

TINKER'S MATERIAL WORLD: HOW THE SUPREME COURT'S FIRST AMENDMENT  
STUDENT SPEECH PRECEDENT FAILS TO CONFRONT INDISCRIMINATE ACTS OF  
VIOLENCE IN SCHOOLS

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**I. Introduction**

In the wake of a series of recent indiscriminate school shootings that started in Moses Lake, Washington in 1996,<sup>1</sup> peaked in Columbine, Colorado in 1999, and continued most recently in Red Lake, Minnesota in March, 2005, one question that continues to haunt school administrators is, "Why didn't we see this coming?" After all, the gunmen were not strangers, they were students who traversed the same hallways and engaged in the same school activities as other students. They interacted daily inside and outside the classroom with school administrators, teachers, and fellow classmates. In most of these instances there were ample warning signs that came from the student assailants themselves. Yet in each case, school officials did not take actions sufficient to prevent these tragedies.

Virtually every indiscriminate violent attack on schools has been foreshadowed through the expressions of the student assailants. Sometimes these expressions hide in private journals or anonymous internet postings. Most troubling, these warning signs often lay in plain view. Eric Harris and Dylan Klebold, the Columbine students-turned-killers, had a history of violent expression in their school assignments prior to killing 14 students, including themselves, and one teacher and injuring 23 other people on April 20, 1999. Klebold's English teacher brought the student's compositions in which he described a killing to the attention of his parents and the

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<sup>1</sup> On February 2, 1996, ninth-grade honors student Barry Loukaitis took three family guns to Frontier Middle School in Lake Moses, Washington, walked into his algebra class and shot his teacher in the back and two fellow students in the chest. This incident was arguably the first of a new breed of school-related shootings—the indiscriminate, multi-victim shooting in which the student shooter may target one person or a group of people only to indiscriminately kill more. Timothy Egan, Where Rampages Begin; A Special Report. From Adolescent Angst to Shooting Up Schools, **N.Y. Times**, June 14, 1998, at A11.

school guidance counselor only to have the concerns dismissed.<sup>2</sup> Harris too had penned an essay laced with violence in which he described himself as a shotgun shell and had also created a website on which he posted violent messages.<sup>3</sup> Before he fatally shot two fellow students and wounded 13 others at Santana High School in Santee, California in 2001, Charles Williams shared his intent with at least 20 other students at the school, none of whom notified anyone.<sup>4</sup> Jeff Weise—the 16-year-old sophomore at Red Lake High School in Minnesota who shot and killed ten people including a teacher, five students and himself<sup>5</sup>—had posted several messages to internet message boards referencing school shootings and violence.<sup>6</sup>

Given the very real threat of violence, school administrators and teachers are being forced to assess any and in students' speech. These same officials must be free to remove at-risk students from the normal school environment before that speech escalates into violence.

Standing in the way of unfettered early preventative action, however, is the threat to students' First Amendment right to free expression. In this arena, the Supreme Court has provided little guidance as to exactly how much freedom a school possesses in confronting violent student expression. How should we balance school safety against students' constitutional freedom of speech? With a recent history of school shootings that borders on a nationwide pandemic, what rights, if any, should students be forced to leave at the schoolhouse gate? Part II of this article provides some background on the Supreme Court's approach to free speech issues

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<sup>2</sup> James Brooke, Teacher of Colorado Gunmen Alerted Parents, **N.Y. Times**, May 11, 1999, at A14.

<sup>3</sup> Id.; Chuck Plunkett, Judge OK's Lawsuit by Columbine Parents but Rohrbough-Petrone Action Stripped of Defamation Claim, **Denv. Post**, Nov. 2, 2003, at B2.

<sup>4</sup> Ruben Rosario, School Shooting Researchers Ask: Why the Silence?, **St. Paul Pioneer Press**, Apr. 23, 2005, at 1A. As an additional example, before he fatally shot a fellow student and his school's principal at his school in Bethel, Alaska in 1997, Evan Ramsey developed a "hit list" with two other boys and got word out amongst his fellow students to gather on a second-floor balcony at the school because "something big was going to happen." Id.

<sup>5</sup> Chuck Haga & Larry Oakes, Every Piece but "Why?": Portrait Emerges of Shooter's Path from Solitary Rage to Murder, **Star Trib.**, Mar. 23, 2005, at 1A.

<sup>6</sup> Heron Marquez Estrada, et al., Red Lake School Shootings: An Internet Trail of a Boy's Death Wish, **Star Trib.**, Mar. 24, 2005, at 1A. Weise apparently made several posts to internet chat rooms and various websites including a short story about "surviving a school shooting," a separate message in which he claimed he was labeled as a school shooter, and an illustrated personal profile page in which he posted a still image of the movie "Elephant" portraying student gunmen walking into a school.

in our nation's public schools and discusses how lower courts have adapted this precedent when addressing issues of school violence. Parts III.A and III.B analyze the inadequacies of the Court's First Amendment precedent when applied to this issue and suggest that school officials be given greater authority to discipline students forecasting violent behavior through their speech. Part III.C compares the Court's First Amendment precedent with its erosion of student liberties in other constitutional contexts. Finally, Part III.D of this article examines potential chilling effects on student speech and concludes that limits to free expression through greater disciplinary authority will be tempered by the requirement that this authority be used reasonably.

## II. Background

The Supreme Court's modern journey into the arena of student expression began with the 1969 case of Tinker v. Des Moines Independent Community School District.<sup>7</sup> In Des Moines, Iowa, several students decided to wear black armbands to their public high school to symbolically voice their objection to the Vietnam War. Upon learning the students' intentions, the school became concerned about other students' reaction to this protest and enacted a policy forbidding wearing black armbands on school grounds. John and Mary Beth Tinker and Christopher Eckhardt chose to go forward with their protest, and they were suspended. In the Court's opinion upholding the students' right to wear these armbands, Justice Fortas penned the now famous line that students "do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>8</sup> The Court determined that in order to sanction student expression, a school must show either that the speech caused a material disruption to the classroom environment or that the school could reasonably forecast a disruption would occur in the future. Concluding that the school's actions had been based upon an "urgent wish to avoid the controversy that might

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<sup>7</sup> 393 U.S. 504 (1969).

<sup>8</sup> Id. at 506.

result from the expression” rather than on a reasonable forecast of disruption, the Court struck down the sanction.<sup>9</sup>

Both Justices Black and Harlan filed dissenting opinions expressing their fears as to the potentially devastating long-term effects this decision would have on a school administrator’s ability to regulate the educational environment. Black articulated his strong concern that the Court was opening the door for students to openly defy their teachers at every opportunity. He worried the school would become a victim to the “whims and caprices of their loudest-mouthed, but maybe not their brightest, students.”<sup>10</sup> Harlan similarly urged that schools be accorded broad authority in maintaining student discipline. In his dissent, he suggested a legal standard by which he thought school officials would have greater authority to maintain order in the school: Place the burden on students challenging a school action to show the action was motivated by something other than legitimate school concerns.<sup>11</sup>

Courts continue to apply the Tinker majority’s material disruption standard as one part of a two-pronged analysis when confronting violent student expression.<sup>12</sup> The first prong of the analysis examines whether the student speech in question constitutes a true threat to the school environment. The true threat standard was first articulated in Watts v. United States where the Court stated that “what is a threat must be distinguished from what is constitutionally protected speech.”<sup>13</sup> In applying the Watts standard in the school environment, courts have looked to a variety of factors to aid in determining the legitimacy of the threat, including: “(1) how the recipient and other listeners reacted to the alleged threat; (2) whether the threat was conditional; (3) whether it was communicated directly to the victim; (4) whether the makers of the threat had

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<sup>9</sup> Id. at 510.

<sup>10</sup> Id. at 525 (Black, J. dissenting).

<sup>11</sup> Id. at 526 (Harlan, J. dissenting).

<sup>12</sup> See, e.g., J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847 (Pa. 2002), D.G. v. Indep. Sch. Dist. No. 11, 2000 U.S. Dist. Lexis 12197, at \*5 (N.D. Okla. Aug. 21, 2000).

<sup>13</sup> 394 U.S. 705, 707 (1969).

made similar statements to the victim on other occasions; and (5) whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence.”<sup>14</sup>

At the end of this analysis, if the student’s expression constitutes a true threat, then the speech is not protected and schools may take appropriate disciplinary action without considering the First Amendment consequences. If the expression does not constitute a true threat, then most lower courts will analyze the speech under Tinker’s material disruption standard. If the expression is deemed to constitute a material disruption, then school officials are similarly free to take action without concern for First Amendment implications. Where a school cannot show evidence sufficient to meet either the true threat or the material disruption standard, it is generally barred from taking action against the student for that expression.

This two-part test casts a net wide enough to allow schools adequate means to snare and confront most of the student speech that poses a potential danger to the school environment. Although the true threat standard provides a difficult burden for schools to meet, courts sometimes find that the school has shown such a threat by determining that the reasonable student would have known his speech would be perceived as a threat.<sup>15</sup> Where the school cannot satisfy the true threat requirements, it is often able to meet Tinker’s less onerous burden of showing the speech yielded a material disruption.

In J.S. v. Bethlehem Area School District,<sup>16</sup> for example, a student created a website entitled “Teacher Sux,” which he showed to a classmate at school. Among the many profane web pages included on the site was one directed at his Algebra teacher, Ms. Fulmer, entitled “Why She Should Die.” The web page directed readers to look at the suggested reasons why

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<sup>14</sup> J.S., 807 A.2d at 858.

<sup>15</sup> See Demers v. Leominster Sch. Dept., 263 F. Supp. 2d 195, 201 (D. Mass. 2003) (finding that reasonable students would have perceived as threat plaintiff’s drawings of his school surrounded by explosives with students crying for help out windows and second drawing depicting principal with gun to his head). But see Doe v. Pulaski County Special Sch. Dist., 306 F.3d 616, 622 (8th Cir. 2002) (stating that lower courts diverge in determining whether statements should be interpreted from viewpoint of reasonable speaker or reasonable recipient)

<sup>16</sup> 807 A.2d 847 (Pa. 2002)

Fulmer should die, and if they agreed, the readers could send the student \$20 to help pay for a hit man.

The court first examined the totality of the circumstances and determined the “Teacher Sux” website was not a true threat. Among the many factors demonstrating a lack of a genuine true threat, the court noted that no address was given for where contributors should send funds. As further evidence, the court explained that: (1) the alleged threat was unconditional; (2) the student had never threatened the teacher in the past; (3) the threats were not communicated directly to the teacher; (4) the school had no reason to believe the student had a propensity to engage in violence; and (5) the school delayed in taking action against the student.<sup>17</sup> The court thus found no true threat, concluding that although the website was a “sophomoric, crude, highly offensive and perhaps misguided attempt at humor or parody... it did not reflect a serious expression of intent to inflict harm.”<sup>18</sup>

In applying the second prong of the test, however, the court went on to hold that the school had produced enough evidence to show a material disruption. It cited first to the effects of the speech on Fulmer, who suffered emotional and physical injuries and was unable to complete the school year. It further based its decision on the school’s assertions that the speech resulted in “feeling[s] of helplessness and low morale” among the student body and had caused parents to become concerned about the safety of the school environment.<sup>19</sup>

Although this case illustrates how courts are often willing to give schools broad flexibility in satisfying the material disruption standard, this two-pronged test is imperfectly suited to allow schools to justify legitimate safety concerns. In most cases, if students’ creative expression includes violent overtones but does not target a specific individual or individuals, it is unlikely to constitute a true threat or create a material disruption under Tinker.<sup>20</sup> In J.S. itself, the court

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<sup>17</sup> Id. at 859.

<sup>18</sup> Id.

<sup>19</sup> Id. at 869.

<sup>20</sup> David L. Hudson, Fear of Violence in Our Schools: Is “Undifferentiated Fear” in the Age of Columbine Leading to a Suppression of Student Speech?, 42 **Washburn L.J.** 79, 103 (2002)

stretched to find a material disruption based largely on the school's highly subjective assertions about its students' feelings of helplessness, a ruling that has drawn the ire of commentators.<sup>21</sup> The case demonstrates a growing judicial trend toward recognizing schools' needs for discretion in dealing with the danger of school violence, even where the school presents only minimal evidence of disruption.<sup>22</sup>

In fact, some courts don't even put up the pretense of requiring the school to demonstrate the student speech caused a material disruption. In a Ninth Circuit case, a student in Washington was suspended for writing a poem describing a disgruntled student's killing rampage at his high school.<sup>23</sup> The poem, entitled "Last Words," included the lines, "When it was all over / 28 were / dead / and all I remember / was not felling (sic) / any remorse (sic) / for I felt / I was / clensing (sic) my soul."<sup>24</sup> After showing it to a few of his classmates, James LaVine turned in the poem to his English Teacher, Vivian Bleecker, at the end of class and asked for feedback. He had on previous occasions sought her advice on his extracurricular writing.

Over the weekend, Bleecker read the poem and immediately became alarmed enough to contact the school principal and guidance counselor. Upon further review, the principal discovered that James was experiencing problems at home, had expressed suicidal thoughts to the school counselor on prior occasions, and had been accused of stalking his ex-girlfriend. In addition, the poem was written in the wake of not only Columbine, but a similar incident at Thurston High School in nearby Springfield, Oregon, where a ninth grader shot and killed two of his classmates and injured 25 others. After considering all of this evidence, James' principal decided to "emergency expel" him—a procedure allowable under Washington law. When James

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(citing *Boman v. Bluestem Unified Sch. Dist.* 205, 2000 WL 297167, at \*4 (D. Kan. Jan. 28, 2000) and *D.G.*, 2000 U.S. Dist. Lexis 12197, at \*12).

<sup>21</sup> See Robert D. Richards & Clay Calvert, *Columbine Fallout: The Long-term effects on Free Expression Take Hold in Public Schools*, 83 *B.U. L. Rev.* 1089, 1116 (2003)(asserting that court in *J.S.* exploited *Tinker* standard by creating "an expansive opening for school administrators and principals to punish students for their speech activities")

<sup>22</sup> See, e.g., *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981 (9th Cir. 2001), *Demers*, 263 F. Supp. 2d at 201, *Porter v. Ascension Parish Sch. Bd.*, 301 F. Supp. 2d 576, 583 (M.D. La. 2004),

<sup>23</sup> *LaVine*, 257 F.3d at 981.

<sup>24</sup> *Id.* at 983.

was later assessed by a psychiatrist and found to no longer be a danger, he was allowed to return to school, but record of the incident remained in his student file. He and his parents filed suit to have the incident expunged from his record, claiming the school's punishment constituted a violation of his First Amendment rights. On appeal, the Ninth Circuit upheld the school's decision, finding that the totality of the circumstances— including the student's personal history and the recent events at Columbine and Springfield—gave the school reason to forecast a disruption from the speech.

LaVine illustrates a critical loophole in the application of the two-pronged test used to assess student speech. Although the LaVine court failed to perform a true threat analysis, it is unlikely the school could have proven that a reasonable person would perceive the poem as a threat to the school given the lack of evidence showing James' intent.<sup>25</sup> The student handed the poem directly to a teacher and only for the purpose of receiving feedback; he had no history of making threats against the school; and the potential threat in the poem was not conditioned upon any occurrence.

More importantly, the Ninth Circuit misapplied the Tinker material disruption standard and erroneously assessed the disruption that may be caused by the *speaker* – not by the speech itself. The school did not present evidence sufficient to show the *speech* posed a material disruption. Evidence of the student's past behavior or incidents of national school violence have no relevance in determining the expression's potential to cause a material disruption.<sup>26</sup> These factors go to the speaker's characteristics. Despite these obvious defects in its logic, other courts have followed the Ninth Circuit's rationale in allowing schools to consider all of these circumstances as part of a Tinker analysis.<sup>27</sup> This confusion in the case law, coupled with the pressing safety concerns confronted daily by school officials nationwide, create a strong need for the Court to step in and resolve this controversy.

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<sup>25</sup> See D.G., 2000 U.S. Dist. LEXIS 12197, at \*13 (assessing merit of true threat claim on evidence of student's intent and her state of mind).

<sup>26</sup> Shannon McMinimee, Lavine v. Blaine School District: Fear Silences Student Speech in the Ninth Circuit, 77 **Wash. L. Rev.** 545, 569 (2002).

<sup>27</sup> Demers, 263 F. Supp. 2d at 201; Porter, 301 F. Supp. 2d at 586.

### III. Analysis

Because the Supreme Court's school case law does not equip schools to address the dangers posed by recent school shootings, the Court needs to craft a new standard permitting schools to take any reasonable action necessary to protect students and teachers from this type of indiscriminate violence. Perhaps the best standard to address this distinctly modern problem is an old one; school officials need the kind of discretion Justice Harlan advocated in Tinker.<sup>28</sup> This standard creates a near presumption of correctness for disciplinary actions taken by school officials in response to student threats of violence and places the burden on students challenging such actions to prove these actions were motivated by something other than legitimate school concerns.

#### A. The Tinker material disruption standard does not adequately address the current climate of school-based violence.

Although the Tinker court could not have anticipated in 1969 that by century's end school officials would be confronting the real danger of students gunning down their classmates in the cafeteria, schools now daily face the risk of exactly this doomsday scenario. Tinker's material disruption standard leaves school administrators woefully ill-equipped to protect their schools from outbreaks of school violence. This is because Tinker only allows school officials to take disciplinary action when student speech materially disrupts the educational environment. In most cases in which students express tentative intentions to commit acts of indiscriminate violence at their school, the *speech* in question rarely creates an actual disruption, nor does it give the school cause to forecast one in the future. Without satisfying the material disruption standard, the student speech in question—despite its foreboding overtone of violent conduct—is protected speech under the First Amendment. This leaves schools with a sort of Hobson's choice, to either: (1) consider the characteristics of the speaker along with the speech and act reasonably in

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<sup>28</sup> See Tinker, 393 U.S. at 526 (Harlan, J. dissenting) (“I would, in cases like this, cast upon those complaining the burden of showing that a particular school measure was motivated by other than legitimate school concerns”).

removing a potentially dangerous student from the school environment, knowing that First Amendment-based litigation may follow; or (2) do nothing in the face of cryptic warning signs only to expose the entire student body to the dangers of a Columbine-style disaster. The Court should not continue to expose its nation's schools to this sinister dilemma.

If the Supreme Court confronts this conflict it will have essentially three options. First, the Court may uphold the new and unfounded Ninth Circuit approach, reconstituting Tinker to include consideration of factors related to the characteristics of the speaker as well as the speech. Second, the Court may adhere to Tinker's plain language, strike down these lower court attempts to expand the decision's standard, and force schools to assess the reasonable forecast of disruption posed by the speech itself. Adhering to this standard would likely leave schools ill-equipped in the current climate of violence and expose them to suit if officials choose to act to sanction speech like that at issue in LaVine. Third, the Court could acknowledge that Tinker was never intended to apply to this type of school safety concern and craft a new exception that allows school officials discretion to handle the dangers posed by expression forecasting violence. For reasons founded not only on good public policy, but also in concordance with valid, post-Tinker Court precedent, the third course is the best one.

Assessing the relative danger posed by this type of violent expression is best left in the hands of the school officials who patrol the hallways and know and understand their students. The Tinker material disruption test simply does not allow administrators the discretion they need to regulate a safe school environment in the post-Columbine era. The Court's school speech case law since Tinker has shown that the Court is by no means devoted to the absolute authority of the material disruption standard. In fact, if Tinker stands as the high-water mark for student constitutional rights,<sup>29</sup> then every case that has followed—both inside and outside the First Amendment context—has drained a little more water from the tub. The precedent established in other student speech cases has carved substantial holes in Tinker's zone of influence. Further,

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<sup>29</sup> Broussard v. Sch. Bd. of Norfolk, 801 F. Supp. 1526, 1534 (E.D. Va. 1992) (characterizing Tinker as “the high-water mark for public school students’ First Amendment rights”).

the Court's decisions regarding other student constitutional rights have demonstrated that school safety often trumps students' individual interests. What remains in the basin after all these cases is the Court's recognition that students do retain some constitutional rights, but a school's legitimate concerns about the safety of the educational environment has the power to eclipse those rights. This unified precedent provides the Court with ample cause to establish a new standard that grants a school administrator broad discretion to curb violent acts forecasted in student speech and prevents courts from overturning school decisions unless the student shows them to be unreasonable.

**B. The Tinker standard only works when addressing students' nonviolent expression.**

At its core, Tinker was about balancing a student's interests against the interests of the student's school and community. The decision recognized that students continue to hold protected constitutional rights within the school building and that school officials cannot suffocate those rights merely because they hold an "undifferentiated fear or apprehension of disturbance."<sup>30</sup> The Court in Tinker also acknowledged, however, that these student rights are not absolute. Where the school can show that a student's speech disrupts classwork or invades upon the rights of other students, the balance shifts in favor of the school and allows officials to take action to prevent the disruption.

Importantly, the safety concerns addressed in Tinker do not even vaguely resemble the more modern dangers confronting schools. At most, the Des Moines school district defending its actions in Tinker faced the possibility of loud verbal exchanges, shoving matches, or fistfights in the hallway as a result of this protest. If the Court was willing to balance student speech rights against the minimal safety concerns in Tinker, *a fortiori*, it should be willing to grant broader deference to schools in assessing danger from student violence in the wake of Columbine and similar tragedies.

Beyond Tinker, the Court has recognized that certain school concerns outweigh the student's interest in free speech. The Court's more recent student speech decisions indicate its

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<sup>30</sup> Tinker, 393 U.S. at 508.

willingness to rebalance the scales. In two opinions drafted in the mid-1980's, when the Civil Rights movement and a strong counter-cultural viewpoint were not so prevalent in the public's conscience,<sup>31</sup> the Court acknowledged circumstances in which the school has a compelling interest in regulating student speech. In Bethel School District No. 403 v. Fraser,<sup>32</sup> the Court held that student speech that was lewd, vulgar, or plainly offensive could be regulated regardless of whether the school could show a material disruption. In Fraser, a twelfth-grade student made an election speech during a school assembly that included sexually explicit language and innuendo. The Court made clear that student speech rights "must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior" and emphasized the school's important role in inculcating the "habits and manners of civility."<sup>33</sup> The Court also recognized that students' rights within the school building are not "automatically co-extensive with the rights of adults in other settings."<sup>34</sup> The Court thus found that this balance weighed in favor of the school and upheld its decision to suspend the student.

Two years later, in Hazelwood School District v. Kuhlmeier,<sup>35</sup> the Court again balanced students' interests against the school's and created another exception to Tinker for speech that is school-sponsored. Following a decision by the principal not to publish two articles in the student newspaper, several students filed suit claiming this restriction on the paper constituted a violation of their right to free expression. After first determining that the school paper was not a public forum, the Hazelwood Court held that the school had regulatory authority over the content and style of school-sponsored speech as long as the school's actions related to "legitimate pedagogical concerns."<sup>36</sup> Despite the Court's failure to explicitly cite to his opinion, this language

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<sup>31</sup> See Kay S. Hymowitz, Tinker and the Lessons from the Slippery Slope, 48 **Drake L. Rev.** 547, 548 (2000) (asserting that Justices in Tinker were clearly affected by turbulent political atmosphere of that time, which included "an intense interest in children's rights").

<sup>32</sup> 478 U.S. 675, 683 (1986).

<sup>33</sup> Id. at 681.

<sup>34</sup> Id. at 682.

<sup>35</sup> 484 U.S. 260 (1988).

<sup>36</sup> Id. at 273.

proves strikingly similar to the standard proposed by Justice Harlan in his dissent in Tinker.<sup>37</sup>

This decision further eroded the application of Tinker and demonstrated the Court's unwillingness to require schools to labor under this standard where the results would prove detrimental to the overall vitality of the learning environment.

These post-Tinker opinions cogently emphasize the rationale that within the school, the interests of the individual often become secondary to the interests of the school community. Although this is a notion not well received in our ruggedly individualistic society, the Court repeatedly recognizes that schools are a distinctive forum. The material disruption test thus functions best as a standard suited to a more limited arena: where students attempt to exercise their right to non-violent student expression.

### **C. Recent Court decisions have shrunk student liberties to create safer schools.**

Outside of the First Amendment context, students' constitutional liberties have been steadily losing ground to safety concerns since the Court decided Tinker in 1969.<sup>38</sup> As the Pennsylvania Supreme Court noted in J.S. v. Bethlehem Area School District,<sup>39</sup> "balancing the constitutional rights of schoolchildren and the necessity for a school environment that is conducive to learning is a complex and delicate task." In certain circumstances, the United States Supreme Court has recognized that students' constitutional interests "must yield to the school officials' need to maintain order and to discipline when necessary to assure a safe school environment that is conducive to learning."<sup>40</sup> Specifically, the Court has held that educational interests in maintaining a safe and orderly school environment trump students' constitutional rights in the areas of Fourteenth Amendment due process,<sup>41</sup> Eighth Amendment cruel and

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<sup>37</sup> 393 U.S. at 526 (Harlan, J. dissenting) (requiring students to show that school's actions were motivated by something other than legitimate school concerns).

<sup>38</sup> See Erwin Chemerinsky, Students Do Leave Their First Amendment Rights at the Schoolhouse Gate: What's Left of Tinker?, 48 **Drake L. Rev.** 527, 529 ("There simply are hardly any Supreme Court cases in the past thirty years protecting students' constitutional rights.").

<sup>39</sup> 807 A.2d at 855.

<sup>40</sup> Id. (citing United States Supreme Court precedent in Pennsylvania case).

<sup>41</sup> See Goss v. Lopez, 419 U.S. 565 (1975) (holding that students have only cursory rights to notice and hearing when suspended from school for at least 10 days).

unusual punishment,<sup>42</sup> and Fourth Amendment search and seizure.<sup>43</sup> Coupling these opinions with the Court's decisions eroding students' First Amendment protections in Fraser and Hazelwood shows that if we cannot presume students will shed their weapons at the schoolhouse gate, they must necessarily shed some of their rights.

i. Limiting students' rights under the Fourth and Eighth Amendments. The common thread among these cases is the notion that "schools are different." As the Court noted in its recent opinion in Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls, "[s]ecuring order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults."<sup>44</sup> In Earls, these "greater controls" took the form of mandatory, suspicionless drug testing of all public school students participating in school-sponsored extracurricular activities. Two students, together with their parents, brought suit alleging the school district's drug-testing policy constituted an unreasonable search and seizure under the Fourth Amendment. The Court upheld the drug-testing policy, however, noting that although the Fourth Amendment requires a showing of probable cause in the criminal context, the "special needs" inherent in the public school context make the "warrant and probable-cause requirement impracticable."<sup>45</sup> In short, the Court stated that Fourth

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<sup>42</sup> See Ingraham v. Wright, 430 U.S. 651 (1977) (holding that corporal punishment of students comports with Eighth Amendment prohibition of cruel and unusual punishment).

<sup>43</sup> See New Jersey v. T.L.O., 469 U.S. 325 (1985) (holding that although Fourth Amendment protections apply to searches conducted by school officials, searches in schools need not be based on probable cause but, rather, are permissible if based only on reasonable suspicion); see also Bd. of Ed. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822 (2002) (holding that school district's policy requiring all students who participated in competitive extracurricular activities to submit to drug testing did not violate students' rights to be free from unreasonable searches); Vernonia Sch. Dist. v. Acton, 515 U.S. 646 (1995) (holding that school district's student-athlete drug testing policy did not violate students' right to be free from unreasonable searches).

<sup>44</sup> 536 U.S. at 831 (citing Justice Powell's concurring opinion in T.L.O., 469 U.S. at 350, in which he noted "the school has the obligation to protect pupils from mistreatment by other children, and also to protect teachers themselves from violence by the few students whose conduct in recent years has prompted national concern").

<sup>45</sup> Id. at 829.

Amendment rights “are different in public schools than elsewhere” and may be trumped by the school districts’ interests in maintaining discipline and ensuring the safety of its students.<sup>46</sup>

The Court similarly limited students’ constitutional rights in Ingraham v. Wright when it declined to extend Eighth Amendment protections against cruel and unusual punishment to students subject to corporal punishment.<sup>47</sup> Although the Eighth Amendment protects against corporal punishment in other contexts, particularly in prisons, the Court noted that most states recognize that reasonable corporal punishment in school is justifiable. According to the Court, the country has struck a balance between students’ constitutional liberty interests and the view that some limited corporal punishment may be necessary to serve legitimate pedagogical interests. This reasoning led Justice White, with whom three justices joined in dissent, to conclude that the majority would sanction the same punishment for students that it would bar for prisoners convicted of crimes.<sup>48</sup> Although the Court majority dismissed this observation as “rhetoric” that “bears no relation to reality,”<sup>49</sup> perhaps a more uniform rebuke would have read: “Schools are different.” Certainly, much of the Court’s reasoning in Ingraham is predicated on the notion that schools are different than jails and prisons.<sup>50</sup> Not only are schools more “open” than prisons and more subject to public scrutiny, but most states permit corporal punishment in schools as a means of maintaining discipline and order.

From this perspective it appears that state actors may exact certain punishments on school students they may not exact on prisoners. Moreover, state actors may employ means to search students that would defy constitutional protections outside the educational context. While these ideas may seem suspect in a neutral context, they comport with the notion that schools are, in fact, different from other public institutions. Perhaps this is because local governments, in instituting and maintaining public schools, undertake a certain responsibility for ensuring that

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<sup>46</sup> Id. at 829-30 (citing Acton, 515 U.S. at 656).

<sup>47</sup> 430 U.S. at 664 (holding that “the Eighth Amendment does not apply to the paddling of children as a means of maintaining discipline in public schools”).

<sup>48</sup> Id. at 684-85 (White, J. dissenting).

<sup>49</sup> Id. at 670 n.39.

<sup>50</sup> Id. at 670 (contrasting public schools as “open institution[s]”).

those schools are safe and orderly learning environments. The Court illustrated this responsibility when describing local school districts' duty to act to curb student drug problems: "[T]he necessity for the State to act is magnified by the fact that this evil is being visited not just upon individuals at large, but upon *children for whom it has undertaken a special responsibility of care and direction.*"<sup>51</sup> When it comes to balancing individual constitutional freedoms with competing state concerns, schools are different.

ii. These precedents should control in the First Amendment context as well. Although these decisions do not involve speech rights reserved under the First Amendment, perhaps their timeliness makes them more apt to address the school violence problem than Tinker. At their core, these decisions stand for the collective proposition that schools are different than other public institutions; schools are subject to greater controls if those controls are necessary to preserve a safe environment conducive to learning. The real, tangible threat of school violence on the scale of Columbine, Springfield and Red Lake is a distinctly modern problem the country had not encountered at the time the Court handed down its decisions in Tinker, Fraser, and Hazelwood. As a result, the Court's suite of cases treating students' First Amendment right to free speech never contemplated the kind of extreme violence and threats of violence being visited upon our schools. In fact, in the only case since Columbine in which the Court balanced students' constitutional rights against an invasive school policy aimed at promoting safety and order—Earls in 2002—the Court struck the balance in favor of safety and discipline.

It is arguable that the right to speak freely is more sacrosanct than these other constitutional freedoms. As Justice Cardozo wrote in Palko v. Connecticut in 1937, freedom of speech is a "fundamental" liberty and "the indispensable condition of nearly every other form of freedom."<sup>52</sup> Yet to properly evaluate the permissibility of this speech, we must consider the setting in which it is delivered. In the school setting there is adequate support for limiting students' speech rights when balancing the right to free expression against a compelling state

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<sup>51</sup> Acton, 515 U.S. at 662 (emphasis added).

<sup>52</sup> 302 U.S. 319, 327 (1937).

interest. As discussed above, Fraser and Hazelwood limited student speech in the face of compelling state interests. In Fraser, the state interest was limiting student exposure to lewd and obscene speech. In Hazelwood, the state interest was limiting student speech when the school sponsored that speech. The Court found these state interests compelling enough to justify limiting students' rights to free expression.

In comparison, preserving student and teacher safety by insulating schools from extreme acts of violence certainly stands as a more compelling state interest than limiting obscene or school-sponsored speech. Because the interest in ensuring the safety of students and teachers is so compelling, schools must be given discretion to address potential threats in a reasonable manner at the school level without fear of constitutional reprisal.

iii. Thinking nationally, acting locally. Following its similar analysis in Vernonia School District v. Acton,<sup>53</sup> the Court in Earls considered the "nature and immediacy" of the school district's concerns in implementing the drug-testing policy at issue.<sup>54</sup> In both cases, the Court found a legitimate cause for concern sufficient to sustain the drug-testing policies. In reaching this conclusion, the Court cited the drug abuse problem confronting youth nationwide as well as specific evidence of drug abuse in the district's schools.<sup>55</sup> The Court further rejected the test fashioned by the Tenth Circuit,<sup>56</sup> which required districts implementing a random suspicionless drug testing policy to demonstrate a drug problem among the particular student groups being tested.<sup>57</sup> This leaves the conclusion, at least in the Fourth Amendment context, that school districts may be justified in taking local action to address national problems such as drug abuse.

Importantly, the problem of violence in schools is bordering on a nationwide pandemic. With recent shootings in virtually all regions of the country, local school districts should be empowered to act locally to avoid this national problem. Unlike the searches implemented by the

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<sup>53</sup> 515 U.S. at 660-62.

<sup>54</sup> 536 U.S. at 834-36.

<sup>55</sup> Id. at 834-35 ("Indeed, the nationwide drug epidemic makes the war against drugs a pressing concern in every school.").

<sup>56</sup> Earls v. Bd. of Ed. of Tecumseh Pub. Sch. Dist., 242 F.3d 1264, 1278 (10th Cir. 2001)

<sup>57</sup> 536 U.S. at 836 (concluding that no threshold level of drug use is needed to justify drug testing program for school children).

schools in the Fourth Amendment cases, however, the restrictions imposed on speech to curb potential episodes of violence are not programmatic. Moreover, empowering teachers and school officials to act in a manner necessary to prevent violent episodes would not violate students' right to privacy like the drug testing programs at issue in Acton and Earls. Student speech is almost necessarily thrust into the public domain whether made in a distinctly public forum or communicated between student and teacher or amongst students. When such speech indicates a propensity for violence, teachers and school officials should be free to act to reasonably discipline, suspend, or expel the speaker in an effort to prevent the violent acts from occurring. The safety of other students and teachers is too important.

**D. Any unintentional chilling effects are outweighed by the need to preserve safety and order and will be checked by the reasonableness standard.**

One unintentional side effect of allowing school officials greater leeway in disciplining students for this type of expression is that some speech may be chilled in the process.<sup>58</sup> It is arguable that by lending a presumption of correctness to school disciplinary actions regarding student expression that students will be less willing to test ideas in the crucible of the classroom.<sup>59</sup> When those ideas project violence into the classroom, however, the school's interest in preserving safety and order outweighs the need for free expression.

Generally, Court precedent indicates that when government regulation polices the content of expression and has the effect of chilling speech, that regulation is often deemed unconstitutional.<sup>60</sup> Perhaps there is an argument that encouraging free expression is even more

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<sup>58</sup> See Hudson, supra note 20, at 80 (characterizing Columbine response by some school administrators as "overreaction" and arguing that "the greatest current threat to student speech now comes from the understandable preoccupation with safety concerns"); see also Louis P. Nappen, Note, School Safety v. Free Speech: The Seesawing Tolerance Standards for Students' Sexual and Violent Expressions, 9 Tex. J. on C.L. & C.R. 93 (2003) (arguing against zero tolerance laws as means of preventing school violence).

<sup>59</sup> See Clay Calvert, Free Speech and Public Schools in a Post-Columbine World: Check Your Speech Rights at the Schoolhouse Metal Detector, 77 Denv. U. L. Rev. 739, 760 (2000) (arguing that by turning "harmless statements" into true threats, school administrators harm "not only the students involved in these cases, but also the free speech rights of others who might want to engage in similar benign expression").

<sup>60</sup> See Reno v. ACLU, 521 U.S. 844, 871-72 (1997) (noting that vagueness of content-based regulation of speech over internet raises "special First Amendment concerns because of its

important in the formative environment of our schools. As the Court stated in Tinker, students' rights must be protected if "we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."<sup>61</sup> Even the most sacred tenets of our Constitution, however, are based on balancing competing interests. In fact, the Court has conceded that in certain contexts there is some speech that never merits First Amendment protection. As Justice Holmes noted when writing for the Court in Schenck v. U.S.: "[T]he character of every act depends upon the circumstances in which it was done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."<sup>62</sup> Shouting "Fire!" in a crowded theater or whispering "bomb" in an airport are examples of speech not protected by the First Amendment.<sup>63</sup> In those situations the context in which the speech is made is the key to understanding its importance and resulting lack of protection. Safety is of the paramount concern in each situation. Safety is of similar import when capable student actors project violence into the educational context.

In the educational environment students are already restricted from expressing themselves in a manner that is lewd or obscene despite the chilling effects this restriction may have on student expression. This shows that other interests may trump the rights to free expression in the school context even if speech is chilled as a result.

Moreover, any chilling effects this policy may have on student speech will be limited by the requirement that school officials act reasonably in disciplining students. Concededly, this standard will make it harder for students to challenge the disciplinary actions of school officials because students will bear the burden of proving those actions unreasonable. The reasonableness standard should, however, be an effective deterrent for unreasonable or

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obvious chilling effect on free speech"); see also 16A **Am. Jur. 2d Constitutional Law** §§ 458-60 (1998) (discussing features of content-based and content-neutral speech regulations).

<sup>61</sup> 393 U.S. at 507 (citing West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 638 (1943)).

<sup>62</sup> 249 U.S. 47, 52 (1919).

<sup>63</sup> See 18 U.S.C. § 35 (2000) (making it crime to knowingly convey false information under chapter concerning destruction of aircraft). See also United States v. Silver, 196 F. Supp. 677 (E.D. Pa. 1961) (holding that false statement that "I have a bomb in my brief case" made at airport was within statutory prohibition even though made in jest).

capricious actions by school officials. It is also important to note that by including considerations such as the speakers' characteristics and evidence of national school violence, many courts are already applying this standard in fact, if not in form.<sup>64</sup> By uniformly establishing the reasonableness standard, students stand to benefit from the development of case law that should clearly define the limits of what is reasonable.

Within this framework it is still possible for students to discuss school violence in an educational setting without the fear of unreasonable reprisal. For instance, if a teacher creates a work assignment in which she instructs students to write about a hypothetical shooting in their school as a means of expressing their feelings or learning from other situations, it would certainly be unreasonable for the teacher or school officials to punish students for complying with the assignment's requirements. The reasonableness requirement should provide ample protections for students' rights to free expression while allowing school officials to act to protect students' safety.

#### **IV. Conclusion**

It is thus not through Tinker in isolation that we understand how to regulate student speech, but by a broader examination of the tapestry of cases that comprise the Supreme Court's educational precedent. Tinker embodies the Court's recognition that a student holds rights and cannot be subjected to tyrannical repression simply by stepping into the schoolyard. Every case subsequent to the Court creating this high-water mark for students' constitutional rights, however, sees the Court draining a little more water from the tub. In limiting the scope of a student's constitutional rights, the Court's decisions in Ingraham, T.L.O., Fraser, Hazelwood, Acton, and Earls all hinge on the same principal: Schools are different. And, because schools are different, so too is the balancing of interests.

Tinker is best understood within the framework of student protest cases, or in its broadest context, as a testament to the student's ability to express unpopular and controversial ideas in the

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<sup>64</sup> See, e.g., LaVine, 257 F.3d at 989; Porter, 301 F. Supp. 2d at 586.

school building. Under circumstances where the school's only countervailing concern is one of general opposition to the ideas expressed, Tinker protects the student from sanction. Where the school holds some legitimate concern for the safety or pedagogy of the educational environment, however, the student's interests must yield. Harlan advocated for this level of deference to no avail in his Tinker dissent. The Court's school case law since then, however, has proven Harlan correct.

It is now time for the Court to acknowledge directly in the arena of free speech the substantial deference it has been giving to school officials for several decades. The Court needs to finally offer its unequivocal support to the commendable efforts of school officials across the country. These brave citizen-soldiers patrol school hallways and daily confront not only the frequent minor infractions of our nation's youth, but also the more ominous peril posed by indiscriminate school violence. Where a student's speech puts teachers and administrators on alert that the student poses a danger to himself and others, the school shouldn't be relegated with the burden of showing a true threat or a future disruption from that speech. Whatever chilling effects this might hypothetically impose on student expression cannot surmount the significant interest school officials have in guarding their students from harm. Our highest Court needs to allow them to do what is reasonable so that every parent can rest a little easier when he drops his child off at the schoolhouse gate, knowing the school has the authority required to protect its populace.

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