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Shannon M. McMinimee

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LAVINE V. BLAINE SCHOOL DISTRICT: FEAR SILENCES STUDENT SPEECH IN THE NINTH CIRCUIT

Shannon M. McMinimee

Abstract: In *LaVine v. Blaine School District*, the Ninth Circuit allowed a school to expel a student for writing a poem about a school shooting. The court held that the school did not violate the student's First Amendment rights because the school could reasonably forecast that the student would cause a substantial disruption or material interference with school activities. This Note argues that the *LaVine* court incorrectly applied the established standards for evaluating the constitutionality of a school's decision to expel a student. The *LaVine* court also unwisely extended the *Tinker* doctrine to a new area of student speech. In doing so, the court departed from U.S. Supreme Court and Ninth Circuit precedent and failed to provide lower courts and schools with a clear framework for evaluating student speech believed to be a threat of violence.

Recent school shootings have changed the way that school officials treat student expression. Teachers and principals are understandably alert to potential warning signs that a particular student might be capable of such violence. Many of these possible "warning signs" occur in the form of student expression. Therefore, schools are placed in the difficult position of maintaining school safety while also avoiding violations of students' First Amendment rights. Courts are also faced with the challenging task of maintaining jurisprudence that both preserves free speech protections and allows schools to protect students adequately.

Schools and courts have struggled to evaluate what constitutional protection should be given to student speech that could be interpreted as a threat of violence. The U.S. Supreme Court has articulated two doctrines under which schools can restrict student speech without violating the First Amendment. First, the Supreme Court has determined that "true threats" of violence are never given First Amendment protection.¹ The Ninth Circuit has since developed an objective test for determining when an expression is an unprotected "true threat."² Second, because students in public schools do not retain the same First Amendment rights as adults, the Supreme Court has developed the *Tinker* doctrine to determine when schools may prohibit student speech that would otherwise be protected under the First Amendment if the speech had occurred in a non-school setting.³

1. See *Watts v. United States*, 394 U.S. 705, 707 (1969).

2. See *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 372 (9th Cir. 1996).

3. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

In *LaVine v. Blaine School District*,⁴ the Ninth Circuit recently allowed a school to expel a student for writing a poem about a school shooting. Although the U.S. District Court had evaluated whether the speech was a “true threat,”⁵ the Ninth Circuit ignored the “true threat” standard. Instead, the circuit court jumped straight to the *Tinker* doctrine to evaluate the poem under the standard governing “otherwise protected” speech in the public school setting.⁶ The Ninth Circuit held that the *Tinker* doctrine permitted the school to expel the student for speech that indicated that he might pose a safety threat.⁷

This Note argues that the Ninth Circuit failed to apply the correct legal standard to decide if the school could expel the student for the possibly threatening poem and incorrectly applied its chosen standard. Part I of this Note outlines the development of the “true threat” doctrine, which permits the prohibition of threatening speech, regardless of the setting. Part II outlines the development of the *Tinker* standard for determining if a student’s otherwise constitutionally protected speech can be prohibited because it occurred in the public school setting. Part III outlines the facts, procedural history, holding, and rationale of the *LaVine* case. Part IV argues that the Ninth Circuit failed to perform the threshold determination of whether the poem could be prohibited in any setting. In doing so, the court unwisely extended the standard for prohibiting otherwise protected speech and failed to give lower courts and schools clear guidance in evaluating similar student speech. Finally, the court reached the wrong conclusion by holding that the school’s action did not violate the First Amendment.

I. TRUE THREATS OF VIOLENCE ARE NEVER AFFORDED FIRST AMENDMENT PROTECTION

The U.S. Supreme Court has held that there are certain types of speech that are never afforded First Amendment protection.⁸ In *Watts v. United States*,⁹ the Court distinguished true threats of violence from speech that

4. 257 F.3d 981 (9th Cir. 2001), *rehearing en banc denied*, 279 F.3d 719 (9th Cir. 2002).

5. See *LaVine v. Blaine Sch. Dist.*, No. C99-1074R, 2000 U.S. Dist. LEXIS 18989, at *8–9 (W.D. Wash. Feb. 24, 2000).

6. See *LaVine*, 257 F.3d at 988.

7. See *id.* at 990.

8. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (speech intending to incite or produce violence and lawless action); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 281–83 (1964) (defamatory speech); *Roth v. United States*, 354 U.S. 476, 485 (1957) (obscene speech).

9. 394 U.S. 705 (1969).

is protected by the First Amendment.¹⁰ Specifically, the Court evaluated whether the statement “[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J.”¹¹ was a true threat. Examining the context in which the statement was given and the reaction of those who heard it,¹² the Court held that the statement was a crude method of expressing political opposition but was not a true threat to the life of the President.¹³ However, the Court failed to create a clear test for evaluating what constitutes an unprotected true threat of violence.¹⁴

In 1996, the Ninth Circuit clarified what constitutes a “true threat.”¹⁵ In *Lovell v. Poway Unified School District*,¹⁶ a school counselor alleged that a student had threatened to shoot her,¹⁷ while the student claimed she used “I could just shoot someone” as a figure of speech to express her frustration.¹⁸ The *Lovell* court reasoned that, because the First Amendment does not protect threats of physical violence in any forum,¹⁹ it need not rely on the *Tinker* doctrine.²⁰ In light of the violence prevalent in schools, school officials were justified in taking student threats very seriously²¹ and could take action against “true threats.”²² The objective test for deciding whether a statement is an unprotected “true threat” is “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.”²³ An alleged threat must be considered in its entire factual context, including the surrounding events and the reactions of the listeners.²⁴

10. *Id.* at 707.

11. *Id.* at 706.

12. *Id.* at 708.

13. *Id.* at 707.

14. See *Doe v. Pulaski County Special Sch. Dist.*, 263 F.3d 833 (8th Cir. 2001), *rehearing en banc granted, opinion vacated*, 2001 U.S. App. LEXIS 23877 (8th Cir. Nov. 5, 2001). “The Supreme Court has not established a bright-line test for distinguishing a true threat from protected speech.” *Id.* at 836.

15. See *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 371–72 (9th Cir. 1996).

16. 90 F.3d 367 (9th Cir. 1996).

17. *Id.* at 372.

18. *Id.* at 368–69.

19. *Id.* at 371 (citing *Watts v. United States*, 394 U.S. 705 (1969)).

20. See *id.* at 372.

21. *Id.*

22. *Id.*

23. *Id.* (citing *United States v. Orozco-Santillan*, 903 F.2d 1262, 1265 (9th Cir. 1990)).

24. *Id.*

The *Lovell* court applied this “true threat” test to the counselor’s version of events.²⁵ The counselor alleged that the student had angrily entered her office and told her that if she refused to provide a schedule change, the student would shoot her.²⁶ Because the statement was unequivocal and specific, a reasonable person would have foreseen that the counselor would interpret the statement as a serious expression of intent to harm.²⁷ Therefore, the statement constituted a “true threat.”²⁸ The counselor’s subjective fear was part of the surrounding factual context, but a mere assertion that the listener subjectively felt threatened does not establish that the speech constituted a “true threat.”²⁹

The court explained that the “true threat” determination would have been a closer question under the student’s version of events.³⁰ The student claimed that after several frustrating hours of attempting to change her schedule she said, “I’m so angry, I could just shoot someone.”³¹ It was not as clear whether a reasonable person would interpret that statement to be a serious expression of intent to do harm because the statement did not “directly and unambiguously” threaten physical harm.³² Therefore, a direct and unambiguous threat is necessary before a statement can rise to the level of a true threat.

The Ninth Circuit recently applied its “true threat” test in *Bauer v. Sampson*.³³ While this case did not involve student speech, it further explains what expression rises to the level of a “true threat.” In *Bauer*, a college disciplined a professor who had published the following arguably threatening writings in a campus newspaper: a fantasy description of a funeral for a college trustee and the asphyxiation of the college president; illustrations showing the president beheading his enemies; an illustration

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 372–73.

30. *Id.* at 373.

31. *Id.* at 369.

32. *Id.* at 373; see also *Emmett v. Kent Sch. Dist.*, 92 F. Supp. 2d 1088, 1089 (W.D. Wash. 2000) (recognizing that schools are in a difficult position after heavily publicized school shootings, but holding that school failed to show any evidence that student’s website was intended to actually threaten anyone or that student manifested any violent tendencies). The student’s claim in *Lovell* ultimately failed because neither side could prove which statement was actually made; thus, the student did not meet her burden of proving that the school had violated her First Amendment rights. See *Lovell*, 90 F.3d at 373.

33. 261 F.3d 775 (9th Cir. 2001).

depicting three shrunken people assembling a rifle; and an illustration of a two-ton granite “shit list” dropping on the president’s head.³⁴ The college argued that these writings constituted true threats.³⁵ In addition, the college asked the court to consider other related events involving the professor.³⁶ For example, the college claimed that the professor had experienced verbal run-ins with other employees, told his supervisor that he and the president were “going down,” told a co-worker “your day has come” after the co-worker mocked a friend, and referred to minority co-workers as “the dark side.”³⁷ The college also submitted a report from a psychiatrist who believed that the professor was sufficiently disturbed to require counseling and was an increasingly ominous risk because of his unambiguously stated fantasies of revenge and destruction.³⁸ The court held that despite a turbulent campus community and the other related events involving the professor, there was “simply no way a reasonable reader would have construed the writings and illustrations to be ‘true threats.’”³⁹ Consequently, mere illustrations and fantasies are not direct and unambiguous enough to amount to true threats.

In *Doe v. Pulaski County Special School District*,⁴⁰ the Eighth Circuit applied the Ninth Circuit’s “true threat” analysis to a student’s songs that contained lyrics about the student wanting to rape and kill his former girlfriend.⁴¹ The court noted that the “true threat” doctrine, and not the *Tinker* doctrine, must govern the evaluation of the songs.⁴² The Eighth Circuit, acknowledging that the Supreme Court had not yet established a bright-line test for distinguishing a “true threat” from protected speech,⁴³ applied the Ninth Circuit’s “clearly articulated” standard for identifying a

34. *See id.* at 780.

35. *See id.* at 782-783.

36. *Id.* at 784 (noting that no allegation had been made that the professor had ever been physically abusive or violent, on or off campus).

37. *See id.*

38. *See id.* at 788 (Gould, J., concurring in part and dissenting in part).

39. *Id.* at 784.

40. 263 F.3d 833 (8th Cir. 2001), *rehearing en banc granted, opinion vacated*, 2001 U.S. App. LEXIS 23877 (8th Cir. Nov. 5, 2001). Although later vacated, this opinion is a helpful application of the “true threat” standard to student speech involving violent imagery.

41. *Id.* at 835. A third party gave one of the songs to the former girlfriend at school and school officials suspended the student for a semester for making a terroristic threat in violation of school rules. *Id.* at 835-36.

42. *See id.* at 836. The *Pulaski* court determined that if the songs did not amount to true threats, *Tinker* would not apply because the songs were personal expressions that occurred off campus. *Id.*

43. *Id.*

“true threat.”⁴⁴ Even though the songs included four threats to kill the former girlfriend by lying in wait under her bed with a knife, and three threats to rape and sodomize her,⁴⁵ the court held that the songs were protected speech.⁴⁶ The former girlfriend had no knowledge of any previous violent acts toward her or others, and the two had peacefully interacted after the breakup.⁴⁷ Therefore, under the totality of the circumstances, a reasonable person would not foresee the songs to be a serious expression of intent to harm her, but merely as the student’s artistic expression of anger and sadness over the breakup. Consequently, even explicitly threatening speech does not amount to a “true threat” without a reasonable estimation that the words carry a true intent to harm.⁴⁸

Thus, the Ninth Circuit’s “true threat” test requires a court to determine whether a reasonable person would foresee that the listener would interpret the speech as a serious expression of intent to cause harm.⁴⁹ In evaluating student speech in schools, if a court finds a student’s statement to be a “true threat” of violence, that speech is deemed unprotected and the court need not perform any additional analysis.⁵⁰ However, if student speech does not amount to a “true threat,” the *Tinker* doctrine may still allow the school to prohibit the speech because of the special nature of public schools.⁵¹

44. *Id.* at 837.

45. *Id.* at 839 (Hansen, J., dissenting).

46. *See id.* at 837.

47. *Id.* at 837–38.

48. *See id.* at 838; *see also* D.G. v. Indep. Sch. Dist. No. 11 of Tulsa County, No. 00-C-0614-E, 2000 U.S. Dist. LEXIS 12197, at *12–16 (N.D. Okla. Aug. 21, 2000) (applying the Ninth Circuit “true threat” test, and holding that student poem expressing hatred of class and expressing yearning to kill her teacher was not serious expression of intent to cause harm, but rather private way for student to address her feelings of frustration and anger); *Boman v. Bluestem Unified Sch. Dist.*, No. 00-1034-WEB, 2000 U.S. Dist. LEXIS 5389, at *10–12. (D. Kan. Jan. 28, 2000) (holding that student’s poster was not a threat, because it was not reasonable to accept that display of unsigned poster would be taken as threat by other students).

49. *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 372 (9th Cir. 1996).

50. *See id.* at 371.

51. *See infra* Part II.

II. COURTS HAVE ALLOWED SUPPRESSION OF CERTAIN OTHERWISE PROTECTED SPEECH IN THE PUBLIC SCHOOL SETTING

In *Tinker v. Des Moines Independent Community School District*,⁵² the U.S. Supreme Court announced that students in public schools retain First Amendment rights, but that those rights are necessarily limited by the special nature of the public school environment.⁵³ The *Tinker* Court set forth the general standard for determining when a school can permissibly restrict student speech that would be “otherwise protected” in any other setting.⁵⁴ If the speech at issue would be protected outside of the school setting, the *Tinker* doctrine applies.⁵⁵ The Court has since recognized two exceptions to the *Tinker* standard giving schools discretion to restrict vulgar⁵⁶ and school-sponsored speech.⁵⁷ Lower courts further developed the *Tinker* doctrine by answering some questions remaining after these cases.

A. *The U.S. Supreme Court Has Created Special Standards for Restricting Otherwise Protected Student Speech in Public Schools*

In 1969, during the height of the Vietnam War, three students questioned the constitutionality of a school policy that prohibited them from wearing armbands to protest the war.⁵⁸ The students violated the policy, were suspended from school, and filed an action against the school district for violating their First Amendment rights.⁵⁹ In *Tinker*, the U.S. Supreme Court held that students are persons under the Constitution and that they possess fundamental rights that public schools must respect.⁶⁰ Therefore, a school may suppress student expression that would otherwise be protected outside of school only if the expression would “materially and substantially” interfere “with the requirements of

52. 393 U.S. 503 (1969).

53. See *id.* at 506.

54. See *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 527–29 (9th Cir. 1992).

55. See *Tinker*, 393 U.S. at 505–06 (discussing otherwise protected nature of the armbands); *Lovell*, 90 F.3d at 371.

56. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986).

57. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

58. *Tinker*, 393 U.S. at 504.

59. See *id.*

60. *Id.* at 511.

appropriate discipline in the operation of the school” or “collid[e] with the rights of others.”⁶¹

Applying this new test to the *Tinker* facts, the Court determined that the armbands did not interrupt school activities or collide with the rights of other students.⁶² While the armbands caused discussion outside of the classroom, no interference with classes or schoolwork occurred,⁶³ nor was there disorder on the school premises.⁶⁴ The Court recognized other students’ rights “to be secure and let alone,” but held that the armbands did not violate those rights.⁶⁵

The *Tinker* Court announced that schools do not have to wait until a disturbance occurs to take action to prevent that disturbance.⁶⁶ School officials may prevent student speech if they are aware of facts that produce a reasonable forecast of material or substantial disruption.⁶⁷ A reasonable forecast requires “more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint”;⁶⁸ undifferentiated fear of disturbance alone is not enough.⁶⁹ Therefore, a school can only restrict otherwise protected speech that has not yet caused a disturbance if it can reasonably forecast that the speech will cause a material or substantial disruption.⁷⁰

61. *Id.* at 513. The *Tinker* court took its rule from two Fifth Circuit cases. *See Blackwell v. Issaquena Bd. of Educ.*, 363 F.2d 749, 754 (5th Cir. 1966) (upholding regulation banning “freedom buttons” because the buttons undermined authority, caused an unusual degree of commotion, a lack of order, decorum, and discipline, and collided with the rights of other students who were harassed and forced to wear the buttons); *Burnside v. Byars*, 363 F.2d 744, 748–49 (5th Cir. 1966) (finding similar ban unconstitutional because there was only a mild curiosity but no disruption or interference).

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

63. *Id.* But *cf. Blackwell*, 363 F.2d at 754.

64. *Tinker*, 393 U.S. at 508, 514.

65. *Id.* at 509.

66. *Id.* at 509, 514.

67. *Id.* Schools may create policies banning speech that would cause material and substantial disruption or collide with the rights of other students. *See, e.g., Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 211–12 (3d Cir. 2001). Such policies must not be vague or overbroad in defining what speech is prohibited. *See id.* at 214–15. These policies are evaluated by determining whether the prohibited speech is within one of the categories that *Tinker* and its progeny authorize schools to prevent. *See id.* at 211–14. Where a student is punished for disobeying a policy, courts often evaluate the application of the policy to a particular student as well as a facial challenge to the constitutionality of the policy itself under *Tinker* and its progeny. *See, e.g., West v. Derby Unified Sch. Dist.*, 206 F.3d 1358, 1365, 1367 (10th Cir. 2000).

68. *Tinker*, 393 U.S. at 509.

69. *Id.* at 508.

70. *Id.* at 514.

Twenty-seven years passed before the U.S. Supreme Court revisited the evaluation of otherwise protected student speech in public schools. In *Bethel School District v. Fraser*,⁷¹ the Court created the first exception to the *Tinker* doctrine, holding that public schools, in fulfilling their responsibility to instill the habits and manners of civility, have the authority to prohibit student speech that is vulgar or lewd without a showing of material disruption.⁷² The Court reasoned that, even though lewd or vulgar speech is protected outside public schools, such speech would undermine the school's basic educational mission.⁷³ In *Fraser*, the Court focused on the nature of the speech itself and the potential effect the speech might have on those who heard it.⁷⁴

Two years later in *Hazelwood School District v. Kuhlmeier*,⁷⁵ the U.S. Supreme Court created a second exception to the *Tinker* standard.⁷⁶ The Court held that schools can exercise editorial control over the style and content of otherwise protected student speech in school-sponsored expressive activities, such as school newspapers, so long as the schools' censorship is reasonably related to legitimate pedagogical concerns.⁷⁷ Again the Court focused on the speech itself and the potential effect that the speech might have, reasoning that schools must be able to control forums that the public might perceive as bearing the imprimatur of the school.⁷⁸ *Tinker*, *Fraser*, and *Hazelwood* constitute the extent of the U.S. Supreme Court jurisprudence governing otherwise protected speech in the public school setting.

B. Circuit Courts Have Further Developed the Tinker Doctrine

Lower courts have since interpreted how these three U.S. Supreme Court decisions interrelate. In *Chandler v. McMinnville School District*,⁷⁹ the Ninth Circuit explained that there are three distinct areas of speech in which public school students retain less First Amendment protection than

71. 478 U.S. 675 (1986).

72. *Id.* at 681; *see also* *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 n.4 (1988) (explaining that the *Fraser* decision was based on the vulgar character of the speech rather than the *Tinker* standard of the speech causing material disruption).

73. *See Fraser*, 478 U.S. at 685.

74. *See id.* at 684.

75. 484 U.S. 260 (1988).

76. *See id.* at 270 ("It is this standard, rather than our decision in *Tinker*, that governs this case.").

77. *Id.* at 273.

78. *Id.* at 271-72.

79. 978 F.2d 524 (1992).

adults.⁸⁰ Vulgar, lewd, obscene, or plainly offensive speech is governed by *Fraser*,⁸¹ speech that occurs in a school-sponsored setting is governed by *Hazelwood*,⁸² and otherwise protected speech that does not fall into the previous two categories is governed by *Tinker*.⁸³

In *Chandler*, students were suspended for wearing buttons with the word "scab" in support of striking teachers.⁸⁴ Finding that the buttons were neither obscene nor school-sponsored,⁸⁵ the court asked if wearing the buttons would "substantially disrupt, or materially interfere with, school activities."⁸⁶ Because the buttons were not actually disruptive, did not inherently distract students, and did not break down the regimentation of the classroom, the expression was protected under *Tinker*.⁸⁷ Thus, the *Chandler* court clarified how the decisions from *Tinker*, *Fraser*, and *Hazelwood* apply to otherwise protected student speech while applying the entire doctrine to the facts of the case.⁸⁸

Because the U.S. Supreme Court has yet to evaluate the suppression of student speech based on a forecast of disruption, lower courts have been forced to define what types of events will support a reasonable forecast of disruption.⁸⁹ In *Karp v. Becken*,⁹⁰ the Ninth Circuit considered the reasonableness of a school's forecast that signs advocating a student walkout from a scheduled assembly would cause disruption.⁹¹ In response to advocacy for the walkout, opposing students had threatened to stop the walkout, and the assembly was cancelled out of fear of violence.⁹² Some students actually walked out of classes to protest, and someone pulled a fire alarm.⁹³ The media was alerted to the planned walkout,⁹⁴ resulting in the disruption of the adjacent junior high school's

80. *Id.* at 529.

81. *Id.* (concluding that, even though the student speech in *Fraser* had occurred in an assembly, school could prohibit such speech regardless of where in the school the speech took place).

82. *See id.*

83. *See id.*

84. *See id.* at 526.

85. *Id.* at 530.

86. *Id.* (omitting consideration of potential invasion of other students' rights included in *Tinker*).

87. *Id.* at 531 (citing *Burnside v. Byars*, 363 F.2d 744, 748 (5th Cir. 1966)).

88. *Id.* at 530.

89. *See, e.g., Karp v. Becken*, 477 F.2d 171, 174 (9th Cir. 1973).

90. 477 F.2d 171 (9th Cir. 1973).

91. *See id.* at 173, 175-77.

92. *Id.* at 175.

93. *Id.*

94. *Id.*

lunch schedule.⁹⁵ When evaluating the school officials' confiscation of the signs, the *Karp* court focused on the signs' potential effect, and held that it was reasonable for the school to fear that the signs themselves would provoke a possibly violent incident.⁹⁶

In *Burch v. Baker*,⁹⁷ the Ninth Circuit evaluated a school's decision to place letters of reprimand in the files of students who distributed an underground newspaper at a class barbeque.⁹⁸ The Ninth Circuit cautioned that courts must only look to "concrete evidence"⁹⁹ of actual or potential disruption resulting from specific student expression,¹⁰⁰ and that a school's forecast must not be based only on an "undifferentiated fear."¹⁰¹ The only evidence that the school could offer to support its forecast was that a similar publication within the school district had harmed a student and that similar publications in other districts had caused disruption in some classes.¹⁰² These facts were not enough to support a reasonable forecast that the underground newspaper would cause a material disruption at the school in question.¹⁰³

Two recent decisions in other circuits have helped to clarify what factors support a reasonable forecast of disruption. In *West v. Derby Unified School District*,¹⁰⁴ the Tenth Circuit held that a reasonable forecast of disruption could be based on recent past disruptions resulting from similar speech.¹⁰⁵ In *West*, racially-motivated altercations over displays of the Confederate flag had occurred in the school district three

95. *Id.* at 176.

96. *See id.*

97. 861 F.2d 1149 (9th Cir. 1988).

98. *Id.* at 1150–51.

99. *Id.* at 1153; *see also* *Chandler v. McMinnville Sch. Dist.*, 978 F.3d 524, 531 (1992) (reasoning that the word "scab" by itself could not support reasonable forecast of disruption but evidence that it was insult directed at replacement teachers may have supported reasonable forecast).

100. *Id.* at 1153.

101. *Id.* at 1154. The Supreme Court in *Tinker* reasoned that any word spoken on a school campus that deviates from the views of another may cause a disturbance, but the Constitution requires schools to risk disturbance when the only evidence to support the forecast of disruption is the desire to avoid discomfort or unpleasantness. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508–09 (1969); *see also* *Emmett v. Kent Sch. Dist.*, 92 F. Supp. 2d 1088, 1089 (W.D. Wash. 2000) (finding that expulsion of student based on his web page, which included mock obituaries and a poll to determine who would "die" next, was based on undifferentiated fears of possible disturbances or embarrassment to school officials).

102. *See Burch*, 861 F.2d at 1152.

103. *See id.* at 1153–54.

104. 206 F.3d 1358 (10th Cir. 2000).

105. *Id.* at 1366.

years earlier.¹⁰⁶ These altercations adequately supported the forecast that disruption would result from a middle school student's drawing of a Confederate flag during class.¹⁰⁷ However, in *Castorina v. Madison County School Board*,¹⁰⁸ the Sixth Circuit held that without evidence of recent past disruptive altercations resulting from the same type of speech within the school district, students could not be suspended for wearing Confederate flag tee shirts.¹⁰⁹

Thus, once a court finds that student speech would be otherwise protected by the First Amendment in non-school settings, it must determine if the speech falls into one of the three categories allowing restriction because of the unique public school setting.¹¹⁰ If the speech is vulgar, lewd, obscene, or plainly offensive, it may be suppressed under *Fraser* because it presumably undermines the basic educational mission of the school.¹¹¹ If the speech is presented in a school-sponsored forum, it is governed by *Hazelwood* and the school may suppress the speech because it bears the imprimatur of the school.¹¹² If the speech does not fall into the other two categories, it is protected in the public school setting under *Tinker* unless a material or substantial disruption actually results from the speech or the school can reasonably forecast that the speech will cause a material or substantial disruption.¹¹³

III. NINTH CIRCUIT COURTS EVALUATED THE FIRST AMENDMENT PROTECTION GIVEN TO A STUDENT POEM CONTAINING VIOLENT IMAGERY IN *LAVINE V. BLAINE SCHOOL DISTRICT*

In the aftermath of several highly publicized instances of school violence, school officials have been quicker to restrict potentially

106. Past events included verbal confrontations between black and white students, "KKK" and "Die Nigger" graffiti written in the school, racial incidents on school buses and at football games, incidents at the middle school resulting from students drawing the Confederate flag on their notebooks and on themselves, and at least one fight as a result of a student wearing a Confederate flag headband. *See id.* at 1362.

107. *Id.* at 1366.

108. 246 F.3d 536 (6th Cir. 2001).

109. *See id.* at 544.

110. *See Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992).

111. *Fraser v. Bethel Sch. Dist.*, 478 U.S. 675, 687 (1986).

112. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

113. *See Chandler*, 978 F.2d at 529.

threatening speech.¹¹⁴ As a result, courts more frequently have been forced to evaluate whether the First Amendment protects student speech that may portend future violence and to evaluate school policies that ban wider categories of student speech.¹¹⁵ In *LaVine v. Blaine School District*,¹¹⁶ the Ninth Circuit first evaluated whether student speech that may signal future violence is protected under the First Amendment.

In the fall of 1998, James LaVine, an eleventh grade student at Blaine High School, asked his English teacher, Vivian Bleeker, to read and give feedback on a poem that he had written.¹¹⁷ The poem was not an assignment for class,¹¹⁸ but Bleeker had invited students to submit personal writings for her review earlier in the year.¹¹⁹ James gave the poem to Bleeker after class,¹²⁰ but she did not read the poem until later in the evening at her home.¹²¹

Bleeker became concerned for James's well-being after reading "Last Words,"¹²² a first-person narrative poem about a student who had shot twenty-eight of his classmates and returned to the school two years later to commit suicide.¹²³ While Bleeker was not concerned for her own

114. See Linda Hils, *Chalk Talk: "Zero Tolerance" for Free Speech*, 30 J.L. & EDUC. 365, 365 (2001).

115. *Id.*

116. 257 F.3d 981 (9th Cir. 2001), *rehearing en banc denied*, 279 F.3d 719 (9th Cir. 2002).

117. See *LaVine v. Blaine Sch. Dist.*, No. C99-1074R, 2000 U.S. Dist. LEXIS 18989, at *2 (W.D. Wash. Feb. 24, 2000), *rev'd in part by* 257 F.3d 981 (9th Cir. 2001).

118. *Id.*

119. See Appellee's Reply Brief at 4, *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981 (9th Cir. 2001) (No. 00-35303).

120. *LaVine*, 2000 U.S. Dist. LEXIS 18989, at *2.

121. *Id.* at *3.

122. *Id.*

123. The poem reads:

As each day passed, I watched, love sprout, from the most, unlikely places, wich reminds, me that, beauty is in the eye's, of the beholder. As I remember, I start to cry, for I, had leared, this to late, and now, I must spend, each day, alone, alone for supper, alone at night, alone at death. Death I feel, crawling down, my neck at, every turn, and so, now I know, what I must do. I pulled my gun, from its case, and began to load it. I remember, thinking at least I won't, go alone, as I, jumped in, the car, all I could think about, was I would not, go alone. As I walked, through the, now empty halls, I could feel, my hart pounding. As I approached, the classroom door, I drew my gun and, threw open the door, **Bang, Bang, Bang-Bang.** When it all was over, 28 were, dead, and all I remember, was not felling, any remorse, for I felt, I was clensing my soul, I quickly, turned and ran, as the bell rang, all I could here, were screams, screams of friends, screams of co workers, and just plain, screams of shear horror, as the students, found their, slayen classmares, 2 years have passed, and now I lay, 29 roses, down upon, these stairs, as now, I feel, I may, strike again. No tears, shall be shead, in sarrow, for I am, alone, and now, I

safety, she was concerned about James.¹²⁴ She called the school counselor, who in turn contacted the school's Vice Principal in charge of discipline.¹²⁵ After reviewing the poem, the school administration contacted the Blaine Police.¹²⁶ Eventually, eight Whatcom County Sheriff's Deputies and a canine unit visited the LaVine farm to review the poem and interview James.¹²⁷ James told the deputies that he had no intention of carrying out the events depicted in the poem and James's mother assured the deputies that he had no access to weapons and was not a danger to himself or others.¹²⁸ The deputies contacted a licensed psychologist with the Department of Mental Health,¹²⁹ who determined that there was not a sufficient basis to involuntarily commit James because he did not present an imminent danger of causing harm to himself or others.¹³⁰ The deputies left, finding that there was no need for further action.¹³¹

Despite the opinions of the psychologist and the Sheriff's Office, the school decided that the situation was grave enough to immediately expel James.¹³² After missing seventeen days of school, James was permitted to return only after a psychiatrist evaluated his mental state and determined that he was fit to return to school.¹³³ James finished the year without incident.¹³⁴ The LaVine family appealed the expulsion to the Blaine School Board, which affirmed the principal's decision to expel James.¹³⁵

hope, I can feel, remorse, for what I did, without a shed, of tears, for no tear, shall fall, from your face, but from mine, as I try, to rest in peace, Bang!

LaVine, 257 F.3d at 983–84 (emphasis and errors in original).

124. See *LaVine*, 2000 U.S. Dist. LEXIS 18989, at *10.

125. *Id.* at *3.

126. *Id.*

127. See Lisa Stiffler, *Violent Poem Not A Threat, Judge Says; Student at Blaine High Gets His Record Cleared*, SEATTLE POST-INTELLIGENCER, Feb. 26, 2000, at B1.

128. See *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 985 (9th Cir. 2001), rehearing *en banc* denied, 279 F.3d 719 (9th Cir. 2002).

129. See *LaVine*, 2000 U.S. Dist. LEXIS 18989, at *3.

130. See *id.*; *LaVine*, 257 F.3d at 990.

131. See *LaVine*, 2000 U.S. Dist. LEXIS 18989, at *4.

132. *Id.* The Washington Administrative Code (WAC) allows an emergency expulsion where there is a good and sufficient reason to believe that the student's presence poses an immediate and continuing danger to the student, other students, or staff, or that there is an immediate and continuing threat of substantial disruption of the educational process. WASH. ADMIN. CODE § 180-40-295 (2001).

133. *LaVine*, 2000 U.S. Dist. LEXIS 18989, at *5.

134. *Id.*

135. *Id.*

However, the board created a new, backdated letter explaining that the expulsion was not based on disciplinary concerns, but was instead based on safety concerns.¹³⁶ The LaVines then brought suit in U.S. District Court alleging that expelling James for his poem infringed on his First Amendment rights.¹³⁷ The LaVines sought damages and an injunction requiring removal of any negative documentation of the event from James's school records.¹³⁸

A. The Federal District Court Held That LaVine's Expulsion Was Unconstitutional Because His Poem Was Protected Speech Under the "True Threat" Analysis

Federal District Judge Barbara Rothstein heard the challenge to James LaVine's expulsion in *LaVine v. Blaine School District*.¹³⁹ The school district argued that the restriction on James's speech was justified, because "Last Words" was not entitled to First Amendment protection as it constituted a threat of physical violence and a disruption of the safe operation of the school.¹⁴⁰ The LaVines maintained that the poem was not a threat of any kind.¹⁴¹ The parties did not dispute that the expulsion was motivated solely by the message of "Last Words," not by the context in which the poem was delivered, and that the school had a compelling interest in ensuring the safety of Blaine High School.¹⁴²

Judge Rothstein analyzed James LaVine's poem under the "true threat" doctrine.¹⁴³ The court held that "'Last Words' was not a sincere expression of intent to harm or assault."¹⁴⁴ Therefore, the court reasoned, the poem fell squarely within the core of the First Amendment's protection.¹⁴⁵ The court relied on the factual circumstances in which James gave the poem to his teacher.¹⁴⁶ He turned in the poem with other school work and mentioned he had written a poem and would appreciate

136. *Id.*

137. *Id.* at *5-6.

138. *Id.* at *6.

139. No. C99-1074R, 2000 U.S. Dist. LEXIS 18989 (W.D. Wash. Feb. 24, 2000), *rev'd in part by* 257 F.3d 981 (9th Cir. 2001).

140. *Id.* at *7.

141. *Id.*

142. *Id.* at *8.

143. *Id.* at *10.

144. *Id.*

145. *Id.*

146. *See id.*

Bleeker's commentary.¹⁴⁷ He did so without manifesting any overt action, violent demeanor, or other threatening behavior.¹⁴⁸ Bleeker was never concerned for her own well-being.¹⁴⁹ Furthermore, the county sheriff and mental health professional found no evidence of a threat or need for action.¹⁵⁰ All of these factors supported the conclusion that the poem was not a "true threat."¹⁵¹

Judge Rothstein rejected the school's consideration of the following concerns regarding James's personal life: James had filed a domestic violence complaint against his father, James had expressed suicidal ideation two years earlier, he was involved in a fight at school the previous year, and another parent had expressed concerns about his behavior.¹⁵² The court held that none of these factors led to a reasonable conclusion that the poem was a threat and none was worthy of expelling James.¹⁵³ Finally, administrators admitted that regardless of these factors, they would have expelled any student who wrote the poem.¹⁵⁴ Judge Rothstein held that the content of "Last Words"—the admitted true basis for the school's action—did not constitute a true threat because it was not a serious expression of an intent to cause physical harm.¹⁵⁵

B. The Ninth Circuit Held That Under Tinker's Reasonable Forecast of Disruption Test, LaVine's Expulsion Did Not Violate the First Amendment

The Ninth Circuit took a different approach to the case by immediately focusing on the rare, but well-publicized, school shootings at Columbine and other high schools.¹⁵⁶ The court noted that the poem was written around the time of a shooting in "nearby" Springfield,

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at *11.

151. *See id.* at *10–11.

152. *Id.* at *11.

153. *See id.*

154. *Id.*

155. *Id.* The court also rejected the school's argument that it had a right and duty under the WAC to expel James. *Id.* at *14. Because the two enumerated grounds for expulsion under the WAC were substantially equivalent to the requisite First Amendment jurisprudence, and because the court had found the poem to be protected speech, reliance on the WAC could not vindicate the school's decision. *Id.*

156. *See LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 983, 987 (9th Cir. 2001), *rehearing en banc denied*, 279 F.3d 719 (9th Cir. 2002).

Oregon.¹⁵⁷ Further, James's mother had read his poem and warned him that his teachers at school might overreact because of the news coverage.¹⁵⁸ Only after this discussion did the court reveal its holding that the school had acted with sufficient justification and within constitutional limits in expelling James, not because of the content of his poem, but because of the need "to avert perceived harm."¹⁵⁹

Despite the court's emphasis on safety concerns and its characterization of the poem as an implied threat, the Ninth Circuit evaluated the poem under the *Tinker* standard, instead of the "true threat" doctrine.¹⁶⁰ Under the categories of student speech developed by *Fraser*, *Hazelwood*, and *Tinker*, the *LaVine* court determined that the poem was "all other" otherwise protected speech, governed by the *Tinker* test.¹⁶¹ Thus, the school had to show factors that might have reasonably led school officials to forecast substantial disruption or material interference with school activities.¹⁶² The *LaVine* court reasoned that, under *Karp v. Becken*,¹⁶³ schools do not have to wait until disruption occurs, but can base a reasonable forecast of disruption on the existing facts.¹⁶⁴

The court examined the totality of the circumstances, including James's actions and all facts confronting school officials that might have reasonably signaled disruption.¹⁶⁵ The court concluded that recent events in James's personal life and the recent shooting in Springfield were relevant factors under *Tinker*.¹⁶⁶ Given these facts, the school did not violate the First Amendment by expelling James because the content of the poem, within the "backdrop of actual school shootings," meant that, at best, "Last Words" was a cry for help from a troubled teenager.¹⁶⁷

157. *Id.* at 984. Roughly six months had passed between the Springfield shooting and James's submission of "Last Words." Springfield, Oregon is approximately 400 miles south of Blaine, Washington. See RAND McNALLY & CO., ROAD ATLAS: UNITED STATES, CANADA, MEXICO A6, 84, 108 (2000).

158. *See id.*

159. *Id.* at 983.

160. *See id.* at 989 n.5.

161. *Id.* at 988.

162. *Id.* at 989.

163. 477 F.2d 171 (9th Cir. 1973).

164. *LaVine*, 257 F.3d at 989. The actual language in *Karp* more closely follows the language of *Tinker*: "*Tinker* does not demand a certainty that disruption will occur, but rather the existence of facts which might reasonably lead school officials to forecast a substantial disruption." *Karp*, 477 F.2d at 175.

165. *LaVine*, 257 F.3d at 989.

166. *Id.* at 990.

167. *Id.*

Taken with the facts about James's personal life, the *LaVine* court reasoned that the poem sufficiently supported a reasonable forecast of substantial disruption or material interference with school activities, "specifically that James [intended] to inflict injury upon himself or others."¹⁶⁸ The opinions of the county sheriff and the psychologist that James was not a threat to himself or to others did not impact the Ninth Circuit's view of the reasonableness of the forecast because *Tinker* does not require a student to meet the standards for involuntary commitment for there to be a potential for substantial disruption.¹⁶⁹

Therefore, even though the content of the poem was a factor, the Ninth Circuit focused on the potential action that the school feared James might take;¹⁷⁰ the school was not trying to discipline James for his speech, but was trying to protect students from potential violence.¹⁷¹ Under this framework, the court held that the expulsion did not violate the First Amendment because the school's forecast of disruption was reasonable given the events that had occurred in James's life, the backdrop of actual school shootings, and the imagery in the poem. The *LaVine* court never expressly held that the poem itself was not protected under *Tinker* but reasoned that "even if the poem was protected speech, the school's actions were justified."¹⁷² However, the court determined that once the "perceived threat" had subsided and James was allowed to return to school, the school's justification for maintaining the documentation for safety concerns was no longer valid.¹⁷³

168. *Id.*

169. *Id.* The standard for involuntary commitment of a minor in Washington is that the minor is suffering from a mental disorder and presents a likelihood of serious harm. WASH. REV. CODE § 71.34.050. While a determination that James's behavior did not pose a threat of serious harm warranting involuntary commitment alone does not mean that "Last Words" was not a "true threat," the psychologist's opinion as to the threat James posed was a surrounding circumstance that the school could consider under the "true threat" doctrine.

170. *Id.* at 991.

171. *Id.*; see also *id.* at 991 n.9 (emphasizing that the school was acting out of safety, and not disciplinary concerns).

172. *Id.* at 989 n.5.

173. *Id.* at 992. The Ninth Circuit has since rejected the LaVines' petition for rehearing, and has rejected a suggestion for rehearing en banc. See *LaVine v. Blaine Sch. Dist.*, 279 F.3d 719, 720 (9th Cir. 2002).

IV. THE NINTH CIRCUIT DEPARTED FROM THE ESTABLISHED
STANDARDS GOVERNING STUDENT SPEECH
RESTRICTIONS IN *LAVINE V. BLAINE SCHOOL DISTRICT*

The Ninth Circuit's application of the *Tinker* standard in *LaVine* was a drastic departure from its previous student speech jurisprudence because it ignored both the "true threat" doctrine and *Tinker*'s limited application to otherwise protected speech.¹⁷⁴ Prior to *LaVine*, the Ninth Circuit had developed what the Eight Circuit described as the "most clearly articulated and concise standard for identifying a 'true threat.'"¹⁷⁵ Furthermore, in *Chandler*, the Ninth Circuit had clearly listed what types of "otherwise protected" speech could be suppressed in the unique public school setting.¹⁷⁶ Consequently, the Ninth Circuit had an opportunity in *LaVine* to clearly indicate both how courts should evaluate student speech that may be a potential threat of violence and how the "true threat" doctrine and the *Tinker* doctrine should relate. Instead, the court confused the application of both doctrines.

The *LaVine* court should have determined whether the poem would be constitutionally protected in a non-public school setting by applying the "true threat" test. Under the "true threat" doctrine, the court should have concluded that James's poem was protected speech.¹⁷⁷ Only after deciding that the poem would be constitutionally protected in a non-public school setting should the *LaVine* court have turned to the *Tinker* doctrine for evaluating otherwise protected speech delivered in public schools.¹⁷⁸ Then the court should have evaluated the reasonableness of the school's forecast of disruption. The *LaVine* court also should have limited this analysis to an evaluation of the potential effects of the speech itself.¹⁷⁹ While the *LaVine* court may have attempted to create a new exception to the *Tinker* doctrine, this potential exception is not consistent with the existing *Tinker* exceptions.¹⁸⁰ Thus, under first a "true threat" analysis, and then under a *Tinker* analysis, the Ninth Circuit should have concluded that James LaVine's poem was protected speech.

174. See *infra* Part IV.A.2.

175. *Doe v. Pulaski County Special Sch. Dist.*, 263 F.3d 833, 837 (8th Cir. 2001), *rehearing en banc granted, opinion vacated*, No. 01-1048, 2001 U.S. App. LEXIS 23877 (8th Cir. Nov. 5, 2001).

176. See *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992).

177. See *infra* Part IV.A.3.

178. See *infra* Part IV.A.1.

179. See *infra* Part IV.B.1.

180. See *infra* Part IV.B.2.

A. *The Ninth Circuit Should Have Applied the "True Threat" Test Instead of the Tinker Doctrine When Evaluating the Constitutionality of "Last Words"*

The *LaVine* court should have first applied the "true threat" test to determine if the poem would be protected in any setting, before applying the *Tinker* test.¹⁸¹ In this context, the court could properly consider personal life factors.¹⁸² Even so, under a proper "true threat" analysis, the district court was correct in holding that James's poem did not rise to the level of a true threat.¹⁸³

1. *The LaVine Court Should Have First Applied the "True Threat" Test To Determine if the Speech in Question Was Protected Outside of the School Setting*

Before applying the *Tinker* doctrine to evaluate "otherwise protected" student speech, the *LaVine* court should have applied the "true threat" test to decide if "Last Words" was constitutionally protected in any setting.¹⁸⁴ Had the court held that the poem was a "true threat," the poem would not have been entitled to constitutional protection in any forum, including public schools.¹⁸⁵ In *LaVine*, the Ninth Circuit never determined that "Last Words" was "otherwise protected" speech. In fact, while the District Court based its decision on the "true threat" test,¹⁸⁶ the Ninth Circuit only mentioned "true threat" in a brief footnote, claiming that the issue did not need to be resolved.¹⁸⁷

By sidestepping the issue of whether the poem was "otherwise protected" speech, the *LaVine* court extended the application of the *Tinker* doctrine beyond the bounds dictated by the U.S. Supreme Court.¹⁸⁸ If the *LaVine* court meant this footnote to satisfy the requirement that it must first determine that the speech was otherwise

181. See *infra* Part IV.A.1.

182. See *Bauer v. Sampson*, 261 F.3d 775, 783 (9th Cir. 2001).

183. See *infra* Part IV.A.3.

184. See *infra* Part IV.A.2.

185. See *infra* Part IV.A.2.

186. *LaVine v. Blaine Sch. Dist.*, No. C99-1074R, 2000 U.S. Dist. LEXIS 18989, at *5 (W.D. Wash. Feb. 24, 2000), *rev'd in part* by 257 F.3d 981 (9th Cir. 2001).

187. *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 n.5 (9th Cir. 2001), *rehearing en banc denied*, 279 F.3d 719 (9th Cir. 2002).

188. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505-06 (1969); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266-67 (1988).

protected, this conclusion was at best unsupported, and at worst resulted in a manipulation of the doctrine.¹⁸⁹ By glossing over the “true threat” doctrine and *Tinker*’s limited applicability to otherwise protected speech, the Ninth Circuit was able to base its holding on a standard that now gives students less First Amendment protection.

2. *The “True Threat” Test Was the Appropriate Analysis for Evaluating the School Officials’ Decision To Expel James LaVine Because They Believed He Posed a Safety Risk*

As *Lovell* illustrates, the “true threat” doctrine evaluates the potential *action* of the speaker—the chance that the speaker will follow the threat with an act of violence.¹⁹⁰ In contrast, *Tinker*, *Fraser*, and *Hazelwood*, when properly applied to otherwise protected expression, evaluate the effect that the speech itself will have on the school.¹⁹¹ The tests are inherently different¹⁹² and evaluation of the threat of future violent action is properly evaluated only under the “true threat” doctrine.

The Blaine School District did not suppress James’s speech to prevent his poem from creating a disturbance¹⁹³ or to prevent the poem from being perceived as representing the school.¹⁹⁴ School officials were not attempting to suppress “Last Words” out of a concern for the impact that the poem itself would have, but were attempting to prevent James from returning to school out of a fear that he, and not his poem, posed a danger.¹⁹⁵ The Ninth Circuit characterized “Last Words” as a perceived or implied threat.¹⁹⁶ The court acknowledged that the school expelled James to avert a perceived potential harm, not out of a concern that the content of “Last Words” itself would lead to disruption.¹⁹⁷ Consequently,

189. See *LaVine*, 257 F.3d 981, 989 n.5.

190. See *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 372 (9th Cir. 1996) (noting that, in light of the violence prevalent in schools today, school officials are justified in taking very seriously student threats against faculty or other students).

191. See *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992) (summarizing the *Tinker*, *Fraser*, and *Hazelwood* decisions).

192. See *Lovell*, 90 F.3d at 371 (describing the two tests and under what circumstances they should be applied).

193. See *Tinker*, 393 U.S. at 509, 514.

194. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270–71 (1988).

195. See Appellant’s Opening Brief at 6, *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981 (9th Cir. 2001) (No. 00-35303).

196. See *LaVine*, 257 F.3d at 983.

197. See *id.*

the evaluation of James's potential for future violence is more properly analyzed under the "true threat" doctrine.

Furthermore, under the "true threat" doctrine, the Ninth Circuit would have been justified in looking at all of the factual circumstances, including James's personal life, in order to evaluate whether "Last Words" constituted a "true threat." Under the "true threat" doctrine, alleged threats should be considered in light of their entire factual context, including the surrounding events and other alleged conduct.¹⁹⁸ In contrast, when evaluating whether a forecast of disruption is reasonable under *Tinker*, courts may only look to evidence of potential disturbance resulting from a specific student expression.¹⁹⁹ The factors used to support a forecast of disruption are limited to factors used to evaluate the potential effect of the speech itself, such as past disturbances occurring as a result of the type of speech in question.²⁰⁰ Because the "true threat" doctrine allows for the evaluation of the nature of the speaker²⁰¹ through consideration of the speech in light of its entire factual context, the Ninth Circuit could have properly addressed all of its concerns under the "true threat" test.

3. *Under the "True Threat" Doctrine, James LaVine's Expulsion Cannot Be Constitutionally Justified*

A court can take action against student speech that is a threat of violence or physical harm, but that speech must rise to the level of a "true threat."²⁰² Even though the *LaVine* court emphasized the violence generally prevalent in schools,²⁰³ under the objective "true threat" test there must be more than a generalized fear for "Last Words" to rise to the level of a "true threat." Instead, a reasonable person must foresee that the statement would be interpreted by the listener as a serious expression of

198. See *Bauer v. Sampson*, 261 F.3d 775, 783 (9th Cir. 2001).

199. See *infra* Part IV.B.1

200. See *Castorina v. Madison County Sch. Bd.* 246 F.3d 536, 544 (6th Cir. 2001); *West v. Derby Unified Sch. Dist.*, 206 F.3d 1358, 1366 (10th Cir. 2000).

201. See *Doe v. Pulaski County Special Sch. Dist.*, 263 F.3d 833, 838 (8th Cir. 2001), *rehearing en banc granted, opinion vacated*, 2001 U.S. App. LEXIS 23877 (8th Cir. Nov. 5, 2001) (taking into account student's past behavior and history of violence); *Bauer v. Sampson*, 261 F.3d 775, 784 (9th Cir. 2001) (noting that there had been no allegation that professor had ever been physically abusive or violent on or off campus).

202. See *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 371-72 (9th Cir. 1996).

203. See *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 983, 987 (9th Cir. 2001), *rehearing en banc denied*, 279 F.3d 719 (9th Cir. 2002).

intent to harm or assault.²⁰⁴ A court must consider alleged threats in light of their entire factual context, including the surrounding events and the reaction of the listener.²⁰⁵

Unlike the *Lovell* statement, “[i]f you don’t give me this schedule change, I’m going to shoot you,” the language of “Last Words” is not expression that any person could reasonably consider to be a serious expression of intent to harm or assault.²⁰⁶ The statement found to be a “true threat” in *Lovell* was a statement of future action directly aimed at the target of the threat.²⁰⁷ “Last Words” is a past-tense narrative that does not mention a desire to harm any specific person at Blaine High School. The poem is even less specific and direct than the student’s version of her statement in *Lovell*, “I’m so angry, I could just shoot someone,”²⁰⁸ which the *Lovell* court reasoned may not have risen to the level of a “true threat.”²⁰⁹ “Last Words” is also far less specific and direct than the threat to murder and rape a particular person in the *Pulaski* songs, which were not found to be true threats.²¹⁰ Further, “Last Words” is less specific than the violent writings of the college professor in *Bauer* that the Ninth Circuit found not to constitute true threats, even though the author specifically named a target and described ways in which the writer wanted to harm that target.²¹¹

In addition, the surrounding circumstances do not support a finding that “Last Words” was a “true threat.” Vivian Bleeker, unlike the counselor in *Lovell*,²¹² was never concerned for her safety.²¹³ The school presented no evidence that other students, arguably the targets of the poem, felt threatened.²¹⁴ Unlike *Bauer*, where a psychiatrist advised that

204. See *Lovell*, 90 F.3d at 372.

205. *Id.*

206. See *id.*

207. *Id.* at 368.

208. *Id.*

209. *Id.* at 373; see also *supra* note 32.

210. See *Doe v. Pulaski County Special Sch. Dist.*, 263 F.3d 833, 837 (8th Cir. 2001), *rehearing en banc granted, opinion vacated*, No. 01-1048, 2001 U.S. App. LEXIS 23877 (8th Cir. Nov. 5, 2001); cf. *D.G. v. Indep. Sch. Dist. No. 11 of Tulsa County*, No. 00-C-0614-E, 2000 U.S. Dist. LEXIS 12197, at *13–14 (N.D. Okla. 2000) (noting that poem entitled “Killing Mrs. . . .” articulating that “the Bitch had to die!” was not a genuine threat despite its specificity).

211. See *Bauer v. Sampson*, 261 F.3d 775, 780 (9th Cir. 2001).

212. See *Lovell*, 90 F.3d at 373.

213. *LaVine v. Blaine Sch. Dist.*, No. C99-1074R, 2000 U.S. Dist. LEXIS 18989, at *10 (W.D. Wash. Feb. 24, 2000), *rev’d in part* by 257 F.3d 981 (9th Cir. 2001).

214. See *id.* at *3 (noting that Bleeker did not read the poem until after she had left the school); see also *Boman v. Bluestem Unified Sch. Dist.*, No. 00-1034-WEB, 2000 U.S. Dist. LEXIS 5389,

the writings were part of a pattern of escalating violence, the Blaine school administration was advised by a psychologist that the poem was not a sufficient basis to determine that James was a threat to himself or others.²¹⁵

The school did have a valid concern about James's state of mind, and that concern was worthy of some school action, such as an evaluation by the school's psychologist. However, when compared with other "true threat" cases, "Last Words" did not rise to the level of a "true threat." A reasonable person would find that the poem was what James claimed it to be—a first person exploration of what a school shooter might feel two years after an assault on other students.²¹⁶

The Ninth Circuit essentially conducted a "true threat" evaluation of the threat that James posed, under the guise of a *Tinker* evaluation of the potential disruptive effect of the speech. Perhaps the court was attempting to take advantage of *Tinker*'s lower threshold for prohibiting student expression while using the broader factors relevant only in a "true threat" analysis. However, doing so in the face of previously clear statements governing the proper application of each test merely accentuates the *LaVine* court's result-oriented approach. Even worse, such misapplication of *Tinker* confuses future courts and reduces predictability for schools already facing difficult decisions in evaluating student speech. While fear of school violence is a valid concern, the Ninth Circuit sacrificed the benefits of predictable results and jurisprudential clarity in order to reach a politically popular result in this case. Had the court followed the appropriate analysis and applied the "true threat" doctrine, the court would likely have found that James LaVine's poem was not a true threat of violence and was instead "otherwise protected" speech that could be restricted only if it met the properly-applied *Tinker* standard.

at *11 (D. Kan. Jan. 28, 2000) (holding that student's poem was not a true threat, because it was not reasonable to believe that other students would view an unsigned art project to be a threat against them).

215. See *supra* notes 133, 169 and accompanying text..

216. Cf. D.G. v. Ind. Sch. Dist. No. 11 of Tulsa County, No. 00-C-0614-E, 2000 U.S. Dist. LEXIS 12197, at *3-4 (N.D. Okla. Aug. 21, 2000) (finding that poem expressing desire to kill teacher was private way for student to address her feelings and not a true threat).

B. A Holding That Tinker Justified James LaVine's Expulsion Is Inconsistent with Prior Applications of the Tinker Doctrine

By choosing to apply the *Tinker* doctrine to a situation that was not about the effect or potential effect of a student's speech, the Ninth Circuit applied *Tinker* in a way that is contrary to U.S. Supreme Court precedent.²¹⁷ The Ninth Circuit, for the first time, allowed the personal life of the speaker, as well as sensational events in other parts of the country, to support a forecast of disruption.²¹⁸ Even if the Ninth Circuit was attempting to create a new exception to the *Tinker* doctrine, this exception cannot be reconciled with the two exceptions that the U.S. Supreme Court has previously articulated.²¹⁹

1. The Court Improperly Focused on Events Unconnected to the Effect of the Actual Speech in Order To Evaluate the Reasonableness of the School's Forecast of Disruption

The *LaVine* court could not find that "Last Words" itself caused an actual disruption at the school.²²⁰ No "interference with schoolwork or discipline" resulted when James wrote the poem and brought it to school;²²¹ Bleeker did not even read the poem until later that evening when she was home.²²² Because there was no actual disruption, the school was required to present factors that would support a reasonable forecast of disruption to justify James's expulsion under the *Tinker* doctrine.²²³

The factors used to support a reasonable forecast of disruption cannot be events unconnected with the actual speech in question. The *LaVine* court cited to *Karp*, in which a school reasonably forecasted that protest signs would cause disturbance, to support the proposition that a court can consider circumstantial factors when evaluating the reasonableness of a forecast.²²⁴ However, the *LaVine* court failed to recognize that all of the

217. See *infra* Part IV.B.2.

218. See *infra* Part IV.B.1.

219. See *infra* Part IV.B.2.

220. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

221. *Id.* at 511.

222. See *LaVine v. Blaine Sch. Dist.*, No. C99-1074R, 2000 U.S. Dist. LEXIS 18989, at *2-3 (W.D. Wash. Feb. 24, 2000), *rev'd in part* by 257 F.3d 981 (9th Cir. 2001).

223. See *Tinker*, 393 U.S. at 509, 514.

224. See *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001), *rehearing en banc denied*, 279 F.3d 719 (9th Cir. 2002).

events evaluated in *Karp* were directly connected to the speech itself and its potential effects.²²⁵

The events upon which the *LaVine* court found a reasonable forecast of disruption included the circumstances of James's personal life²²⁶ and school shootings that had occurred across the country.²²⁷ These events had nothing to do with the possible history of poetry-induced disruptions in the Blaine School District.²²⁸ The *LaVine* court never considered the potential disruption that "Last Words" itself could cause, even when acknowledging that, had the content of James's poem not played a role in the decision to expel him, the court would not have to turn to First Amendment law at all.²²⁹ Without a connection to the impact of the speech itself, the Ninth Circuit reached beyond the previous limitations of *Tinker*. Furthermore, as the *Tinker* case demonstrates, nationwide turmoil alone, absent any specific link to the speech in question, fails to support a reasonable forecast that speech about a controversial subject will cause a material and substantial disruption.²³⁰ The school did not offer any evidence that the shootings at other schools had occurred because of speech similar to "Last Words."²³¹ Even if such a connection did exist, the *Castorina v. Madison* court's holding that a forecast of disruption based on the Confederate flag tee shirts was unreasonable illustrates that similar disruptions must have previously occurred within the school district making the forecast.²³² Allowing unrelated shootings at distant schools to justify an expulsion of a student who writes about school shootings creates a forecast of disruption based only on

225. See *Karp v. Becken*, 477 F.2d 171, 175-76 (9th Cir. 1973).

226. *LaVine*, 257 F.3d at 989-90.

227. See *id.* at 987, 990.

228. In both *Karp v. Becken*, 477 F.2d 171, 176 (9th Cir. 1973), and *West v. Derby Unified School District*, 206 F.3d 1358, 1362 (10th Cir. 2000), the courts looked directly at the potential future effects of the speech when determining the reasonableness of a school's forecast of disruption. The *Karp* court determined that confiscating student signs, which advocated a walkout, was not an unreasonable forecast of disruption because of the potential that other students might be provoked by the signs. *Karp*, 477 F.3d at 176. In *West*, the school had experienced recent disruption based on the display of exactly the same speech then at issue. *West*, 206 F.3d at 1362.

229. *LaVine*, 257 F.3d at 991.

230. While the Vietnam War was a major source of controversy in many localities during the time in which the school district passed the armband regulation in *Tinker*, that generalized fear, without any actual disruption, was not enough to support the prohibition of the armbands. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 510 n.4 (1969).

231. Cf. *Burch v. Barker*, 861 F.2d 1149, 1152 (9th Cir. 1988) (finding that a similar underground newspaper had harmed a student at another school in the district in the past).

232. See *Castorina v. Madison County Sch. Bd.*, 246 F.3d 536, 544 (6th Cir. 2001).

undifferentiated, unsupported fear of violence.²³³ A proper forecast must instead be based on “concrete evidence” of potential disturbance resulting from the specific expression.²³⁴

Thus, the *LaVine* court violated the limits of the *Tinker* doctrine in two ways. First, it considered factors that did not relate to the impact of the speech itself. Second, it gave weight to events that were too far removed from this particular school to contribute to a reasonable forecast. These analytical flaws amount to a holding outside of the limits of the U.S. Supreme Court’s *Tinker* doctrine and previous Ninth Circuit interpretations of that doctrine.

2. *The LaVine Decision Cannot Be Reconciled with Supreme Court Case Law*

The *LaVine* court did not expressly state that it was creating a new exception to the *Tinker* doctrine. Nevertheless, because it used factors never before considered by the Supreme Court or the Ninth Circuit, the *LaVine* court created an exception to justify its restriction of student speech where a school is concerned that the speaker poses a safety risk.²³⁵ However, such an exception cannot be reconciled with the two limited exceptions that the U.S. Supreme Court recognized in *Fraser* and *Hazelwood*.

The *LaVine* court did admit that under its reasoning the school could have expelled James LaVine, regardless of whether the poem was protected speech,²³⁶ because the school was afraid that James would become violent.²³⁷ By forcing its analysis into *Tinker*’s framework, the *LaVine* court allowed schools to justify expulsions without having to link the expulsion to the effect of a specific expression.²³⁸ This separation creates a new exception to the *Tinker* standard, allowing a school to silence, punish, or expel students when a forecast of disruption is raised

233. See *Tinker*, 393 U.S. at 509, 514.

234. See *Burch*, 861 F.2d at 1153.

235. See *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 983, 990 (9th Cir. 2001), *rehearing en banc denied*, 279 F.3d 719 (9th Cir. 2002).

236. See *LaVine*, 257 F.3d at 989 n.5.

237. See *id.* at 990.

238. *Id.* at 991; *supra* Part IV.B.1.

based on student characteristics rather than the potential effect of speech itself, a result that cannot be reconciled with Supreme Court precedent.²³⁹

In *Fraser* and *Hazelwood*, the Supreme Court permitted schools to suppress otherwise protected speech for very specific reasons. The *Fraser* Court allowed schools to prohibit otherwise protected vulgar or lewd speech if the speech could undermine the basic education mission of public schools.²⁴⁰ The *Hazelwood* Court allowed schools to suppress otherwise protected speech that could reasonably be interpreted to bear the imprimatur of the school, as long as the suppression was supported by a legitimate pedagogical concern.²⁴¹ Both exceptions are limited to speech that would otherwise be protected in non-school settings. Schools can suppress this speech because of the effect that the speech has on the educational mission or public perception of the school.

The *LaVine* court has created an exception that restricts speech otherwise protected under *Tinker*, if the school can show adequate concern that the student who delivered the speech may pose a risk of disruption.²⁴² Unlike the express exceptions laid out by the Supreme Court in *Fraser* and *Hazelwood*, the exception seemingly created by the *LaVine* court does not differentiate between protected and unprotected speech.²⁴³ Furthermore, this exception could be invoked without determining if the speech in question would have an effect on the school's reputation or the school's basic educational mission. The *LaVine* holding is not focused on any specific type of speech, but rather on the action that a potential speaker may take. Any exception to *Tinker*, like *Tinker* itself, must focus on the impact that the speech itself has or could have. Therefore, interpreting *LaVine* as creating a third categorical exception to *Tinker* would constitute an unsupported departure from previous U.S. Supreme Court jurisprudence.

The Ninth Circuit's application of the *Tinker* standard in *LaVine* was an unsupported departure from the *Tinker* doctrine. The *LaVine* court incorrectly focused on the personal life of speaker and sensational events

239. One Ninth Circuit judge has interpreted the *LaVine* decision to create a new First Amendment rule, allowing public schools to punish students for non-threatening speech when school officials believe the speaker poses a risk of violence. See *LaVine v. Blaine Sch. Dist.*, 279 F.3d 719, 724 (9th Cir. 2002) (Kleinfeld, J., dissenting) (dissenting from court's denial of petition for rehearing en banc).

240. See *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986).

241. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272-73 (1988).

242. See *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 983, 990 (9th Cir. 2001), rehearing en banc denied, 279 F.3d 719 (9th Cir. 2002).

243. See *id.* at 989 n.5.

in other parts of the country instead of the potential effect of the speech itself to support a forecast of disruption. While this application of *Tinker* might be read to create a new exception to the *Tinker* doctrine, this exception cannot be reconciled with the exceptions created by the U.S. Supreme Court.

V. CONCLUSION

In reaching the conclusion that James LaVine's expulsion was justified under *Tinker*, the Ninth Circuit missed an opportunity to give schools and lower courts guidance on how the "true threat" and *Tinker* doctrines can be used together to determine whether poems, songs, or stories about school violence are constitutionally protected speech. A court faced with similar speech should not follow the *LaVine* model, but instead should first apply the "true threat" test to determine whether the speech would be protected in any setting. If the court finds the speech to be a "true threat," the speech can be restricted and no further analysis is necessary. If the court determines that the speech is not a "true threat," then the court should determine if the speech would be protected in the unique school setting. In that case, a school can only restrict the speech if the speech itself causes, or reasonably has the potential to cause, a material or substantial disruption of the school or if the speech meets one of the two exceptions set forth in *Fraser* and *Hazelwood*.

In *LaVine*, the Ninth Circuit departed from these established doctrines for evaluating student speech. By applying *Tinker*, the *LaVine* court not only failed to make the basic determination that the poem was otherwise protected, but also failed to evaluate "Last Words" as what the school interpreted it to be—an implied threat to do harm. By applying the *Tinker* doctrine to a case that had nothing to do with the potential effect of the speech on other students, the court attempted to put a round peg in a square hole. This attempt to fit a decision based on a fear of potential action into the standard for evaluating the disruptive effect of speech distorts the *Tinker* doctrine. Perhaps the choice to apply *Tinker*, with its lower protection for student speech, was an attempt by the *LaVine* court to reach the result of finding James's expulsion to be justified. While there may be valid reasons for a school to take action to expel a student whom school officials believe might pose a danger to the safety of the school, these concerns should not become part of First Amendment doctrine. The *Tinker* doctrine, a tool developed for evaluating First Amendment protection, should remain focused on the actual or potential effect of the student *speech* in question. Fear of potential future action

that is not a direct result of the speech has no place in determining the constitutional protection afforded student speech.