TOWARD AN IMPROVED TRUE THREAT DOCTRINE FOR STUDENT SPEAKERS

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In the wake of several high profile school shootings at the end of the 1990s, school administrators struggled with the question of how to predict and prevent future attacks. They were not alone. Case law reveals that judges, too, have been moved by these events, and they are trying to do their part to curb school violence, often by punishing threats of violence made by student speakers. The Supreme Court has held that "true threats" are not protected by the First Amendment based on three justifications: preventing fear, preventing the disruption that follows from that fear, and diminishing the likelihood that the threatened violence will occur. In this Note, the author challenges the application of the true threat doctrine to student threats on three grounds. First, the doctrine is excessively vague and does not provide judges with sufficient standards, which leads to disparate enforcement across cases. Second, recent evidence suggests that punishing threats as a proxy for punishing or preventing future violence—which is explicitly endorsed by the Court's true threat jurisprudence—is ineffective in the context of student speech. Third, the author identifies a serious policy concern implicated by any punitive response to student threats. To address these shortcomings, Stanner concludes with a series of recommendations for different courts that are designed to improve both the formulation and the implementation of the true threat doctrine.

INTRODUCTION

On March 15, 2001, the second-grade teacher at Augusta Street School in Irvington, New Jersey stepped out of her classroom for a moment.[1] While the teacher was away, eight-year-old Hamadi Alston stood up from his desk, raised a piece of paper that he had folded to look like a gun, and said, "I'm going to kill you all."[2] Hamadi later explained that he was just imitating what he had seen his friend, Jaquill Shelton, also eight, do earlier in the day. School officials notified police, who took the two boys to the station for five hours of questioning. Both eight-year-olds were charged with making "terror-

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1 Amy Westfeldt, *Judge Dismisses Charges Against Second-Graders with Paper Guns*, RECORD (Bergen County, N.J.), Apr. 4, 2001, at A4.

2 *Id.*

istic threats."[3] The local police chief justified the arrest, saying, "[i]t may appear to some as though we went a little overboard because it was a paper gun, but what would those same people say if this incident was ignored and in a day, week or month the same student came to school with a firearm?"[4]

In Texas, thirteen-year-old Christopher Beamon was asked to write a scary story for a Halloween assignment.[5] He turned in a first-person tale that included a passage in which he accidentally shoots his English teacher, Mrs. Henry.[6] When the school principal got word of the story, she notified the police and a juvenile court judge subsequently ordered the seventh-grader detained in a juvenile detention center for ten days.[7] Meanwhile, Mrs. Henry, the "victim" in Christopher's tale, had enjoyed the story so much that she gave him an "A."[8] In Louisiana, a middle school student spent over two weeks in a juvenile detention center for telling a classmate, "if you take all the potatoes, I'm gonna get you."[9]

How can stories like these be true? One reason is that they have not occurred in a vacuum. There are other narratives that can be told, tales that paint a very different picture of school violence, and make us much more wary of student threats. Among these is the story of Michael Carneal, a high school freshman from West Paducah, Kentucky, who opened fire in the crowded lobby of his school, killing three of his classmates and injuring several others.[10] Months later, in Jonesboro, Arkansas,[11] two middle school students killed four classmates and a teacher, and left ten others wounded.[12] In all, the 1997–1998 academic year yielded six school shootings.[13] The following year, Dylan Klebold and Eric Harris, two students at

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[3] A judge later dismissed the case. *Id.*

[4] *Grade 2 Boys Face Terrorist Charges: Police Alarmed over Folded Paper 'Gun,'* OTTAWA CITIZEN, Mar. 22, 2001, at A9.

[5] *Texas Boy Earns 'A,' Six Days in Jail for Halloween Tale*, ASSOCIATED PRESS, Nov. 3, 1999, *available at* http://www.freedomforum.org/templates/document.asp?documentID=10270.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] BOULDER COUNTY CHAPTER, ACLU OF COLO., SAFETY IN SCHOOLS: ARE WE ON THE RIGHT TRACK? IV (2001), http://www.aclu-co.org/news/letters/paper_boulderschools.htm.

[10] *See* Katherine S. Newman et al., Rampage: The Social Roots of School Shootings 3–5 (2004).

[11] *Id.* at 7.

[12] *Id.* at 12.

[13] *Id.* at 47.

Columbine High School, killed one teacher and twelve students and injured twenty-three others before taking their own lives.[14]

Schools have been deeply affected by these highly publicized school shootings, but they are not alone. Case law illustrates that the spate of shootings has heavily influenced courts as well.[15] Judges are understandably moved by these events, and many are trying to do their part to curb school violence.[16] One popular method for doing so is to punish students for making *threats* of violence against others.[17]

Speech is, of course, presumptively protected under the First Amendment of the Constitution, and for good reason. The Supreme Court has held that the freedom of speech is "not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole."[18] Particularly relevant to any discussion of student speech is the view that speech is a means of self-expression and self-definition,[19] and that it cultivates tolerance.[20] One scholar has even argued that "[t]he freedom of expression must be respected in the classroom if it is to be respected at all."[21]

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[14] DORIANE LAMBELET COLEMAN, FIXING COLUMBINE: THE CHALLENGE TO AMERICAN LIBERALISM 17 (2002). A month later, another shooting in Conyers, Georgia left six students injured. NEWMAN, *supra* note 10, at 47.

[15] *See infra* Part I.

[16] *See infra* Part I.B.

[17] It is important, at the outset, to clarify that "threatening speech" is not limited to verbal utterances. As the early examples illustrate, student speech does include spoken threats of physical harm to a teacher or fellow student, but it can also include "[b]omb threats, graphic violent drawings, online assaults, suicide poems, violent rap songs [written by the student]," or other communications that may signal a future assault. David L. Hudson, Jr., *Fear of Violence in Our Schools: Is "Undifferentiated Fear" in the Age of Columbine Leading to a Suppression of Student Speech?*, 42 WASHBURN L.J. 79, 80 (2002) (citations omitted). The FBI has written, "[a] threat is an expression of intent to do harm or act out violently against someone or something. A threat can be spoken, written, or symbolic—for example, motioning with one's hands as though shooting at another person." MARY ELLEN O'TOOLE, FBI, THE SCHOOL SHOOTER: A THREAT ASSESSMENT PERSPECTIVE 6 (2000), *available at* www.fbi.gov/publications/school/school2.pdf. Some questions have been raised as to whether or not a student's clothing can constitute "speech." *See* Robert D. Richards & Clay Calvert, *Columbine Fallout: The Long-Term Effects on Free Expression Take Hold in Public Schools*, 83 B.U. L. REV. 1089, 1121–24 (2003) (discussing school's attempt to prevent student from wearing inflammatory political t-shirt).

[18] *Bose Corp. v. Consumers Union*, 466 U.S. 485, 503–04 (1984).

[19] *See, e.g.*, C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 994 (1978) ("To engage voluntarily in a speech act is to engage in self-definition or expression.").

[20] *See, e.g.*, LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA 9–10 (1986).

[21] Andrew D.M. Miller, *Balancing School Authority and Student Expression*, 54 BAYLOR L. REV. 623, 625 (2002). "In the 'cradle of our democracy,' students learn the fundamentals of that democracy. If the freedom of expression is so fundamental, then

Nevertheless, the Supreme Court has held that "true threats" are not protected by the First Amendment and can be subject to criminal liability. The doctrine applies equally whether the threats are made inside or outside the classroom. The Court has offered three justifications for exempting true threats from First Amendment protection: preventing fear, preventing the disruption that follows from that fear, and diminishing the likelihood that the threatened violence will occur.[22]

This Note challenges the application of the true threat doctrine to student threats.[23] It argues that there are two doctrinal problems and one major policy problem with the true threat doctrine in the student context. First, this Note adds to the work of other scholars who have identified a vagueness problem with the true threat doctrine. The test of what constitutes a "true" threat is so vague that it provides judges with no meaningful standard to distinguish between criminal threats and constitutionally protected speech. As a result, the determination of a true threat turns largely on the whim of the judge deciding a given case.

Second, this Note is the first scholarly attempt to identify a proxy problem with the true threat doctrine. Under the Court's true threat jurisprudence, one explicit justification for excepting threats from First Amendment protection is to diminish the likelihood that the threatened violence will occur. Under this reasoning, threatening speech serves as a proxy for courts seeking to prevent future violence; they can punish the threat as a means of preventing the threatened act. However, new research on student threats indicates that the nexus between student threats and future school shootings is actually quite tenuous.[24] Focusing on threatening speech alone, without due regard to other factors, is likely to be ineffective in preventing future violence, and may even be counterproductive. This Note argues, therefore, that courts should not rely on the Supreme Court's "proxy" justification in punishing student threats. The Court has offered two other justifications—preventing both fear and the disruption that

concluding that our nation's schools should teach our students to respect that freedom is a simple matter of completing the syllogism." *Id.* (citation omitted).

[22] *See infra* notes 46–50 and accompanying text.

[23] This Note, like most other scholarship on student speech and the true threat doctrine, uses the term "student" to refer solely to primary and secondary school students. It does not consider post-secondary students. For a brief summary of reasons why this distinction is made within the literature, see, for example, Lisa M. Pisciotta, Comment, *Beyond Sticks & Stones: A First Amendment Framework for Educators Who Seek to Punish Student Threats*, 30 SETON HALL L. REV. 635, 641 (1999), listing significant legal and personal differences between the two aforementioned classes of students.

[24] *See infra* Part II.

results from that fear—that remain viable despite the new research, but requiring courts to rely on these two reasons alone could have significant consequences for student threat cases.

Finally, drawing largely on this new research, this Note argues that, apart from these two doctrinal problems, punishing student threats also raises a serious policy concern. A punitive response to threatening speech may have disturbing and perverse consequences for future school violence. In short, punishment may have the effect of making the actual violence *more* likely, or of silencing valuable warning signs of impending violence.[25]

These three contentions may have ramifications for the true threat doctrine generally, but this Note confines itself to the argument that, in light of recent research on the unique nature of student threats, the doctrine is *particularly* inappropriate when applied to student speech. This is especially problematic given that student threat cases have been entering the court system with much greater frequency over the last decade.[26]

This Note proceeds in three parts. Part I explores the Supreme Court's true threat doctrine, where the roots of the vagueness and proxy problems lie, and presents a collection of lower court cases that illustrate how these problems have plagued recent student threat cases. Part II draws heavily on recent research on school shootings and student threats in order to illustrate the inadequacy of the proxy justification, and the policy problems inherent in a punitive response to student threats. Part III urges the Supreme Court and the courts of appeals to refine the vague and unworkable true threat doctrine, at least as applied to student speech, and also suggests ways in which lower courts can mitigate the three problems identified in this Note within the bounds of existing law.

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[25] This Note does not take up the discussion of a school's right to suspend, expel, or otherwise sanction its students for threatening speech through traditional school-based remedies. Rather, it focuses on the question of when the *state*, through its criminal and juvenile justice system, can and should punish a student for his threatening speech. The justice system's power to punish student threats is decidedly more limited than that of a school. Schools are generally given wide latitude in punishing student speech that the school deems merely "inappropriate," even when such speech is clearly protected under the First Amendment. *See* Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of* Tinker?, 48 DRAKE L. REV. 527, 537–38 (2000) (discussing Court's deference to school officials in determining appropriate student behavior in cases since *Tinker v. Des Moines Ind. Comm. School Dist.*, 393 U.S. 503 (1969)). The justice system, however, can only constitutionally punish that speech which is not protected by the First Amendment. *See* Sarah E. Redfield, *Threats Made, Threats Posed: School and Judicial Analysis in Need of Redirection*, 2003 BYU EDUC. & L.J. 663, 693 (noting that speech not protected by First Amendment is "appropriately subject to state control via its criminal statutes").

[26] *See infra* note 153 and accompanying text.

I
IDENTIFYING "TRUE THREATS"

This Part explores the Court's true threat doctrine and how it has been developed and applied by the lower courts. Part I.A explains the vague guidelines provided by the Supreme Court and the federal courts of appeals. Part I.B presents four lower court opinions to show how this doctrine has been improperly applied in student threatening speech cases in the wake of recent school shootings.

A. The Letter of the Law: The Supreme Court on Threatening Speech

The Supreme Court has made clear that "true threats," like "fighting words"[27] and obscene speech,[28] do not enjoy constitutional protection.[29] But what is a "true threat?" The Supreme Court has provided no workable definition for the term.[30] The Supreme Court's first articulation of the true threat doctrine appeared in 1969 in *Watts v. United States*.[31] In *Watts*, the Court overturned an eighteen-year-old defendant's conviction on charges of threatening the life of the President.[32] During a conversation at a public rally, Watts stated, "[N]ow I have already received my draft classification as 1-A . . . . If they ever make me carry a rifle the first man I want to get in my sights is L.B.J."[33] In overturning the conviction the Court read the statute to require a "true 'threat,'" and characterized Watts's speech merely as "political hyperbole," albeit crude and offensive.[34]

For decades after *Watts*, the Supreme Court said almost nothing further to define its concept of a true threat. How do we distinguish between true threats and otherwise crude or frightening speech? The

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[27] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–73 (1942) (upholding constitutionality of statute that prohibited offensive speech intended to provoke addressee to fight).

[28] *See* Miller v. California, 413 U.S. 15, 23 (1973) ("[O]bscene material is unprotected by the First Amendment.").

[29] Watts v. United States, 394 U.S. 705, 707 (1969) ("What is a threat must be distinguished from what is constitutionally protected speech."). While these categories may at times overlap, courts have increasingly applied the "true threat" analysis rather than either the obscenity or fighting words analyses in adjudicating student threatening speech cases. *See* Redfield, *supra* note 25, at 680 & n.82.

[30] *See* Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL'Y 283, 288 (2001) ("Even though the Supreme Court has made clear that true threats are punishable, it has not clearly defined what speech constitutes a true threat.").

[31] 394 U.S. at 705.

[32] The statute in question prohibited any person from "'knowingly and willfully. . . [making] any threat to take the life of or to inflict bodily harm upon the President of the United States.'" *Id.* (quoting 18 U.S.C. § 871(a)).

[33] *Id.* at 706.

[34] *Id.* at 708.

difficulty is probably best illustrated by the incidents with which this Note began. How does one decide, for example, whether a student who points a paper gun at another and yells "I'm going to kill you all!" has made a true threat, or if, instead, he has just uttered foolish and offensive hyperbole?[35] What about a student who draws a picture of himself shooting his teacher,[36] or angrily destroying his school building?[37]

Far from resolving these questions, the Court has deliberately *avoided* placing limits on the scope of the true threat doctrine,[38] thereby leaving lower courts with little guidance to distinguish true threats from protected speech. The result is that assessing true threats is a "highly fact-specific determination."[39] This is largely because the true threat inquiry asks whether or not a reasonable recipient of the statement would believe it constituted a true threat.[40] However, as the above examples demonstrate, reasonable people can have widely disparate reactions to student threats, particularly in the wake of highly publicized incidents of school violence. Lower courts have tried to identify reliable factors to aid them in assessing reasonableness,[41] but it remains the case that "a true threat is in the eyes of the beholder, regardless of what criteria courts may claim to apply."[42]

This is the root of what I have termed the *vagueness problem* inherent in the Court's current doctrine. It has resulted in uneven application of the law from one case to another.[43] As Professor Jordan Strauss puts it, the true threat doctrine, in its current form, subjects citizens to "the same risks posed by vague and overbroad

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35 *See supra* notes 1–4 and accompanying text.

36 *See infra* notes 54–61 and accompanying text.

37 *See infra* notes 63–72 and accompanying text.

38 *See* Virginia v. Black, 538 U.S. 343, 359–60 (2003) (holding that true threats "encompass" statements where speaker means to communicate serious intent to commit act of unlawful violence, and that "[i]ntimidation" is only "a type" of true threat).

39 Richards & Calvert, *supra* note 17, at 1107.

40 *Id.* at 1109.

41 *See, e.g.*, Doe v. Pulaski County Special Sch. Dist., 306 F.3d 616 (8th Cir. 2002). The court identified five "non-exhaustive" factors relevant to how a "reasonable recipient would view the purported threat," including:

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

Id. at 623 (citations omitted).

42 Richards & Calvert, *supra* note 17, at 1109.

43 *Id.* at 1139–40 (noting that tests applied by courts are "too vague and speculative," provide judges with too much discretion, and lead to "unequal and disparate treatment").

laws that regulate First Amendment behavior,"[44] including contradictory outcomes and unfair penalties.[45] As the cases in Part I.B reveal, this vagueness problem persists, even more than thirty years after *Watts*.

While the Court has done little to define a true threat, however, it has made efforts to explain *why* such threats are punishable. In *R.A.V. v. City of St. Paul*,[46] Justice Scalia, writing for the Court, stated:

> [T]he Federal Government can criminalize only those threats of violence that are directed against the President—since the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the person of the President.[47]

These three justifications for the threat exception—preventing fear, preventing the disruption that fear entails, and protecting individuals from the possibility that the threatened violence will occur—appear only in a parenthetical aside, with no citation given to support the Court's reasoning.[48] In the 2003 case *Virginia v. Black*,[49] however, Justice O'Connor disposed of the parentheses and built on Justice Scalia's proffered reasons, holding:

> "True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit

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[44] Jordan Strauss, *Context is Everything: Towards a More Flexible Rule for Evaluating True Threats Under the First Amendment*, 32 Sw. U. L. Rev. 231, 232 (2003). Professor Strauss adds:

> The now-antiquated Supreme Court precedent dealing directly with threats has caused confusion in the circuits and has resulted in several different interpretations of this important concept. An unclear and disparate approach to threat speech risks contradictory outcomes and exposes citizens to potentially unfair penalties for a simple slip of the tongue.

Id. (citation omitted).

[45] *Id.*

[46] 505 U.S. 377 (1992).

[47] *Id.* at 388 (citations omitted).

[48] Moreover, *R.A.V.* was ultimately decided under the Court's "fighting words" jurisprudence, so the cursory mention of true threats is mere dicta. *Id.* at 381. Nevertheless, these reasons have been cited repeatedly by lower court opinions as the bases for criminalizing threatening speech. *See, e.g.*, Lovell v. Poway Unified Sch. Dist., 90 F.3d 367, 372 (9th Cir. 1996) (holding that threat is "true threat" unprotected by First Amendment if speaker could foresee that audience would interpret speech as serious expression of intent to harm); Porter v. Ascension Parish Sch. Bd., 301 F. Supp. 2d 576, 586–87 (M.D. La. 2004) (quoting directly from *R.A.V.*); State v. Kilburn, 84 P.3d 1215, 1219 (Wash. 2004) (same). For journal articles citing these justifications, see, for example, Hudson, *supra* note 17, at 79; Rothman, *supra* note 30, at 290–91; Fiona Ruthven, Note, *Is the True Threat the Student or the School Board? Punishing Threatening Student Expression*, 88 Iowa L. Rev. 931, 963 (2003).

[49] 538 U.S. 343 (2003).

> an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur.[50]

The three justifications for proscribing threats are drawn directly from *R.A.V.* without any further citation. The first two justifications—preventing fear and the disruption resulting from that fear—speak to the harm caused by the threat itself. The third of these justifications—preventing the possibility that the threatened violence will occur—does not speak to the harm caused by the threat itself, but rather to the future violence that is threatened. This rationale invites courts to punish threats as a proxy for future violence. Here lies the root of a second problem with the true threat doctrine, which I have called the *proxy problem*. Recent research, presented in Part II, reveals the major shortcomings of this proxy justification as applied to student threats.

The Supreme Court has not tried to remedy these two doctrinal problems, and recent, high-profile school shootings have only exacerbated them in the lower courts. Part I.B presents a collection of true threat cases that will illustrate the following: First, the effects of the vagueness problem, and second, the degree to which courts have relied on the proxy justification.

B. The Spirit of the Law: Punishing Student Threats as a Method for Preventing School Violence

The massacre in Littleton and others like it have clearly had a substantial impact on judges' evaluations of true threats.[51] One researcher has noted that court opinions in the years since the spate of shootings are "permeated" with a fear of another Columbine.[52] The true threat cases presented here illustrate two problematic trends. First, they present the vagueness problem in stark relief. What consti-

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[50] *Id.* at 359–60 (citations omitted). Notably, *Black*, like *R.A.V.*, was decided on grounds wholly unrelated to threatening speech, so the discussion of true threats is, again, dicta.

[51] Richards & Calvert, *supra* note 17, at 1094 ("Columbine is weighing heavily on the minds of judges when they consider whether student speech constitutes a threat of violence . . . ."). Professors Richards and Calvert analyzed the application of the true threat doctrine in five lower court opinions from 2002 to 2003.

[52] Hudson, *supra* note 17, at 103 ("All courts post-Columbine are conscious of the backdrop of school violence. Most specifically state such in their opinions. Most of these courts have factored this into their analysis.") (footnote omitted). Hudson adds that it has "become the norm" for courts to "analyze student speech against the 'backdrop of increasing violence.'" *Id.* at 86 (quoting *Lovell*, 90 F.3d at 372).

tutes a true threat appears to be in the eye of the beholder: Judges worried about the "specter of Columbine" are likely to view student threats as "true," while judges that do not invoke Columbine are not.[53] Second, these cases illustrate the courts' heavy reliance on the proxy justification, which is problematic in light of the research presented in Part II.

1. Commonwealth v. Milo M.[54]

While sitting in the hall outside his classroom due to a disciplinary matter, twelve-year-old Milo was drawing a picture of himself shooting his teacher, Mrs. F.[55] Another teacher confiscated the drawing and handed it to Mrs. F. Milo immediately proceeded to make another drawing very similar to the first one, then walked into the room, held it out to Mrs. F and said, in a "defiant" tone, "Do you want this one too?"[56] Milo was charged and adjudicated delinquent based on the second drawing. The Supreme Judicial Court of Massachusetts found that "*given recent, highly publicized incidents of school violence*," the drawing constituted a true threat.[57]

Milo M. clearly illustrates the vagueness problem of the true threat doctrine, and how that feature has become particularly evident in student speech cases after Columbine. The court consciously decided to place Milo's conduct against the backdrop of recent school shootings and explicitly altered the standard by which it was judging

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[53] This is an important distinction. David Hudson's analysis, in contrast, includes several cases that do *not* implicate the true threat doctrine. *See* Hudson, *supra* note 17 at 86–103. Most such cases are civil suits brought by students or parents to challenge a school's disciplinary measure as excessive. *See supra* note 25 (describing separate issue of school's "right" to discipline). Because schools are granted more latitude than courts in punishing speech, there is ordinarily no need for reviewing courts to undertake a true threat analysis in such cases. Nevertheless, it does occasionally happen. At least in some cases, this is because courts are unsure which doctrine to apply. *See, e.g.*, Demers v. Leominster Sch. Dep't, 263 F. Supp. 2d 195, 202 (D. Mass. 2003) ("Without deciding which standard is appropriate, I will analyze this matter under both doctrines.").

[54] 740 N.E.2d 967 (Mass. 2001).

[55] *Id.* at 969.

[56] *Id.*

[57] *Id.* at 969 (emphasis added). In assessing whether or not Mrs. F's fear was justified, the court stated, "given the recent highly publicized, school-related shootings by students, we take judicial notice of the actual and potential violence in public schools . . . . [S]uch violent episodes are matters of common knowledge, particularly within the teaching community, and thus, are 'indisputably true.'" *Id.* at 973 (citations omitted). The court supported its decision by citing to other state courts that took similar notice of recent school shootings. *Id.* In light of the "'climate of apprehension' concerning school violence," the court concluded, Mrs. F's fear that Milo could carry out his threat was "quite reasonable and justifiable." *Id.* at 974.

the criminality of his speech.[58] Not all courts choose to take notice of recent school shootings, or explicitly allow such events to factor into their decisions.[59] That choice is a subjective one, dependent on the judge hearing the case, as is the extent to which these outside events will color a given judge's view of the facts.

The *Milo M.* opinion also illustrates the court's reliance on the proxy justification offered by the Supreme Court in *R.A.V.* and *Black*.[60] In effect, the Massachusetts court tried to gauge whether Milo might *carry out* his threat "at a later time."[61] Concluding that he might, the court found his speech was a true threat and adjudicated Milo delinquent. Though it is impossible to quantify the weight that this court, or any other, places on the proxy justification alone, it is nonetheless relevant that such a concern animates the opinion. As with the vagueness problem, the proxy problem can appear with greater or lesser force in different cases, but its relevance in many true threat cases is unmistakable. Its import in the next case is particularly obvious.

2. Porter v. Ascension Parish School Board[62]

Andrew Porter, a middle school student, let a friend flip through his sketch pad on the bus home from school.[63] The friend discovered a drawing that Andrew's brother, Adam, had made two years earlier depicting the violent destruction of his school.[64] Andrew was suspended for possessing the drawing, while Adam, a high school student, was summoned to the middle school and readily admitted having drawn the picture. He was promptly expelled from his school, arrested and charged with both "terrorizing"[65] and illegal possession of a weapon (a razor blade, or "box cutter," found in his backpack).[66]

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58 For more on the court's subjective approach in *Milo M.*, see Redfield, *supra* note 25, at 688–89 n.125.

59 *See infra* Part I.B.3–4.

60 *See Milo M.*, 740 N.E.2d at 969 (noting that one element of crime of "threatening" is "an ability to [commit a crime] in circumstances that would justify apprehension on the part of the recipient of the threat") (citations omitted); *id.* at 972 (finding sufficient circumstantial evidence to demonstrate juvenile's ability "to carry out the threat").

61 *Id.* at 973. The court reviewed Milo's ability to carry out the threat and considered it significant that Milo was seen loitering near Mrs. F's car later that day. *Id.*

62 301 F. Supp. 2d 576 (M.D. La. 2004).

63 *Id.* at 580. Unlike most true threat cases, which are typically criminal in nature, this case is a civil suit filed by the students against the school district. *Id.* at 579. For purposes of this Note, however, it is sufficient that the court applies a complete true threat analysis. For more on the distinction between civil and criminal threat cases, see note 53, *supra*.

64 *Porter*, 301 F. Supp. 2d at 580.

65 *Id.*

66 *Id.* at 580–81.

As in *Milo M.*, the *Porter* court made explicit reference to Columbine and other shootings, and thus the court, in its discretion, chose to view the student's actions as analogous to such incidents,[67] virtually assuring an unfavorable verdict for the student. *Porter*, however, is most noteworthy because it is such a striking example of a court's reliance on the proxy justification. The court explicitly punished Adam's threats in an attempt to prevent the threatened violence, not simply the threat: "After Columbine, Thurston, Santee and other school shootings, questions have been asked about how many teachers or administrators could have missed telltale 'warning signs,' why something was not done earlier and what should be done to prevent such tragedies from happening again."[68] In considering the case "against this backdrop,"[69] the court found that it was "necessary and proper" to consider Adam's drawing a threat to the school's students, faculty, and facilities.[70] The court's conclusion thus flows directly from its belief that the picture was a warning sign of violence to come,[71] and that "both students were capable of carrying out the threats depicted on the drawing."[72]

3. In re Douglas D.[73]

Douglas was assigned a creative writing exercise by his eighth grade teacher, Mrs. C, but promptly began acting up in class and was sent outside the room to complete his assignment. Free to choose his own topic, Douglas wrote a story about "an ugly old woman" named Mrs. C, who became a teacher because she "would beat children sencless [sic]."[74] He continued:

> Well one day she kick a student out of her class & he din't like it [sic]. That student was named Dick. The next morning Dick came to class & in his coat he conseled a machedy [sic]. When the teacher told him to shut up he whiped it out & cut her head off [sic].[75]

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[67] *Id.* at 583 ("[S]chool officials cannot operate in a vacuum or in a fantasy world and must be aware of the events occurring at other schools to properly protect their students and faculty.").

[68] *Id.* (quoting LaVine v. Blaine Sch. Dist., 257 F.3d 981, 987 (9th Cir. 2001) (alteration in original)). The court also stresses that one "key" to avoiding violence at schools is "to be aware of acts which could cause such." *Id.*

[69] *Id.*

[70] *Id.* at 587.

[71] "For school officials to ignore the potential or actual danger exhibited by the facts surrounding Adam's drawing and subsequent search would have been a gross violation of a duty school administrators have to protect their students and facilities." *Id.* at 589.

[72] *Id.* at 588.

[73] 626 N.W.2d 725 (Wis. 2001).

[74] *Id.* at 730–31.

[75] *Id* at 731.

The teacher took the story to be a threat and she notified the principal. Douglas promptly apologized, said that he did not intend the story as a threat, and received an in-school suspension.[76] Over a month later, local police filed a delinquency action against Douglas for his "death threat."[77] The lower courts ruled against Douglas, but the state supreme court held that the story did *not* constitute a true threat.[78] Making much of the fact that the story was done as a creative writing assignment, the court stated that "a thirteen-year-old boy's impetuous writings do not necessarily fall from First Amendment protection due to their offensive nature."[79] The court found his story "unquestionably" protected, however distasteful.[80]

In responding to a dissenting opinion by Judge Prosser, the majority opinion openly criticized the approach taken by courts in *Milo M.* and *Porter*. The *Douglas D.* majority chose *not* to draw comparisons to Columbine and other school shootings,[81] and in fact harshly criticized courts that would do so.[82] The majority viewed such references to school violence as a problem of indiscretion on the part of judges who were trying to appease public opinion. However, given

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[76] *Id.*

[77] *Id.* at 731.

[78] *Id.* at 730, 741.

[79] *Id.* at 741.

[80] *Id.* at 742.

[81] Interestingly, Judge Prosser, writing in dissent, made the opposite choice. Whereas the majority found that the writings were merely "impetuous" and "distasteful," the lengthy dissent challenged the majority's account of the facts and, citing recent instances of school violence, *id.* at 749–50, urged deference to the lower court's finding of a true threat. *Id.* at 753–54 (Prosser, J., dissenting). The majority, in turn, attacked Judge Prosser's view of the facts as "judicial speculation" that "clearly exceed[ed] the proper scope" of the court's inquiry. *Id.* at 741 n.15.

[82] In criticizing the dissenting opinion, the majority was troubled by what it saw as a problem of courts bowing to pubic opinion, presumably in the wake of recent events:

> [P]ublic opinion regarding protected freedoms may wax and wane over time. However, courts should not easily be swayed by public opinion, particularly in matters of constitutional rights. . . .
>
> . . . .
>
> Unfortunately, the dissent seems willing to sidestep these legal principles. In its seeming urgency to satisfy public opinion and convince the majority of this court and this state that Douglas's conduct must be removed from First Amendment protection, the dissent cites as support everything from FBI symposium publications to magazine articles to myriad newspaper headlines. However, . . . the dissent scarcely cites the stuff of judicial import—the Constitution and those cases and statutes that interpret it. Ever conscious of the principles undergirding the Constitution, this court must not succumb to public pressure when deciding the law. Headlines may be appropriate support for policy arguments on the floor of the legislature, but they cannot support an abandonment in our courthouses of the constitutional principles that the judiciary is charged to uphold.

Id. at 742 n.16.

the number of judicial opinions that unapologetically engage in precisely the type of inquiry that the *Douglas D.* court criticizes, the problem may not rest with the individual judges, but with the vague, open-ended doctrine that invites widely disparate approaches to similarly situated defendants. Understood in this light, the *Douglas D.* opinion is a testament to the vagueness problem that has plagued student threat cases in the years since Columbine.

In addition, *Douglas D.* illustrates the significance of the proxy justification in assessing the criminality of a threat. The majority opinion found no evidence that Douglas was likely to engage in future violence, or that Mrs. C could reasonably have believed he would,[83] and thus found the speech to be protected. The dissent, meanwhile, *did* find reason to believe that the threatened act would occur, and held that punishment of the threat was therefore justified.[84] The majority, in turn, characterized the dissent's assessment as nothing more than "judicial speculation."[85] The contrast reveals the central importance of the proxy justification in student threat cases. Quite apart from the fear and disruption that threats themselves may cause, courts seem much more willing to punish threats of violence when it seems that such punishment might prevent *actual* violence.

4. State v. Kilburn[86]

During the last class of the day on March 21, 2001, Martin Kilborn, an eighth grader, turned to the girl sitting next to him, K.J., and told her, "I'm going to bring a gun to school tomorrow and shoot everyone and start with you."[87] Then he paused and said, "maybe not you first."[88] That night, K.J. told her parents about the incident, and her mother called 911.[89] Kilborn was arrested, charged with felony harassment involving a threat to kill, and adjudicated guilty.[90]

As in the previous cases, *Kilburn* illustrates the vagueness problem inherent in the true threat inquiry. The state supreme court read the same facts as the lower court but reached the opposite con-

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[83] *Id.* at 741 ("[T]here is no evidence that Douglas had threatened Mrs. C in the past or that Mrs. C believed Douglas had a propensity to engage in violence.").

[84] *Id.* at 762.

[85] *Id.* at 741 n.15.

[86] 84 P.3d 1215 (Wash. 2004). Though the case name is reported as *State v. Kilburn*, the petitioner's name is spelled "Kilborn" throughout. I will maintain this distinction, writing "Kilburn" when referring to the case by its reported name and "Kilborn" when referring to the petitioner.

[87] *Id.* at 1217.

[88] *Id.*

[89] *Id.*

[90] *Id.* at 1217–18.

clusion,[91] finding that the speech did not amount to a true threat. Moreover, as in *Douglas D.*, the *Kilburn* majority did not take notice of recent shootings, while a dissenting judge *did* take such notice and concluded that the threat was true.[92]

The *Kilburn* opinion also illustrates the central importance of the proxy justification. Though the *Kilburn* court explicitly claimed not to be concerned with whether Kilborn "might have been serious or not,"[93] the opinion suggests otherwise. The clear theme running throughout the court's account of the facts was that Kilborn may well have been joking, that he would have expected K.J. to interpret his comments as a joke,[94] and that it would therefore be unreasonable to expect him to follow through on his threat. Once the court found (or, more accurately, predicted) that Kilborn's speech was not a harbinger of future violence, it readily concluded that his speech was not criminal, but was instead constitutionally protected. Once again, though the court explicitly considered the fear that K.J. may have felt and the disruption that fear caused, the opinion was most animated by a concern with preventing future violence—that is, with the proxy justification.

These four cases are representative of the way in which courts have handled student threats in the years since Columbine. There are many others, most of which are replete with allusions to highly publicized incidents of school violence.[95] They expose the vagueness

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[91] While the trial court ruled against Kilborn, the state supreme court concluded that "a reasonable person in Kilborn's position would foresee that his comments would *not* be interpreted seriously." *Id.* at 1224 (emphasis added).

[92] Judge Owens dissented in *Kilburn* and did not take issue with the law the majority applied, only the result it reaches in doing so. *Id.* at 1226 (Owens, J., dissenting). "The majority reviewed these same facts and concluded that a reasonable person in Kilborn's position would not foresee that his statement to shoot K.J., and other middle school students, could be interpreted as a serious threat. I disagree." *Id.* (citation omitted). Owens argues that "in light of the current atmosphere engendering fear around school shootings, a reasonable person in Kilborn's position would foresee that the communication would be interpreted . . . as a serious threat." *Id.*

[93] *Id.* at 1224.

[94] *See id.*

[95] *See, e.g.*, *In re* McCoy, 742 N.E.2d 247, 248, 250 (Ohio Ct. App. 2000) (affirming delinquency adjudication of student who said "she wanted to wear a trench coat that had bombs in it . . . and kill the faculty," and noting that student's speech was "a significant contributing factor" to "air of panic" at school "following a highly reported tragedy like that at Columbine"); State v. E.J.Y., 55 P.3d 673, 680 (Wash. Ct. App. 2002) (affirming delinquency adjudication in case where student told teacher, among other things, "[y]ou're going to have another Columbine around here, you guys better watch out. It's not just the white boys that go off, I might do it, too," and noting with approval lower court's reliance, in part, on "the victims' awareness of other incidents of school violence"); *In re* A.S., 626 N.W.2d 712, 722, 724 (Wis. 2001) (affirming juvenile's conviction for disorderly conduct based on threatening statements and noting that A.S.'s statements were made "during a

problem that inheres in the Supreme Court's true threat doctrine, and they reveal that this defect has been *particularly* problematic in the context of student threats over the last several years.

In addition, these cases reveal the central role of the proxy justification in the true threat inquiry among the lower courts. Courts rely heavily on this rationale, which makes them more likely to punish those threats that raise the "specter of Columbine"[96] and suggest to the court that an actual attack may be forthcoming. In short, judges are attempting to use threatening speech as a proxy for, or warning sign of, future school violence, and to punish it largely to prevent that violence.

While past scholarship has illustrated the dangers of the vagueness problem, this Note is the first to focus so closely on the proxy justification, and to suggest that it, too, is a serious problem with the true threat doctrine. On that score, Part I has endeavored only to show that the proxy justification is extremely important in student threat cases. It remains to be shown, however, why judicial reliance on this rationale is, in fact, a problem. Part II.A now takes up that question in earnest, leaving aside any further discussion of the vagueness problem until Part III. Part II.A presents recent research on student threats that reveals that courts are presently ill-equipped to engage in productive and effective threat assessment.

In addition, this Note urges that, whatever the failings of the true threat doctrine, this recent research also provides strong evidence that a serious policy problem inheres in punitive responses to student threats. Part II.B presents this research, and suggests that, quite apart from deep-seated doctrinal problems, juvenile and criminal courts may be even more fundamentally incapable of responding to student threats.

II
UNDERSTANDING THREATENING SPEECH: RECENT RESEARCH ON THREAT ASSESSMENT

In 2000, the FBI's National Center for the Analysis of Violent Crime released its report, *The School Shooter: A Threat Assessment*

discussion of recent school shootings in Colorado," which "could provide charged circumstances"); *see also* Richards & Calvert, *supra* note 17 (analyzing seven threatening speech cases from 2003 to 2004 and identifying strong influence of Columbine on judges, and highly subjective application of true threat doctrine that depends more on predilection of judge than facts of case).

96 Arthur McCune, *Teen's Violent Letter Not Free Speech*, NAT'L L.J., Oct. 7, 2002, at B1.

Perspective,[97] which offers a model of assessing student threats based on an "in-depth review of eighteen school shooting cases."[98] Meanwhile, beginning in 1999, the Department of Education and the U.S. Secret Service jointly launched the Safe School Initiative (SSI).[99] That study examined thirty-seven incidents of "targeted violence"[100] that occurred in schools in the United States from December 1974 through May 2000.[101] Additionally, in her 2004 book, *Rampage*,[102] Katherine Newman conducted an analysis of media accounts and case studies and offered a theory of the factors that contribute to school shootings.[103] This Part presents the results of these recent studies in order to illustrate why the Court's proxy justification is problematic in the context of student threats.

A. Threat Assessment: Distinguishing Between Threats Made and Threats Posed

Despite public perception in the wake of highly publicized attacks, incidents of targeted violence in America's schools remain extremely rare.[104] The odds that a child would die in school by homicide are no greater than one in a million.[105] More to the point, this

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97 O'TOOLE, *supra* note 17.

98 *Id.* at 1.

99 BRYAN VOSSEKUIL ET AL., U.S. SECRET SERV. & U.S. DEP'T OF EDUC., THE FINAL REPORT AND FINDINGS OF THE SAFE SCHOOL INITIATIVE: IMPLICATIONS FOR THE PREVENTION OF SCHOOL ATTACKS IN THE UNITED STATES 3 (2002).

100 Targeted violence was defined "as any incident of violence where a known or knowable attacker selects a particular target prior to their violent attack." *Id.* at 4. Importantly, the thirty-seven attacks analyzed by the SSI include every incident cited by the Pennsylvania court in *In re B.R.*, and all but one of the ten incidents the court took notice of in *Commonwealth v. Milo M.* The SSI's use of the term "targeted violence" thus refers to the same kind of violent attacks that gave rise to the cases discussed in Part I, *supra*. That there are more incidents included in the study only reflects the fact that the study includes incidents from as long ago as 1974, and that it includes similar attacks that were not as highly publicized as those noticed by the courts.

101 VOSSEKUIL ET AL., *supra* note 99, at 4.

102 NEWMAN ET AL., *supra* note 10.

103 Newman's findings support the work of the FBI and the Secret Service and Department of Education. She considered these findings in her work, as well as the database of school-associated violent deaths maintained by the Centers for Disease Control and Prevention. *See generally* NEWMAN ET AL., *supra* note 10, at 231–70, 292 (repeatedly drawing from and referring to government reports with approval). In order to avoid duplicative reporting, this Part focuses largely on the findings of the government agencies themselves and only cites to Newman's work for additional support where it is most useful.

104 ROBERT A. FEIN ET AL., U.S. SECRET SERV. & U.S. DEP'T OF EDUC., THREAT ASSESSMENT IN SCHOOLS: A GUIDE TO MANAGING THREATENING SITUATIONS AND TO CREATING SAFE SCHOOL CLIMATES 3, 11 (2002) (noting that school shootings are "extreme and, thankfully, rare events").

105 VOSSEKUIL ET AL., *supra* note 99, at 6.

research indicates that most attackers "did not threaten their target(s) directly . . . whether in direct, indirect or conditional language prior to the attack,"[106] and "some made no threat at all."[107] Instead, "other behaviors and communications that may prompt concern, such as hearing that a young person is talking about bringing a gun to school, are indicators of a possible threat."[108]

Findings like these prompted the SSI to draw a crucially important distinction between students who *make* threats (i.e., tell people they intend to harm someone), and students who *pose* threats (i.e., "engage[ ] in behaviors that indicate an intent, planning, or preparation for an attack").[109] Making this distinction, however, is an extremely complex and nuanced endeavor that considers all aspects of the student's life in great detail.[110] The process "relies primarily on an appraisal of *behaviors*, rather than on *stated threats* or *traits*, as the basis for determining whether there is cause for concern."[111]

None of this is to say that threats made should not be taken seriously, but rather that "all threats are not created equal."[112] Even though most threateners are not likely to carry out their threats,[113] a student who makes a threat should never be ignored.[114] All threats *must* be taken seriously by school officials, but not every threat should be taken literally.[115] Not every threat represents the same danger, nor

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106 *Id.* at 25.

107 FEIN ET AL., *supra* note 104, at 20.

108 *Id.* Newman's media analysis and constellation theory also confirm this finding. *See* NEWMAN ET AL., *supra* note 10 at 229–70 (listing five factors contributing to school shootings, and listing threats as sub-factor of two such factors).

109 FEIN ET AL., *supra* note 104, at 20. "[I]t is important to distinguish between someone who *makes* a threat—tells people they intend to harm someone—and someone who *poses* a threat—engages in behaviors that indicate an intent, planning, or preparation for an attack." *Id.*; *see also id.* at 33 (defining "*posing* a threat" as "engaging in behavior that indicates furthering a plan or building capacity for a violent act").

110 O'TOOLE, *supra* note 17, at 10 ("All aspects of a threatener's life must be considered when evaluating whether a threat is likely to be carried out. This model provides a framework for evaluating a student in order to determine if he or she has the motivation, means, and intent to carry out a proclaimed threat.").

111 FEIN ET AL., *supra* note 104, at 5 (emphasis added); *see also id.* at 20 ("Those conducting threat assessment inquiries should focus particular attention on any information that indicates that a student poses a threat, regardless of whether the student has told a potential target he or she intends to do them harm.").

112 O'TOOLE, *supra* note 17, at 5.

113 *Id.* at 6.

114 In fact, the SSI notes that "[t]he lack of response could be taken by the threatener as permission to proceed with carrying out the threat." VOSSEKUIL ET AL., *supra* note 99, at 33.

115 FEIN ET AL., *supra* note 104, at 33 (noting that "[a]lthough voicing a threat should not be used as the principle [sic] determinant in making judgments about the likelihood of a school attack, it likewise would be a mistake to assume that [all] individuals who make threats . . . are unlikely to follow through [on them]").

requires the same response.[116] One major reason for this is that juveniles, much more than adults, can have any number of motivations for making threatening comments, many of which are entirely unrelated to the actual threatened act.[117]

Effective threat assessment is therefore a vitally important and a highly sophisticated enterprise. The FBI has stated that merely identifying whether a student has made a threat is too simplistic.[118] Proper threat assessment requires training.[119] The suggested "Four-Pronged Assessment Model"[120] considers the following dimensions: (1) personality of the student, (2) family dynamics, (3) school dynamics and the student's role in those dynamics, and (4) social dynamics.[121] Each of these dimensions, in turn, requires an in-depth analysis focusing on a host of variables.[122]

Two factors combine to make threat assessment particularly difficult in the case of student speech. The first complication is the age of the speaker. An adolescent's personality is markedly different than that of an adult, and often adolescents will engage in behavior that seems quite strange to others.[123] Adolescents "experience emotions more intensely than adults, process information differently, and as a

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116 *See* O'Toole, *supra* note 17, at 5.

117 "Students may make threats with a variety of intents and for a wide range of reasons, e.g., to get attention; to express anger or frustration; to frighten or coerce their peers; as a part of joking or 'playing around;' or, in some cases, to communicate intent to attack." FEIN ET AL., *supra* note 104, at 33; *see also* O'TOOLE, *supra* note 17, at 6 (noting that threat may be made for host of reasons, and may express love, hate, fear, rage, desire for attention, revenge, excitement, or recognition).

118 O'TOOLE, *supra* note 17, at 10. The report states:

> Anyone can deliver a spoken or written message that sounds foreboding or sinister, but evaluating the threat alone will not establish if the person making it has the intention, the ability, or the means to act on the threat. . . .
>
> Educators, law enforcement, mental health professionals and others must realize they cannot handle threats in the same "old" way.

Id.

119 *Id.* at 5–6 ("To use the model effectively, those making the assessments should have appropriate training."); *see also id.* at 10 ("Those tasked with assessing threats must be trained in the basic concepts of threat assessment, personality assessment and risk assessment as presented in this monograph, and realize the importance of assessing all threats in a timely manner.").

120 *Id.* at 10.

121 *Id.*

122 *Id.* at 11–24 (listing twenty-eight "behaviors and traits" to be considered under first prong, six under second prong, seven under third prong, and five under fourth prong).

123 *Id.* at 11 (noting importance of understanding adolescent personality development because "[a]n adolescent's personality is not yet crystallized," so "young people are likely to explore or engage in what others perceive as strange behavior"). *See generally* Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, 15 CRIM. JUST. 26 (2000) (using case studies to argue for developmental perspective in analyzing adolescent criminal intent); Marty Beyer, *Recognizing the Child in the Delinquent*, 7 KY. CHILD. RTS. J. 16 (1999) (noting serious differences in adolescent and adult psychology,

result make decisions differently."[124] The second complication in student threat assessment is that the assessor must have a heightened understanding of that particular school's environment.[125] The goal is not simply to appreciate the dynamics of the school setting as a reasonable outsider, but to do so "*from the student's perspective*," which requires a much deeper level of understanding.[126]

In sum, these findings reveal that threatening speech has extremely limited predictive value, that proper threat assessment requires detailed inquiry into every aspect of the student's personality and environment, and that some specialized knowledge may well be required in the case of student threats. Drawing largely from these findings, Professor Sarah Redfield recently analyzed a variety of judicial opinions and concluded that their approach to threat assessment was "disturbingly incomplete."[127] Courts consistently focus on the content of student speech, rather than the circumstances of the speaker's life and environment.[128] In short, courts are consistently concerned with whether a threat was *made*, rather than whether a threat was *posed*.[129] In fact, in the cases she examined,[130] the factors identified by the FBI "were generally ignored" by courts.[131] Redfield

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including adolescents' difficulty in anticipating consequences of their actions, anticipating harmful outcomes, and empathizing with others).

124 O'TOOLE, *supra* note 17, at 12 n.2 (citation omitted).

125 *Id.* at 22.

> I]t is necessary to understand what it is about the school which might have influenced the student's decision to offend there rather than someplace else. . . . [O]ne must have some degree of awareness of these unique dynamics—prior to a threat—in order to assess a student's role in the school culture and to develop a better understanding—from the student's perspective—of why he would target his own school.

Id.; *see also* NEWMAN ET AL., *supra* note 10, at 231 (noting that school attacks are unique because they are assaults on *institution*, and that "it is the organization, not the individuals, who are important").

126 O'TOOLE, *supra* note 17, at 22 (emphasis added).

127 Redfield, *supra* note 25, at 715.

128 *Id.* at 717.

129 *Id.*

130 Two of Redfield's cases, *Milo M.* and *Douglas D.*, are also featured in Part I.B, *supra*. The other two cases from Part I.B, *Kilburn* and *Porter*, are too recent to have appeared in her study, but they are nonetheless consistent with her findings. *See supra* notes 62–72, 86–94 and accompanying text (discussing *Porter* and *Kilburn*). Among the cases from Part I.B, however, Judge Prosser's dissent in *Douglas D.* merits further discussion. Judge Prosser actually cited directly to the FBI report and attempted to apply the four prongs of the assessment model to Douglas's case. *See* State v. Douglas D., 626 N.W.2d 725, 750–53 (Wis. 2001) (Prosser, J., dissenting) (listing all four prongs, but actually considering only prongs one and two). While this appeal to existing research is commendable, Judge Prosser ultimately produces a substantially incomplete assessment.

131 Redfield, *supra* note 25, at 717, 719 (noting that judicial consideration of factors involved in formal threat assessment "is neither universal nor mandated in current jurisprudence"). Redfield found only *one* case among those she studied in which the court

further concluded that had the courts engaged in proper threat assessment, the substance of every opinion would have been quite different, and at least one case would have come out differently.[132]

The foregoing data suggests that judicial efforts to punish threatening speech as a proxy for future school violence is extremely ineffective. Existing research indicates that the link between student threats and school shootings is a tenuous one, and Professor Redfield's analysis suggests that courts are utterly failing to bridge this gap by way of proper threat assessment.[133] However, judicial treatment of student threats is not merely ineffective at stopping school shootings. As Part II.B suggests, in addition to the vagueness and proxy problems that plague the true threat doctrine, criminal punishment of students who make or pose threats, even under an improved doctrine, may actually make a dangerous situation worse.

B. *The Inappropriateness of Punitive Responses to Student Threats*

Fearful that school administrators would respond to Columbine and similar events by punishing student threats more severely, the FBI cautioned school administrators against resorting to punitive disciplinary measures.[134] Such a reaction, however understandable, would be "exaggerated—and perhaps dangerous, leading to potential underestimation of serious threats, overreaction to less serious ones, and unfairly punishing or stigmatizing students who are in fact not dangerous."[135] This Section argues that the same dangers inhere in any judicial response centered around punishment of student threats.

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looked at other factors beyond the content of the student's speech (to say nothing of engaging in a thorough threat assessment). *Id.* at 715 (discussing court's analysis in *LaVine*). Even in that case, however, Redfield notes that the court's ultimate decision is inconsistent with both the threat assessment model and the court's own analysis. *Id.* at 716 (noting that it is "less clear" that threat assessment would have led to same verdict in *LaVine*); *see also* LaVine *ex rel.* LaVine v. Blaine Sch. Dist., 279 F.3d 719, 723 (9th Cir. 2002) (Kleinfeld, J., dissenting from denial of rehearing en banc) (noting holes in majority's analysis and inconsistency of its ultimate ruling).

132 *See* Redfield, *supra* note 25, at 717 (noting that *In re Douglas D.* would "arguably" have been decided differently); *id.* at 716 (positing that *LaVine* court's evaluation of school's response—that is, punishment rather than psychiatric evaluation—might have been different under threat assessment analysis).

133 Redfield ultimately argues that schools must move toward threat assessment, and that courts should change their methodology for identifying "true" threats in order to align it with the FBI's threat assessment model. *See infra* notes 183–86 and accompanying text (discussing Redfield's proposed solution).

134 O'TOOLE, *supra* note 17, at 5.

135 *Id.*

Students who carry out school shootings typically do *not* have a history of discipline problems[136] or criminal behavior.[137] Instead, they tend to suffer from "pain, loneliness, desperation and despair."[138] Accordingly, the SSI discourages disciplinary responses and stresses instead that schools must focus their energies on creating climates of "safety, respect, and emotional support."[139]

The SSI is written for educators and parents; it is not directed at courts.[140] Nevertheless, if one reads the report with courts in mind, a strong case can be made that the criminal justice system likewise offers wholly inappropriate responses to student threats. The report cautions that "[t]he most familiar response may or may not be the best response, the best course of action for the longer term."[141] While school administrators may see fit to "get tough" or "set an example" by imposing a severe punishment on a student who makes threats,[142] such punitive responses can be dangerous: "[S]uspension or expulsion of a student can create the risk of triggering either an immediate or a delayed violent response unless such actions are coupled with containment and support."[143]

In short, punishing the speaker is not an effective solution to the problem. Not only is it unlikely to prevent violence even in that particular case, but it may actually exacerbate the danger by adding to a student's underlying sense of anger or despair.[144] This prospect is

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136 VOSSEKUIL ET AL., *supra* note 99, at 20 ("Attackers' histories of disciplinary problems at school also varied. Some attackers had no observed behavioral problems, while others had multiple behaviors warranting reprimand and/or discipline.").

137 *Id.* at 22 ("Most attackers had no history of prior violent or criminal behavior.").

138 FEIN ET AL., *supra* note 104, at 11.

139 *Id.* at 5–6.

140 *See infra* notes 183–186 and accompanying text.

141 FEIN ET AL., *supra* note 104, at 64.

142 *Id.*

143 *Id.* at 64–65. The report continues:

> A student who is expelled may conclude: "I have lost everything. I have only a short time to act. I will give them what they deserve." Acting upon those beliefs, the student may return to school with weapons and attack others. In addition, a student who is suspended or expelled without alternative educational placement may be under less supervision than if he or she were to remain in a school setting.

Id. at 65. "The response with the greatest punitive power may or may not have the greatest preventive power." *Id.*; *see also* NEWMAN ET AL., *supra* note 10, at 285 ("A punitive approach is counterproductive, because it does little to change the underlying dynamics of peer relations and the flow of information in schools—factors that lie closer to the root of the problem.").

144 *See supra* note 143 and accompanying text; *see also* O'TOOLE, *supra* note 17, at 26 ("Disciplinary action alone, unaccompanied by any effort to evaluate the threat or the student's intent, may actually exacerbate the danger—for example, if a student feels unfairly or arbitrarily treated and becomes even angrier and more bent on carrying out a violent act.").

problematic for schools, but they at least have a range of disciplinary and therapeutic responses from which to choose. Within the court system, however, even in the juvenile context, the most familiar responses are punitive measures.[145] For courts, then, these conclusions may well present an intractable dilemma. If courts are punishing threats partly to prevent future shootings, but research strongly suggests that this response is counterproductive, what are courts to do?

One logical conclusion is that courts are simply institutionally incompetent to handle student threat speech cases. Even if courts were capable of properly identifying those students that *pose* a threat,[146] they are unable to offer an appropriate response that would lessen the likelihood of a future attack. Law enforcement advocates reject this conclusion and argue instead that referring troubled youth to the justice system is often in the best interests of the child.[147] This view, however, has been roundly criticized as "sophistic."[148]

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[145] *See* Bernadine Dohrn, *"Look Out Kid / It's Something You Did": Zero Tolerance for Children*, *in* ZERO TOLERANCE 89, 101–02 (William Ayers et al. eds., 2001) (noting expansion of categories of juvenile offenses and attendant punishments); Vincent Schiraldi & Jason Ziedenberg, *How Distorted Coverage of Juvenile Crime Affects Public Policy*, *in* ZERO TOLERANCE, *supra*, at 114, 115 (noting that juvenile justice policies being enacted coast to coast in wake of school shootings are increasingly punitive). It is important to note that the *severity* of the response is distinguishable from its punitive nature. Any sentence, however light, that yields a delinquency or criminal record also carries with it a host of detrimental collateral consequences that can only be understood as punitive in nature. *See* Dohrn, *supra*, at 98 ("Having any delinquency or criminal record has increasing consequences for obtaining scholarships, access to higher education, job eligibility, and the likelihood of escalated sanctions if there is a subsequent police investigation or arrest.").

[146] *But see supra* Part II.A.

[147] *See, e.g.*, People *ex rel.* C.C.H., 651 N.W.2d 702, 710 (S.D. 2002) (Amundson, J., dissenting) ("It is well established that the purpose of any juvenile disposition is to serve the best interest of the child and the public." (citations omitted)) .

[148] *See* Robert Schwartz & Len Reiser, *Zero Tolerance as Mandatory Sentencing*, *in* ZERO TOLERANCE, *supra* note 145, at 126, 132 (citations omitted).

> It is easy to refer a child to the justice system if the referral seems benign. Indeed, there are many caring juvenile court judges in the country, and many programs that serve children well.
>
> On the other hand, few parents would want their children unnecessarily labeled as a delinquent or criminal merely because a school administrator thinks that the child needs help. Labels come with a cost, one of which is a 50-percent chance that a child who is placed in a public juvenile justice facility in this country will be in an institution that fails to comply with minimum national standards of care.
>
> There are many in law enforcement who overlook the risks to children that come with labeling them as adults or criminals. A prosecutor in Florida insists that transferring children to adult court is his way of helping them, because he has services in his county jail. A Tennessee police detective charges an eight-year-old boy with murder—after he stabbed his mother's abusive boyfriend following years of domestic violence—"more to get [the boy] into the system, get him counseling and away from the mother."

Id.

Another argument that is frequently advanced in favor of criminal punishment of student threats centers around incapacitation. This argument is extremely limited, however, because proportionality concerns dictate that young offenders not be sentenced to a juvenile or criminal justice facility for a substantial period of time for threatening speech.[149] Upon their release, these juveniles are likely to feel the same feelings of resentment that one would feel after a suspension or expulsion. Moreover, an argument for incapacitation does not necessitate resort to the criminal justice system; local medical or mental health facilities are arguably more appropriate venues for such incapacitation.[150]

To date, at least one court, the Pennsylvania Court of Common Pleas, has explicitly refused to adjudicate a student threat case on the grounds that it was beyond the court's competence.[151] Finding that the charges were "inappropriately filed," the court held that such situations are "best left to be handled" by schools and mental health professionals rather than courts.[152] Despite this isolated exception, however, courts continue to hear threatening speech cases, and they do so with increasing frequency.[153]

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[149] *See, e.g.*, Jones v. State, 63 S.W.3d 728, 729 (Ark. 2002) (noting that lower court imposed sentence of twenty-four months of supervised probation and seven days in juvenile detention facility for terroristic threats); *People* ex rel. *C.C.H.*, 651 N.W.2d at 709 (noting that maximum sentence available for threatening speech would be thirty days in jail and $200 fine if tried as adult, and that no post-disposition detention would be allowed if tried as juvenile).

[150] *See, e.g.*, LaVine *ex rel.* LaVine v. Blaine Sch. Dist., 279 F.3d 719, 723 (9th Cir. 2002) (Kleinfeld, J., dissenting from denial of rehearing en banc).

> It is not unusual to hear some troubled person say things that give rise to the thought, "That person may be mentally ill or emotionally disturbed," and sometimes, "That person ought to be examined to determine whether he poses a danger to himself or others." Those conclusions, even assuming that they are well taken, do not justify *punishing* the speaker.
>
> This case does not put at issue whether the school could, consistently with the Constitution, remove James pending psychiatric examination to ensure that he did not pose an unreasonable risk to the safety of other students. . . . [I]t is of legitimate concern when a boy in high school is preoccupied with thoughts about murder and suicide. Neither the LaVines, nor the district court, nor I, have taken issue with the proposition that James could properly be excluded from the school so that a psychiatrist could examine him and communicate a judgment about when it was safe to readmit him.
>
> Punishment has meaning and consequences distinct from examination, counseling, and exclusion for health or safety reasons based on predictions about future conduct.

Id. at 723–24.

[151] *In re* A Minor Child, JU-98-119 (Ct. Com. Pl. Northumberland County, Pa. Aug. 6, 1998), http://www.kidstogether.org/pa-crt1.htm; *see also infra* Part III.B.1.

[152] *A Minor Child*, JU-98-119.

[153] *See* Schwartz & Reiser, *supra* note 148, at 132–33 (noting that school referrals to juvenile court are rising, and that examples of juvenile courts dismissing inappropriate

If we assume that a legislative solution removing these cases from the court system is unlikely, the question remains how courts should handle student threats. Having identified two doctrinal problems—of vagueness and proxy—and one major policy problem, this Note now takes up the question of how courts on all levels should handle student threats in light of these findings.

III
TOWARD AN IMPROVED JURISPRUDENCE FOR STUDENT THREATS

It is not controversial to assert that courts should punish *some* threats. The difficult question is what *kind* of threats should be punished. This Note has thus far attempted to show why the true threat doctrine is an inadequate tool for answering this question as it relates to student threats. This Part now offers remedies to these doctrinal and policy problems. Part III.A argues for refinement of the existing true threat doctrine by the Supreme Court and the Courts of Appeals. Recognizing that doctrinal change may not be forthcoming, Part III.B offers recommendations to the trial courts, which will inevitably handle the lion's share of student threatening speech cases, as to how they can mitigate the effects of the problems thus identified.

A. Improving the True Threat Doctrine for Student Speakers

1. Adding an Intent Requirement to Mitigate the Vagueness Problem

After *Virginia v. Black*, it is clear that a speaker can run afoul of the law without intending to carry out his threat.[154] What is more problematic, however, is that the true threat doctrine does not even require that the speaker intend to *threaten* the victim.[155] This Section illustrates how the addition of an "intent to threaten" requirement—from either the Supreme Court or any of the circuit courts—would go a long way toward remedying the vagueness problem. Other commentators have argued for the addition of an intent prong to the true

referrals are rare). "Juvenile courts lost a part of their caseload to the adult criminal courts as a result of get-tough policies of the 1990's. As thousands of youth were transferred to adult courts, juvenile courts had room for the new referrals, and showed little inclination to turn them away." *Id.* at 133.

154 *See supra* notes 49–50 and accompanying text.

155 *Black* does not explicitly require such intent, and lower courts have largely rejected the requirement. *See supra* notes 39–42 and accompanying text (explaining that courts have largely resorted to objective standard that asks if "reasonable person" would interpret threat as serious expression of intent to harm, and that courts have rejected subjective test).

threat doctrine generally,[156] but this Note does not assert such a broad claim. Instead, this Note argues only that such a requirement is particularly crucial in judging *student* threats.

Since *Watts v. United States*, most courts have adopted an objective test for identifying true threats[157] that asks whether a "reasonable person" would interpret the speech as a serious expression of an intent to cause harm.[158] As shown in Part I, it falls to trial judges to determine what a "reasonable person" would consider to be a threat. Despite the purportedly objective nature of this test, the vagueness problem persists: The outcome of a given case depends far more on the predilections of the judge than on the particular facts.[159] Since 1975, critics ranging from Justice Marshall to the drafters of the Model Penal Code have criticized the objective test on the grounds that it allows a defendant to be convicted of a criminal threat on nothing more than a negligence standard, and does not require sufficient mens rea.[160] Nevertheless, appellate courts have continually declined to require further proof of intent.[161]

The addition of a subjective intent requirement would remedy the mens rea problem that these critics have identified. More importantly for the present analysis, a subjective intent requirement would also obviate the need for the reasonable person test, and thereby eradicate the very root of the vagueness problem.[162] Instead of showing that a reasonable person would view the speech as a threat, the government would have to prove that the speaker intended it as such. Though this requirement would not guarantee perfect consis-

156 *See infra* note 160 and accompanying text (listing critics).

157 *See* Doe v. Pulaski, 306 F.3d 616, 622 (8th Cir. 2002); *see also supra* notes 39–42 and accompanying text.

158 *Pulaski*, 306 F.3d at 622.

159 *Id.*

160 *See* Rogers v. United States, 422 U.S. 35, 43–48 (1975) (Marshall, J., concurring). Justice Marshall urged the lower courts to adopt a subjective intent requirement, adding: "We have long been reluctant to infer that a negligence standard was intended in criminal statutes; we should be particularly wary of adopting such a standard for a statute that regulates pure speech." *Id.* at 47 (citation omitted); *see also* MODEL PENAL CODE § 211.3 (1962); Rothman, *supra* note 30, at 314–19 & nn.162, 179, 187, 189 (arguing that lack of intent requirement obviates requisite mens rea and presenting similar arguments of other commentators); Robert Kurman Kelner, Note, United States v. Jake Baker*: Revisiting Threats and the First Amendment*, 84 VA. L. REV. 287, 304–07, 313 (1998) (arguing that heightened intent requirement would be more consistent with demands of First Amendment).

161 *See* Virginia v. Black, 538 U.S. 343, 360 (2003) ("[I]ntimidation in the constitutionally proscribable sense of the word is *a type* of true threat, where a speaker directs a threat to a person or group of persons *with the intent* of placing the victim in fear of bodily harm or death.") (emphasis added).

162 *See supra* notes 42–45 and accompanying text.

tency from case to case, it would certainly help to ensure that students are not punished solely based on the caprice of a particular judge, or in response to charged public opinion. For example, it would no longer suffice for a prosecutor to show that, "against the backdrop" of recent shootings, a reasonable person could interpret Adam Porter's two-year-old drawing as a threat. Instead, before Adam could be charged with "terrorizing,"[163] the state would have to show that he *intended* to threaten his victim. Under the facts of Adam's case—where the drawing was discovered by accident two years after it was made—this would be a major hurdle for the prosecution. Prosecution would also be difficult in cases where a student intended his or her comments as a joke, even if he or she were to encounter a judge who found the student's sense of humor particularly offensive.

While other scholars have argued for the addition of an intent requirement to all threats, it is important to realize that such an element is particularly crucial in student threat cases. The cases reviewed in Part I.B demonstrate that the "reasonable person" standard can change in unpredictable ways in response to high profile school shootings,[164] which has a particularly harsh effect on student speakers. Moreover, existing research on adolescent personality development makes clear that adolescents are frequently liable to do and say things that a "reasonable" person might find altogether strange.[165] In general, juveniles experience emotion more strongly than adults, and exercise worse judgment.[166] Thus, a reasonable *person* and a reasonable *adolescent* might have very different ideas about what constitutes a true threat. Application of the former standard to all student cases disregards these unique characteristics of juvenile speech.

Just this past year, the Supreme Court itself strongly endorsed this view of adolescent personality development in the landmark case *Roper v. Simmons.*[167] Holding that the Constitution forbids the execution of a juvenile defendant, the Court stressed that juveniles are "categorically less culpable than the average criminal,"[168] and that they lack the maturity, responsibility, and fixed personality traits of grown adults.[169] This recognition by the Supreme Court strongly supports the argument that the reasonableness test is particularly inap-

[163] *See supra* Part I.B.2. An intent prong would similarly help students like Christopher Beamon, who was detained for seven days in a juvenile facility for his scary Halloween story. *See supra* notes 5–8 and accompanying text.

[164] *See supra* Part I.B.

[165] *See supra* notes 116–17 and accompanying text.

[166] *See supra* note 123 and accompanying text.

[167] 125 S.Ct. 1183 (2005).

[168] *Id.* at 1194 (citing Atkins v. Virginia, 536 U.S. 304, 316 (2002)).

[169] *Id.*

propriate in the context of student threats, and should be replaced by a subjective intent requirement, which can be more appreciative of the uniqueness of student threats and adolescent personality development.

Importantly, adding an intent requirement does not raise concerns that appropriate threats will go unpunished. Merely requiring intent to threaten does not lead to broad exculpation of every student, or every type of threat. It will not preclude the justice system from punishing students who deliberately and knowingly tried to frighten their victims, but it will protect many students who merely exercised bad judgment or poor taste. This, in turn, will go a long way to eliminate the strong likelihood that student speakers are subjected to "contradictory outcomes" and "unfair penalties,"[170] which is the hallmark of the vagueness problem.

2. *Eliminating the Proxy Justification in Student Threat Cases*

Although *Virginia v. Black* provides three justifications for the punishment of true threats—preventing fear, the disruption that results from that fear, and the violence that is threatened—the cases reviewed in Part I.B suggest that the last of these, the proxy justification, plays a uniquely prominent role in student threat cases. The most direct way to counteract the proxy problem, then, may be to eliminate the proxy justification altogether. The Supreme Court has never offered any authority, other than its own dicta in *R.A.V.*, to support the three justifications. Either the Supreme Court or the circuit courts should consider abandoning the proxy justification as it applies to student threats.

Abandoning the proxy justification still allows courts to punish threatening speech in order to prevent fear and the disruption that results from fear, but it prevents courts from ineptly attempting to assess the future dangerousness of a student speaker.[171] Rather than engaging in what the Wisconsin Supreme Court called "judicial speculation," which will inevitably be colored by public outcry over rare but highly publicized events,[172] elimination of the proxy justification in student cases would force courts to assess only the fear that a threat caused a particular listener to experience, and the disruption that fear engendered.

Without the proxy justification, judges have no reason to inquire as to whether the student speaker is likely to carry out his threatened

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[170] Strauss, *supra* note 44, at 232.

[171] *See supra* notes 127–133 and accompanying text.

[172] *See supra* notes 81–82 and accompanying text.

act. Given how poorly most courts have fared in this endeavor, this change would be a welcome relief. It would diminish the likelihood that students are subjected to disproportionate penalties simply because the judges hearing their cases have incorrectly assessed the seriousness of their threats, either because of a personal bias or, more likely still, because they have failed to apply adequately rigorous threat assessment. Of course, courts will remain free to apply the first two *Black* justifications, but elimination of the proxy justification would go a long way toward remedying the proxy problem.

B. The Policy Arguments: Some Suggestions for Criminal and Juvenile Court

As the review of case law in Part I.B illustrated, the identification of true threats is a highly subjective enterprise that turns largely on the predilections of the judge deciding the case.[173] While this has proven extremely problematic for juvenile defendants in recent years, it also demonstrates that individual state judges have vast discretion in the way they handle student speech cases, and they can therefore be the vehicle for change. This Section thus recommends ways in which those courts can better respond to student threats while staying within the bounds of the current true threat doctrine.

1. Shutting the Door: The Bold Inaction of the Pennsylvania Court of Common Pleas

Courts must consider that the best judicial response to student threats may be no response. Part II.B presented the example of the Northumberland County Court of Common Pleas in Pennsylvania, which dismissed a student threat case as "inappropriately filed."[174] Far from being a forgettable anomaly, Judge Wiest's opinion should be viewed both as a model for other courts to follow in similar cases, and as the starting point for a judicial dialogue about the role of courts in handling student threat cases.[175] Though the opinion has been characterized by some authors as an outlier,[176] the sentiments it expresses have been endorsed by other jurists of some repute.[177]

The Northumberland court considered the case of a fourteen-year-old girl who threatened her teacher and various aides at her elementary school. The court was heavily impressed by the evidence of

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[173] *See supra* Part I.B.

[174] *In re* A Minor Child, JU-98-119 (Ct. Com. Pl. Northumberland County, Pa. Aug. 6, 1998), http://www.kidstogether.org/pa-crt1.htm.

[175] *See supra* notes 146–48 and accompanying text.

[176] *See* Schwartz & Reiser, *supra* note 148 at 132–33.

[177] *See infra* note 180 and accompanying text.

the girl's severe psychiatric disorders and agreed with defense counsel's claim that the girl was "unable to comprehend the criminal justice system."[178] The functional outcome of the case is no different than it would have been if the court had reached the merits and decided the speech was not a true threat. That is, the case was dismissed and the juvenile was set free. What is unique about the case, however, is that rather than simply deciding that the minor's speech did not amount to a true threat given the evidence of her disorder (and her teachers' detailed knowledge of that disorder), the court instead delivered a frank commentary on the institutional competence of the criminal courts in threatening speech cases:

> [T]his type of case is usually and probably best handled through other, better suited avenues, without resorting to the criminal court system. . . . While this decision is not intended to effectively cut off all access to the criminal court system by school authorities, the instances where it is appropriate should be rare indeed. Thus, in these types of cases, the criminal court system is to be considered only as a "last resort," after the exhaustion of all administrative remedies that are available in the school and to mental health areas outside of the school setting.[179]

The opinion is remarkable for its candor regarding the limitations of the justice system. Admittedly, the juvenile's extraordinary psychiatric needs were a driving force behind the court's holding, but the quoted language nonetheless stretches beyond the facts of this case and serves as a caution to school officials and, perhaps, to legislators who might be considering legislation mandating more court referrals.

It is rare to find judicial opinions arguing that the courts are not the proper place to assess and respond to student threats, but one oft-cited opinion lends some support to the ideas expressed by Judge Wiest. In his dissent in *LaVine ex rel LaVine v. Blaine County School District*, Judge Kleinfeld of the Ninth Circuit explored the problem inherent in a school's expulsion of a student for a dark poem he had written about a school shooting:

> [I]t is of legitimate concern when a boy in high school is preoccupied with thoughts about murder and suicide. Neither the LaVines, nor the district court, nor I, have taken issue with the proposition that James could properly be excluded from the school so that a psychiatrist could examine him and communicate a judgment about when it was safe to readmit him. Punishment has meaning and consequences distinct from examination, counseling, and exclusion for

178 *A Minor Child*, JU-98-119.

179 *Id.*

health or safety reasons based on predictions about future conduct.[180]

LaVine is not a criminal case and the court did not purport to apply the true threat doctrine, but the importance of Judge Kleinfeld's dissent should not be understated. It picks up where Judge Wiest left off, as a momentous challenge to courts on all levels to question their own institutional competence to respond to student threats. Furthermore, because it comes from one of the nation's highest courts, it can better serve as persuasive precedent in the lower courts.

2. *Beyond Columbine: Taking Notice of More than School Shootings*

Part I.B illustrated the substantial impact that external developments can have on courts in individual student threat cases. Consequently, if courts were to take notice (formally or informally) of other external developments beyond the recent spate of school shootings, it is reasonable to assume that their decisions would be more balanced. Three scholars have recently suggested other facts that courts should consider in deciding student threat cases. While none of these solutions is ideal, they are worthy contributions and would likely improve judicial assessment of student threats.

Professors Richards and Calvert have argued that courts deciding juvenile threatening speech cases must appreciate the reality that current teen culture "is saturated with violent imagery and profane language."[181] They assert that the generation gap is affecting judges' true threat analyses, and they urge judges to consider the current teen cultural context as a "mitigating factor" in juvenile threatening speech cases.[182] The suggestion is limited insofar as it relies on individual judges to overcome the very powerful biases that Richards and Calvert have themselves identified, but the identification of a generation gap between students and judges is powerful, and deserving of greater consideration from the courts.

Professor Redfield has offered an alternative solution. She argues that courts should change their methodology for identifying true threats so as to mimic the FBI's threat assessment model.[183] It is

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[180] LaVine *ex rel.* LaVine v. Blaine School District, 279 F.3d 719, 723 (Kleinfeld, J. dissenting from denial of rehearing en banc). Judge Kleinfeld was joined in his dissent by Judges Kozinski and Reinhardt.

[181] Richards & Calvert, *supra* note 17, at 1110.

[182] *Id.* at 1112.

[183] Redfield, *supra* note 25, at 718 ("[I]t is preferable for schools and courts to look first to whether a threat is actually posed. Here, incorporating the FBI standards can lead to more predictable results than the typical judicial analysis."); *see also id.* at 719 ("Using an

clear from the FBI study that the authors did not contemplate that the model would be used by courts, but by parents and educators.[184] Consequently, it is unclear that courts will be able to employ the model in the way it was intended.[185] The real promise of Redfield's proposal, however, may be educational. Professor Redfield notes that judicial application of the model will quickly foster use of the model in schools.[186] In addition, judicial application of the threat assessment model would ultimately serve to educate the public about the limited predictive value of threatening speech.

Taken together, the proposals of Professors Redfield, Richards, and Calvert serve as a valuable reminder to trial courts that they are, for better or worse, free to consider student threatening speech in light of virtually any circumstances or facts that they wish. In the same way that courts have taken judicial notice of school shootings, then, they ought to take notice of recent research on adolescent development and the extremely limited predictive value of student threats. Perhaps when viewed against *this* backdrop, courts will find that a "reasonable" person's interpretation of a student threat is quite different.

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augmented true threat analysis that focuses on whether a threat is actually posed would also facilitate school and judicial analysis of the First Amendment issues.").

184 *See, e.g.*, Message from FBI Director Louis J. Freeh, *in* O'TOOLE, *supra* note 17, at iv (dedicating resource "to the educators and parents who will use it"); *see also* O'TOOLE, *supra* note 17, at 11 ("The assessor may be a school psychologist, counselor, or other staff member or specialist who has been designated and trained for this task.").

185 There are at least two causes for concern with Professor Redfield's proposal. First, in the event of a student threat, the model is meant to be implemented by a specially trained threat assessor. O'TOOLE, *supra* note 17, at 11. It is probably unreasonable to expect judges, even in juvenile court, to undergo the extensive training in threat assessment that is urged by the model. Even assuming, however, that courts could retain a specialist in threat assessment, the model requires that the assessor have knowledge of the particular school and social dynamics at work in the student's life, and that the assessor have some awareness of these dynamics "*prior* to a threat." *See id.* at 22 (emphasis added). The report offers seven school-related criteria about which an assessor should be knowledgeable. *Id.* at 22–23. The seven factors are: student attachment to school, tolerance for disrespectful behavior, inequitable discipline, inflexible culture, pecking order among students, code of silence, and unsupervised computer access. *Id.* Courts, of course, would have no such knowledge. In the best case scenario, courts would have to give dispositive weight to the testimony of school officials and other witnesses as to prongs three and four. In the worst case scenario, they would simply ignore half of the model and make decisions based on their incomplete knowledge of the first two. This is, in fact, exactly what Judge Prosser did in his dissent in *Douglas D.* *See supra* note 81 and accompanying text.

186 Redfield, *supra* note 25, at 723–24.

CONCLUSION

The aim of this Note is decidedly narrow. It criticizes the Supreme Court's true threat doctrine as it applies to student threats. First, it identifies two doctrinal problems. The true threat doctrine is excessively vague and dependent on the caprice of a given judge, which has been particularly problematic for student speakers in recent years. In addition, the doctrine explicitly justifies punishment of threats as a proxy for preventing future violence, but this approach flies in the face of empirical research on student threats and school shootings. In addition to these doctrinal problems, this Note has also presented evidence that there are serious policy problems inherent in a punitive response to threatening speech. Recognizing these three inadequacies, this Note has offered recommendations for improvement to the doctrine itself, but it has also suggested ways in which lower courts, working within the confines of existing doctrine, can better respond to student threats.

Unfortunately, recent tragic events have made this Note particularly timely. After more than five years without an incident of targeted violence in America's schools, the Native American community of Red Lake, Minnesota fell victim to a school shooting on March 21, 2005. Jeff Weise, age sixteen, shot seven people at Red Lake High School before turning the gun on himself.[187] As of this writing, media reports suggest that Jeff was a very troubled teen,[188] but it is unclear if he ever *made* a threat to anyone before his attack.[189]

What is clear, however, is that the link between threats *made* and threats *posed* is more tenuous than many courts would like to believe, and so long as courts focus on threatening speech as a proxy for future school shootings, we will continue to see both false negatives and false positives. Students who pose a threat, like Jeff, may never come into contact with the justice system, while students like Hamadi Alston,[190] who threatened his classmates with a paper gun, may feel the wrath of a judge whose reasoning is clouded by recent shocking events. This Note argues that courts can and must do more to realize the promise of the First Amendment and to ensure greater fairness to student speakers. It offers remedies in the hope that now, in the wake of a new tragedy, courts on all levels will take care not to repeat the mistakes of the past.

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187 Ceci Connolly & Dana Hedgpeth, *Shooter Described as Deeply Disturbed*, WASH. POST, Mar. 23, 2005, at A12.

188 *See, e.g.*, Monica Davey, *Bewildered Tribe Looks Warily Inward*, N.Y. TIMES, Mar. 31, 2005, at A20.

189 *See id.*

190 *See supra* notes 1–4 and accompanying text.