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**Constitutional Law—True Threat Doctrine and Public School Speech—An Expensive View of a School's Authority to Discipline Allegedly Threatening Student Speech Arising off Campus. Doe v. Pulaski County Special School District, 306 F.3d 616 (8th Cir. 2002).**

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CONSTITUTIONAL LAW—TRUE THREAT DOCTRINE AND PUBLIC SCHOOL SPEECH—AN EXPANSIVE VIEW OF A SCHOOL’S AUTHORITY TO DISCIPLINE ALLEGEDLY THREATENING STUDENT SPEECH ARISING OFF CAMPUS. *Doe v. Pulaski County Special School District*, 306 F.3d 616 (8th Cir. 2002).

## I. INTRODUCTION

In light of several highly publicized school shootings in recent years, school officials across the country increasingly punish student expression and conduct perceived to be threatening.<sup>1</sup> While this increased scrutiny is in many respects understandable, it is often unconstitutional.<sup>2</sup> School districts surely have a right—even a duty—to discipline student speech that rises to the level of a threat.<sup>3</sup> But parsing protected speech from proscribable threats is a tricky task—a task that continues to challenge modern courts. So when does speech constitute a true threat? When can a school district punish a perceived threat without trampling on a student’s free speech rights? These questions are difficult enough when a threat is made on school grounds, but consider the quandary presented when a student makes a threat off campus. In this situation, when does a school have the authority to discipline a student for such off campus speech?

This note examines *Doe v. Pulaski County Special School District*,<sup>4</sup> a recent case decided by the United States Court of Appeals for the Eighth Circuit that confronts these questions. The note begins by chronicling the facts of *Doe*, including the “puppy love” romance and break-up of two junior high teenagers, the violent and threatening letter at the heart of the case, the school’s reaction, and the ensuing progression through the court system.<sup>5</sup> Next, the note explores both the history of the true threats doctrine—from its origin in the 1969 United States Supreme Court case, *Watts v. United States*,<sup>6</sup> to the circuit courts’ subsequent attempts to define a true threat<sup>7</sup>—and the law governing free speech in the secondary public school context.<sup>8</sup> Within this review of background law, the note also examines the underly-

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1. Kathryn E. McIntyre, *Hysteria Trumps First Amendment: Balancing Student Speech with School Safety*, 7 SUFFOLK J. TRIAL & APP. ADVOC. 39, 40–42 (2002). McIntyre says that in the last two years, suspensions and expulsions have dramatically increased for student conduct neither criminal nor violent. *Id.* at 42.

2. *Id.* at 42–43.

3. See Andrew D.M. Miller, *Balancing School Authority and Student Expression*, 54 BAYLOR L. REV. 623, 625 (2002).

4. 306 F.3d 616 (8th Cir. 2002).

5. See *infra* Part II.

6. 394 U.S. 705 (1969) (per curiam); see *infra* Part III.A.1.

7. See *infra* Part III.A.2.

8. See *infra* Part III.B.1–2.

ing policy issue of judicial deference to local school board decisions.<sup>9</sup> The note then explains the United States Court of Appeals for the Eighth Circuit's reasoning in finding that J.M.'s letter was a true threat, examining the arguments of the majority opinion as well as the two dissenting opinions.<sup>10</sup> Finally, the note considers the significance of the *Doe* holding, proposing that, by excluding the school context analysis, the majority erroneously suggests to school officials a seemingly unlimited authority to discipline student speech arising off campus.<sup>11</sup>

## II. FACTS

J.M. and K.G.<sup>12</sup> "dated" during the seventh grade at Northwood Junior High School.<sup>13</sup> The relationship consisted primarily of time spent together at school and at church.<sup>14</sup> Sometime during the summer of 2000—following the conclusion of the seventh-grade school year—K.G. became interested in another boy and broke up with J.M.<sup>15</sup>

J.M., frustrated and angry about the break-up, wrote two drafts of a violent, obscenity-laden "composition"<sup>16</sup> expressing a desire to rape and

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9. See *infra* Part III.B.3.

10. See *infra* Part IV.

11. See *infra* Part V.

12. The parties involved in this case were minors at the time of the suit. See *Doe v. Pulaski County Special Sch. Dist.*, 306 F.3d 616, 619 (8th Cir. 2002). The court has sealed the record of the case in order to protect the identities of the minors. Consequently, both the court opinions and this note refer to the parties by their initials. *Id.* "J.M." refers to the plaintiff, a male who at the time of the suit was fourteen years of age. *John Doe v. Pulaski County Special Sch. Dist.*, No. 4:00CV00707 GH, slip op. at 1 (E.D. Ark. Nov. 22, 2000). "K.G." is a female student who was thirteen years old when J.M. targeted K.G. with the alleged threats. *Doe*, 306 F.3d at 625.

Additionally, because of the court-ordered seal, the author was unable to access attorneys' briefs, trial transcripts, and other trial documents for the purposes of researching this note.

13. *Doe*, 306 F.3d at 619.

14. *Id.* Both J.M. and K.G. attended Stanfill Baptist Church and were involved in the church youth group. *Doe ex rel. Doe v. Pulaski County Special Sch. Dist.*, 263 F.3d 833, 838 n.6 (8th Cir. 2001), *rev'd en banc*, 306 F.3d 616 (8th Cir. 2002).

15. *Doe*, 306 F.3d at 619. The couple apparently had experienced multiple break-ups during the previous school year. *Id.*

16. The term "composition" was used by the district court to refer generically to the writing in question. *John Doe*, No. 4:00CV00707 GH, slip op. at 2. The Eighth Circuit Court of Appeals used both "letter" and "song" to refer to the composition throughout its opinion, *Doe ex rel. Doe*, 263 F.3d at 835 n.3, because J.M. first intended the writing to be a song but later drafted it as a letter. *Doe*, 306 F.3d at 619. According to J.M., he initially attempted to write a song patterned after the lyrics of rap artists such as Eminem, Juvenile, and Kid Rock. *Id.* Finding however that his "songs" fit no particular rhythm, he ultimately treated the compositions as letters, signing both at their respective conclusions. *Id.*

murder K.G.<sup>17</sup> In the four-page writing J.M. used the “f-word” approximately ninety times;<sup>18</sup> referred to K.G. as a “bitch,” “slut,” “ass,” and “whore” more than eighty times;<sup>19</sup> and described in coarse detail how he planned to rape, sodomize, and murder K.G.<sup>20</sup> J.M. also warned K.G. twice in the letter that he planned to hide under her bed and kill her with a knife as she slept.<sup>21</sup>

J.M. wrote the letters at his home and allegedly had no intention of sharing the letters’ contents with anyone.<sup>22</sup> Approximately one month prior to the beginning of the 2000–2001 school year, J.M.’s best friend, D.M., found one of the letters in J.M.’s bedroom while searching for something on top of a dresser.<sup>23</sup> J.M. immediately snatched the letter from D.M.’s hands, but after D.M. asked to read it, J.M. relented and handed it back to D.M.<sup>24</sup> D.M. then asked for a copy of the letter, but J.M. refused the request.<sup>25</sup>

In the days following D.M.’s discovery of the letter, K.G. also became aware of the letter’s existence.<sup>26</sup> At some point during this time, K.G. and J.M. engaged in two or three telephone conversations in which they discussed the letter.<sup>27</sup> J.M. initially denied to K.G. that he wrote the letters, claiming that another boy was the author,<sup>28</sup> but later admitted that he had in fact written them.<sup>29</sup> In at least one conversation, J.M. told K.G. that the letters contained statements about killing her.<sup>30</sup> Additionally, at some point

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17. *Doe*, 306 F.3d at 619.

18. *Id.* at 625.

19. *Id.*

20. *Doe ex rel. Doe*, 263 F.3d at 839 (Hansen, J., dissenting).

21. *Doe*, 306 F.3d at 625.

22. *Id.* at 619; *Doe ex rel. Doe*, 263 F.3d at 835.

23. *Doe*, 306 F.3d at 619. The parties disputed the facts concerning precisely when J.M. wrote the letter and when D.M. discovered the letter. *Id.* at 628 n.6 (Heaney, J., dissenting). J.M.’s father contended that the letter remained in J.M.’s bedroom for two months before D.M. stole it. *Id.* (Heaney, J., dissenting). The attorney for the school district stated during oral arguments before the Eighth Circuit that he believed J.M. wrote the letter in late July or early August. Oral Argument, *Doe v. Pulaski County Special Sch. Dist.*, 306 F.3d 616 (8th Cir. 2002), available at <http://www.ca8.uscourts.gov/oralargs/oaFrame.html> [hereinafter *Oral Argument*].

24. *Doe*, 306 F.3d at 619.

25. *Id.*

26. *Id.* The court noted that it was unclear how K.G. first learned of the letter. *Id.* K.G. testified that she first learned of a letter during a phone conversation with J.M., but J.M. claimed that K.G. found out about the letter through D.M. *Id.*

27. *Id.* During oral arguments before the Eighth Circuit, attorneys for both parties noted that there was factual dispute as to who initiated the telephone calls. *Oral Argument, supra* note 23.

28. *John Doe v. Pulaski County Special Sch. Dist.*, No. 4:00CV00707 GH, slip op. at 2 (E.D. Ark. Nov. 22, 2000).

29. *Doe*, 306 F.3d at 619.

30. *Doe ex rel. Doe v. Pulaski County Special Sch. Dist.*, 263 F.3d 833, 835 (8th Cir. 2001).

during one of the phone conversations, K.G. asked J.M. if she could read the “songs” he had written, but J.M. refused her request.<sup>31</sup>

Approximately one week before the new school year began, D.M. spent the night at J.M.’s house and, at the request of K.G., stole one of the letters.<sup>32</sup> D.M. then called K.G. and read portions of the letter to her over the phone, at which point K.G. asked D.M. to bring her the letter.<sup>33</sup>

D.M. delivered the letter to K.G. on the second day of the new school year.<sup>34</sup> K.G. read the letter in gym class in the presence of several other students.<sup>35</sup> One of the other students present notified the school resource officer of the letter.<sup>36</sup> The resource officer accompanied the student back to the gym where the officer conducted an investigation and informed school administrators of the situation.<sup>37</sup> After meeting with each of the students involved, Principal Allison recommended that the district expel J.M. from Northwood for the remainder of his eighth-grade year in accordance with the school district’s “terroristic threatening” policy.<sup>38</sup>

At a conference the following day, J.M. and his parents appealed the expulsion to Dr. Welch, director of Student Services and Athletics, who served as a hearing officer for the district.<sup>39</sup> Dr. Welch recommended that the school suspend J.M. for one semester and that he be able to attend the district’s alternative school during his suspension.<sup>40</sup> At some point during

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31. *Id.* This fact—mentioned in both preceding opinions—does not appear in the Eighth Circuit’s *en banc* opinion.

32. *Doe*, 306 F.3d at 619.

33. *Doe ex rel. Doe*, 263 F.3d at 835. Again, while the district court and the Eighth Circuit’s panel opinions mention this conversation, the Eighth Circuit’s *en banc* opinion does not include it.

34. *Doe*, 306 F.3d at 619–20.

35. *Id.* at 620.

36. *Id.*

37. *Id.*

38. *Id.* Principal Allison based his recommendation on Rule 36 of the school district’s Handbook for Student Conduct and Discipline. *Id.* The rule provides: “Students shall not, with the purpose of terrorizing another person, threaten to cause death or serious physical injury or substantial property damage to another person or threaten physical injury to teachers or school employees.” *Id.* at 620 n.2. Rule 36 further provides that students violating the rule will be recommended for expulsion. *Id.*

39. *Id.* The conference, also described as a “hearing” by the district court, appears to have been requested by Principal Allison immediately upon J.M.’s expulsion. *See* John Doe v. Pulaski County Special Sch. Dist., No. 4:00CV00707 GH, slip op. at 3 (E.D. Ark. Nov. 22, 2000). Mr. Calhoun, assistant principal at Northwood, also attended the conference. *Id.*

40. *Doe*, 306 F.3d at 620. The district’s alternative school is referred to as “Alpha Academy” and is “designed to provide prevention and intervention strategies to students dropping out of school due to excessive suspensions, poor attendance, inappropriate behavior, or lack of interest in academics.” PULASKI COUNTY SPECIAL SCHOOL DISTRICT HANDBOOK FOR STUDENT CONDUCT AND DISCIPLINE 30 (2002–03), available at [http://www.pcssd.org/dept/account/PCSSD\\_Sec\\_Handbook\\_2002-03.pdf](http://www.pcssd.org/dept/account/PCSSD_Sec_Handbook_2002-03.pdf).

this time, a police officer interviewed the students involved, but the state prosecuting attorney declined to take action against J.M.<sup>41</sup>

Still unhappy with the semester-long suspension, J.M. and his parents appealed Dr. Welch's recommendation to the Pulaski County School Board.<sup>42</sup> On September 12, 2000, the school board voted to extend J.M.'s expulsion to the end of the school year as well as deny him the opportunity to attend alternative school.<sup>43</sup>

On September 26, 2000, J.M., through his parents, filed suit in the United States District Court for the Eastern District of Arkansas alleging that the school district violated his rights under the First and Fourteenth Amendments.<sup>44</sup> The following day, the court issued a temporary restraining order, reinstating J.M. to the school district but stipulating that he have no contact with K.G.<sup>45</sup> Following a bench trial in November,<sup>46</sup> the district court held that J.M.'s letter did not constitute a true threat of violence and therefore was protected speech under the First Amendment.<sup>47</sup> The court ordered the school district to terminate the expulsion and remove all references to the expulsion from J.M.'s school records.<sup>48</sup> The school district appealed, and a three-judge panel of the United States Court of Appeals for the Eighth Circuit affirmed the district court's decision.<sup>49</sup> The Eighth Circuit then granted the school district's request for a rehearing *en banc*.<sup>50</sup> On September 25, 2002, the Eighth Circuit, in a six to four decision, reversed the district court, finding that J.M.'s letter constituted a true threat, and, therefore, his expulsion did not violate the First Amendment.<sup>51</sup>

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41. *Doe ex rel. Doe v. Pulaski County Special Sch. Dist.*, 263 F.3d 833, 838 (8th Cir. 2001).

42. *Id.* at 836. The appeal was not heard until the September 12, 2000 school board meeting. *Id.* Consequently, J.M. attended alternative school from August 29 to September 12. *Id.*

43. *Id.* For a discussion of the school board proceedings on September 12, 2000, see *infra* Part IV.B.4.

44. *John Doe*, No. 4:00CV00707 GH, slip op. at 1.

45. *Doe*, 306 F.3d at 620.

46. *John Doe*, No. 4:00CV00707 GH, slip op. at 1.

47. *Id.* at 5.

48. *Id.* at 6.

49. *Doe ex rel. Doe v. Pulaski County Special Sch. Dist.*, 263 F.3d 833, 838 (8th Cir. 2001). The Eighth Circuit's three-judge panel—consisting of Judge Hansen, Judge Heaney, and District Judge Tunheim of the District of Minnesota, sitting by designation—affirmed the district court in a two to one decision. *Id.* at 834–35.

50. *Doe*, 306 F.3d at 619.

51. *Id.* at 626–27.

## III. BACKGROUND

*Doe* falls under the analytical umbrella of two areas of First Amendment law. On one hand, the content of J.M.'s speech clearly involves the "true threat" limitation to the Free Speech Clause.<sup>52</sup> But at the same time, because it was a public school authority that disciplined J.M., the case implicates speech limitations arising within the context of public schools.<sup>53</sup>

Accordingly, this section first will trace the development of free speech limitations—focusing primarily on the "true threat" doctrine and its development through United States Supreme Court and federal circuit court decisions.<sup>54</sup> The section then will give an overview of free speech jurisprudence within the context of secondary public schools—emphasizing the distinction between on campus and off campus expression,<sup>55</sup> as well as addressing the underlying policy issue of judicial deference to local school authorities.<sup>56</sup>

## A. The "True Threat" Doctrine

"Congress shall make no law . . . abridging the freedom of speech."<sup>57</sup> Under the First Amendment, the government may not proscribe what people see, read, speak, or hear.<sup>58</sup> But while freedom of speech is among the most highly regarded constitutional rights, its protections are not absolute.<sup>59</sup> The Supreme Court has recognized certain narrow classes of speech—including obscenity, defamation, "fighting words," and "true threats"<sup>60</sup>—that can be limited in certain instances without giving rise to constitutional violations.<sup>61</sup> The Court has reasoned that these classes of speech are limitable because

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52. *Id.* at 621–22.

53. *Id.* at 627 (Heaney, J., dissenting).

54. *See infra* Part III.A.

55. *See infra* Part III.B.1–2.

56. *See infra* Part III.B.3.

57. U.S. CONST. amend. I.

58. *E.g.*, *Ashcroft v. The Free Speech Coalition*, 535 U.S. 234, 245 (2002) (finding several provisions of the Child Pornography Prevention Act of 1996 unconstitutionally overbroad).

59. *E.g.*, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942) (upholding as constitutional a New Hampshire statute that prohibited the use of speech in a public place that was likely to cause a breach of the peace).

60. *See R. A. V. v. City of St. Paul*, 505 U.S. 377, 383 (1992) (citing *Roth v. United States*, 354 U.S. 476 (1957) (obscenity); *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (defamation); and *Chaplinsky*, 315 U.S. at 572 (fighting words)).

61. *Chaplinsky*, 315 U.S. at 572. These types of speech are limitable "because of their constitutionally proscribable content. These categories, however, are not entirely invisible to the Constitution, and government may not regulate them based on hostility, or favoritism, towards a nonproscribable message they contain." *R. A. V.*, 505 U.S. at 377.

they “are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”<sup>62</sup>

### 1. *The Supreme Court and True Threats*

The Supreme Court has articulated the precise social interests it seeks to protect by limiting speech that threatens violence.<sup>63</sup> Justice Scalia, writing for the majority in *R. A. V. v. City of St. Paul*,<sup>64</sup> reasoned that threats of violence fall outside the First Amendment because of our nation’s interest in “protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur.”<sup>65</sup> With these interests in mind, the Court has recognized “true threats” as a proscribable class of speech.<sup>66</sup>

The “true threat” doctrine finds its origin in *Watts v. United States*,<sup>67</sup> a 1969 case in which a man made a threat against President Lyndon B. Johnson in violation of a federal statute.<sup>68</sup> The Supreme Court distinguished, in a per curiam opinion, threats from constitutionally protected speech,<sup>69</sup> but provided little else in defining specifically what constitutes a true threat.<sup>70</sup>

In *Watts* the alleged threat occurred when the defendant, speaking to a small group attending a Washington, D.C., rally, said, “[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J.”<sup>71</sup> In determining whether Watts’s statement was proscribable, the Court considered

62. *Chaplinsky*, 315 U.S. at 572.

63. See *R. A. V.*, 505 U.S. at 377.

64. *Id.*

65. *Id.* at 388.

66. *Watts v. United States*, 394 U.S. 705, 707–08 (1969) (per curiam). Threats also are proscribable under a variety of federal and state statutes. See John Rothchild, *Menacing Speech and the First Amendment: A Functional Approach to Incitement That Threatens*, 8 TEX. J. WOMEN & L. 207, 212 (1999). An examination of threats punished under such statutes, however, is beyond the scope of this note.

67. 394 U.S. 705 (1969) (per curiam).

68. *Id.* at 706. 18 U.S.C. § 871(a) provides that “[w]hoever knowingly or willfully . . . [makes] any threat to take the life of, to kidnap, or to inflict bodily harm upon the President of the United States . . . shall be fined . . . or imprisoned not more than five years, or both.”

69. *Watts*, 394 U.S. at 707.

70. E.g., Lisa M. Pisciotta, Comment, *Beyond Sticks & Stones: A First Amendment Framework for Educators Who Seek To Punish Student Threats*, 30 SETON HALL L. REV. 635, 642–43 (2000).

71. *Watts*, 394 U.S. at 706. The defendant’s statement was made partly in reference to his opposition to being inducted into the Armed Forces after having received his draft classification. *Id.*



whether the comment rose to the level of a "true threat."<sup>72</sup> Specifically, the Court found three factual considerations significant.<sup>73</sup>

First, the Court cited the political backdrop in which the statements were made.<sup>74</sup> Political speech made in the context of a public rally is generally the type of speech awarded the highest constitutional protection.<sup>75</sup> The *Watts* court reflected this sentiment by acknowledging our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wideopen,"<sup>76</sup> even when speech results in unpleasant and offensive attacks on government officials.<sup>77</sup> Second, the Court noted the statement's expressly conditional nature.<sup>78</sup> *Watts* conditioned his threat upon his being inducted into the Armed Forces, something he suggested would never occur because he intended not to appear for his mandatory physical after receiving his draft classification.<sup>79</sup> Finally, the Court found significant the reaction—both *Watts* and the crowd laughed—of those who heard the statement.<sup>80</sup>

Considering *Watts*'s statement against these factors, the Court found that he had not issued a true threat.<sup>81</sup> *Watts* consequently held that true threats of violence do not fall under First Amendment protection, but failed to provide a precise definition of a true threat.<sup>82</sup>

Subsequent Supreme Court cases also fail to provide further specificity as to what constitutes a true threat.<sup>83</sup> Until April 2003, *NAACP v. Claiborne Hardware Co.*<sup>84</sup> was the only other case where the Court directly addressed the true threat exception to the First Amendment.<sup>85</sup>

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72. *Id.* at 708.

73. *Id.*

74. *Id.*

75. Emily Calhoun, *Initiative Petition Reforms and the First Amendment*, 66 U. COLO. L. REV. 129, 130 (1995). Calhoun suggests that historically, most considered petitioning the government to be a right superior to that of free speech. *Id.*

76. *Watts*, 394 U.S. at 708 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

77. *Id.*

78. *Id.*

79. *Id.* at 706–07.

80. *Id.* at 707–08.

81. *Id.* at 708.

82. Pisciotta, *supra* note 70, at 642–43; Rothchild, *supra* note 66, at 213.

83. Rothchild, *supra* note 66, at 213.

84. 458 U.S. 886 (1982).

85. Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL'Y 283, 295–96 (2001). In April 2003 the Supreme Court confronted the true threat doctrine in *Virginia v. Black*, 123 S. Ct. 1536 (2003). Addressing the doctrine in the context of the intimidation resulting from cross burning, the Court said, "[t]rue threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Id.* at 1548. The Court further noted that the speaker need not actually intend to carry out the

In *NAACP* the Court considered whether Charles Evers, Field Secretary for the NAACP in Mississippi, had uttered protected or proscribable speech in a series of public speeches to supporters of a local boycott.<sup>86</sup> In the speeches Evers allegedly said that those who broke the boycott would “have their necks broken.”<sup>87</sup> The Court found these statements to be protected speech, though the Court focused much of its discussion on the *Brandenburg*<sup>88</sup> incitement test rather than the true threat doctrine.<sup>89</sup> While the Court only mentioned *Watts* in a footnote,<sup>90</sup> it is important to note what the Court relied upon in dismissing the claim that Evers’s speech constituted a true threat. As in *Watts*, the Court considered the political context of the speech to be significant.<sup>91</sup> Considered against this backdrop, the Court found Evers’s speech to be more akin to the political rhetoric found permissible in *Watts*.<sup>92</sup>

Taken together, *Watts* and *NAACP* provide the basic framework for the true threat doctrine, but provide little specific guidance in determining when speech rises to the level of a true threat.<sup>93</sup> Given this lack of guidance, federal circuit courts of appeal have struggled to develop a workable “true threat” definition since *Watts* and *NAACP*.<sup>94</sup>

## 2. *The Circuit Split: Reasonable Speaker Versus Reasonable Recipient*

In developing the true threats doctrine, the federal circuit courts of appeals generally have adopted an objective test that considers whether a reasonable person would consider the alleged threat to be a serious expression of an intent to cause harm.<sup>95</sup> The individual circuits, however, are nearly

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threat and said that “[i]ntimidation . . . is a type of true threat, where a speaker directs a threat to a person . . . with the intent of placing the victim in fear of bodily harm or death.” *Id.* Even if *Virginia v. Black* had been decided before *Doe*, it does not appear that it would have altered the *Doe* court’s analysis. Except for articulating a definition of a “true threat,” *Virginia v. Black* does not appear to modify the doctrine.

86. *NAACP*, 458 U.S. at 886.

87. *Id.* at 900 n.28. There is some factual dispute over what Evers actually said. Rothman, *supra* note 85, at 299–300. Rothman notes that one witness believed Evers said “[i]f you break the boycott your own people will break your necks,”—constituting a warning rather than a threat. *Id.* Rothman suggests that this factual uncertainty might have made the Court hesitant to deem Evers’s statements a threat. *Id.*

88. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam). In *Brandenburg* the Supreme Court held that a state may prohibit advocacy of the use of force or of lawless action if such advocacy is *likely* to produce *imminent* lawless action or force. *Id.* at 447.

89. *NAACP*, 458 U.S. at 927–29.

90. *Id.* at 928 n.71.

91. *See id.* at 926–29.

92. *Id.*

93. *See supra* note 82 and cited sources.

94. Pisciotto, *supra* note 70, at 642–45.

95. *United States v. Fulmer*, 108 F.3d 1486, 1490–91 (1st Cir. 1997) (noting that other

evenly split on whether to apply this objective test from the perspective of a reasonable speaker or a reasonable recipient.<sup>96</sup>

For instance, the United States Court of Appeals for the Ninth Circuit has adopted a reasonable speaker approach and construes a true threat based upon whether a reasonable speaker would foresee that the recipient would interpret the statement to be a serious expression of intent to harm or assault.<sup>97</sup> Some variation of this test has been implemented by at least four other circuits.<sup>98</sup> The Fourth Circuit, however, has adopted a reasonable recipient approach that considers whether a reasonable recipient who is familiar with the context would interpret the statement as a threat.<sup>99</sup> Though the phrasing varies from circuit to circuit, five other circuits use this listener-based approach in some form.<sup>100</sup>

The distinction between these two approaches has been the subject of much scholarly analysis, but the practical effect of adopting one test over the other is relatively insignificant.<sup>101</sup> The outcome will be the same in the vast majority of cases regardless of whether the court analyzes the speech in question from the vantage point of a reasonable speaker or a reasonable listener.<sup>102</sup> As one commentator noted, "To foresee how a *listener* would react to a threat, the only frame of reference a reasonable speaker would have is how the *speaker* would react . . . if he were himself a *listener*."<sup>103</sup> Additionally, the difference takes on less significance in practice because most circuits consider subjective factors—such as how the specific recipient reacted to the speech—in determining how a reasonable person would per-

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circuits have adopted an objective test applied from the vantage point of either a reasonable person making the statement or a reasonable person receiving the statement).

96. See Rothman, *supra* note 85, at 302. The author gives a useful overview of the various circuit approaches, citing the First, Third, Sixth, Seventh, and Ninth Circuits as adopting some form of a reasonable speaker test, and the Fourth, Fifth, Eighth, Tenth, Eleventh, and D.C. circuits as using some variation of a reasonable recipient test. *Id.* at 302–05. The author further notes that the Second Circuit has split from the pack and has added an imminence requirement to its reasonable recipient test. *Id.* at 306 (citing *United States v. Kelner*, 534 F.2d 1020 (2d Cir. 1976)).

97. *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 372 (9th Cir. 1996). *Lovell* is unique because it applied the true threats doctrine to student speech uttered in a public school context. *Id.* at 371. There a school counselor alleged that the student walked into her office and said, "If you don't give me this schedule change, I'm going to shoot you!" *Id.* at 369. The Ninth Circuit held the speech to constitute a true threat, finding that a reasonable person in the student's position would foresee that the counselor would interpret the statement as a serious expression of intent to harm. *Id.* at 372–73.

98. For a list of these circuits, see *supra* note 96.

99. *United States v. Maisonet*, 484 F.2d 1356, 1358 (4th Cir. 1973).

100. For a list of the circuits applying this test, see *supra* note 96.

101. *E.g.*, Rothman, *supra* note 85, at 303.

102. *Id.*

103. *Id.* (emphasis in original).

ceive the threat.<sup>104</sup> Despite the relative insignificance of the particular approach used, most all of the various circuits have adopted one approach over the other.<sup>105</sup>

a. The Eighth Circuit “reasonable recipient” approach

The Eighth Circuit falls into the group of circuits having adopted the reasonable recipient approach.<sup>106</sup> In *United States v. Dinwiddie*,<sup>107</sup> the Eighth Circuit held that whether a statement was a true threat depended upon “whether the recipient of the alleged threat could reasonably conclude that it expresses ‘a determination or intent to injure presently or in the future.’”<sup>108</sup> Furthermore, the court said that the particular threat must be analyzed “in the light of [its] entire factual context.”<sup>109</sup>

In *Dinwiddie* a pro-life advocate made pointed threats to physicians who performed abortions at the Planned Parenthood of Greater Kansas City clinic.<sup>110</sup> Over the course of a year and with the aid of a bullhorn, Mrs. Dinwiddie made more than fifty offensive statements, including such comments as, “Patty, you have not seen violence yet until you see what we do to you” and “Robert, remember Dr. Gunn [a physician who was killed by an abortion opponent in 1993] . . . This could happen to you . . .”<sup>111</sup> Examining these comments within their entire factual context, the Eighth Circuit found that Dinwiddie’s comments constituted a threat of force.<sup>112</sup>

b. The *Dinwiddie* factors

In reaching this decision, the Eighth Circuit analyzed Dinwiddie’s comments against several specific factors to determine how a reasonable recipient might perceive the alleged threats.<sup>113</sup> The factors used by the *Dinwiddie* court include: the reaction of the recipient of the threat and of other listeners,<sup>114</sup> whether the threat was conditional,<sup>115</sup> whether the threat was

104. *Id.*

105. *See supra* note 96 and accompanying text.

106. *See United States v. Dinwiddie*, 76 F.3d 913, 925 (8th Cir. 1996); *see also Martin v. United States*, 691 F.2d 1235, 1240 (8th Cir. 1982). In *Martin* the Eighth Circuit adopted the Fourth Circuit’s approach, which considers a statement from the standpoint of a reasonable recipient familiar with the context of the communication. *Id.*

107. 76 F.3d 913 (8th Cir. 1996).

108. *Id.* at 925 (quoting *Martin*, 691 F.2d at 1240).

109. *Id.* (quoting *United States v. Lee*, 6 F.3d 1297, 1306 (8th Cir. 1993) (en banc)).

110. *Id.* at 917.

111. *Id.*

112. *Id.* at 926.

113. *Dinwiddie*, 76 F.3d at 925.

114. *Id.* (citing *United States v. J.H.H.*, 22 F.3d 821, 827 (8th Cir. 1994)).

115. *Id.* (citing *United States v. Bellrichard*, 994 F.2d 1318, 1321 (8th Cir. 1993)).

communicated directly to the victim,<sup>116</sup> whether the maker of the threat had made similar statements to the victim in the past,<sup>117</sup> and whether the victim had reason to believe the maker of the threat had a propensity to engage in violence.<sup>118</sup> The court noted that the presence or absence of any one of these factors was not dispositive.<sup>119</sup> In light of these factors, the court found that a reasonable recipient would consider Dinwiddie's comments a true threat.<sup>120</sup>

The Eighth Circuit has applied the *Dinwiddie* factors in subsequent cases,<sup>121</sup> but courts in other circuits have used slightly varying factors to determine how a reasonable person would perceive an alleged threat.<sup>122</sup>

### 3. *The Relevance of Intent*

An additional issue of importance is the relevance of a speaker's intent when making a purported threat. The courts generally have rejected the notion that a speaker must have intended to carry out the threat or have had the capacity to carry out the threat before the threat is proscribable under the true threat doctrine.<sup>123</sup> The rejection of this notion is attributable to the very reasons underlying why threats of violence are proscribable in the first place.<sup>124</sup> As the Supreme Court noted in *R. A. V. v. City of St. Paul*,<sup>125</sup> threats fall outside First Amendment protection because of a desire to protect individuals from the fears and harms arising from such threats.<sup>126</sup> Basing the constitutionality of a purported threat upon whether a speaker

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116. *Id.*

117. *Id.* (citing *United States v. Whitfield*, 31 F.3d 747, 749 (8th Cir. 1994)).

118. *Id.*

119. *Dinwiddie*, 76 F.3d at 925 (citing *Bellrichard*, 994 F.2d at 1322) (finding that even a conditional threat may constitute a "true threat").

120. *Id.* at 926. The Eighth Circuit, comparing Dinwiddie's comments to those made in *Watts*, found that Dinwiddie's statements were not conditional, the recipient of the statements responded by wearing a bullet-proof vest, and the statements were communicated directly to the recipient by use of a bullhorn. *Id.* On these facts, the court found Mrs. Dinwiddie's comments to be substantially more threatening than those made in *Watts*. *Id.*

121. *See, e.g.*, *United States v. Hart*, 212 F.3d 1067, 1071-74 (8th Cir. 2000) (applying the *Dinwiddie* factors to find that an anti-abortion activist who parked and then abandoned two Ryder trucks in the driveways of two local abortion clinics was guilty of making a "true threat").

122. *See, e.g.*, *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 858-59 (Pa. 2002); *see also infra* note 176 and accompanying text.

123. *Planned Parenthood of the Columbia/Williamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1075 (9th Cir. 2002); *United States v. Kelner*, 534 F.2d 1020, 1023 (2d Cir. 1976) (considering whether a threat to assassinate Yasser Arafat was punishable under 18 U.S.C. § 875(c), which makes it a crime to transmit in interstate commerce a threat to injure another person).

124. *Planned Parenthood*, 290 F.3d at 1076.

125. 505 U.S. 377 (1992).

126. *Id.* at 388; *see supra* note 65 and accompanying text.

actually intended to carry the threat out would not serve these purposes.<sup>127</sup> An intent requirement would instead minimize the significance of the recipient's perceived harm.<sup>128</sup> For these reasons circuit courts generally have refused to require a showing that the speaker intended to carry out his threat.<sup>129</sup>

In contrast, courts consistently have required a speaker to intentionally or knowingly communicate the threat to someone before the state may discipline the speaker for the alleged threat.<sup>130</sup> In most true threat cases, however, whether a speaker intended to communicate the threat requires little analysis.<sup>131</sup> A cursory look at the facts usually establishes the speaker's intent to communicate.<sup>132</sup> But, when there is a factual dispute as to whether the speaker intended to communicate the alleged threat, intent to communicate becomes a threshold question.<sup>133</sup>

## B. Public School Jurisprudence

To fully understand *Doe*,<sup>134</sup> an analysis must extend beyond true threat jurisprudence. Because K.G. read J.M.'s letter on school grounds and because a public school authority disciplined him, the analysis must necessarily examine free speech jurisprudence as it relates to the context of secondary public schools. Three areas will be particularly insightful in considering the *Doe* case: the scope of student rights for "on campus" speech,<sup>135</sup> a school's authority to limit "off campus" student speech,<sup>136</sup> and the tradition of judicial deference to local school board decisions.<sup>137</sup>

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127. *Planned Parenthood*, 290 F.3d at 1076.

128. *Id.*

129. *See supra* note 123.

130. *E.g.*, *United States v. Orozco-Santillan*, 903 F.2d 1262, 1265–66 n.3 (9th Cir. 1990).

131. *See, e.g.*, *Watts v. United States*, 394 U.S. 705, 706 (1969) (examining a protestor who communicated purported threat to President Johnson directly to a crowd gathered around him at a Washington, D.C. rally); *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 369 (9th Cir. 1996) (noting that student made threatening remarks directly to school counselor); *United States v. Dinwiddie*, 76 F.3d 913, 917 (8th Cir. 1996) (discussing an anti-abortion advocate who used bullhorn to make more than fifty threatening remarks directly to physicians as they entered an abortion clinic).

132. *See supra* note 131 (citing cases that demonstrate the notion that the facts of the case often establish an intent to communicate without any analysis by the court).

133. *See Doe v. Pulaski County Special Sch. Dist.*, 306 F.3d 616, 624–25 (8th Cir. 2002). Because of the unique nature of its facts, *Doe* appears to be one of the only cases to extensively examine whether the speaker actually intended to communicate the threat. As noted by the court in *Doe*, this issue was a determinative factor in deciding whether the school district could punish J.M. for making the alleged threat. *Id.*

134. *Id.* at 616.

135. *See infra* Part III.B.1.

136. *See infra* Part III.B.2.

137. *See infra* Part III.B.3.

### 1. *Scope of Student Rights for "On campus" Speech*

Although it is recognized that freedom of speech is not an absolute right, for public school students the First Amendment offers even fewer protections.<sup>138</sup> Any analysis of student free speech rights begins with the landmark case of *Tinker v. Des Moines Independent Community School District*.<sup>139</sup> In *Tinker* three students wore black armbands to school in protest of the Vietnam War.<sup>140</sup> The school subsequently suspended the students for violating a school policy.<sup>141</sup> In overturning the students' suspensions, the United States Supreme Court emphasized that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>142</sup> The Court limited this seemingly expansive view of student speech rights, however, by holding that First Amendment protection did not extend to speech that materially disrupts class work or involves substantial disorder.<sup>143</sup>

*Tinker* represents the high-water mark for student expression because in later years the Court greatly scaled back student speech rights.<sup>144</sup> *Bethel School District No. 403 v. Fraser*<sup>145</sup> established the first exception to *Tinker* in holding that a school may prohibit the use of vulgar and offensive language if the speech is inconsistent with the school's basic educational mission.<sup>146</sup> Two years later, *Hazelwood School District v. Kuhlmeier*<sup>147</sup> established the second exception when the Court held that schools can limit otherwise protected student speech if that speech arises in the context of

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138. See generally Leonard M. Niehoff, *The Student's Right to Freedom of Speech: How Much Is Left at the Schoolhouse Gate?*, 75 MICH. B.J. 1150 (1996).

139. 393 U.S. 503 (1969).

140. *Id.* at 504.

141. *Id.*

142. *Id.* at 506.

143. *Id.* at 509.

144. See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); see also *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

145. 478 U.S. 675 (1986). In *Fraser*, a high school student included sexual innuendo and offensive terms in a speech given during a school assembly in support of a classmate running for class office. *Id.* The Supreme Court upheld the student's suspension, citing the school's interest in prohibiting the use of vulgar and offensive language in public discourse. *Id.* at 683.

146. *Id.* at 685.

147. 484 U.S. 260 (1988). In *Hazelwood* high school students wrote and edited a newspaper as part of a journalism class. *Id.* at 262. The principal reviewed the paper and removed two pages that dealt with what he considered to be controversial topics such as student pregnancy, birth control, and the effect of divorce on students. *Id.* at 263-64. The Supreme Court upheld the school's right to censor such school-sponsored speech where its actions are related to legitimate pedagogical concerns. *Id.* at 273.

school-sponsored activities and the school's censorship is reasonably related to legitimate pedagogical concerns.<sup>148</sup>

This trilogy of cases forms the basic framework of free speech jurisprudence in public schools.<sup>149</sup> More specifically, the cases constitute the bedrock of law for student speech occurring on campus.<sup>150</sup> As scholars have reasoned and some lower courts have acknowledged, *Tinker's* assertion that student rights do not end at the schoolhouse gate draws a distinction between the rights of students outside school and their rights while in school.<sup>151</sup> Scholars assert that the clear inference to be drawn from these Supreme Court cases is that a school's authority over student speech generally ends when the students leave school.<sup>152</sup> Despite such assertions, lower court decisions have failed to establish a clear standard for determining when a school is within its authority to proscribe off campus student speech.<sup>153</sup>

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148. *Id.* at 273.

149. *See* Miller, *supra* note 3, at 626.

150. *See* Clay Calvert, *Off campus Speech, On campus Punishment: Censorship of the Emerging Internet Underground*, 7 B.U. J. SCI. & TECH. L. 243, 270-71 (2001).

151. *See* Sullivan v. Houston Indep. Sch. Dist., 307 F. Supp. 1328, 1340-41 (S.D. Tex. 1969), *vacated by* 475 F.2d 1071 (5th Cir. 1973). In the first post-*Tinker* case addressing a school's authority to punish off campus speech, the court said:

[I]t makes little sense to extend the influence of school administration to off campus activity under the theory that such activity might interfere with the function of education. School officials may not judge a student's behavior while he is in his home with his family nor does it seem to this court that they should have jurisdiction over his acts on a public street corner. A student is subject to the same criminal laws and owes the same civil duties as other citizens, and his status as a student should not alter his obligations to others during his private life away from the campus.

*Id.*; *see also* Thomas v. Bd. of Educ., Granville Cent. Sch. Dist., 607 F.2d 1043, 1052 (2d Cir. 1979) ("When school officials are authorized only to punish speech on school property, the student is free to speak his mind when the school day ends."); Leora Harpaz, *Internet Speech and the First Amendment Rights of Public School Students*, 2000 BYU EDUC. & L.J. 123, 142 (2000).

152. Harpaz, *supra* note 151, at 142; Calvert, *supra* note 150, at 252. *But cf.* Donovan v. Ritchie, 68 F.3d 14, 16-18 (1st Cir. 1995) (upholding a school official's determination that on campus distribution of an underground newspaper written off campus was a sufficient link to justify the school's authority to discipline the students); J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847 (Pa. 2002) (upholding school's authority to punish an off campus student website on grounds that it created a material and substantial disruption at the school).

153. *See* Student Press Law Ctr. CyberGuide, *A Legal Manual for Online Publishers of Independent Student Web Sites* (2001), at [http://www.splc.org/printpage.asp?id=13&tb=legal\\_research](http://www.splc.org/printpage.asp?id=13&tb=legal_research) [hereinafter CyberGuide].



## 2. School Authority over "Off campus" Speech

While there are no Supreme Court cases addressing a school's authority to discipline off campus student speech,<sup>154</sup> several lower court decisions are representative of the trend of law governing the scope of student rights within this context.<sup>155</sup> The starting point is *Thomas v. Board of Education, Granville Central School District*,<sup>156</sup> a 1979 case in which a high school suspended five students for publishing and distributing an off campus magazine containing "morally offensive, indecent, and obscene" material.<sup>157</sup> The United States Court of Appeals for the Second Circuit overturned the suspensions, finding that the school had exceeded its authority in disciplining the students for what amounted to off campus speech.<sup>158</sup> The court, acknowledging that school officials may only punish speech on school property, held that a student is "free to speak his mind when the school day ends."<sup>159</sup>

*Klein v. Smith*<sup>160</sup> considered whether a school had the authority to discipline a student who made a vulgar gesture toward a teacher in a restaurant parking lot.<sup>161</sup> The gesture took place off school premises and after school hours.<sup>162</sup> The student sued the school district after it suspended him for ten days for violating a school rule prohibiting vulgar language or conduct directed toward school staff.<sup>163</sup> The district court overturned the suspension, finding the link between the off campus gesture and a disruption of the orderly operation of the school too remote to support disciplining the student.<sup>164</sup>

In contrast to the clear boundary established by *Thomas* and *Klein*, some lower courts have supported attempts to extend school authority over off campus student speech when the speech has a disruptive effect on campus or where the speech is linked to some on campus event.<sup>165</sup>

For instance, in *Boucher v. School Board of the School District of Greenfield*,<sup>166</sup> the Seventh Circuit vacated a temporary injunction in favor of a student who had been expelled for writing an article in an underground

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154. Harpaz, *supra* note 151, at 142.

155. See *infra* Part III.B.2 for a discussion of the relevant lower court cases.

156. 607 F.2d 1043 (2d Cir. 1979).

157. *Id.* at 1046.

158. *Id.* at 1050.

159. *Id.* at 1052.

160. 635 F. Supp. 1440 (D. Me. 1986).

161. *Id.* at 1440-41.

162. *Id.* at 1441.

163. *Id.*

164. See *id.*

165. See CyberGuide, *supra* note 153.

166. 134 F.3d 821 (7th Cir. 1998).

newspaper instructing readers how to hack into school computers.<sup>167</sup> Though no evidence showed that the student author distributed the paper on campus or that he used school resources to produce the article, the court applied a *Tinker* analysis and found that the speech could lead school officials to reasonably forecast substantial disruption of school activities.<sup>168</sup>

A fast-growing category of cases involving on campus punishment for arguably off campus expression is that concerning student speech on the Internet.<sup>169</sup> Most of these cases involve situations where students create and maintain off campus websites that are somehow brought to the attention of school officials.<sup>170</sup> A few courts have denied the school's disciplinary authority on the sole basis that the website clearly was off campus speech unrelated to the operation of the school.<sup>171</sup> Some courts, however, have evaluated Internet speech under the *Tinker* analysis of material and substantial disruption.<sup>172</sup>

One of the few cases to support school officials in a dispute involving off campus Internet speech is *J.S. v. Bethlehem Area School District*.<sup>173</sup> This case is particularly insightful because the court analyzed the speech under both a true threats and a *Tinker* analysis.<sup>174</sup> In *J.S.* a school expelled a student for creating an off campus website that included insulting and derogatory comments about a teacher and the principal, a picture of the teacher's severed head dripping with blood, and a request that visitors to the site contribute funds to pay for a hitman to deal with the teacher.<sup>175</sup> Applying factors similar to those outlined in *Dinwiddie*, the Pennsylvania Supreme Court found that the Internet speech did not constitute a true threat.<sup>176</sup> The court

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167. *Id.* at 822–23.

168. *Id.* at 827–29.

169. Calvert, *supra* note 150, at 244–45.

170. See generally Bettina Brownstein, *Student Rights and the Internet*, ARK. LAW., Winter 2002, at 8–12.

171. E.g., *Emmett v. Kent Sch. Dist.*, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000).

172. See *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001) (applying *Tinker* but finding that a student's off campus email did not create a disruption at the school); *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1181 (E.D. Mo. 1998) (applying *Tinker* but finding that an off campus website created no substantial or material disruption of the school).

173. 807 A.2d 847 (Pa. 2002). Interestingly, the Honorable Robert E. Simpson, Jr., Judge of the Court of Common Pleas for Northampton County, Pennsylvania,—the court which heard the student's initial appeal—wrote an article appearing in the *Dickinson Law Review* which discussed the *J.S.* case. See Honorable Robert E. Simpson, Jr., *Limits on Students' Speech in the Internet Age*, 105 DICK. L. REV. 181 (2001).

174. See *J.S.*, 807 A.2d at 856–59, 868–69.

175. *Id.* at 851.

176. *Id.* at 859. The court found that the threats were unconditional, but determined that the student did not communicate the threats directly to the recipient, that the student had not made similar statements to the recipient before, and that no evidence showed that the recipient had reason to believe that the student had the propensity to engage in violence. *Id.*

went on to find, however, that the website constituted on campus speech since the student accessed the site on a school computer in a classroom.<sup>177</sup> Applying *Tinker*, the court held that the website caused disruption of the entire school community, and the school did not, therefore, violate the student's First Amendment rights by expelling him.<sup>178</sup>

In contrast, *Beussink v. Woodland R-IV School District*<sup>179</sup> is representative of the trend of cases where courts have protected off campus student speech.<sup>180</sup> In *Beussink* a Missouri high school student created a website at home which used crude and vulgar language to criticize the school, teachers, and administrators.<sup>181</sup> The court found that the student created the website completely off campus and did not deliberately bring its contents onto campus.<sup>182</sup> Despite this finding, the court, with little explanation, applied the *Tinker* standard but found that the website did not substantially interfere with school discipline.<sup>183</sup> On this factual determination, the court held that the school had violated Beussink's First Amendment rights.<sup>184</sup>

Considered as a whole, this group of cases has failed to establish clear guidance as to how far the First Amendment extends in protecting off campus student speech on the Internet.<sup>185</sup> Many courts have extended *Tinker* to apply to off campus speech, while others have refused to recognize the school's disciplinary authority simply because of the speech's off campus origin.<sup>186</sup> Clearly, the state of the law concerning off campus Internet speech remains an open question.<sup>187</sup> But, while the courts have showed little consistency in the analyses used to reach their decisions, most courts have decided in favor of student speech.<sup>188</sup>

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177. *Id.* at 865. The court stated that it would consider speech to be on campus speech if it is aimed at a specific school or its personnel and is brought onto the school campus or accessed at school by its originator. *Id.*

178. *Id.* at 869.

179. 30 F. Supp. 2d 1175 (E.D. Mo. 1998). The United States District Court for the Eastern District of Missouri was the first court to render a verdict in a case involving school punishment for a student's off campus Internet use. See *CyberGuide*, *supra* note 153.

180. See, e.g., *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001).

181. *Beussink*, 30 F. Supp. 2d at 1177.

182. *Id.*

183. *Id.* at 1180-81.

184. *Id.* at 1182. The court granted Beussink's request for preliminary injunctive relief. *Id.* Specifically, the court enjoined the school district from considering Beussink's ten-day suspension in applying the school's absenteeism policy when calculating his semester grades. *Id.* If the ten-day suspension applied, Beussink would fail four of his subjects. *Id.* at 1181. The court order also enjoined the district from prohibiting Beussink from reposting the website on his home computer. *Id.* at 1182.

185. See *CyberGuide*, *supra* note 153.

186. See, e.g., *Emmett v. Kent Sch. Dist.*, 92 F. Supp. 2d 1088 (W.D. Wash. 2000).

187. *Brownstein*, *supra* note 170, at 12.

188. See, e.g., *supra* note 172 and accompanying text.

### 3. *Judicial Deference to Local School Board Decisions*

An additional judicial policy to be examined is the tradition of judicial deference to the decisions of local school authorities.<sup>189</sup> Local control is a fundamental tenet of our nation's public education system.<sup>190</sup> This national value has led to the practice of judicial bodies granting tremendous deference to the decisions of local school boards.<sup>191</sup> The Supreme Court has acknowledged that courts should not intervene in the resolution of conflicts that "arise in the daily operation of our public school[s]."<sup>192</sup>

With this general custom of deference, however, come certain limits.<sup>193</sup> Courts still have an obligation to ensure that school boards exercise their powers in a manner that complies with the protections afforded under the First Amendment.<sup>194</sup> When a local school authority's exercise of power results in an abuse of discretion, courts have the license to step in and provide a remedy.<sup>195</sup> Despite these limitations, most courts are hesitant to substitute their judgment for that of local school authority.<sup>196</sup>

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189. Though the issue of judicial deference to local school authority is not a substantive issue of law generally considered in judicial decisions, it is a policy consideration that permeates constitutional law. See James Scott McClain, *The Voting Rights Act and Local School Boards: An Argument for Deference to Educational Policy in Remedies for Vote Dilution*, 67 TEX. L. REV. 139, 176 (1988).

190. See Julie Goyer, *Student First Amendment Rights in the Public School Setting: A Topic of Increased Litigation*, 6 AM. J. TRIAL ADVOC. 163, 163-65 (1982).

191. See, e.g., *Epperson v. Arkansas*, 393 U.S. 97, 104-05 (1968) (acknowledging the tremendous deference given to local education authorities and noting that courts should not interfere unless there is clearly a constitutional issue at hand). But see *Bowman v. Pulaski County Special Sch. Dist.*, 723 F.2d 640, 645-46 (8th Cir. 1983) (recognizing that courts must ordinarily defer to the judgment of the school board, but further noting that the court is "not so obligated when the exercise of power constitutes an abuse of discretion"). Note that the deference given to local schools in making disciplinary decisions has greatly increased in the wake of the highly-publicized school shootings of the past several years. 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, 200 (2000).

192. E.g., *Epperson*, 393 U.S. at 104.

193. See *Bowman*, 723 F.2d at 645; see also *Stark v. Indep. Sch. Dist. No. 640*, 123 F.3d 1068, 1072-73 (8th Cir. 1997).

194. See *Stark*, 123 F.3d at 1072-73 (citing *Edwards v. Aquillard*, 482 U.S. 578, 583-84 (1987)).

195. E.g., *Bowman*, 723 F.2d at 645 (upholding the reversal of a school board decision to involuntarily transfer two assistant high school football coaches after they spoke out in a public debate).

196. See, e.g., *Wood v. Strickland*, 420 U.S. 308, 326 (1975) (holding that the Civil Rights Act is not to be a method for federal courts to correct what they perceive to be errors in judgment by local school officials if those errors do not implicate constitutional violations).

## IV. REASONING

## A. Majority Opinion

In *Doe v. Pulaski County Special School District*,<sup>197</sup> a split Eighth Circuit, sitting en banc, held that a student's violent and obscenity-laden letter constituted a true threat and that the school district, therefore, did not violate his First Amendment rights by expelling him.<sup>198</sup>

1. *Mootness and Standard of Review*

As a preliminary matter, the court addressed J.M.'s argument that his First Amendment claim was moot because he had already completed the eighth grade.<sup>199</sup> The majority acknowledged that courts must dismiss appeals as moot when the decision will have no effect for either party,<sup>200</sup> but disagreed that J.M.'s case presented such a situation.<sup>201</sup> The court reasoned that a reversal of the district court decision would result in the school district being able to document the incident in J.M.'s student records<sup>202</sup> or in considering the incident in determining J.M.'s current privileges as a student.<sup>203</sup> The court also cited the school district's interest in a judicial determination of whether it acted constitutionally in applying its rule prohibiting terroristic threats.<sup>204</sup>

The court addressed an additional preliminary matter in establishing the appropriate standard of review for a First Amendment claim.<sup>205</sup> Citing

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197. 306 F.3d 616 (8th Cir. 2002).

198. *Id.* at 626–27. Judge Hansen authored the majority opinion, which was joined by Judges Bowman, Loken, Murphy, and Riley. *Id.* at 618. The Honorable Roger L. Wollman stepped down as Chief Judge on January 31, 2002—after oral arguments in this case were presented but before the opinion was written—and was succeeded as Chief Judge by Judge Hansen. *See id.* at 618 n.1.

199. *Id.* at 620–21. J.M. originally brought suit in district court in November 2000 during the fall semester of his eighth-grade year. *See id.* The Eighth Circuit's en banc opinion was not issued until September 2002, at which point J.M. had already completed the eighth grade. *Id.* at 616, 621.

200. *Id.* at 621 (citing *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992)).

201. *Id.*

202. *Id.* The district court required the school board to expunge any mention of the incident from J.M.'s school records. *Id.*

203. *Doe*, 306 F.3d at 621. As an example, the court noted that if it reversed the district court, the school district might consider the Rule 36 violation in determining whether the school could exclude J.M. from a class in which K.G. is enrolled. *Id.*

204. *Id.*

205. *Id.* An appellate court normally would review a district court's factual findings for clear error and its conclusions of law de novo. *Id.* (citing *Speer v. City of Wynne*, 276 F.3d 980, 984–85 (8th Cir. 2002)).

*New York Times Co. v. Sullivan*,<sup>206</sup> the court noted that it must adopt a heightened level of scrutiny when considering a First Amendment claim.<sup>207</sup> Specifically, the court said it must make an "independent examination of the whole record,"<sup>208</sup> using a de novo standard for facts relevant to the free speech issue but still using a clear error standard for facts not implicating the First Amendment claim.<sup>209</sup> The court said it would continue to use a de novo standard of review in considering conclusions of law.<sup>210</sup>

## 2. *True Threat Inquiry*

Before proceeding to the heart of its analysis, the court examined the history of the true threat doctrine, the various approaches adopted by the federal courts of appeals, and the particular true threat test the Eighth Circuit has adopted.<sup>211</sup>

The court began this discussion by establishing that threats of violence are among the types of speech the government can limit without violating the First Amendment.<sup>212</sup> According to the court, the government has an interest in "protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur."<sup>213</sup> The court then explained that, because *Watts* and subsequent Supreme Court decisions provide no specific definition of a "true threat," lower courts have been left to determine for themselves when speech rises to the level of a true threat.<sup>214</sup>

The court next discussed the differing true threat analyses adopted by the federal courts of appeals.<sup>215</sup> After distinguishing the reasonable speaker from the reasonable recipient test, the court declared itself to be among those courts adopting the reasonable recipient approach.<sup>216</sup> Further clarifying-

206. 376 U.S. 254 (1964).

207. *Doe*, 306 F.3d at 621.

208. *Id.* (quoting *Sullivan*, 376 U.S. at 285).

209. *Id.* Though not bound by the district court's findings, the court said it "remain[ed] cognizant that the district court is in the best seat to observe the demeanor of the witnesses." *Id.* (citing *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557, 567 (1995)).

210. *Id.*

211. *Id.* at 622-24.

212. *Id.* at 622 (citing *Watts v. United States*, 394 U.S. 705 (1969)). For the particular facts and holdings of *Watts*, see *supra* Part III.A.1.

213. *Doe*, 306 F.3d. at 622 (quoting *R. A. V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)).

214. *Id.* For a detailed discussion of how lower courts have treated the true threat doctrine, see *supra* Part III.A.2.

215. *Doe*, 306 F.3d. at 622; see *supra* note 96 and accompanying text.

216. *Doe*, 306 F.3d. at 622. Later in its opinion, the court addressed the fact that the Eighth Circuit panel first weighing in on this case employed the Ninth Circuit's reasonable

ing its true threat analysis, the court then outlined the factors used in *United States v. Dinwiddie*<sup>217</sup> to determine how a reasonable recipient would view an alleged threat.<sup>218</sup> These factors consist of the following:

(1) the reaction of those who heard the alleged threat; (2) whether the threat was conditional; (3) whether the person who made the alleged threat communicated it directly to the object of the threat; (4) whether the speaker had a history of making threats against the person purportedly threatened; and (5) whether the recipient had a reason to believe that the speaker had a propensity to engage in violence.<sup>219</sup>

The court thus enumerated its true threat analysis as one that adheres to the inquiry used in *Dinwiddie* and that defines a true threat as "a statement that a reasonable recipient would have interpreted as a serious expression of an intent to harm or cause injury to another."<sup>220</sup>

### 3. *Intent to Communicate*

Before discussing whether J.M.'s letter constituted a threat, the Eighth Circuit addressed what it considered a threshold question: whether J.M. intended to communicate the purported threat.<sup>221</sup> The court emphasized that a speaker must have intentionally or knowingly communicated the alleged threat to someone before the state may proscribe the speech.<sup>222</sup> The court

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speaker test to determine whether J.M.'s letter was a true threat. *Id.* at 623. Considering the panel's reliance on the reasonable speaker test and the First Circuit's past criticism of the reasonable recipient test, the Eighth Circuit was compelled to address whether its adoption of the reasonable recipient approach was justified. *Id.*; see *United States v. Fulmer*, 108 F.3d 1486, 1491 (1st Cir. 1997). The court, adhering to its previous use of the reasonable recipient test, noted that differences in the two tests were largely academic, and the fact that a recipient approach must in all cases be reasonable alleviated the First Circuit's concerns. *Doe*, 306 F.3d at 623-24.

217. 76 F.3d 913 (8th Cir. 1996).

218. *Doe*, 306 F.3d at 623. See *supra* Part III.A.2.b for a discussion of the *Dinwiddie* factors.

219. *Doe*, 306 F.3d at 623 (citing *Dinwiddie*, 76 F.3d at 925).

220. *Id.* at 624.

221. *Id.* The court said the district court's determination that the letter was protected speech turned on its finding that J.M. never intended to communicate the threat to K.G. *Id.* See *supra* Part III.A.3 for further discussion of the relevance of speaker intent in a true threat analysis.

222. *Doe*, 306 F.3d at 624 (citing *Planned Parenthood of the Columbia/Williamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1075 (2d Cir. 1994)). The court said that "[r]equiring less than an intent to communicate . . . would run afoul of the notion that an individual's most protected right is to be free from governmental interference in the sanctity of his home and in the sanctity of his own personal thoughts." *Id.* (citing *Stanley v. Georgia*, 394 U.S. 557, 564-68 (1969)).

then noted that either communicating the statement directly to the target of the purported threat or to a third party would satisfy this requirement.<sup>223</sup>

Applying the facts to this framework, the court found that J.M. intended to communicate the contents of the letter.<sup>224</sup> In reaching this conclusion, the court found several facts significant.<sup>225</sup> First, J.M. permitted D.M. to read the letter.<sup>226</sup> The court considered this especially problematic because J.M. testified that he knew D.M. was likely to tell K.G. about the letter.<sup>227</sup> Second, J.M. discussed the letter with K.G. in more than one phone conversation, including telling her that he wrote the letter and that the letter talked of killing her.<sup>228</sup> Finally, the court noted that J.M. told K.G.'s best friend about his desire to kill K.G. knowing that the friend was likely to relay these comments to K.G.<sup>229</sup> Based on these facts, the court found that J.M. did not intend to keep the letter private.<sup>230</sup>

#### 4. *Reasonable Recipient's Perception of the Letter*

Having established that J.M. intended to communicate the letter, the court next considered whether a reasonable recipient would have perceived the letter as a true threat.<sup>231</sup> After a brief discussion establishing the letter's clear intent to harm and its clearly threatening nature,<sup>232</sup> the court proceeded to apply a rough equivalent of the *Dinwiddie* factors to the facts of the case.<sup>233</sup>

First, the court noted that the letter stated in unconditional terms that K.G. should not go to sleep because J.M. would be lying under her bed waiting to kill her with a knife.<sup>234</sup> Second, while J.M. did not personally

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223. *Id.* The court cited two cases to support the notion that communication to a third party is sufficient for a true threat analysis. *Id.* *United States v. Crews* concerned the conviction of a man who told a third party he intended to kill the President of the United States in violation of a federal statute. 781 F.2d 826 (10th Cir. 1986). In *State v. Chung*, the Supreme Court of Hawaii found that a defendant's statements to other teachers that he would kill the principal were true threats. 862 P.2d 1063, 1073 (Haw. 1993).

224. *Doe*, 306 F.3d at 624.

225. *See id.* at 624–25.

226. *Id.* at 624.

227. *Id.*

228. *Id.* at 625.

229. *Id.* at 626.

230. *Doe*, 306 F.3d at 625.

231. *Id.*

232. *Id.* In making this finding, the court relied upon the offensive, vulgar, and threatening language used in the letter. *Id.* The court also noted its disagreement with the district court's characterization of the letter as "only 'arguably' threatening." *Id.*

233. *Id.* at 623; *see supra* Part IV.A.2.

234. *Doe*, 306 F.3d at 625. The court said that most thirteen-year-old girls and most reasonable adults would fear for their physical well-being if they received the same letter. *Id.*



deliver the letter to K.G., the intimate and personal nature of the letter made it appear as if J.M. were speaking directly to K.G. as he wrote the letter.<sup>235</sup> Next, the court considered significant the fact that J.M. never attempted to alleviate K.G.'s concerns about the letter prior to her obtaining it.<sup>236</sup> The court found that it appeared that J.M. wanted to scare K.G. as retribution for the break-up and that he did not apologize until after the school board expelled him.<sup>237</sup>

The court next examined the reactions of those who read the letter.<sup>238</sup> The court specifically noted that D.M. considered the letter serious enough that he stole it from his best friend's house,<sup>239</sup> that a girl present when K.G. first read the letter was so concerned that she immediately told the school resource officer about the letter,<sup>240</sup> and that K.G. cried and was scared to leave the gym upon reading the letter.<sup>241</sup> K.G. also slept with the lights on for several nights after reading the letter and was so frightened that she left school early on the day J.M. returned to school after being temporarily re-instated.<sup>242</sup> Based upon these reactions, the court concluded that those who read the letter clearly considered it to be a threat.<sup>243</sup>

Finally, the court said that J.M.'s previous portrayal of himself as a "tough guy" made his threat more credible to K.G.<sup>244</sup> The court specifically relied upon K.G.'s testimony that J.M. told her he was a member of the

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235. *Id.* In support of this finding, the court cited *United States v. Bellrichard*, which recognized that a statement directed to a person's home or work is more likely to be perceived as a threat than a statement delivered at a public gathering. 994 F.2d. 1318, 1321 (8th Cir. 1995). In an interview on CNN's *Connie Chung Tonight* program, Gregory T. Jones, the attorney who represented the school district, noted that the letter was extremely personal given that it contained K.G.'s address. *Connie Chung Tonight* (CNN television broadcast, Sept. 26, 2002, available at <http://www.cnn.com/TRANSCRIPTS/0209/26/cct.00.html>). CNN legal analyst Jeffrey Toobin further pointed out that the letter also included K.G.'s phone number. *Id.*

236. *Doe*, 306 F.3d at 625. The court found that J.M. discussed the letter with K.G. knowing that she might have taken the threat as truthful. *Id.* The court also noted that J.M. let D.M. read the letter and told K.G.'s best friend about wanting to kill K.G., knowing that both were likely to relay this information to K.G. *Id.*

237. *Id.* at 625-26.

238. *Id.* at 626.

239. *Id.* In testimony at trial, D.M. said he stole a copy of the letter because he "felt that something should be done about it." *Id.* (citing Trial Tr. at 302).

240. *Id.*

241. *Id.*

242. *Doe*, 306 F.3d at 626.

243. *Id.* On this point, the court again emphasized the relevance of a listener's reaction in determining whether speech constitutes a threat. *Id.* (citing *Watts v. United States*, 394 U.S. 705, 708 (1969)).

244. *Id.* The district court refused to consider the school district's evidence of J.M.'s violent tendencies since the school board did not consider this evidence. *Id.* The Eighth Circuit concluded, however, that the evidence was relevant to determining whether K.G.'s reaction to the letter was reasonable. *Id.*

"Bloods" gang and that he had once shot a cat while speaking to K.G. on the phone.<sup>245</sup>

Upon this factual analysis, the court concluded that, because a reasonable recipient would consider J.M.'s letter to be "a serious expression of an intent to harm K.G.," the letter constituted a true threat.<sup>246</sup> The court held that the school board did not violate J.M.'s First Amendment rights by expelling him for writing the letter, but observed that the school district's punishment appeared to be unnecessarily harsh.<sup>247</sup> Nevertheless, the court said, "[i]t is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion."<sup>248</sup> On this finding, the Eighth Circuit reversed the district court's decision and remanded the case with instructions to dissolve J.M.'s injunctive relief and to dismiss his First Amendment claim against the school district.<sup>249</sup>

## B. Dissenting Opinions

The first of the two dissenting opinions opened by criticizing the majority for ignoring the school context analysis of this case.<sup>250</sup> The minority said the proper inquiry is whether J.M.'s letter is protected speech or a true threat, and if it is protected speech, whether it is subject to discipline because it may cause substantial disruption of the school.<sup>251</sup> Addressing these questions, the minority said it would hold that the letter was protected speech, but that the school district could reasonably regulate the speech to prevent a substantial disruption of the school.<sup>252</sup>

### 1. *True Threat Analysis*

The minority agreed with the majority's use of the reasonable recipient test but said the majority failed to include analysis of how the *Dinwiddie* standard is applied.<sup>253</sup> Comparing the facts of *Dinwiddie* to those in the pre-

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245. *Id.* The court noted that K.G. testified at trial that J.M.'s violence towards animals made her more concerned about the letter. *Id.* (citing Trial Tr. at 262-63).

246. *Id.*

247. *Id.* at 627.

248. *Doe*, 306 F.3d at 627 (quoting *Wood v. Strickland*, 420 U.S. 308, 326 (1975)).

249. *Id.*

250. *Id.* (Heaney, J., dissenting). The first dissenting opinion was written by Judge Heaney and joined by Judges Morris Sheppard Arnold, Bye, and McMillian. *Id.* (Heaney, J., dissenting). Judge McMillian also filed a separate dissent. *Id.* at 636 (McMillian, J., dissenting).

251. *Id.* (Heaney, J., dissenting).

252. *Id.* (Heaney, J., dissenting).

253. *Id.* at 627 (Heaney, J., dissenting).

sent case, the minority said it failed to see how the majority could conclude that J.M.'s letter rose to the level of a true threat as established in *Dinwiddie*.<sup>254</sup>

## 2. *Intent to Communicate*

Heaney's dissenting opinion next disagreed with the majority's finding that J.M. intended to communicate a threat to K.G. by allowing D.M. to read the letter.<sup>255</sup> The minority said that whether J.M. intended to communicate a threat is a finding of fact that the court should review by a clearly erroneous standard.<sup>256</sup> According to the minority, instead of deferring to the district court's reasonable factual findings, the majority attempted to turn the issue into a question of law.<sup>257</sup> The minority specifically criticized the legal authority the majority cited in support of its finding that J.M.'s acquiescence to D.M.'s request to read the letter amounted to communication of a threat.<sup>258</sup> The dissent distinguished *United States v. Crews*<sup>259</sup> on the basis that, in that case, the violation of a federal statute prohibiting the making of threats against the President to anyone precluded an analysis of the context in which the statement was made.<sup>260</sup> The minority factually distinguished *State v. Chung*<sup>261</sup> from *Doe* to show that the majority's reliance on *Chung* was misguided.<sup>262</sup> Finally, the minority cited authority of its own supporting the notion that "third-party knowledge of the contents of an alleged threat against another is not enough to conclude that a true threat has been issued."<sup>263</sup> Based upon these considerations, the minority opinion found that J.M. did not intend to communicate the alleged threat.<sup>264</sup>

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254. *Doe*, 306 F.3d at 628–29 (Heaney, J., dissenting). For a discussion of the facts in *Dinwiddie*, see *supra* Part III.A.2.a.

255. *Doe*, 306 F.3d at 629 (Heaney, J., dissenting).

256. *Id.* (Heaney, J., dissenting). For a discussion of the standard of review used by the majority, see *supra* Part IV.A.1.

257. *Doe*, 306 F.3d at 629 (Heaney, J., dissenting).

258. *Id.* (Heaney, J., dissenting). The minority criticized *United States v. Crews*, 781 F.2d 826 (10th Cir. 1986), and *State v. Chung*, 862 P.2d 1063 (Haw. 1993), as lending little insight to the *Doe* analysis.

259. 781 F.2d 826 (10th Cir. 1986).

260. *Doe*, 306 F.3d at 629 (Heaney, J., dissenting).

261. 862 P.2d 1063 (Haw. 1993).

262. *Doe*, 306 F.3d at 630 (Heaney, J., dissenting). The minority distinguished the facts of *Chung* and *Doe*, noting that the defendant teacher in *Chung* had a history of mental illness, showed fellow teachers the gun and ammunition he planned to use to kill the principal, had a months-long strained relationship with the principal, violated his administrative leave by being on campus, and initiated conversations with fellow teachers concerning his plan to kill the principal. *Id.* (Heaney, J., dissenting).

263. *Id.* (Heaney, J., dissenting) (citing *Roberts v. Arkansas*, 78 Ark. App. 103, 78 S.W.3d 743 (2002)). The minority said that *Roberts*, while not binding authority, "accurately and reasonably sets forth the analysis we should follow when reviewing an alleged intent to

### 3. *Reasonable Recipient's Perception of the Letter*

The minority next addressed the issue of how a reasonable recipient would perceive the letter.<sup>265</sup> While the minority argued that J.M. did not intend to communicate the letter, it said that even if it were able to find such intent, it still would not consider the letter a true threat because a reasonable recipient in K.G.'s position would not have viewed the letter as a threat.<sup>266</sup>

In reaching this conclusion the dissent dismissed each of the facts the majority relied upon to find that a reasonable recipient would perceive the letter as a threat.<sup>267</sup>

First, the minority, while acknowledging that the letter's contents were "chilling," said it would consider the letter within its entire context.<sup>268</sup> Specifically, the minority emphasized that J.M. did not intend to communicate the letter to K.G. and that it was not surprising that teenagers express themselves with aggression considering the violence observed in music, television, video games, and for some, relationships at home.<sup>269</sup>

Addressing J.M.'s acknowledgment that he wrote the letter, the minority concluded that J.M.'s admission was inconclusive and that J.M. never issued verbal threats against K.G. during their multiple telephone conversations.<sup>270</sup> The minority next stated its belief that it was unreasonable for K.G. to believe that the letter was a true threat.<sup>271</sup> The minority found particularly

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communicate a threat." *Id.* (Heaney, J., dissenting).

264. *Id.* at 629 (Heaney, J., dissenting).

265. *Id.* at 630-32 (Heaney, J., dissenting).

266. *Id.* at 630 (Heaney, J., dissenting).

267. *Id.* at 631 (Heaney, J., dissenting). These facts include "the contents of the letter, that J.M. acknowledged that he had written the letter, that K.G. was upset and slept with the lights on, and that J.M. told K.G. that he had shot a cat and was a member of the Bloods." *Id.* (Heaney, J., dissenting).

268. *Doe*, 306 F.3d at 631 (Heaney, J., dissenting). The minority supported this finding with language from the dissenting opinion in *United States v. Crews*, 781 F.2d 826 (10th Cir. 1986) (Logan, J., dissenting). There, Judge Logan said:

When a threat is not communicated nor intended to be communicated to the object of the statement, . . . some further evidence that the individual has done more than think evil thoughts ought to be shown. Proof of actual intent to carry out the threat is needed to demonstrate the reality of the threat itself. Any other rule vests far too much power in the government at the expense of the individual.

*Id.* at 837.

269. *Doe*, 306 F.3d at 631 (Heaney, J., dissenting).

270. *Id.* (Heaney, J., dissenting). The dissent noted that once J.M.'s social circle knew about the contents of the letter, he denied having written it. *Id.* (Heaney, J., dissenting). The minority said this would lead one to conclude that J.M. was embarrassed about writing the letter. *Id.* (Heaney, J., dissenting).

271. *Id.* (Heaney, J., dissenting). The minority noted that K.G.'s response, while relevant, is not determinative because the objective standard used to analyze an alleged threat relies upon a reasonable recipient's response. *Id.* (Heaney, J., dissenting).

significant the fact that K.G.—though she knew who had written the letter’s disturbing contents and had even been read portions of the letter over the telephone—failed to alert a parent, Sunday school teacher, or other adult about the letter before it was brought to school.<sup>272</sup> The minority thus found it unreasonable for K.G. to have considered her life to be in danger.<sup>273</sup>

Finally, addressing the majority’s reliance on J.M.’s tough guy reputation to show that K.G. had reason to believe J.M. had a propensity for violence, the dissent dismissed as teenage bravado J.M.’s claim that he was a member of the Bloods and that he shot a cat while on the phone with K.G.<sup>274</sup>

In light of this factual analysis, the minority concluded that a reasonable recipient would not consider the letter a true threat.<sup>275</sup>

#### 4. *School Board Action*

Because the dissenting judges would find that J.M.’s letter was not a true threat, they next turned to the issue of whether the school board acted reasonably in regulating J.M.’s letter.<sup>276</sup> While the majority deferred to the school board’s decision despite finding that the board’s punishment was unnecessarily harsh, the minority said it would consider the school board’s punishment of J.M. an abuse of discretion.<sup>277</sup> The minority cited several specific findings in concluding that the school board failed to exercise sound, reasonable, and legal decision-making in its review of J.M.’s speech.<sup>278</sup> In its lengthy discussion of the school board proceedings, the minority observed that the board failed to make a reasoned analysis of its terroristic threat rule as applied to the facts of the case; the board seemingly concluding before the hearing began that a threat had been issued;<sup>279</sup> the board did not allow J.M. to explain his side of the story at the hearing;<sup>280</sup> one board member appeared to allow a family member’s experience with

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272. *Id.* (Heaney, J., dissenting).

273. *Id.* (Heaney, J., dissenting).

274. *Id.* at 632 (Heaney, J., dissenting).

275. *Doe*, 306 F.3d at 632 (Heaney, J., dissenting).

276. *Id.* (Heaney, J., dissenting). Before addressing the school board’s decision, the minority discussed the relevant background law concerning student speech as established in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), and *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986). *Id.* at 632–33. For further discussion of the law governing student speech in a school setting, see *supra* Part III.B.1.

277. *Doe*, 306 F.3d at 633, 636 (Heaney, J., dissenting).

278. *Id.* at 633–36 (Heaney, J., dissenting).

279. *Id.* at 634 (Heaney, J., dissenting). The minority said it would be unreasonable to expect the school board to undertake a complex true threat analysis, but the board at a minimum was required to apply some type of reasoned analysis to the facts of the case before it. *Id.* (Heaney, J., dissenting).

280. *Id.* (Heaney, J., dissenting).

threatening conduct sway her decision,<sup>281</sup> J.M.'s exercise of his right to appeal resulted in the board punishing him far more severely than what Dr. Welch initially recommended;<sup>282</sup> and that the board's extreme punishment of J.M. was unprecedented among the school threat cases across the nation.<sup>283</sup>

The dissenting opinion concluded by acknowledging that while J.M.'s conduct required some disciplinary action, the board abused its discretion in expelling him.<sup>284</sup> Upon this finding and the previous conclusion that J.M.'s letter did not constitute a true threat, the minority said it would affirm the district court.<sup>285</sup>

In a separate dissent, Judge McMillian said that J.M.'s letter was protected speech and questioned whether the school had any legitimate authority to discipline J.M. regarding the letter since it was not written at school, during school hours, or with school equipment.<sup>286</sup> Judge McMillian noted that the case arguably was a police matter and that the local prosecuting attorney had refused to take any action against J.M.<sup>287</sup>

#### V. SIGNIFICANCE

A reader of the *Doe* decision likely might ask the question: "What gives the school the authority to punish J.M.?" Seemingly, the only connection between the letter and the school is that the school happened to be the place D.M. chose to deliver the stolen letter to K.G. So why did the school district have the power to punish J.M. for writing the letter?

In light of this lingering question, the United States Court of Appeals for the Eighth Circuit's decision in *Doe* is significant more for the school context analysis it excludes than for what it includes.<sup>288</sup> By excluding the

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281. *Id.* at 635 (Heaney, J., dissenting).

282. *Id.* (Heaney, J., dissenting). The dissent observed that J.M. arrived at the school board meeting carrying a punishment of a one semester suspension with the right to attend alternative school. *Id.* (Heaney, J., dissenting). He left the meeting, however, with a year-long expulsion and no opportunity to attend alternative school. *Id.* (Heaney, J., dissenting).

283. *Doe*, 306 F.3d at 635 (Heaney, J., dissenting). The minority contrasted J.M.'s expulsion with punishments doled out in several other school threat cases from across the country. *Id.* (Heaney, J., dissenting). Among the cases cited was one involving a three-day suspension given to a student who directly threatened to shoot a school counselor if the counselor did not change the student's class schedule. *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367 (9th Cir. 1996).

284. *Doe*, 306 F.3d at 635-36 (Heaney, J., dissenting).

285. *Id.* at 636 (Heaney, J., dissenting).

286. *Id.* (McMillian, J., dissenting).

287. *Id.* (McMillian, J., dissenting).

288. In oral arguments before the Eighth Circuit, Gregory T. Jones, attorney for the school district, claimed that the only question before the court was whether J.M.'s letter was a true threat. *Oral Argument*, *supra* note 23. Jones said that because J.M. failed to assert

school context analysis, *Doe* supports an overly broad view of a school's authority over off campus student speech. This view has the effect of erroneously suggesting to school officials a seemingly unlimited authority to discipline student speech arising off campus.

Generally, courts adjudicating off campus student speech cases have viewed establishing a connection between the speech in question and the school campus as a threshold issue.<sup>289</sup> Almost without exception, courts have established some such connection before finding a school to have the authority to discipline off campus speech.<sup>290</sup> In some cases, courts have justified a school's jurisdiction to discipline on the grounds that the speech, though created off campus, has a physical connection to the school campus, such as on campus distribution of, or the use of school equipment in producing, an underground newspaper.<sup>291</sup> In other cases, courts have established the necessary link by extending the *Tinker* doctrine to show that speech arising off campus has led to a substantial and material disruption on campus.<sup>292</sup>

But in *Doe*, a majority of the Eighth Circuit excluded this analysis.<sup>293</sup> The school context analysis was critical to the court's holding, regardless of whether the court found J.M.'s letter to constitute a true threat. By failing to articulate the rationale upon which the school's authority was grounded, the court appears to imply that such authority was never in question—that the school district's authority to discipline J.M.'s letter was fundamental. This conclusion, however, is inconsistent with the boundaries supported under *Tinker* and its progeny.<sup>294</sup> Because the majority failed to establish a nexus between J.M.'s letter and the school district's authority to punish J.M. for writing the letter, *Doe* creates a "dangerously broad precedent" in terms of

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procedural or substantive due process claims, the question of whether the school overstepped its authority was not an issue before the court. *Id.* In response, Morgan E. Welch, attorney for J.M., stated that he believed he had brought procedural and substantive due process claims before the court. *Id.* The court, neither during oral arguments nor in its opinion, addressed this procedural dispute. If the majority did in fact rely on Jones's argument in choosing to exclude the school context analysis, its failure to articulate this reliance results in confusion.

289. See, e.g., *Boucher v. Sch. Dist. of Greenfield*, 134 F.3d 821 (7th Cir. 1998) (finding that the school board could punish a student for writing an article in an underground newspaper on the grounds that the school could forecast substantial disruption of school activities). For further discussion of this issue, see *supra* Part III.B.2.

290. See *supra* note 289 and accompanying text.

291. E.g., *Donovan v. Ritchie*, 68 F.3d 14, 16–18 (1st Cir. 1995) (upholding a school official's determination that on campus distribution of an underground off campus newspaper was a sufficient link to justify the school's authority to discipline the students).

292. E.g., *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847 (Pa. 2002) (upholding school's authority to punish an off campus student website on grounds that it created a material and substantial disruption at the school).

293. *Doe*, 306 F.3d at 627 (Heaney, J., dissenting).

294. See *supra* note 151 and accompanying text.

how far school authority may extend over student speech arising off campus.<sup>295</sup>

The practical effect of the court's exclusion of the school context analysis is that school officials are left with the erroneous impression that school authority over student speech exists around-the-clock and regardless of where the speech originates. Under *Doe*'s guidance, principals faced with similar situations in the future will be more likely to limit student speech upon any showing that student speech constitutes a threat—regardless of whether the speech occurred on school grounds or within the privacy of the student's home. Establishing the grounds for the school's authority would have given needed clarity as to how far that authority may extend to discipline student speech off campus. Absent this analysis, *Doe* instead appears to recognize school districts as having boundless authority to discipline off campus student speech.

An additional point of significance is *Doe*'s potential to influence future cases arising in other contexts. Though the fact scenario in *Doe* seems unique, future courts could potentially extend *Doe* to govern situations such as those involving student websites created off campus or student disputes occurring off campus. Already, a number of courts across the country have faced cases involving off campus websites, including a dispute involving a high school student in Jonesboro, Arkansas.<sup>296</sup> Future courts could potentially cite *Doe* to support a more expansive view of school authority to discipline student conduct arising in these contexts.

So why did the school district have the authority to punish J.M.? The *Doe* court, by excluding the school context analysis, missed an opportunity to shed light on this important question. Consequently, *Doe* suggests an overly broad scope of school authority and leaves school officials still searching for guidance in determining the limits of school authority over off campus speech.

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295. *Doe*, 306 F.3d at 627 (Heaney, J., dissenting).

296. American Civil Liberties Union, *ACLU of Arkansas Sues School District on Behalf of Student Expelled for Creating Off campus Web Site* (June 22, 2000), at <http://www.aclu.org/StudentsRights/StudentsRights.cfm?ID=7991&c=160>.

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