

Social Networking and Student Safety: Balancing Student First Amendment Rights and Disciplining Threatening Speech

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ABSTRACT

As the use of social media increases and becomes an integral part of nearly every student's life, problems arise when student expression on these sites turns into threats against the school or other students, implicating both student safety and the speaker's right to free speech. Facing a lack of Supreme Court precedent, school officials need guidance on whether and how to take action when a student makes threats on a social network—how to prevent any danger at school while respecting the student's right to free speech. This note develops an approach that combines the Supreme Court's *Watts* "true threat" test and its *Tinker* "substantial disruption" test. It provides guidance by arguing that schools should be free to take liberal action on student speech to prevent danger at school, and lays out a model procedure. Schools that follow this procedure can respond to threatening student speech without infringing a student's First Amendment rights.

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“[W]e live in a time when school violence is an unfortunate reality that educators must confront on an all too frequent basis. The recent spate of school shootings have put our nation on edge and have focused attention on what school officials, law enforcement and others can do or could have done to prevent these kinds of tragedies.”¹

I. INTRODUCTION

Social networking through sites like Facebook and MySpace has revolutionized how adults and students connect with others in their community, and allow students to connect with others in their school as well as students at other schools. Additionally, these sites allow users to post comments on other people’s sites about their photos and on their “walls,” send messages to each other, and invite people to social events. Not surprisingly, students occasionally exchange less savory comments, like threats, over these sites—comments that could raise concerns about student and campus safety.

The focus of this note is what schools can, and should be able to do, through discipline or other action, when threatening speech or activity appears on a student’s social network profile or between students on such a network. There are obvious constitutional issues with giving a public school such abilities, as monitoring or acting on students’ speech could infringe their First Amendment rights and punishing them for that speech could pose a due process issue. Fortunately, for school administrators, the Supreme Court has made due process an easy hurdle for schools to clear in *Goss v. Lopez*, which upheld school suspensions as a “necessary tool to maintain order.”² The Court added that the school must (1) give students written or oral notification of the charges against them and (2) explain the evidence backing the charges, as well as (3) give them the ability to provide an explanation for their actions.³ While this case has been distinguished many times, it has also been cited positively over the past thirty-five years, and sets a clear standard that enables schools to comply with due process requirements.⁴ As a result, I will not focus on due process

¹ *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 987 (9th Cir. 2001).

² *Goss v. Lopez*, 419 U.S. 565, 580 (1975).

³ *Id.* at 574, 581.

⁴ *See A.W. ex rel. Wilson v. Fairfax Cnty. Sch. Bd.*, 548 F. Supp. 2d 219, 223 (E.D. Va. 2008).

issues that may arise in disciplining students for their threatening speech online.

On the other hand, schools lack legal guidance on how to properly assess a student's threatening online speech as current legislation and case law does not provide a determinative approach to investigating or punishing such speech.⁵ When it comes to students, their safety and the overall security of the campus should trump any free speech concerns, and many lower courts have recently taken that stance in a number of cases involving threatening student speech on social networks, both in secondary schools and universities.⁶ These cases illustrate that courts have the tools to determine if a school's disciplinary action was constitutional under the First Amendment, and often uphold the school's action if it was reasonable under the circumstances to protect the school and students.⁷ However, despite these cases, schools nationwide still lack definitive guidance to create a procedure that would allow its officials to take decisive action on threatening speech and avoid any violation of a student's right to free speech.

This note will argue that schools should have the ability to act liberally when a student's speech on a social network presents a threat to school or student safety, and that the school should be able to intervene to prevent harm and discipline the student, if necessary. The type of activity that schools could act on would include threats against a student or teacher and other indications of violent action, even if it were to the student himself. This note will focus on what public primary and secondary schools (i.e., kindergarten through high school) could do in such circumstances, and will lay out a model procedure to deal with these situations in those school settings.

The discussion will proceed in five parts. Part II discusses student use of social networking, generally. Part III will then discuss the four Supreme Court cases on student speech, which provides a foundation for determining when and how a school may discipline student speech. Part IV discusses threatening student speech, the true threat doctrine as

⁵ Christi Cassel, *Keep Out of MySpace!: Protecting Students from Unconstitutional Suspensions and Expulsions*, 49 WM. & MARY L. REV. 643, 650–51 (2007).

⁶ See, e.g., *D.J.M. v. Hannibal Sch. Dist. No. 60*, 647 F.3d 754, 764–65 (8th Cir. 2011); *Wisniewski ex rel. Wisniewski v. Bd. of Educ. Weedport Cent. Sch. Dist.* 494 F.3d 34, 39–40 (2d Cir. 2007); *Tatro v. Univ. of Minn.*, 800 N.W.2d 811, 814–15 (Minn. Ct. App. 2011).

⁷ *D.J.M.*, 647 F.3d at 764–65; *Wisniewski*, 494 F.3d. at 39–40; *Tatro*, 800 N.W.2d at 814–15.

established by the Supreme Court in *Watts v. United States*,⁸ as well as cases that have dealt with threatening student speech. Part IV offers a model procedure on how schools can act on a student's social networking activity that poses a threat to students and campus. Finally, Part V provides the note's conclusion that student speech online should be protected unless it presents a threat of serious disruption or violence at school, in which case schools should have the ability to take swift action to prevent any harm from befalling the school, students, or educators.

II. STUDENTS AND SOCIAL NETWORKING

Teens and young adults, especially those in school, have led the way in the growing use of online social networking, and as social networking sites have evolved and the number of users has grown, concerns about student safety and privacy in their use, have correspondingly increased. Recent statistics show that the internet and social networking are a part of a vast majority of all students' daily lives. According to a recent Pew Research Center project, approximately 93% of teens ages 12–17 go online, and 73% of those users are on social networking sites.⁹ Additionally, of adults ages 18–33, which would encompass the average college student, 95% go online and 83% of them use social networking sites.¹⁰ This near ubiquitous use of the internet and increasing use of social networking sites by teens¹¹ and adults¹² inevitably leads to questions about internet and social network use and their impact on educational institutions.

The major sites that students use today are MySpace and Facebook.¹³ MySpace, founded in 2003, was an immediate success, and now provides anyone with an email address above the age of

⁸ *Watts v. United States*, 394 U.S. 705 (1969).

⁹ Kathryn Zickuhr, *Generations 2010*, PEW INTERNET & AM. LIFE PROJECT, 9 (Dec. 16, 2010), available at <http://pewinternet.org/Reports/2010/Generations-2010.aspx>.

¹⁰ *Id.*

¹¹ Amanda Lenhart et al., *Social Media & Mobile Internet Use Among Teens and Young Adults*, PEW INTERNET & AMERICAN LIFE PROJECT, 2 (Feb. 3, 2010) available at <http://pewinternet.org/Reports/2010/Social-Media-and-Young-Adults.aspx> (the 2006 PEW study explains that 55% of teens used social networking sites, but in 2009, it was up to 73%).

¹² *Id.* at 17 (adults as a whole, aged 18+, have increased their usage of social networking sites from 8% in 2005 to 42% in Sept. of 2009, with adults 18–33 constituting the majority of those users).

¹³ *Id.* at 18.

thirteen, access to an online global network.¹⁴ MySpace is a social networking site dedicated to connecting not only people to people, but also people to the media and entertainment that they enjoy—hosting band websites with streaming music, pictures, movies, and other media.¹⁵

Facebook was founded a year later, and has a similar goal to MySpace, but is more focused on connecting people to people, with its stated mission of “giving people the power to share and make the world more open and connected.”¹⁶ In 2008, Facebook overtook MySpace as the most popular social networking site,¹⁷ but both sites have millions of users; as of January 2011, Facebook boasts over 600 million users¹⁸ with MySpace’s numbers dropping, as a result of users switching to Facebook, from over 100 million to 63 million between January and February 2011, alone.¹⁹

With these impressive numbers and access to both sites available not only via computer, but also through mobile devices, it is clear that students nearly always have access to their social networks. This means that even if a school blocks the sites on its networks, it may be possible for the students to access the sites in other ways, and they therefore could send and access messages, threatening or otherwise, both during school and afterward. With the recent increase of startling incidents of cyber-bullying and resulting violence to students²⁰ and teachers,²¹ awareness of these problems, especially those on social

¹⁴ MYSPACE.COM, *Myspace Safety*, <http://www.myspace.com/help/safety/parents> (last visited Mar. 22, 2011).

¹⁵ See MYSPACE.COM, *About Us*, <http://www.myspace.com/help/AboutUs> (last visited Mar. 22, 2011).

¹⁶ See FACEBOOK.COM, <http://www.facebook.com/facebook?sk=info> (last visited Mar. 22, 2011).

¹⁷ Geoffrey Mack, *Facebook Overtakes MySpace*, ALEXA BLOG (May 7, 2008, 3:52 PM), http://blog.alexa.com/2008/05/facebook-overtakes-myspace_07.html.

¹⁸ Nicolas Carlson, *Facebook Has More Than 600 Million Users, Goldman Tells Clients*, BUSINESS INSIDER (Jan. 5, 2011, 1:45 PM), <http://www.businessinsider.com/facebook-has-more-than-600-million-users-goldman-tells-clients-2011-1>.

¹⁹ Desire Athow, *10 Million Users Leave MySpace Within a Month*, ITPORTAL.COM (Mar. 27, 2011), <http://www.itproportal.com/2011/03/27/10-million-users-leave-myspace-within-month/>.

²⁰ DEPT. OF EDUC., INDICATORS OF SCHOOL CRIME AND SAFETY: 2010, 42–44 (2010), <http://www.edpubs.gov/document/ed005161p.pdf?ck=662> (noting that this study reports that from the most recent data in 2007, 32% of students of students aged 12–18 were victims of cyber-bullying of various degrees).

²¹ See generally Ruth Broster & Ken Brien, *Cyber-Bullying of Educators by Students: Evolving Legal and Policy Developments*, 20 EDUC. & L.J. 35 (2010) (discussing the nature and scope of cyber-bullying in schools against teachers by

networking sites, has made it apparent that there is a growing need for educators to have guidelines to enable them to act quickly and decisively to prevent any harm to the school or students.

So far, schools' attempts to discipline students for online, off-campus speech have met with mixed results, with courts sometimes upholding the school's actions, and other times finding them unconstitutional under the First Amendment.²² Schools and courts alike need a reasoned and definitive approach to deal with this issue, and in the public school system this will require a balance between, on the one hand, constitutional issues of free speech and due process and, on the other, school concerns about safety.

III. SOCIAL NETWORKING AND STUDENTS' FREE SPEECH

In cases involving threatening online student speech, lower courts, lacking guidance from the Supreme Court, have followed two lines of reasoning to decide whether the school's disciplinary act was appropriate. The first line is that the speech was a true threat and was thus unprotected speech under the holding of *Watts v. United States*.²³ The second line is that the speech caused a substantial disruption at school, and therefore the school was reasonable in taking action to discipline the student under the test set forth in *Tinker v. Des Moines Independent Community School District*.²⁴

While the Supreme Court has often stated that schools have a tremendous amount of freedom in regulating student activity while on campus, the Supreme Court has protected student expression in most cases. However, each of those cases has created certain exceptions, which allow a school to restrict a student's speech. Although student speech that rises to the level of a true threat is not protected under the First Amendment, the constitutional rights of students to free speech and due process are involved in any disciplinary action, and accordingly this section discusses what the Supreme Court has held on those rights.²⁵

students and legislation and policy being developed to address and protect educator's concerns about such activity).

²² Cassel, *supra* note 5, at 650–51; *see also* U.S. CONST. amend. I.

²³ *Watts v. United States*, 394 U.S. 705 (1969).

²⁴ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

²⁵ *Id.* at 581; *A.W. ex rel. Wilson v. Fairfax Cnty. Sch. Bd.*, 548 F. Supp. 2d 219, 223 (E.D. Va. 2008).

A. Supreme Court Holdings on Student Free Speech

One of the cornerstones of life in the United States is embodied in the Constitution's First Amendment declaration that "Congress shall make no law . . . abridging the freedom of speech. . . ." ²⁶ However, the necessity of schools to have control of large numbers of students often leads to controversy regarding how the school proceeds in disciplining a student for his or her speech. On some occasions, school disciplinary action has raised questions about whether out-of-school speech, if it has an impact on school safety, was lawfully disciplined. This section will discuss the Supreme Court guidelines on when a school can lawfully take disciplinary action that implicates a student's First Amendment rights.

The Supreme Court has addressed the issue of student free speech specifically in four seminal cases; however, none of these addressed the aspect of protecting student safety through the regulation of another's speech, nor have they addressed regulation of online speech. Despite that fact, the cases lay a foundation from which an assessment can be made as to whether a disciplinary action violates a student's First Amendment rights.

The most important of the Supreme Court cases on free speech, and most relevant for this note, was the first case dealing with student speech heard in the Supreme Court, *Tinker v. Des Moines Independent Community School District*. ²⁷ In this 1969 case, the Court held that the right to free speech extended to students in school. ²⁸ In *Tinker*, students sued over being suspended for wearing black armbands—symbols of their opposition to U.S. involvement in the war in Vietnam. The Court's decision in *Tinker* is far removed from the computer age, but its statement that "it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" is still relevant today for online student speech. ²⁹

Despite its clear support for First Amendment rights, *Tinker* did place two important limits on those rights for students. The court stated that even though the guarantee of free speech to a student extended into school, a school can discipline a student for speech that "materially and substantially interfere[s] with the requirements of

²⁶ U.S. CONST. amend. I.

²⁷ *Tinker*, 393 U.S. at 503.

²⁸ *Id.*

²⁹ *Id.* at 506.

appropriate discipline in the operation of the school”³⁰ or “impinge[s] upon the rights of other students,”³¹—in short, anything that “materially disrupts classwork or involves substantial disorder or invasion of the rights of others.”³² It is important to note that the court held that “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.”³³ The court did not find that the students’ symbolic speech would have interfered with the discipline or operation of the school, nor that it infringed on the rights of other students, and therefore found the school’s action violated the students’ right to free speech.³⁴

The test set forth by the Supreme Court is now commonly referred to as the “Tinker test,” and it is often applied by lower courts to cases involving student speech both on and off campus—and is one of the lines of reasoning followed by lower courts in cases involving threatening student speech. Therefore, it follows that if a student’s speech on a social networking site raises a legitimate concern for the safety of the school, a student, or a teacher, and thereby materially disrupts the operation of the school, then the school should be able to take disciplinary action to prevent any danger, even if that action that would otherwise violate a student’s free speech rights. This should be true even if the speech originated outside of school, as long as it had a substantial effect at school.

After *Tinker*, subsequent Supreme Court decisions found that certain other forms of school discipline did not infringe the student’s rights to free speech, but none of these cases provide clear guidance on how to deal with threatening speech outside of school. In *Bethel School District No. 403 v. Fraser*, the Court recognized that “the constitutional rights of students in the public schools ‘are not automatically coextensive with the rights of adults in other settings.’”³⁵ The Court held that “the First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent’s would undermine the school’s basic educational mission.”³⁶ In a second case, *Hazelwood School District v. Kuhlmeier*, the Supreme Court determined that a school could restrict student

³⁰ *Id.* at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

³¹ *Id.* at 509.

³² *Id.* at 513.

³³ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969).

³⁴ *Id.* at 514.

³⁵ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 340–42 (1985)).

³⁶ *Id.* at 685.

speech in a school's newspaper because the school would essentially be sponsoring the speech if it were allowed.³⁷ The Court created another exception in its most recent decision on student speech, *Morse v. Frederick*, more commonly called the "Bong Hits 4 Jesus" case. In this case, the Court held that a school could punish a student for out of school activity, at a school-approved event, but this holding was narrowly tailored to focus on the school's interest in restricting speech that promotes illegal drug use.³⁸ One commentator, and undoubtedly many others would agree, criticized this holding as a missed opportunity to clearly state whether a school could discipline off-campus speech,³⁹ and the failure to state this ability has caused difficulty in lower courts trying to deal with off-campus internet speech.

B. The Supreme Court's Holdings and Internet Speech

None of the cases heard by the Supreme Court on student speech spoke to expressions on the internet nor to student speech that would have an impact on student safety; however, these cases provide a foundation for approaching such speech by showing that exceptions have been found to *Tinker*. In summary, these four cases show that the test in *Tinker* is not the only test for analyzing a school's discipline of student speech, and that a student's constitutional rights, although protected in school, must be viewed "in light of the special characteristics of the school environment."⁴⁰ Speech can be restricted by the school at out-of-school, school-sponsored events without offending the First Amendment rights of the student if it: (1) has a material and substantial effect on the rights of the school or of other students; (2) is vulgar or lewd, inappropriate speech; (3) is the content of a newspaper or other school-sponsored speech and the school deems it inappropriate; or (4) is speech that promotes illegal drug use.⁴¹ If the trend of finding exceptions to *Tinker* continues, it is likely that the Court in the future may find another exception for schools that discipline a student for online speech that threatens school or student safety.

³⁷ *Hazelwood Sch. Dist v. Kuhlmeier*, 484 U.S. 260 (1988).

³⁸ *Morse v. Frederick*, 551 U.S. 393, 396–97 (2007).

³⁹ Mary-Rose Papandrea, *Dunwody Distinguished Lecture in Law: Article: Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1028–29 (2008).

⁴⁰ *Id.* at 405 (quoting *Tinker*, 393 U.S. at 506; citing *Fraser*, 478 U.S. at 682).

⁴¹ Diane Heckman, J.D., *Just Kidding: K-12 Students, Threats and First Amendment Freedom of Speech Protection*, 259 EDUC. LAW REP. 381, 383 (2010).

Building on the *Tinker* analysis appears to be the most common method in both Supreme Court and lower court cases where student speech is an issue. However, if the speech is threatening in nature, the Court's decision in *Watts v. United States* would provide an alternative line of reasoning under which schools could take action on student speech, even if it is online, on a social network.

IV. THREATENING SPEECH ON SOCIAL NETWORKS

Although schools should continue to be concerned about protecting students' right to free speech, in the aftermath of terrible school massacres like those at Columbine High School in 1999, Red Lake Senior High School in 2005, and Virginia Tech in 2007, concerns over student safety have increased, and as a result, schools should have an increased ability to take action on threatening speech to protect students. While these events are relatively rare, they are still tragic because they involve students. Even more unfortunate is finding out after, that events leading up to the incident indicated something was wrong with the eventual attacker, and students could have been saved if schools were able to act more freely on reports of threatening speech arising from sources like social networking sites and cyber-bullying. The following section discusses the "true threat" doctrine and its application to the school setting and to social networking, and proposes certain actions that schools should be able to take in response to such threats.

A. Unprotected Speech and *Watts*' "True Threat" Doctrine

While the First Amendment of the Constitution protects a wide range of speech, there are some categorical exceptions. These include: "(1) insurrectionary speech, (2) immediate danger speech, (3) fighting words, (4) threatening speech, (5) defamatory speech, and (6) obscene speech."⁴² Schools, therefore, have the legal authority to discipline these types of speech between students in school. The question for our purposes is whether and how that authority extends to threatening speech that occurs online by or between students on a social network.⁴³

⁴² *Id.* at 382.

⁴³ See Samantha Neiman & Jill DeVoe, *Crime, Violence, Discipline, and Safety in U.S. Public Schools: Findings From the School Survey on Crime and Safety: 2007-08* (NCES 2009-326), NAT'L CTR. FOR EDUC. STATISTICS, INST. OF EDUC. SCI., U.S. DEP'T OF EDUC. (May 2009) (showing that 39,600 schools reported 461,910 incidents of threats of a physical attack without a weapon, meaning in nearly 9.7 threats per student at the reporting schools).

The Supreme Court has yet to hear a case on a school's discipline of a student for threatening speech made against another, but the Court created a "true threat" doctrine in *Watts v. United States*, holding that speech that constitutes a "true threat" to an individual is not protected by the First Amendment.⁴⁴ In this case, the eighteen-year-old Robert Watts attended a rally in Washington D.C. in 1966 against the U.S. involvement in Vietnam.⁴⁵ Once the rally broke into smaller discussion groups, Watts voiced that he had been drafted and intended not to go, and he said that if they gave him a rifle "the first man I want to get in my sights is L.B.J."⁴⁶ It is unclear from the facts how or why Watts was arrested for this statement, but his apparent threat against the sitting President, Lyndon B. Johnson, was held by the trial and appellate court to be in violation of 18 U.S.C. § 871(a), which makes threatening the life of or threatening bodily harm on the President a felony.⁴⁷

In a per curiam opinion, the Supreme Court held that Watts had not made a true threat, and pointed out that Watts made this statement in a context where it was mere political hyperbole.⁴⁸ However, the decision made it clear that the form and context of the speech together, as well as the resulting reaction of those who heard the speech, are important factors in determining if there is a true threat.⁴⁹ The court also pointed out that there was a conditional nature to the threat, which was that Watts had to go to his draft physical, which he declared he would not do, and had to be given a rifle before the threat could even be carried out.⁵⁰ In sum, the true threat doctrine requires the court to look at "the reaction of the listener, the conditional nature of the threat, the extent to which one's speech is mere political hyperbole, and the overall context and background circumstances of the expression."⁵¹

⁴⁴ *Watts v. United States*, 394 U.S. 705, 707–08 (1969).

⁴⁵ *Id.* at 706.

⁴⁶ *Id.* at 706.

⁴⁷ 18 U.S.C. § 871(a) (2011) (Reads in part: "Whoever knowingly and willfully. . .[makes] any threat to take the life of or to inflict bodily harm upon the President of the United States . . . shall be fined not more than \$1,000 or imprisoned not more than five years, or both.").

⁴⁸ *Watts*, 394 U.S. at 705.

⁴⁹ *Id.* at 706.

⁵⁰ *Id.*

⁵¹ Richard V. Blystone, *School Speech v. School Safety: In the Aftermath of Violence on School Campuses Throughout This Nation, How Should School Officials Respond to Threatening Student Expression?*, 2007 B.Y.U. EDUC. & L.J. 199, 205 (2007). See also *Watts*, 394 U.S. at 707–08.

B. Applying *Watts* to Student Speech

Applying the *Watts* factors to student speech is more complex in some ways, and easier in others, than applying it to facts like in the principal case of *Watts*. The application of *Watts*, to threatening student speech both online and in school could be complicated by the fact that the students are children and young adults, and may not fully grasp the meaning of threatening words they are saying. However, assessment of the threat as a school administrator might be made easier by the fact that he or she would likely have more information about a student and the community before acting on a threat, and would not be acting on the threat alone.⁵² Richard Blystone, in an article about school safety and speech, laid out some of these additional factors:

Factors that school officials might consider before acting on a perceived threat include the age and maturity of the student speaker, his or her past academic record, whether the expression was directly communicated to the object of the threat or some third person, whether the speaker intended to carry out his or her threat, other instances of school violence in the community, and whether the recipient's response to the expression was reasonable.⁵³

These additional factors may add some complexity to the decision of whether a threat is true threat by requiring more to consider when deciding whether to take action, but it would also give the decision to act a stronger backing if the action taken by an administrator would implicate a student's free speech rights.

Even with the additional factors that schools and courts should look at when dealing with a student threat; courts have been successful in applying the *Watts* factors to in-school speech on a number of occasions.⁵⁴ In one such case, *Lovell v. Poway Unified School District*, Sarah Lovell, a fifteen-year-old high school student at California's Mt. Carmel High School, allegedly threatened to shoot her guidance counselor if the latter did not change her class schedule.⁵⁵ This threat came after a frustrating day for Lovell of being sent between offices trying to get her schedule straight, and when the counselor said she may not be able to make the final changes because the classes were

⁵² Blystone, *supra* note 51, at 205.

⁵³ *Id.*

⁵⁴ *See, e.g., Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367 (9th Cir. 1995); *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608 (5th Cir. 2004). *See also* Cassel, *supra* note 5, at 657–59.

⁵⁵ *Lovell*, 90 F.3d at 368–69.

overloaded. Lovell apparently said, “I’m so angry, I could just shoot someone.”⁵⁶ Lovell apologized for her actions, but the counselor claimed to have felt threatened and believed Lovell was serious in her threat, and she reported her to the assistant principal who eventually gave Lovell a three-day suspension.⁵⁷

The trial court held that the school district had violated Lovell’s free speech rights because her speech did not rise to the requisite level for disciplinary action.⁵⁸ The Ninth Circuit reversed, holding that the District Court’s ruling made the California Educational Code inappropriately trump federal law.⁵⁹ After briefly discussing the Supreme Court student speech cases, the court held that they did not matter in the analysis because “threats of physical violence are not protected by the First Amendment under either federal or state law, and as a result, it does not matter to our analysis that Sarah Lovell uttered her comments while at school.”⁶⁰ The court then analyzed Lovell’s statement using *Watts*, taking into consideration the reasonableness of the school’s action in the circumstances.⁶¹ This determination was based on whether the person who had heard the statement would interpret it as “a serious expression of intent to harm or assault” in light of the entire factual context,⁶² and noted “in light of the violence prevalent in schools today, school officials are justified in taking very seriously student threats against faculty or other students.”⁶³

The Ninth Circuit overturned the lower court’s decision, and held that the school district did not violate Lovell’s First Amendment rights based on the effect that the threatening statement had on the school counselor, and that the counselor’s reaction and the school’s disciplinary action were reasonable responses under the circumstances because of the prevalence of violence in schools.⁶⁴ Notably, the court held that if Lovell had been able to prove that she did not utter the statement as a direct threat as the counselor understood it, that the school’s action would have violated her free speech rights.⁶⁵

⁵⁶ *Id.* at 369.

⁵⁷ *Id.*

⁵⁸ *Id.* at 370.

⁵⁹ *Id.* at 370–71.

⁶⁰ *Lovell*, 90 F.3d at 371.

⁶¹ *Id.* at 372.

⁶² *United States v. Orozco-Santillan*, 903 F.2d 1262 (9th Cir. 1990).

⁶³ *Lovell*, 90 F.3d at 372.

⁶⁴ *Id.* at 373–74.

⁶⁵ *Id.*

C. Cases Involving Threatening Student Speech Online

The following cases exhibit how lower courts nationwide have dealt with arguably threatening online speech by students. The discussions and holdings contained in these cases illustrate that student speech need not rise to the level of *Watts*' true threat doctrine for a school to act upon it. Additionally, these cases show the interplay of the *Tinker* and *Watts* analyses and how either or both could be used by courts and schools to address threatening student speech.

1. *J.S. v. Bethlehem Area Sch. Dist.*

The first appellate decision in a case on threatening internet speech is *J.S. v. Bethlehem Area School District* from the Supreme Court of Pennsylvania in 2002.⁶⁶ In this case, J.S. was an eighth grade student at Nitschmann Middle School who created a web site called "Teacher Sux" that "made derogatory, profane, offensive and threatening comments, primarily about the student's algebra teacher, Mrs. Kathleen Fulmer and Nitschmann Middle School principal, Mr. A. Thomas Kartsotis. The comments took the form of written words, pictures, animation, and sound clips."⁶⁷ Additionally, the site had some derogatory comments about a German teacher, but these were apparently not a basis for J.S.'s discipline.⁶⁸ A disclaimer greeted visitors to the site, but there was no limitation on access, so anyone could visit the site.⁶⁹

The most disturbing aspect of this site, and the characteristic that set it apart from other cases where student speech had been protected, was a section about Mrs. Fulmer titled "Why Should She Die?" and asking for money to help hire a hit man to kill the teacher.⁷⁰ Many students and faculty members viewed the site and felt the threat was serious, and Mrs. Fulmer testified as being frightened, actually suffered adverse effects on her health from the stress, and was unable to continue working at the school.⁷¹ Additionally, the court noted that the site had a "demoralizing impact on the school community" that included low morale among students and staff.⁷² The school did not take any disciplinary action until the summer before the following

⁶⁶ *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847 (Pa. 2002).

⁶⁷ *Id.* at 851.

⁶⁸ *Id.* at 851 n.2.

⁶⁹ *Id.* at 851.

⁷⁰ *Id.*

⁷¹ *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 852 (Pa. 2002).

⁷² *Id.*

school year, giving J.S. a ten-day suspension.⁷³ The decision by the school was upheld through the trial and appeal levels, all the way to the state supreme court.⁷⁴

The Supreme Court of Pennsylvania applied the *Watts* test as to whether J.S.'s statements were a true threat, and found that they did not rise to the level of a true threat despite the harm suffered by Mrs. Fulmer, because the school did not treat them as such; it had allowed J.S. to continue attending classes and activities.⁷⁵ The court's holding seems to imply that had the school acted immediately, they would have been more open to the argument that the speech was a true threat. The court then decided that because J.S. facilitated on-campus dissemination of the website and aimed it at a particular audience, namely his fellow students, there was "a sufficient nexus between the web site and the school campus to consider the speech as occurring on-campus."⁷⁶ Moving through the different Supreme Court tests as well as those advocated in lower courts, the Supreme Court of Pennsylvania applied both *Fraser* and *Tinker*, and held that J.S.'s website caused enough actual and substantial disruption that went beyond a "mild distraction or curiosity" to satisfy the requirements of *Tinker*, and therefore, the school's discipline was upheld.⁷⁷ While this case did not involve a social networking site, the court's application of *Tinker* to online threatening student speech is significant because it illustrates that there is a standard that both schools and courts can use to evaluate a threat and resulting disciplinary action on a social network even if it is not a true threat.

2. *Wisniewski v. Board of Education*

In *Wisniewski v. Board of Education of the Weedsport Center School District*, the U.S. Court of Appeals for the Second Circuit, heard the case of Aaron Wisniewski, who had an instant messenger icon depicting the firing of a pistol at a person's head.⁷⁸ The words underneath the icon called for the killing of his English teacher, with whom one of Wisniewski's friends shared the icon.⁷⁹ It was determined that Wisniewski intended the icon as a joke; nevertheless,

⁷³ *Id.* at 852–53.

⁷⁴ *Id.* at 853.

⁷⁵ *Id.* at 858–59.

⁷⁶ *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 865 (Pa. 2002).

⁷⁷ *Id.* at 869.

⁷⁸ *Wisniewski ex rel. Wisniewski v. Bd. of Educ. Weedsport Cent. Sch. Dist.*, 494 F.3d. 34, 35–36 (2d Cir. 2007).

⁷⁹ *Id.*

after a hearing, the icon was found to have caused enough of a disruption to warrant discipline by the school and Wisniewski was given a one semester suspension.⁸⁰ On appeal of the suspension, the court considered applying *Watts*, but found that “we think that school officials have significantly broader authority to sanction student speech than the *Watts* standard allows.”⁸¹

Instead, the Second Circuit found that the icon crossed the boundary of being a mere expression, as protected in *Tinker*, and that it was reasonable to assume that the icon would have come to the school’s attention and create a disturbance at school.⁸² While it is obvious that this icon did come to the attention of the school (because there would have been no case otherwise), the issue is that although Wisniewski made the icon off-campus, there was a foreseeable chance that the icon would have an effect at school and thereby, lead to a potentially substantial disruption. The court upheld the school’s action and determined that Wisniewski’s icon was not constitutionally protected speech under *Tinker*.⁸³ The extension of the *Tinker* test to the threatening expression in this case is a positive sign that such an analysis might be acceptable to the Supreme Court, especially as certiorari was denied by the high court.⁸⁴

3. *Tatro v. Univ. of Minn.*

One of the most recent cases involving student speech, threats, and social networking is *Tatro v. University of Minnesota*, in which University officials found that a mortuary science student, Amanda Tatro, violated school policy by posting threatening speech in her Facebook status messages that were viewable by possibly hundreds of people.⁸⁵ While the focus of this note is how primary and secondary schools can deal with threatening speech on social networks, the court’s analysis in *Tatro* illustrates a willingness to be liberal with the interpretation of what speech is threatening, and of school policies to deal with such activity. Therefore, a discussion of this case is helpful in crafting a model policy that could be adopted by lawmakers and schools to deal with threatening student speech.

Tatro’s status messages were arguably threatening, but were, according to her, in reference to her school activities. For example, one

⁸⁰ *Id.* at 37.

⁸¹ *Id.* at 38.

⁸² *Id.* at 38–40.

⁸³ *Id.*

⁸⁴ *Wisniewski*, 494 F.3d. at 39–40.

⁸⁵ *Tatro v. Univ. of Minn.*, 800 N.W.2d 811, 814–15 (Minn. Ct. App. 2011).

of her messages included statements like “Amanda Beth Tatro Is looking forward to Monday’s embalming therapy as well as a rumored opportunity to aspirate. Give me room, lots of aggression to be taken out with a trocar.”⁸⁶ While this statement is clearly about schoolwork, a trocar is a sharp instrument and the statement that she had “lots of aggression to be taken out,” could pose a threat to other students in the classroom, especially read out of context, like on an online social network. Another status message read in part, “I still want to stab a certain someone in the throat with a trocar though. Hmm . . . perhaps I will spend the evening updating my ‘Death List #5’ and making friends with the crematory guy.”⁸⁷ Tatro admitted this statement was in reference to an ex-boyfriend and that she knew he would see it and interpret it as referring to him since the context of the statement did not make its target clear.⁸⁸

After seeing a number of these posts, a fellow mortuary student reported Tatro’s messages to the department faculty, which resulted in the faculty asking Tatro to stay home for a few days.⁸⁹ Tatro was subsequently cleared and returned to school, but the University filed a formal complaint against Tatro for violating school policy, which she had agreed to follow, to not participate in “threatening, harassing, or assaultive conduct.”⁹⁰ The campus committee on student behavior (CCSB) found that Tatro violated school policy and imposed sanctions, placing her on academic probation for the remainder of her undergraduate career, giving her a failing grade in the course, and requiring her to enroll in an ethics course, write a letter to the department about the subject, and have a psychiatric evaluation.⁹¹ The findings of the CCSB were appealed to the provost of the university, who affirmed the sanctions.⁹²

The Court of Appeals of Minnesota heard the appeal of the provost’s decision, and found that Tatro’s posts constituted threatening conduct, and therefore posed a threat to student safety upon which the school could take disciplinary action.⁹³ Furthermore, the Court stated that even if Tatro’s friends understood the context of her posts, it did

⁸⁶ *Id.* at 814 n.3 (A trocar is an instrument that has a hollow long needle with a sharp end used in embalming to remove gas and fluids from the body.).

⁸⁷ *Id.* at 814.

⁸⁸ *Id.* at 814 n.4.

⁸⁹ *Id.* at 814.

⁹⁰ *Id.* at 814–15.

⁹¹ *Tatro v. Univ. of Minn.*, 800 N.W.2d 811, 815 (Minn. Ct. App. 2011).

⁹² *Id.*

⁹³ *Id.* at 815–818 (citing Student Code Section V(6)).

not change that they could be viewed as reasonably threatening by others nor “diminish the university’s substantial interest in protecting the safety of its students and faculty and addressing potentially threatening conduct.”⁹⁴ The Court found the school’s action reasonable based on the threatening nature of the speech stating, “the realities of our time require that our schools and universities be vigilant in watching for and responding to student behavior that indicates a potential for violence.”⁹⁵

The court discusses the true threat doctrine but does not apply it despite its conclusion that the conduct was threatening in nature; instead, it applies *Tinker*’s substantial disruption standard.⁹⁶ Interestingly, the court notes that a substantial disruption could look different at different school levels, e.g., between primary schools and universities, but nonetheless it finds that *Tinker* can be applied broadly, and that Tatro’s speech caused a substantial disruption at school that permitted academic discipline without violating her right to free speech.⁹⁷

This case illustrates the impact of having something in a school’s conduct code, regulations, or policies, which, at least following the Court’s reasoning in this case, could free the court to broadly apply the *Tinker* test to threatening speech that violated the school’s conduct code. Language in a school’s code permitting discipline of off-campus speech raises issues about whether that type of regulation is too vague or overreaching, and in two recently decided cases, the respective courts found that schools could not regulate student speech outside of school even though the school code, at least on its face, permitted such regulation.⁹⁸ While *Watts* would be applicable to this speech if the court determined it was a true threat, *Tatro* illustrates that the student’s speech would not have to rise to that level to be disciplined by the school because a violation of a school rule would constitute a substantial disruption to satisfy *Tinker*, even more so if it involved threatening or dangerous conduct.

⁹⁴ *Id.* at 816–18.

⁹⁵ *Id.* at 817.

⁹⁶ *Id.* at 820–22.

⁹⁷ *Tatro v. Univ. of Minn.*, 800 N.W.2d 811, 821–23 (Minn. Ct. App. 2011).

⁹⁸ See *T.V. ex rel. T.V. v. Smith-Green Cmty. Sch. Corp.*, 2011 U.S. Dist., LEXIS 88403 (N.D. Ind. 2011); see also *J.S. ex rel. v. Blue Mt. Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011).

4. *D.J.M. v. Hannibal Pub. Sch. Dist. #60*

In the most recent case involving threatening online student speech, *D.J.M. v. Hannibal School District #60*, the Court of Appeals for the Eighth Circuit found that a student's instant messages were true threats and that the school was reasonable in its punishment of the student.⁹⁹ The Court's discussion and analysis of the speech in this case is illustrative of recent court decisions regarding threatening student speech, as it utilizes both the *Watts* true threat and *Tinker* tests in coming to its decision. In this case, D.J.M., a tenth grade student at Hannibal High School in Missouri, was sending instant messages to a fellow student stating that he had access to a gun and naming specific students he would shoot, as well as groups of students such as "'midgets,' 'fags,' and 'negro bitches.'"¹⁰⁰ Additionally, D.J.M. had threatened to shoot himself after killing the others and said that he wanted "[H]annibal to be known for something."¹⁰¹

The student with whom D.J.M. had been communicating, C.M., became concerned about these statements because she knew he had been hospitalized and was on medication for depression.¹⁰² C.M. forwarded D.J.M.'s comments to both an adult friend and the principal of Hannibal High School, who then forwarded the statements to the district superintendent Jill Janes.¹⁰³ Powell and Janes decided to call the police, and on the night of October 24, 2006, D.J.M. was arrested and sent to juvenile detention.¹⁰⁴ D.J.M. was next sent to a hospital for psychiatric evaluation where he remained until November 28 before being sent back to juvenile detention. While in the hospital he admitted that he had contemplated suicide.¹⁰⁵ One week after the initial arrest, Powell suspended D.J.M. for ten days, then for the rest of the school year, for having a disruptive impact on the school and for the conduct resulting in his arrest and detention, which violated the school's code of conduct prohibiting disruptive and threatening speech.¹⁰⁶

In determining whether D.J.M. had the requisite intent to carry out the threat under *Watts*, the court points to *Doe v. Pulaski County Special School District*, which defined a true threat as a "statement that

⁹⁹ *D.J.M. v. Hannibal Sch. Dist. No. 60*, 647 F.3d 754, 764–65 (8th Cir. 2011).

¹⁰⁰ *Id.* at 757–58.

¹⁰¹ *Id.* at 758–59.

¹⁰² *Id.* at 758.

¹⁰³ *Id.* at 758–59.

¹⁰⁴ *Id.* at 759.

¹⁰⁵ *D.J.M. v. Hannibal Sch. Dist. No. 60*, 647 F.3d 754, 759 (8th Cir. 2011).

¹⁰⁶ *Id.*

a reasonable recipient would have interpreted as a serious expression of an intent to harm or cause injury to another.”¹⁰⁷ Whether the recipient of the threat was the target of the threatened action was not of consequence to the court, as it stated that intent to carry out the threat was satisfied, if the threat was communicated to either the target or a third party.¹⁰⁸ The Court found that D.J.M. had the requisite intent because he intentionally communicated the threats to a third party, namely C.M., and should have “reasonably foreseen that his statements would have been communicated to his alleged victims.”¹⁰⁹

The Court also found that D.J.M.’s statements would have been threatening to a reasonable person based on the totality of the circumstances surrounding his statements.¹¹⁰ These circumstances included D.J.M.’s admitted depression, rejection by a love interest, access to a weapon and expressed intention to take it to school, his statement that he “wanted Hannibal to be known for something,” and C.M.’s concerns based on D.J.M.’s statements.¹¹¹ The Court points out that the reaction of the readers of his statements show that they were taken seriously as threats and it was reasonable for the school to treat them as such saying:

In light of the District’s obligation to ensure the safety of its students and reasonable concerns created by shooting deaths at other schools such as Columbine and the Red Lake Reservation school, the district court did not err in concluding that the District did not violate the *First Amendment* by notifying the police about D.J.M.’s threatening instant messages and subsequently suspending him after he was placed in juvenile detention.¹¹²

The District argued in the alternative that even if D.J.M.’s comments were not viewed as a true threat, its actions were reasonable and did not violate the First Amendment because his speech caused a substantial disruption at school and therefore satisfied the *Tinker* test.¹¹³ Word of D.J.M.’s statements led to concerned parents calling the school concerned about what the school was doing and whether their student was on D.J.M.’s “hit list.”¹¹⁴ The school spent

¹⁰⁷ *Id.* at 761–62 (quoting *Doe v. Pulaski Cty. Spec. Sch. Dist.*, 306 F.3d 616, 624 (8th Cir. 2002)).

¹⁰⁸ *Id.* at 762 (citing *Doe*, 306 F.3d at 624).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 762–63.

¹¹¹ *D.J.M. v. Hannibal Sch. Dist. No. 60*, 647 F.3d 754, 762–63 (8th Cir. 2011).

¹¹² *Id.* at 764.

¹¹³ *Id.* at 766.

¹¹⁴ *Id.* at 759, 766.

“considerable time dealing with these concerns,”¹¹⁵ as well as time and effort to ensure safety by increasing security by assigning staff to monitor entrances and public areas and limiting access to the school.¹¹⁶ The Court concluded that following either line of reasoning, D.J.M.’s suspension from school was reasonable under the circumstances as “one of the primary missions of schools is to encourage student creativity and to develop student ability to express ideas, but neither can flourish if violence threatens the school environment.”¹¹⁷

This case is the latest and most instructive case on how schools could deal with threatening student speech originating on a social network. Since *Watts* and *Tinker* are the only relevant precedent addressing threatening speech and First Amendment rights of students, the Eighth Circuit approach is a sound approach for schools to deal with this type of student speech. If school procedure and policy work these analyses in to their approach of disciplining threatening student speech and the resulting discipline is reasonable, courts would be hard-pressed to find a constitutional violation by the school.

D. Social Networking and the “True Threat” Doctrine

If a student’s speech falls under the true threat doctrine of *Watts*, then the student’s First Amendment right to free speech does not come into play and schools can act quickly and decisively to prevent any danger at school. However, recent cases involving threatening student speech online or on social networking sites, illustrate that the *Watts* analysis is not always appropriate or necessary even when the speech is threatening, and that threats between students do not have to reach the level of a true threat for a school to act on them. These cases also show that courts can apply the *Tinker* test in situations involving student speech on social networks, especially with added elements from cases like *Lovell* and *Watts*. Whichever line of reasoning the court chooses, it is clear with the most recent cases that courts can handle online student speech cases following *Watts*, *Tinker*, or even both. Despite the ability of the courts to handle these situations, the schools, which are asked on a daily basis to look after the best interest and safety of its students, lack clear guidance on how to discipline a student when off-campus threatening speech on a social networking site is brought to a school official’s attention. In the next part of this note I will lay out a model procedure to deal with threatening online

¹¹⁵ *Id.* at 766.

¹¹⁶ *Id.* at 759, 766.

¹¹⁷ *D.J.M. v. Hannibal Sch. Dist. No. 60*, 647 F.3d 754, 766 (8th Cir. 2011).

student speech, bringing together elements of the case law discussed in this note.

V. MODEL PROCEDURE FOR SCHOOLS TO DISCIPLINE STUDENT INTERNET SPEECH

The one thing that is clear from court precedent is that schools can and have been able to act on threatening student speech that appears on a social networking site, and that actions taken by schools to prevent danger have been upheld by most courts as constitutional. The courts in these cases have followed either the *Watts* true threat analysis or the *Tinker* substantial disruption test, and usually the courts discuss both, applying one or the other to the facts of the case. Despite the recent trend of courts upholding the discipline under one of those tests, such as in *Tatro* and *D.J.M.*, it is inevitable that more problems will arise in situations involving threatening student speech if schools remain without a model procedure to discipline this speech and have to wait to see if the discipline is upheld in court. This is especially true as the means and methods for internet speech are constantly changing with the advent of new technology like smart phones and other mobile internet devices where “expression travels at lightning speed from student’s homes to the schoolhouse.”¹¹⁸ The increased involvement of students in social media has accordingly increased the ways students can talk to each other and express their ideas both in and outside of schools.

There are a limited number of courts that have heard a case on student speech, internet based or not, and have recognized that schools present unique circumstances where regulation of student speech is necessary to maintain order and discipline in school.¹¹⁹ Therefore, in creating a policy to deal with threatening student speech, it must be remembered that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”¹²⁰ However, when a student’s speech or expression on a social network takes on a threatening nature, school’s should have a policy in place with a procedure to handle these situations that balances the concerns of the school with the rights of the student, while allowing the school to act quickly and decisively. However, courts should be careful in providing

¹¹⁸ Nelda H. Cambron-McCabe, *Students’ Speech Rights in an Electronic Age*, 242 EDUC. LAW REP. 493, 493 (2009).

¹¹⁹ See, e.g., *id.*

¹²⁰ *Tinker*, 393 U.S. at 506.

too much discretion to schools; school officials should only be able to discipline students for threatening speech on a social network that poses a danger of violence of school, or that is of such a nature that it has a substantial effect at school and disrupts normal school activity.

Keeping those basic principles in mind, off-campus student speech on a social network should be normally afforded the same First Amendment protection as any other off-line speech.¹²¹ However, when a student comment on a social network's message board or wall threatens violent action at school or directed towards a faculty member or fellow student, and these comments come to the school's attention, then the school should be able to act to prevent any possible violence. Even general, nonspecific threats have an impact on the school community at large because the possibility exists that violence could erupt at any time at school, and school officials have an obligation to prevent any danger to their students.

When the student's speech first comes to the attention of a school official, they must determine if the threat involves an action at school, or against a student or official at the school. Because the threat is online, the context surrounding the threat may not be readily apparent, so even a vague threat should be evaluated seriously by the school. In order to provide proper due process to the student who expressed the threat, the next step should be removal of the student from the classroom followed by questioning from the principal or other school official about the threatening speech. During questioning, the student would be confronted with the speech and accusations against him, and the school officials should take into consideration the student's age, maturity, academic record, and whether other violent incidents might have influenced the student. Furthermore, the school should consider if the student who made the threat, previously had discipline problems at school, or made a threat before at school.

If the school officials determine the speech involved, rises to the level of a true threat, even if this determination occurs before questioning the student, then under the true threat doctrine from *Watts*, the student's speech is not protected under the First Amendment. As a result, the school would be able to take any reasonable action to prevent danger from occurring at school, which would likely involve the police and at least a suspension from school. What further criminal punishment could occur is beyond the scope of this note, but based on what occurs in a criminal proceeding, the school could impose an

¹²¹ See Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 FLA. L. REV. 395, 430 (2011).

appropriate punishment on the student whether it is a lengthy suspension, loss of credits or grades, or expulsion.

The school's ability to discipline the student for his or her online threatening speech is not limited to speech that rises to the level of a true threat however. Recent case law illustrates that the *Tinker* test of substantial disruption is applicable to these situations, and allows the school to take disciplinary action without a violation of the student's First Amendment rights. Even if the speech would only create a foreseeable risk of substantial disruption at the school, then school officials can still act on the speech in order to intervene before any possible danger or disruption occurs at the school.¹²² It would be reasonable for officials to act in this type of situation because with the prevalence of social media in the lives of students, even a vague hint that a student may do something endangering student safety at school could spread quickly around the school creating a disruption even if the threat was not actually going to be carried out.

A final method would be beyond the ability of the school to create, but the Supreme Court's holding in *Morse* suggests that an extension of *Morse* to deal with off-campus threatening student speech would be possible. The Fifth Circuit has actually already done something similar in the case of *Ponce ex rel. E.P. v. Socorro Independent School District*, where a student created and maintained a diary about making a neo-Nazi group and attacking the school.¹²³ After the diary came to the attention of school officials, the student was suspended. He then sued for a violation of his First Amendment rights.¹²⁴ The Fifth Circuit held that the school did not violate his rights, and extended *Morse*, creating an exemption prohibiting speech advocating drug use, to apply to language advocating violence.¹²⁵ The creation of a categorical exception to the First Amendment rights of students for speech that advocates "harm that is demonstrably grave and that derives that gravity from the 'special danger' to the physical safety of students arising from school environment,"¹²⁶ would provide schools with an even broader ability to take action on threatening speech that appears on a social network or elsewhere.

¹²² *Wisniewski*, 494 F.3d. at 40.

¹²³ *Ponce ex rel. E.P. v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 766, 770 (5th Cir. 2007).

¹²⁴ *Id.* at 766–67.

¹²⁵ *Id.* at 771–72.

¹²⁶ *Id.* at 770.

One advantage of this method would be that it would not necessarily rely on the speech creating a disruption at the school as *Tinker* focuses on, or for the speech to be a true threat and falling under *Watts*, even if both lines of reasoning would be applicable. This type of exemption could provide some clarity, because if the speech was threatening the school could unquestionably act on it without violating a student's right to free speech. However, creating an exemption like this might also raise concerns over giving a school too much discretion in punishing a student because it would be up to the school to determine the definition of a grave harm. Therefore, in order for a school to be able to discipline a student via this categorical exception, the courts would have to define grave harm in a way that would balance student rights with protecting campus safety, while still allowing schools leeway to act on any threatening speech that does not rise to the level of a true threat.

Finally, the procedure would have to provide for appropriate discipline of the offending student, which would have to be reasonable and proportionate for the circumstances. First of all, the school should remove the student from classes to prevent any immediate danger and to find out the student's story and intent. Following the removal, school officials can better assess the situation using the factors discussed above and determine whether the student's activity warrants a detention, suspension, or expulsion. The length or type of suspension could vary in length, but should be only as long as necessary to prevent the student from carrying out the threat. As a result, the discipline could range from an "in-school detention" to a year-long or longer expulsion, depending on the school's policies for such discipline, the severity of the threat, and the amount of disruption that threat caused at school.

VI. CONCLUSION

Parents, teachers, and administrators should encourage free expression by students inside and outside of schools in all forms of media; however, when it comes to school safety, school officials are in a unique position which requires them to take measures to protect hundreds or thousands of students. When a student's expression takes on a potentially threatening nature that places other students, faculty, or the school itself in danger, officials must be able to make a quick decision to prevent any harm, even if that requires action that would traditionally be considered to violate the student's First Amendment rights.

In a time where the internet is a part of everyday life for children and adults alike, it is necessary for schools to have a means to take action when a student posts threatening language online that would affect the school. However, the issue of how to discipline a student's threatening speech on a social network has not been addressed by any legislature or the U. S. Supreme Court. The present practice in the majority of courts is to protect student speech made on an online social network under the First Amendment, since it originated off campus, and indeed, this speech should remain protected unless the speech embodies a threat or substantial disruption to the school. However, this practice is changing with the increasing use of technology by students at home and in school.

As illustrated by the cases discussed in this note, the recent trend in lower courts is to uphold the school's actions in disciplining students for threats that appeared online. Despite this trend, there is no widespread legislation or Supreme Court holding that would protect schools' actions from being subjected to First Amendment challenges. If schools and courts adopted procedures similar to the model procedure laid out in this note, school officials would have an approach that would allow them to take quick, decisive action to preserve order, discipline, and safety within the school without having to worry if their actions would withstand a First Amendment challenge in court. If the trend that has developed in the lower court continues, it is only a matter of time before a case reaches the U.S. Supreme Court, and schools will have an established standard to follow when dealing with threatening online student speech.