Id.* at 367.

feelings out.<sup>97</sup> He went on to say that this poem was the first one he had ever written that mentioned killing of any kind, that usually his poems were about angels, and that he never intended the poem to be a threat.<sup>98</sup> Julius also testified that he intended the poem as a joke, and that he and his friends joked that they would be “the next Columbine kid.”<sup>99</sup>

Despite this testimony, the Court of Appeals found that the poem did not warrant First Amendment protection because it constituted a “substantial and material disruption” under *Tinker* since Julius intended the poem to be a criminal threat to his two classmates.<sup>100</sup> The court made a strong connection between the language about bringing guns to school and the testimony by Julius and his friends that they joked about being “the next Columbine kid.”<sup>101</sup> It also emphasized that this was Julius’s third school, and that he had a history of disruptive behavior.<sup>102</sup> The Supreme Court of California recently overturned this decision, ruling that Julius’s poem was “too ambiguous” to be a threat, and that his criminal conviction was inappropriate.<sup>103</sup> The court did not address the lower court’s analysis under *Tinker* regarding whether the poem was truly a substantial disturbance.<sup>104</sup> Like the court in *Douglas D.*, the court emphasized that the poem warranted in-school punitive measures in light of pervasive school violence.<sup>105</sup>

Like Julius, James LaVine, a high school junior, voluntarily brought a poem to school. However, in addition to sharing it with

---

<sup>97</sup> *Id.* at 371.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 375-76.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 374.

<sup>103</sup> *In re George T.*, 16 Cal. Rptr. 3d 61 (Cal. 2004).

<sup>104</sup> *Id.*

<sup>105</sup> The court did not dispense with the Columbine-based understanding of the school environment. It stated, “This case implicates two apparently competing interests: a school administration’s interest in ensuring the safety of its students and faculty versus students’ right to engage in creative expression. Following Columbine, Santee, and other notorious school shootings, there is a heightened sensitivity on school campuses to latent signs that a student may undertake to bring guns to school and embark on a shooting rampage. Such signs may include violence-laden student writings. . . . Minor’s reference to school shootings and his dissemination of his poem in close proximity to the Santee school shooting no doubt reasonably heightened the school’s concern that minor might emulate the actions of previous school shooters. Certainly, school personnel were amply justified in taking action following Mary’s e-mail and telephone conversation with her English teacher.” *Id.* at 75. The court also noted, “For example, the two student killers in Columbine had written poems for their English classes containing ‘extremely violent imagery.’” *Id.*

friends, James shared his poem, *Last Words*, with his English teacher.<sup>106</sup> James was “emergency expelled” from school for this poem.<sup>107</sup> James argued that his temporary emergency expulsion based on the poem was content-based discrimination. The school countered by declaring the poem to be only one of a “confluence of factors . . . that indicated he was a danger to the safety of the school and to himself,” and therefore unprotected by the First Amendment.<sup>108</sup> The court agreed with the school.<sup>109</sup> At the beginning of its discussion, the court noted the violent climate of schools and the struggle faced by school administrators “[a]fter Columbine, Thurston, Santee and other school shootings.”<sup>110</sup> In a balancing test of the student’s right to free speech and schools’ safety concerns, the court found that the school had not acted in contravention to James’ constitutional right to free speech by “emergency expelling” him based in part on his poem.<sup>111</sup> In light of the school’s knowledge of the problems James was dealing with at home, his past disciplinary problems, and a recent break-up with his girlfriend that included allegations of stalking, the court held that the school was within its rights to investigate James’s mental state before allowing him to return to school.<sup>112</sup> Under *Tinker*, the court held that the poem forecasted a potential substantial disruption which justified the school’s actions.<sup>113</sup> However, the court did uphold a permanent injunction granted by the lower court that prevented the school from recording the incident in James’s permanent file as it could cause unnecessary damage to his ability to secure employment in the future.<sup>114</sup>

Thirteen-year-old Douglas was slightly different from Julius and James in that he wrote his poem as part of an in-class English assignment and submitted it to his teacher as required.<sup>115</sup> The piece, which led to Douglas’s conviction and placement under one year of formal supervision for violating the Wisconsin disorderly conduct statute, reads:

---

<sup>106</sup> *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 984 (9th Cir. 2001). For the text of the poem, see the Introduction.

<sup>107</sup> *Id.* at 985 n.3. For a definition of emergency expulsion see *supra*, note 14.

<sup>108</sup> *Id.* at 988.

<sup>109</sup> *Id.* at 991.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 992.

<sup>112</sup> *Id.* at 991.

<sup>113</sup> *Id.* at 990.

<sup>114</sup> *Id.* at 991.

<sup>115</sup> *In re Douglas D.*, 626 N.W.2d 725, 730 (Wis. 2001).

There one lived an old ugly woman her name was Mrs. C that stood for crab.

She was a mean old woman that would beat children sencless.

I guess that's why she became a teacher.

Well one day she kick a student out of her class and he din't like it.

That student was named Dick.

The next morning Dick came to class & in his coat he con-seled a machedy.

When the teacher told him to shut up he whiped it out & cut her head off.

When the sub came 2 days later she needed a paperclipp so she opened the droor.

Ahh she screamed as she found Mrs. C's head in the droor."<sup>116</sup>

The police pressed charges despite Douglas's apology and his assurance that he did not intend his story to be a threat.<sup>117</sup> The district court agreed that the piece was a threat, and therefore un-protected by the First Amendment, because it caused a substantial disturbance by upsetting his teacher, Mrs. C.<sup>118</sup> The Court of Ap-peals affirmed.<sup>119</sup>

The Supreme Court of Wisconsin disagreed, instead finding that Douglas's story did not rise to the level of a true threat because it contained jest and hyperbole.<sup>120</sup> Relying heavily on the fact that Douglas wrote the story as an in-class assignment at the behest of his teacher and that the story was written in the third person, the court held that the piece itself was a work of fiction and was in-tended as such.<sup>121</sup> Throughout the opinion, the court took great pains to emphasize its deference to school officials who take inter-nal disciplinary action.<sup>122</sup> The court noted that it "share[d] the

---

<sup>116</sup> *Id.* at 730-31.

<sup>117</sup> *Id.* at 731.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 741. The court defines a true threat as, "a statement . . . as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech." *Id.* at 739 (citing *State v. Perkins*, 626 N.W.2d 762 (Wis. 2001)). The court then decides that in the context of an English class creative writing assign-ment, Douglas could not have made a true threat. *Id.* at 741.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 242. ("By no means should schools interpret this holding as undermining their authority to utilize their internal disciplinary procedures to punish speech such as Douglas's story.").

public's concern regarding threats of school violence."<sup>123</sup> It also clearly stated that "[s]ociety need not tolerate true threats."<sup>124</sup>

The cases involving painting and drawing share the analysis and outcomes of the poetry cases. With the exception of *Ryan D*,<sup>125</sup> these cases reflect the underlying judicial consensus that the artwork must be considered in light of a Columbine-based threat of school violence. Like the poetry cases, the circumstances in which the drawings were created vary, as do the punishments which were meted out.

The decision in *In re Ryan D*. was an appeal from Ryan's prosecution in juvenile court under California's criminal threat statute which had resulted in his being adjudicated delinquent, made a ward of the court, and placed on home probation for a painting he turned in for an art class project.<sup>126</sup> Ryan's painting was a graphic illustration of a young man shooting a female officer in the head, complete with pieces of brains and skin flying from the wound.<sup>127</sup> The officer in the painting wore the same badge number as a female peace officer who worked at the school and had cited Ryan earlier in the semester for marijuana possession.<sup>128</sup> Ryan's art teacher took the painting to a school administrator who contacted the authorities.<sup>129</sup>

Ryan repeatedly stated that he painted the picture to express his anger at Officer McPhail for citing him for marijuana possession and testified that he was simply "letting his anger out for getting in trouble" and had no intent to scare anyone.<sup>130</sup> The court found that the painting lacked the "gravity of purpose" and the "immediate prospect of the execution of a crime that would result in death or great bodily injury to [Officer] McPhail."<sup>131</sup> It overturned the juvenile court's decision to convict Ryan.<sup>132</sup> In holding that the painting fell below the high standard that would make it a true threat, the court cited a variety of factors, including the submission of the painting as a class assignment, the month that had passed between the incident that angered Ryan and the submission of the painting, and the fact that Ryan could not have expected the

---

<sup>123</sup> *Id.* at 743.

<sup>124</sup> *Id.*

<sup>125</sup> 123 Cal. Rptr. 2d 193 (Cal. Ct. App. 2002).

<sup>126</sup> *Id.* at 195.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 196.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 197.

<sup>131</sup> *Id.* at 199.

<sup>132</sup> *Id.* at 202.

Officer to see the painting.<sup>133</sup> Most importantly, the court held that the painting was too “ambiguous” to be a real threat, stating that “[a]s an expression of intent, a painting—even a graphically violent painting—is necessarily ambiguous,” whereas a criminal threat “is a specific and narrow class of communication.”<sup>134</sup>

The judicial analysis in *Porter v. Parish Ascension School Board*<sup>135</sup> contrasts greatly to the analysis in *Ryan D.* This is so even though Adam, the student in *Porter*, was expelled from school rather than arrested for his drawing.<sup>136</sup> The case involved a drawing Adam made two years earlier which his brother, Andrew, found in a sketchbook that he brought to school without Adam’s permission.<sup>137</sup> The drawing depicted

[the school] being soaked with gasoline surrounded by an individual with a torch and a missile. The drawing also depicted at least two students holding what appeared to be guns and a student throwing a brick at . . . Principal Conrad Braud, while saying the words, ‘shut the f— up faggot.’ A racially explicative word was also written on the drawing.<sup>138</sup>

The drawing was confiscated by Andrew’s bus driver and turned over to school administrators, who questioned Adam about the drawing. Due to the drawing’s content and Adam’s admission that he drew it, his bag was searched, revealing other notebooks carved with gang symbols and containing writings about drugs, sex, and death, a fake ID, and a box cutter. Adam was expelled and arrested for “terrorizing” and illegal possession of a weapon.<sup>139</sup>

The Louisiana District Court explicitly recognized Columbine and other school shootings as a “backdrop”<sup>140</sup> for its decision. It rejected the plaintiff’s arguments that the drawing was created out of school and that Adam never intended for it to be shown to anyone or brought onto school grounds, and instead likened bringing the drawing to school to a student bringing a gun to school.<sup>141</sup> In

---

<sup>133</sup> *Id.* at 200.

<sup>134</sup> *Id.* (citing *People v. Mirmirani*, 636 P.2d 1130).

<sup>135</sup> 301 F. Supp. 2d 576 (M.D. La. 2004).

<sup>136</sup> *Id.* at 580.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 580-81.

<sup>140</sup> *Id.* at 583 (“Indeed, several of the opinions the Court relies on in this opinion mention Columbine and similar incidents in upholding the actions taken by the schools in other cases . . . . It is against this backdrop that this Court must now decide if Adam Porter’s drawing is entitled to First Amendment protection.”).

<sup>141</sup> *Id.* at 589 (“The Court has little doubt that bringing a gun from home and using it as a threat at school would not be sanctioned because the gun was loaded at home.”).

affirming Adam's punishment, the court conducted a two-part analysis and held, first, that the drawing was not covered by *Tinker* because it caused a substantial disruption to the educational process, and second, that the drawing rose to the level of a true threat because it caused the administration to fear that Adam would blow up the school.<sup>142</sup> The decision made no reference to Adam's reasons for drawing the picture, yet relied heavily on the fact that he had a past disciplinary record.<sup>143</sup>

The Massachusetts Supreme Court also accepted the premise that the events in Columbine should dictate the school's approach to discipline in *Commonwealth v. Milo M.*<sup>144</sup> The court upheld twelve-year-old Milo's adjudication as delinquent for drawing a picture the court labeled a terroristic threat based on the following events.<sup>145</sup> As he waited for an appointment with the principal to discuss disciplinary problems from the previous day, Milo drew a picture of himself shooting his teacher, Mrs. F.<sup>146</sup> This picture was confiscated by a passing teacher, who immediately showed it to Mrs. F. Milo then drew a second picture, which was delivered to Mrs. F. by another student after Milo asked, "Do you want to see this one, too?"<sup>147</sup> Technically, Milo was adjudicated delinquent for making a terroristic threat based on the second drawing only and the circumstances surrounding the delivery of the drawing to his teacher.

The pictures were graphic. In one, Milo aims a large gun at Mrs. F.'s head as Mrs. F. says in a speech bubble, "Please don't kill me," with the word "blood" written in large letters at her feet. In the other picture, Mrs. F. has urinated in her pants and sits on her knees with her hands clasped in front of her as if begging for her life. Milo, who is smoking an enormous cigarette, holds a gun with a banner reading, "Kill. Bang" to her head.<sup>148</sup> The court found that Milo's drawing was a true threat, and that it was therefore unprotected speech.<sup>149</sup>

Milo claimed on appeal that the judge's ruling was premised largely on Mrs. F.'s state of mind and did not adequately consider

---

<sup>142</sup> *Id.* at 586, 588.

<sup>143</sup> *See id.* at 587-88.

<sup>144</sup> 740 N.E.2d 967 (D. Mass. 2001).

<sup>145</sup> *Id.* at 974.

<sup>146</sup> The drawings can be found in Appendix A and B of the Court's opinion. *Id.* at 976-77. The drawings are also found appended to this article.

<sup>147</sup> *Id.* at 969.

<sup>148</sup> *Milo M.*, 740 N.E.2d at 972.

<sup>149</sup> *Id.* at 975.

his subjective intent or the actual possibility that he could carry out the threat.<sup>150</sup> The Appeals Court disagreed, finding that the judge had given appropriate weight to each element.<sup>151</sup> After judicially noticing “actual and potential violence in public schools,”<sup>152</sup> the court held that Milo’s personal delivery of the drawing and its content constituted a threat. In addition, the court was careful to state that a drawing could be a threat in and of itself, and discussed in detail the content of the drawings as indicating intent to instill fear in Mrs. F. and harm her.<sup>153</sup>

In *Demers v. Leominster School Department*, Michael A., like Milo, drew two violent drawings that alarmed teachers and the school administration.<sup>154</sup> Fifteen-year-old Michael, who was classified as having special needs, had been removed from class for his behavior.<sup>155</sup> He went to a classroom next door, where a teacher suggested that he draw his feelings about being disciplined.<sup>156</sup> In response, Michael drew a two-sided picture. The first side depicted the school “surrounded by explosives, with students hanging out the windows crying for help.”<sup>157</sup> Michael indicated both the type (“C-4”), and in one instance, the amount of explosives (“7 lbs.”).<sup>158</sup> The other side had a picture of “Dr. Joseph Rappa, the Superintendent of Schools, with a gun pointed at his head and explosives at his feet.”<sup>159</sup> The teacher who suggested that Michael make the drawing gave it to the principal.<sup>160</sup> The next day Michael wrote, “I want to die,” and “I hate life,” repeatedly on a piece of paper and then threw it away; the paper was rescued from the trash and given to the principal.<sup>161</sup>

After a meeting with the principal, Michael was suspended until a meeting could be held.<sup>162</sup> The outcome of this meeting was that Michael was allowed to return to school as long as he would do his schoolwork, behave, and undergo a psychiatric evaluation.<sup>163</sup> When Michael refused to attend the psychiatric evaluation, he was

---

<sup>150</sup> *Id.* at 970.

<sup>151</sup> *Id.* The court did not explain the reasons for its holding.

<sup>152</sup> *Id.* at 973.

<sup>153</sup> *Id.* at 972.

<sup>154</sup> 263 F. Supp. 2d 195, 198 (D. Mass. 2003).

<sup>155</sup> See *id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 199.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

suspended for the remainder of the school year and referred to an alternative placement.<sup>164</sup> After a hearing at the Bureau of Special Education, the school allowed Michael to return.<sup>165</sup> Michael's father then filed a Section 1983 constitutional tort action alleging that by suspending his son because of the drawing and the writings, the school had violated his right to free speech.<sup>166</sup>

In its decision, the *Demers* court analyzed the issue under both *Tinker*<sup>167</sup> and *Watts*<sup>168</sup> and decided that *Tinker* did not provide protection for the drawing because the speech at issue was not "silent or passive."<sup>169</sup> It further held that under the *Watts* analysis Michael could "reasonably have foreseen" that the teacher and school administration would consider the drawing and the writing a threat to school safety,<sup>170</sup> and therefore, Michael was properly subjected to expulsion based on his drawings.<sup>171</sup> There was no discussion of the fact that Michael was asked to share his feelings in a drawing. Instead, the court deemed the facts in *Demers* analogous to another case in which a girl's verbal threat of physical harm to her guidance counselor constituted a true threat.<sup>172</sup>

The commonalities between the students involved in these creative expression cases are revealing. All of the cases involve teenage boys with histories of disciplinary and psychological problems. The art itself is relatively similar, depicting schools blowing up and burning down, students aiming guns at or shooting teachers and fellow students. The pieces undeniably reflect a deep desire for school to disappear, generally as a result of some act of violence. However, whether or not the expression of such a wish is truly a threat is certainly questionable. In fact, it is arguable whether even the most graphic of these depictions of teen angst is

---

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 200.

<sup>166</sup> *Id.* at 198.

<sup>167</sup> *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 509 (1969).

<sup>168</sup> *Watts v. United States*, 394 U.S. 705 (1969). See *United States v. Kelner*, 534 F.2d 1020, 1027 (2d Cir. 1976) (explaining the *Watts* holding to mean that the government must show that the speaker intended to make a true threat, one that on "its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate, and specific as to the person threatened, that they convey the gravity and purpose and imminent prospect of execution.").

<sup>169</sup> *Demers*, 263 F. Supp. 2d at 202 (quoting *Tinker*, 393 U.S. at 508).

<sup>170</sup> *Id.* at 202 (citing *United States v. Fulmer*, 108 F.3d 1486, 1491-92 (1st Cir. 1997)).

<sup>171</sup> *Id.* at 203.

<sup>172</sup> *Id.* at 201 (citing *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 373 (9th Cir. 1996), in which a fifteen year old high school student told her guidance counselor, "I am going to shoot you.").

so disruptive that it should be deprived of the protections provided by *Tinker*, or so immediately threatening as to constitute a true threat under *Watts* or *Fulmer* analysis. However, the cases suggest that as long as the work is analyzed in the wake of Columbine they will be so construed.

If the artwork is considered from a standpoint which takes into account the falsity of public perception regarding Columbine and considers the nature of children's artwork from a practical perspective, the common judicial perspective appears far less reasonable than as presented in the majority of the opinions.

#### IV. COLUMBINE AS A FALSE PREMISE

Regardless of whether punishment of a student actually survives judicial scrutiny, each court considers the content of the student's artwork in the wake of Columbine under an assumption that incidents of mass violence like the one that occurred at Columbine High School are an ever-present reality in the daily life of every student in every public school. This judicial perception of public schools provides the foundation for the entrance of the true threat doctrine into the discourse surrounding student artwork, and expands the substantial disturbance doctrine such that its limits are ultimately meaningless. If the threat of danger in schools is heightened, the abrogation of student speech rights to protect students from danger is justified. Without the Columbine rationale, restricting student speech including artwork would likely appear to be a gross overstepping of school disciplinary boundaries.

The courts' perception of the school setting as inherently violent or peaceful is crucial to the outcome of the creative expression cases because of the discretionary nature of the *Tinker* test, and the heavy reliance on the listener's perception of danger in the true threat analysis.<sup>173</sup> Practically speaking, it is much more likely that judges will consider a drawing a true threat or an act of violence that causes a "substantial disruption" when they fundamentally believe that schools are in constant danger of erupting into violence. Only the court in *Milo M.* went so far as to judicially notice the fact of school violence by stating that "such violent episodes are matters of common knowledge, particularly within the teaching community, and thus are 'indisputably true.'"<sup>174</sup> However, even when it is not explicitly stated, the recognition of school violence as a fact of

---

<sup>173</sup> See *Watts*, 394 U.S. at 708; *Fulmer*, 108 F.3d at 1491-92.

<sup>174</sup> *Commonwealth v. Milo M.*, 740 N.E.2d 967, 973 (D. Mass. 2001) (citations omitted).

everyday life in the nation's public schools in the creative expression cases is akin to judicial notice.<sup>175</sup> The universe in which courts imagine student artwork to be created is a violent one. Artwork, therefore, takes on characteristics that it could not if the setting was peaceful – it becomes a statement of intent rather than an expression of emotion.

What is striking about courts taking judicial notice of the fact of school violence is that acts of violence in schools, especially random, large-scale mass shootings like the one at Columbine High School, are the rare exception, rather than the rule. Examination of school violence statistics reveals that the creative expression decisions are grounded entirely on a counterfactual premise. In response to the events at Columbine High School, President Bill Clinton directed Attorney General Janet Reno to compile a national school safety report. The cover letter to that report testified to the overall safety of American public schools, stating that “it is important to remember that ninety percent of our schools are free of serious, violent crime . . . . [O]ur schools are among the safest places for students to be on a day-to-day basis.”<sup>176</sup> The Department of Justice's most recent report on school safety echoes that letter, indicating that children are safest at school.<sup>177</sup>

Not only are schools safe, but other more in-depth reports suggest that school violence has actually been on the decline. During the 1998-1999 school year, the year that included the Columbine shooting, the National School Safety Center reported that there were 26 school-associated violent deaths. This was a 40% decline from the previous year. With 52 million students in America's schools, students that year had a one in two million chance of dying from school violence.<sup>178</sup> The Center for Disease Control reported that between 1993 and 1997 the number of students who brought guns to school dropped by 25 percent. Further, a joint study by the Bureau of Justice Statistics and National Center for Education Statistics found that between 1993 and 1997, the num-

---

<sup>175</sup> Federal Rule of Evidence 201 allows courts to take judicial notice of certain facts. The rule states, “A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” *Id.*

<sup>176</sup> Letter from Secretary Richard W. Riley, Secretary of Education and Janet Reno, Attorney General, to William Clinton, President, Cover Letter for 1998 Annual Report on School Safety (Oct. 1998), *available at* [www.ed.gov/pubs/AnnSchoolRept98/Letter.html](http://www.ed.gov/pubs/AnnSchoolRept98/Letter.html).

<sup>177</sup> See Nation's School Crime Rate Continues to Decline, *supra* note 17.

<sup>178</sup> *School House Hype*, *supra* note 34.

ber of school crimes declined 29 percent, the number of serious violent crimes declined 34 percent, the number of violent crimes (including fighting) declined 27 percent, and the number of thefts declined 29 percent.<sup>179</sup> In a survey by Metropolitan Life, 86 percent of teachers and 89 percent of students and law enforcement officials surveyed said that they thought their local schools were safe.<sup>180</sup>

The stark contrast between the statistics and public perception regarding the overall safety of public schools is probably due to the extensive media coverage of the Columbine incident.<sup>181</sup> A Justice Policy Institute article, *School House Hype*, reports:

A phone poll of 1,004 adults for The Wall Street Journal and NBC News revealed that 71% of Americans thought it was likely that a school shooting could happen in their community. A Washington Post poll conducted seven months after the tragic shootings at Columbine High School revealed that 60% of respondents reported school violence as an issue that 'worried them a great deal.' According to two polls conducted by Gallup for the USA Today, respondents were 49% more likely to be fearful of schools in 1999 than in 1998. Polls showed that rural parents were the most fearful of school violence, even though the overwhelming majority of serious crime against or by youth occurs in cities.<sup>182</sup>

The courts have fashioned a legal fiction from this public perception, choosing to ignore the government's hard statistical evidence that schools are safe. This fiction lives past the immediate aftermath of Columbine in the late 1990s and pervades public thinking about schools in decisions written as recently as 2004. School violence is the language of the creative expression cases, regardless of the outcome.

The court in *Douglas D.*, which ultimately found in Douglas's favor, set the case in the wake of Columbine, stating "[s]chool violence is all too prevalent in our schools today. . . . [T]he threat of violence intrudes our children's places of learning . . . . Our children consequently often must live in an environment of fear."<sup>183</sup> The *LaVine* court stated unequivocally, "[a]s we noted at the outset, we live in a time when school violence is an unfortunate reality that educators must confront on an all too frequent basis. The recent

---

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> In re Douglas D., 626 N.W.2d 725, 737 (Wis. 2001).

spate of school shootings have put our nation on edge and have focused attention on what school officials, law enforcement and others can do or could have done to prevent these kinds of tragedies.”<sup>184</sup> The court in *Demers* explicitly relied on this premise to justify its legal conclusion, writing “a reasonable interpretation of the law would allow a school official to prevent potential disorder or disruption to school safety, particularly in the wake of increased school violence across the country.”<sup>185</sup> Similarly, the court in *Porter* used the Columbine premise as its entire legal context, explaining

In determining whether this drawing is entitled to the first amendment protections claimed by the plaintiff, it is necessary to review certain events which preceded the defendant’s actions . . . [T]he most notable story was Columbine High School in April 1999 . . . [S]ome schools became like war zones . . . It is against this backdrop that this court must decide whether Adam Porter’s drawing is entitled to Constitutional protection.<sup>186</sup>

*School House Hype’s* thesis that the media attention surrounding Columbine created an enormous disparity between the truth and public perception is reflected in the fact that the sources for judicial information on school violence are primarily television and newspaper reports.<sup>187</sup> The decision in *Milo M.* states, “[G]iven the recent, highly publicized school-related shootings by students, we take judicial notice of the actual and potential violence in the public schools . . . . [J]udges cannot ignore what everybody else knows: violence and the threat of violence are present in the public schools.”<sup>188</sup> The court supports this statement with a litany of school shootings in a page-long footnote that cites most dramatically *ABC News, An Explosion of Violence* as a primary source.<sup>189</sup> The dissent in *Douglas D.* footnotes an article entitled *Scorecard of Hatred*

---

<sup>184</sup> *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 987 (9th Cir. 2001).

<sup>185</sup> *Demers v. Leominster Sch. Dep’t*, 263 F. Supp. 2d 195, 203 (D. Mass. 2003).

<sup>186</sup> *Porter ex rel. LeBlanc v. Ascension Parish Sch. Bd.*, 301 F. Supp. 2d 576, 583 (M.D. La. 2004).

<sup>187</sup> *School House Hype*, *supra* note 34. The U.S. Dept. of Justice agrees, stating in *The School Shooter: A Threat Assessment Perspective*, “Though school shootings are extensively covered in the news media, the information available in news reports is not necessarily complete, accurate, or balanced. News coverage is inherently hasty and often relies on sources who themselves have incomplete or inaccurate information. And journalists ordinarily do not have access to police and other investigative reports that may contain highly significant but confidential information about a school shooting incident or about the background, previous activities, and traits of the student or students who carried out the shooting.” O’TOOLE, *supra* note 21.

<sup>188</sup> *Commonwealth v. Milo M.*, 740 N.E.2d 967, 973 (D. Mass. 2001) (internal quotations and citations omitted).

<sup>189</sup> *Id.* at 973-74 n.8 (citing *ABC News, An Explosion of Violence* (Mar. 28, 2002)).

from *Time Magazine* which examined post-Columbine “incidents of violence or potential violence” to support the thesis that schools are dangerous.<sup>190</sup> Such explicit reliance on media-driven public perception of school violence as the whole context of the court’s decision about whether to afford First Amendment protection to student artwork looks, feels, and functions like judicial notice. Under the Federal Rule of Evidence 201(c) judges may independently apply judicial notice to adjudicative facts at their discretion. Yet, under the doctrine of judicial notice, courts must have an incontrovertible basis for the notice.<sup>191</sup> Perhaps that is why the decisions do not explicitly notice school violence. An alternative possibility is all the more disturbing; judges may believe school violence is such a commonly understood reality that judicial notice is unwarranted.

However, judges have a choice about the sources they follow and the statistics they use. This couching of the creative expression cases in an atmosphere of constant fear is a conscious and active judicial choice that creates a heightened sense of urgency about student behavior and allows courts and schools to impose serious legal restrictions on the First Amendment rights of children. Courts readily adopt the myth of Columbine and consequently place heavy emphasis on the prevention of future Columbines, despite the fact that this kind of incident, though undeniably tragic, is by nature isolated and extremely rare. The legal effects of the blanket acceptance of this premise even by the more liberal judges are dangerous not only for the future of student speech, but potentially for speech rights of all citizens.

#### V. THE CHILLING EFFECT ON STUDENT SPEECH

The chilling impact of the decisions described above is derived from both the more technical legal effects of the importation of new criminal doctrines into the school environment, including the dangerous expansion of the “substantial disturbance” standard in the *Tinker* doctrine, and the practical, visceral consequences both for individual students and art in general.

---

<sup>190</sup> *Douglas D.*, 626 N.W.2d at 750 n.2 (Prosser, J. dissenting) (citing Amanda Bower, *Scorecard of Hatred*, TIME, Mar. 19, 2001, at 31-32).

<sup>191</sup> See 60 AM. JUR. 3d *Proof of Facts* §5 (2001) (“[J]udicial notice may only be taken of facts as to which there can be no reasonable dispute.”).

A. *Creating Art is Not an Act of Violence: True Threat Doctrine in School*

True threat doctrine removes speech from the protection of the First Amendment when a statement is so frightening and immediate that it rises to the level of an actual physical threat. The application of this doctrine in the cases seeking to overturn delinquency verdicts and in challenges to internal school disciplinary actions has immediate implications for student speech in the present and for the speech rights of artists in the future.

The decisions that apply the true threat analysis to artwork transform violent imagery and metaphor used in drawings, poems, and stories into literal statements of intent to cause actual harm.<sup>192</sup> Application of true threat doctrine shifts the focus of a school speech analysis from consideration of whether the speech in question has caused a substantial disturbance in the educational setting to the metaphorical content of the speech itself and the student's ability to foresee the frightened reaction of a teacher or another student to the speech. Such a shift emphasizes the intent and predictive abilities of the individual student rather than the effect of the student's actions on the educational setting, and it gives schools and juvenile court judges an incredible amount of power over the content of student artwork.

The decisions about Adam and Michael's drawings in *Demers* and *Porter* illustrate how the true threat doctrine has been imported into the First Amendment student speech analysis.<sup>193</sup> In both cases the true threat analysis is performed side by side with *Tinker's* substantial disruption analysis.<sup>194</sup> Essentially, the use of the true threat doctrine in conjunction with the substantial disturbance doctrine renders the substantial disturbance test moot. If artwork is so serious and so dangerous as to be a true threat, then by its very nature it causes a substantial disturbance to the educational process under *Tinker*.

This reasoning is evident in the results of the student artwork cases. Adam and Michael's drawings were adjudicated to be true threats and the courts held that the schools' disciplinary actions were reasonable and appropriate in light of the threatening nature

---

<sup>192</sup> *Milo M.*, 740 N.E.2d at 972; *Demers v. Leominster Sch. Dep't*, 263 F. Supp. 2d 195, 202-03 (D. Mass. 2003); *Porter ex rel. LeBlanc v. Ascension Parish Sch. Bd.*, 301 F. Supp. 2d 576, 586-87 (M.D. La. 2004).

<sup>193</sup> *Demers*, 263 F. Supp. 2d at 202-03; *Porter*, 301 F. Supp. 2d at 586-87.

<sup>194</sup> *Id.*

of the work.<sup>195</sup> *Milo M.*, *George T.*, and *Douglas D.* provide a more dramatic illustration of the application of true threat doctrine. These students were sent to juvenile court as punishment for their artwork and were adjudicated delinquent because the courts determined their artwork constituted violations of state disorderly conduct and criminal threat laws.<sup>196</sup>

The use of the true threat analysis places artwork within the sphere of criminal conduct and outside of the protections of the First Amendment. As discussed above, there are two versions of the true threat analysis. When applied to student artwork, the use of the *Fulmer* version of the true threat analysis is especially worrisome.<sup>197</sup> This version examines whether the threat-maker could have reasonably foreseen the reaction of the listener without inquiring into the intent of the speaker or his or her ability to carry out the threat.<sup>198</sup> This analysis was used in *Demers* to conclude that Michael's drawing of the school surrounded by explosives and the superintendent of schools at gunpoint in the foreground was a true threat because Michael should reasonably have foreseen the frightened reaction of a teacher.<sup>199</sup>

Unlike *Fulmer*, the *Watts* true threat test, considers both the capability and the intent of the speaker. Unfortunately, it does not necessarily produce a more positive result. For example, in *Milo M.*, the court found that Milo had both the intent and the ability to carry out the threat it found in the pictures he drew of himself holding a gun to his teacher's head. The court found that "the content of both drawings" evidenced his intent to shoot his teacher.<sup>200</sup> Additionally, the court held that the ability to carry out the threat could be inferred from "circumstantial evidence:" Milo seemed angry when he held the drawings out to Mrs. F. and he had been disciplined prior to creating the drawings.<sup>201</sup> Under a somewhat different interpretation in *Porter*, the court concluded that Adam's drawing of the school on fire and surrounded by bombs was a true threat simply because the recipients of the threat could reasonably have believed that he intended the drawing as a

---

<sup>195</sup> *Demers*, 263 F. Supp. 2d at 202-3; *Porter*, 301 F. Supp. 2d at 599.

<sup>196</sup> *Milo M.*, 740 N.E.2d. at 969; In re *George T.*, 126 Cal. Rptr. 2d 364, 366 (Cal. Ct. App. 2003); In re *Douglas D.*, 626 N.W.2d 725, 730 (Wis. 2001)

<sup>197</sup> *United States v. Fulmer*, 108 F.3d 1486, 1491-92 (1st Cir. 1997).

<sup>198</sup> *Id.*

<sup>199</sup> *Demers*, 263 F. Supp. 2d at 202.

<sup>200</sup> *Milo M.*, 740 N.E.2d at 972.

<sup>201</sup> *Id.*

threat.<sup>202</sup>

The same court analogized Adam's drawing to a loaded gun, stating:

The Court has little doubt that bringing a gun from home and using it as a threat at school would not be sanctioned because the gun was loaded at home. The same can be said of the drawing. The key issue is whether the school administrators or students perceived the drawing (or gun) as a threat to their safety and security . . .<sup>203</sup>

This loaded gun/violent artwork parallel is an excellent example of the impact of true threat analysis on students. The true threat analysis should not be applicable to student artwork because even student art is entitled to First Amendment protection. Constitutional arguments aside, the true threat analysis cannot be appropriately applied to teenage students.

Both the intent and reasonably foreseeable frameworks of analysis derived from *Watts* and construed in *Schneider/Malik/Maisonet* and *Kelner/Fulmer* attribute adult developmental capacity to teenagers.<sup>204</sup> These frameworks place a heavy emphasis on the content of the artwork.<sup>205</sup> This emphasis contradicts psychological research about the extent to which a child's art expresses literal meaning. Given the power imbalances between students and teachers, it seems unlikely that a teacher would find a student's artwork frightening enough to believe that it communicated an intent to cause real harm.<sup>206</sup>

The true threat analysis's emphasis on the student's ability to reasonably foresee a teacher's reaction to a drawing places an adult burden on a child. It is questionable whether a student would ever believe that a drawing could put a teacher in fear of imminent physical harm. The true threat analysis is particularly adult-oriented in that it fails to recognize that children and teenagers have

---

<sup>202</sup> Porter *ex rel.* LeBlanc v. Ascension Parish Sch. Bd., 301 F. Supp. 2d 576, 587 (M.D. La. 2004).

<sup>203</sup> *Id.* at 589.

<sup>204</sup> See *supra* Section I.

<sup>205</sup> See *In re George T.*, 126 Cal. Rptr. 2d 364, 375-76 (Cal. Ct. App. 2003) (*rev'd* 93 P.3d 1007 (Cal. 2004)), in which the court emphasizes the fact that the poem talked about bringing guns to school. See also the court's extensive description of the content of the drawing in *Commonwealth v. Milo M.*, 740 N.E. 2d 967, 972 (Mass. 2001), and its assertion that a drawing can be a threat.

<sup>206</sup> See CLAIRE GOLOMB, *THE CHILD'S CREATION OF A PICTORIAL WORLD* 165-66 (2d ed. 2004) ("The fantasy dimension of pictorial expression may diminish the intensity of emotional conflicts that are particularly painful because of the child's dependency on adults and her powerlessness vis à vis them.").

a reduced sense of consequence and foresight.<sup>207</sup> Such an approach also particularly implicates students who have a history of behavior problems, or who, like Michael, have an actual behavior disorder, because they may be particularly unable to predict reactions and to control their own behavior, as the true threat analysis requires.

More importantly, the true threat analysis acknowledges that what appears to be a true threat may actually be intended as political hyperbole, metaphor, or jest.<sup>208</sup> Art itself may simply be too vague and ambiguous to constitute a true threat in the legal sense. A child's artwork is especially unlikely to be indicative of a specific intent to act in a certain way. Even analysts who specialize in the meaning and diagnostic value of child artwork caution against understanding a child's art as a literal translation of internal thought or feeling. For example, Claire Golomb, author of *The Child's Creation of a Pictorial World*, states, "I have cautioned against using drawings as if they were an X-ray of the child's heart and mind."<sup>209</sup> If a psychoanalyst is unsure as to the exact meaning of a child's artwork, surely a judge is not equipped to determine whether a piece of art is indicative of criminal intent.

Aside from the many reasons that it is unfair to treat student artwork as a true threat, there is real danger that the true threat analysis may become applicable to all art. True threat analysis indi-

---

<sup>207</sup> See Marty Beyer, *Recognizing the Child in the Delinquent*, 7-SUM KY. CHILD. RTS. J. 16, 2-3 (1999). Beyer examines why adult criminal standards do not apply to the child offender. In her review of modern adolescent psychology, she emphasizes that adolescents have different thought processes, which are more immature and less nuanced, than those of an adult. Beyer identifies four major characteristics that separate adolescent from adult cognitive thinking: 1) not anticipating, 2) reacting to perceived threat, 3) minimizing danger, and 4) having only one choice. In the context of true threat analysis, these factors lend credence to the argument that teenagers may not conceive of the future consequences of their actions. Because of this, the true threat analysis should not be applied to teenagers' behavior.

<sup>208</sup> *Watts v. United States*, 394 U.S. 705 (1969). Robert Watts stated, "They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is [Lyndon B. Johnson]. . . . They are not going to make me kill my black brothers." *Id.* at 706. The Supreme Court held he was not actually threatening to kill Johnson, but rather was speaking in political hyperbole. *Id.* at 708. If such a statement is protected by the First Amendment because it is hyperbolic, why not a drawing made by a twelve year old student? The court in *In re Ryan D.*, 123 Cal. Rptr. 2d 193, 195-96 (Cal. Ct. App. 2002) relied on this analogy, as did the dissent in *In re George T.*, 126 Cal. Rptr. 2d 364, 380 (Cal. Ct. App. 2003) (Rushing, J., dissenting) *rev'd*, 93 P.3d 1007 (Cal. 2004)). The same reasoning formed the basis of the recent reversal of *In re George T.*, 93 P.3d 1007 (Cal. 2004).

<sup>209</sup> GOLOMB, *supra* note 206, at 319.

icates a shift in the Supreme Court's art jurisprudence from analyzing art as obscenity to analyzing art as threatening conduct. The role of art and artists in American society—to entertain, to question the status quo, to provoke thought, to portray alternative perspectives, and to criticize—is jeopardized by the courts' and school administrators' treatment of student artwork as a threat.<sup>210</sup> If a school is, as the Supreme Court insisted in *Bethel*, the locus of the student's moral development, and, as *Tinker* conceives it, a place where students learn to communicate as a society, then treating violent artwork as a crime in school threatens to re-form our future society's perception and treatment of art.<sup>211</sup> The analogy between artwork and a gun in *Porter* raises critical questions about how present-day students will both create and evaluate artwork of the future. It implicates the development of young artists and their work, as well as the role and value assigned to artwork when the current generation of students matures into adults.

Censorship by schools undermines the goal of the First Amendment: to create a society that values its freedom to express discontent with the status quo and permits such expression through an artistic medium.<sup>212</sup> When students are censored for ex-

---

<sup>210</sup> See *Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995), in which the court cautions against narrowing First Amendment protection to speech which has a "particularized message" lest it exclude the, "unquestionably shielded artwork of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll," all controversial, yet vital artists in their time. In a case in which it found computer source code to be protected under the First Amendment, the Sixth Circuit analogized the code to artwork, citing *Roth v. United States*, 354 U.S. 476, 484 (1957), to emphasize that, "'all ideas having even the slightest redeeming social importance,' including those concerning 'the advancement of truth, science, morality, and the arts' have the full protection of the First Amendment." *Junger v. Daley*, 209 F.3d 481, 484 (6th Cir. 2000) (quoting *Roth*, 354 U.S. at 484). When the courts decide that student artwork is a threat, they take away the artwork's First Amendment protection altogether, silencing the student's expression. If children are being trained in the morals and values of society in school, than it follows logically that when a school treats creative expression as if it dangerous, students will learn that viewpoint. They will carry that viewpoint into their adult lives and exercise it in their communities. Art may lose its advocates and its message, its vitality, will be jeopardized.

<sup>211</sup> Courts have worried about the ramifications of limiting First Amendment protection of artwork before. For example, the Second Circuit cautioned that a statute banning artists from selling their work in public places, "raises concerns that an entire medium of expression is being lost," and held that the statute violated the artists' First Amendment rights. *Bery v. City of New York*, 97 F.3d 689, 697, 699 (2d Cir. 1996).

<sup>212</sup> Artwork has been deemed "a quintessential form of expression," worthy of and requiring First Amendment protections. *People for the Ethical Treatment of Animals v. Giuliani*, 105 F. Supp. 2d 294, 304 (S.D.N.Y. 2000) (citing *Bery v. City of New York*, 94 F.3d 689, 696 (2d Cir. 1996)). As the court in *Mastrovincenzo v. City of New York* passionately expounded, "Should it be a prerequisite for art to be art, that the artist

pressing anger with the first institution that they become part of, the message is that expressing anger with the status quo is dangerous. Students learn that certain metaphor and symbolism is inappropriate, which also potentially removes that symbolism and metaphor from artistic discourse, narrowing the artistic perspective. The fundamental lesson is that art that addresses sensitive and disturbing topics is punishable and unacceptable to society and the community as a whole.<sup>213</sup>

However, because of the ambiguous nature of art and the potential for multiple interpretations of its meaning, students cannot predict what kind of creative expression will get them in trouble. Students punished for their artwork will learn quickly that art must

---

express his thoughts through traditional, perceptually accessible means? The long history of ideas, which records infamous instances of persecution of creative expression, would answer compellingly, for any society that values free speech as much as ours, with an emphatic 'No.' Civilization has traveled too far down the road in the evolution of art as embracing the whole spectrum of human imagination for the law to countenance a classification of an artist's design as art only when imparted in conventional shapes and forms sufficiently familiar or acceptable to a government licensor." *Mastrovincenzo v. City of New York*, 313 F. Supp. 2d 280, 289 (S.D.N.Y. 2004). The court goes on to recognize clothing decorated with graffiti to convey "themes and voices of underrepresented individuals and groups in a large urban environment" and deems this to be expression protected by the First Amendment, thus recognizing the right of the artist to sell them in public. *Id.* at 291. Further emphasis on the expressive power of art in society comes from *Parks v. LaFace Records*, 76 F. Supp. 2d 775, 780 (E.D. Mich. 1999) (citing *Hicks v. Casa Blanca Records*, 464 F. Supp. 426, 430 (S.D.N.Y. 1978)), in which the court recognizes that artwork like books and movies, "are vehicles through which ideas and opinions are disseminated and, as such, have enjoyed certain constitutional protections . . ." Art is protected by the virtue of its expressiveness, by the fact that it communicates the artist's opinion.

<sup>213</sup> The potential implications for the legal analysis of artwork under the true threat doctrine is not reserved to students in public schools. Just as schools have used security as a justification for chilling student speech in the wake of Columbine, so has the federal government used security as justification for the narrowing of various civil rights by the Patriot Act, which has ramifications for the art world as a whole both in the present and the future. The FCC's recent actions censoring speech on the radio, the destruction of puppets and banners created for anti-war and anti-WTO protests for fabricated security reasons, and the increased permission for law enforcement to wiretap and monitor left wing political groups under the Patriot Act lend validity to this fear. See generally David Graeber, *Lying in Wait*, THE NATION, Apr. 19, 2004, at 18, available at [www.thenation.com/doc/html?i=20040419&s=graeber](http://www.thenation.com/doc/html?i=20040419&s=graeber).

It is possible that the expansion of the true threat analysis from stalking, harassment, and cross burning to student artwork heralds the possibility of applying this analysis to adult paintings, movies, and media. The national security and school security universes collided recently when the secret service questioned a student in Prosser, Washington after he drew a picture for an art class journal assignment depicting a man in Middle Eastern-style clothing holding a rifle in one hand and George W. Bush's head on a stick in the other, captioned with a call for the end of the war in Iraq. See Associated Press, *Secret Service Questions Students on Drawings* (Apr. 27, 2004), available at [http://www.refuseandresist.org/police\\_state/art.php?aid=1334](http://www.refuseandresist.org/police_state/art.php?aid=1334).

be both safe and benign in order to be socially acceptable. The savvy student will suppress or self-censor all school-sponsored creative expression. Public school may therefore silence the student artists who would grow up to be the adult artists, thereby stifling those who provide the introspection and social commentary which is key to our society. As eloquently illustrated by the dissent in *In re George T.*, some of the most important and powerful poetry of our time is rife with violent images.<sup>214</sup> These cases represent a trend toward censorship of our society's future artists before they can truly begin to develop.

The court in *Douglas D.* stated that "we cannot imagine how a student threatening a teacher could not be deemed conduct that tends to menace, disrupt, and destroy public order."<sup>215</sup> This statement contradicts recent statistics regarding teachers and safety,<sup>216</sup> and inappropriately implies that teachers' fear of their students justifies nearly unbounded reign over their speech. Such deference to a teacher's emotions creates a new definition of substantial disruption that focuses more on the effect on the teacher's feelings than on the effect on the actual educational process.

Although the court ultimately found that *Douglas D.*'s criminal conviction was improper because his drawing was not a true threat, it relied on *Tinker* to decide that the school officials acted properly when they disciplined George for his drawing.<sup>217</sup> *LaVine*, *George T.*, and *Porter* are in alignment with *Douglas D.* In each of these cases, the court found that the student's artwork was unprotected by the *Tinker* doctrine because it was threatening, and therefore that school administrators were justified in meting out punishment.<sup>218</sup>

---

<sup>214</sup> *In re George T.*, 126 Cal. Rptr. 2d 364, 382 (Cal. Ct. App. 2003) (Rushing, J., dissenting). This dissent cites passages of Allen Ginsburg's "Howl" and Lowell's "Skunk Hour," and also mentions the work of Sylvia Plath and John Berryman. Further, violent artwork is protected by the First Amendment. The court in *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180, 1185 (W.D. Wash. 2004), holding that graphically violent video games are protected speech stated:

The same cannot be said for depictions of violence [as can be said about obscenity]: such depictions have been used in literature, art, and the media to convey important messages throughout our history, and there is no indication that such expressions have ever been excluded from the protections of the First Amendment or subject to government regulation. The Court declines defendants' invitation to expand the narrowly-defined obscenity exception to include graphic depictions of violence.

<sup>215</sup> *In re Douglas D.*, 626 N.W.2d 725, 738 (Wis. 2001).

<sup>216</sup> *School House Hype*, *supra* note 34.

<sup>217</sup> *Douglas D.*, 626 N.W.2d at 741-43.

<sup>218</sup> See *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 990 (9th Cir. 2001); *In re George T.*, 126 Cal. Rptr. 2d 364, 377 (Cal. Ct. App. 2003); *Douglas D.*, 626 N.W.2d at 743

Teachers and administrators already have a significant amount of control over discipline and policy. This discretion is granted them by student speech cases in the tradition of *Tinker*, *Bethel*, and *Kuhlmeier*.<sup>219</sup> The court in *LaVine* relied on the restrictions placed on *Tinker* by *Karp*<sup>220</sup> and *Chandler*,<sup>221</sup> which emphasize school officials' right to "forecast" a substantial disruption before one actually occurs.<sup>222</sup> Reliance on the myth of Columbine has further increased the judicial deference to administrators' decisions regarding what student activities set off alarm bells. The *LaVine* court emphasizes this point in stating that the student's poem was "filled with imagery of violent death and suicide . . . . 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."<sup>223</sup> The court in *Porter* echoed this sentiment when it "consider[ed] the nature of the drawings and similar events at other schools that had resulted in tragic outcomes"<sup>224</sup> in finding Adam's drawing to be a substantial disruption. It is unclear what the court meant by "similar events," but it appeared to be referring to the content of Adam's drawing which depicted the school on fire and students jumping from windows.<sup>225</sup>

The court in *Douglas D.* discusses Mrs. F.'s reaction to the poem and her fear of this student extensively. It even cites publicized incidents of machete violence to support Mrs. F.'s claim that she was truly afraid for her life.<sup>226</sup> Even so, the court directs little

---

("Under the circumstances in the present case, we hold that the school had more than enough reason to discipline Douglas for the content of his story. . . . Although the story is not a true threat, it is an offensive, crass insult to Mrs. C."); *Porter ex rel. Leblanc v. Ascension Parish Sch. Bd.*, 301 F. Supp. 2d 576, 588 (M.D. La. 2004).

<sup>219</sup> *Bethel v. Fraser*, 478 U.S. 675, 681 (1986); *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 507 (1969); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

<sup>220</sup> *Karp v. Becken*, 477 F.2d 171, 175 (9th Cir. 1973).

<sup>221</sup> *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524 (9th Cir. 1992).

<sup>222</sup> *LaVine*, 257 F.3d at 989.

<sup>223</sup> *Id.* at 990.

<sup>224</sup> *Porter*, 301 F. Supp. 2d at 588. See also *Demers v. Leominster Sch. Dep't*, 263 F. Supp. 2d 195, 203 (D. Mass. 2003) ("On these facts, a reasonable interpretation of the law would allow a school official to prevent potential disorder or disruption to school safety, particularly in the wake of increased violence across the country.").

<sup>225</sup> *Porter*, 301 F. Supp. 2d at 586.

<sup>226</sup> *Douglas D.*, 626 N.W.2d at 757-58 ("The machete appears to be a particularly lurid weapon for inflicting injury. In short, there is no reason to dismiss the seriousness of a threat merely because it involves use of a machete . . . . [T]his news story [about machete violence] dispels the notion that a student could not conceal a machete.").

attention to Douglas's reasons for writing the poem.<sup>227</sup> Such factors as the teacher's knowledge of a student's home life, the content of the drawing, and whether or not the child handed the teacher the drawing are considered in *Milo M.*, *Douglas D.*, *Porter*, and *LaVine* as integral to the school's rationale that the writing and artwork were frightening.<sup>228</sup> These circumstances could easily be considered in a different light. In fact, they could be regarded as indicators that a child is struggling—perhaps because of violence at home, learning disabilities, or psychological issues that are not being treated, and that some kind of therapeutic rather than judicial intervention might be appropriate. Instead, the doctrine permits almost automatic curtailment of a student's right to speak when a teacher perceives a threat.

The courts fail to address alternative explanations, and instead interpret disturbing poems or stories as conclusive evidence that the student intended to harm himself or others. This is an extremely punitive approach to student creative speech. It uses the emotional issues a child may have to convict that child. In *Douglas D.*, the lower court heard evidence that the student apologized for the poem and told school officials that he did not intend to threaten his teacher. Yet it approved his delinquency adjudication anyway, citing the child's history of behavior problems in school.<sup>229</sup> Douglas's apology did not protect him from the impact of his poem. Rather, the juvenile court reasoned that if the teacher was scared by his poem, the poem was a threat, and the student's creative speech was unprotected.<sup>230</sup> The court in *Demers* made a similar judgment, finding that Michael's drawing created fear among students and teachers.<sup>231</sup> The school and court did not evaluate the student's feelings and motivations, but rather placed the potential fear of students and teachers ahead of students' right to speak.

Increased judicial deference to schools and administrators "in the wake of increased school violence" under the substantial disruption doctrine leaves the student whose rights have been violated with little recourse or protection.<sup>232</sup> This deference was aptly described in *Demers*, when the judge, citing *LaVine*, stated, "We review . . . with deference, schools' decisions in connection with the safety

---

<sup>227</sup> *Id.*

<sup>228</sup> See *Milo M.*, 740 N.E.2d at 969; *Douglas D.*, 626 N.W.2d at 738; *Porter*, 301 F. Supp. 2d at 588; *LaVine*, 257 F.3d at 990.

<sup>229</sup> *Douglas D.*, 626 N.W.2d 725, 731 (Wis. 2001).

<sup>230</sup> *Id.*

<sup>231</sup> *Demers*, 263 F. Supp. 2d at 202-03.

<sup>232</sup> *Id.* at 203.

of their students even when freedom of expression is involved.”<sup>233</sup> The judge went on to say that “[g]iven the difficulty in balancing safety concerns and free expression, I conclude that their actions were reasonable.”<sup>234</sup> Creative expression of emotion is vital artistic speech, and even disturbing expression should not automatically be curtailed when a teacher or school principal claims to be afraid.

As long as poems and artwork fall within the judicial definition of substantial disruption, students remain vulnerable to random and serious punishment. The cases addressing such expression focus on the feelings of teachers and administrators, with little regard to the students who created the artwork and poetry. Courts rubber stamp juvenile hall and expulsion for students whose expression may be a cry for help, not punishment. If the courts want to prevent another Columbine, this punitive approach is counterproductive.

*B. Student Artistic Speech is a Peaceful Method of Expressing Negative Emotions*

A mother whose 11-year-old daughter was suspended for three days after drawing a picture of her teacher on a gallows with an arrow through her head when she received a low grade on a quiz told the local newspaper, “[s]he had done poorly on a test that was handed back to her. We’ve always told her that you can’t take your feelings out on your teacher, so write about it or draw it as a catharsis.”<sup>235</sup> In *Milo M.*, *Douglas D.*, *Ryan D.*, and *Demers*, the students expressed frustration and anger with the school administration and teachers through artwork and, as a result, faced criminal charges or expulsion from school. Harshly disciplining students for expressing anger and frustration through a creative outlet has three primary consequences: (1) it eliminates a crucial and therapeutic mode of expressing feelings, (2) it stifles a primary source of emotional relief in the school environment, and (3) it prevents students from receiving crucial constructive social feedback from peers and teachers.

The cases about drawings present a variety of means through which creative work depicting violence directed toward a school was discovered by the administration. They range from obvious

---

<sup>233</sup> *Id.* (quoting *LaVine*, 257 F.3d at 992).

<sup>234</sup> *Id.*

<sup>235</sup> The Associated Press, *Girl Doodles Her Way into 3-Day Suspension*, May 5, 2002, available at <http://www.freedomforum.org/templates/document.asp?documentID=16187&printerfriend>.

baiting by a teacher, as in *Demers*<sup>236</sup> where a teacher specifically asked Michael to draw a picture of his feelings and then turned it over to the principal; to accidental revelation, as in *Porter*,<sup>237</sup> where Adam brought a sketchbook containing the drawing to school and showed it to other students; to *Milo M.*, in which Milo handed a drawing he spontaneously created to his teacher.<sup>238</sup> The cases about stories and poems demonstrate a similar range. In *Douglas D.*, Douglas wrote his poem in response to an in-class assignment and then turned it in,<sup>239</sup> whereas Julius in *In Re George T.* wrote his poem on his own time and shared it at school.<sup>240</sup> What these works of art share is that all of the artwork was created out of an emotional reaction to something that occurred at school and depicted scenarios occurring at school. None of the students punished for this violent artwork actually performed an act of physical violence in the school setting.

It is highly possible that these students' ability to express and dissipate frustration and anger associated with school through artwork was integral in preventing the feelings from escalating into physical violence. Artwork can be a particularly powerful non-verbal means through which children can express difficult emotions.<sup>241</sup> Teenage boys who have been exposed to violence face particular challenges in expressing their feelings in a creative, non-violent manner.<sup>242</sup> However, social science and the foundational research for art therapy demonstrate that it is worth the effort to help children learn to channel emotions into artistic forms of expression. Adolescents, especially, are at a crucial point in the development of coping mechanisms and defenses. The development of "communicative" defenses during this stage is crucial to healthy

---

<sup>236</sup> *Demers*, 263 F. Supp. 2d at 199.

<sup>237</sup> *Porter ex rel. LeBlanc v. Ascension Parish Sch. Bd.*, 301 F. Supp. 2d 576, 580 (M.D. La. 2004).

<sup>238</sup> *Commonwealth v. Milo M.*, 740 N.E.2d 967, 969 (Mass. 2001).

<sup>239</sup> *In re Douglas D.*, 626 N.W.2d 725, 730 (Wis. 2001).

<sup>240</sup> *In re George T.*, 126 Cal. Rptr. 2d 364, 367 (Cal. Ct. App. 2003).

<sup>241</sup> See GOLOMB, *supra* note 206, at 162 (describing how a child's art fantasy world provides, "an outlet for the expression of aggressive feelings in a socially acceptable form. The shooting of enemy aliens, flame-throwing, and explosions are emotionally charged themes that could be explored without risk . . .").

<sup>242</sup> "For adolescents, the approach of the therapist needs to reflect their current life experience. Therefore, "talk therapy" tends not to be as effective as therapy that involves activity or experience (such as experiential therapy, play therapy, and art therapy). These forms of therapy allow symbolic expression of internal conflicts." 4 *Troubled Teens, Adolescent Therapy: Current Trends in the Therapeutic Treatment of Adolescents*, at <http://www.4troubledteens.com/adolescent-therapy.html> (last visited Feb. 19, 2005).

adulthood.<sup>243</sup> Expression through art can be an excellent form of non-verbal communication and a healthy way of coping with emotions that allows the child to take control over the drawing's subject.<sup>244</sup> As Claire Golomb states, "[d]rawing and painting are expressive statements about what one knows, feels, and wants to understand."<sup>245</sup>

The data and theory derived from the development of art therapy offer enlightening insight into the benefits of art for children. Art therapy is guided by the basic tenet that the act of creating art is cathartic, healing, and therapeutic.<sup>246</sup> More specifically, the four primary aims shared by the many schools of art therapy<sup>247</sup> illustrate why a student's expression of negative emotions through artwork should be encouraged rather than punished. By processing difficult emotions through art, an individual will experience (1) catharsis, (2) integration/insight, (3) communication, and (4) mastery.<sup>248</sup> The expression and confrontation of emotions expressed through art releases blocked feelings; art allows its creator to "see" confused emotions and gain insight and understanding about their meaning; it allows a child to share feelings for which they may not have language; and finally, the depiction of certain feelings in artwork allows a child to master those emotions, to gain some element of control over them.<sup>249</sup>

This experience of art is particularly promising for children with behavior and anger management problems.<sup>250</sup> "At risk" children generally have the hardest time expressing their feelings, and benefit the most by learning to channel ingrained violent reactions into creative expression. Art "gets it out."<sup>251</sup> It offers those who create it a "way to gain distance from disturbing thoughts and feelings."<sup>252</sup> It is an accepted and proven way that children, especially

---

<sup>243</sup> MYRA F. LEVICK, *THEY COULD NOT TALK AND SO THEY DREW* 27 (1983).

<sup>244</sup> GOLOMB, *supra* note 206, at 164. "The act of drawing asserts control over the objects represented; it is the power to make and unmake . . ."

<sup>245</sup> *Id.* at 164.

<sup>246</sup> See LEVICK, *supra* note 243, at 9-10; GLYN V. THOMAS & ANGELE M.J. SILK, AN INTRODUCTION TO THE PSYCHOLOGY OF CHILDREN'S DRAWINGS 123 (1990).

<sup>247</sup> THOMAS & SILK, *supra* note 246, at 124.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 124-25.

<sup>250</sup> Myra Levick hypothesizes that when drawings made by children with behavior problems are "accepted and valued by the art therapist/teacher [it] may be the first step toward self-acceptance for that child." LEVICK, *supra* note 243, at 10.

<sup>251</sup> George Sanchez, *Rising Eagle*, *Publique!*, Mar. 22, 2004, available at <http://www.coav.org.br/publique/cgi>, in which the author writes about the success of an art therapy counseling program for gang-related youth in Salinas, California.

<sup>252</sup> LEVICK, *supra* note 243, at 11.

those at high risk, can learn to channel violent and angry behavior into a socially acceptable form of expression.<sup>253</sup> In fact, art therapy can be more effective than verbal therapy for youth at risk, who often have difficulty verbally expressing their emotions.<sup>254</sup> It is “a great channel for expressing feelings, including difficult feelings like aggression, anger, and sadness.”<sup>255</sup> Claire Golomb describes this process more specifically in the results of her study in which children drew pictures of “scary dreams.”<sup>256</sup> She writes, “[t]he threats that emanate from the child’s private nightmares, the thoughts and images of punishment and of destruction that lock her into her gloomy world, can become more manageable and subject to change once they find their concrete expression in a drawing.”<sup>257</sup>

Should these difficult emotions remain unexpressed and contained, they may eventually erupt dangerously or uncontrollably, producing the exact result that school administrators seek to avoid: a violent outburst. William Pollack, an assistant professor of clinical psychology at Harvard Medical School neatly summarized this possibility, stating simply that “[s]ome boys who can’t cry, cry bullets.”<sup>258</sup>

The teenage boys who were the subjects of the cases this paper has examined are Pollack’s boys who “can’t cry.”<sup>259</sup> They were all considered high risk both because of their personal lives and poor school disciplinary histories.<sup>260</sup> However, Milo, Michael, James, Ju-

---

<sup>253</sup> Brief of Amici Curiae Juvenile Law Center, et al, at 9, In Re George T, 126 Cal. Rptr. 2d 364 (Cal. Ct. App. 2003), available at [http://www.jlc.org/Resources/pdfs/george\\_t\\_amicus\\_brief.pdf](http://www.jlc.org/Resources/pdfs/george_t_amicus_brief.pdf) (citing Udesky, *Depression and Violence in Teens* (2001) <http://www.ahealthyme.com/topic/depteen>).

<sup>254</sup> See *id.*

<sup>255</sup> Anna Reyner, *Ask Our Experts*, at [www.earlychildhood.com/commentary/ask/ask\\_current.asp?ExpertID=175&QuestID=148&Count=20](http://www.earlychildhood.com/commentary/ask/ask_current.asp?ExpertID=175&QuestID=148&Count=20) (last visited Dec. 17, 2004).

<sup>256</sup> GOLOMB, *supra* note 206, at 319-20.

<sup>257</sup> *Id.* at 320.

<sup>258</sup> Brief of Amici Curiae Juvenile Law Center, et al, at 8, In Re George T, 126 Cal. Rptr. 2d 364 (Cal. Ct. App. 2003), available at [http://www.jlc.org/Resources/pdfs/george\\_t\\_amicus\\_brief.pdf](http://www.jlc.org/Resources/pdfs/george_t_amicus_brief.pdf) (citing Udesky, *Depression and Violence in Teens* (2001)), <http://www.ahealthyme.com/topic/depteen>).

<sup>259</sup> See *id.*

<sup>260</sup> In *Demers*, Michael was actually diagnosed as having a behavior disorder for which he was in special education. *Demers v. Leominster Sch. Dep’t*, 263 F. Supp. 2d 195, 198 (D. Mass 2003). Julius in *George T.* was trying out his third high school. In *Re George T.*, 126 Cal. Rptr. 2d 364, 374 (Cal. Ct. App. 2003). Milo M., as portrayed in the decision, is characterized as having a “very angry demeanor and defiant manner” toward the teacher; the decision references his “history” at school, noting that he was generally considered a bad kid. *Massachusetts v. Milo M.*, 740 N.E.2d 967, 972 (Mass. 2001). Adam, in *Porter*, had a reputation as a trouble-maker and gang member.

lius, Douglas, and Ryan did the right thing – they expressed themselves through art rather than violence, reacting to anger in a manner that most child psychologists would consider positive, even healthy. Yet, despite the research on the positive effects that all forms of art have on children who are at high risk for violent behavior, the school administrators treated the boys as criminals, and the courts condoned it. The boys were treated as if they had come into school with a gun, or assaulted a teacher. The judge in *Porter* even analogized Adam’s drawing to a loaded gun.<sup>261</sup>

It is undeniable that the artwork is violent in content. Douglas wrote a poem about chopping his teacher’s head off with a machete.<sup>262</sup> Milo drew two pictures in which he aimed a gun at his teacher as she begged for mercy.<sup>263</sup> Michael drew the school in flames, surrounded by explosives.<sup>264</sup> James’s poem explores his feeling of indifference after going to school and shooting all his classmates.<sup>265</sup> However, the psychological reasons for such violent imagery form a much more positive image of the students and suggest reasons that their artwork cannot be a real threat as understood by the law. For example, Claire Golomb’s study of children’s drawings of scary dreams revealed that emotionally disturbed children drew violent images depicting “harm of a more personal nature to the child” in contrast to “normal” children who directed the violence toward anonymous enemies.<sup>266</sup> Children like Michael, James, Douglas, or Ryan may simply be trying to re-gain control over situations in which they feel powerless.

More simply, the drawings were created in reaction to events at school that caused the students to feel angry and perhaps humiliated. Noticing that Michael was upset that he had been removed from class, the teacher who later turned his drawing in to the principal asked him to draw what he was feeling—and he did. He wanted the school to be destroyed. In fact, all three boys had been removed from class and likely suffered from anger and humiliation. Milo asked for a piece of paper and made a drawing while he

---

*Porter ex rel. LeBlanc v. Ascension Parish Sch. Bd.*, 301 F. Supp. 2d 576, 580 (M.D. La. 2004).

<sup>261</sup> *Porter*, 301 F. Supp. 2d at 589.

<sup>262</sup> *In re Douglas D.*, 626 N.W.2d 725, 731 (Wis. 2001).

<sup>263</sup> *Milo*, 740 N.E.2d at 972.

<sup>264</sup> *Demers*, 263 F. Supp. 2d at 200.

<sup>265</sup> The poem reads, “When it was all over, 28 were, dead, and all I remember, was not felling, any remorse, for I felt, I was, cleansing my soul . . .” *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 983-84 (9th Cir. 2001).

<sup>266</sup> GOLOMB, *supra* note 206, at 319.

waited to see the principal.<sup>267</sup> Douglas used his in-class assignment to tell his teacher he was angry.<sup>268</sup> The decisions fail to consider that the feelings that motivated these drawings could be natural and normal reactions of anger and depression to events at school, and that artistic expression of these emotions may be the most positive and peaceful outlet for such emotions.

The cases also fail to consider that the school setting encourages the kind of suppression of emotion, through an the emphasis on discipline and through the power dynamic between teachers and students, which William Pollack considers to be dangerous because it prevents students from expressing difficult emotions.<sup>269</sup> Acting out violently at school is not permitted, nor is yelling, swearing, or other similar means of expressing anger and frustration. Should school administrators and the courts desire to prevent such acting out they might do well to consider art as an alternative. Creating art is a silent, non-violent, non-disruptive form of expression that is perfectly suited to the school environment. Such a medium also allows the release of feelings as they arise, thereby preventing the aggregation of negative emotions into pure rage.

Communication with other students about expressive art is also crucial to students' social development. Chilling student creative speech in school prevents students from receiving necessary social feedback from their peers. This seriously limits student discourse. The Supreme Court in both *Tinker* and *Bethel* recognized school as an institution that teaches children to become citizens.<sup>270</sup>

---

<sup>267</sup> *Commonwealth v. Milo M.*, 740 N.E.2d 967, 969 (Mass. 2001).

<sup>268</sup> See *Douglas D.*, 626 N.W.2d at 729.

<sup>269</sup> ELAINE BATCHER, *EMOTION IN THE CLASSROOM: A STUDY OF CHILDREN'S EXPERIENCE* 78, 80 (1981) ("It is apparent that children experience a whole array of emotions about school life and that many of these might be seen as negative. The children's negative attitudes emerge in emotional statements but more often in visible reactions to events. Even reactions, however, are controlled because children are of the general belief that emotion is not a good thing. The teacher also would rather not have to deal with the emotions of children.")

<sup>270</sup> *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 512 (1969) ("The Nation's future depends on leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, rather than through any kind of authoritative selection.'") (citing *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)). The Court in *Tinker* noted, "The principal use to which schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is an important part of the educational process." *Id.*; *Bethel Sch. Dist. No. 43 v. Fraser*, 478 U.S. 675, 681 (1986) ("[T]he objectives of public education [are] the . . . 'inculcation of fundamental values necessary to the maintenance of a democratic political system.'" (quoting *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979))).

Censorship of student artwork undermines both *Tinker's* conception of school as a “marketplace of ideas,”<sup>271</sup> and *Bethel's* assertion that school provides the foundation for morals and civility.<sup>272</sup> The ultimate purpose of education is irrelevant in this context since the censorship of student artwork undermines both conceptions of the purpose of school. Children naturally censure one another; they help each other learn what is acceptable and unacceptable within a given community.<sup>273</sup> Their “experience of the classroom centers on belonging, knowing, working/learning, and trying/failing.”<sup>274</sup> Children also naturally test boundaries.<sup>275</sup> Without a safe forum at school in which to test ideas, children cannot negotiate with their peers about what is acceptable, or what causes others fear or anguish.

For example, in *George T.* Julius was having a bad day and wrote a poem to get his feelings out.<sup>276</sup> He gave the poem to two other students after writing on the top of the page, “[t]hese poems describe me and my feelings. Tell me if they describe you and your feelings.”<sup>277</sup> Giving the poem to Mary may have been misguided, but it was clearly an attempt to seek a connection or find a common ground with other people his age. Although in his testimony Julius minimized the emotional nature of his poem by characterizing it as a joke, it is hard to deny that the poem and the circumstances around its delivery were Julius’s attempt to express himself to another student. If Mary’s reaction was to stay away from him, or show the poem to a teacher who could initiate a discussion about it, Julius would receive social feedback about the feelings he expressed, and perhaps receive validation of his feelings. In a marketplace, students learn through trial and error. We must wonder whether the prison has become a more apt metaphor than the marketplace for our nation’s public schools.

C. *Courts Fail to Recognize That Art is Art and That Children are Children*

Glaringly absent from most of the creative expression cases is any meaningful discussion about the fact that what is alleged to be

---

<sup>271</sup> *Tinker*, 393 U.S. at 512 (citing *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)).

<sup>272</sup> See *Bethel*, 478 U.S. at 681.

<sup>273</sup> BACHER, *supra* note 269, at 71.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.* at 57.

<sup>276</sup> In re *George T.*, 126 Cal. Rptr. 2d 364, 367 (Cal. Ct. App. 2003).

<sup>277</sup> *Id.*

a threat is actually artwork. Instead, the analysis of the student work is contained within the parameters of the true threat analysis, or the greatly relaxed version of the substantial disturbance doctrine employed in conjunction with true threat. The fact that art is at stake is only cursorily discussed in the context of intent to threaten.<sup>278</sup> Likewise, the fact that art is at stake is brushed over despite arguments, which Douglas and James LaVine both asserted, that prosecution for their poems was a form of content discrimination.<sup>279</sup> Douglas also attempted to soften the “message” of his poem by pointing out that it was written in the third person about a fictional character named Dick.<sup>280</sup> However, that strategy is really an evasion of the true threat analysis rather than an argument that *this is art*. The failure to recognize his argument reflects the fact that courts do not recognize children’s art as the kind of artistic expression which commands First Amendment protection.<sup>281</sup> Further, the myth of Columbine has created a feeling of urgency about school safety that precludes a more rational assessment of student behavior. Succumbing to this false urgency, the courts have failed to take the time to consider the true nature of art itself, and how children function, ignoring an entire realm of reasonable and realistic alternatives to the true threat analysis.

Perhaps judges find it easier to use the true threat analysis than to evaluate the social and psychological factors that may motivate a student to produce violent artwork. Granted, judges are not the appropriate interpreters of children’s artwork, and are unequipped to determine the meaning of a poem or drawing. By ignoring the true nature of children and the inherent ambiguities in artwork, the true threat analysis causes more harm than good.

The analysis effectively ignores the deeper societal problems arising from the saturation of our nation’s children in meaningless violent imagery. It ignores the simple fact that school is a student’s

---

<sup>278</sup> See, e.g., *George T.*, 126 Cal. Rptr. 2d at 377 (in which Julius argued that, “the vehicle [of the threat] is a poem, not a statement of personal intent to do anything”).

<sup>279</sup> *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 988 (2001); *In re Douglas D.*, 626 N.W.2d 725, 731 (Wis. 2001).

<sup>280</sup> *Douglas D.*, 626 N.W.2d at 729 (“He contends that his story is a fictional third-person creative writing assignment . . .”).

<sup>281</sup> The First Amendment protects expressive communication, which has been interpreted to include, as discussed earlier, “all ideas having even the slightest redeeming social importance including . . . the advancement of truth, science, morality, and arts.” *Junger v. Daley*, 209 F.3d 481, 484 (6th Cir. 2000) (citations omitted). It is notable that while the courts do not accord children’s artwork the protection that is presumably accorded to adult artwork, they do not hesitate to apply such strict adult-behavior centered standards such as the true threat doctrine to their artwork.

life context, and that the events at Columbine had a deep impact on students attending public schools at the time the wave of school shootings occurred. It also demonizes children at risk who may only be able to communicate their pain through symbolism. Consequently, rather than encouraging school administrators to create effective mental health-centered solutions for students at risk who may be issuing a cry for help through art, current legal doctrine sanctions an easy solution to problem students, allowing schools to eliminate them from the roster through suspension, expulsion, and juvenile detention.

This section examines a variety of reasons that students create violent artwork, using the specific symbolism and metaphor that so alarms school officials. It is impossible to discuss violent artwork created by children without addressing the general culture of violence to which they are exposed. However, rather than place blame, it is important to develop a better understanding of how the prevalence of violence in television, video games, the news media, current events, and music has increased the likelihood that children will use violent imagery to express themselves.

Whether it takes place in school or elsewhere, violence is part of the American cultural language. It is the basis of much of our entertainment, including video games, and it is infused into popular music. For many children, pictures of guns and explosives may simply be the easiest and most accessible imagery to express anger and frustration with school, and artwork the only viable vehicle for such expression.

The role of television's standardized violent visual imagery in a child's development of symbolism and metaphor should not be discounted. A variety of studies have revealed that television negatively influences children's ability to be independently creative.<sup>282</sup> A study of middle-school students found a negative relationship between the "amount of television viewed and creativity."<sup>283</sup> More specifically, studies have shown that a child's high saturation in television has direct effects on a child's capacity to imagine both storylines and visual depictions of such storylines, and can result in the mimicry of visual images seen on television rather than the imaginative development of imagery.<sup>284</sup> Television also reduces a

---

<sup>282</sup> GORDON L. BERRY & JOY KEIKO ASAMEN, *CHILDREN & TELEVISION: IMAGES IN A CHANGING SOCIOCULTURAL WORLD* 76-80.

<sup>283</sup> *Id.* at 79.

<sup>284</sup> *Id.* at 80-81. A 1981 study conducted by Meringoff, Vibbert, Kelly, and Char demonstrated that children who were shown visual images of a story and then asked to draw their own images of the story created higher quality, but more imitative illus-

child's ability to conceive of alternative uses for everyday objects, and the ability to develop fictional stories.<sup>285</sup>

It is therefore quite possible that the violent imagery of schools blowing up and students shooting classmates and teachers that has come to be associated with Columbine has a cultural derivation, and is natural imagery for children to use to express anger and frustration. That the nation views Columbine as a symbol is not exclusive to adults. Children may have come to view Columbine and its real life narrative as an archetype of teen angst. Claire Golomb explains this phenomenon, "The act of drawing becomes a vehicle for the expression of personal fantasies that are embedded in emotionally significant themes of a collective nature and thus provide the means for participating in the shared imagery of the youth culture."<sup>286</sup> For students like Julius, whose propensity to joke with friends about being the next "Columbine kids" sealed his fate with the judge.<sup>287</sup> Columbine has provided students with an actual name to associate with their anti-institutional feelings - the anger and frustration that derive naturally from the institutional setting and its social and disciplinary structure.

Of primary importance is that this cultural archetype existed before real students breathed life into the fiction through large-scale, random, and indiscriminate acts of violence in school. In fact, even before Columbine, school as the setting for huge and frightening acts of violence was already well-established as a cultural metaphor and archetype. Pearl Jam's video for the song "Jeremy," in which a boy who was picked on by other kids opened fire in his classroom, topped the MTV charts in the 1990s.<sup>288</sup> More

---

trations. Another study, conducted by Forsythe in 1970, found that children exposed to television copied images from television, whereas those who listened to the radio created images from their own imagination.

<sup>285</sup> *Id.* at 79-80.

<sup>286</sup> GOLOMB, *supra* note 206, at 161.

<sup>287</sup> *In re George T.*, 126 Cal. Rptr. 2d 364, 375 (Cal. Ct. App. 2003) (stating "the juvenile Court could take into account the fact that Julius referred to killing in his writing because he and his friends 'kind of joke[d]' about the Columbine killings, saying, 'Oh I'm going to be the next Columbine kid; I'm going to shoot everybody at the school.'").

<sup>288</sup> Pearl Jam, *Jeremy*, on Ten (Sony Records 1990). In the video, Jeremy, a boy of about 12 in a Catholic school uniform enters his classroom and systematically guns down all of his classmates. The lyrics of the song are as follows:

at home and drawing pictures of mountain tops, with him on top  
lemon yellow sun, arms raised in a v  
and the dead lay in pools of maroon below  
daddy didn't give attention  
to the fact that mommy didn't care  
king jeremy the wicked, ruled his world

generally, numerous horror movies portray widespread death and destruction in a high school setting, or profile a rage-filled teen outcast who seeks vengeance against classmates and school staff.<sup>289</sup>

School forms an enormous part of a child's life, which makes it both the source of experiences and emotions, and a natural setting for artistic depiction of those emotions. Children spend up to eight hours a day at school, and are largely at the mercy of the rules and procedures of the school. Both the school and the teacher are natural objects of attention. Further, despite teachers' prominence in children's lives, children cannot communicate their feelings to teachers in the same way that they might to their mothers or fathers. Considering the widespread exposure of children to violence in the media, the ascendance of Columbine as a cultural and legal metaphor for the violence of teen angst, and the primacy of school in children's lives, it makes sense that Milo, Douglas, Julius, and Ryan used imagery of bombs and weapons in school to express their anger.

The failure of courts to consider this background highlights

---

jeremy spoke in class today  
 jeremy spoke in class today  
 clearly i remember pickin' on the boy  
 seemed a harmless little fuck  
 but we unleashed a lion  
 gnashed his teeth and bit the recess lady's breast  
 how could i forget?  
 and he hit me with a surprise left  
 my jaw left hurtin', dropped wide open  
 just like the day, like the day i heard  
 daddy didn't give affection, no  
 and the boy was something that mommy wouldn't wear  
 king jeremy the wicked, ruled his world  
 jeremy spoke in class today  
 jeremy spoke in class today  
 jeremy spoke in class today  
 try to forget this. . .try to forget this. . .  
 try to erase this. . .try to erase this. . .  
 from the blackboard. . .  
 jeremy spoke in class today  
 jeremy spoke in class today  
 jeremy spoke in, spoke in  
 jeremy spoke in, spoke in  
 jeremy spoke in class today. . .  
 (spoke in, spoke in. . .)

<sup>289</sup> *E.g.*, *CARRIE* (MGM Pictures 1974); *NIGHTMARE ON ELM STREET* (New Line 1984); *HALLOWEEN 5: H20* (Anchor Bay Entertainment 1989); *TEXAS CHAINSAW MASSACRE* (New Line 1974); *JEEPERS CREEPERS* (MGM 2001); *HEATHERS* (New World Ent. 1989); *PROM NIGHT* (Avco Embassy Pictures 1980); *THE IN CROWD* (Warner Bros. 2000).

the way that courts focus on teachers and administrators when applying true threat analysis. Despite the fact that Columbine involved both teachers and students, and that more students were killed in the incident than teachers, the courts placed heavy emphasis on teacher reaction rather than student reaction. They also failed to understand artwork that reflects such incidents as using a kind of cultural archetype, or reacting to the impact of Columbine and its companion incidents.<sup>290</sup>

## VI. PROPOSED SOLUTIONS

### A. *Student Creative Expression Should be Recognized as Constitutionally Protected Speech*

The courts need to return to the original *Tinker* analysis, which treats school as a mini-marketplace of ideas and allows students to express themselves as long as the expression does not cause a substantial disruption. *Tinker's* affirmation of students' First Amendment rights to silently protest the Vietnam War by wearing black armbands to school indicates the Court's deep respect for student speech.<sup>291</sup> Currently, courts and school administrators are treating artwork as a weapon, rather than as an armband. Such an imbalanced analogy needs to be replaced, and art should be recognized as a protected vehicle of creative expression in the nation's public schools. Like an armband, art and writing are forms of peaceful, silent expression, and should be recognized as such as a matter of law. This First Amendment framework is far more appropriate than the threat analysis because it recognizes art as a protected vehicle of creative expression and takes into account jest, hyperbole, and the possibility that speech is innocuous.<sup>292</sup>

If the courts persist in applying the true threat analysis to student creative expression, then age, emotional development, and the ambiguous and metaphorical meaning of children's art should be factors in the "context" and "totality of circumstances" considerations central to the true threat analysis. If a student's home life may be considered, then why not consider their basic psychological makeup?

### B. *The Myth of Columbine High School Must be Dispelled*

In order for courts to recognize student creative speech as

---

<sup>290</sup> See GOLOMB, *supra* note 206, at 160-61.

<sup>291</sup> *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1969).

<sup>292</sup> See *Yorty v. Chandler*, 13 Cal. App. 3d 467 (Cal. Ct. App. 1970).

constitutionally protected speech, they need a new lens through which to analyze the disciplinary issues that arise in schools. The artwork cases reflect the fact that zero tolerance policies have gone too far and that courts have supported this increasingly authoritarian trend through reliance on the fiction of Columbine. It is time for the courts to begin relying on facts and not media-crafted fiction. If courts adopt a new perspective on schools that is student and education centered, reform of current disciplinary practices is possible.

C. *Schools Need To Reform Their Culture and Re-structure Their Disciplinary Policies*

The creative expression cases demonstrate that school administrators have carried the zero tolerance mindset too far. Ample evidence suggests that a heavily punitive disciplinary structure in the school environment creates an unhealthy climate that increases the possibility of violence and has a variety of negative consequences for students.<sup>293</sup> It is highly recommended that schools restructure the school setting to emphasize social, emotional, and academic learning rather than discipline.<sup>294</sup> U.S. Education Secretary Richard W. Riley opposes the use of profiling, and instead asserts that the use of “compassion, discipline, and conflict resolution” can prevent 80% of violent behavior.<sup>295</sup> As one commentator has noted, “[d]iscipline that is fair, corrective and includes therapeutic relationship-building with students reduces the likelihood of further problems.”<sup>296</sup> Zero tolerance should be abandoned in light of recent psychological studies and be replaced with a holistic, child-centered approach to education.

The zero tolerance approach produces a variety of negative outcomes for children. One such outcome is that it has invited schools and the courts to employ student profiles and lists of warning signs to pre-emptively discipline students they believe to be potentially violent.<sup>297</sup> Jennifer Brady suggests that profiling is negative and results in false positives that hurt students. She also

---

<sup>293</sup> Brady, *supra* note 20.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> Andrea Canter and Browning Wright, *Challenging Behavior & Effective Discipline for All Students: Best Practice Strategies for Educators*, GUIDANCE CHANNEL EZINE, at <http://www.guidancechannel.com/default.aspx?M=a&index=662&cat=17> (last visited Feb. 23, 2005) [hereinafter *Challenging Behavior*].

<sup>297</sup> As discussed *infra*, violent artwork has appeared on these lists. Despite the fact that the writer of the list of warning signs may caution against using it as a kind of checklist for the violent student, it is apparent in the decisions that both schools and

believes that the “[t]he potential of abuse is as great as the potential of violence.”<sup>298</sup> She suggests that part of the reason that the potential for abuse is so great is that there is no agreement among experts as to which of these “warning signs” are actual predictors of violence.<sup>299</sup> Violent artwork and writing should not be deemed warning signs, as art is a particularly unreliable indicator of future violence and is fundamental to students’ rights to creative expression.

Schools and the courts need to refuse to extend the automatic punishment mechanism that characterizes zero tolerance to student artwork and, more generally, to re-think their use of zero tolerance policies as the primary school diplomacy structure. Zero tolerance policies are proven to be ineffectual “in the long run,” have resulted in an increase in school drop out rates, and are proven to be susceptible to discriminatory application.<sup>300</sup> Further, the punishments meted out under zero tolerance policies are primarily exclusionary—suspension and expulsion—which result in isolation of the child from the social setting, increasing feelings of isolation, and lost educational opportunity. As one psychologist states, “[t]here is no evidence that removing children from school makes a positive contribution to school safety.”<sup>301</sup> However, for children who demonstrate anti-social behavior, the punishment actually increases the likelihood that a child will become delinquent because removal results in a loss of the structure and supervision provided by the school environment.<sup>302</sup> Suspension and expulsion exacerbate the risk that students will become dangerous after receiving such punishment.<sup>303</sup>

This risk is particularly relevant when student artwork is involved. Children who create artwork have non-violently expressed emotions through artwork and should not face punitive measures because such punishment may only deepen the hostile feelings they have expressed. The creative expression cases universally sanction the use of internal school disciplinary action against the students for their artwork, granting much deference to the choices

---

judges are taking a one-size fits all type of blanket approach to these warning signals. See Brady, *supra* note 20.

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> See *Challenging Behavior*, *supra* note 296.

<sup>301</sup> Russell Skiba et al., *Zero Tolerance and Alternative Discipline Strategies*, GUIDANCE CHANNEL EZINE, at <http://www.guidancechannel.com/default.aspx?M=A&index=1581&cat=17> (last visited Feb. 23, 2005).

<sup>302</sup> *Id.*

<sup>303</sup> See *Challenging Behavior*, *supra* note 296.

made by teachers and administrators as long as the juvenile court is not involved. This leaves students who are punished for creating violent artwork without recourse to stand up for their First Amendment rights. It also precludes a judicial mandate requiring schools to alter their approach to student creative expression.

*D. Schools Can Address Violence Through Mental Health Based Non-Violence Programs*

The creative expression cases place the blame for both potential and actual school violence on students and absolve the schools from making the necessary structural and policy-based changes that could render school environments more academic, more student-friendly, and ultimately safer. By allowing schools to mete out serious punishment to students for artwork, the courts have ignored the existence of alternative approaches that do not damage student speech rights.

The failure of the courts to recognize the consequences of sanctioning schools' treatment of artwork is especially unfortunate in light of the numerous mental health-based alternatives to zero tolerance which are particularly relevant for students who have difficulty expressing their feelings. The most promising alternatives to zero tolerance are social and emotional based strategies, which seek to restructure school policy to provide a more nurturing and safe environment for students.<sup>304</sup> In their article *Zero Tolerance and Alternative Discipline Strategies*, social scientists Skiba, Cohn, and Canter recommended three alternatives to zero tolerance policies, all of which are mental health centered strategies intended to utilize school psychologists, counselors, and social workers to provide a student-centered response to behavior issues.<sup>305</sup> The first alternative is the implementation of a school violence prevention curriculum. Major themes of violence prevention programs are "socializing children, by promoting non-violent values such as egalitarian behavior and the right to be different."<sup>306</sup>

A variety of curriculums advocate that school counselors and psychologists work together with the community and parents, and that the school implement an "effective" disciplinary policy.<sup>307</sup> The second alternative involves the use of social skills training and be-

---

<sup>304</sup> See Brady, *supra* note 20; *Challenging Behavior supra* note 296; Skiba et al., *supra* note 301.

<sup>305</sup> Skiba et al., *supra* note 301.

<sup>306</sup> University of Calgary, *Prevention Programming*, at <http://www.ucalgary.ca/resolve/violenceprevention/English/pdf/Section2.pdf> (last visited Feb. 23, 2005).

<sup>307</sup> *Id.*

havioral supports.<sup>308</sup> Finally, the psychologists recommend that schools employ early intervention strategies which “target low levels of inappropriate behavior before they escalate into violence.”<sup>309</sup>

Additionally, the Center for the Prevention of School Violence (CPSV) suggests that peer mediation, teen courts, student based groups like Students Against Violence Everywhere (S.A.V.E), and conflict management help to increase safety in schools by involving students in creating a safe environment.<sup>310</sup> CPSV further recommends that an increase in the number of school counselors in given schools would allow them to provide crucial services that could help make schools safer. Most notably, counselors could “team with other student services staff to develop an effective system of referral and assessment for students exhibiting problem behaviors.”<sup>311</sup>

These changes would allow a school to treat violent artwork like artwork, and in an occasional case where artwork indicates a deeper problem, provide true therapeutic intervention for the student. Of equal importance, schools would stop treating student artwork like violence and allow students to express themselves creatively in school. The student mental health approach does not have such a chilling effect on expression for two reasons. First, it is not punitive, and therefore may actually encourage students to continue to express themselves in a creative manner. Second, it recognizes artwork and writing for what they are—creative expression of emotions. This analysis insulates student creative expression from non-artwork centered analysis such as the true threat doctrine.

#### *E. The Positive Outcome*

Should these changes be implemented, violent student artwork and writing would be treated not as a threat of violence, but as either expressive speech or a cry for help, depending on a counselor, social worker, or school psychologist’s assessment of the child. A future artist could be nurtured, art could be recognized as

---

<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

<sup>310</sup> Pamela L. Riley, *How to Establish and Maintain Safe, Orderly, and Caring Schools* (Center for the Prevention of School Violence, N.C.) at <http://www.ncdjjdp.org/cpsv/Acrobatfiles/SOC1pager.pdf>.

<sup>311</sup> NORTH CAROLINA CENTER FOR PREVENTION OF SCH. VIOLENCE, SCH. COUNSELORS AND SCH. VIOLENCE: PREVENTION, INTERVENTION, AND CRISIS RESPONSE 4, at [www.ncdjjdp.org/cpsv/Acrobatfiles/counselors.pdf](http://www.ncdjjdp.org/cpsv/Acrobatfiles/counselors.pdf).

a valuable expressive tool for a troubled child, and early warning signs that a child is having emotional and psychological problems could be effectively addressed.

The use of mental health professionals is essential. Teachers, administrators, and judges should not be the people evaluating the content of such expression if they are inexperienced with child psychology and art therapy. Schools need to consult mental health professionals rather than interpreting and responding to the work without input. The school in *LaVine* actually had a model initial response to the poem James gave to his teacher to read. The teacher who was familiar with James and his prior work became concerned that he wanted to harm himself and others when she read the poem. She consulted with the principal and the school guidance counselor who had knowledge of problems James was going through at home. They called the local mental health hotline and received a referral to a psychiatrist. They also called the local police who went to James's home to determine whether he needed emergency psychiatric care. James was subsequently examined by the psychiatrist, who declared him mentally fit to return to school, at which time he was allowed to return.<sup>312</sup>

Such a student mental health-centered response to violent student artwork is highly preferable to the punitive approach so many schools have adopted. A more positive school environment focused on social and emotional learning rather than discipline is the most effective way to make schools safer. It also allows for schools to listen to their students. Michael Greene, Executive Director of the Violence Institute says, "first and foremost school officials, whether students or teachers or whoever, have to listen to students in a non-judgmental manner. Often, that's all a child needs—someone to talk to. And that requires only minimal training."<sup>313</sup> When it comes to art, listening and not judging are key.

#### CONCLUSION

As the dissent in *George T.* remarked in reference to John Donne's poem *Song*: "[g]o and catch a falling star' is not a command."<sup>314</sup> Yet, in the wake of an imagined trend of large-scale school violence, courts and school administrators have ascribed intent and means to harm to stick figures and rudimentary flames.

---

<sup>312</sup> *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 984-86 (2001).

<sup>313</sup> Brady, *supra* note 20.

<sup>314</sup> *In re George T.*, 126 Cal.Rptr.2d 364, 384 (Cal. Ct. App. 2003) (Rushing, J., dissenting).

They have turned fantasy and imagination into vivid reality. Strikingly, they have transferred a great deal of power to children, ignoring the true power imbalance between child and adult, student and teacher. With this attribution of power comes adult-level criminal charges and juvenile detention.

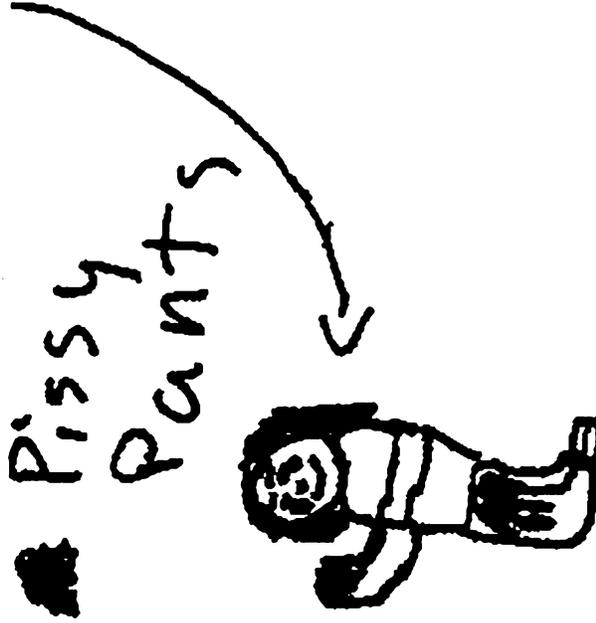
Using the myth of Columbine, the courts have employed an analytical backdrop that casts every student as a potential mass murderer. This analysis blatantly ignores the reality that children may find art to be a cathartic, safe, and non-violent form of creative expression. The analysis also ignores the short and long-term consequences of chilling students' speech. Punishing students for peaceful expression through art takes away an immediate outlet for feelings of frustration and rage and may increase the likelihood of future violent outbursts. As troubled students seeking alternatives to violence are thwarted in their quest, students who seek to be artists are taught that there is no safe place for dissent or for rage within their work. This lesson, that art is equally a weapon and a threat, forms the foundation of a student's understanding of art and its role in society.

Whether Milo, Douglas, or Julius are the artists of the next generation remains to be seen. Regardless, at the heart of this discussion of legal rights and societal ramifications lies the simple fact that these are troubled children who used a non-violent medium to communicate anger and frustration. Art by nature is constructive rather than destructive. For generations, people have used it to share, and sometimes even exorcise, their deepest and darkest feelings. Bukowski, the "suicide kid," grew up to write poems that changed the face of American literature. Julius, the "next Columbine kid," should be given the same opportunity to turn anger into art, regardless of whether it is beautiful or frightening.

Juvenile's name deleted by the court.



Teacher's name deleted by the court.



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

Juvenile's name deleted by the court. Teacher's name deleted by the court.



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