School Safety v. Free Speech: The Seesawing Tolerance Standards for Students' Sexual and Violent Expressions

By: Louis P. Nappen*

"They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety."

-Benjamin Franklin[1]

I. A BRIEF LEGAL HISTORY OF STUDENT FREE EXPRESSION

The Supreme Court has long sustained laws that treat minors as an exceptional class as long as the distinction is reasonable.[2] Minors often receive added legal protections or leniencies; for instance, the legislature and the judiciary have enacted and upheld laws that specifically protect children from sexually-based crimes, such as child pornography[3] and statutory rape.[4] Minors are also sentenced in their own juvenile court systems and are exempt from the death penalty.[5]

---

* Juris Doctor candidate, Seton Hall University Law School, 2005; Master of Arts in Teaching, Monmouth University, 1993; Bachelor of Arts in Speech, Communications, and Theatre with a Minor in Writing, Monmouth University, 1990; New Jersey Standard Certifications as Elementary School Teacher and Teacher of English, 1993.

As a former high school English teacher and publications advisor, I realize that both subtle and overt forms of student disruption exist. I recognize the need to maintain discipline in an educational environment, and, to this extent, I support court decisions that uphold this. On the other hand, as a former editor-in-chief of both my university newspaper and literary magazine, I also believe in encouraging honesty, creativity, forensic debate, and freedom of expression. In an educational setting, problems arise when either discipline or expression are radically extreme. Problems can also arise when boundaries of expression and discipline were never delineated.

Special thanks to my family, professors, and editors for helpful comments during the drafting of this note.

1. BENJAMIN FRANKLIN, HISTORICAL REVIEW OF PENNSYLVANIA (1759). "This sentence was much used during America's Revolutionary period. It occurs even so early as November, 1755, in answer by the Assembly of Pennsylvania to the Governor." RICHARD FROTHINGHAM, RISE OF THE REPUBLIC OF THE UNITED STATES 413 (1873), *available at* http://www.bartleby.com/100/245.1.html (last visited Nov. 27, 2003).

2. *E.g.*, New York v. Ferber, 458 U.S. 747 (1982) (holding that a statute may not be under-inclusive or substantially overbroad); Ashcroft v. The Free Speech Coalition, 535 U.S. 234 (2002) (holding that a statute may not be unconstitutionally overbroad); Stephenson v. Davenport Cmty. Sch. Dist., 110 F.3d 1303 (8th Cir. 1997) (holding that a statute may not be too vague).

3. Child Pornography Prevention Act, 18 U.S.C. § 2251 (1996). New York v. Ferber, 458 U.S. 747 (1982). Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) limits the restrictions of *Ferber* when no child is actually being harmed. Similarly, obvious *depictions* of weapons are *not actual* weapons and present no actual physical danger. *Id.*

4. Statutory rape laws fall under the auspices of each state. *See, e.g.*, N.J. STAT. tit. 2c §14-2 (West 2002) ("An actor is guilty of aggravated sexual assault if he commits an act of sexual

On the other hand, young peoples' rights may sometimes be curtailed or even eliminated. Even though in *Goss v. Lopez* the Supreme Court confirmed that minors maintain their criminal due process rights despite their youth,[6] alternatively, the Supreme Court has maintained that minors' First Amendment rights may be restrained towards the greater interests of discipline and school safety.[7] No doubt, students' rights decline while on school grounds.[8]

Although educators may stop expression that substantially interferes with the functioning of the school, students do not completely "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[9] But, when are limits on free expression considered reasonable, fair, or necessary? "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[10] Yet, at what point do school restrictions go too far? School officials are allowed to restrict student expression that presents a "material" and "substantial disruption."[11] However, "in the post-Columbine climate, 'safe schools' are being created at the expense of students feeling safe and being treated fairly."[12]

It probably makes sense that administrators need not wait to see an "imminent" or "clear and present" danger[13] until they may react; however, does this mean that administrators should re-adopt the theory of bad tendencies[14] when it comes to scholastic environments? Of course, instructors who interact with children daily may be more astute to each child's particular "bad tendencies." Regarding expression made outside schoolhouses and made in communities at large, the well-known *Miller v. California* case ruled that "patently offensive" was too vague a

---

penetration with another person under any one of the following circumstances: (1) The victim is less than 13 years old; (2) The victim is at least 13 but less than 16 years old. . . . ").

5. Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (holding that the Eighth and Fourteenth Amendments prohibited capital punishment for juveniles under sixteen years of age at the time of their crimes). *See* Stanford v. Kentucky, 492 U.S. 361 (1989) (upholding the death penalty for sixteen- and seventeen-year-old minors); Hain v. Mullin, 123 S. Ct. 1654 (2003) (denying a stay of execution for a defendant who committed homicide at seventeen).

6. *See* Goss v. Lopez, 419 U.S. 565 (1975) (holding that due process is required in connection with suspensions up to ten days and that suspended students require notice of charges and an opportunity to present their versions of events to authorities).

7. *See infra* Parts I, II.

8. *E.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 665-66 (1995) (holding that school officials may drug-test student athletes).

9. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 680 (1986) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).

10. Shelton v. Tucker, 364 U.S. 479, 487 (1960).

11. *Tinker*, 393 U.S. at 514.

12. Nancy Murray, Director, Bill of Rights Education Project, *Safety in Schools: Are We on the Right Track?*, *at* http://www.aclu-mass.org/youth/studentrights/safeschools.html (last visited Feb. 11, 2003) [hereinafter *Safety in Schools*].

13. *See* Brandenburg v. Ohio, 395 U.S. 444, 450 (1969) (stressing free expression in the public at large); Schenck v. United States, 249 U.S. 47, 52 (1919) (outlining "clear and present danger") (Holmes, J.).

14. Gitlow v. People of New York, 268 U.S. 652 (1925).

definition without clear illustration and redefined constitutionally protected pornography according to "community standards."[15] The courts have not fully delineated what constitutes a "material and substantial disruption" nor the boundaries of disciplining expression under the pretext of defusing "disruptive" behaviors. However, such delineation appears unlikely given the recent surge of discretionary powers granted to government authorities to fight terrorism[16] and drug-using minors.[17] In 1925, Justice Sanford noted, "The State cannot reasonably be required to measure the danger from every . . . utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration."[18] This is true of all expression regardless of setting. Outside of schools, "the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."[19] *Brandenburg v. Ohio* noted, "The critical line [is] the line between mere advocacy and advocacy 'directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action.'"[20] In other words, where dangers are merely perceived and are not present or imminent, the government cannot limit expression. Schools, however, have greater power to limit juveniles' expression.[21]

Gitlow v. People of New York is the first case deciding that free speech should come under Fourteenth Amendment protection as a fundamental right.[22] We now assume that First Amendment rights are fundamental; however, the Supreme Court has long held that age is not an unreasonable classification.[23] With the understanding that school authorities have dramatically more control over their students than the state would have over the public, at what point do educational authorities clarify the boundaries between free expression and school safety, beyond which a youth may not cross, especially concerning symbolic expressions of sex or violence? This control is particularly troubling when students are strictly disciplined for private expression not intended for an audience or when there is no evidence that the student even realized his or her actions may be, or become, disruptive.

The focus of this article is *symbolic* gestures, communication, and expression by primary and secondary school students. This thesis is not concerned with *actual* assaults, vandalism, and other obviously unacceptable and disruptive behaviors. Likewise, this thesis is not an

15. Miller v. California, 413 U.S. 15, 24-25 (1973).
16. *See* USA PATRIOT ACT OF 2001, Pub. L. No. 107-56 (2001).
17. Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822 (2002).
18. *Gitlow*, 268 U.S. at 669.
19. Bridges v. California, 314 U.S. 252, 263 (1941).
20. Healy v. James, 408 U.S. 169, 188 (1972) (citing Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)).
21. *See infra* Parts I, II.
22. *Gitlow*, 268 U.S. at 666.
23. *See* cases cited *supra* note 2.

examination of court or classroom rulings regarding students' *actual* guns, knives or other weaponry. *In arguendo*, schools require and should retain power over such issues.

Three leading Supreme Court cases explore the greater limits and controls of students' free expressions inside educational settings: *Tinker v. Des Moines Independent Community School District*,[24] *Hazelwood School District v. Kuhlmeier*,[25] and *Bethel School District No. 403 v. Fraser*.[26]

The most widely cited of the three is *Tinker*, where students were suspended for wearing black armbands while in school to protest the Vietnam War.[27] Notably, many of the student-centered free expression cases arose during the socially turbulent late-1960s and early-1970s. In *Tinker*, "[t]he 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."[28] The Supreme Court ruled in *Tinker* that fear and apprehension of disruption are not enough to overcome the rights of free expression. The Court stated:

> [Schools must] be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained.[29]

Subsequent Supreme Court cases, however, in delineating what constitutes a "material and substantial disruption," have chipped away at what appeared, in 1969, to be a broad declaration of freedom of expression in the classroom.

In addition to *Tinker*'s "material and substantial disruption" test, a "true threat" doctrine has also been applied to questionable student expression.[30] "In *Watts v. United States* . . . the Supreme Court held that Watts' statement, 'If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.,' was political hyperbole and therefore did not constitute a 'true threat.'"[31] "*Watts* suggests that a 'communication which an objective, rational observer would tend to interpret, in its

24. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).
25. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).
26. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).
27. *Tinker*, 393 U.S. 503.
28. *Id.* at 508.
29. *Id.* at 509.
30. Lynda Hils, *"Zero-Tolerance" for Free Speech*, 30 J.L. & EDUC. 365, 366 (2001).
31. *Id.*; *see also*, Watts v. United States, 394 U.S. 705, 705-08 (1969).

factual context, as a credible threat, is a 'true threat,' which may be punished by the government."[32] In *Lovell v. Poway Unified School District*, a student allegedly threatened to shoot her school counselor if the counselor did not grant her schedule change.[33] The standard applied was "whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault."[34] The *Lovell* court determined that "the increase in school violence was a significant part of the context in which the allegedly threatening statement should be interpreted."[35] Thus, the statement was not protected by the First Amendment because the statement could reasonably "be considered a true threat."[36]

In 1988, *Hazelwood School District v. Kuhlmeier* granted broad power for administrators to censor school publications.[37] *Hazelwood* concerns a principal who pulled two articles from publication in the school newspaper.[38] Justice White opined, "The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech."[39] Basically, the Court decided that since school publications are school funded, administrators are, in a sense, publishers with editorial rights to extinguish expression that they feel may be inappropriate or that could be erroneously attributed as school-wide opinion.[40] Publications distributed in school which are *not* school funded have come under varying restrictions.[41]

In *Bethel School District No. 403 v. Fraser*, a student delivered a sexually suggestive speech at a school assembly.[42] School officials subsequently suspended Fraser for three days and eliminated him as a candidate to speak at his graduation.[43] Justice Brennan's concurrence in *Bethel* stated: "[t]he State has interests in teaching high school students how to conduct civil and effective public discourse *and* in avoiding disruption of educational school activities."[44] Therein lies the conflict. Lackluster free expression devoid of passion and personality is not really

---

32. David C. Potter, *The Jake Baker Case: True Threats and New Technology*, 79 B.U.L. REV. 779, 793 (1999).

33. Lovell v. Poway Unified Sch. Dist., 90 F.3d 367 (9th Cir. 1996).

34. *Id.* at 372 (quoting United States v. Orozco-Santillan, 903 F.2d 1262 (9th Cir. 1989)).

35. Hils, *supra* note 30, at 366.

36. *Id.*

37. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

38. *Id.* at 263. One article examined teenage pregnancy; the other, the impact of divorce on children.

39. *Id.* at 270-71.

40. *Id.*

41. *See infra* Part II.A.

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

43. *Id.* at 678.

44. *Id.* at 688.

free expression. Whether the expression is sexual or violent in content, expurgation changes meaning and intent.

Brennan's *Bethel* concurrence provides a key starting point to examine student free expression rights. If no actual acts of sex or violence occur during or from a student's expression then, arguably, an "effective public discourse" analysis should prevail and not the view that expressions were a "disruption of educational school activities."[45] The student in *Bethel* knew exactly what he was doing; Fraser thought he was being clever. He knew his speech might be shocking. His *mens rea* was clear. In summary, he:

1. was given some form of warning
2. delivered his expression to an entire student body, and
3. knew that there would more likely than not be a reaction.[46]

It is also true that his speech's double entendre would only be crude to those who understood (or perhaps looked for) sexual innuendo.[47] Even though Fraser lost his case, Justice Brennan said that there was no proof that there was an actual disruption in the school's mission[48] and Justice Stevens noted how standards have changed so much that such speech may be acceptable under contemporary standards.[49]

Whereas, contemporarily, social comments of a sexual nature have lost or are losing their impact,[50] conversely, it is not considered "politically correct" to openly discuss even the positive aspects of gun ownership such as the joys of firearm collecting, hunting, marksmanship, or the pride of self-defense.[51] This is not to say that there is absolute permissiveness for sexual expression, but there appears to be more awareness yet greater disciplining for symbolic violence. Schools currently teach sexual education classes and distribute condoms; yet, rifle clubs have been eliminated from most extra-curricular programs and physical education departments are phasing out archery and fencing

---

45. *See infra* Part IV.

46. *Bethel*, 478 U.S. at 678. Two of Fraser's teachers informed him that his speech was "inappropriate" . . . and that its delivery might have "severe consequences." *Id.*

47. *Id.* at 687 (Brennan, J., concurring) ("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.").

48. *Id.* at 688-89 (Brennan, J., concurring).

49. *Id.* at 691 (Stevens, J., dissenting) ("When I was a high school student . . . 'Frankly, my dear, I don't give a damn' . . . shocked the nation.").

50. Compare television episodes of *I Love Lucy*, circa 1953 (where a married couple sleeps in separate beds) to episodes of *Will & Grace*, circa 2003 (where homosexual men French kiss).

51. Compare television episodes of *Dennis the Menace*, circa 1959 (where a boy consistently bears a sling shot) to episodes of *MacGyver*, circa 1992 (where the hero refuses to use any firearm).

classes.[52] National standards about sex and guns are shifting. For instance, 22-caliber rifles (such as Marlin and Remington 22 rifles) that have traditionally been used by Boy Scouts to acquire their Rifle and Shotgun Merit Badges have been banned as assault firearms under New Jersey law.[53] Although, arguably, "the right of the people to keep and bear arms"[54] is an enumerated right,[55] depictions of firearms or of people using firearms have become punishable in the primary and secondary educational settings.[56] As a result of Columbine, the terrorism of 9/11, "The Sniper" attacks, and the anti-gun hysteria that has followed these and other events of the last decade, concern is no longer solely the potential of abusing weapons, but even the *symbolic* representation of weapons. In other words, in an age of graphic motion pictures, lurid lyrics, explosive video games, live battlefield coverage, and other media depicting violence, students are limited in their attempts to honestly reflect on their violence-filled world.

In 1990, Congress passed the Gun-Free School Zones Act, prohibiting the possession or discharging of a firearm in a school zone.[57] However, the Supreme Court subsequently invalidated the law in *United States v. Lopez*, saying that Congress had exceeded its power by treading on state and local responsibilities and that guns in school did not significantly involve interstate commerce.[58] The Gun-Free Schools Act of 1994 required public schools, in order to receive money from the federal government, to enact a policy mandating a one-year expulsion for students who bring firearms to school.[59] Following the passage of that law, school systems rapidly adopted zero-tolerance policies, many of which included punishment for mere expression.[60] The National Center for Education Statistics (NCES) issued a report in 1999 entitled 'Indicators of School Crime and Safety' that found "94% of the nation's

---

52. *E.g.*, in New Jersey, Westfield Township School System has eliminated fencing class, Delaware Valley Regional School System has eliminated archery, and Ocean Township School System has eliminated fencing and archery classes. Telephone Interviews with: William Alusik, teacher, Westfield Township High Sch. (Nov. 29, 2003); Lisa Wood, teacher, De. Valley Reg'l High Sch. (Nov. 29, 2003); Laura Neville, teacher, Ocean Township High Sch. (Nov. 29, 2003); *see also*, Valerie Richardson, *Zero Tolerance Takes Toll on Pupils*, WASH. TIMES, May 13, 2002, *at* http://asp.washtimes.com/printarticle.asp?action=print&ArticleID=20020513-9519286 ("Colorado law mandates expulsion for students who 'carry, bring, use or possess a firearm *or firearm facsimile* at school.'") (emphasis added) [hereinafter *Toll on Pupils*].

53. N.J. STAT. ANN. § 2C:39-1w.(4) (West 2002) ("[A] semi-automatic rifle with a fixed magazine capacity exceeding 15 rounds.").

54. U.S. CONST. amend. II.

55. Conversely, no reference to sexual conduct exists in The Bill of Rights (U.S. CONST. amend. I-X).

56. *See infra* Part II.

57. Gun-Free School Zones Act, 18 U.S.C. § 922 (q) (1990).

58. United States v. Lopez, 514 U.S. 549 (1995) (citing U.S. CONST., art. I, §8, cl. 3 (Commerce Clause)).

59. GUN-FREE SCHOOLS ACT, 20 U.S.C. § 8921 (1994); *see also*, NO CHILD LEFT BEHIND ACT, 20 U.S.C. § 7139 (2001) (requiring gun-free schools to receive federal funding).

60. Lisa M. Pisciotta, *Beyond Sticks & Stones: A First Amendment Framework For Educators Who Seek To Punish Student Threats*, 30 SETON HALL L. REV. 635, 636 (2000).

schools had adopted such policies in regards to firearm possession and almost as many included other weapons and drugs as well."[61] The NCES also reported "incidents of violence in schools have decreased significantly over the past decade."[62] Zero-tolerance rules punish students for statements that are not "true threats."[63] Accordingly, a new *Tinker*- or *Goss*-type controlling case is needed to re-examine and confirm the extent of student free speech rights in the contemporary school environment, especially concerning expressions incorporating weaponry or acts of violence. This would also help put *Lovell* in proper perspective. Punishing students for writing, drawing, or talking about firearms is a new phenomenon; many of the landmark cases on pre-empting violence, such as *Tinker*, deal, ironically, with *peace* activists.

Legislators have criminalized adults who engage in sexual acts with minors; still, statutory rape laws, which fall under the auspices of each state, usually include leniencies towards minors having sex with other minors in their age group.[64] The student speaker in *Bethel* most likely understood that his peers could handle any level of student reaction his speech might have roused.[65] Justice Stevens noted that "[Fraser] was probably in a better position to determine whether an audience composed of 600 of his contemporaries would be offended by the use of a four-letter word—or a sexual metaphor—than is a group of judges who are at least two generations and 3,000 miles away from the scene of the crime."[66] Arguably, First Amendment rights deserve similar respect when it comes to peer group leniency.

Several recent cases involve children being suspended for playing "cops-and-robbers" games because they pointed their fingers as though firing guns.[67] To what extent should students be held responsible for so-called disruptive behaviors where the students are not aware that his or her actions may be problematic or when the expression is not meant for public distribution? The father of the boy arrested for his paper gun said, "In their mind, all [they] did was play with some paper."[68] The ten-year-old who was suspended for playing cops-and-aliens kept saying, "Mom, I don't know, I don't understand. I'm bad, but I don't know why."[69] The student who was suspended for reading aloud derisive commentary about

---

61. Phillip, *Student-Rights Advocates Say 'Zero-Tolerance' Can Ensnare Free Speech, at* http://www.freedomforum.org/template/document.asp?documentID=14355 (July 10, 2001).

62. *Id.*

63. Hils, *supra* note 30, at 373.

64. *See* N.J. STAT. ANN § 2C:14-2C(4) (West 2002) (including where "[t]he victim is at least 13 but less than 16 years old and the actor *is at least four years older than the victim*" within the definition of sexual assault) (emphasis added).

65. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 692 (1986).

66. *Id.*

67. *See infra* Part II.D.

68. Christine Haughney, *2 Boys, a Paper Gun and a Heap of Trouble*, WASH. POST, June 20, 2001, at A03, *available at* http://www.sierratimes.com/txt/amn110200.htm [hereinafter *Paper Gun*].

69. *Toll on Pupils, supra* note 52.

his principal argued, "I never intended for the principal to see or hear it. It was meant as a joke and I'm truly sorry that people were offended."[70] Attempting to eliminate bullying behavior, school boards and legislatures are passing zero-tolerance policies allowing suspension or expulsion of students for inappropriate gestures or intimidating threats towards classmates.[71] Educators are currently allowed to punish students who do not understand what they have done wrong. As seen in *Hazelwood* and *Bethel*, educators' editorial opinions may legally subordinate or eliminate student expression.[72] Therefore, two issues should be addressed regarding censorship and/or punishment of student expression: 1) To what extent does a child know and understand the rules? and 2) To what extent can a child predict or understand the consequences (*mens rea*) of his or her actions (*actus reus*)?

II. SURVEY OF "DISRUPTIVE" EXPRESSIONS

The major types of free expressions administrators have censored or punished under "true threat"[73] or "material interference or substantial disruption"[74] rationales can basically be divided into five categories: Written, Verbal, Artistic, Gestural, and Fashion-related.

Internet expressions could be considered a possible sixth category; however, webpage expression extends beyond the scope of this paper.[75] Although computer, graphic art, journalism, and other such classes rely heavily on computer research and usage, for the most part Web page expressions do not *per se* take place in school or immediately disturb the learning environment. Notably, the Columbine murderers did utilize

---

70. Student Press Law Center, *Michigan Student Takes School to Court Over Suspension*, *at* http://www.splc.org/newsflash.asp?id=297 (Sept. 12, 2001).

71. *See* Carmen M. Snook, *Oregon's "Bully Bill": Are We Needlessly Repressing Student Speech in the Name of School Safety?*, 38 WILLAMETTE L. REV. 657 (2002); *see also*, James L. Hirsen, *The Regression of Free Expression*, *at* http://www.firstliberties.com/regression_of_expression.html (Mar. 15, 2001) [hereinafter *Regression*].

72. *See infra* Part IV. Should the educator or the student speaker define what would be disruptive? To what extent is educator rationale taken into consideration?

73. Lovell v. Poway Unified Sch. Dist., 90 F.3d 367, 365 (9th Cir. 1996).

74. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).

75. Several law review articles have examined Internet concerns at length,(as well as the free speech issue concerning Web page blocking devices. *E.g.*, Ray August, *Issues in Higher Education: Gratis Dictum! The Limits of Academic Free Speech on the Internet*, 10 J.L. & PUB. POL'Y 27 (1998); David L. Hudson, Jr., *Censorship of Student Internet Speech: The Effect of Diminishing Student Rights, Fear of the Internet and Columbine*, 2000 L. REV. M.S.U.-D.C.L. 199 (2000); Glenn Kubota, *Public School Usage of Internet Filtering Software: Book Banning Reincarnated?*, 17 LOY. L.A. ENT. L.J. 687 (1997); Philip T.K. Daniel & Patrick D. Pauken. *Educator's Authority and Students' First Amendment Rights on the Way to Using the Information Highway: Cyberspace and Schools*, 54 WASH. U.J. URB. & CONTEMP. L. 109 (1998); Jennifer Kathleen Swartz, *Beyond the Schoolhouse Gates: Do Students Shed Their Constitutional Rights When Communicating to a Cyber-Audience?*, 48 DRAKE L. REV. 587 (2000); *see also*, Phillip J. Trobaugh, Attorney at Mansfield, Tanick & Cohen, P.A., *Student Websites: 1st Amendment Issues & Challenges*, *at* http://www.mansfieldtanick.com/art_39.htm (last visited Nov. 27, 2003).

Web pages and Internet boards during their planning stages.[76] In terms of general content though, Web page expressions incorporate many of the other five categories.

Prototypical examples from each of the five categories illustrate the extent to which educators have attempted and/or have been allowed to limit student expression.

A. WRITTEN EXPRESSIONS

The *Hazelwood* case examined educator rights concerning school-sponsored publications.[77] Prior to *Hazelwood*, students apparently had a much higher First Amendment bar.[78] Examples of educators editing under the *Hazelwood* rationale are in the news about once a month.[79] Schools may pull or threaten to pull funding if students do not accept an advisor or administrative review.[80] Sometimes advisors are fired for letting students express themselves.[81]

Other types of student writings besides school-sponsored publications have also come under judicial review.

1. NONSCHOOL-SPONSORED PUBLICATIONS

A few months after *Hazelwood*, the issue of *non*school-sponsored publications reached the Ninth Circuit Court of Appeals.[82] Students sought and received declaratory and injunctive relief and expungement of reprimands imposed for distributing at a senior class barbecue a four-page newspaper published at their own expense, off school property, and without the knowledge of school authorities.[83] The paper did not include any profanity, religious epithets, or any material which could be

---

76. CBS News, *Arrest in Columbine Threat*, *at* http://www.cbsnews.com/stories/1999/12/16/national/main140730.shtml (Mar. 23, 2000). Eric Harris and Dylan Klebold posted threats on the Internet before their April 20 attack. *Id.*

77. *See supra* Part I.

78. *See* Bystrom v. Fridley High Sch., 686 F. Supp. 1387 (D. Minn. 1987) and Sullivan v. Houston Indep. Sch. Dist., 333 F. Supp. 1149 (S.D. Tex. 1971).

79. *See* Chandra M. Hayslett, *Shelving of School Paper Raises Free-Speech Issue*, ASBURY PARK PRESS, Feb. 27, 2003; Tania deLuzuriaga, *About Steton*, ORLANDO SENTINEL, Apr. 11, 2003 ("One of the state's oldest college newspapers was shut down this week . . . after publishing a profanity-filled April Fool's Day issue that included racist jokes and a sex column advocating domestic violence.").

80. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270-71 (1988).

81. *See* Lacks v. Ferguson Reorganized Sch. Dist. R-2, 154 F.3d 904 (8th Cir. 1998) (Teacher terminated after twenty years for allowing student to use profanity in their writing.); Paul McMasters, *Tough Times at Free Speech High School*, *at* http://www.tentler.com/StudentsRights.htm (Dec. 7, 1998) (discussing newspaper adviser allegedly fired for refusing to censor stories that school officials did not like) [hereinafter *Tough Times*].

82. Burch v. Barker, 861 F.2d 1149 (9th Cir. 1988).

83. *Id.* at 1150.

considered obscene, defamatory, or commercial.[84] The school policy to submit pre-distribution review was deemed "overbroad and of unlimited scope and duration and had no justification other than undifferentiated fears," in line with *Hazelwood*'s distinction between school- and nonschool-sponsored publications.[85] However, other cases have granted administrative review powers for school distribution of materials depending on content, time, place, and manner of distribution in line with *Bethel*'s and *Tinker*'s material disturbance test.[86]

2. "VIOLENT POETRY"

The California Supreme Court has agreed to hear a case this year regarding a teenager who was expelled and convicted of a crime for writing "violent poetry" while in school.[87] The boy's poem threatened to bring guns to school and kill students.[88] The student's attorney defends that the boy was expressing an exaggerated response to student attacks like that of Columbine.[89] Persuasive cases from other states may aid their decision-making.

For example, in 2001 a Washington student showed his teacher a poem he wrote entitled "Last Words" that described him shooting other students.[90] The student was placed on emergency expulsion.[91] He was allowed to return to school after being subjected to a psychiatric examination.[92] The Ninth Circuit stated that this poem was "not 'an elaborate, graphic, and explicit sexual metaphor,' as was the student's speech in [*Bethel*], nor does it contain the infamous seven words that cannot be said on the public airwaves [*Pacifica*]."[93] In other words, the court distinguished lewd expression from violent expression. It held that expulsion did not violate the student's First Amendment rights because schools have "a duty to prevent any potential violence on campus."[94]

---

84. *Id.* at 1150-51.

85. *Id.* at 1158.

86. *See* Bystrom v. Fridley High Sch. Indep. Sch. Dist., 822 F.2d 747 (8th Cir. 1987); Nelson v. Moline Sch. Dist. No. 40, 725 F. Supp. 965 (C.D. Ill. 1989).

87. *California High Court to Decide If Violent Poetry is Criminal*, TRIB., Jan. 18, 2003, at A4.

88. *Id.*

89. *Id.*

90. Lavine v. Blaine Sch. Dist., 257 F.3d 981, 983 (9th Cir. 2001). The poem included lines such as: "I pulled my gun,/from its case, and began to load it./ I remember,/thinking at least I won't,/go alone." and "Bang, Bang, Bang-Bang./When it all was over,/28 were,/dead . . . .". *Id.*

91. *Id.* at 989.

92. *Id.* at 986.

93. *Id.* at 989; Fed. Communications Comm'n v. Pacifica Found., 438 U.S. 726, 758 (1978) (concerning references "to excretory or sexual activities, or organs . . . when children are in the audience.").

94. *Id.* at 989.

The court did, however, curtail the school from placing negative documentation in the student's file because of the incident.[95]

In 2000 a Kansas student posted in a school hallway a concrete poem[96] consisting of spiraling verses stating "threats" such as: "I'll kill you if you don't tell me who killed my dog," and "I'll kill you all."[97] The student had not actually experienced having her dog killed and had no actual intent to harm anyone, yet the administration refused to reinstate her as a student until she underwent a psychological evaluation.[98] The court, nonetheless, decided that the student met the requirements of four-part preliminary injunctive relief *(discussed infra)* and overruled the administration.[99]

3. INTERPERSONAL COMMUNICATIONS

Another girl's poem was the center of controversy in 2000. After being moved to a new seat in the classroom, an Oklahoma student wrote a poem for a friend expressing her frustrations:[100] "*Killing Mrs. [Teacher]*" . . . "Now as the days get longer/My yearning gets stronger/to kill the bitcher./One day when I get out of jail/Cuz my friends paid my bail./And people will ask why/I'll say because the Bitch had to die!"[101] The student said that writing the poem was her private way to address her frustrations, that the concept of killing her teacher was purely imaginary, and that she did not intend for the teacher to ever see the poem.[102] The poem was later found on the floor of another teacher's classroom and the student was suspended.[103] The court held, "[o]nce the administration gathered the facts, and the context of the poem became clear, there was no longer a factual basis for believing that the poem constituted any sort of threat."[104] Hence, the student's speech did not fall under school restrictions. The poem was not substantially disruptive and its expression was protected by the First Amendment.[105]

Significantly fewer recent cases concern student comments of a sexual nature (when the expression is not school sponsored).[106] However, in 2001 a Pennsylvania student was granted a preliminary

---

95. *Lavine*, 257 F.3d at 989.

96. A poem bordering on artwork where words are fashioned into a shape.

97. Boman v. Bluestem Unified Sch. Dist. No. 205, No. 00-C-1034-WEB, 2000 U.S. Dist. Lexis 5389, *1-2 (Kan. Dist. Ct. Jan. 28, 2000).

98. *Id.* at *7.

99. *Id.* at *13-14.

100. D.G. & C.G. ex rel. M.G. v. Indep. Sch. Dist. No. 11 of Tulsa County Okla., No. 00-C-0614-E, 2000 U.S. Dist. Lexis 12197, *3-4 (N.D. Okla. Aug. 21, 2000).

101. *Id.* at *3.

102. *Id.* at *3-4.

103. *Id.* at *4.

104. *Id.*

105. D.G. & C.G. ex rel. M.G. v. Indep. Sch. Dist. No. 11 of Tulsa County Okla., No. 00-C-0614-E, 2000 U.S. Dist. Lexis 12197, *3-4 (N.D. Okla. Aug. 21, 2000).

106. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 680 (1986).

injunction after his e-mail was printed and distributed by another student.[107] His e-mail included a top-ten list that ridiculed the alleged sexual inadequacies of an overweight physical education teacher.[108] Several days passed before the administration became aware of the top-ten list, and at least one week passed before educators took any action.[109] No evidence was presented at trial that teachers were incapable of teaching or controlling their classes because of the student's comments; hence, the administration failed to show a "substantial disruption" in school activities.[110]

4. JOURNALS, PLAYS, AND STORIES

Following Columbine, in May 1999 the Nevada legislature enacted a statewide zero-tolerance policy for any student labeled "a habitual disciplinary problem" for threatening behavior.[111] The policy mandated that the student *must* be expelled immediately from school for at least one semester with apparently no indication of mitigating or aggravating circumstances.[112] In 2001, a Nevada student wrote a play about a student who shoots other students who are late or disobedient.[113] During strict enforcement of the zero-tolerance statute, the sixteen-year-old girl "cried as a school administrator tore personal notes—evidence—from her journal."[114] "Short of the ability to read minds, I don't know how one could come closer to punishing thought than convicting a man as a felon for the contents of his private diary," notes Raymond Vasvari, legal director of the ACLU of Ohio.[115] Another Nevada girl was given a ten-day suspension in 2001 for compiling a list of classmates with whom she was "frustrated."[116] "There was no overt threat, no hint of violence and

---

107. *PA High School Pays $60,000 to Student Who Was Punished for Private Internet Message, at* http://www.aclu.org/StudentsRights/StudentsRightslist.cfm?c=159 (Nov. 18, 2002).

108. *Id.*

109. *Id.*

110. Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446 (W.D. Pa. 2001).

111. *In the Crosshairs: Killing Creativity in the Clark County School District*, LAS VEGAS WKLY., May 17, 2001, at 7, *available at* http://www.lasvegasweekly.com/2001/features/05_17_killingcreativity/killing.html (last visited Nov. 27, 2003) [hereinafter *Crosshairs*].

112. *Id.* According to Bradley Waldron, the head of the Nevada school district's Pupil Personnel Services, Nevada's zero-tolerance law more than doubled the number of students being expelled compared to the prior year before the law. *Id.*

113. *Id.* at 4. The lead character also had the same name as the student author. *Id.*

114. *Id.* at 1. Police also searched her locker. *Id.*

115. Brendan I. Koerner, *The New Thought Police Don't Care What You Do—Only What You Imagine: Crime Out of Mind*, THE VILLAGE VOICE, *at* http://www.villagevoice.com/issues/0135/koerner.php (Sept. 4, 2001).

116. *Short Take: More Schoolyard Follies, at* http://www.civilliberty.about.com/library/briefs/b1032801.htm (Mar. 28, 2001).

no suggestion that the girl was about to go off the deep end."[117] Nonetheless, sheriff deputies were also called to investigate.[118]

An eleventh-grade, A-student in Rhode Island was suspended for over a month, without notice or hearing, based solely on the content of an extra-credit journal writing assignment for his English honors class.[119] "Although he has never exhibited any signs of violent behavior and has no criminal or juvenile record, school officials are barring him from returning until he has a psychological evaluation."[120] He was instructed to engage in a 'free write' or stream-of-consciousness exercise.[121] The teacher then handed the work over to the school psychologist and a social worker that concluded that there were "suicidal, homicidal, mood concerns, non-bizarre delusions of grandeur and narcissistic themes included in the exposition" and "significant distress and impairment in the academic setting."[122]

B. ARTISTIC EXPRESSIONS

Written art and figurative art share a close relationship. In the *D.G. and C.G. ex rel. M.G.* case, educators also found a drawing of the teacher hanging from a gallows.[123] The student who drew the concrete poem written in spirals was considered by her art teacher "an accomplished art student;" the teacher encouraged her artistic expression and defined it as "compulsive and repetitive art."[124] He noted that, "Ms. Boman had previously done somewhat comparable work for art class, and had used the concept of 'derangement' in her artwork before."[125]

In another case, an eighth-grader who was thrown out of class was asked by another teacher to draw a picture about how he was feeling.[126] He drew a picture of the school and the superintendent surrounded by explosives.[127] When asked if he planned on carrying out what he drew,

---

117. *Id.*

118. *Id.*

119. *ACLU Challenges Suspension of Student in Latest Example of "Post Columbine Hysteria," at* http://www.angelfire.com/scifi/dreamweaver/bannedbks/censoraclu.html (Nov. 21, 2000). *See also, Rhode Island School District Reinstates Student Suspended for English Composition, at* http://www.angelfire.com/scifi/dreamweaver/bannedbks/censoraclu.html (Dec. 5, 2000).

120. *Id.*

121. *Id.*

122. *Id.*

123. D.G. & C.G. ex rel. M.G. v. Indep. Sch. Dist. No. 11 of Tulsa County Okla., No. 00-C-0614-E, 2000 U.S. Dist. Lexis 12197, *3-4 (N.D. Okla. Aug. 21, 2000). The gallows resembled a game of hangman. This graphic was allegedly drawn by the other student plaintiff in the case. *Id.*

125. Boman v. Bluestem Unified Sch. Dist. No. 205, No. 00-1034-WEB, 2000 U.S. Dist. Lexis 5389, *4-6 (Kan. Dist. Ct. Jan. 28, 2000). The art teacher said, "[She] openly made the poster in tutorial class and made no effort to hide it . . . ." *Id.*

125. *Id.* (expressing the issue of teachers inducing students who then get into trouble for doing what they have been taught).

126. Demers v. Leominster Sch. Dep't, 96 F. Supp. 2d 55, 56 (Mass. Dist. Ct. 2000).

127. *Id.*

he said no.[128] Nonetheless, the principal suspended the student, and the school board subsequently expelled him because he refused to see a psychiatrist.[129] Prior to the expulsion, the school administration had not analyzed [the student's] intent or ability to carry out the act depicted in his artwork *i.e.*, whether or not he was a "true threat."[130]

In *Commonwealth v. Milo* a student drew a picture depicting him shooting his teacher.[131] After that picture was taken away from him, he drew a second picture of him pointing a gun at his teacher.[132] The court decided that because the student had the intention and the ability[133] to commit such a crime and communicated the threat to his teacher, the teacher's fear was deemed reasonable and justifiable.[134] The case includes a two-page list of examples across the United States where students actually harmed people (ending with Columbine).[135] Although there was no evidence that Milo owned any firearms, the court ruled that he had the ability to do bodily harm.[136]

Attempts to discipline students for violent or sexual expression also occur beyond high school education.[137] Famously, in 1973 the Supreme Court ruled that a state university's expulsion of a student because of disapproved content of a newspaper, which the student distributed on campus, could not be justified as nondiscriminatory application of reasonable rules governing conduct.[138] At issue in *Papish* was a political cartoon depicting policemen raping the Statue of Liberty and the Goddess of Justice.[139]

C. VERBAL EXPRESSIONS AND MANDATORY SPEECH

Beyond *Bethel*, a paucity of published case law exists concerning punishment of verbally expressive students. This is possibly due to the dearth of physical evidence and/or court challenges. Nonetheless, the American Civil Liberties Union (ACLU) and Student Press Law Center

128. *Id.*
129. *Id.* at 57; *see infra* Part IV.
130. *Id.* at 56-57.
131. Commonwealth v. Milo, 740 N.E.2d 967 (Mass. 2001).
132. *Id.* at 969.
133. *Id.* at 973-74. *Contra* D.A.R.E., *Study Finds Fewer Guns in U.S. Schools, at* http://www.dare.com/NewsRoom/StoryPage.asp (Apr. 2003).
134. *Id.* at 969-74.
135. *Id.*
136. *Id.*
137. *See* Papish v. Bd. of Curators of the Univ. of Mo., 410 U.S. 667 (1973); Healy v. James, 408 U.S. 169 (1972); *Regression, supra* note 71 ("In a move affecting Penn State University, an anti-harassment policy was created, which bans speech that is offensive or belittling to an individual. Students who make comments of a negative nature about a person's sexual orientation risk expulsion from school, without regard for moral convictions that may motivate discussion."). *See also infra* notes 140, 150, 182 & 240.
138. *Papish*, 410 U.S. at 671.
139. *Id.* at 667-70. The drawing and its caption, "Up Against the Wall, M-----F-----," were deemed "not constitutionally obscene or otherwise unprotected." *Id.*

(SPLC) have documented some post-Columbine over-reactions to speech. For instance, a Louisiana middle school student spent more than two weeks in a juvenile detention center for saying, while in his school lunch line, "If you take all the potatoes, I'm gonna get you."[140] Also, a Massachusetts student was questioned by police and indefinitely suspended when "he said that a certain boy was 'on his list.'"[141] The student had not meant 'hit list,' but didn't want to say 'shit list' with a teacher within earshot."[142]

In St. Louis, school officials pulled the 1960s Jefferson Airplane hit "White Rabbit" from the marching band's half-time routine because the song's lyrics referred to drugs, even though the song wasn't being sung.[143] Yet, perhaps the most bizarre case of free expression concerns a fifteen-year-old Oklahoma City student who was suspended for fifteen days for allegedly casting a magic spell that caused a teacher to become sick.[144] "The suit also charged the Tulsa-area Union Public Schools with repeatedly violating [Brandi] Blackbear's civil rights by seizing notebooks she used to write horror stories and barring her from drawing or wearing signs of the pagan religion Wicca."[145]

In 2001, the Oregon Legislature passed "The Bully Bill," requiring that each school district adopt a policy against bullying and harassment.[146] The Bully Bill regulation prohibits expression that, among other things, "knowingly places a student in reasonable fear" of harm, or creating a "hostile educational environment."[147]

Also in 2001, a teacher overheard a Michigan high school student reading a sarcastic commentary on the school tardiness policy to his peers in the cafeteria.[148] The commentary inferred that the principal was a "skank" and "tramp" who divorced her husband after having an affair with another principal.[149] The Student Code of Conduct required mandatory punishment of suspension for violating the "Verbal Assault

---

140. *Safety in Schools*, *supra* note 12.

141. *Id.* ("The same teacher started disciplinary action when he was later overheard saying, 'maybe everyone should wear a trench coat.'").

142. *Id.* In trying to avoid a vulgarity, the student was disciplined for what was taken to be a violent remark.

143. *Tough Times*, *supra* note 81.

144. Ben Fenwick, Reuters, *School Suspends Girl for Casting Spell*, *at* http://www.angelfire.com/scifi/dreamweaver/bannedbks/censoraclu.html (Oct. 2000).

145. *Id.*

146. 339 OR. REV. STAT. § 250 (2001).

147. Snook, *supra* note 71.

148. Student Press Law Center, *supra* note 70.

149. Several cases, such as this one, concern both sexual and violent interpretations. *E.g.*, Papish v. Bd. of Curators of the Univ. of Mo., 410 U.S. 667 (1973); Hinze v. The Superior Ct. of Marin County, Tamalpais Union High Sch. Dist., 119 Cal. App. 3d 1005 (Cal. Ct. App. 1981).

Policy."[150] The Nevada student who wrote the violence-centered play in her journal read her play aloud to her creative writing class.[151]

To contrast, delivering speech with sexual innuendoes to an entire student body in 1988 results in a suspension for three days (*Bethel*); whereas, reading a violent story to a creative writing class in 2001 may result in mandatory suspension or expulsion.[152]

An intriguing flipside of free speech concerns educators and legislators who *demand* that students execute particular expressions. Of course, most students are required to present oral reports while in school and to repeat the Pledge of Allegiance daily; however, a Wisconsin bill recently required all public and charter school pupils to address employees with the term "Sir," "Ma'am," "Mr.," "Mrs.," or "Ms." as appropriate.[153] Discipline included community service, but not suspension or expulsion.[154] Also in Wisconsin, educators excluded a boy from participating in school activities because of his allegiance to the Green Bay Packers football team.[155] "This case is about a young boy who did not want to conform to the school's mandate that he be a Viking's fan," said Chuck Samuelson, Minnesota's ACLU Executive Director.[156]

D. GESTURAL EXPRESSIONS

1. "FINGER POINTING"

Recently, seven Colorado fourth-graders were suspended for pointing their fingers at each other while playing a game of army-and-aliens on the playground.[157] The school is located about 20 miles from Columbine.[158] The principal defended, "'No tolerance' means more than just a warning, because that would mean tolerance."[159] In 2001, an eight-year-old boy in Arkansas was suspended for three days after pointing a "chicken finger" at a teacher and saying, "Pow, pow, pow."[160] The town

150. Student Press Law Center, *supra* note 70. The administration said that the student's ten-day suspension was reduced to eight days after the student agreed to undergo a "voluntary" psychological screening. *Id.*

151. *Crosshairs*, *supra* note 111.

152. *Id.*

153 *Wisconsin Assembly Bill Forces Students to Say "Sir" and "Ma'am" in School, at* http://www.aclu-wi-org/youth/issues/issues.html (last visited Feb. 11, 2003).

154. *Id.*

155. *In Football Controversy, ACLU of MN Sues School District on Behalf of 10-Year-Old Packers Fan, at* http://www.angelfire.com/scifi/dreamweaver/bannedbks/censoraclu.html (Dec. 15, 2000).

156. *Id.*

157. *Toll on Pupils*, *supra* note 52. The boys "pointed fingers at each other to simulate guns but stayed in a remote part of the playground away from other children . . . .". *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

where this took place was Jonesboro, site of a 1998 school shooting that left two dead.[161] Magazines as mainstream as *Woman's Day* have come out in support of a rational solution to allow children to freely express themselves in traditional ways. Their article *Remember Recess?* promotes the website of the American Association for the Child's Right to Play[162] and disparages, "In New Jersey, four kindergartners were suspended for using their fingers as guns. At other schools, musical chairs and duck-duck-goose have been outlawed. Free play is often replaced by organized games."[163] A year later, also in New Jersey, two second graders playing cops-and-robbers were charged with making terrorist threats.[164] "Where recess isn't being eliminated or reduced, it's being commandeered by nervous grownups. In California and Maryland, some elementary schools have banned tag," because it could damage the self esteem of slower kids and cause "unwanted touching."[165]

2. SYMBOLIC OBJECTS

In 1999, a Virginia boy was expelled for waving a stapler on the school bus as if it were a gun and pointing it at the driver.[166] Also in 1999, a seven-year-old girl from Ohio was expelled for carrying a cap gun onto a school bus.[167] In 2001 in New Jersey, an eight-year-old pointed paper folded like a gun at his classmates and said, "I'm going to kill you all."[168] The student claims he was playing "cops-and-robbers;" however, the police charged him with making terroristic threats.[169] "An agreement between county education and law enforcement officials requires schools to immediately notify police when a student is believed to have made a threat."[170] The boy's father summarized, "We're talking about an eight-year-old with a piece of notebook paper."[171] Similarly, in 2000, a Nevada middle-school student was given ten days suspension after two paper guns fell out of his backpack.[172] Although the child had never been in trouble before, the teacher picked up the paper and called a security guard to escort him to the school office.[173] "[The] school system policy on devices that look like guns gives examples such as a cap pistol

161. *Id.*
162. Paula Spencer, *Remember Recess?* WOMAN'S DAY, Mar. 4, 2003, at 184, *available at* http://www.ipausa.org/recess_promotion.htm.
163. *Id.* at 184.
164. *Toll on Pupils*, *supra* note 52.
165. Spencer, *supra* note 162, at 184.
166. Gannett News Service, *When Does School Safety Become Oppression?*, *at* http://www.nospank.net/n-e64.htm (June 12, 1999).
167. *Id.*
168. *Paper Gun*, *supra* note 68.
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Paper Gun*, *supra* note 68.

or water pistol. The length of the penalty for possessing look-alike guns can vary."[174]

These students held symbolic objects; they did not possess actual weaponry or intend to inflict actual harm. In protest to such zero-tolerance for Second Amendment rights,[175] the Manhattan Libertarian Party recently organized a "Guns for Tots" drive, whereby they distributed water pistols and cap guns at P.S. 72 in Harlem.[176] Nonetheless, "any toy gun not made of transparent or white plastic is already illegal in the Big Apple."[177]

E. FASHION-RELATED EXPRESSIONS

1. "BAND" T-SHIRTS

Although Tinker's armband was available for all to see, Tinker was not disturbing the peace with any additional actions.[178] Similarly, Cohen did not call attention to the jacket he wore in the courthouse or make any other "loud or unusual" actions.[179] A later California case definitively mirrors *Cohen* in all but the setting in which the same "Fuck the Draft" slogan was worn;[180] this *Hinze* court emphasized that "First Amendment rights must always be applied 'in light of the special characteristics of the . . . environment' in the particular case."[181] In other words, courthouses are not schoolhouses. Since school restrictions on vulgarity are "reasonable," the student's right to free speech was not violated by ordering him not to display profanity throughout the school day.[182] Perhaps educators and courts need to distinguish between vulgarity and sexuality.

Only two years after *Tinker*, administrative action to make students take off black berets was upheld because, in addition to wearing berets, the students were shouting and acting disrespectfully in the halls while other classes were in session, and it was determined that this behavior "materially disrupts."[183] Among the other disruptive behaviors, the students shouted, "Chicano Power," tried to induce other students to

---

174. *Id.*

175. LIBERTARIAN PARTY NEWS, *New York 'Guns for Tots' Effort Attracts Attention*, Mar. 2003, at 3. New York City Council members have proposed a bill that would make it illegal to sell or possess any toy gun in the city. *Id.*

176. *Id.*

177. Charlton Heston, *President's Column*, AMERICA'S FIRST FREEDOM, Apr. 2003, at 12.

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

179. Cohen v. California, 403 U.S. 15, 17 (1971).

180. Hinze v. The Superior Ct. of Marin County, Tamalpais Union High Sch. Dist., 119 Cal. App. 3d 1005 (Cal. Ct. App. 1981).

181. Healy v. James, 408 U.S. 169, 180 (1972) (quoting *Tinker*, 393 U.S. at 506).

182. *Hinze*, 119 Cal. App. 3d at 1005.

183. Hernandez v. Sch. Dist. No. One, Denver, Colorado, 315 F. Supp. 289, 292 (D. Colo. 1970) (citing *Tinker*, 393 U.S. at 513).

leave classrooms, and told students who were talking to a teacher, "Don't listen to that old bag—the berets will take care of her."[184] The black berets, in a sense, became a gang symbol. Twenty-seven years later, however, the Eighth Circuit ruled that a school rule requiring a girl to remove a tattoo believed to be a gang symbol should be voided for vagueness.[185] Apparently some lines are being drawn, although no definitive court ruling on symbolic violence exists.

Coming full circle from 1969's *Tinker* era, early in 2003, a Dearborn Heights, Michigan, high school student was forced to remove his anti-war t-shirt that showed a picture of President Bush and the words "International Terrorist."[186] The Vice Principal allegedly told the student that he could not wear a shirt that promotes terrorism.[187] Also, in 2002, a Bensonhurst, New York, student was "taken from class in November, searched and told that she could not wear a T-shirt and pin that showed the Palestinian flag or display pro-Palestinian stickers."[188] Shirts displaying Confederate flags and redneck jokes were at issue in New Jersey in 2002. The dress code in question prohibited speech that "creates ill will;" the New Jersey Supreme Court decided this definition was substantially overbroad.[189] The court held "[w]hen a symbol is actually displayed and actually causes ill will, it does not necessarily follow that substantial disruption will result."[190]

Regarding sexual innuendo, in 1994, the judiciary denied students' request to enjoin a school board and superintendent from prohibiting t-shirts that advertised: "Button Your Fly," "Co-ed Naked Band: Do It To The Rhythm," "Drugs Suck," and "See Dick Drink. See Dick Drive. See Dick Die. Don't Be A Dick."[191] T-shirts advertising rock bands have also come under fire.[192] Interestingly, in 2000, the Superior Court of Connecticut did not find a significant safety rationale or "rational relationship to achievement of a legitimate state purpose" for prohibiting students from wearing baggy pants; nonetheless, schools are generally allowed to enforce dress codes banning what educators believe to be vulgar or disruptive outfits.[193] However, this is up to the discretion of

184. *Id.*

185. Stephenson v. Davenport Cmty. Sch. Dist., 110 F.3d 1303, 1305 (8th Cir. 1997).

186. Tamar Lewin, *High School Tells Student To Remove Antiwar Shirt*, N.Y. TIMES, Feb. 26, 2003, at A12.

187. *Id.*

188. *Id.* The school later reversed its decision. *Id.*

189. Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 264-69 (3d Cir. 2002).

190. *Id.*

191. Pyle v. S. Hadley Sch. Comm., 861 F. Supp. 157 (Mass. Dist. Ct. 1994).

192. *Tough Times*, *supra* note 81 ("[A Rhode Island] high school student has decided to go to court after he was suspended twice for wearing a White Zombie rock group t-shirt."); *see also* http://www.freedomforum.org/religion/1998/11/17rishcoolcoade.asp (last visited Feb. 11, 2003).

193. Byars et al. v. City of Waterbury et al., 795 A.2d 630, 642 (Conn. Super. Ct. 2001) (holding the issue moot, as the plaintiffs no longer attended the middle school in question); *see, e.g.*, Trevor Bothwell, *School Wars, Part 1: How Misguided Educators Have "Facilitated" Today's Educational Woes, at* http://www.therightreport.com/articles/InMyOpinion/38.htm (last visited Dec. 4, 2003).

educators.[194] The California Education Law Report's *School Uniform Guidelines* states:

> A uniform policy may not prohibit students from wearing buttons that support political candidates, so long as they do not interfere with discipline or the rights of others. A uniform policy may prohibit items that 'undermine the integrity of the uniform.' This would include a sweatshirt that has a political message on it that also covers or replaces the type of shirt required by the uniform policy. Schools should not impose a form of expression on students by requiring them to wear uniforms bearing a substantive message, such as a political message.[195]

Sometimes educators initiate the more offensive behavior. At San Diego's Rancho Bernardo High School parents called for the resignation of Principal Rita Wilson after she allegedly lifted girls' skirts in front of other students at a high school dance to determine whether the girls were wearing thong underwear.[196] She asked them, "What kind of underwear do you have on?"[197] Students who said they were wearing thongs were told to go home and put on appropriate underwear.[198]

In *Guzick v. Drebus*, another federal circuit court ruled that because of the school's particular history of disturbances, the certainty of disruption was deemed high enough to ban students' anti-war buttons.[199] However, two decades later in *Chandler v. McMinnville School District*, a federal circuit court decided that students were allowed to wear buttons proclaiming that replacement teachers were "scabs."[200] The court compared the situation more in line with *Tinker* and political free speech than with *Bethel* and offensive language.[201] The school board was unable to show or forecast with certainty any material or substantial disruption that the buttons caused or would cause.[202]

---

194. See *supra* Part IV for analysis of this issue.

195. The California Education Law Report, *School Uniform Guidelines*, *at* http://www.mcn.org/a/celr/Articles2.html (Sept. 1996).

196. Eleanor Yang, *Rancho Bernardo High Official Suspended Over Underwear Inspection*, SAN DIEGO UNION-TRIB., May 1, 2002, at B1, *available at* http://www.sigonsandiego.com/news/northcounty/20020501--n75890.html.

197. *Id.*

198. *Id.*

199. Guzick v. Drebus, 431 F.2d 594, 598-600 (6th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971).

200. Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 530 (9th Cir. 1992).

201. *Id.* at 529.

202. *Id.* at 530.

2. HAIR

Throughout the late 1960s and early 1970s, several differing cases debated the appropriateness of disciplining for unsociable hair length.[203] In 1972, the Alaskan Supreme Court decided that "students attending public educational institutions in Alaska possess a constitutional right to wear their hair in accordance with their personal tastes."[204] However, Arkansas, Texas, Maine, and other courts decided that a dress code that incorporates hair length is not "so arbitrary and unjustified as to constitute a significant encroachment upon personal liberties" if it can meet its burden of showing a compelling justification for the reasonable dress code, which was to avoid disturbance and disruption of the educational process.[205]

Soon after Columbine, a Virginia student was dropped from his high school rolls because of his blue-dyed hair.[206] Symbolic styles of expressions (such as hair, sex, or guns) fluctuate according to their social acceptability. Reaction to the AIDS epidemic eased classroom discussions of sexual promiscuity, whereas current events such as Columbine have created an awareness (and unacceptability) of what had not previously been at the forefront of public consciousness—proliferation and/or misuse of firearms.

III. COLLATERAL CONSEQUENCES OF ZERO-TOLERANCE DISCIPLINING OF SYMBOLIC EXPRESSION

Zero-tolerance laws encourage a wasteful use of taxpayer money. As an article in the *Washington Post* concluded:

> Nationwide, 41 percent of elementary school principals reported less-serious violent and nonviolent crimes to police during the 1996-97 school year . . . A growing number of law enforcement officers refer those cases to the courts. The

---

203. *See, e.g.*, Crews v. Cloncs, 303 F. Supp. 1370 (S.D. Ind. 1969); Akin v. Bd. of Educ. of Riverside Unified Sch. Dist., 262 Cal. App. 2d 161 (Cal. Ct. App. 1968); Davis v. Firment, 408 F.2d 1085 (5th Cir. 1969); Leonard v. Sch. Comm. of Attleboro, 212 N.E.2d 468 (Mass. 1965) (finding justification for hair regulations and holding them valid). Richards v. Thurston, 304 F. Supp. 449 (D. Mass. 1969), *aff'd*, 424 F.2d 1281 (1st Cir. 1970); Zachry v. Brown, 299 F. Supp. 1360 (S.D. Ala. 1967) (finding no rational basis for hair regulations).

204. Breese v. Smith, 501 P.2d 159, 168 (Alaska 1972).

205. Carter v. Hodges, 317 F. Supp. 89, 94 (W.D. Ark. 1970) (noting that a student was disciplined for "'Beatle' type hair over his ears"); Ferrell v. Dallas Ind. Sch. Dist., 392 F.2d 697, 702-04 (5th Cir. 1968) (holding that long hair on boys caused disruptions and conduct problems within the school; no violation of due process because the state could circumscribe students' free speech rights where it had a compelling interest in maintaining effective public schools); *see also*, Farrell v. Smith, 310 F. Supp. 732, 738-39 (S.D. Me. 1970) (holding that a vocational school may discipline students for facial hair).

206. Gannett News Service, *When Does School Safety Become Oppression?*, *at* http://www.nospank.net/n-e64.htm (June 12, 1999) ("According to the school board president, officials had to draw the line somewhere.").

> most recent FBI statistics show a 33 percent jump in court referrals for children under the age of 13 between 1988 and 1997 . . . Most of these cases involve minor crimes such as theft . . . 'Violence in schools is rare.'[207]

Clogging the court system (and police departments) with frivolous, baseless, time-consuming, or unnecessary actions is just one collateral consequence of strictly disciplining student expression. Other collateral consequences of zero-tolerance disciplining are less documented by the courts, which seem to be more concerned with immediate legal issues than with collateral issues. Nonetheless, some collateral consequences of zero-tolerance rules readily present themselves.

A. ACADEMIC DISHONESTY

Zero-tolerance disciplining of what would otherwise be considered legal free expression outside the school environment prohibits realism and accurate open discussions and/or presentations. These policies are particularly hurtful in the areas of social studies, science, health, art, and language arts classes where words and the effects of violence and prejudice are more likely to be examined. For instance, Colorado school officials pulled from public view a third grader's science project, which presented Barbie dolls of differing ethnicities in an attempt to determine whether skin color influences people's perception of prettiness.[208] Educators should encourage acceptance of alternative opinions and discussions. However, some educators are punishing students who express personal knowledge or beliefs.

Schools regularly teach sex education, but, rarely teach gun safety. PAX promotes an ASK campaign of "[a]sking your neighbor if they have a gun before sending your kids over to play."[209] Avoidance seems to be a favored approach to teaching firearm safety by many educators.[210] This probably works just as well as teaching abstinence in the hopes of discouraging sex. The National Rifle Association offers a little-known—compared to programs such as D.A.R.E.[211]—Eddie Eagle Program to educate children under twelve about firearms.[212] Eddie Eagle's main

---

207. *Paper Gun, supra* note 68.

208. *Regression, supra* note 71. *See also ACLU of Colorado Challenges School Censorship of 8-Year-Old's Science Project on Racism, at* http://www.angelfire.com/scifi/dreamweaver/bannedks/censoraclu.html (Feb. 28, 2001).

209. PAX: Real Solutions to Gun Violence, *at* http://askingsaveskids.com/ASK.html (last visited Nov. 27, 2003).

210. *Id.*

211. D.A.R.E. (Drug Abuse Resistance Education) *at* http://www.dare.com (last visited Nov. 29, 2003).

212. Eddie Eagle, *at* http://nrahq.org/safety/eddie/whyteach.asp (last visited Nov. 29, 2003).

message is: "If you see a gun: STOP! Don't touch. Leave the area. Tell an adult."[213] "A well-regulated militia"[214] would certainly require citizens to have a basic knowledge of and exposure to firearms and defense; yet such skills and information are rarely, if ever, taught at the secondary school, preparatory level.

1. BANNED BOOKS

The list of violence portrayed in literature is endless and, hence, could be the list of banned literature. A few poignant examples relate the collateral issue of how books are essentially banned when free expression is limited. In Harper Lee's *To Kill a Mockingbird*, lawyer Atticus Finch uses a gun to kill a rabid dog. However, without open analysis of *Mockingbird*, students may no longer be afforded an opportunity to discuss both moral and immoral uses of weapons.[215] The topic of euthanasia may be curtailed without open analysis of the final scene in *Of Mice and Men*.[216] Would the guided study of any Shakespearean play be even half as intriguing (or even achievable) after bowdlerizing[217] swords, knives, acts of violence, and sexual intrigue?

2. BANNED WORDS

It seems logical that we should let students express their violent or sexual thoughts through nonviolent or nonsexual outlets rather than bottle such emotions.[218] Students deserve an outlet to let their opinions be heard. When school newspapers are stringently censored, students feel that they have no voice and that their opinions are not valid.

Extreme political correctness is not purely a problem of the United States. In 2003, officials at Lombardi Public Schools in Ontario, Canada, banned the word "gun"[219] from a first grade spelling list after a parent complained.[220] Many educators are acting on a presumed content standard that gun equals bad. However, a gun could represent: defense,

---

213. *Id.*

214. U.S. CONST. amend II.

215. HARPER LEE, TO KILL A MOCKINGBIRD (1960).

216. JOHN STEINBECK, OF MICE AND MEN (1937).

217. RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, 2ND ED. (1987). The term derives from Thomas Bowdler (1754-1825), who edited a bland, expurgated edition of Shakespeare.

218. Spencer, *supra* note 162, at 184.

219. The new "bad words" are weapons. *Contra* George Carlin's *Seven Words You Can't Say on Television* (*Pacifica* case) wherein all of the banned words were body parts or bodily functions. *See also supra* note 93.

220. Mark Chesnut et al. eds., AMERICA'S FIRST FREEDOM, Apr. 2003, at 18 ("Everyone knows that when the word 'gun' is outlawed, only outlaws will know how to spell 'gun.'").

freedom, history, sport, technology, sexual potency, James Bond,[221] happiness[222]— basically anything.

3. HISTORICAL INACCURACIES

In *Brown v. Board of Education*, Justice Warren reiterates that segregation is an attempt to ignore (instead of confront) the reality that blacks with equal rights exist in society.[223] Inclusion of blacks into our school systems forced the public to face the reality that blacks are citizens with equal rights. Inclusion of free expression regarding "hot" topics in our society forces school systems to focus on (and, hopefully, find solutions for) social ills. A more rational approach would be for schools to encourage acceptance and review of differing opinions.

Violence *is* a part of our world; to sidestep its existence is ignorance. Instead, we should confront and learn from history, as a New Jersey judge recently exemplified when he sentenced men who cut a swastika into a cornfield to "complete written reports of at least 500 words on the movies *Schindler's List*[224] and *Ghandi*[225] and essays of at least 1,000 words on the books *Roots* and *Native Son*."[226, 227] These films and books would not have the same impact if the dramatized violence was expurgated.

When students cannot draw references to actual history and current events and teachers cannot teach them,[228] then truth is collaterally damaged and ultimately students experience an education of falsehoods through omissions and avoidance.[229]

---

221. James Bond, 007, is highly associated with the silhouette of his Walther PPK.

222. THE BEATLES, *Happiness Is a Warm Gun*, *on* THE WHITE ALBUM (Apple Music Publishing Co., Inc. EMI Records 1968).

223. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

224. *Schindler's List* retells the plight of Jews in Nazi Germany.

225. *Ghandi* retells the life of the civil disobedient Indian leader.

226. Both *Roots* and *Native Son* retell the plight of African Americans.

227. The Packet Group, *Swastika Vandals May Skip Jail Time, Judge Requires Essays on Racism*, *at* http://www.pacpubserver.com/new/news/12-24-99/swastika.html (Dec. 24, 1999).

228. Of course, the flipside to this issue is limiting teacher expression. *See* the famous *John Thomas Scopes v. State*, 154 Tenn. 105, 289 S.W. 363 (Tenn. 1926), wherein the defendant was charged with teaching the theory of evolution in the public schools in violation of the Tennessee Anti-evolution Act.

229. Stacy Teicher, *School Democracy Snapshot*, CHRISTIAN SCIENCE MONITOR, Mar. 27, 2001, *at* http://www.csmonitor.com/durable/2001/03/27/fp15s2%2Dcsm.shtml. ("Fewer than a third [of polled public school teachers and administrators] said students at public high schools should be allowed to report on controversial issues without authorities' 'approval.'"); *see also* Stacy Teicher, *Short Take: More Schoolyard Follies*, *at* http://civilliberty.about.com/library/briefs/b1032801.htm (Mar. 28, 2001).

B. ARTISTIC SUFFOCATIONS

Zero-tolerance discipline of what would otherwise be considered legal free expression outside the school environment inhibits surrealism. It is common knowledge that art, like law, is open to interpretation.[230] Art is subject to the eye of the beholder; however, people sometimes construe art that incorporates weaponry or violence as threatening.[231] Humor, art, and other stress-relieving expressions are important parts of the human dynamic and, arguably, should be encouraged. James L. Hersen, J.D., Ph.D., believes:

> We are witnessing a slow but steady assemblage of impediments to creative expression. Ironically, some of the same people who sought to break the rules of convention in the name of freedom during the 1960s are now advocates of a contrary direction. In many of our nation's institutions of learning, emotion reigns over reason. Amidst this confusion, the First Amendment is being cast off as an old relic from colonial times.[232]

As one ACLU commentator, Jon Katz, asked, "Why are schools adopting increasingly draconian measures to silence the non-normal, becoming more repressive and fearful even though violence in schools and among the young in general has been dropping sharply for years?"[233] Media coverage of school violence, however, has empirically increased.[234] Katz described school officials' post-Columbine actions as a process of "silenc[ing] the weird."[235]

C. STULTIFIED THINKING

Thoughts should, arguably, remain a private matter. However, many schools only allow expelled students to return to school after psychological examinations.[236] Beyond public political statements,[237] if

---

230. *See, e.g.*, CONSTANCE EMERSON CROOKER, THE ART OF LEGAL INTERPRETATION (1996).

231. *E.g.*, Boman v. Bluestem Unified Sch. Dist., No. 205, No. 00-1034-WEB, 2000 U.S. Dist. Lexis 5389, *1-2 (Kan. Dist. Ct. Jan. 28, 2000) (concrete poem poster); *Crosshairs*, *supra* note 111 (dramatic play).

232. *Regression*, *supra* note 71.

233. Jon Katz, *Schools' Solution to Violence: Silence the Weird*, *at* http://www.freedomforum.org/technology/1999/11/4katz.asp (Nov. 4, 1999).

234. *Id.*

235. *Id.*

236. *See, e.g.*, *Crosshairs*, *supra* note 111; Boman v. Bluestem Unified Sch. Dist. No. 205, No. 205, No. 00-1034-WEB, 2000 U.S. Dist. Lexis 5389 (Kan. Dist. Ct. Jan. 28, 2000); Demers v. Leominster Sch. Dep't, 96 F. Supp. 2d 55, 56 (Mass. Dist. Ct. 2000).

237. *ACLU of MA Sues Holliston School Officials for Punishing Students Over Protest Signs*, *at* http://www.aclu.org/StudentRights/StudentsRightslist.cfm?c=159 (May 2, 2002) (stating

it is acceptable to display an armband, a tattoo, long hair, or a lewd jacket (without additional material disruptions), what should students' rights be when no one else can view what has been written or drawn, or when students have particularly been asked to draw or write things by teachers? For instance, a Boston high school student was suspended for writing a vivid horror story, as assigned by his English teacher.[238] "[The student] was so successful in fulfilling his writing assignment that he frightened his English teacher. Instead of getting a high grade for his effort; he got suspended because the teacher [felt threatened]."[239] When it comes to school safety, we are bordering on punishing for "thought crimes."

A major goal of education is to teach people to conceptualize and problem-solve, to encourage student exploration and imagination. "By neutralizing the threat of any fact or opinion differing from the curriculum, even very intelligent students who are not exposed to the second side of the coin are molded into another piece of the unquestioning masses."[240] Perhaps the most well-known and incorporated of all educational theories is Benjamin Bloom's *Taxonomy*.[241] Bloom said that the highest level of competence is "Evaluation," wherein students appraise, debate, criticize, evaluate, editorialize, defend, or recommend.[242] These objectives cannot be achieved when thoughts and expressions are censored.

D. COLLATERAL DRAGNETTING

Perhaps the most frightening by-product of draconian rules is that it presents an excuse to dragnet beyond the students in question, thereby trampling on the rights of citizens outside of school settings. The seven Dry Creek boys who where suspended for finger pointing were also

---

that officials from Holliston High School punished a high school senior who displayed a protest sign during the school's annual talent show); *see also MA High School Settles Free Speech Case; Senior No Longer Banned from Prom and Graduation*, *at* http://www.aclu.org/StudentRights/SutdentsRightslist.cfm?c=159 (May 15, 2002). Public political statements are often at issue at the graduate school level. *See* Healy v. James, 408 U.S. 169 (1972); *ACLU Opposes Suppression of Pro-Palestinian Student Protest*, *at* http://www.aclu.org/StudentRights/StudentsRightslist.cfm?c=159 (May 7, 2002) (stating that over forty 'Students for Justice in Palestine' were arrested for holding events at UC Berkeley).

238. *ACLU Urges Boston School to Annul Suspension of Creative Student*, *at* http://legalminds.lp.findlaw.com/list/news/msg00080.html (Apr. 27, 2000); *see also supra* Part II.B.

239. *Id.*

240. Doug Matje, *Liberty Round Table Essay Contest, DLT Kudos Winners*, *at* http://www.libertyroundtable.org/essaycontest/ec5.dltkudos.html (last visited Nov. 27, 2003).

241. BENJAMIN BLOOM, TAXONOMY OF EDUCATIONAL OBJECTIVES: THE CLASSIFICATION OF EDUCATIONAL GOALS: HANDBOOK 1, COGNITIVE DOMAIN (1956). Many schools require that teachers write their lesson plans in accordance with *Bloom's Taxonomy* (common knowledge among educators).

242. *Id.* The six levels of the Taxonomy are, from lowest to highest: Knowledge, Comprehension, Application, Analysis, Synthesis, and Evaluation. *Id.*

quizzed on whether their families owned guns.[243] "That's like asking what political party your parents belong to, or how they voted, or whether they've ever had an abortion. It's none of the schools' business how parents exercise their constitutional rights."[244]

In 2002, a New Jersey middle school student drew a picture of a soldier with crosshairs and a guy fishing.[245] The teacher panicked and immediately went to a police station and filed a criminal complaint.[246] A judge issued a search warrant and the father's firearms were seized.[247] The father was an instructor of firearm safety for New Jersey Fish and Game Department.[248] Another judge eventually ruled that the warrant was in violation of the father's Fourth Amendment rights and granted a motion for the return of the property.[249] Nonetheless, financial and judiciary abuses had been inflicted on an innocent man.

Traditional childhood activities and standards are being forced to shift. Yet, "a 1997 study by the National Center for Education Statistics found that even after four years, schools with zero-tolerance policies had more incidents of violence than those without."[250] In other words, students' behaviors have generally not changed. "[Zero-tolerance] makes the administration safer—from legal action in the future. It does not make the school any safer."[251] In summary, "[z]ero tolerance takes away discretion—from the classroom to the boardroom—in determining what is best for an individual student."[252]

IV. A MORE EQUITABLE MODEL

The student nominating his candidate in *Bethel* knew his audience well; he understood what type of speech would best get his candidate elected.[253] *Bethel*'s dissents and concurrences are a good starting point for a more equitable address of questionable student expression.[254] The following three-pronged test can be gleaned from the dissenting and

---

243. *The Cutting Edge of Zero Tolerance Draconian Policies Penalize Students, Parents,* EDUC. REP.: NEWSPAPER EDUC. RTS., No. 198, July 2002, *available at* http://www.eagleforum.org/educate/2002/july02/zero-tolerance.shtml (last visited Nov. 27, 2003); *see also Toll on Pupils, supra* note 52.

244. *Toll on Pupils, supra* note 52 (quoting Dave Kopel, research director for the Independence Institute).

245. Telephone Interview with Richard Gilbert, Esq. (Mar. 27, 2003). This unpublished case is a good example of the difficulty exemplifying collateral damages.

246. *Id.* The teacher did so without first consulting administrators. *Id.*

247. *Id.*

248. *Id.*

249. *Id.* (holding no probable cause).

250. *Toll on Pupils, supra* note 52.

251. *Id.*

252. Texas Association of School Boards, Inc., *Can Our Discipline Policies Help? – Playing It Safe, at* http://www.tasb.org/policy/discipline/safety/discipline.shtml (2002).

253. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); *see also supra* notes 47 and 65 on the *Bethel* decision.

254. *Id.* at 690-96.

concurring opinions expressed in *Bethel*[255] as a possible means to judge students accused of being disruptive:

> A. Did the school provide any notice or warning that such expression could constitute a violation and what the punishment for that violation could be?
> B. Did the student believe that his or her expression would be or could be disruptive?[256]
> C. Was the student's expression disruptive?[257]

Courts should examine these issues when a student has been disciplined for disruptive behavior due to symbolic sexual or violent expression.

A. DID THE SCHOOL PROVIDE ANY NOTICE OR WARNING THAT SUCH EXPRESSION COULD CONSTITUTE A VIOLATION AND WHAT THE PUNISHMENT FOR THAT VIOLATION COULD BE?

Logically, educators want to pre-empt disruption. However, as Justice Stevens said, "If a student is to be punished for using offensive speech, he is entitled to fair notice of the scope of the prohibition and the consequences of its violation."[258] The Bethel student handbook noted: "*Disruptive Conduct.* Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language and gestures."[259] The published *Bethel* decision does not make clear whether all student nominations had to be reviewed or whether Fraser voluntarily proffered his speech for review. Fraser's punishment was three days suspension and he was blocked as a possible valedictory speech candidate.[260]

1. VAGUENESS

The *Bethel* court said that "[g]iven the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions."[261] However, the later *Killion* court refined that "the [*Bethel*]

---

255. *Id.*; *see also* Lovell v. Poway Unified Sch. Dist., 90 F.3d 367 (9th Cir. 1996); Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 264-69 (3d Cir. 2002); Saxe v. State College Area Sch. Dist., 240 F.3d 200, 215 (3d Cir. 2001); Commonwealth v. Milo, 740 N.E.2d 967 (Mass. 2001).

256. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 678 (1986).

257. *Id.* at 689.

258. *Id.* at 691.

259. Bethel Sch. Dist. No. 403 v. Fraser, 755 F.2d 1356, 1357 n.1 (9th Cir. 1985).

260. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 678, 691 (1986); *see also* notes accompanying *supra* note 46.

261. *Id.* at 676.

Court did *not* hold that school rules could be devoid of *any* detail, as here."[262] Under the "void for vagueness doctrine," a governmental regulation may be declared void if it fails to give a person adequate warning that his conduct is prohibited or if it fails to seek out adequate standards to prevent arbitrary and discriminatory enforcement.[263] School rules, like statutes, should not be "unconstitutionally" vague. As with good contracting, parties' expectations and considerations should be delineated. If schools are to prepare students for life as citizens outside schools, then school rules should mirror as closely as possible the laws of the land. School rules should avoid vagueness yet, at the same time, be comprehendible by children. Conflicts arise when districts go too far to avoid vagueness and their rules become draconian. "The problem with zero-tolerance policies is they tend to be zero-intelligence policies."[264]

2. STUDENT HANDBOOKS

Most school handbooks, it seems, err on the side of vagueness. For example, Fair Lawn High School's handbook offers this paragraph to cover disruptive behavior:

> 13. INAPPROPRIATE, OBSCENE, OR DISRUPTIVE LANGUAGE AND BEHAVIOR. Depending on the severity of the case and the circumstances involved, the penalty will be determined by the Assistant Principal. In any case inappropriate behavior or language toward a teacher, student, staff member or administrator shall result in a minimum of a one-day suspension and a required parent conference before re-entry.[265]

In other words, the administration has free will to limit whatever free expression it deems "inappropriate." The Dry Creek, Colorado, *Student Policy and Discipline Handbook* defines "violent and aggressive behavior" as "threats directed, either orally (including by telephone), by non-verbal gesture, or in writing, at an individual, his or her family or group."[266] In the case concerning the student who wrote a poem about killing her teacher, the principal told the student's father that the school had a "zero-tolerance" policy regarding threats by students; the father

---

262. Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 459 (W.D. Penn. 2001) (emphasis added) (finding "vague and overbroad" school rules).

263. Chicago v. Morales, 527 U.S. 41, 64 (1999).

264. *Crosshairs*, *supra* note 111 (quoting ACLU attorney Allen Lichtenstein).

265. FAIR LAWN SCHOOL SYSTEM, RED BOOK, *at* http://www.flhs.org/Administration/red_book.htm. (posted Aug. 2002). Many schools post their rules online and/or issue handbooks.

266. *Toll on Pupils*, *supra* note 52.

asked to see a copy of the policy that had been violated, but the principal was unable to produce such a copy.[267]

Even if school handbooks define what constitutes a threat and what violations may occur if threats are determined, the court should determine on a case-by-case basis:

1. Whether the student had been provided with a handbook.
2. Whether faculty consistently explains the handbook content to the students at appropriate comprehension levels. This includes:
   - Stressing and describing the rules (comprehension),
   - Discussing why each rule exists (rationale), and
   - Explaining the potential penalties for violations (responsibility for the consequences of their actions).
3. Whether rule boundaries were defined and examples provided.

In terms of providing notice, courts should examine what efforts have been taken to describe to students what may lead to a disruption. Ironically, under zero-tolerance rules, when the mere mention of violent acts becomes criminal, providing examples and asking questions to define what "constitutes a threat" could itself constitute disruptive behavior. For example, a student may be in violation (*i.e.*, considered threatening or disruptive) for asking "Is it okay to draw a picture of the principal with an arrow through her head?" or "May I wear a Nazi armband when I give my speech about fascism?" even when the student only wants to do what is permitted by the rules. Additionally, degrees of punishment—warnings, counseling, detention, suspension, expulsion—need to be examined on a case-by-case basis. As Nancy Murray comments, "[t]his one strike and you are out approach to education is as likely to create the bitterness and antagonism that feed violence in society as it is to make schools safer places."[268] Murray argues, "Students should be taught the value of an education, and not consigned to do without one as soon as they make a single mistake."[269] Instead, students should be taught to expect and respect fairness and equity. Of course, not all teachers approve of zero-tolerance policies. For instance, former teacher Trevor Bothwell, notes, "We are essentially seeing overcompensation for years lacking disciplinary enforcement . . . ."[270]

---

267. D.G. & C.G. ex rel. M.G. v. Indep. Sch. Dist. No. 11 of Tulsa County Okla., No. 00-C-0614-E, 2000 U.S. Dist. Lexis 12197, *5 (N.D. Okla. Aug. 21, 2000).

268. *Safety in Schools*, *supra* note 12.

269. *Id.*

270. *School Wars, Part 1: How Misguided Educators Have "Facilitated" Today's Educational Woes, at* http://www.therightreport.com/articles/InMyOpinion/38.htm (last visited Dec. 4, 2003).

3. EDUCATOR *MENS REA*

"[O]ne man's vulgarity is another's lyric."[271] Similarly, what constitutes a threat to one person may not threaten another. A purview of the cases on point reveals that school censorship cases generally fall into three categories, with some overlap. Basically, administrators and/or teachers take actions against students because of:

1. *personal hostility* towards a student's expression,
2. *fear of* public reaction towards a student's expression, and/or
3. *actual* public reaction towards a student's expression.

As with a *mens rea* element concerning students' actions, *administrators'* mindsets should be considered. Courts should, perhaps, question: Why does *this* educator want to limit or punish *this* student's expression? What is the nature of the threat and to whom is it directed? The Third Circuit Court suggests:

> There might be instances in which *R.A.V.*[272] would require finding unconstitutional a school policy in a case governed by *Tinker*. Presumably a school cannot distinguish between subclasses of disruptive speech on any basis it chooses. Where such a distinction is made on no legitimate basis at all, it might be possible to conclude the subcategory of disruptive speech had been singled out simply because the school officials disfavored the views expressed.[273]

Many of the cases mentioned in Part II. SURVEY OF "DISRUPTIVE" EXPRESSIONS concerned students who were punished for mocking particular teachers or administrators.[274] Administrators should be required to defend the type and level of threat (to school safety or disruption) that was apparent; this may limit administrators from arbitrarily censoring students based solely on personal hostility towards a topic or unsubstantiated fears. The *Lovell* case emphasized reasonableness.[275]

Public reactions and what may lead to disruptions are difficult for adults to gauge. To what extent can this be clarified to minors so that it

---

271. Cohen v. California, 403 U.S. 15, 25 (1971) (Harlan, J.).

272. R.A.V. v. City of St. Paul, Minn., 505 U.S. 377 (1992) (regarding the legality of burning crosses).

273. Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 268 n.27 (3d Cir. 2002).

274. *See generally* D.G. & C.G. ex rel. M.G. v. Indep. Sch. Dist. No. 11 of Tulsa County Okla., No. 00-C-0614-E, 2000 U.S. Dist. Lexis 12197, *3-4 (N.D. Okla. Aug. 21, 2000); Boman v. Bluestem Unified Sch. Dist. No. 205, No. 00-1034-WEB, 2000 U.S. Dist. Lexis 5389 (Kan. Dist. Ct. Jan. 28, 2000); Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 526 (9th Cir. 1992).

275. Lovell v. Poway Unified Sch. Dist., 90 F.3d 367 (9th Cir. 1996).

is not vague? To what extent, if any, should we hold children accountable for possibly disruptive, yet nonviolent, expressions? The *Tinker* freedom is effectively obsolete when administrators are too free to base their reactions on potential reactions. "The most important factor is whether or not the armband disrupts other students. If it does, the principal has every right to throw the student out."[276] Yet, "[w]hen policies focus broadly on listeners' reactions, without providing a basis for limiting application to disruptive expression, they are likely to cover a substantial amount of protected speech."[277] In other words, "[w]e have entered the third degree where we devote our intelligence to anticipating what average opinion expects the average opinion to be."[278]

Educators need to distinguish a "disruption" from deliberately "causing a disruption." In other words, some students may be "passively disruptive." A need for discipline is obvious when there is a call for rioting or jumping up and down and throwing desks, *i.e.* "a clear and present danger." However, subtle drawings or questionable t-shirts deserve more than zero-tolerant reactions. People could look at such expressions with amusement or they could overreact. Educators must avoid causing the disruptions they fear by overreacting. At the very least, educators who over-punish are disrupting the disciplined children's educations. Some students may act in true ignorance or innocence yet still be punished under zero-tolerance policies. Gauging what another may find offensive or disruptive is, generally, impossible. To Anita Hill, genitalia references are apparently offensive.[279] To Larry Flynt,[280] apparently they are not.

In sum, "[t]he Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it."[281] Educators should be held to this higher standard when basing their discipline on fear of public reaction. Yet, educators are afforded great leniency in claiming potential for disruption and students must assert their rights through the courts if they feel unfairly censored. In other words, the current subjective system is ripe for inequity, censorship, and discrimination.

---

276. *Crosshairs*, *supra* note 111 (Len Paul, Clark County Schools Superintendent of Secondary Education).

277. *Sypniewski*, 307 F.3d at 268-69.

278. DAVID NIVEN, THE 100 SIMPLE SECRETS OF SUCCESSFUL PEOPLE 25-26 (2001) (paraphrasing John Maynard Keynes).

279. Congressional Record – Extension of Remarks, THOMAS-HILL REVISITED, 139 CONG. REC. E 1346-04 (May 25, 1993) ("[Thomas] asked, inexplicably, 'Who has put pubic hair on my Coke?'").

280. Larry Flynt is the publisher of *Hustler* Magazine.

281. Saxe v. State College Area Sch. Dist., 240 F.3d 200, 215 (3d Cir. 2001).

B. DID THE STUDENT BELIEVE THAT HIS OR HER EXPRESSION WOULD BE OR COULD BE DISRUPTIVE?

A student's *mens rea* should be considered as it would be outside the school environment. School officials need to consider whether a student believed that his or her action might be a problem. The *Milo* court encourages a two-pronged analysis: the student's present *intent* and present *ability* to act upon the threat.[282] In other words, educators should strictly penalize only if there is a likelihood of an actual harmful act, not just a symbolic act. The *Boman* court worked through four elements to test for injunctive relief which could be restated as points for educators to consider *before* disciplining:

> 1. Will the student suffer irreparable injury via the punishment?[283]
> 2. Does the threatened injury to the student outweigh whatever damage not punishing may cause the other party?
> 3. Would a less severe punishment be adverse to public interest?
> 4. Will the student most likely prevail on the merits of her claim in court?[284]

C. WAS THE STUDENT'S EXPRESSION DISRUPTIVE?

In his *Bethel* dissent, Justice Marshall noted:

> [I]n [his] view the School District failed to demonstrate that the respondent's remarks were indeed disruptive . . . I recognize that the school administration must be given wide latitude to determine what forms of conduct are inconsistent with the school's educational mission; nevertheless, where speech is involved, we may not unquestioningly accept a teacher's or administrator's assertion that certain pure speech interfered with education.[285]

In his *Bethel* concurrence, Justice Brennan "find[s] it difficult to believe" that the student's speech was "'obscene,' 'vulgar,' 'lewd,' or 'offensively lewd'" as the majority decided. However, Brennan did believe that it

---

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

283. *E.g.*, loss of potential employment or college acceptance, undue emotional or financial impact. *See* Boman v. Bluestem Unified Sch. Dist. No. 205, No. 00-1034-WEB, 2000 U.S. Dist. Lexis 5389, *8 (Kan. Dist. Ct. Jan. 28, 2000). In addition to losing days at school, Boman would have been prevented from graduating. *Id.*

284. *Id.* at *9.

285. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 690 (1986).

was, nonetheless, "not unconstitutional for school officials to conclude, under the circumstances of this case, that respondent's remarks exceeded permissible limits."[286] These two justices present logical pre-emptive queries: Was the student's expression disruptive? Did the educator's concerns to avoid disruptive behavior truly outweigh the student's First Amendment rights? Basically, the *Milo* court broadly decided that, since *some* students have found ways to obtain weapons, *every* student has the ability to do bodily harm.[287]

As can be seen in the well-known free speech cases outside of educational environments, such as *R.A.V.*[288] and *Johnson*,[289] laws must be content neutral unless there is a showing of a rationally related reason to limit speech. Within educational settings, a vague zone of disciplining exists between possibly disruptive symbolic sexual or violent expressions and actual true threats to school safety. At the very least, educators should provide written comprehendible standards and rational bases for the enforcements of such standards.

286. *Id.* at 687-88.

287. Commonwealth v. Milo, 740 N.E.2d 967, 973-74 (Mass. 2001). *Contra* D.A.R.E., *Study Finds Fewer Guns in U.S. Schools, at* http://www.dare.com/NewsRoom/StoryPage.asp (Apr. 2003).

288. R.A.V. v. City of St. Paul, Minn., 505 U.S. 377 (1992).

289. Texas v. Johnson, 491 U.S. 397 (1989) (disputing statutes outlawing desecration of American flags).