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# Lovell v. Poway Unified School District: An Elementary Lesson Against Judicial Intervention in School Administrator Disciplinary Discretion

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# NOTES

## *LOVELL V. POWAY UNIFIED SCHOOL DISTRICT*: AN ELEMENTARY LESSON AGAINST JUDICIAL INTERVENTION IN SCHOOL ADMINISTRATOR DISCIPLINARY DISCRETION

### INTRODUCTION

A high school guidance counselor, accustomed to dealing with students' frustrations during class scheduling appointments, is taken aback when an irritable 15-year-old sophomore sitting in her office declares, "If you don't give me this schedule change, I'm going to shoot you!"[1] Angered that their child is suspended for threatening a teacher, the parents bring an action in federal court on behalf of their daughter for free speech and due process violations. A United States district court must now face the task of sorting out where school administrator discretion ends and federal judicial intervention begins.

In deciding whether the student should prevail in such a scenario, the court must consider whether such an utterance is protected by the free speech provisions of the First Amendment.[2] But it must also consider whether it should limit normally protected speech, given the unique needs of a school environment.[3] In the wake of the famed *Tinker v. Des Moines Independent Community School District* directive that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[4] courts have lacked consistency in interpreting the free speech rights of schoolchildren.[5] As a result, the courts have also differed on how much discretion to afford local school officials.[6]

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1. These facts stem from Lovell By and Through Lovell v. Poway Unified Sch. Dist., 90 F.3d 367 (9th Cir. 1996), discussed *infra*.

2. The First Amendment provides that "Congress shall make no law . . . abridging . . . freedom of speech . . ." U.S. CONST. amend I.

3. *See* Larry Bartlett & Linda Frost, *The Closing of the School House Gates: Increasing Restrictions on the Public School Student's Exercise of Speech and Expression*, 16 T. MARSHALL L. REV. 311 (1991) (describing the tension between freedom of thought and speech and the state's competing interest of meeting its educational mission).

4. 393 U.S. 503, 506 (1969). The Supreme Court held that high school students were entitled to their First Amendment rights to wear armbands to express their political opposition to the American involvement in the Vietnam War.

5. *See* David A. Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477, 487 (1981), for a criticism of Tinker's standard of judicial intervention, evidenced by the fallout of post-Tinker cases with contradictory holdings. *See also* Ralph D. Mawdsley & Steven Permuth, *Free Speech and Public Education: An Overview of Legal, Social, and Political Issues*, 16 ST. MARY'S L.J. 873, 875 (1985). ("Although not every utterance or public display is deserving of constitutional protection, judicial attempts at providing guidelines have been far from clear.")

6. Diamond, *supra* note 5, at 487.

A recent case in the Ninth Circuit, based on the facts above, evidences the confusion created when a federal court attempts to strike the delicate balance between a schoolchild's free speech rights at school with the interest of the school board in maintaining discipline. In an unexplained about-face, the Ninth Circuit reversed its own earlier decision in *Lovell By and Through Lovell v. Poway Unified School District.*[7] The Ninth Circuit's second decision found that a suburban San Diego high school that had suspended a student for making a potentially threatening statement to her counselor had not violated the student's free speech rights after all.[8] The contradiction in the reasoning of the two decisions[9] reflects the hurdles the Ninth Circuit faced. The court had to reconcile Supreme Court decisions that have limited schoolchildren's free speech rights in the school with a recent California statute[10] that explicitly gives high school students on campus the same free speech rights they have off campus. Along with avoiding the question of how much deference to afford local school administrators,[11] the Ninth Circuit bypassed the substantive issues in its second decision by holding that Lovell's statement was a true threat—and therefore not protected by the Constitution in any forum.[12]

The *Lovell* court, in restructuring its factual conclusion to avoid the hard-to-resolve legal principles, has done an injustice to the educational system by failing to give clear legal rules for educators to follow. Given the increase of violence in the schools, teachers and administrators are concerned not only about their own immediate safety,[13] but also about more amorphous discipline issues that contribute to an unsafe environment. Does the California statute protect students who address their teachers in a manner that is not adjudged to be a true threat, but that is potentially threatening or defiant nonetheless?

A number of commentators have addressed the balancing of student rights and state interests in the context of Fourth Amendment searches and

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7. Lovell By and Through Lovell v. Poway Unified Sch. Dist., 90 F.3d 367 (9th Cir. 1996).

8. In its prior decision, the Ninth Circuit had held that the student's free speech rights had been violated. *See infra* note 9.

9. The earlier Lovell decision, 1996 WL 140805 (9th Cir. March 29, 1996), was withdrawn a little more than two months later. *See* Lovell By and Through Lovell v. Poway Unified Sch. Dist., 1996 WL 304396 (9th Cir. June 7, 1996). The Court issued the revised decision, 90 F.3d 317 (9th Cir. July 18, 1996), a month later.

10. CAL. EDUC. CODE § 48950 (West 1992). *See infra* note 30 for the relevant text of this statute.

11. Since the landmark Brown v. Board of Education case, the Supreme Court has found consistently that education is one of the most important functions of local government. 347 U.S. 483, 493 (1954). *See also* Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386 (1995), discussed *infra* in Part V.

12. *Lovell,* 90 F.3d at 372-73.

13. The Supreme Court recognized even in 1985 that in recent years, "school disorder has often taken particularly ugly forms." New Jersey v. T.L.O., 469 U.S. 325, 339 (1985). Part V of this Note discusses such school violence in more detail.

seizures.[14] Other scholars have examined the First Amendment rights of students where the speech involved *Tinker*-style political expression.[15] However, little scholarly treatment exists on the status of defiant speech that might be protected by the First Amendment if it were uttered on the street, but that constitutionally may be limited on campus.[16]

This Note examines the challenges which the Ninth Circuit faced as it decided the *Lovell* case. It argues that the limitations on Lovell's speech were justified, even if one were to determine that her statement was constitutionally protected because it was not a true threat. Part I discusses the unique history of the *Lovell* decisions, specifically focusing on the confusion created by the contradictory factual conclusions of the Ninth Circuit. Part II reviews the *Tinker* case, compares the constitutional free speech rights of children to those of adults, and then argues that limitations on such rights are justified in the school context. Part III reviews the post-*Tinker* decisions that have limited schoolchildren's speech on campus. Part IV critiques the 1992 California statute invoked in *Lovell*,[17] suggesting that the statute is poorly drafted because First Amendment analysis cannot properly be performed without consideration of the forum in which the speech occurs. Part V addresses the issue of school administrator discretion versus students' rights and judicial intervention. Included in this delicate balance is a consideration of the duty of administrators to provide a safe environment for students and teachers. In addition, Part V argues that courts should afford local administrators liberal discretion within constitutional bounds.

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14. The leading case on the constitutionality of public school searches is New Jersey v. T.L.O., 469 U.S. 325 (1985) (lowering the threshold requirement for conducting a search in order to balance students' privacy rights with school administrators' interests). More recently, in Vernonia School Dist. 47J v. Acton, 115 S. Ct. 2386 (1995), the Supreme Court found that a student athlete random drug testing policy did not violate a student's Fourth Amendment rights. For critical treatment of the search and seizure issue in the schools, *see* Jaqueline A. Stefkonovich, *Students' Fourth and Fourteenth Amendment Rights After Tinker: A Half Full Glass*, 69 ST. JOHN'S L. REV. 481 (1995); Irene Merker Rosenberg, *Public School Testing: The Impact of Action*, 33 AM. CRIM. L. REV. 349 (1996).

15. *See, e.g.*, Bartlett & Frost, *supra* note 3; Mawdsley & Permuth, *supra* note 5; and Bruce C. Hafen & Jonathan O. Hafen, *The Hazelwood Progeny: Autonomy and Student Expression in the 1990s*, 69 ST. JOHN'S L. REV. 379 (1995).

16. Scholarly treatments that touch on the issue of potentially threatening speech, but do not examine school administrator discretion versus judicial intervention, include Alison Myhra, *The Hate Speech Conundrum and the Public Schools*, 68 N.D. L. REV. 71 (1992); Barbara E. Smith & Sharon Goretsky Elstein, *Effective Ways to Reduce School Victimization: Practical and Legal Concerns*, 14 CHILDREN'S LEGAL RTS. J. 22 (1993); and Jonathan Wren, Note, *Alternative Schools For Disruptive Youths: A Cure for What Ails School Districts Plagued by Violence?*, 2 VA. J. SOC. POL'Y & L. 307 (1995).

17. *See infra* note 30 for the text of CAL. EDUC. CODE § 48950(a) (West 1992).

## I. THE *LOVELL V. POWAY UNIFIED SCHOOL DISTRICT* ABOUT-FACE

### *A. The Facts of* Lovell

The difficulty of determining the scope of public school students' free speech rights on campus is well illustrated by a recent Ninth Circuit case, *Lovell v. Poway Unified School District*.[18] This case began in a principal's office and eventually made its way before the Ninth Circuit twice (and almost three times).[19]

After being shuffled back and forth between various administrators in search of a scheduling change, 15-year-old Sarah Lovell wound up in her school counselor's office. When she learned that the classes she had been signed up for were full,[20] Lovell reportedly said to her counselor, "If you don't give me this schedule change, I'm going to shoot you!"[21] Alarmed by Lovell's tone of voice and demeanor, the counselor later filled out a school referral form and reported the statement as a disciplinary incident to the assistant principal.[22] After holding a meeting with Lovell to determine the gravity of the incident, the school's assistant principal suspended her for three days.[23] The school also included a report of the incident in Lovell's permanent record.[24] Apparently dismayed by this record's negative characterization of his daughter's behavior,[25] Lovell's father sued the school board on behalf of his daughter in federal court, alleging both free speech and due process violations.[26] By requesting federal court intervention, Lovell's

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18. Lovell By and Through Lovell v. Poway Unified Sch. Dist., 90 F.3d 367 (9th Cir. July 18, 1996).

19. The plaintiff in Lovell was denied a petition to be heard *en banc* before the Ninth Circuit on August 30, 1996. Had the petition for rehearing been granted, the case would have appeared before the Ninth Circuit for a third time.

20. *Lovell*, 90 F.3d at 369. In search of a scheduling change, Lovell had waited in line to see her counselor, who told her to see another administrator. The second administrator placed Lovell in the classes she wanted and sent her back to her counselor. After standing in line again, the counselor told Lovell that the classes were full after all.

21. Maintaining that she merely had said, "I'm so angry, I could just shoot someone," the student argued throughout the proceedings that she was merely using a figure of speech. *Id.*

22. *Id.* at 373 n.5. Since the counselor had to continue to meet with students, she did not tell the school assistant principal about the incident until several hours later. The plaintiff argued that this delay proved that the counselor did not feel threatened.

23. Relying on Goss v. Lopez, 419 U.S. 565 (1975), the magistrate later determined that no due process violation had occurred in this proceeding. Lovell By and Through Lovell v. Poway Unified Sch. Dist., 847 F. Supp. 780, 785 (S.D. Cal. 1994). The administrator had met Goss's minimum due process requirements when a student is suspended for less than ten days, including notice and an opportunity to refute the allegations. In addition, California's statutory requirements to ensure procedural fairness had been met. *Id.* The procedural due process issue was not raised on appeal and is not the focus of this Note.

24. *Lovell*, 90 F.3d at 369-70.

25. Lovell By and Through Lovell v. Poway Unified Sch. Dist., 1996 WL 140805, at *2 (9th Cir. March 29, 1996) (withdrawn).

26. *Lovell*, 847 F. Supp. at 780.

father bypassed the administrative appeals process within the Poway Unified School District and the California Department of Education.[27]

### *B. The Magistrate as Fact Finder*

In a bench trial that lasted three days,[28] the magistrate heard evidence and testimony that exceeded what had been available to the assistant principal.[29] The judge determined that the school administrators had violated Lovell's right to free speech, as guaranteed by California Education Code Section 48950[30] (hereinafter "Section 48950") and the First Amendment.[31] Applying the tests of *United States v. Kelner*[32] and *United States v. Orozco-Santillan*[33] (neither of which involved threats by students), the magistrate determined that Lovell's statement did not constitute a threat, and was therefore constitutionally protected.[34] Even though both of the precedent cases involved adult criminal defendants, the magistrate found that their standards provided a "great deal of guidance" in determining whether Lovell's statement was a threat. The court held that Lovell's words did not convey

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27. All students within the Poway Unified School District receive written notice of Uniform Complaint Procedures, including appeals to the Regional Area Superintendent, the District's Board of Education, and the California Department of Education, in that order. *See* Poway Unified School District Annual Notification of Uniform Complaint Procedures form (on file with author).

28. Rex Bossart, *Court Reverses Ruling, Limits Student Speech*, L.A. DAILY J., July 19, 1996, at 8.

29. The assistant principal had followed the required state procedures when she had held a short meeting with Lovell. Such an informal proceeding is not nearly as exhaustive as a full-blown adjudication before a federal magistrate.

30. CAL. EDUC. CODE § 48950(a) (West 1992) provides:

> School districts operating one or more high schools and private secondary schools shall not make or enforce any rule subjecting any high school pupil to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside of the campus, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article 1 of the California Constitution.

31. Lovell By and Through Lovell v. Poway Unified Sch. Dist., 847 F. Supp. 780, 785 (S.D. Cal. 1994). The First Amendment provides that "Congress shall make no law . . . abridging . . . freedom of speech. . ." U.S. CONST. amend I.

32. 534 F.2d 1020, 1026 (2d Cir. 1976) (holding that defendant's threat to assassinate a foreign political leader was not constitutionally protected) (citing Watts v. United States, 394 U.S. 705, 708 (1969)). The Second Circuit held that statements are not threats unless they "convey a gravity of purpose and likelihood of execution" in their language and context.

33. 903 F.2d 1262, 1265 (9th Cir. 1990) (holding that defendant's threat to a federal law enforcement officer was not constitutionally protected). The Ninth Circuit found that threats should be judged by an objective standard–"whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault."

34. *Lovell*, 847 F. Supp. at 784-85.

a "gravity of purpose and likelihood of execution, nor the intent to harm or assault."[35]

### *C. The Ninth Circuit's About-face*

In its first decision, which it later withdrew,[36] the Ninth Circuit affirmed the trial court's decision.[37] The court reasoned that the Supreme Court has narrowed the First Amendment speech rights of students in recent years, but noted that the California Legislature has expanded those rights.[38] Interpreting Section 48950,[39] the court concluded that the Legislature intended to protect such speech as Lovell's, because the statute gives high school student speech the same protection on campus as such speech has off campus.[40]

Along with criticizing the intervention of a federal court in a local school board matter, Judge Noonan in dissent feared the floodgates of litigation that would open by usurping the authority of local school administrators: "This needless excursion into school discipline invites litigation under the California Education Code into a federal forum with a federally-awarded [sic] fee for the lawyers who win."[41]

In response to the first Ninth Circuit decision, the school board filed a petition for writ of certiorari to the Supreme Court.[42] But before the plaintiffs could file a response, the Ninth Circuit withdrew its earlier decision without explanation.[43] One month later, in July 1996, the Ninth Circuit reversed the trial court's decision in an opinion that did not reference its earlier contrary ruling.[44]

The reasoning of the Ninth Circuit's second *Lovell* opinion differed completely from its earlier decision. In its second decision, the court noted that Section 48950 expands the constitutional protections guaranteed by the

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35. *Id.* at 785. In arriving at its decision, the magistrate noted that Lovell had not acted in a physically threatening manner when she had spoken to the counselor several times that day. He also considered the counselor's delay in seeking assistance from the principal. *Id.*

36. *See supra* note 9.

37. Lovell By and Through Lovell v. Poway Unified Sch. Dist., 1996 WL 140805 (9th Cir. March 29, 1996) (withdrawn). The Ninth Circuit reached its decision despite arguments by the school board that the trial court incorrectly substituted its own opinion for the conclusion reached by the assistant principal. Specifically, the school board argued that the magistrate should have limited its role to deciding whether the facts available to the assistant principal at the time provided substantial evidence to support her finding. Poway Unified Sch. Dist.'s Petition for Cert. to the U.S. Sup. Ct. 10 (October 1995 Term) (withdrawn petition, on file with author).

38. *Lovell,* 1996 WL 140805, at *4 (withdrawn).

39. CAL. EDUC. CODE § 48950 (West 1992). *See supra* note 30.

40. *Lovell,* 1996 WL 140805, at *6 (withdrawn).

41. *Id.* at *11 (withdrawn) (Noonan, J., dissenting).

42. Interview with Christopher Welsh, attorney for the Poway Unified School District in the Lovell case (September 10, 1996).

43. *See supra* note 9.

44. Lovell By and Through Lovell v. Poway Unified Sch. Dist., 90 F.3d 367 (9th Cir. July 18, 1996).

First Amendment.[45] The court then held that the district court "implicitly and inappropriately allowed the California Education Code to trump federal constitutional law."[46] Regardless, the court concluded that the student's speech was a threat under both federal *and* state law.[47] Contrary to its first decision, the reversing *Lovell* court held that a reasonable person in the counselor's shoes would have felt threatened by the student's statement.[48] Significantly, the court here failed to include its earlier elaborate analysis of the applicable California statute. Perhaps the Ninth Circuit concluded that its earlier first-impression interpretation of a recent California statute was better left to the state courts.[49]

The Ninth Circuit did provide additional clues, however, on why it reversed itself. At least four times in the opinion, the court made comments on the level of violence that exists in the schools such as the following: "In light of the violence prevalent in schools today, school officials are justified in taking very seriously student threats against faculty or other students."[50] By comparison, the court had raised no concerns about violence in the earlier opinion. Perhaps the reevaluation of violence in the schools led to the court's change of position.[51] Yet the court stopped short of addressing whether the courts should give school administrators more discretion, given this increase in violence.

In any event, the Ninth Circuit avoided some of the more difficult substantive issues which the court itself had raised in its first opinion by changing its view of the facts. By finding in its second decision that Lovell's statement was a true threat, the court did not have to analyze the impact of Supreme Court cases and the 1992 California statute on defiant but nonthreat-

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45. The court cited the following cases to support its argument that the First Amendment guarantees only limited protection for student speech in the school context: Tinker v. Des Moines Indep. Community Sch. Dist, 393 U.S. 503, 509 (1969); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988); and Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986).

46. *Lovell,* 90 F.3d at 371.

47. *Id.*

48. *Id.* at 372. Specifically, the court found that the magistrate had stated the applicable law, but had misapplied the law to the facts. Unlike the magistrate, the court here based its conclusions on the counselor's characterization of the student's statement, since the plaintiff had not met her burden of proving her "figure of speech" version of the statement. *Id.* at 373.

49. As will be discussed *infra,* the Ninth Circuit recognized the problems created by this newly passed California statute. For example, the court noted that the statute expanded free speech rights of students, which contradicts the trend in the federal courts to limit students' free speech rights. Also, the Ninth Circuit wished to avoid interpreting this California statute on first impression. Judge Noonan alluded to this concern in his partial dissent to the Lovell reversal: "The scope of this recently enacted statute [California Education Code § 48950] will no doubt be narrowed in the courts of California, but this task is better left in the first instance to those courts." *Lovell,* 90 F.3d at 374 (Noonan, J., partially dissenting).

50. *Id.* at 372. The opinion then cited United States v. Lopez, 115 S. Ct. 1624, 1659 (1995) (Breyer, J., dissenting), which noted that "the problem of guns in and around schools is widespread and extremely serious," as "four percent of American high school students . . . carry a gun to school at least occasionally." *Id.*

51. The impact of violence on the schools will be addressed in Part V of this Note.

ening speech. As the magistrate correctly reasoned, both the Supreme Court cases and Section 48950 lead to the same conclusion that true threats are never constitutionally protected.[52] While seemingly the coward's way out of a difficult legal straightjacket created by the California Legislature, the Ninth Circuit decision, in the end, makes good sense and good law. The final resolution of this case also illustrates that an administrator is a better judge of the facts than a magistrate, who is far removed from the unique school environment.

Even if the Ninth Circuit had concluded that Lovell's statement was not a threat, Supreme Court cases since *Tinker* would nonetheless permit restriction of Lovell's speech. The more difficult issue arises in trying to reconcile the constitutional status of schoolchildren's speech with the status of such speech under the California statute.[53]

## II. THE SCHOOLHOUSE GATE AND THE CONSTITUTIONAL FREE SPEECH RIGHTS OF SCHOOLCHILDREN

### *A. The* Tinker *Standard*

Both of the Ninth Circuit *Lovell* decisions recognized that the Supreme Court has limited the First Amendment rights of students in the school context.[54] This Part examines *Tinker v. Des Moines Independent Community School District,* an early student speech case, to determine the constitutional status of schoolchildren's speech. Such an analysis will set the stage for then critiquing Section 48950, which may, on one interpretation, ignore the limitations that Supreme Court cases have placed on such speech. Understanding that the *Tinker* standard by itself is inapplicable in a *Lovell* scenario is especially significant, since the California Legislature relied on *Tinker* in drafting the statute that will be criticized in Part IV below.

While the United States Constitution guarantees the protection of First Amendment rights to all citizens,[55] these protections may be limited for some groups of people in certain circumstances.[56] Viewing children as such a group, the Supreme Court had not formally recognized that children in school are entitled to First Amendment speech rights prior to the 1969 *Tinker*

52. Lovell By and Through Lovell v. Poway Unified Sch. Dist., 847 F. Supp. 780, 784 (S.D. Cal. 1994).

53. *See* Part IV for a critique of CAL. EDUC. CODE § 48950 (West 1992).

54. *Lovell,* 1996 WL 140805, at *4 (9th Cir. March 29, 1996) (withdrawn); 90 F.3d 367, 371 (9th Cir. July 18, 1996).

55. U.S. CONST. amend. I.

56. Bartlett & Frost, *supra* note 3, at 311-12 ("When liberty of speech conflicts with other important values, it may be restricted.").

decision.[57] In fact, just prior to *Tinker*, in *Ginsberg v. State of New York*, the Supreme Court had found that "a child . . . is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees."[58]

By contrast, the Supreme Court in *Tinker* upheld the First Amendment rights of public school students to wear black armbands in protest of the American involvement in the Vietnam conflict.[59] The Court found that "First Amendment rights, applied in light of the special circumstances of the school environment, are available to teachers and students."[60] In finding that students did not shed their rights to freedom of speech at the "schoolhouse gate," and in speaking of student's rights in the same breath as teacher's rights, the Court in essence elected to treat the school campus as a public space. Recognizing the interests of schools in avoiding large disruptions, however, the *Tinker* standard also provided that students could engage in such political expression as long as they did not "materially and substantially interfere with the requirements of appropriate discipline in the operations of the school" nor "impinge upon the rights" of other students.[61] While the scope of this standard engendered contradictory holdings in subsequent lower court decisions,[62] it remained the only authoritative guidance for school free speech rights analysis until the Supreme Court decided *Bethel School District No. 403 v. Fraser*[63] in 1986.

### *B. The Constitutional Status of Schoolchildren's Speech*

Some commentators praised the *Tinker* decision for guaranteeing students' free flow of ideas in the marketplace.[64] But the *Tinker* decision also drew much criticism because the Court for the first time appeared to equate the free speech rights of children on campus with those of children, and even adults, on the street. Moreover, as Professor Diamond explains in

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57. Prior Supreme Court decisions had discussed First Amendment rights in education generally, but had not formally acknowledged the First Amendment free speech rights of children. Such cases often dealt with coercive indoctrination, as in *West Virginia v. Barnette*, 319 U.S. 624, 642 (1943), where the Court invalidated a statute that required public school students, including Jehovah's Witnesses opposed to the practice, to salute the flag. *Tinker* was the first decision that did not just acknowledge children's intellectual rights, but actually recognized children's rights as persons under the Constitution and the First Amendment. *See* DAVID MOSHMAN, CHILDREN, EDUCATION, AND THE FIRST AMENDMENT: A PSYCHOLEGAL ANALYSIS 12-14 (1989).

58. 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring) (upholding a statute that forbade the sale of otherwise constitutionally protected sexually explicit magazines to minors).

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

60. *Id.* at 503.

61. *Id.* at 509.

62. Diamond, *supra* note 5, at 487.

63. 478 U.S. 675 (1986).

64. *See, e.g.*, Bartlett & Frost, *supra* note 3, at 318-19 (describing Tinker as a "cornerstone of education law doctrine" that was eventually modified by subsequent Supreme Court decisions).

his analysis of *Tinker*, subsequent contradictory holdings in the lower courts stemmed from "the *Tinker* Court's presentation of first amendment speech rights as absolutely present or absent, in much the same way that it presented children as fully adult persons."[65]

Justice Black in his *Tinker* dissent warned that the Court should limit the First Amendment rights of schoolchildren, because "school discipline, like parental discipline, is an integral and important part of training our children to be good citizens—to be better citizens."[66] By contrast, Justice Fortas, writing for the *Tinker* majority, recognized the need for school discipline and order, but found that free speech in the school context would not be inconsistent with that educational interest.[67] Justice Fortas explained that children are "possessed of fundamental rights which the State must respect" and that children should not be viewed as "closed-circuit recipients" of only that which the State wishes to teach them.[68] However, he did not draw explicit distinctions between children's rights and adult's rights, thereby leaving the impression to some that children are vested with absolute constitutional rights. As a result, courts and legislatures have continued to cite the holding of *Tinker* in evaluating free speech scenarios in schools without carefully distinguishing the free speech rights of children from those of adults.

As one commentator has suggested, a right has meaning only "if we can articulate its source and nature."[69] Accordingly, any meaningful discussion of children's rights must consider children's limited autonomy in the state and in their families,[70] and must avoid characterizing the rights of children as either non-existent or absolute.[71] The *Tinker* Court found that "students in school as well as out of school are persons under our Constitution."[72] Yet such a view of children's constitutional status may not consider that children often lack the adult wisdom, experience, and insight to know what choices are in their best interest.

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65. Diamond, *supra* note 5, at 487.

66. *Tinker*, 393 U.S. at 524 (Black, J., dissenting).

67. *Id.* at 508.

68. *Id.* at 511.

69. Irving R. Kaufman, *Protecting the Rights of Minors: On Juvenile Autonomy and the Limits of the Law*, 52 N.Y.U. L. REV. 977, 1019 (1977) (cited in Diamond, *supra* note 5, at 487). Professor Kaufman discusses the unique rights of minors in this criticism of the juvenile justice system.

70. Kaufman, *supra* note 69, at 1019.

71. *See* Hafen & Hafen, *supra* note 15, at 385, who argue that viewing children as "presumptively autonomous persons" is contrary to Supreme Court policy:

> For our children's own sake, we must often limit children's legally bestowed ("de jure") autonomy in the short-run in order to maximize their actual ("de facto") autonomy in the long-run. Such limits are essential not only to develop their own ability to function independently, but also to sustain in perpetuity the social conditions that will continually regenerate autonomous capacity within each new individual.

*Id.*

72. *Tinker*, 393 U.S. at 511.

In cases that address children's rights in non-education contexts, the Supreme Court has concluded that, as applied to a child, a right can have a different meaning than as applied to an adult.[73] For example, in *Belloti v. Baird*, a state statute required parental notification for a minor to obtain an abortion. The Court concluded the following:

> We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child-rearing.[74]

Professor John Garvey, in a critical inquiry addressing the First Amendment rights of children, concluded that children have rights to "certain freedoms" against the government, despite the fact that they often lack the maturity and wisdom to make competent choices.[75] But such rights are "parasitic upon" the rights of adults. Freedom of speech, Garvey argues, is "derivative" in that children are learning to use a powerful tool that they will have full use of when they are adults.[76]

Professor Garvey also notes that the *Tinker* Court endorsed a model of education that rejects the traditional belief that disciplining is itself a primary goal of education.[77] Other commentators have echoed the view that normal First Amendment analysis is inapplicable in the school context, because one of the primary traditional functions of public education in America has been value inculcation.[78] While the First Amendment is an important American value in such an inculcation model, it should not override other important values.[79]

The leading Supreme Court cases that followed *Tinker* retreated from *Tinker's* "substantially disruptive" constitutional standard and began to re-

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73. For a discussion of such cases, *see* Diamond, *supra* note 5, at 492. Diamond discusses limitations on children's constitutional rights in criminal proceedings and in obtaining abortions, restrictions on broadcasts that contain indecent materials, and limitations on free expression of religious ideas when child labor laws are implicated. Diamond's conclusion is that the case law and critical commentaries "make the point that *Tinker* ignored: children are not fully persons for constitutional purposes." *Id.* at 489.

74. 443 U.S. 622, 634 (1979) (plurality opinion) (invalidating the statute, yet finding that the state can compel a child to prove that she has sufficient maturity to make her own decisions) (quoted in Diamond, *supra* note 5, at 493).

75. John H. Garvey, *Children and the First Amendment*, 57 TEX. L. REV. 321, 327 (1979).

76. *Id.* at 344-45.

77. *Id.* at 340.

78. *See, e.g.*, ROBERT WHEELER LANE, BEYOND THE SCHOOLHOUSE GATE: FREE SPEECH AND THE INCULCATION OF VALUES 48 (1995).

79. Professor Diamond argues that the *Tinker* Court erred in affording children the same constitutional status as adults and in allowing the value of free speech to preempt other values. He also concludes that the Court went wrong in assuming that the only way to teach First Amendment values is to bring the unfettered free exchange of ideas allowable on the street into the schoolhouse. Diamond, *supra* note 5, at 499-500.

erect the gate that separated campus speech from street speech, thereby limiting schoolchildren's free speech rights.

## III. BEYOND *TINKER*: REDEFINING SCHOOLCHILDREN'S RIGHTS

### *A. The* Bethel *and* Hazelwood *Standards*

In upholding the suspension of a student who gave an assembly speech containing sexual innuendo,[80] the Court in *Bethel School District No. 403 v. Fraser* recognized the need to give appropriate deference to school administrators. The audience in the *Bethel* assembly consisted mainly of 14-year-olds who were required either to attend an assembly or go to a study hall. In a speech nominating a fellow student for an elected student body office, the student speaker referred to the candidate in terms of a "graphic and explicit sexual metaphor."[81] Finding that the student had violated a school rule prohibiting lewd speech, the principal suspended the student for three days and removed his name from a list of potential graduation speakers.[82]

The Court found that certain speech—in this case indecent speech as opposed to political speech in *Tinker*—may interfere with a school's "basic educational mission."[83] Retreating from the *Tinker* standard, the *Bethel* Court reasoned that the First Amendment rights of public school students "are not automatically coextensive with the rights of adults in other settings."[84] The resulting *Bethel* standard is that it is a "highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse."[85] As one commentator has suggested, by adopting this more restrictive standard, the Supreme Court in *Bethel* had "shattered the myth of the open schoolhouse gate," and provided a "polestar for further restrictions on student speech."[86]

In 1988, the Supreme Court in *Hazelwood School District v. Kuhlmeier*,[87] appeared to reconcile the *Tinker* and *Bethel* standards by differentiating between various forms of speech and administrator involvement. The Court held that the administrator in *Hazelwood* properly exercised his discretion when he disallowed the publication of articles containing sexually explicit material in the school newspaper. The Court distinguished such "school-sponsored activity" from individual student speech that takes place

80. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).
81. *Id.* at 677.
82. *Id.* at 678.
83. *Id.* at 685.
84. *Id.* at 682.
85. *Id.* at 683.
86. Scott D. Makar, *Free Speech on High School and University Campuses*, 14 CHILDREN'S LEGAL RTS. J. 29 (1993).
87. 484 U.S. 260 (1988).

on school grounds.[88] While some have argued that *Hazelwood* is not a major shift away from *Tinker*,[89] others have concluded that *Hazelwood's* retreat from *Tinker* has resulted in an unclear standard.[90] The *Hazelwood* standard is that public school authorities may censor school-sponsored publications, as long as the censorship is "reasonably related to legitimate pedagogical concerns."[91] The consensus among commentators following the *Hazelwood* decision suggests that the Supreme Court in *Hazelwood* moved toward affording school administrators more discretion.[92]

The defiant speech in *Lovell* is neither school-sponsored (*Hazelwood*), indecent (*Bethel*), nor political (*Tinker*). Yet the underlying guidelines of these cases, which recognize the need for limitations on speech when legitimate pedagogical concerns exist, apply to defiant speech as well. Moreover, defiant speech interferes with the basic educational mission of the school at least as much as the indecent speech in *Bethel*. If the Court in *Tinker* recognized the need for disciplinary limitations on free speech when a schoolchild is engaging in political expression[93]—an exercise reflecting the core of the First Amendment right—then defiant speech such as Lovell's warrants at least equal limitation.

In reconciling the cases on student speech, the *Lovell* court relied on a 1992 Ninth Circuit decision, *Chandler v. McMinnville School District*,[94] which involved political expression as well. In *Chandler*, the court held that students' First Amendment rights had been violated when they were suspended for refusing to remove buttons that contained language in support of striking teachers.[95] Reviewing the prior Supreme Court decisions, the court found three distinct categories of student speech: (1) vulgar and

88. *Id.* at 271. The Court reiterated the *Tinker* standard for individual political expression, while finding that administrators are entitled to greater control over students' expression that occurs in a school-sponsored context.

89. *See, e.g.*, William Buss, *School Newspapers, Public Forum, and the First Amendment*, 74 IOWA L. REV. 505, 507 (1989).

90. *See, e.g.*, Thomas C. Fischer, *Whatever Happened to Mary Beth Tinker and Other Sagas in the Marketplace of Ideas*, 23 GOLDEN GATE U. L. REV. 351 (1983) (cited in Hafen & Hafen, *supra* note 15, at 395 n.68). Professor Fischer concludes that *Tinker*'s "sweeping grant of Constitutional protection to students" is unworkable in the school setting. *Id.* at 357. As a result, cases like *Hazelwood* have been able to weaken the *Tinker* standard. *Id.* at 358.

91. *Hazelwood*, 484 U.S. at 273. *See* Bruce C. Hafen, Comment, *Hazelwood School Dist. and the Role of First Amendment Institutions*, 1988 DUKE L.J. 685, for a detailed description of the inquiry required under the Hazelwood standard.

92. *See, e.g.*, Makar, *supra* note 86, at 30 (describing the Hazelwood standard as "a significant empowerment of school officials to prohibit student expression provided a single 'legitimate pedagogical concern' is articulated").

93. Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 509 (1969).

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

95. *Id.* at 526.

offensive speech, which must be judged by the *Bethel* guidelines;[96] (2) school-sponsored speech, which must be judged by the *Hazelwood* standard;[97] and (3) all other speech, which must be judged by *Tinker's* guidelines.[98] Because the buttons were not vulgar or indecent per se, and because they were not endorsed by the school,[99] the court placed the students' expression in the third category and found that they were not substantially disruptive of school activities.[100]

Returning to the *Tinker* standard in the "catch-all" third category, however, may overstate the case. *Tinker* was a political speech case, not a "catch-all" case. The buttons in *Chandler* are very similar to the armbands approved of in *Tinker*. However, neither *Tinker* nor *Chandler*, nor their facts, govern the defiant language in *Lovell*. If Lovell's speech is not a true threat, her defiant speech should not fall into *Chandler's* third category by default. Rather, applying *Tinker's* "substantially disruptive" standard, and especially the spirit of *Bethel* and *Hazelwood*, the student in *Lovell* should constitutionally be subject to sanction for "legitimate pedagogical" reasons.

While broadly stating the *Tinker* standard, the *Chandler* court nonetheless acknowledged that school children do not have the same rights as adults. It also recognized the door to judicial intervention in local administrator decisions which cases like *Tinker* had opened:

> The First Amendment rights of public school students "are not automatically coextensive with the rights of adults in other settings." . . . Despite the fact that the suppression of speech has obvious First Amendment implications, courts are not necessarily in the best position to decide whether speech restrictions are appropriate. "The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board," and not with the federal courts.[101]

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96. As discussed *supra* at notes 85 and 86 and accompanying text, the Bethel standard is that it is a "highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse," since it interferes with a school's "basic educational mission." Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

97. The *Hazelwood* standard is that public school authorities may censor school-sponsored publications, as long as the censorship is "reasonably related to legitimate pedagogical concerns." Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

98. *Chandler*, 978 F.2d at 529. The *Tinker* rule provided that students could engage in political expression as long as they did not "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school" nor "impinge upon the rights" of other students. Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 509 (1969).

99. *Chandler*, 978 F.2d at 530.

100. *Id.* at 530-31.

101. *Id.* at 527 (citing *Bethel*, 478 U.S. at 682-83).

### *B. Aligning* Lovell *with Supreme Court Cases*

Instead of returning to the *Tinker* standard, which characterized the free speech rights of schoolchildren on campus as being equal to those off campus, a more sophisticated analysis should focus on the limitations on student speech that have emerged since *Tinker*. Recognizing that schoolchildren's "derivative"[102] free speech rights should not overshadow legitimate pedagogical concerns, the Supreme Court no longer requires that speech may be limited only if it is "substantially disruptive." Instead, school administrators are justified in limiting schoolchildren's speech if it simply "interferes with the basic educational mission" of the school, according to the 1986 *Bethel* decision.

Unfortunately, the *Lovell* court seemed so unsure of the meaning of Section 48950, it may have refrained from considering the school's educational mission at all.[103] Had the court considered the issue of whether schools can limit student's civil discourse, it could have found that such on-campus statements interfere with the basic educational mission of the school. The basic mission of schools includes both the teaching of discipline and the teaching of mutual respect among teachers and students. Moreover, given the very real fear of student outbursts and even violence in the schools, deterring potentially threatening speech among students is a legitimate pedagogical concern in the 1990s.

Applying the *Bethel* and *Hazelwood* standards also reflects a practical understanding of the dynamics of value inculcation in the schools. *Tinker's* high "substantial disruption" standard does not account for everyday occurrences in school that could arguably be protected under *Tinker*. For example, children have the right to use bad grammar on the street, yet their teachers can mark them down or even fail them when they use the same language in an English paper. Likewise, a child need not raise her hand to speak in the park, yet most class rules require hand raising to speak in class. To fulfill its unique educational mission and to maintain order, schools need to limit the individual speech of children in many instances.

Considering this unique role of schools, the *Lovell* court could well have found that the school administrators were constitutionally justified in punishing Lovell for her statement, even though this same statement may well be protected if spoken on the street. Had the court not avoided this issue by characterizing her statement as an unprotected "true threat," the court would then have faced the more difficult hurdle of reconciling *Bethel* with Section 48950.

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102. *See* Garvey's discussion, *supra* note 75. Children's free speech rights, while not absent, are also not absolute. They are "derivative" of the free speech rights of adults.

103. Neither the earlier withdrawn decision, *Lovell*, WL 140805, at *3 (9th Cir. March 29, 1996) (withdrawn), nor the revised decision, 90 F.3d 367, 371 (9th Cir. July 18, 1996), analyzed the *Lovell* facts in terms of the law of *Tinker*, *Bethel*, or *Hazelwood*, even though both outlined the broad principles of these cases.

## IV. THE PANDORA'S BOX IN CALIFORNIA EDUCATION CODE SECTION 48950

### *A. The Controversy Over Section 48950*

In *Lovell*, the Ninth Circuit was interpreting student rights not only under the First Amendment, but also under Section 48950, passed in 1992. The statute gives both university and public high school students the same speech rights on campus as they have off campus:

> School districts operating one or more high schools and private secondary schools shall not make or enforce any rule subjecting any high school pupil to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside of the campus, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article I of the California Constitution.[104]

The California Legislature must not have meant, however, that the school context is the same as a playground or a park setting. By explicitly referencing *Tinker* in the committee reports,[105] the Legislature recognized, at the very least, that the special rule of "substantial disruption" governed school speech. Still, those same reports failed to incorporate the more deferential *Bethel* and *Hazelwood* rules,[106] which recognized a stronger line of division than *Tinker* had between the school context and the public forum. Even though the Legislature did not incorporate the *Bethel* rule, it referenced the *Tinker* rule, which seems to indicate that the Legislature at least recognized that substantially disruptive speech is not protected. Yet the Senate Bill underlying Section 48950 explicitly states "that a student shall have the same right to exercise his or her right to free speech on campus as he or she enjoys when off campus"[107]—a standard incongruent even with *Tinker*.

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104. CAL. EDUC. CODE § 48950(a) (West 1992). *See also* California Statutes and Amendments to the Codes of 1992, Ch. 1363 [SB 1115, Leonard] (1992) for the full text and Legislative Council's Digest of the bill underlying the statute.

105. ASSEMBLY COMMITTEE ON EDUCATION, REPORT FOR 1991 CALIFORNIA SENATE BILL NO. 1115, 1991-92 REG. SESSION (1992). The Legislature cited *Tinker* in its comments to the bill underlying Section 48950, yet failed to acknowledge the trend in the Supreme Court since *Tinker* to limit high school students' First Amendment rights to protect the basic educational mission of schools. *Id.*

106. The statute purports to rely on *Tinker*, while implicitly rejecting the *Bethel* and *Hazelwood* standards. *Id.* While other states have considered such legislation, the majority of states have rejected it. *See* Hafen & Hafen, *supra* note 15, at 406.

107. *See* California Statutes and Amendments to the Codes of 1992, Ch. 1363 [SB 1115, Leonard] (1992). Senate Bill 1115 led to the enactment of CAL. EDUC. CODE § 48950 and various other amendments to then-existing Education statutes, including CAL. EDUC. CODE § 94367 (West 1992), which also included the statement, "It is the intent of the Legislature that a student shall have the same right to exercise his or her right to free speech on campus as he or she enjoys when off campus." *Id.*

This Part will outline the effect of Section 48950, specifically arguing that the California Legislature should not have included high school students in a statute that gives university students the same speech rights on campus as on the street. In the alternative, the statute should be construed to recognize the legitimate mission of schools. No education is possible if defiant speech that interferes with the school's educational mission must be tolerated. Since *Bethel* and *Hazelwood*, and even *Tinker*, do not require this outcome, neither should the California statute.

### *B. University Speech Codes and High School Willful Defiance?*

California State Senator Leonard introduced Senate Bill 1115,[108] the precursor to Section 48950, to combat the proliferation of speech codes on various university campuses.[109] These speech codes subjected students to discipline if they engaged in certain kinds of "hate speech" or other speech designed to intimidate members of perceived minority groups.[110] Concerned that such speech codes reflected "politically correct" efforts to infringe on the speech of conservative students, Leonard argued that educational institutions should be "bastions of unfettered free expression."[111] Specifically, the statute gives students whose schools discipline them in violation of this statute standing to seek relief in civil court. It also awards prevailing plaintiffs attorney's fees.[112]

The "Leonard Bill" erred in two ways. First, Leonard most likely had viewpoint discrimination of the *Tinker* variety in mind when he wrote the bill. Yet the Bill failed to enunciate this viewpoint discrimination standard, applying instead a "street" standard inappropriate to the educational setting. Second, the statute failed to distinguish between university students and

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108. This Senate Bill (SB 1115) was also known as the "Leonard Bill," named after its author, California State Senator Bill Leonard.

109. ASSEMBLY OFFICE OF RESEARCH, CALIFORNIA LEGISLATURE STATE ASSEMBLY FINAL ANALYSIS OF SENATE BILL 1115 (1992). In the floor debates, Leonard expressed concerns about university speech codes that "encourage students to conform to a 'politically correct' view." He cited the example of a UCLA student editor who was suspended for running a cartoon in a school paper that was critical of affirmative action. *Quoted in* Ken Hoover, *Bill Banning Speech Codes Passes Senate*, U.P.I. NEWS SERVICE, June 4, 1991, *available in* LEXIS, News Library, UPI File. Leonard also told a news service that he was "prompted to introduce the legislation in part by a story about a high school principal in Kansas who sent a youngster home for wearing a Bart Simpson T-Shirt that said, 'School Sucks.'" *Quoted in* Betty Dietz, *Committee Boosts Free Speech*, GANNETT NEWS SERVICE, August 20, 1991, *available in* LEXIS, News Library, GNS File.

110. ASSEMBLY OFFICE OF RESEARCH, CALIFORNIA LEGISLATURE STATE ASSEMBLY FINAL ANALYSIS OF SENATE BILL 1115 (1992). Senator Leonard apparently was concerned that such codes "add to an atmosphere of intolerance on campus," unfairly punishing students who may hold beliefs contrary to majority views. *Id.*

111. *Id.*

112. CAL. EDUC. CODE § 48950(b) (West 1992) provides that any pupil enrolled in a school that "has made or enforced any rule in violation of subdivision (a) may commence a civil action to obtain appropriate injunctive and declaratory relief as determined by the court." The subsection then provides attorney's fees to a prevailing plaintiff. *Id.*

secondary school students.[113] Admittedly, both the public school and the university settings encourage the exchange of ideas in a "marketplace of ideas."[114] Unlike university administrators who are mainly concerned that the speech of one adult student offends or intimidates another adult student,[115] however, public school administrators must maintain order over minor students to whom they have a state-mandated obligation to provide an education.[116] High school students, who are younger and less mature than their university counterparts, require more guidance and discipline.[117] University students, on the other hand, have chosen to pursue post-secondary education. Such adult students can expect to receive the same free speech protections as other adults in society, although order is also necessary in a college classroom to avoid cacophony and confusion. The Leonard Bill and its proponents failed to recognize both the disparities between minor and adult students and the problems of disruption in both contexts.

### *C. Statutory Expansion of Student Rights in California*

In *Bethel*, the Supreme Court had upheld an educational limit on speech that would have been protected on the street.[118] By contrast, the Ninth Circuit's original *Lovell* decision concluded that Section 48950 expanded the

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113. ASSEMBLY COMMITTEE ON EDUCATION, REPORT FOR 1991 CALIFORNIA SENATE BILL NO. 1115, 1991-92 REG. SESSION (1992).

114. *See* Bartlett & Frost, *supra* note 3, at 311.

115. This Note refers to university speech code cases only to explain the origins of Section 48950. Since the focus of this Note is defiant speech in public secondary schools, it will consider these university cases only to the extent that their inapplicability in a public school environment becomes apparent.

116. While the Supreme Court has not formally recognized the right to an education, the Supreme Court of California has held, "We are convinced that the distinctive and priceless function of education in our society warrants, indeed, compels our treatment of it as a fundamental interest." Serrano v. Priest, 5 Cal.3d 584, 608 (1971) (cited in Hafen & Hafen, *supra* note 15).

117. The Assembly Committee on Education noted the differences between college and high school students when it raised the following concern in its Committee Hearing on the Leonard Bill:

> Should high schools be bound by the same free speech requirements as colleges? The author's primary intent is aimed at preventing speech codes on university campuses. Yet, this bill extends the same speech protections to high school students. High schools may be qualitatively different than universities in that (a) they have a constitutional obligation to provide students with an education, and (b) high school students are less mature than college students and, therefore, may need more guidance. Should this bill delete the reference to high school students?

ASSEMBLY COMMITTEE ON EDUCATION, REPORT FOR 1991 CALIFORNIA SENATE BILL NO. 1115, 1991-92 REG. SESSION (1992). *But see* Bishop v. Aronov, 926 F.2d 1066, 1074 (11th Cir. 1991) (cited in Makar, *supra* note 86, at 32). The Eleventh Circuit extended *Hazelwood* from the public school to the university in a case where a professor was propounding his religious beliefs in the university classroom.

118. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

First Amendment rights of California students.[119] The language of the Leonard Bill unambiguously rejects the notion that students' free speech rights are subject to greater regulation in public schools: "It is the intent of the Legislature that a student shall have the same right to exercise his or her right to free speech on campus as he or she enjoys when off campus."[120] However, even *Tinker* recognized the need to avoid "substantial disruption" in the school, thereby distinguishing the school context from the street context. Yet the California Legislature, while referencing *Tinker*, ignored such a distinction and incorporated a street standard into this statute.

Prior to the enactment of Section 48950 in 1992,[121] California school boards looked to California Education Code Section 48900 for guidance on local disciplinary discretion.[122] California Education Code Section 48900 stated the grounds for which a high school student would formerly be suspended, including the disruption of school activities and the "willful defiance" of school officials in the exercise of their duties.[123] Thus, local school administrators facing a *Lovell* situation before 1992 may well have had the discretion to suspend the student for speech that was willfully defiant of the counselor, even if it was not threatening to her.[124]

Since the passage of Section 48950, public school administrators must think twice before disciplining a student who openly defies a teacher. Because children need not obey their teachers on the street, need they obey them in the classroom? This uncertainty creates a situation of doubt among administrators and teachers at a time when the educational problems in the schools are particularly pressing. The Ninth Circuit avoided reconciling the Supreme Court cases, in the context of a statutory mandate to treat schools like streets in some unspecified respect. The Ninth Circuit thereby passed up the chance to clarify the purview of Section 48950, perhaps even limiting

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119. *Lovell*, 1996 WL 14805, at *4 (9th Cir. March 29, 1996) (withdrawn).

120. California Statutes and Amendments to the Codes of 1992, Ch. 1363 [SB 1115, Leonard] (1992).

121. CAL. EDUC. CODE § 48950 (West 1992).

122. ASSEMBLY OFFICE OF RESEARCH, CALIFORNIA LEGISLATURE STATE ASSEMBLY FINAL ANALYSIS OF SENATE BILL 1115 (1992).

123. CAL. EDUC. CODE § 48900. This Section further provides that no such discipline shall occur unless the student's conduct is "related to school activity or school attendance" and such conduct "occurred within a school."

124. The Assembly Committee considering Senate Bill 1115 described the discretion afforded school boards prior to consideration of this Bill. Specifically, the then-existing law "expresse[d] legislative intent that school boards not be prevented from adopting . . . policies relating to oral expression by students." Such law protected the free speech of students, "except when such expression is obscene, libelous, slanderous, or substantially disrupts the orderly operation of the school." ASSEMBLY COMMITTEE ON EDUCATION, REPORT FOR 1991 CALIFORNIA SENATE BILL NO. 1115, 1991-92 REG. SESSION (1992). The Legislative Counsel's Digest of Senate Bill 1115 provides: "Under existing [prior to Section 48950] law, public secondary schools . . . are considered limited public forums and, thus, certain conduct by students, including speech . . . may be regulated to a greater extent than speech or other communication in other public forums." California Statutes and Amendments to the Codes of 1992, Ch. 1363 [SB 1115, Leonard] (1992).

its embrace to the viewpoint discrimination Senator Leonard had in mind. The *Lovell* court may well have deferred to the California state courts to interpret the legislation on first impression.

Recognizing that true threats are never protected speech, Section 48950 does not "prohibi[t] the imposition of discipline for harassment, threats, or intimidation, unless constitutionally protected."[125] Yet the explanations of these terms in the Bill and Senator Leonard's statements in the floor debates make it clear that such discipline is restricted only to speech that would be considered truly threatening even in a non-school environment.[126] To avoid resolving this dilemma, the Ninth Circuit thus concluded that Lovell's speech was not only defiant and uncivil but also a threat.

### *D. Section 48950's Uncertain Aftermath*

The fallout in California colleges, schools, and courts since the passage of Section 48950 has been two-fold. First, the Leonard Bill has aided in the successful challenge of speech codes on university campuses. Even while the California Legislature was still debating the Leonard Bill, the University of California and Stanford University amended their codes to punish only fighting words that might incite violence.[127] Since the passage of Section 48950, several university students in California have relied on the statute to sue their colleges for unlawful disciplinary actions.[128]

By contrast, the Section 48950 directive to public school administrators has created confusion in the high schools and the courts. Initial opponents

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125. CAL. EDUC. CODE § 48950(d) (West 1992).

126. CAL. EDUC. CODE § 48950(d) provides that harassment, threats, or intimidation are not protected, "unless constitutionally protected." No explanation is provided on how intimidation, for example, could be constitutionally protected. Senator Leonard's intent to allow discipline only when a student's statement reaches the level of a criminal threat is evidenced by his statement in the Senate floor debate: "[This bill] does not increase anyone's right of free speech; it gives no one a right to misbehave in a criminal nature on or off the public school or private school campus." *Quoted in* Jim Specht, *California Senate OK's Bill to Protect Free Speech on Campus*, GANNETT NEWS SERVICE, June 5, 1991, *available in* LEXIS, News Library, GNS File.

127. Ken Hoover, *Bill Banning Speech Codes Passes Senate*, U.P.I. NEWS SERVICE, June 4, 1991, *available in* LEXIS, News Library, UPI File.

128. For example, members of a fraternity at Occidental College escaped disciplinary action after they circulated a private newsletter that described a rape in verse. Their attorney, relying on Section 48950 and other law, filed suit against the college, which then agreed to stay its disciplinary proceedings and to revise its harassment policy. Linda Seebach, *Political Correctness in LA*, NATIONAL REVIEW, July 19, 1993, *available in* LEXIS, News Library, NTNREV File. The same attorney represented members of a fraternity at California State University at Northridge who were threatened with suspension after posting a flier that alluded to a lewd drinking song that disparaged Mexican women. The attorney has acknowledged that such suits are easier in California because of Section 48950. After reading the law, he "realized that this was a tremendous tool in reversing this trend [of speech codes]. It gives us a powerful tool in beating back encroachments on the First Amendment by college radicals." Valerie Richardson, *Free Speech "Vigilante" Nemesis of Campus Political Correctness*, THE WASHINGTON TIMES, March 29, 1993, at A1, *available in* LEXIS, News Library, WTIMES File.

of the statute, including the California School Boards Association, had feared that Section 48950 would restrict school administrators' abilities to limit student behavior, given the broad and ambiguous language of the statute.[129]

The ambiguity of the statute became apparent just a year after Section 48950 became law, after the Legislature passed Assembly Bill (AB) 980 in 1993.[130] AB 980 permitted school district governing boards to adopt reasonable policy regulations regarding the wearing of "gang-related apparel" by public school students, including school uniforms implementation.[131] Still fearing the litigation risks of Section 48950, some school districts seeking to implement a uniform dress code in 1994 sought a statement from the Legislature to clarify the relation of Section 48950 to AB 980.[132] As a result, the Legislature modified AB 980 in 1994 to provide that a schoolwide uniform policy did not violate the free speech restrictions in Section 48950.[133] This request points both to the ambiguously wide reach of Section 48950 and to the frustration of school administrators whose discretion is no longer clear in the wake of Section 48950.

### *E. Lessons from* Lovell: *Close the Section 48950 Pandora's Box*

Courts in California that have addressed Section 48950 claims have also had difficulty defining the purview of this statute.[134] The contradictions in

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129. In the Committee Hearings in the Assembly, many concerns about the statute's intent arose. For example, would the statute "supersede existing law which requires schools to adopt rules and regulations elaborating the guidelines for written publications by students?" Would this statute "nullify existing intent language that school boards not be prevented from adopting similar guidelines for oral expression by students," pursuant to Section 48907 of the Education Code? Would the statute "impede a school's ability to maintain order on campus?" "Should high schools be bound by the same free speech requirements as colleges?" ASSEMBLY COMMITTEE ON EDUCATION, REPORT FOR 1991 CALIFORNIA SENATE BILL NO. 1115, 1991-92 REG. SESSION (1992).

130. Assembly Bill 980 became CAL. EDUC. CODE § 35183 (1993). *See* California Statutes and Amendments to the Codes of 1993, Ch. 435 [AB 980, Allen] (1993).

131. *Id.* The bill permitted, but did not mandate, the adoption of schoolwide uniform policies. The bill's author, Assemblywoman Doris Allen, argued that this bill was necessary to counteract Section 48950, since it had been interpreted by some school officials as inhibiting the enforcement of anti-gang dress codes. The California School Board Association and other school and parent organizations supported the bill, while the American Civil Liberties Union opposed it. Eric Bailey, *Wilson Signs Orange County Legislator's Gang-Attire Bill*, LOS ANGELES TIMES, Sept. 25, 1993, at A1, *available in* LEXIS, News Library, LAT File.

132. SENATE COMMITTEE ON JUDICIARY, REPORT FOR 1993 CALIFORNIA SENATE BILL NO. 1269, 1993-94 REG. SESSION (1994).

133. *Id.*

134. For example, in Lopez v. Tulare Joint Union High Sch. Dist. Bd. of Trustees, 34 Cal. App. 4th. 1302, 1330, 40 Cal. Rptr. 2d 762, 779 (1995), a California Appellate Court had to decide on first impression whether Section 48950 trumped Education Code Section 48907, which provides for a system of prior restraint of school-sponsored materials that are obscene, libelous, or slanderous. CAL. EDUC. CODE § 48907. The court in Lopez held that Section 48950 did not govern this case, where an administrator had asked a high school student to edit a class videotape that contained lewd material. The Ninth Circuit later, in its first Lovell decision, Lovell By and Through Lovell v. Poway Unified Sch. Dist., 1996 WL 140805, at *4 (March 29, 1996) (withdrawn), noted that Section 48907 expanded the free speech rights of students who

the two Ninth Circuit *Lovell* rulings point to the Pandora's box which the California Legislature created by enacting this wide-reaching statute. As discussed in Part I above, the two Ninth Circuit *Lovell* decisions interpret Section 48950 very differently. In the withdrawn decision, the Ninth Circuit, applying Section 48950, reasoned:

> To be sure, the legislature seemed concerned primarily with expression of alternate, and often unpopular or minority viewpoints. Although the legislature focused on expression such as Tinker's armbands, it did not, however, exclude protection for statements like Lovell's. It quite clearly expressed the intent to expand students' rights to the boundaries of speech protected by the First Amendment. And outside of the school context the First Amendment protects speech that is merely rude and petulant from content-based regulations. *The California legislature quite likely did not consider conduct such as Lovell's when it enacted 48950. But the clear language of the statute invites challenges like this one—it invites students to make federal cases out of school disciplinary actions.*[135]

The Ninth Circuit reversed its own decision but avoided the statutory interpretation issue by deciding that Lovell's statement was a true threat after all, which would not be constitutionally protected by the federal or state standard.[136] However, the court's true motives emerged in the reversing opinion, when the court examined the high school environment more carefully and noted in the opinion repeatedly the increasing violence that exists in schools today.[137] This factual reconstruction may have solved the Section 48950 problem for the day, but it left the statute as an unchecked fetter on school administrators and teachers.

In sum, the California Legislature should reconsider Section 48950. A statute that was enacted to curtail speech codes on university campuses has also tied the hands of public high school administrators to maintain order in high schools. In addition, a statute that perhaps contemplated only political expression or viewpoint discrimination cases has offered the carrot of attorney's fees to high school student plaintiffs who have potentially threatened or willfully defied their teachers.[138] The California Legislature should close the Section 48950 Pandora's Box by removing high school students from its purview, or, at a minimum, by permitting educators to

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publish materials in school-sponsored newspapers, which also runs counter to the Supreme Court trend of limiting the free speech rights of students. (*See* discussion of Hazelwood in Part III *supra*.)

135. Lovell By and Through Lovell v. Poway Unified Sch. Dist., 1996 WL 14085, at *5 (9th Cir. March 29, 1996) (withdrawn) (emphasis added).

136. Lovell By and Through Lovell v. Poway Unified Sch. Dist., 90 F.3d 367, 372 (9th Cir. July 18, 1996).

137. *See* discussion of the repeated references to violence in the second Ninth Circuit opinion in Part I *supra*.

138. Plaintiffs like Lovell find access to the federal courts by invoking their First Amendment rights under the United States Constitution. Yet by bringing her claim in federal court, Lovell did not have to meet the state court requirement to exhaust her administrative remedies, including appealing the decision within the school district. *See supra* note 27.

forbid speech that is not appropriate to the decorum of the educational setting.[139]

## V. ARGUMENTS IN FAVOR OF SCHOOL ADMINISTRATOR DISCRETION

### *A. A Modern Argument: The Trend of Violence*

Along with applying *Bethel's* "interference with education" standard, the *Lovell* court should have given the local administrators more deference in determining what behavior interferes with education. School administrators are better equipped than judges to develop policies that best meet their local educational goals. Similarly, administrators can best determine the impact of defiant speech on the school environment, particularly in light of one compelling trend that teachers must face with increasing regularity: the sharp rise of violence in the schools. This Part will argue for granting such administrators substantial constitutional leeway in carrying out their ever-increasing task of maintaining order in the schools.

In its reversing *Lovell* decision, the Ninth Circuit repeatedly bemoaned the rise in violence that teachers must face in the public schools.[140] By noting this rise in violence, the court implicitly recognized that administrators are in a better position to determine whether a statement like Lovell's conveys a gravity of harm to its recipient.[141] The Supreme Court recently recognized that "this widespread violence in schools throughout the Nation significantly interferes with the quality of education in those schools."[142]

One of the most obvious consequences of school violence is the creation of fear in the students, which in turn hampers the learning process and the educational mission of the school.[143] But of equal concern is the effect of such violence on teachers and administrators who must work daily in increasingly volatile work environments. The National Center for Education reported the following statistics of teachers it surveyed in 1993: nineteen percent had been "verbally abused" by students in the last four weeks prior to the survey, eight percent had been "threatened with injury" in the last

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139. Whether or not the restrictions on college speech codes are still merited in California deserves consideration in a separate scholarly inquiry.

140. *See supra* note 50 for quotations from the Ninth Circuit opinion. As discussed there, the Ninth Circuit had not even mentioned this rise in violence in its earlier withdrawn opinion.

141. Lovell By and Through Lovell v. Poway Unified Sch. Dist., 90 F.3d 367, 373 (9th Cir. July 18, 1996).

142. United States v. Lopez, 115 S. Ct. 1624, 1659 (1995) (Breyer, J., dissenting) (citing sources to support the proposition that "the problem of guns in and around schools is widespread and extremely serious" and that "four percent of American high school students ... carry a gun to school at least occasionally") (quoted in *Lovell*, 90 F.3d at 372). Indeed, a variety of sources document the presence of violence in our public schools today. *See, e.g.*, Florence M. Stone & Kathleen B. Boundy, *School Violence: The Need for a Meaningful Response*, 28 CLEARINGHOUSE REV. 453 (1994); Smith & Elstein, *supra* note 16, at 22.

143. "Schools, once considered havens of stability and safety, have become settings where students are at risk of being exposed to violence." Stone & Boundy, *supra* note 142, at 453.

twelve months, and two percent had been "physically attacked" in the last twelve months.[144] Teachers and administrators on the frontline of public schools in 1997 must deal regularly with anything from pupils' willful defiance to kids with weapons. They are in the best position to evaluate the impact a student's defiant statement has on the learning environment.

Thus, violence in the schools provides an additional reason for why discretion should rest with teachers and administrators in handling student infractions. While administrators facing Lovell-type statements must remain within constitutional bounds in their disciplining, state statutes should not further limit educators' discretion.

### *B. A Traditional Argument for Local Control*

This rise in violence in the schools, which clearly was a factor in the Lovell reversal, is a uniquely modern fact.[145] It justifies giving school administrators maximum constitutional discretion in assessing the impact of a student's statement, not in restricting that discretion. An additional justification for discretion stems from the long tradition in the United States of leaving school board decisions in the hands of local administrators and the school board appeals process.[146]

As recently as 1995, the Supreme Court reaffirmed the role of local school boards in disciplining public school students. In *Vernonia School District 47J v. Acton,* the Supreme Court considered the constitutionality of a school district's drug policy for student athletes.[147] In *Vernonia,* Justice Scalia compares public school teachers' power over their students to that of private teachers: "When parents place minor children in private schools . . . the teachers and administrators of those schools stand *in loco parentis* over the children entrusted to them."[148] Justice Scalia then explains that

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144. EDUCATION WEEK, Apr. 7, 1993, at 7. *See also* PEPPERDINE UNIVERSITY, NATIONAL SCHOOL SAFETY CENTER, SCHOOL CRIME AND VIOLENCE STATISTICAL REVIEW 5-6 (Aug. 1993) (citing U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, NATIONAL CRIME SURVEY (1991) (reporting that 16 percent of teachers it surveyed had been attacked or threatened with attack in the six months prior to the survey) and ILLINOIS CRIMINAL JUSTICE INFORMATION AUTHORITY, TRENDS AND ISSUES 91 (1991) (reporting that one in eleven of the 1300 teachers in Illinois public high schools it surveyed had been threatened by a student during the prior month; that 52.9 percent had a student direct an obscenity at them; and that 32.4 percent had a student make an obscene gesture at them)).

145. *See supra* note 50.

146. *See* Wren, *supra* note 16, at 314.

147. 115 S. Ct. 2386 (1995) (holding that the school's athlete urine testing policy did not violate a student's federal or state constitutional right to be free from unreasonable searches).

148. *Id.* at 2391. Justice Scalia defines *in loco parentis* by quoting from 1 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 441 (1769), which finds the following:

> A parent may . . . delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed.

the Supreme Court has "rejected the notion that public schools, like private schools, exercise only parental power over their students." Such parental power, Justice Scalia points out, is "not subject to constitutional constraints."[149] Instead, the school's power is "custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults."[150] Still, Justice Scalia acknowledges that "for many purposes, school authorities act *in loco parentis*, with the power to inculcate habits and manners of civility."[151] Under this view, schools have a legal obligation to protect students while they attend public schools.[152] Coupled with this power and responsibility, Justice Scalia concludes that schools should be given substantial "constitutional leeway" in carrying out their "traditional mission of responding to particularized wrongdoing."[153] Thus, the traditional Supreme Court view of the power of local administrators enhances the argument in favor of local discretion.

### *C. Judicial Deference to School Administrators*

Although the courts have been reluctant to intervene in the schools, increasing litigation in the area of schoolchildren's free speech rights has forced the courts to re-assess their roles in such interventions.[154] In *Lovell*, the California statute so constrained the Ninth Circuit that it could find no way to defer appropriate discretionary authority to the school board other than by fudging its factual conclusion. Except for Judge Noonan's initial dissent, the Ninth Circuit in its first opinion failed to consider how much deference to afford the school in assessing the context and impact of the student's statement. Specifically, the court gave the school principal little deference in determining, contextually, whether Lovell's statement was threatening.[155] By contrast, in the reversing opinion, the court accepted the

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*Id.*

149. *Id.* By comparison, under the traditional doctrine of *parens patriae*, the state's interest in a child's education was so strong that it could outweigh substantial parental objections about the child's schooling. A number of cases have moved back toward *parens patriae* in recent years to avoid the notion that schools have to follow the parents' wishes. Wren, *supra* note 13, at 314.

150. *Vernonia*, 115 S. Ct. at 2391.

151. *Id.* (citing Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986)).

152. *See* Wren, *supra* note 16, at 314 (citing Donald L. Beci, *School Violence: Protecting Our Children and the Fourth Amendment*, 41 CATH. U. L. REV. 817, 823-24 (1992) ("asserting that the state's obligation to protect students from harm at school stems from state tort law and state and local regulatory law")). Moreover, Wren explains that school administrators even have an "affirmative duty" to enforce order and discipline in the schools. Wren, *supra* note 16, at 315 (citing Logar v. New York, 543 N.Y.S.2d 611, 663 (N.Y. App. Div. 1989)).

153. *Vernonia*, 115 S. Ct. at 2391.

154. *See* Julie Goyer, *Student First Amendment Rights in the Public School Setting: A Topic of Increased Litigation*, 6 AM. J. TRIAL ADVOC. 163, 166 (1982) (discussing the controversy surrounding the courts' increasing intervention in school matters).

155. Lovell By and Through Lovell v. Poway Unified Sch. Dist., 1996 WL 140805, at *4-5 (9th Cir. March 29, 1996) (withdrawn) (rejecting the school board's argument for deference).

principal's characterization of the facts.[156] Had the *Lovell* court determined that the statement was not a threat, and was therefore constitutionally protected, it would then have had to decide which substantive standard to apply to the statement.

If, for example, the court had decided to use the *Bethel* standard, much analysis remained in determining whether the student's outburst interfered with the school's educational mission. In such an analysis, deference to the school administrator's expertise is especially appropriate. Since the judge may not understand as well as the local administrator how much a distraction interferes with learning,[157] it makes sense for courts to defer to the judgments of school administrators, who are in a better position to assess the impact of a student's statement on the school environment.[158]

In *Tinker*, Justice Harlan in dissent, concluded that the "widest authority" must be given to the school board.[159] Justice Harlan even proposed a deferential minimum standard of review where the student had the "burden of showing that a particular school measure was motivated by other than legitimate school concerns."[160] On the other hand, those who oppose a minimum rationality standard argue that it places too great a burden on the student plaintiff to overcome a presumption of constitutionality.[161]

Nonetheless, the Supreme Court in *Bethel* concluded explicitly that the manner of speech appropriate in a school is a decision that local administrators are in a better position than judges to make.[162] Judge Noonan in the original *Lovell* dissent echoed such a reluctance for courts to intervene and implicitly embraced a deferential position:

> It is no doubt remarkable that such an error in administrative judgment may be redressed by the federal courts. But I cannot avoid the feeling that this federal act of vindication robs the school of its rightful responsibilities, trivializes the First Amendment, and contributes to the overload of the federal courts by rewarding attorneys such as Lovell's with a fee of over $11,000. . . . The First Amendment does not answer these questions. I'd say that the school is the right place to decide all the facts if the procedure the school offers is as fair as the one provided here; and

156. Lovell By and Through Lovell v. Poway Unified Sch. Dist, 90 F.3d 367, 373 (9th Cir. July 18, 1996).

157. Diamond, *supra* note 5, at 481-82.

158. *See* Dessem, *Board of Curators of the Univ. of Missouri v. Horowitz: Academic vs. Judicial Expertise,* 34 OHIO ST. L.J. 476 (1978) (cited in Diamond, *supra* note 5, at 498).

159. Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 526 (1969) (Harlan, J., dissenting).

160. *Id.*

161. *See, e.g.,* Rosemary C. Salomone, *Free Speech and School Governance in the Wake of Hazelwood,* 26 GA. L. REV. 253, 318 (1992) (arguing the danger of a standard where students are able to prevail only if the school clearly abuses its discretion).

162. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986).

> the school is to decide the penalty if it is as far from immoderate as the one imposed here. . . .[163]

A number of other courts have agreed with this deference to local discretion, including the Ninth Circuit *Chandler v. McMinnville School District* case discussed above in Part II.[164] A district court in Massachusetts recently recognized that substituting its own judgment for that of school officials "raises the nightmarish potential of this court mired in the role of Dress Code Board of Appeals."[165] The court in *Pyle v. South Hadley School Committee* reasoned: "Again, it is important to emphasize that the First Amendment does not require the court to substitute its own judgment on these issues for that of the defendants, but only to determine based on the record whether these concerns are reasonable."[166]

Just as the Ninth Circuit deferred to the school administrator in *Lovell* for its factual determination, a state court of appeals in Alabama in 1989 concluded that it should defer to school administrators on factual matters:

> We would further note that school disciplinary matters are best resolved by the local community school boards and officials and that *courts should supersede only when the school board's actions are clearly unconstitutional.* This court will not review or revise school board disciplinary actions *except in the rare cases where there is a shocking disparity between the offense and the penalty.* We will not question the wisdom of those entrusted with the duties of enforcement, as these matters are the prerogative of the school administrators rather than the courts.[167]

In addition to reversing clearly unconstitutional viewpoint-based school board actions, the court should make sure that the school did not violate the student's procedural due process rights when it determines the facts. For the most part, schools are employing better procedural safeguards to avoid abuses of discretion.[168] Still, such procedures must necessarily be flexible. The Supreme Court in *Goss v. Lopez* allowed school administrators to make

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163. Lovell By and Through Lovell v. Poway Unified Sch. Dist., 1996 WL 140805, at *11 (9th Cir. March 29, 1996) (withdrawn).

164. Despite the fact that suppression of speech has obvious First Amendment implications, courts are not necessarily in the best position to decide whether speech restrictions are appropriate. "The determination of what manner of speech in the classroom or in school assembly is inappropriate rests with the school board, and not with the federal courts." 978 F.2d 525, 527 (9th Cir. 1992) (quoting *Bethel,* 478 U.S. at 685).

165. Pyle v. South Hadley Sch. Comm., 824 F. Supp. 7, 10 at n.2 (D.C. Mass. 1993).

166. *Id.* at 10. *See also* Baker v. Downey City Bd. of Educ., 307 F. Supp. 517, 522 (C.D. Cal. 1969) (holding that students suspended for using profanity in an off-campus newspaper received procedural due process). ("It is not for the court to consider whether such rules are wise or expedient, but merely whether they are a reasonable exercise of the power and discretion of the school authorities." *Id.*)

167. Scoggins v. Henry County Bd. of Educ., 549 So. 2d 99, 101 (Ala. Civ. App. 1989) (holding that expulsion of student who had threatened teacher was proper) (citing Davis v. Ann Arbor Public Schs., 313 F. Supp. 1217 (E.D. Mich. 1970)) (emphasis added).

168. *See* Mawdsley, *supra* note 5, at 881.

disciplinary judgments involving short suspensions without conducting a full trial.[169] The *Goss* Court described the importance of flexible, informal disciplining procedures in the schools:

> Some modicum of discipline and order is essential if the educational function is to be performed. Events calling for discipline are frequent occurrences and sometimes require immediate, effective action. Suspension is considered not only to be a necessary tool to maintain order, but a valuable educational device.[170]

The principle behind due process requirements of fact finding is to afford local administrators the authority and flexibility to engage in limited fact finding and to make a decision based on all the evidence available to them.

### *D. Lessons Learned: Intervention in Limited Circumstances*

These decisions show that the courts are aware of their limited roles in adjudicating school board disciplinary decisions. Even where the student plaintiff has raised free speech violation issues, the primary factual determination should be made at the school level. The Ninth Circuit, in the end, properly deferred to educators to determine the facts when enforcing school rules. Students can appeal a principal's decision through the school board administrative appeals process,[171] but only in rare cases should the court revisit factual determinations properly arrived at in accordance with school disciplinary procedures.

If public school students judicially challenge the disciplinary discretion of school administrators, the role of the trial court should not be to substitute its own factual evaluation for that of the administrators[172]—administrators familiar with the context of modern schools and a violent environment quite unlike that experienced by judges years before. The trial court should ensure that administrators met the *Goss* due process requirements[173] and had

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169. 419 U.S. 565, 583 (1975) (finding that students with short suspensions do not have the right to secure counsel, call witnesses, cross-examine the school's witnesses, etc., since "further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroys its effectiveness as part of the teaching process").

170. *Id.* at 580. The Court did require that the student be given oral or written notice of the charges and, if he denies them, "an explanation of the evidence the authorities have and an opportunity to present his side of the story." *Id.* at 581. In response to Goss, California enacted Education Code Sections 48900 and 48911 to establish procedures for issuing a suspension. In the Lovell case, the trial court found that the administrator complied with these requirements when she met with the student and the counselor. Lovell By and Through Lovell v. Poway Unified Sch. Dist., 847 F. Supp. 780 (S.D. Cal. 1994).

171. *See supra* note 27 for an overview of the Poway Unified School District's appeals process.

172. Pyle v. South Hadley Sch. Comm., 824 F. Supp. 7, 10 (D.C. Mass. 1993).

173. *Goss*, 419 U.S. at 582-83.

reasonable evidentiary support for their decision.[174] Such a model affords "constitutional leeway"[175] to school administrators, but still protects students from school administrators who overstep their disciplinary discretion where there is no evidence of wrongdoing, or where the administrators are clearly, as in the case of *Tinker*, engaged in viewpoint-based discrimination. Administrators who face statements like "If you don't give me this schedule change, I'm going to shoot you" from students, should have the discretion to impose quick judgments without fearing that the courts will second-guess such decisions.

## CONCLUSION

In its second *Lovell* decision, the Ninth Circuit avoided the difficult task of assessing Lovell's constitutional rights in lieu of both Supreme Court policy and Section 48950 by finding that Lovell's statement was a true threat after all. Had the court found that the statement was not a true threat, it would have had to strike a delicate balance between an individual student's rights and the educational goals of the school. Unfortunately, that balance was upset by legislation that seems to ignore the special context of the high school setting, leaving courts and administrators with an "all or nothing" decision. This legislation should be clarified or repealed because schools are special settings that require particularized analysis of conflicting interests, including the interest of teaching and learning in a safe environment.

Since *Tinker*, many commentators have recognized the incongruency of free speech principles and the disciplinary function of public schools.[176] On the one hand, we want our children to learn to be autonomous decision makers who express their ideas freely—to explore the powerful tool of free speech as they move toward adulthood. On the other hand, we must protect the basic educational mission of the school, including providing an ordered environment where students and teachers feel safe. The Supreme Court, applying the Constitution, has struck a balance between student rights to freedom of viewpoint and administrator rights to discipline and order. Both public school students and teachers must face challenges in the 1990s that are very different from those faced by their counterparts in the 1960s. An administrator concerned about the disruption caused by the silent wearing of black armbands in 1969 might hardly have imagined the veiled intimidation which teachers in the 1990s would fear.[177]

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174. *Pyle*, 824 F. Supp. at 10.

175. Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2391 (1995).

176. *See, e.g.*, Lane, *supra* note 78, at 48, which discusses the role of value inculcation in the public school.

177. *See* Robert Berkley Harper, *School Searches–A Look Into the 21st Century*, 13 MISS. C. L. REV. 293 (1993). The author describes how dramatically the problems facing school teachers have changed since he taught in the public schools twenty years before. Then, teachers worried about enforcing the tardiness code or finding gum chewers. Now, teachers are more

Several lessons emerge from the *Lovell* conundrum. First, the California Legislature should amend Section 48950 either to remove high school students from the purview of the statute or to add limitations on student speech, as the Supreme Court did in *Bethel,* for valid educational purposes. In so doing, the California Legislature should recognize that children's free speech rights, while not absent, are derivative, and subject to limitation. Second, a sophisticated constitutional analysis of a Lovell-scenario cannot be undertaken without reference to the special mission of our schools. The Legislature's suggestion in Section 48950 that context is irrelevant to free speech. analysis lacks both analytic sophistication and practical realism. Finally, courts should be aware of their specific roles when they intervene in school administrator decisions.

As Judge Noonan noted, a federal judge is far removed in time and place from a disciplinary action that occurs in a school principal's office.[178] The *Lovell* decisions have illustrated that courts should afford local administrators as much discretion as possible and should intervene only when such discretion has been abused, either substantively or procedurally. When a federal magistrate usurps a school administrator's decision to issue a mere three-day suspension for a statement like Lovell's, the court has "raised the nightmarish potential" of a federal court being "mired in the role of Dress Code Board of Appeals"[179]—not to mention contravening the sage directive from our mothers never to talk back to our teachers.

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frequently faced with dangerous weapons and illegal drugs. *Id.*

178. Lovell By and Through Lovell v. Poway Unified Sch. Dist., 1996 WL 140805, at *10 (9th Cir. March 29, 1996) (withdrawn).

179. Pyle v. South Hadley Sch. Comm., 824 F. Supp. 7, 10 n.2 (D.C. Mass. 1993).

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