

March 2013

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Christopher Marquis
Boston College Law School, christopher.marquis.2@bc.edu

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Recommended Citation

Christopher Marquis, *Cuff ex rel. B.C. v. Valley Central School District: The Battle Between Safety and Liberty in an Era of Student Violence*, 33 B.C.J.L. & Soc. Just. E. Supp. 39 (2013), <http://lawdigitalcommons.bc.edu/jlsj/vol33/iss3/4>

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CUFF EX REL. B.C. v. VALLEY CENTRAL SCHOOL DISTRICT: THE BATTLE BETWEEN SAFETY AND LIBERTY IN AN ERA OF STUDENT VIOLENCE

CHRISTOPHER MARQUIS*

Abstract: On March 22, 2012, in *Cuff ex rel. B.C. v. Valley Central School District*, the U.S. Court of Appeals for the Second Circuit held that suspending a student for writing a wish to blow up the school did not violate the student's First Amendment right of expression. The court concluded that the suspension satisfied the substantial disruption test outlined by the Supreme Court in *Tinker v. Des Moines Independent Community School District*. The Second Circuit, however, could have reached the same result without undermining student speech protections by applying the Supreme Court's narrower standard presented in *Bethel School District Number 403 v. Fraser*, which allows restrictions on certain types of speech based on the school's role in teaching students societal values. Applying the *Fraser* standard in this case would have given school officials the tools necessary to protect students from violence, while preserving the students' free speech rights.

INTRODUCTION

On September 12, 2007, B.C., a minor, was suspended from the Berea Elementary School in Montgomery, New York, for six days.¹ The suspension stemmed from an assignment given to B.C. by his science teacher "to fill in a picture of an astronaut and write various things in various sections of the astronaut."² When the teacher instructed the students to write a "wish" in the leg of the astronaut, B.C. wrote that he wished to "[b]low up the school with the teachers in it."³ After B.C. showed this to his fellow students, one of the students brought the wish to the attention of the teacher.⁴ The teacher then sent B.C. to the

* Staff Writer, BOSTON COLLEGE JOURNAL OF LAW & SOCIAL JUSTICE (2012–2013).

¹ *Cuff ex rel. B.C. v. Valley Cent. Sch. Dist. (Cuff IV)*, 677 F.3d 109, 112 (2d Cir. 2012). B.C. was suspended for a period of five days out of school suspension and one day in school suspension. *Id.*

² *Id.* at 111.

³ *Id.*

⁴ *Id.*

school's principal, who, after questioning B.C. about the "wish," contacted the superintendent and issued a suspension.⁵

B.C.'s parents, the Cuffs, sued the school district on his behalf claiming that the school's actions violated B.C.'s First Amendment right to free speech.⁶ The school district moved for summary judgment and the district court granted the motion.⁷ The Cuffs appealed the grant of summary judgment to the U.S. Court of Appeals for the Second Circuit, where a three-judge panel affirmed the decision.⁸ The panel split two-to-one on the correct application of the substantial disturbance standard set forth in the Supreme Court's 1969 decision in *Tinker v. Des Moines Independent Community School District*.⁹ The majority opinion deferred to school administrator's judgment as to the risk of a substantial disturbance, whereas the dissent made a more exacting inquiry into the reasonableness of the school's judgment.¹⁰ Although the dissenting opinion coheres with the principles of *Tinker*, the court should have adopted the approach employed by the Supreme Court in *Bethel School District Number 403 v. Fraser* because it more effectively balances school safety and free speech protections.¹¹

I. NO LAUGHING MATTER: A VIOLENT WISH ENDS IN SUSPENSION AND LITIGATION

On September 12, 2007, B.C.'s science teacher, Tara DeBold, asked her students to write statements within a picture of an astronaut, and specifically to "write a 'wish' in the left leg of the astronaut."¹² According to testimony, DeBold, in response to students' questions, told them that "you can write, like, anything you want . . . you can involve a missile . . . [y]ou can write about missiles."¹³ B.C. told the other stu-

⁵ *Id.* at 111–12.

⁶ *Id.* at 112.

⁷ *Cuff IV*, 677 F.3d at 112.

⁸ *Id.*

⁹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504, 509, 514 (1969) (holding that, absent a showing that school officials had a reasonable belief that the speech in question was likely to cause a substantial disruption of the school environment, students had a First Amendment right to wear armbands in protest of the Vietnam war); see *Cuff IV*, 677 F.3d at 112–13; *Cuff IV*, 677 F.3d at 118–19 (Pooler, J., dissenting).

¹⁰ *Cuff IV*, 677 F.3d at 113; *id.* at 115 (Pooler, J., dissenting).

¹¹ See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (holding that a student's profane speech could be restricted in light of the school's role in teaching students socially acceptable values); *Tinker*, 393 U.S. at 509; *Cuff IV*, 677 F.3d at 115 (Pooler, J., dissenting).

¹² *Cuff ex rel. B.C. v. Valley Cent. Sch. Dist.* (*Cuff IV*), 677 F.3d 109, 111 (2d Cir. 2012).

¹³ *Id.*

dents that he planned to write that his wish was to “[b]low up the school with the teachers in it,” and the students laughed in reply.¹⁴ C.P., a student seated nearby, looked at B.C.’s completed picture and, per B.C.’s testimony, also laughed.¹⁵ C.P. then reported the drawing to DeBold, who testified that C.P. appeared to be very worried.¹⁶ Following a conversation with C.P., DeBold confronted B.C. and asked him “if he meant what he had written.”¹⁷ When B.C. did not respond, DeBold sent him to Principal Knecht’s office.¹⁸

B.C. had a history of misbehavior prior to the incident.¹⁹ In January of 2006, B.C. drew a picture of a person shooting a gun, above which he wrote “[o]ne day I shot 4 people each of them got fo[ur] blows + they were dead. I wasted 20 bullets [sic] on them.”²⁰ His teacher notified the school psychologist, and school officials alerted B.C.’s parents.²¹ In response, B.C. claimed he was depicting a game of paintball.²² In the spring of 2007, B.C. wrote a story about “a big wind [that] destroyed every school in America . . . [and] every body ran for there [sic] life and than [sic] all adults died and all the kids were alive. Than [sic] all the kids died.”²³ This was also reported to the school psychologist, who did not speak to B.C.²⁴ Additionally, teachers and administrators had previously disciplined B.C. for physical altercations during recess and in the hallways, and for other instances of rough play.²⁵

Principal Knecht and Assistant Principal Malley consulted the superintendent for advice on punishment, relaying the incident, B.C.’s past behavioral problems, and the possibility that B.C. had scared C.P.²⁶ The superintendent and the principals agreed that suspension was appropriate.²⁷ Soon thereafter, Principal Knecht met with B.C. and his parents, and B.C. expressed that he did not mean what he wrote and

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* According to B.C.’s testimony, C.P. had a history of tattling on B.C. whenever he did something inappropriate. *Id.* at 117 (Pooler, J., dissenting).

¹⁷ *Id.* at 111 (majority opinion).

¹⁸ *Cuff IV*, 677 F.3d at 111.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *See Cuff IV*, 677 F.3d at 111.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

that it was just a joke.²⁸ After the meeting, Knecht issued B.C.'s suspension in writing.²⁹

B.C.'s parents, William and Margaret Cuff, appealed the suspension to the District's Board of Education.³⁰ After the Board of Education upheld the suspension, the Cuffs then brought a section 1983 action on behalf of B.C. against the Board and Principal Knecht.³¹ Specifically, the Cuffs alleged that the suspension was not only excessive, but also violated B.C.'s First Amendment right to freedom of expression.³²

On May 5, 2012, the U.S. District Court for the Southern District of New York granted the School District and the principal's motion to dismiss, holding that the school administrators reasonably believed that the speech was likely to cause a substantial disruption.³³ On appeal, the Second Circuit vacated the dismissal and remanded the case to the district court.³⁴ The School District and the principal filed for summary judgment, which the district court granted, and the Cuffs again appealed the decision to the Second Circuit.³⁵

II. THE *TINKER* SUBSTANTIAL DISRUPTION TEST AND OTHER STANDARDS FOR STUDENT SPEECH

In analyzing the Cuffs' complaint, the Second Circuit discussed the standard articulated by the Supreme Court in 1969 in *Tinker v. Des Moines Independent Community School District*.³⁶ Pursuant to *Tinker*, public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."³⁷ The First Amendment rights of public school students are not the same as those enjoyed by

²⁸ *Id.* at 112.

²⁹ *Id.*

³⁰ *Cuff IV*, 677 F.3d at 110, 112.

³¹ 42 U.S.C. § 1983 (2006) (creating a federal civil action for state actions which deprive citizens of "rights, privileges, and immunities" protected by the Constitution); *Cuff IV*, 677 F.3d at 112.

³² *Cuff IV*, 677 F.3d at 112.

³³ *Cuff ex rel. B.C v. Valley Cent. Sch. Dist. (Cuff I)*, 559 F. Supp. 2d 415, 417, 422, 424 (S.D.N.Y. 2008), *vacated*, 341 F. App'x 692 (2d Cir. 2009).

³⁴ Fed. R. Civ. Pro. § 12(b) (6) (permitting dismissal of a complaint for "failure to state a claim upon which relief can be granted"); *see Cuff ex rel. B.C. v. Valley Cent. Sch. Dist. (Cuff II)*, 341 F. App'x 692, 693 (2d Cir. 2009).

³⁵ *Cuff IV*, 677 F.3d at 110, 112; *Cuff ex rel. B.C v. Valley Cent. Sch. Dist. (Cuff III)*, 714 F. Supp. 2d 462, 463 (S.D.N.Y. 2010), *aff'd*, 677 F.3d 109 (2d Cir. 2012).

³⁶ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969); *Cuff ex rel. B.C. v. Valley Cent. Sch. Dist. (Cuff IV)*, 677 F.3d 109, 112 (2d Cir. 2012).

³⁷ *Tinker*, 393 U.S. at 506.

adults in other settings, however, and instead “must be ‘applied in light of the special characteristics of the school environment.’”³⁸

In *Tinker*, the Supreme Court held that school officials may not suppress student speech unless it is to prevent a substantial disturbance or material disruption of the school environment.³⁹ In order to limit student speech, school officials must show more than an “undifferentiated fear or apprehension of disturbance,” and cannot act merely to avoid any “discomfort and unpleasantness” caused by the expression of unpopular viewpoints.⁴⁰ In applying *Tinker*’s substantial disturbance test, courts ask whether the school’s apprehension of “substantial disruption of or material interference with school activities” was reasonable.⁴¹ The courts do not require that there be an actual or inevitable disruption.⁴² Rather, courts assess whether the administrator might reasonably forecast disruption from the student speech in question.⁴³

Tinker, however, is not the only standard employed to assess student speech.⁴⁴ In 1986, in *Bethel School District Number 403 v. Fraser*, the Supreme Court set out a separate standard for certain types of student speech, including vulgar and offensive speech.⁴⁵ This standard allows schools to consider their role in teaching students “the boundaries of socially appropriate behavior” when regulating student speech.⁴⁶

A. *Reasonableness and Deference to the School: The Majority’s Interpretation of the Tinker Substantial Disruption Test*

In upholding B.C.’s suspension, the Second Circuit majority analyzed B.C.’s wish in the astronaut drawing under *Tinker*’s substantial disturbance standard.⁴⁷ Emphasizing B.C.’s disciplinary history, the school psychologist’s concerns, the fact that the drawing had been shown to other students, and that the teacher “perceived C.P. to be ‘very wor-

³⁸ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (quoting *Tinker*, 393 U.S. at 506).

³⁹ *Morse v. Frederick*, 551 U.S. 393, 403 (2007); *Tinker*, 393 U.S. at 509, 513.

⁴⁰ *Tinker*, 393 U.S. at 508–09.

⁴¹ *DeFabio v. E. Hampton Union Free Sch. Dist.*, 623 F.3d 71, 79 (2d Cir. 2010); *see Tinker*, 393 U.S. at 514.

⁴² *Cuff IV*, 677 F.3d at 113; *Doninger v. Niehoff*, 527 F.3d 41, 51 (2d Cir. 2008).

⁴³ *Tinker*, 393 U.S. at 514; *DeFabio*, 623 F.3d at 79; *Doninger*, 527 F.3d at 51.

⁴⁴ *Morse*, 551 U.S. at 405; *see Hazelwood*, 484 U.S. at 271; *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986); *Tinker*, 393 U.S. at 509.

⁴⁵ *See Morse*, 551 U.S. at 405; *Fraser*, 478 U.S. at 675, 683.

⁴⁶ *Fraser*, 478 U.S. at 681, 685 (holding that a student’s profane speech could be restricted in light of the school’s role in teaching students socially acceptable values).

⁴⁷ *Cuff IV*, 677 F.3d at 113; *see Tinker*, 393 U.S. at 509.

ried,” the court held that it was reasonably foreseeable that B.C.’s drawing may generate a substantial disruption within the school.⁴⁸ The majority then noted that school administrators have “wide leeway” to discipline students for violent writing and conduct.⁴⁹

The court also concluded that B.C.’s sharing of the image with his classmates could reasonably be perceived as an “attention-grabbing device,” contributing to the threat of a substantial disruption.⁵⁰ The court found that school administrators could reasonably believe that, if left unchecked, other students could very well imitate or intensify this type of behavior, spurring more disciplinary issues at the school.⁵¹ Finally, the court observed that ongoing behavior of this sort might decrease parental confidence in school safety.⁵² This in turn, would have collateral consequences such as the need to hire school security, or even a drop in enrollment.⁵³ In light of the above considerations, the majority concluded that it was reasonable for school officials to conclude that such conduct may have caused a substantial disruption of the school environment.⁵⁴ Accordingly, the Second Circuit upheld B.C.’s suspension.⁵⁵

B. *Requiring a Causal Nexus Between Speech and Disruption: The Dissent’s Interpretation of the Tinker Substantial Disturbance Test*

In her dissenting opinion, Judge Pooler argued that a jury could reasonably conclude that B.C.’s behavior was unlikely to cause even “a stir at school, let alone a substantial disruption.”⁵⁶ She contended that the majority failed to make all reasonable inferences and interpret all ambiguities in favor of the non-moving party, as required at the sum-

⁴⁸ *Cuff IV*, 677 F.3d at 113–14.

⁴⁹ *Id.* at 114; *see also* *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 766, 772 (5th Cir. 2007) (finding that threatening speech regarding a Columbine-type shooting at a school was not protected by the First Amendment because “administrators must be permitted to react quickly and decisively to address a threat of physical violence against their students”); *Boim v. Fulton Cnty. Sch. Dist.*, 494 F.3d 978, 980, 984–85 (11th Cir. 2007) (ruling that school officials did not violate a student’s First Amendment rights when they suspended her for writing a narrative depicting her shooting her math teacher); *Doe ex rel. Doe v. Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616, 619, 626 (8th Cir. 2002) (finding that a reasonable school official in possession of a student’s letter describing the rape and murder of a classmate would have taken action based on the letter’s content, and thus concluding that the letter constituted a “true threat”).

⁵⁰ *Cuff IV*, 677 F.3d at 114.

⁵¹ *Id.* at 114–15.

⁵² *Id.* at 115.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Cuff IV*, 677 F.3d at 115 (Pooler, J., dissenting).

mary judgment stage.⁵⁷ Judge Pooler's opinion turned on her belief that a jury could find that the school did *not* reasonably believe the speech could cause a substantial disruption.⁵⁸

Judge Pooler interpreted *Tinker* as requiring "a causal link between the speech that school officials want to suppress and the substantial disruption that they wish to avoid."⁵⁹ Based on this, she argued that certain facts relied on by the majority, such as B.C.'s disciplinary record, were not directly relevant in an examination under *Tinker*.⁶⁰ This was because, she reasoned, the question was whether the speech itself was likely to cause a disruption, not whether it signaled a future violent act by B.C.⁶¹ This standard nevertheless leaves room for school officials to engage in certain non-punitive actions to ensure the safety of other students.⁶² For example, the dissent stated that school officials may detain a student to investigate the veracity of a threat of violent conduct.⁶³ This seems to mitigate the concerns raised by the majority that school officials would be unable to respond to violent attacks at school.⁶⁴ On the whole, Judge Pooler's interpretation of *Tinker* gives less deference to the perception of school officials than the majority does, and requires a showing that the student speech in question could reasonably cause a substantial disruption.⁶⁵

C. *Other Standards Applied to Student Speech*

Courts have also looked beyond the *Tinker* standard to analyze student speech.⁶⁶ In *Fraser*, the Supreme Court upheld a suspension of a student who gave a speech laden with sexual innuendos at a student assembly.⁶⁷ The Court held that it was "a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse."⁶⁸ It reasoned that the fundamental values of

⁵⁷ See *id.* at 116. Judge Pooler pointed to testimony showing the students laughed when shown B.C.'s wish, and that the one allegedly concerned student may have had ulterior motives for reporting the statement to her teacher. *Id.* at 116–17.

⁵⁸ See *id.* at 118–19.

⁵⁹ *Id.* at 122.

⁶⁰ *Id.* at 121.

⁶¹ *Id.* at 122.

⁶² See *Cuff IV*, 677 F.3d at 123 (Pooler, J., dissenting).

⁶³ *Id.*

⁶⁴ See *id.* at 114 (majority opinion); *id.* at 123 (Pooler, J., dissenting).

⁶⁵ See *id.* at 120, 122 (Pooler, J., dissenting).

⁶⁶ *Morse*, 551 U.S. at 405; see *Hazelwood*, 484 U.S. at 271; *Fraser*, 478 U.S. at 683; *Tinker*, 393 U.S. at 509.

⁶⁷ *Fraser*, 478 U.S. at 678–80.

⁶⁸ *Id.* at 683.

a democratic society do not support highly offensive or threatening speech.⁶⁹ Furthermore, it asserted that a school's role encompasses instilling these values in its students.⁷⁰ Thus, a school may suspend a student for the use of offensive language as part of its mission to educate them as to the values of a democratic society.⁷¹ The *Fraser* standard not only considers the risk of disruption under *Tinker*, but also balances the student's speech rights "against society's countervailing interest in teaching students the boundaries of socially appropriate behavior."⁷²

In 2007, in *Morse v. Frederick*, the Supreme Court reaffirmed that *Fraser*, while building upon *Tinker*, is a separate standard and not merely an expansion of the substantial disruption test.⁷³ In *Morse*, the Court upheld a suspension of a student who displayed a banner at a school event that read, "BONG HiTS 4 JESUS."⁷⁴ The Court held that the speech in question could reasonably be interpreted as promoting illegal drug use, and thus could be regulated in light of the governmental interest in preventing such drug use.⁷⁵ Therefore, it is evident that the *Fraser* standard allows school officials to regulate student speech that could not be regulated under *Tinker* when there is a countervailing societal interest in educating students as to the limits of socially acceptable behavior.⁷⁶

III. THE MISSING STANDARD: STRIKING A BALANCE BETWEEN SAFETY AND LIBERTY

In *Cuff ex rel. B.C. v. Valley Central School District* the majority and the dissent analyzed whether B.C.'s violent statement was protected speech under the *Tinker v. Des Moines Independent Community School District* substantial disruption test.⁷⁷ Both opinions, however, failed to strike an appropriate balance between the protection of student speech and the societal interest in preventing violence.⁷⁸ Permitting unburdened ex-

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 683, 685.

⁷² *Morse*, 551 U.S. at 405; *see Fraser*, 478 U.S. at 681, 683; *Tinker*, 393 U.S. at 508.

⁷³ *Morse*, 551 U.S. at 405; *see Fraser*, 478 U.S. at 683; *Tinker*, 393 U.S. at 509.

⁷⁴ *Morse*, 551 U.S. at 397–98, 410.

⁷⁵ *Id.* at 408.

⁷⁶ *Fraser*, 478 U.S. at 681; *see Morse*, 551 U.S. at 405; *Tinker*, 393 U.S. at 509, 514.

⁷⁷ *Cuff ex rel. B.C. v. Valley Cent. Sch. Dist. (Cuff IV)*, 677 F.3d 109, 118–19 (2d Cir. 2012) (Pooler, J., dissenting); *see Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969).

⁷⁸ *See Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986); *Tinker*, 393 U.S. at 511; *Cuff IV*, 677 F.3d at 114–15; *Cuff IV*, 677 F.3d at 120 (Pooler, J., dissenting).

pression of views in schools exposes students to a greater variety of viewpoints than just those within the school curriculum.⁷⁹ This benefit must be balanced against the need to ensure that students are safe and that they learn the bounds of acceptable conduct.⁸⁰ Taking these dual interests into consideration, the standard employed by the Supreme Court in *Bethel School District Number 403 v. Fraser* would have been more appropriate in the instant case.⁸¹

A. *Failings of the Majority and Dissent in Striking a Balance Between Speech Protections and the Threat of Violence*

The majority opinion in *Cuff IV* is questionable in two respects.⁸² First, the majority relied on cases that were primarily decided on grounds inapplicable to the *Tinker* analysis in order to support the proposition that school officials should have broad leeway in determining whether violent speech poses a threat of a substantial disturbance.⁸³ For example, the majority cited the 2002 case *Doe v. Pulaski County Special School District*, in which the Eighth Circuit held that a student letter describing the rape and murder of a classmate constituted a true threat and could be prohibited on those grounds.⁸⁴ Thus, the holding regulated speech on grounds applicable to the greater public and did not implicate the special conditions placed on the school environment.⁸⁵ The court also cited the Fifth Circuit's 2007 case, *Ponce v. Socorro Independent School District*, for the notion that school officials have broad dis-

⁷⁹ See *Tinker*, 393 U.S. at 511.

⁸⁰ *Fraser*, 478 U.S. at 681; *Cuff IV*, 677 F.3d at 114; *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 771–72 (5th Cir. 2007).

⁸¹ See *Fraser*, 478 U.S. at 681, 683; *Cuff IV*, 677 F.3d at 114–15; *Cuff IV*, 677 F.3d at 120 (Pooler, J., dissenting).

⁸² See *Fraser*, 478 U.S. at 681, 683; *Tinker*, 393 U.S. at 508–09; *Cuff IV*, 677 F.3d at 123 (Pooler, J., dissenting).

⁸³ See *Cuff IV*, 677 F.3d at 114; *Ponce*, 508 F.3d at 771–72 (applying *Morse* and finding that speech threatening violence at school was not protected by the First Amendment); *Doe ex rel. Doe v. Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616, 622, 626–27 (8th Cir. 2002) (considering whether the student speech in question was a “true threat,” which is designated by the Supreme Court as a category of speech to which the First Amendment does not apply, and declining to employ the *Tinker* substantial disturbance standard).

⁸⁴ See *Cuff IV*, 677 F.3d at 114; *Pulaski*, 306 F.3d at 619, 626–27.

⁸⁵ See *Tinker*, 393 U.S. at 506 (noting that the First Amendment should be “applied in light of the special characteristics of the school environment”); *Pulaski*, 306 F.3d at 622, 626–27 (citing *Watts v. United States*, 394 U.S. 705, 707 (1969)) (holding that “threats of violence also fall within the realm of speech that the government can proscribe without offending the First Amendment”).

cretion in their determinations regarding violent speech.⁸⁶ In that case, the court upheld a suspension of a student for speech describing a “Columbine style” shooting attack on the school.⁸⁷ The Fifth Circuit did not analyze *Ponce* under the *Tinker* substantial disruption standard, but instead employed the standard articulated in *Morse v. Frederick* to uphold the student’s suspension.⁸⁸

Second and more importantly, the majority’s interpretation of the *Tinker* standard, if applied in *Tinker* itself, would arguably have resulted in a different conclusion.⁸⁹ The majority in *Cuff IV* seemed to hold that a simple undifferentiated fear of potential violence and unrest was sufficient to meet the *Tinker* substantial disruption standard.⁹⁰ *Tinker* involved a school’s attempt to prohibit a protest of the Vietnam War, an immensely controversial subject at that time, in order to avoid a potentially inflammatory situation.⁹¹ Nevertheless, the court in *Tinker* required school officials to have more than just a general apprehension of violence.⁹² The majority opinion in *Cuff IV* did reference the potential that other students may resort to violence if this speech were left unchecked and also additional concerns that local parents may have about school safety.⁹³ Although concerns about violence and distress were certainly present in *Tinker*, they were not sufficient to support a prohibition of the speech in that case.⁹⁴ The majority’s opinion could be read to limit the expression of even core political speech upon any school official’s determination that such speech may negatively affect the school environment.⁹⁵

⁸⁶ *Cuff IV*, 677 F.3d at 114; *see also Ponce*, 508 F.3d at 772 (reasoning that school officials must be able “to react quickly and decisively” in order to address threats of violence at school).

⁸⁷ *Ponce*, 508 F.3d at 766–67, 772.

⁸⁸ *Id.* at 771–72; *see also Morse v. Frederick*, 551 U.S. 393, 408 (2007) (holding that “the governmental interest in stopping student drug abuse” allows schools to restrict “student expression that they reasonably regard as promoting illegal drug use”). The court in *Morse* made clear that it was not analyzing the student speech under *Tinker*. *See Morse*, 551 U.S. at 404–05.

⁸⁹ *See Tinker*, 393 U.S. at 508, 510 (articulating the limits of its standard by explaining that “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression”); *Cuff IV*, 677 F.3d at 114–15.

⁹⁰ *See Cuff IV*, 677 F.3d at 114–15.

⁹¹ *See Tinker*, 393 U.S. at 510 & n.4.

⁹² *Id.* at 508.

⁹³ *Cuff IV*, 677 F.3d at 114–15.

⁹⁴ *See Tinker*, 393 U.S. at 508, 509 n.3, 514.

⁹⁵ *See Cuff IV*, 677 F.3d at 114–15; *id.* at 120 (Pooler, J., dissenting).

The dissent, on the other hand, is more doctrinally consistent with *Tinker*.⁹⁶ The dissent's approach, however, may ultimately expose schools and students to a rising tide of violent speech and deprive them of the tools necessary to prevent tragic attacks like those that occurred at Columbine.⁹⁷

In applying the *Tinker* substantial disturbance test to the facts before them, the majority and dissent failed to balance the countervailing interests in free speech and promoting socially acceptable behavior.⁹⁸ The majority's interpretation of the *Tinker* standard undermines protections for student speech, leaving students subject to school administrators' determinations about the appropriate scope of discourse in schools.⁹⁹ Conversely, the dissent's interpretation may leave schools without the means to combat violent behavior among their students.¹⁰⁰

B. *The Fraser Standard: A Better Approach to Balance Student Speech and Safety*

Both the majority and dissent in *Cuff IV* failed to adequately protect students from the threat of violence and also ensure that students' speech is not unduly burdened by school administrators.¹⁰¹ The court overlooked an important tool in student First Amendment jurisprudence that would have provided a more appropriate solution to this problem.¹⁰² The standard the Supreme Court used in *Fraser* and its reasoning in *Morse* supports the notion that certain types of speech are less appropriate in the school environment given the countervailing interest of inculcating students with societal values.¹⁰³ This standard has been used to support prohibitions on other types of speech that otherwise may not have met the substantial disruption test and are unre-

⁹⁶ See *Tinker*, 393 U.S. at 509; *Cuff IV*, 677 F.3d at 120 (Pooler, J., dissenting).

⁹⁷ See *Cuff IV*, 677 F.3d at 119–22 (Pooler, J., dissenting); *Ponce*, 508 F.3d at 771–72.

⁹⁸ See *Fraser*, 478 U.S. at 681; *Tinker*, 393 U.S. at 511; *Cuff IV*, 677 F.3d at 113–15; *Cuff IV*, 677 F.3d at 120 (Pooler, J., dissenting).

⁹⁹ See *Tinker*, 393 U.S. at 511; *Cuff IV*, 677 F.3d at 114–15; *Cuff IV*, 677 F.3d at 119–22 (Pooler, J., dissenting); *Ponce*, 508 F.3d at 771–72.

¹⁰⁰ See *Tinker*, 393 U.S. at 511; *Cuff IV*, 677 F.3d at 114–15; *Cuff IV*, 677 F.3d at 119–22 (Pooler, J., dissenting); *Ponce*, 508 F.3d at 771–72.

¹⁰¹ See *Tinker*, 393 U.S. at 509, 511; *Cuff IV*, 677 F.3d at 114–15; *Cuff IV*, 677 F.3d at 119–22 (Pooler, J., dissenting); *Ponce*, 508 F.3d at 771–72.

¹⁰² See *Morse*, 551 U.S. at 405, 408; *Fraser*, 478 U.S. at 681, 683; *Cuff IV*, 677 F.3d at 113; *Cuff IV*, 677 F.3d at 118–19 (Pooler, J., dissenting).

¹⁰³ See *Morse*, 551 U.S. at 405, 408; *Fraser*, 478 U.S. at 681, 683.

stricted outside of the school environment, such as “vulgar and lewd” statements or those supporting drug use.¹⁰⁴

The *Fraser* analysis is applicable to the violent speech in this case.¹⁰⁵ The First Amendment has historically protected violent speech less than other forms of speech.¹⁰⁶ Additionally, the court in *Cuff IV* properly alluded to the societal interest in discouraging violent behavior.¹⁰⁷ Furthermore courts, through a *Fraser*-type analysis, have previously provided lesser protection to violent student speech in order to support its prohibition.¹⁰⁸ Doing so in this case would have given school administrators the tools necessary to protect students and the classroom environment without undermining the important protections for speech that *Tinker* offers.¹⁰⁹ Protection of speech within public schools ensures that schools do not become “enclaves of totalitarianism” in which students are “confined to the expression of those sentiments that are officially approved.”¹¹⁰ At the same time, this concern must be balanced against the school’s role in ensuring both that students are safe, and that they learn the bounds of socially acceptable behavior.¹¹¹

CONCLUSION

Although courts usually cite *Tinker v. Des Moines Independent Community School District* when assessing First Amendment rights in the school environment, the majority and dissent in *Cuff ex rel. B.C. v. Valley Central School District* erred in doing so. Given the lesser protections for violent speech and the societal interest in discouraging violent behavior, the court could have provided schools with more effective tools to prevent violent behavior while simultaneously protecting student speech. This could have been accomplished by applying the standard the Supreme Court laid out in *Bethel School District Number 403 v. Fraser*. Such an approach would protect students from violent behavior at

¹⁰⁴ *Fraser*, 478 U.S. at 681, 683, 685; see *Morse*, 551 U.S. at 405, 408.

¹⁰⁵ See *Fraser*, 478 U.S. at 681, 683; *Cuff IV*, 677 F.3d at 111, 114–15; *Cuff IV*, 677 F.3d at 120 (Pooler, J., dissenting).

¹⁰⁶ See, e.g., *Watts*, 394 U.S. at 707 (“What is a threat must be distinguished from what is constitutionally protected speech.”); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (holding that fighting words are not protected by the First Amendment).

¹⁰⁷ See *Cuff IV*, 677 F.3d at 114–15 (Pooler, J., dissenting).

¹⁰⁸ See *Ponce*, 508 F.3d at 771–72.

¹⁰⁹ See *Fraser*, 478 U.S. at 681; *Tinker*, 393 U.S. at 511; *Cuff IV*, 677 F.3d at 113–15; *Cuff IV*, 677 F.3d at 119–22 (Pooler, J., dissenting); *Ponce*, 508 F.3d at 771–72.

¹¹⁰ *Tinker*, 393 U.S. at 511.

¹¹¹ *Fraser*, 478 U.S. at 681; *Cuff IV*, 677 F.3d at 114; *Ponce*, 508 F.3d at 771–72.

school and also prevent the suppression of their First Amendment speech rights by school administrators.

