

STATE OF WISCONSIN  
IN THE SUPREME COURT

No. 99-1767-FT

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In the interest of Douglas D.,  
A Person under the Age of 17,

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

DOUGLAS D.,

Respondent-Appellant-Petitioner.

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On Review Of A Decision Of the Court of Appeals Affirming  
A Judgment Entered In The Oconto County Circuit Court,  
The Hon. Richard D. Delforge Presiding

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FOR YOUTH LAW IN SUPPORT OF DOUGLAS D.

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## I. INTEREST OF *AMICI*

The Juvenile Law Center (“JLC”) is a private, non-profit public interest law firm that has represented children since 1975 in cases involving Pennsylvania’s child welfare, juvenile justice, mental health and public health systems. JLC has worked to ensure, *inter alia*, that children’s constitutional and statutory rights are rigorously enforced throughout these systems.

The National Center for Youth Law (“NCYL”) is a private, non-profit legal organization devoted to improving the lives of poor children in the United States. For more than 25 years, NCYL has provided support services to child advocates nationwide and direct representation in cases involving child welfare, public benefits for children and their families, legal issues involving child and adolescent health, fair housing for families with children, and juvenile justice.

## II. SUMMARY OF ARGUMENT<sup>1</sup>

Schools are among the safest places for our children to be. Yet, driven by the *misperception* that school violence is on the rise, school officials, legislators, law enforcement and the courts are increasingly taking on the issue of school safety in a heavy-handed manner. However, punitive measures, administered

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*Amici* adopt the Statement of the Case as set forth in Appellant Douglas D.’s brief.

without judgment or balance, as evidenced in “zero tolerance”<sup>2</sup> policies, criminalize minor transgressions and expose our children to a juvenile justice system ill-suited to deal with youthful indiscretions.

### III. ARGUMENT

A. **The perception that schools are increasingly violent and that our children and teachers are not safe is a misconception; the evidence shows that schools are among the safest places to be.**

“America’s schools are among the safest places to be on a day-to-day basis.” Richard W. Riley & Janet Reno, Introductory Letter to U.S. Dept. of Educ. & U.S. Dept. of Just., *Early Warning, Timely Response: A Guide to Safe Schools* (Aug. 1998) (<[www.ed.gov/offices/OSERS/OSEP/earlywarn.html](http://www.ed.gov/offices/OSERS/OSEP/earlywarn.html)>) [hereafter “DOE/DOJ, *Early Warning, Timely Response*”]. By virtually every measure, all types of school crimes are declining. School-associated violent deaths in 1998-99 showed a 40 percent decline from the previous year and 26 percent drop from the average for the previous six years. *School Associated Violent Deaths*, Westlake Village, CA: The National School Safety Center (Aug. 1999). Between 1993 and 1997, student reports of physical fights on and off school grounds decreased, as

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“Zero-tolerance” refers to those policies that “punish all offenses severely, no matter how minor ....” Russ Skiba & Reece Patterson, *The Dark Side of Zero Tolerance: Can Punishment Lead to Safe Schools?*, at 1 of 12 (Jan. 1999) (<[www.pdkintl.org/kappan/kski9901.htm](http://www.pdkintl.org/kappan/kski9901.htm)>) [hereafter “Skiba, *Dark Side*”].

did the number of students reported as having brought a gun to school. Nancy D. Brener, et. al., *Recent Trends in Violence Related Behaviors Among High School Students*, 2112 JAMA (1999). During this same period, non-fatal school crimes in general have decreased: reported school crimes decreased 29 percent; serious violent crimes, 34 percent; violent crimes, 27 percent; and thefts, 29 percent. P. Kaufman, et al., *Indicators of School Crime and Safety, 1999*, Washington, DC: U.S. Depts. of Education and Justice (1999). More broadly, there has been a continuing decline in the rate and number of youth arrested for serious offenses. U.S. Dept. of Justice & Fed. Bureau of Invest., *Crime in the United States: Uniform Crime Reports*, Washington, DC: U.S. Dept. of Justice & Fed. Bureau of Investigation (1998, 1993). Juvenile homicide arrests, in particular, have dropped 56 percent from 1993 through 1998. *Id.* All totaled, there has been a 30 percent drop in the total juvenile crime rate. *Id.*<sup>3</sup>

By way of comparison, over 98 percent of the children who die each year from gunfire were shot and killed away from school. Elizabeth Donohue, et al., *School Housing Hype: School Shootings and the Real Risks Kids Face in America*, in Justice Policy Inst., Policy Report 4 (1998). One study, moreover,

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Wisconsin schools reflect these national trends. See Wisconsin Depts. of Justice & Public Instruction, *Wisconsin Safe Schools Task Force Final Report – November 1999*, at 4 of 14 Madison, WI: Wisconsin Depts. of Justice & Public Instruction (Nov. 1999) (<[www.doj.state.wi.us/ssreport/recom.htm](http://www.doj.state.wi.us/ssreport/recom.htm)>).



estimated that over 10 percent of U.S. children are victims every year of a “severe violent act” at the hand of their parents, K.A. Dodge, et al., *Mechanisms in the cycle of violence*, 250 *Science* 1678-83 (Dec. 21, 1990); yet only one in one-thousand (or 0.1 percent of all children) were victimized by serious violent crime at school. U.S. Depts. of Education & Justice, *School Safety: 1999 Annual Report on School Safety* 3-4, Washington, DC: U.S. Depts. of Education & Justice (1999) [hereafter “DOE/DOJ, 1999 Annual Report”].

These statistics notwithstanding, Americans increasingly perceive our schools as less safe.<sup>4</sup> There is one in two million chance of being killed in schools, yet polls suggest that almost three-quarters of Americans think it is “likely” that a shooting will occur in their schools. Kim Brooks, et. al., *School House Hype: Two Years Later*, Washington, DC: Justice Policy Institute, Covington, KY: Children's Law Center (April 2000) [hereafter “Brooks, *School House Hype*”], at 6, citing to *USA Today/CNN/Gallup Poll Results*, April 21, 1999. There has been a 30 percent drop in youth crime, but almost two-thirds of Americans think it is on the rise. *Id.*, Brooks, *School House Hype*, at 9.

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In this case, the State expressly invokes the recent specter of school shootings. See Brief of Petitioner-Respondent, State of Wisconsin, at 23-25. See also *In the Interest of A.S.*, \_\_\_ N.W.2d \_\_\_, 2000 WL 233125 (Wis. App. 2000), slip op. at 9 (court observes that juvenile's actions in that case occurred in a context of “extreme violence in our public schools,” and that there is “a specter of violence that currently troubles our public schools”)

A number of factors may account for this gap between perception and reality. First, although school-associated violent deaths are on the decline, the number of multiple victim homicides has increased, DOE/DOJ, *1999 Annual Report*, at 3, thereby drawing more intense media attention. Another explanation may be due to aggressive surveillance-type efforts to make schools safer. One recent study suggests that “security-focused” schools (i.e., those which emphasized security through metal detectors, locked doors, surveillance, and personal searches), create an “unwelcoming, almost jail-like, heavily scrutinized environment” that make children *feel* less safe. Matthew J. Mayer & Peter E. Leone, *A Structural Analysis of School Violence and Disruption: Implications for Creating Safer Schools*, 22 *Educ. and Treatment of Children* (Aug. 1999). Also, violent incidents in suburban schools has made what heretofore was perceived as an urban problem for poor and minority kids a national issue for all parents.

The mass media plays a pivotal role in educating the public about violence in our schools.<sup>5</sup> Understandably, the media has closely covered school shootings. However, media coverage generally has not sought to place those events in perspective. Ira M. Schwartz, *School Bells, Death Knells, and Body Counts: No Apolcalypse Now*, 37 *Hous. L. Rev.* 1, 4 (2000) [hereafter “Schwartz, *School*

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See Lori Dorfman, et al., *Youth and Violence on Local Television News in California*, 87 *Am. J. of Public Health* 1311-16 (Aug. 1997).

Bells”]. As a result, the media has “render[ed] Americans more fearful of their kids than they ought to be.” Brooks, *School House Hype*, at 31.

**B. The misconception about safety in our schools has led schools to deal with even minor transgressions in an increasingly heavy-handed manner, turning our children into criminals.**

Misconceptions regarding school violence, bolstered by a few hyper-publicized tragedies, are transforming school safety policies at a local, state and national level. From “profiling” – whereby students are targeted based on a list of characteristics deemed predictive of a tendency toward violence<sup>6</sup> – to beefed up security measures such as metal detectors and video surveillance, to the use of “zero-tolerance” policies, which impose swift and severe sanctions for a variety of behavior, schools nationwide are more and more adopting a bunker mentality.

Although these reactive policies initially addressed gun and drug related offenses, many now target behaviors that ordinarily would be considered minor transgressions. Gone is the day where “the playground scrap or kickball tussle [is] deemed a rite of passage best settled by a teacher who orders the combatants to

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See Francis X. Clines, *Program Spots Dangerous Youths; Columbine Spurs Student Profiling System*, Dayton Daily News, Oct. 24, 1999, at 4A; Andrea Billups, *FBI Teaches Ways to Prevent Violence: Schools Search for Solutions*, The Washington Times, Sept. 19, 1999. One Illinois school’s profiling checklist includes “use of abusive language,” “cruelty to animals,” and “writings reflecting an interest in the ‘dark side of life’.” Brigitte Greenberg, Associated Press, *‘Student Profiling’ Launched to Combat Violence*, The Capital Times, Sept. 7, 1999.

their corners, hears out the warring sides and demands apologies and a handshake.” Dirk Johnson, *Schools Are Cracking Down On Misconduct*, New York Times, Dec. 1, 1999, at A1 [hereafter “Johnson, *Cracking Down*”]. Instead, heavy-handed measures, administered without discretion or judgment, rule the day. From the third-grader who is expelled for twisting the finger of a girl he said was “saying bad thing in line” and getting into a scuffle on the playground during tetherball, Skiba, *Dark Side*, at 6 of 12, to the nine-year-old who is suspended for bringing to school a manicure kit with a one-inch knife, *id.* at 4 of 12, examples of extreme reactions to trivial wrongdoing abound.

One highly publicized incident involved a scenario similar to the present case. Last year, in Denton, Texas, a seventh-grade English class was assigned the task of writing a Halloween horror story. See Brenda Rodriguez & Annette Reynolds, *Boy freed after story lands him in cell*, Dallas Morning News, Nov. 3, 1999 (<[www.dallasnews.com/metro/1103met999jailboy.htm](http://www.dallasnews.com/metro/1103met999jailboy.htm)>). Thirteen-year-old Christopher Beamon completed the assignment and received a perfect grade, plus extra credit for reading his story aloud in class. The story described shooting a teacher and two classmates, all of whom were referred to in the story by name. Concerned that Christopher might cause some harm, the parents of the students named in the essay called the school’s principal. School officials notified the juvenile authorities, and the sheriff’s deputies arrived to remove Christopher from

school. Ultimately, the charges were dropped, but not before Christopher spent five days in juvenile detention.<sup>7</sup>

As many of these examples demonstrate, a particularly troubling aspect of rigid “get tough” approaches is that they are turning our children into criminals, with the responsibility for dealing with problem behavior in schools now being handed off to an increasingly punitive juvenile justice system. The loss of discretion and “on-the-spot” resolution of conflict can mean a lost opportunity to teach children about respect and a missed chance to inspire their trust of authority figures. *See Johnson, Cracking Down*, at A20. It also means, more fundamentally, that schools are less and less a positive socializing force in students’ lives, and more and more appendages of the juvenile justice system. Criminalizing youthful misbehavior in schools may have been less of a problem when juvenile courts adhered to a rehabilitative model. However, as explained more fully below, juvenile courts are ill-suited to address behavior ordinarily handled by the schools themselves.

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*See also* Schwartz, *School Bells*, at 16, citing to Nadine Strossen, *My So-Called Rights*, IntellectualCapital.Com (Sept. 30, 1999) (describing phone calls in “post-Littleton backlash” related to suspensions and expulsions for self-expression).

**C. A juvenile court that has become punishment oriented may do more harm than good by adjudicating delinquent a 13-year-old child based on the content of his creative writing assignment.**

In the 1990s, virtually every state, including Wisconsin, amended its juvenile code to de-emphasize the rehabilitation of youth in favor of accountability and public safety. These changes have dangerous implications and consequences for children like Douglas, who engage in minor misbehavior. The type of punitive intervention favored by today's juvenile court is not likely to improve the lives of affected children, and may actually disadvantage them.

**1. Recent amendments to Wisconsin's Juvenile Act have discarded the protective features of the historic juvenile court.**

In 1996, Wisconsin's Legislature adopted a series of amendments to the state's "Children's Code," which significantly altered the operation and purpose of Wisconsin's juvenile courts. Act of Dec. 4, 1995, Wis. Act 77 (codified as Wis. Stat. § 938 et al.). These amendments reflect the Legislature's belief that "although society does not yet classify juveniles' actions as criminal, *they are 'almost there.'*" See Juvenile Justice Study Committee, *Juvenile Justice: A Wisconsin Blueprint for Change* (March 1995), at 30 (emphasis added). By taking the delinquency jurisdiction from the Children's Code – where jurisdiction over neglected and dependent children remain – the Juvenile Justice Code breaks with

certain bedrock principles of the original juvenile court reformers: that there was a continuity between neglected and delinquent children; that often the delinquent children came from a deprived background; and that it made sense to handle them in the same system. Today, Wisconsin's juvenile court imposes criminal-like responsibility and accountability on children, as it "punishes" them for their "crimes." It stresses "protect[ion] of the community" and "accountability". Wis. Stat. § 938.01. Moreover, in telling fashion, it erodes the confidentiality provisions applicable to children who commit offenses, *see id.* at §§ 938.396(1) - (8), "a protection which has long been at the heart of the juvenile justice system in this country." Brooks, *School House Hype*, at 27.

**2. Douglas D. was improperly referred to the juvenile court.**

Despite juvenile courts' historic discourse of "compassionate care" and "individualized treatment," there has long been a disjunction between rehabilitative rhetoric and punitive reality. The criminalization of the juvenile court is all the more troublesome as its docket increasingly involves allegations of non-violent, non-serious misconduct – like that at issue here – which could easily be addressed in other ways.

Additionally, the apparent existence of effective treatment for addressing problem behavior does not justify the punishment meted out to Douglas here. In the absence of a record of past violent or aggressive behavior or severe emotional

disturbance, the fictional depiction of violence penned by Douglas is not by itself alarming. To the contrary, drawings or stories by adolescents with violent content are relatively “normal” forms of expression, which professionals view as a form of sublimation – channeling anger into some form of healthy expression that is acceptable to society. See *The Psychoanalytic Study of the Child*, Vol. 33, New Haven, CT: Yale New Haven Press (1978); Levick, *They Could Not Talk and So They Drew*, at 17, 63 (Chas. C. Thomas, 1983). Moreover, as the courts have consistently held, threats must be placed and considered in light of their entire factual context. *United States v. Gilbert*, 884 F. 2d 454 (9th Cir.1989). Nothing in the record would support a presumption that this fictional writing was – or was intended to be – anything more than a fanciful story about a young boy who “imagines” a way to get back at his “mean” teacher.

In short, a punishment oriented juvenile court is not the place to respond to the sort of behavior seen here. On the other hand, school boards and administrators have long been empowered with the authority and duty to regulate school behavior in order to protect the interests of the student body and the school. Douglas’s conduct is school-based behavior that schools *should* handle. Reasonable sanctions can be imposed if students do not adhere to legitimate



conduct regulations.<sup>8</sup>

Indeed, there are growing indications that school-based interventions are effective in curbing aggression and violence in schools. *See* DOE/DOJ, 1999 *Annual Report*, at 31-50 (model violence prevention, substance abuse prevention, and problem behavior prevention programs). As noted in a joint guide issued by the U.S. Departments of Justice and Education, safe schools require “having in place many preventive measures for children’s mental and emotional problems – as well as a comprehensive approach to early identification of all warning signs that might lead to violence toward self or others.” DOE/DOJ, *Early Warning, Timely Response*, at 2. Yet it is critical to recognize that “over-labeling [and] ... stigmatizing children in a cursory way that leads to overreaction is harmful.” *Id.* at Introductory Letter. While an over-representation of violence directed at specific individuals consistently over time, for example, “may signal emotional problems and the potential for violence,” *id.* at 9, there is a risk in misdiagnosing such signs. Accordingly, the guide notes “it is important to seek the guidance of a qualified professional – such as a school psychologist, counselor or other mental health

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There are risks, however, associated with sanctioning children with suspension and expulsion. Some research shows an association between exclusionary discipline and delinquency, substance abuse, and school drop-out. Brian Bumbarger, *School Violence: Disciplinary Exclusion, Prevention and Alternatives* 3, State Park, PA: Universities Children’s Policy Partnership (Univ. of Pittsburg & Pennsylvania State Univ.) (March 1999). Moreover, under a public health model, poor “school bonding” is a risk factor for multiple problems, including violence, substance abuse, delinquency, and drop-out. *Id.*

specialist – to determine ... [the] meaning of [violent writings or drawings.]” *Id.*

Not every expression of anger is a cause for alarm or call for help.

Certainly, schools must be attuned to those behaviors that might be a prelude to violence, including the type of indicator seen in this case, i.e. the expression of violence in writing. However, schools’ efforts in this regard should be part of an overall strategy aimed at helping students learn how to manage conflict appropriately; creating a culture of mutual respect; and providing services and support to children in need. “Get tough” measures that criminalize our youth and expose them to an increasingly punitive juvenile justice system undermine not only the role that schools can have in promoting citizenry and responsibility among our youth, but also, at bottom, threaten the very notion of education itself.

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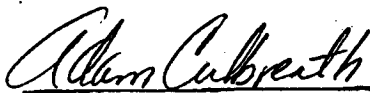
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#### IV. CONCLUSION

There are times when school referrals to police and the courts is appropriate and necessary to promote safety and rehabilitation. However, efforts to ensure that schools are safe cannot succeed if they are based on fiction and not fact, and if there is "a cloud of fear over every student in every school." There are occasions when a civil society must curtail expression to protect civility and safety, but this is not one of those cases.

Dated this 6th day of June, 2000.

Respectfully submitted,

  
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#### CERTIFICATION

I certify that this brief meets the requirements of the Rules of Appellate Procedure for a document printed in a proportional font. The brief contains 2,993 words.

  
Adam Culbreath *by ELS*

  
Carol W. Medaris

PROOF OF SERVICE BY MAIL

I, the undersigned, hereby declare that I am employed in the City of Oakland, California. I am over the age of eighteen and not a party to the within entitled cause. My business address is 405 -14<sup>th</sup> Street, 15<sup>th</sup> Floor, Oakland, California 94612-2701. I am familiar with the firm's practice for collection and processing of mail, which provides that mail be deposited within the U.S. Postal Service on the same day in the ordinary course of business.

On June 6, 2000, I served the attached:

NON-PARTY BRIEF OF JUVENILE LAW CENTER AND NATIONAL CENTER FOR YOUTH LAW IN SUPPORT OF DOUGLAS D.

in said cause, by placing three true copies thereof enclosed in a prepaid sealed envelope addressed to:

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for delivery, deposit, and collection to the U.S. Postal Service in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Oakland, California on June 6, 2000.

  
Ethel L. Oden-Brown