

## BEYOND STICKS & STONES: A FIRST AMENDMENT FRAMEWORK FOR EDUCATORS WHO SEEK TO PUNISH STUDENT THREATS

### INTRODUCTION

In March 1998, two middle school students planned and carried out a deadly assault at their school in Jonesboro, Arkansas, that left four pupils and one teacher dead.<sup>1</sup> Approximately one year later, in April 1999, two high school students walked into Columbine High School in Littleton, Colorado, armed with an arsenal of guns and pipe bombs — they killed twelve of their classmates and one teacher.<sup>2</sup> These are just two of the school massacres in recent years that have riveted the attention of the nation,<sup>3</sup> leaving terrified parents

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<sup>1</sup> See Kenneth Heard, *Killer's Essay Haunts Westside Teacher*, ARK. DEMOCRAT-GAZETTE, June 6, 1999, at A1. On the morning of March 24, 1998, thirteen-year-old Mitchell Johnson and eleven-year-old Andrew Golden broke into the home of Golden's grandfather, stole rifles and handguns, and drove a van that belonged to Johnson's mother to the woods behind their middle school. *See id.* Johnson hid fifty yards from the school while Golden went into the school, pulled the fire alarm, and doubled back to meet his partner. *See id.* As students and teachers left the school because of the fire alarm, Golden and Johnson opened fire, killing four students and teacher Shannon Wright. *See id.* Authorities believe Johnson hoped to kill a teacher who had disciplined him in the past. *See id.*

<sup>2</sup> See Ann Beeson Holds News Conference with Others on the Law and the Columbine High School Shooting, in FDCH Political Transcripts, Aug. 13, 1999 [hereinafter *News Conference*] (statement of Troy Eid, chief counsel to Colorado governor Bill Owens). Eighteen-year-old Eric Harris and seventeen-year-old Dylan Klebold, seniors at Columbine High School, were associated with a group known as the "Trench Coat Mafia" and were known admirers of Adolf Hitler and the white supremacy movement. *See id.* On April 20, 1999, the anniversary of Hitler's birthday, Harris and Klebold entered Columbine High School with guns, knives, and pipe bombs, and used these weapons to systematically kill students pursuant to a plan that they had spent a year developing. *See id.* Harris and Klebold murdered twelve students and one teacher, wounded twenty-three other students, and ultimately killed themselves. *See id.*; see also Valerie Schremp, *Collinsville Schools Will Close Today Amid Bomb Rumors, E-Mail Threats*, ST. LOUIS POST-DISPATCH, Apr. 30, 1999, at A1 (detailing the murderous rampage of Harris and Klebold at Columbine High School).

<sup>3</sup> See James Brooke, *25 Feared Dead, 20 Hurt in High School Shooting*, THE COURIER-J. (Louisville, Ky.), Apr. 21, 1999, at 1A. Besides the Jonesboro and Columbine High School killings, several other recent incidents of school violence have occurred. On May 21, 1998, a fifteen-year-old Oregon boy opened fire at his high school, killing two peers and hurting twenty other students. *See id.* On May 19, 1998, an eighteen-

searching for answers and educators asking what can be done to prevent bloodshed at their own schools.<sup>4</sup>

School administrators across the country have begun to implement zero-tolerance policies when dealing with threatening behavior by students. Administrators are suspending, expelling, and even having students arrested for discussing and planning acts of violence against their teachers and schools.<sup>5</sup> As a result, courts have

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year-old Tennessee student opened fire in his high school parking lot, killing a classmate. *See id.* On April 24, 1998, a fourteen-year-old Pennsylvania student killed a science teacher in front of other students during an eighth grade graduation dance. *See id.* On December 1, 1997, fourteen-year-old Michael Carneal killed three Kentucky students and wounded five others when he opened fire in the hallway of his high school. *See id.* Finally, a sixteen-year-old Mississippi boy allegedly shot nine students at his high school, killing two, having allegedly killed his mother earlier that day. *See id.*

<sup>4</sup> *See* Debbi Wilgoren, *Area Schools Enhancing Security; Shootings in U.S. Prompt New Policies*, WASH. POST, Aug. 25, 1999, at A1. According to Pam Riley, the director of the Center for Prevention of School Violence in Raleigh, North Carolina, the center has received over 5,000 requests from school administrators seeking guidance and advice about how to make their schools safer following the Columbine High School shooting. *See id.* Riley stated that "[t]he public expects when they drop their children off in the morning that they will be safe." *Id.*; *see also* Kate Folmar & Phil Willon, *Wave of Rumors, Threats Sweeps Schools*, L.A. TIMES, May 1, 1999, at A1 (quoting John A. Lammel, National Association of Secondary School Principals, as saying, "This is a terrible time for school administrators, teachers and especially students and parents . . . every phone call, fight and bomb threat [gets] even more serious attention than usual"); Dan Freedman, *Schools Becoming Safer, Education Secretary Says; Fewer Students Caught with Guns, Study Shows*, SEATTLE POST-INTELLIGENCER, Aug. 11, 1999, at A3 (observing that "surveys have shown a level of anxiety among parents and students over school violence").

<sup>5</sup> *See* Kenneth J. Cooper & Dale Russakoff, *Schools Walk Fine Line Between Security, Overreaction*, THE LAS VEGAS REV. J., May 28, 1999, at 14A. Especially after the Columbine shooting, "school administrators and police across the country have faced increased pressure to crack down on student misconduct in an effort to increase school safety." *Id.* In several incidents, school officials have reacted strongly to perceived threatening behavior by students. *See id.* For example, a nine-year-old Maryland boy was suspended for waving a picture of a gun in his classroom. *See id.* Four fifth-graders who were heard discussing the possibility of bringing guns to their school were brought to the police station, strip-searched, charged with terroristic threatening, and three of the four were expelled from school. *See id.* A Virginia student was arrested for writing an essay that involved a nuclear bomb as the school found that the writing violated the school system's "zero-tolerance" policy. *See id.* Other illustrative incidents of the "no-nonsense" approach adopted by schools and the police include:

Two Pittsburgh seventh graders were suspended last April for distributing a "hit list" of 10 teachers the students wanted killed.

In Miami last February, nine high school students were jailed for distributing an underground newspaper in which one writer speculated: "I have often wondered what would happen if I shot Dawson [the school principal] in the head and other teachers who have p--d me off."

seen a rise in civil litigation. Disgruntled parents, angry that a suspension or expulsion has marred their child's school record, are suing schools, seeking a reversal of the punishment and monetary damages.<sup>6</sup> To a lesser extent, teachers have filed civil suits against

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In Macon County, Tennessee, two 13-year-olds were suspended in April after a teacher found a note titled "Death List" naming 15 students . . . . In three separate instances occurring the same week, officials in Fairfax County, Virginia last June suspended students for posting a "personal death list" of 17 names on a Web site, writing a note naming seven students the writer wanted to die, and threatening to put a bomb in a teacher's cabinet.

Michael D. Simpson, *Taking Threats Seriously*, NEA TODAY, Vol. 17, No. 1, Sept. 1, 1998 (alteration in original). Two *Los Angeles Times* writers also describe the precautions taken by school administrators and law enforcement personnel following the Columbine High School shooting:

At Quartz Hill High School in the Antelope Valley, where three students were arrested earlier in the week on suspicion of making violent threats, administrators and teachers warned pupils that joking about violence could lead to expulsion.

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A 17-year-old student in the Bay Area suburb of San Rafael was arrested on suspicion of posting names of students he wanted to kill on an Internet Web page.

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[P]olice in Oxnard arrested a high school student who allegedly had threatened to blow up Hueneme High School. Officers said they found as many as 10 pipe bombs in his house.

Folmar & Willon, *supra* note 4; see also *News Conference* (statement of Ann Beeson, attorney with the American Civil Liberties Union (ACLU), *supra* note 2 ("[T]he reaction, since Littleton, on the part of some school administrators has been extreme."). In addition to strict disciplinary responses, schools across the United States have taken a number of other safety measures, including "setting up anonymous telephone hot lines to report trouble, buying new alarms, cameras and metal detectors by the truckload and creating conflict mediation programs to identify potentially dangerous students." Wilgoren, *supra* note 4. According to an Education Department Report, despite the increased attention of school officials and law enforcement personnel, the number of students that were expelled during the 1997-1998 school year for carrying firearms into school actually dropped by 31% as compared to the number of students expelled in the prior year. See Freedman, *supra* note 4.

<sup>6</sup> See Eve Mitchell & Marianne Costantinou, *Goin' Postal Essay Gets Student Suspended*, S.F. EXAMINER, May 6, 1998, at A1 (observing that, following their son's suspension for the content of a school essay, "the youth's parents [sued] Cabrillo Unified School District, hoping to have the suspension expunged from his permanent school record"); Editorial, *Censoring Web Pages: Tough Calls for Teachers Trashed on the Internet*, SACRAMENTO BEE, Sept. 1, 1998, at B6 ("[A student] and his parents sued the school district over the suspension, claiming violation of his free speech rights and seeking \$550,000 in damages."); see also Cooper & Russakoff, *supra* note 5 ("[A]ccording to civil liberties lawyers, [there] has been a rash of complaints from upset parents whose children have been suspended, expelled or arrested for misconduct involving vaguely threatening speech, Web sites or clothing.").

students who terrorize them.<sup>7</sup>

In response to these zero-tolerance policies, civil rights and First Amendment groups have zealously advocated the free speech rights of censored students.<sup>8</sup> For example, days after the Columbine shooting, the American Civil Liberties Union (ACLU) defended eleven Ohio high school students who faced expulsion after they created a web site congratulating the two Columbine gunmen for killing their classmates.<sup>9</sup> Admonishing schools for dealing with pupils as if each were a potential killer,<sup>10</sup> the ACLU argues that schools' extreme disciplinary measures are the result of unfounded mass hysteria<sup>11</sup> and constitute egregious violations of students' free speech rights.<sup>12</sup> The ACLU maintains that if authority figures do not respect

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<sup>7</sup> See John M. Flora, *Three Carmel Teachers Sue Student, Mom over Web Site*, THE INDIANAPOLIS NEWS, Aug. 6, 1999, at B1. High school junior Brian Conratt created a web site that allegedly asked site visitors to ridicule his teachers. *See id.* The web site intimidated and frightened the named teachers. *See id.* Although the student was disciplined and the web site was taken off the Internet, the teachers sued the student, charging him "with defamation, [intentional] infliction of emotional distress and making false statements that caused outrage or caused mental suffering, shame and humiliation." *Id.*; *see also News Conference* (statement of Ann Beeson, attorney with the ACLU), *supra* note 2 (stating that Indiana teachers filed suit against a boy and his mother for defamation and emotional distress after the boy created a web site that claimed that the teachers were devil worshippers).

<sup>8</sup> See Cooper & Russakoff, *supra* note 5 ("Free speech advocates say students who might have been unfairly disciplined have lost constitutionally protected rights as well as learning time . . .").

<sup>9</sup> See Editorial, *Trenchcoat Rights: The ACLU Defense; Taking Liberties with School Safety*, CIN. ENQUIRER, May 12, 1999, at A18 [hereinafter *Cincinnati Enquirer Editorial*]. The "Trench Coat Mafia"-style web site, titled "The Field Dominion of Freaks," congratulated the Columbine killers and discussed the students' hatred of various student groups, including athletes and prep students. *See id.* The students' ACLU attorney claimed that the web site was meant to be a satire on the tragedy. *See id.*

<sup>10</sup> *See id.* The ACLU's Ohio executive director declared that "because you're a teen-ager and say something vaguely threatening, you're put in shackles . . . What happened in Colorado was tragic. But it would be doubly tragic if those who took so many lives in Littleton were allowed to rob children across America of their right to free expression as well." *Id.*

<sup>11</sup> *See News Conference* (statement of Ann Beeson, attorney with the ACLU), *supra* note 2 (presenting Beeson's argument that parents' and educators' fears about school violence are largely unfounded because less than one percent of all homicides among minors occur in or around schools).

<sup>12</sup> *See id.* Some of the "extreme measures" that allegedly violate students' rights, as described by ACLU attorney Beeson, include a fourteen-year-old Pennsylvania girl who was strip-searched and suspended after she told her class that she could understand how a child could snap after being ridiculed by fellow students. *See id.* A twelve-year-old Louisiana boy was placed in juvenile detention for 14 days after he told fellow fifth graders in the lunch line that he would "get them" if they did not leave him potatoes. *See id.* A student, dressed in black, was intensely questioned by school administrators for having a chemistry book because the administrators were concerned that the book described how to construct a bomb. *See id.* A nine-year-old

the free speech rights of young people, then those young people will grow into disillusioned adults who do not tolerate thoughts and opinions different from their own.<sup>13</sup> Although school administrators have a duty to ensure that students are educated in a safe environment, this safety may come at the cost of limited student speech rights.<sup>14</sup>

School administrators respond to arguments like those of the ACLU by declaring that in today's violent society, it is not possible to be too cautious. Accordingly, educators are quick to heed warning signs of potentially violent student behavior by swiftly punishing students who terrorize their teachers and fellow pupils.<sup>15</sup> A *Cincinnati Enquirer* Editorial concisely summarizes the position of cautious educators and frightened parents by asking, "How many . . . victims would gladly trade unlimited 'free expression' for a chance to draw one more breath, to walk in the sun again, to hug their parents?"<sup>16</sup>

According to the National Education Association's (NEA) Office of General Counsel, educators are justified in treating student threats seriously because many recent student killers told fellow pupils of either their plans or their desire to kill prior to their murderous

Ohio boy was suspended after he wrote "You will die an honorable death" on a fortune-cookie insert as part of an Asian culture class project. *Id.*

<sup>13</sup> See Nadine Strossen, *Students' Rights and How They Are Wronged*, 32 U. RICH. L. REV. 457, 458 (1998) (the author, president of the ACLU, explaining that "[w]e believe that if other people do not respect the rights of young people, then young people are less likely to grow up respecting the rights of other people"); see also *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) ("That [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."); *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp.2d 1175, 1182 (E.D. Mo. 1998) ("The public interest is . . . served . . . by giving . . . students . . . th[e] opportunity to see the protections of the United States Constitution and the Bill of Rights at work.").

<sup>14</sup> See *News Conference* (statement of James Rapp, the editor in chief of *Education Law*), *supra* note 2. Rapp stated that, in the school context, "[d]iscipline, self restraint and the common good may well require that we . . . subordinate some of our individual expression and belief." *Id.*; see also *supra* notes 8-13 and accompanying text (describing the ACLU's arguments that school safety measures are sacrificing students' constitutional rights).

<sup>15</sup> See Cooper & Russakoff, *supra* note 5 (quoting Gary Marx, spokesman for the American Association of School Administrators, as saying, "Schools are less likely to take chances at this point, and I think their communities in large part would prefer they not take chances . . ."); Simpson, *supra* note 5 (quoting school superintendent R. Mark Harris as saying, "It's real scary when you see indications that kids may be contemplating doing things like this . . . [The threats] can't be left unaddressed"); see also *supra* notes 5-6, 12 and accompanying text (discussing the swift punishment imposed on students).

<sup>16</sup> *Cincinnati Enquirer Editorial*, *supra* note 9.

rampages.<sup>17</sup> For example, one of the Jonesboro killers, a thirteen-year-old student, told fellow pupils prior to his crime that he “had some killing to do.”<sup>18</sup> Columbine killer Dylan Klebold wrote various violent essays that so disturbed his teacher that she felt the need to discuss them with his parents.<sup>19</sup> Eric Harris, the other Columbine gunman, posted death threats against fellow students on his web site.<sup>20</sup>

As the debate rages on between staunch free speech supporters and cautious school administrators, the United States Supreme Court remains relatively silent as to the extent of students’ First Amendment rights, especially in the context of low-value speech such as vulgarity, incitement, and threats. Ultimately, educators are faced with a dangerous dilemma. The educators can take a threat seriously, possibly infringing students’ First Amendment rights, and then become confronted with a lawsuit brought by indignant parents. Alternatively, educators can wait to see if the vociferous, threatening student eventually comes to school carrying a handgun, intent on fulfilling his murderous threats.<sup>21</sup>

This Comment addresses student threats against teachers, schools, or fellow students, and the First Amendment issues that may arise as educators struggle to deal with these threats. The Comment discusses threats, in the form of pure speech, by elementary and high

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<sup>17</sup> See Simpson, *supra* note 5 (“[S]chool officials have good reason to treat these kinds of [student] threats seriously. Most of the alleged killers in the campus shootings this past year actually told others about their plans to kill before they took violent action . . .”). According to June Arnette, the Associate Director of the National Safe Schools Center in Westlake Village, California, students know which of their peers are capable of violence and which students have uttered threats. See *Students Hold Key to Ending Violence; Lesson Learned from School Shootings: Listen to Your Students*, SCH. VIOLENCE ALERT, Vol. 5, No. 5, May 1999 [hereinafter *Students Hold Key*]. Jonesboro Middle School teacher Beth Fuller has also declared that teachers must pay close attention to warning signs from problematic students in order to avert school violence. See Heard, *supra* note 1. Before the Jonesboro shooting, a student had warned Fuller that Mitchell Johnson was after her. See *id.*

<sup>18</sup> Simpson, *supra* note 5. According to Jonesboro teacher Beth Fuller, Mitchell Johnson was known for his explosive temper and wrote an essay 14 months before the shootings about hating his suspension and that he planned to shoot “squirrels,” which was believed to be a code word for teachers and students. See Heard, *supra* note 1.

<sup>19</sup> See *Cincinnati Enquirer Editorial*, *supra* note 9.

<sup>20</sup> See *News Conference* (statement of Troy Eid, chief counsel to Colorado governor Bill Owens), *supra* note 2.

<sup>21</sup> See Tim Swarens, Editorial, *Seeking Security at School*, IND. STAR, Aug. 27, 1999, at A18 (“Pretend you’re a teacher. How do you distinguish between idle words and legitimate threat? Lean one way and you might be chased one day by a kid with a gun. Lean the other and you might find a lawyer with a subpoena coming after you.”).

school students, but will not delve into the constitutional speech rights of post-secondary students. The reasons for this narrowed focus are numerous, but the primary ones include (1) the majority of post-secondary students are no longer juveniles, hence, the utilization of law enforcement and criminal punishment becomes a viable option in lieu of school discipline; (2) few federal court cases discuss the applicability of the First Amendment to grammar school students, leaving schools to search blindly for answers; (3) civic education — the teaching of courtesy and respect — is an important goal in secondary and lower schools, while college students are assumed already to have learned these essential civic lessons;<sup>22</sup> and (4) smaller classes, greater daily interaction with teachers and peers, and lower maturity levels cultivate situations in which elementary and high school students seem more inclined to vocalize and act upon their feelings of violence and bitterness.<sup>23</sup> Moreover, courts generally are more protective of students' free speech rights as the age and grade level of the students increase. Therefore, courts intensely scrutinize restrictions that are placed on post-secondary student speech.<sup>24</sup>

The analysis of this Comment proceeds in four parts. Part I reviews the "true threat" doctrine and describes the tests that courts have established for evaluating whether verbal terrorism should be protected speech or speech subject to punishment. Part II considers general education jurisprudence in the context of the First Amendment. Part III discusses recent federal and state cases that involve students' violent expressions. Finally, Part IV argues that student threats need not rise to the level of a "true threat" to be legally punished. Part IV also contains a constitutional framework that school administrators can utilize when they are faced with the

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<sup>22</sup> See Garner K. Weng, *Type No Evil: The Proper Latitude of Public Educational Institutions in Restricting Expressions of Their Students on the Internet*, 20 HASTINGS COMM. & ENT. L.J. 751, 777-78 (1998) (discussing the three basic goals of public educational institutions that courts have recognized: civic education, democratic education, and critical education). In contrast, educator Gary Pavela claims that colleges and universities have a significant impact on student behavior and the learning of civility. See Gary Pavela, *Civility and Student Life*, 27 STETSON L. REV. 161, 164 (1997).

<sup>23</sup> The number of violent incidents involving elementary and secondary school students demonstrates this trend. See, e.g., *supra* note 3 and accompanying text (discussing recent incidents of school violence involving elementary and high school students). In addition, at least one survey indicates that American teenagers rank violence as the biggest problem at their schools. See SOURCEBOOK OF CRIM. JUST. STAT. 1998 98 (Table 2.7).

<sup>24</sup> See Weng, *supra* note 22, at 773 ("The Court has been somewhat more vigilant in protecting First Amendment rights of students at the college and university level . . . The Court looks at the university as a haven for intellectual discourse and debate in need of the greatest First Amendment protections.").

dilemma of how and when to regulate threatening student speech. This framework focuses particularly on electronic threats by students, as the Internet becomes the medium of choice for the younger generation and provides an effortless means of committing verbal terrorism.<sup>25</sup>

### I. THE "TRUE THREAT" DOCTRINE

The First Amendment ensures that Congress "shall make no law . . . abridging the freedom of speech."<sup>26</sup> The United States Supreme Court, however, has carved out various classes of speech that are not worthy of full, if any, constitutional protection, including threats, defamation, speech that incites violence, fighting words, and obscenity.<sup>27</sup> Government may regulate and censor these types of speech because they are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."<sup>28</sup> Supreme Court precedent suggests that the First Amendment is not violated when a citizen is convicted under a statute that criminalizes threats, as long as the citizen's speech was a "true threat."<sup>29</sup> The "true threat" doctrine, and the precedent upon which it is founded, is an amalgamation of cases that deal mainly with two unprotected classes of speech: threatening speech and speech that incites violence.

*Watts v. United States*<sup>30</sup> is the seminal Supreme Court case that established the "true threat" doctrine, although the Court did not specifically define "true threat."<sup>31</sup> *Watts*, however, has not provided

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<sup>25</sup> See David C. Potter, *The Jake Baker Case: True Threats and New Technology*, 79 B.U. L. REV. 779, 801 (1999) ("New technology, especially computers, creates new methods for people to commit old crimes and provides new means for people to commit harmful acts that are not currently defined as crimes.").

<sup>26</sup> U.S. CONST. amend. I.

<sup>27</sup> See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-88 (1992).

<sup>28</sup> *Id.* at 382 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). Elaborating, the Court explained that these certain types of speech could "be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.) — not [because] . . . they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content." *Id.* at 383-84.

<sup>29</sup> See Potter, *supra* note 25, at 792 ("Using the Supreme Court's reasoning . . . a criminal conviction under a threat statute that is based on a finding that a statement is a true threat, does not violate the First Amendment . . ."). A "true threat" is "a serious threat as distinguished from words uttered as mere political argument, idle talk or jest." BLACK'S LAW DICTIONARY 1480 (6th ed. 1990).

<sup>30</sup> 394 U.S. 705 (1969) (per curiam).

<sup>31</sup> See *id.* at 708. The Court described a "true threat" as something more than "political hyperbole." See *id.*



clear guidance to lower courts, as the courts have struggled during the last thirty years to formulate a workable “true threat” test.<sup>32</sup> In *Watts*, the defendant was convicted, pursuant to 18 U.S.C. § 871(a),<sup>33</sup> of knowingly threatening the President when he threatened President Lyndon B. Johnson at an anti-war rally.<sup>34</sup> The Supreme Court overturned the conviction, holding that Watts’s “political hyperbole” did not implicate the statute.<sup>35</sup> Because the risk was too great that valuable public discourse would be stifled, the Court explained that before speech could be punished, the First Amendment required the government to demonstrate that the speech constituted a “true threat.”<sup>36</sup> In determining whether Watts’s speech could be punished, the Court examined the context in which the statement was uttered, the conditional quality of the utterance, and the reaction of those within earshot of the statement, ultimately deciding that Watts’s comments did not rise to the level of a “true

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<sup>32</sup> See Potter, *supra* note 25, at 791 (“Unfortunately, the Supreme Court has not articulated a rationale that lower courts can easily apply in examining other threat cases under the First Amendment.”).

<sup>33</sup> 18 U.S.C. § 871(a) provides:

Whoever knowingly and willfully deposits for conveyance in the mail or for a delivery from any post office or by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of or to inflict bodily harm upon the President of the United States, the President-elect, the Vice President or other officer next in the order of succession to the office of President of the United States, or the Vice President-elect, or knowingly and willfully otherwise makes any such threat against the President, President-elect, Vice President or other officer next in the order of succession to the office of President, or Vice President-elect, shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

18 U.S.C. § 871(a) (1994).

The Court emphasized that in examining this type of statute, in which a class of “pure speech” is criminalized, the statute “must be interpreted with the commands of the First Amendment clearly in mind. *What is a threat must be distinguished from what is constitutionally protected speech.*” *Watts*, 394 U.S. at 707 (emphasis added).

<sup>34</sup> See *Watts*, 394 U.S. at 705-06. Watts stated that “[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J.” *Id.*

<sup>35</sup> See *id.* at 708. The Court found that the defendant’s only offense was his crude and offensive method of expressing his political opposition to the President. See *id.*

<sup>36</sup> See *id.* In discussing the value of public discourse, the Court noted that occasionally such debate could become offensive and insulting. See *id.* Accordingly, the Court explained that the language of § 871(a) had to be interpreted “against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” *Id.* (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

threat.”<sup>37</sup> *Watts* implies that a statement “which an objective, rational observer would tend to interpret, in its factual context, as a credible threat, is a ‘true threat’ which may be punished by the government.”<sup>38</sup>

In searching for a workable “true threat” standard, lower courts have also used language and reasoning from the Supreme Court case of *Brandenburg v. Ohio*,<sup>39</sup> which discussed speech that may be punished if it could incite others to commit violent acts.<sup>40</sup> In *Brandenburg*, the Court struck down Ohio’s Criminal Syndicalism Act and held that the government cannot prosecute an individual merely because that individual teaches or advocates the use of force for political or social reform.<sup>41</sup> The Court distinguished speech that is mere advocacy from speech that is an incitement to imminent lawless action, with the former meriting constitutional protection only until the point at which such advocacy is likely to result in such action.<sup>42</sup>

Although not a “true threat” case, the Court’s more recent decision in *R.A.V. v. City of St. Paul*<sup>43</sup> contributed to the development of the “true threat” doctrine. In striking down a Minnesota hate-crime ordinance as facially unconstitutional, the Court emphasized that content-based restrictions on speech are presumptively unconstitutional.<sup>44</sup> The Court clarified that threatening speech generally is not protected by the First Amendment; not necessarily

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<sup>37</sup> See *Watts*, 394 U.S. at 708.

<sup>38</sup> Potter, *supra* note 25, at 793 (quoting *United States v. Alkhabaz*, 104 F.3d 1492, 1505 (6th Cir. 1997) (Krupansky, J., dissenting)).

<sup>39</sup> 395 U.S. 444 (1969).

<sup>40</sup> See, e.g., *United States v. Kelner*, 534 F.2d 1020, 1027 (2d Cir. 1976) (articulating a “true threat” test with language reminiscent of the *Brandenburg* standard).

<sup>41</sup> See *Brandenburg*, 395 U.S. at 447, 448. The defendant, the leader of a Ku Klux Klan group, was arrested after making racist and inflammatory statements during a rally. See *id.* at 444-45. The Court explained that the Ohio Criminal Syndicalism Act made it illegal to advocate the necessity of violence as a means of achieving industrial or political reform. See *id.* The Court emphasized that the Act intended “to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action.” *Id.* at 449. Accordingly, the Court ruled that “[s]uch a statute falls within the condemnation of the First and Fourteenth Amendments.” *Id.*

<sup>42</sup> See *id.* at 447, 449.

<sup>43</sup> 505 U.S. 377 (1992).

<sup>44</sup> See *id.* at 391, 382. Admonishing the government, the Court made it clear that “hostility — or favoritism — towards the underlying message expressed” is not a valid basis upon which legislators may regulate speech. *Id.* at 386. Although the Court accepted the Minnesota Supreme Court’s interpretation that the ordinance applied only to “fighting words,” the Court ruled that “the ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses.” *Id.* at 381.

because the government disagrees with the speaker's underlying message, but because the very nature of the speech is so harmful that the government has a duty to protect its citizens from the alarm and disruption the speech produces and from the likelihood that the threatened harm will occur.<sup>45</sup>

Lower federal courts have grappled with the application of the "true threat" doctrine and, in particular, its role in allowing the government to criminally punish threatening speech pursuant to 18 U.S.C. § 875(c).<sup>46</sup> The United States circuit courts of appeals currently disagree as to whether the mens rea requirement of § 875(c) calls for the speaker to possess a specific intent to threaten another, or whether a general intent requirement will suffice.<sup>47</sup> The majority of circuits stress that the statutory language contains no specific intent component and conclude that the government may punish the speech at issue if a reasonable person would consider the statements to be threats, regardless of the defendant's actual intent to cause fear.<sup>48</sup> Moreover, courts are generally reluctant to criminally punish pure speech without evidence of the seriousness of the threat.<sup>49</sup>

The Second Circuit created the *Kelner* test to address the intent standard of § 875(c) in light of the reasoning of *Watts*.<sup>50</sup> In *United*

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<sup>45</sup> See *id.* at 380, 388.

<sup>46</sup> See Potter, *supra* note 25, at 782-90. Title 18, § 875(c) of the United States Code provides that "[w]hoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined not more than \$1,000 or imprisoned not more than five years, or both." 18 U.S.C. § 875(c) (1994).

<sup>47</sup> See Potter, *supra* note 25, at 785-88 (describing the diverse holdings of the courts of appeals as to the mens rea requirement of § 875(c)).

<sup>48</sup> See *id.* at 788-90. The Ninth Circuit is the only circuit that requires specific intent under § 875(c), while six other circuits have held that § 875(c) requires general intent. See *id.* at 788-89.

<sup>49</sup> See Sally Greenberg, *Threats, Harassment, and Hate On-Line: Recent Developments*, 6 B.U. PUB. INT. L.J. 673, 680 (1997) (referring to the holding in *United States v. Baker*, 890 F. Supp. 1375 (E.D. Mich. 1995), *aff'd sub nom.* *United States v. Alkhabaz*, 104 F.3d 1492 (6th Cir. 1997), as an example of courts' reluctance "to punish all but the most egregious of threats under this 'true threat' standard"). In *Baker*, a University of Michigan student was charged with transmitting threats in interstate commerce in violation of § 875(c) after he posted a sadistic rape and torture story about a fellow classmate on a public newsgroup and exchanged e-mail with another young man regarding abducting and raping young girls. See *Baker*, 890 F. Supp. at 1378-80. The court dismissed the charges, stating that a discussion of fantasies did not implicate the statute because the communications expressed only a general desire to hurt women and lacked a specific target and specific expression of intent. See *id.* at 1385-91.

<sup>50</sup> See Robert Kurman Kelner, *United States v. Jake Baker: Revisiting Threats and the First Amendment*, 84 VA. L. REV. 287, 294 (1998).

*States v. Kelner*,<sup>51</sup> the defendant, a leader of the Jewish Defense League, was convicted of violating § 875(c) after he told television reporters that his group was planning to assassinate Yasser Arafat.<sup>52</sup> In sustaining the conviction and the constitutionality of the statute, the Second Circuit held that pure speech can be punished if “the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution.”<sup>53</sup> The language of this test is consistent with the language in *Watts*<sup>54</sup> and also evokes the *Brandenburg* incitement standard.<sup>55</sup> Acknowledging the general-versus specific-intent debate regarding § 875(c), *Kelner* clarified that the statute punishes the expression itself, not the intent to perform the threatening act.<sup>56</sup> The *Kelner* test has been described as a stringent “true threat” analysis that is calculated to exclude situations in which the defendant did not intend to inflict injury.<sup>57</sup>

The case of greatest relevance to the analysis of “true threats” made by students is *Lovell v. Poway Unified School District*.<sup>58</sup> In *Lovell*,

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<sup>51</sup> 534 F.2d 1020 (2d Cir. 1976).

<sup>52</sup> *See id.* at 1021.

<sup>53</sup> *Id.* at 1027. Applying the test to *Kelner*’s speech, the court noted that his statement “We are planning to assassinate Mr. Arafat” was unequivocal and unconditional. *Id.* at 1028. The court also found that *Kelner*’s statement “We have people who have been trained and who are out now . . .” was immediate. *Id.* Finally, the court announced that *Kelner*’s targeting of Arafat and his lieutenants was specific. *See id.* Accordingly, the court concluded that *Kelner*’s utterances were “true threats” punishable under the statute. *See id.*

<sup>54</sup> *See Watts*, 394 U.S. at 708. The *Watts* Court clarified that speech must be taken in context and “the expressly conditional nature of [a] statement” will weigh against finding it a “true threat.” *Id.*

<sup>55</sup> *See Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). The *Brandenburg* Court stressed that a state can punish advocacy when such advocacy “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” *Id.*

<sup>56</sup> *See Kelner*, 534 F.2d at 1023. The court stated that “[i]t was not necessary under the statute for the Government to prove that appellant had a specific intent or a present ability to carry out his threat, . . . but only that he intended to communicate a threat of injury through means reasonably adapted to that purpose.” *Id.* (citations omitted).

<sup>57</sup> *See Kelner*, *supra* note 50, at 296-97 (“[T]he Second Circuit in *Kelner* concluded that the First Amendment concerns surrounding general threat statutes could be adequately addressed through a stringent ‘true threat’ test designed to weed out cases in which the accused speaker did not intend to do real harm.”).

<sup>58</sup> 90 F.3d 367 (9th Cir. 1996). This case is addressed in Part I and not Part III because the court did not consider the school context relevant to the holding. Rather, the court viewed the threats as “true threats” in *any* forum, explaining that “it does not matter to our analysis that Sarah Lovell uttered her comments while at school . . . because we hold that threats such as Lovell’s are not entitled to First

high school student Sarah Lovell was suspended after she allegedly threatened a school guidance counselor.<sup>59</sup> Lovell filed suit against the school district, the principal, and the assistant principal, claiming that the school officials violated her First Amendment rights when they suspended her for her comment.<sup>60</sup> The district court found that Lovell's First Amendment rights were violated, but the Ninth Circuit reversed, finding that the words she uttered were unprotected "true threats."<sup>61</sup>

In reaching this conclusion, the Ninth Circuit utilized an objective "true threat" test that asked whether a reasonable individual would anticipate that the listener would interpret the speaker's statement as a serious declaration of the speaker's intent to commit violence.<sup>62</sup> Abiding by the Supreme Court's command in *Watts*, the court examined the entire factual context in which the threat was uttered, noting all of the surrounding events and the responses of the listeners, and found that the statement was unequivocal enough to constitute a "true threat" of violence.<sup>63</sup>

According to the Ninth Circuit, the lower court's erroneous conclusion that Lovell's comments did not constitute a "true threat" arose from the district court's failure to focus on whether a reasonable student would anticipate that the guidance counselor would construe her statement as serious and containing a real intent to injure.<sup>64</sup> Before concluding the opinion, the court clarified that

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Amendment protection in any forum." *Id.* at 371.

<sup>59</sup> See *id.* at 368. Lovell's exact comments to her guidance counselor were disputed, but the statement essentially was that Lovell was going to shoot the counselor if she did not alter Lovell's class schedule. See *id.*

<sup>60</sup> See *id.* at 370.

<sup>61</sup> See *id.* at 368, 372.

<sup>62</sup> See *id.* at 372. According to the court, a threat is not protected by the First Amendment if "a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault." *Id.* (quoting *United States v. Orozco-Santillan*, 903 F.2d 1262, 1265 (9th Cir. 1990)).

<sup>63</sup> See *Lovell*, 90 F.3d at 372-73. The court recognized that "any person could reasonably consider the statement . . . made by an angry teenager, to be a serious expression of intent to harm or assault . . . . This statement is unequivocal and specific enough to convey a true threat of physical violence." *Id.* at 372.

<sup>64</sup> See *id.* According to the Ninth Circuit, the "ultimate inquiry" for the lower court should have been "whether a reasonable person in Lovell's position would foresee that [the guidance counselor] would interpret her statement as a serious expression of intent to harm or assault." *Id.* Although the court equated the test established in *Lovell* with the *Kelner* "true threat" test, at least one author has noted that the tests are not necessarily in accord. See *Kelner*, *supra* note 50, at 299-300 (according to *Kelner*, the *Lovell* court confused matters when the court cited the *Kelner* "true threat" test as if this standard was in accord with the reasonable person

although courts may consider the actual effect of the utterance on the victim when determining whether a statement constitutes a "true threat," ultimately the court must ascertain whether a reasonable individual should have anticipated that his utterance would cause alarm.<sup>65</sup>

Although the Ninth Circuit did not emphasize Supreme Court precedent in the area of students' speech rights, the court's analysis did address the brutality prevalent in modern public schools and commented that, given this violence, the guidance counselor not surprisingly felt threatened.<sup>66</sup> Ultimately, though, the Ninth Circuit's comments failed to clarify the degree of latitude schools possess and the degree of discretion they can exercise in dealing with students' threats of violence. The language of *Lovell* implies, however, that had the court relied upon "school law" precedent<sup>67</sup> to establish that the school had a constitutional right to punish the student, it could have done so with ease.<sup>68</sup>

## II. FIRST AMENDMENT JURISPRUDENCE RELATED TO THE SCHOOL CONTEXT

Public school teachers and administrators are state actors who must abide by the Constitution, including both the First Amendment and the Due Process Clause of the Fourteenth Amendment.<sup>69</sup> First

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inquiry established in the opinion).

<sup>65</sup> See *Lovell*, 90 F.3d at 372-73. The court clarified that "[w]hile courts may consider the effect on the listener when determining whether a statement constitutes a true threat, the final result turns upon whether a reasonable person in these circumstances should have foreseen that his or her words would have this effect." *Id.* at 373.

<sup>66</sup> See *id.* at 374. The court emphasized "that violence is prevalent in public schools today, and that teachers and administrators must take threats by students very seriously." *Id.* The court cited *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), and *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988), however, as supporting the proposition that the First Amendment only provides limited protection for student communications within the school context. See *Lovell*, 90 F.3d at 371.

<sup>67</sup> See *infra* notes 69-99 and accompanying text (discussing education jurisprudence in the context of the First Amendment).

<sup>68</sup> See *Lovell*, 90 F.3d at 371. The court explained that "[t]o resolve the federal claim, we need not rely upon the Supreme Court cases that limit students' free speech rights; because we hold that threats such as *Lovell*'s are not entitled to First Amendment protection in any forum . . ." *Id.*

<sup>69</sup> See *Tinker*, 393 U.S. at 506-07 ("First Amendment rights . . . are available to teachers and students . . . . [T]he Court has repeatedly emphasized the need for affirming the comprehensive authority . . . of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."); see also *Goss v. Lopez*, 419 U.S. 565, 574 (1975) ("The authority [of] the

Amendment jurisprudence in the context of the school setting is a unique and continually evolving area of law.<sup>70</sup> Supreme Court decisions reviewing the rights of students contain the underlying theme that the school environment is unique and fragile, such that the need to protect it might allow an allocation of rights between students and the state that would be unconstitutional if applied to another group of individuals.<sup>71</sup> At the same time, the Supreme Court has demonstrated an understanding that students should be taught the value of constitutional freedom by example and that students are persons under the Constitution who possess fundamental rights that the state must respect.<sup>72</sup> With these competing considerations in mind, the Supreme Court formed the basis for modern student speech rights in three First Amendment cases.

For many scholars, the apex of student speech rights was the Vietnam-era decision of *Tinker v. Des Moines*.<sup>73</sup> In *Tinker*, a school suspended students who failed to abide by the school's request that they remove their black anti-war armbands.<sup>74</sup> The Supreme Court considered the wearing of the armbands "pure speech," which is granted exhaustive protection under the First Amendment.<sup>75</sup> The Court emphasized that students and teachers have a right to enjoy First Amendment protection, even in the educational environment, and held that the students have a constitutional right to wear the armbands in school.<sup>76</sup>

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State . . . in its schools . . . must be exercised consistently with constitutional safeguards . . . [T]he State is constrained to recognize a student's . . . entitlement to a public education . . . which may not be taken away . . . without adherence to the . . . procedures [of the Due Process] Clause.").

<sup>70</sup> See Thomas Fischer, *The Law & Education: Supreme Court Doctrine Reaches Critical Mass*, 13 Miss. C. L. REV. 287, 288-91 (1993) (discussing the evolution of school law).

<sup>71</sup> See *id.* at 288.

<sup>72</sup> See *Tinker*, 393 U.S. at 736 ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.").

<sup>73</sup> 393 U.S. 503 (1969). See Strossen, *supra* note 13, at 458 (claiming that *Tinker* was the "high-water mark for students' rights.").

<sup>74</sup> See *Tinker*, 393 U.S. at 735.

<sup>75</sup> See *id.* at 736. Agreeing with the lower court's analysis of the type of speech at issue, the Court noted "that the wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amendment" and was "closely akin to 'pure speech' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment." *Id.* (citations omitted).

<sup>76</sup> See *id.* at 736, 740. The Court emphasized that "[s]tudents in school as well as out of school are 'persons' under our Constitution" and are "possessed of

The Court distinguished the passive act of wearing the armbands from speech that interferes with the work of the school or intrudes upon the rights of other students.<sup>77</sup> The crux of the Court's analysis, often referred to as the *Tinker* test, asked whether the forbidden speech would substantially disrupt the work or disciplinary process of the school, or whether the speech involved significant disorder or the invasion of the rights of other students.<sup>78</sup>

Unlike the political speech in *Tinker*, *Bethel School District No. 403 v. Fraser*<sup>79</sup> addressed student speech rights involving speech deemed of minimal value — lewd speech.<sup>80</sup> Specifically, the Supreme Court questioned whether the First Amendment bars educators from punishing a student who gives a sexually explicit and lewd speech during an assembly.<sup>81</sup> The high school student, Matthew Fraser, brought suit against the school district, alleging violations of his First Amendment rights.<sup>82</sup> Fraser had been suspended for vulgar comments he made during a school assembly.<sup>83</sup>

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fundamental rights which the State must respect." *Id.* at 739. Hence, the Court held that without evidence that the speech interfered with classwork or caused disorder, "our Constitution does not permit officials of the State to deny [students'] form of expression." *Id.* at 740.

<sup>77</sup> *See id.* at 740. Describing the passive nature of the student speech, the Court explained that the "petitioners merely went about their ordained rounds in school. Their deviation consisted only in wearing on their sleeve a band of black cloth, not more than two inches wide . . . They neither interrupted school activities nor sought to intrude in school affairs or the lives of others." *Id.* In contrast, the Court felt that "conduct by [a] student . . . which for any reason . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." *Id.*

<sup>78</sup> *See id.*

<sup>79</sup> 478 U.S. 675 (1986).

<sup>80</sup> *See id.* at 677.

<sup>81</sup> *See id.*

<sup>82</sup> *See id.* at 679.

<sup>83</sup> *See id.* Fraser gave the following speech during a high school presentation in support of a fellow student's candidacy for student government:

"I know a man who is firm — he's firm in his pants, he's firm in his shirt, his character is firm — but most . . . of all, his belief in you, the students of Bethel, is firm.

"Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts — he drives hard, pushing and pushing until finally — he succeeds.

"Jeff is a man who will go to the very end — even the climax, for each and every one of you.

"So vote for Jeff for A.S.B. vice-president — he'll never come between you and the best our high school can be."

*Id.* at 687 (Brennan, J., concurring) (alterations in original).

Fraser was suspended for violating a Bethel High School rule that stated that



Examining the First Amendment in the school context, the Court observed that the constitutional rights of students were not equivalent to the rights of adults in other contexts.<sup>84</sup> The Court noted that, although adults may have a constitutional right to use vulgar terms, schools may punish students for using such vulgarities.<sup>85</sup> In addition, the Court stated that the determination of the manner of speech appropriate and permitted in a school rests within the discretion of school administrators.<sup>86</sup> Accordingly, the Court held that the school administrators possessed the discretion to punish Fraser for his offensive, though not legally obscene, speech, in order to protect the sensibilities of the children in the assembly who were captive listeners to his comments.<sup>87</sup> The Court also found that the school had a right to punish Fraser as a means of disassociating itself from his comments and demonstrating to the student body that lewd conduct is entirely inconsistent with the basic values of public education.<sup>88</sup>

*Hazelwood School District v. Kuhlmeier*,<sup>89</sup> the most recent Supreme Court case to address students' First Amendment rights, advanced Fraser's rationale that schools are entitled to disassociate themselves from speech that is inconsistent with their educational goals.<sup>90</sup> In *Hazelwood*, three student staff members of a school-sponsored

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"[c]onduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures." *Id.* at 678.

<sup>84</sup> *See id.* at 682. The Court expounded that "[i]t does not follow . . . that simply because the use of an offensive form of expression may not be prohibited to adults . . . the same latitude must be permitted to children in a public school." *Id.*

<sup>85</sup> *See id.* The Court announced that "[s]urely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse." *Id.* at 683.

<sup>86</sup> *See Fraser*, 478 U.S. at 683 ("The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.").

<sup>87</sup> *See id.* at 685. The Court cited various cases that identified "the obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children — especially in a captive audience — from exposure to sexually explicit, indecent, or lewd speech." *Id.* at 684. In recognition of this concern, the Court reasoned that "schools . . . may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy." *Id.* at 683.

<sup>88</sup> *See id.* at 685-86. The Court stated that "it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education." *Id.*

<sup>89</sup> 484 U.S. 260 (1988).

<sup>90</sup> *See id.* at 266-67 (citing *Fraser*, 478 U.S. at 685-86).

newspaper sued the school district for violating their First Amendment rights after the school prevented them from publishing various articles on teen pregnancy.<sup>91</sup> The Court distinguished the First Amendment requirement that a school tolerate some unpleasant student expression from the issue of whether a school must actively endorse certain student speech.<sup>92</sup> The Court reasoned that in the latter situation, as long as the regulation is reasonable and based on legitimate pedagogical concerns, school officials have the right to regulate expressive activities that may be perceived as bearing the imprimatur of the school.<sup>93</sup> The Court ruled for the defendant school district, stating that the school was entitled to exercise extensive editorial control over school-sponsored student speech to ensure that students under its care were not exposed to inappropriate material.<sup>94</sup>

Following *Hazelwood*, courts may rely upon three distinct standards to analyze issues involving students' First Amendment rights in the school context.<sup>95</sup> Courts may utilize the *Tinker* standard, which allows administrators to punish student speech that is materially disruptive to the school environment.<sup>96</sup> Courts may apply

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<sup>91</sup> See *id.* at 262-64.

<sup>92</sup> See *id.* at 270-71. According to the Court, "[t]he question whether the First Amendment requires a school to tolerate particular student speech" is distinct "from the question whether the First Amendment requires a school affirmatively to promote particular student speech." *Id.*

<sup>93</sup> See *id.* The Court felt that "[a] school must be able to set high standards for the student speech that is disseminated under its auspices . . . and may refuse to disseminate student speech that does not meet those standards." *Id.* at 271-72.

<sup>94</sup> See *id.* at 266, 271-72. The Court stated that school officials are entitled to exercise expansive control over school-sponsored student speech in order "to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school." *Id.* at 271.

<sup>95</sup> See *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 530 (9th Cir. 1992) (holding that "scab" political buttons worn by students during school hours were not inherently disruptive). The *Chandler* court concluded that "three distinct areas of student speech" can be distilled from Supreme Court precedent: "(1) vulgar, lewd, obscene, and plainly offensive speech, (2) school-sponsored speech, and (3) speech that falls into neither of these categories." *Id.* at 529. The court indicated that the first type of speech is governed by *Fraser*, the second by *Hazelwood*, and all other types of speech by *Tinker*. See *id.* at 529.

<sup>96</sup> See text accompanying note 78 *supra* (detailing the *Tinker* test). In *Hazelwood*, the Supreme Court asserted that, although "[t]he dissent perceives no difference between the First Amendment analysis in *Tinker* and that applied in *Fraser*," a distinction between the analyses exists. See *Hazelwood*, 484 U.S. at 272 n.4. The Court explained that the decision in *Fraser* rested on the lewd and offensive character of a speech given during an official school event rather than on any tendency of the

the *Hazelwood* standard when the school sponsors or fosters student expression in some manner.<sup>97</sup> This standard allows the school to control the content and dissemination of the speech as long as the regulation is reasonably related to educational concerns.<sup>98</sup> Finally, *Fraser* has been interpreted to stand for the principle that some student speech is not worthy of constitutional protection, regardless of whether that speech is sponsored by the school, because the very nature of the speech is inconsistent with the educational mission of schools.<sup>99</sup>

### III. FEDERAL AND STATE CASES: STUDENT THREATS OF VIOLENCE

The Supreme Court has yet to establish the extent of a student's First Amendment rights in the context of threatening speech. With no Supreme Court guidance, lower courts disagree about the degree of discretion school administrators can exercise when deciding whether to punish a student's threatening speech. Three recurring inquiries arise in the courts' analyses. First, did the student's threat occur during school hours or within the school environment? Second, within what context or circumstances was the student threat uttered? Third, what was the reaction of the person to whom the threat was directed, and if that reaction was fear, was that fear a reasonable and foreseeable reaction? All of the cases discussed below involve the issue of violent, threatening student speech. Yet only one of the cases can clearly be labeled a "student threat" case. One reason for this difficulty in locating case law that solely addresses student threats is that the student expression at issue is frequently a potpourri of low-value speech.<sup>100</sup> Typically, obscene language is written to threaten teachers and, frequently, to incite fellow students to violent action.<sup>101</sup> Another reason is that courts are eager to locate

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speech to disrupt classwork or invade the rights of others. *See id.*

<sup>97</sup> *See Hazelwood*, 484 U.S. at 272-73; *see also supra* notes 89-94 and accompanying text (analyzing *Hazelwood*).

<sup>98</sup> *See Hazelwood*, 484 U.S. at 273.

<sup>99</sup> *See Chandler*, 978 F.2d at 529, 530. The *Chandler* court stated that "the deferential *Fraser* standard applies when . . . speech . . . is vulgar, lewd, obscene, or plainly offensive without a showing that such speech occurred during a school-sponsored event or threatened to 'substantially interfere with [the school's] work.'" *Id.* at 529 (citations omitted); *see also Heller v. Hodgin*, 928 F. Supp. 789, 798 (S.D. Ind. 1996) (stating that the offensive and vulgar nature of student speech can be enough, in and of itself, to justify the school's discipline of a student).

<sup>100</sup> *See supra* notes 27-28 and accompanying text (discussing low-value speech such as obscenity, fighting words, and vulgarity).

<sup>101</sup> *See, e.g., Bystrom v. Fridley High Sch.*, 686 F. Supp. 1387 (D. Minn. 1987) (involving a vulgar student publication that encouraged fellow students to take

the obscenity or vulgarity within the student speech, rather than to focus on the threats themselves — an approach that enables the courts to utilize the analysis and reasoning in *Fraser*.

The first case examined, *Bystrom v. Fridley High School*,<sup>102</sup> involved three high school students who were suspended after they distributed an “underground” student newspaper that included an article entitled “Trash and Slash” that applauded the vandalism of a teacher’s home.<sup>103</sup> The students sued the school pursuant to 42 U.S.C. § 1983,<sup>104</sup> alleging that the school violated their First Amendment rights.<sup>105</sup> The court granted the school district’s motion for summary judgment and dismissed the action.<sup>106</sup>

The court reasoned that the school had three legitimate bases for punishing the students.<sup>107</sup> First, the court explained that the underground newspaper, although pure speech, caused a substantial disruption of educational activities.<sup>108</sup> Although the students did not intend to disrupt school activities, the court observed that the dissemination of the newspapers was the root cause of the ensuing chaos in the school’s classrooms and, therefore, was a punishable act.<sup>109</sup> Second, the court noted that the newspaper contained language that was sexually explicit and inconsistent with the values of public education; therefore, the school administrators could

violent action).

<sup>102</sup> 686 F. Supp. 1387 (D. Minn. 1987).

<sup>103</sup> See *id.* at 1389-90.

<sup>104</sup> Title 42, § 1983 of the United States Code provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (1994).

<sup>105</sup> See *Bystrom*, 686 F. Supp. at 1390.

<sup>106</sup> See *id.* at 1396.

<sup>107</sup> See *id.* at 1392-93.

<sup>108</sup> See *id.* at 1392. The court initially noted that the case “involves only pure speech” and that there was “no claim that *the plaintiff students’ conduct in distributing the . . . papers . . .* disrupted regular school activities.” *Id.* (emphasis added).

<sup>109</sup> See *id.* The court found that, although the plaintiffs did not intend to disrupt school activities, the fact remained that “[i]n circulating, reading, and reacting to this publication, some students at the school disrupted their classes to such a degree that their teachers found it necessary to interrupt their teaching to quell these disruptions.” *Id.* at 1390. Accordingly, the court reasoned that it was constitutionally permissible for school officials to “punish that disruption.” See *id.* at 1392.

discipline the students.<sup>110</sup>

Finally, the court stated that the newspaper advocated violent action toward school employees.<sup>111</sup> The court compared the newspaper to the speech in *Fraser*, in which the speech was punishable in the school environment although the sexually vulgar language at issue could not have been regulated according to the indecent speech standards applied to adults.<sup>112</sup> Analogizing, the court reasoned that although the language of "Trash and Slash" fell short of the standards by which adults could be penalized for advocating violence pursuant to the *Brandenburg* test,<sup>113</sup> the violent rhetoric could be regulated because the speaker was a student.<sup>114</sup>

At the opposite end of the spectrum of constitutional protection for student speech is *Beussink v. Woodland R-IV School District*,<sup>115</sup> in which a district court admonished high school officials for trampling upon a student's First Amendment rights.<sup>116</sup> High school student Brandon Beussink used his personal computer to create a homepage that used vulgar language to criticize a Woodland teacher and the school principal, Yancy Poorman.<sup>117</sup> Poorman suspended Beussink for ten days, which resulted in Beussink failing all his classes due to the school's absenteeism policy.<sup>118</sup> Beussink requested a preliminary

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<sup>110</sup> See *id.* at 1393; see also *supra* notes 79-88 and accompanying text (examining *Fraser*).

<sup>111</sup> See *Bystrom*, 686 F. Supp. at 1393. The court was referring to an article in the unofficial student newspaper that discussed an incident of vandalism at a teacher's home and commented that "many students attending Fridley would like to claim responsibility for this act, and I can't say that I blame them." *Id.* at 1390.

<sup>112</sup> See *id.*

<sup>113</sup> See text accompanying notes 41-42 *supra* (defining the *Brandenburg* test).

<sup>114</sup> See *Bystrom*, 686 F. Supp. at 1393. The court ruled that the student article could be censored, even though the "constitutional guarantees of free speech . . . do not permit a state to forbid or proscribe advocacy of the use of force . . . except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action" and that "[n]o such . . . likelihood appear[ed] in the plaintiff students' publication." *Id.* The court concluded by speculating that "the Supreme Court would defer to the school authorities . . . with respect to their decision to discipline the plaintiff students for advocating violence against their teachers." *Id.*

<sup>115</sup> 30 F. Supp.2d 1175 (E.D. Mo. 1998).

<sup>116</sup> See *id.* at 1182. The court enjoined the school district from sanctioning Beussink in any way for his speech and advised Woodland school officials that "it is provocative and challenging speech, like Beussink's, which is most in need of the protections of the First Amendment." *Id.*

<sup>117</sup> See *id.* at 1177-78. Beussink's web page, using vulgar language, criticized the school's web site and encouraged visitors to contact the principal and inform him of their dislike for the site. See *Suspension over Web Page Violates Student's Free Speech* (visited Jan. 20, 2000) <<http://www.hannibal.net/stories/123198/webpage.html>>.

<sup>118</sup> See *id.* at 1180.

injunction to enjoin the school from considering his suspension when calculating his grades, claiming that the suspension violated his First Amendment rights.<sup>119</sup> The court concluded that the principal's actions in suspending Beussink were not justified because they were based on Poorman's personal distaste of the homepage and not on any legitimate fear of disruption to the school environment.<sup>120</sup>

The court stated that Buessink's homepage, characterized as containing "provocative and challenging" speech, could actually be valuable for stimulating public discourse.<sup>121</sup> The court reasoned that Buessink's speech should be protected, even if it is unpopular, as long as it does not substantially interfere with the mission of the school.<sup>122</sup> The district court granted the injunction, finding it likely that Beussink could prove that his First Amendment rights were violated.<sup>123</sup>

*Klein v. Smith*,<sup>124</sup> though not a true "student threat" case, illustrates the concern that some courts have about whether administrators are reaching too far outside of the educational environment to regulate student speech.<sup>125</sup> *Klein* involved student vulgarity directed toward a teacher, but reached a different conclusion than the Supreme Court did in *Fraser*.<sup>126</sup> *Klein* was suspended for ten days for making a vulgar gesture to a teacher, although the gesture was made neither on school grounds nor during school hours.<sup>127</sup> *Klein* filed suit, asking for a permanent injunction

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<sup>119</sup> See *id.* at 1177, 1182.

<sup>120</sup> See *id.* at 1180. The court stressed that "[d]isliking or being upset by the content of a student's speech is not an acceptable justification" for punishing that speech. *Id.*

<sup>121</sup> See *Beussink*, 30 F. Supp.2d at 1182. The court emphasized that "[o]ne of the core functions of free speech is to invite dispute. 'It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.'" *Id.* at 1181-82 (quoting *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949)).

<sup>122</sup> See *id.* at 1182. The court stated that the very purpose of the First Amendment is to protect unpopular speech and that the public interest is best served not by censoring Beussink, but "by giving the students at Woodland High School this opportunity to see the protections of the United States Constitution and the Bill of Rights at work." *Id.*

<sup>123</sup> See *id.*

<sup>124</sup> 635 F. Supp. 1440 (D. Me. 1986).

<sup>125</sup> See *id.* at 1442. While acknowledging that "[u]nder ideal circumstances, the effective response to out-of-school misbehavior would be the swift application of . . . parental discipline," the court declared that teachers may not trespass upon First Amendment rights in their eagerness to provide such discipline. *Id.*

<sup>126</sup> See *id.* at 1440, 1442.

<sup>127</sup> See *id.* at 1440-41. *Klein* extended the middle finger of his hand toward his teacher in a restaurant parking lot. See *id.* The court noted that "[d]efendant's

against the suspension.<sup>128</sup> The court granted the injunction, finding that the suspension violated the First Amendment.<sup>129</sup>

The court explained that Klein's lewd speech occurred far from school premises, outside of school hours, and with no relation to any school activity.<sup>130</sup> Therefore, the court reasoned, any connection between the vulgar gesture to a member of the teaching staff and the orderly functioning of the school's activities was too attenuated to sustain a disciplinary action against Klein for violating the school rule prohibiting discourteous behavior toward a teacher.<sup>131</sup>

School administrators had argued that the effect of Klein's gesture diminished teachers' resolve to discipline students properly, thereby adversely affecting the teacher-pupil relationship and the efficient operation of the school.<sup>132</sup> Citing *Tinker*, the school administrators reasoned that the adverse educational consequences should have negated any expressive value the speech may have had.<sup>133</sup> The court disagreed, explaining that individual liberty of expression outweighed the need to discipline Klein for his rude gesture.<sup>134</sup> The court also dismissed the school's contention that the gesture should be viewed as "fighting words" that are outside the scope of constitutional protection; the gesture did not, and had not in the

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counsel stated in argument that the gesture used is commonly understood to mean 'fuck you.'" *Id.* at 1441 n.2. This gesture violated a school rule that authorized the school to impose suspension for "vulgar or extremely inappropriate language or conduct directed to a staff member." *Id.* at 1441.

<sup>128</sup> *See id.* at 1441.

<sup>129</sup> *See id.* at 1442. The court held that the "First Amendment protection of freedom of expression" would be "made a casualty" if the school was allowed "to force-feed good manners" to ruffians like Klein. *Id.* Hence, the court granted the plaintiff a permanent injunction. *See id.*

<sup>130</sup> *See Klein*, 635 F. Supp. at 1441. Noting the circumstances of the incident, the court stressed that "[t]he conduct in question occurred in a restaurant parking lot, far removed from any school premises or facilities at a time when teacher Clark was not associated in any way with his duties as a teacher." *Id.*

<sup>131</sup> *See id.*

<sup>132</sup> *See id.* at 1442. Various teachers testified that the incident with the plaintiff student "sapped their resolve to enforce proper discipline upon him and other students during school hours." *Id.* at 1442 n.4.

<sup>133</sup> *See id.* The school officials argued that "this weakening of the resolve of the teaching staff to enforce appropriate discipline . . . constitutes a sufficient adverse effect . . . upon the proper operation of the school and upon the teacher-pupil relationship . . . to deprive the gesture of its protected status." *Id.*

<sup>134</sup> *See id.* at 1442. Scoffing at the educator's argument, the court refused to "do these sixty-two mature and responsible professionals the disservice of believing that collectively their professional integrity, personal mental resolve, and individual character are going to dissolve, willy-nilly, in the face of the digital posturing of this splenetic, bad-mannered little boy." *Id.* at 1442 n.4.

past, led to violence between students and teachers.<sup>135</sup>

Recently, in one of the first cases of its kind, a judge ruled that a school could punish a student who posted a threatening web site, even though the web site was created outside of school hours and without the use of school equipment.<sup>136</sup> In *J.S. v. Bethlehem Area School District*,<sup>137</sup> Justin Swidler was expelled after he created a web site that threatened and degraded his math teacher, Kathleen Fulmer.<sup>138</sup> Appealing the school district's punishment, the expelled eighth grader sued the school district, alleging that the school district had violated several of his constitutional rights, including his First Amendment rights.<sup>139</sup>

Judge Robert E. Simpson declared that the web site was not protected expression pursuant to the First Amendment because the site was materially disruptive to the school environment and because it advocated violence against the school staff.<sup>140</sup> Quoting *Fraser*, the court explained that the school appropriately imposed punishment that would demonstrate to the students that speech such as Swidler's

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<sup>135</sup> See *id.* at 1441-42. Noting that educators are frequently the subjects of vulgar gestures, the court concluded that "the finger,' at least when used against a universe of teachers, is not likely to provoke a violent response." *Id.* at 1442 n.4.

<sup>136</sup> See *J.S. v. Bethlehem Area Sch. Dist.*, No. 1998-CE-7696, at 17, 1 (Pa. D. & C.4th filed July 23, 1999).

<sup>137</sup> No. 1998-CE-7696 (Pa. D. & C.4th filed July 23, 1999).

<sup>138</sup> See *id.* at 6, 2. The web site, "Teacher Sux," contained offensive comments about teachers and administrators. See *id.* at 1-2. Also, the site contained an image of the teacher's decapitation and another of the teacher morphing into Hitler. See *id.* at 2. The site also had a section stating, "Why Should She Die - Take a look at the diagram and the reasons I gave. then [sic] give me \$20 to help pay for the hitman." *Id.* After the site was discovered, Principal A. Thomas Kartsotis notified Bethlehem Police; the United States Justice Department was ultimately notified by an unknown individual, and the Federal Bureau of Investigation looked into the matter, but no criminal charges were filed against Swidler. See Kathleen Parrish, *Teacher Sues School over Derogatory Web Site*, ALLENTOWN MORNING CALL, Nov. 6, 1998, at B1. Northhampton County District Attorney John Morganelli did not pursue criminal charges, saying that the issue would be difficult to prosecute because the seriousness of the threat was questionable. See *id.*

<sup>139</sup> See *J.S.* at 8. In a separate matter, the subject of the web site, math teacher Kathleen Fulmer, filed a lawsuit against the student and his parents, claiming that the web site caused her to suffer public humiliation and mental and emotional distress. See Parrish, *supra* note 138.

<sup>140</sup> See *J.S.* at 10. The court found that the web site had a traumatic and disruptive effect on the school environment because the staff feared for their safety and disturbed students had to seek help from counselors. See *id.* at 5, 13. Finding for the defendant school district, the court concluded that the "School District carried its burden of demonstrating a reasonable basis for its conduct based on actual disruption and a reasonable forecast of continued disruption" and that the Constitution did not protect the "materially disruptive expression." *Id.* at 13.



is incompatible with the basic values of public education.<sup>141</sup> Although Swidler emphasized that he utilized his home computer to create the web site outside of school hours and that the speech was removed from school property,<sup>142</sup> the court rejected this argument, stressing that disruptive speech does not have to originate from the school environment in order to be punished.<sup>143</sup> Judge Simpson explained that the site significantly interfered with the school's educational mission although the site was created outside the school environment.<sup>144</sup> The court distinguished *Beussink*, noting that the Woodland School District could not demonstrate any legitimate fear of educational disruption, while the Bethlehem School District could document actual disruption and could reasonably forecast continued disruption.<sup>145</sup>

Swidler also argued that the statements were not "true threats."<sup>146</sup> The court applied *Lovell's* objective test for ascertaining when threatening speech loses constitutional protection and found that, like the counselor in *Lovell*, both the teacher and principal were justified in taking the electronic threats seriously in light of the violence prevalent in today's schools.<sup>147</sup> The court also compared the web site to the censored speech in *Bystrom* and found the expression in the former far more malignant.<sup>148</sup> With the foregoing considerations in mind, the judge concluded that Swidler's

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<sup>141</sup> See *id.* at 10 (quoting *Fraser*, 478 U.S. at 685-86).

<sup>142</sup> See *id.* at 1, 8.

<sup>143</sup> See *id.* at 12. The court announced that "[t]he expression sanctioned as disruptive need not originate in school." *Id.* The court observed that students who make statements in an unofficial newspaper that is created, reproduced, and disseminated off-campus could be disciplined as long as the "on-campus effect [of the student expression] is materially disruptive." *Id.*

<sup>144</sup> See *id.* at 13. The court asserted that the web site hindered the school's educational mission by disturbing the orderly functioning of the school and instilling fear into members of the teaching staff. See *id.*

<sup>145</sup> See *id.* at 14.

<sup>146</sup> See Kathleen Parrish, *Swidlers Lose the First Round; Judge Rules BASD Didn't Violate Free Speech Right When it Expelled Boy over Web Site*, ALLENTOWN MORNING CALL, July 24, 1999, at B1 ("In their appeal of Justin's expulsion, the Swidlers argued that statements Justin made against Fulmer did not represent a 'true threat under the circumstances or under the law.'").

<sup>147</sup> See *J.S.* at 16-17. The court approvingly noted the school board's finding that the "Principal took the threat seriously and that [the] [t]eacher was frightened," and that both "were justified in taking the threat seriously in light of the violence prevalent in schools today." *Id.* at 17.

<sup>148</sup> See *id.* at 15-16. Judge Simpson opined that Swidler's expression was more malignant because, unlike the plaintiffs in *Bystrom*, he actually "referenced [Fulmer] and explained why she should die," sought money to finance the hiring of a hitman, and included on the web site an image of Fulmer being shot in the head. *Id.* at 15.

expression was not protected and that the school did not violate the First Amendment in expelling him.<sup>149</sup>

#### IV. A CONSTITUTIONAL FRAMEWORK FOR EDUCATORS WHO SEEK TO PUNISH STUDENT THREATS

Judges and scholars seem uniformly to agree that threatening student speech is incompatible with the educational mission of the school and can be constitutionally punished. Yet no court seems willing to state explicitly what should be obvious: that a student threat need not rise to the level of a "true threat" before it legally can be punished.<sup>150</sup> In analyzing this issue, courts universally cite *Fraser* for the proposition that low-value student speech can be suppressed for pedagogical reasons because the constitutional rights of pupils are not as extensive as the rights of adults.<sup>151</sup> Hence, as with the vulgarity in *Fraser*, threats that could not criminally be punished may be censored when students utter them. At the same time, courts have failed to present school administrators with a clear approach for managing student threats within constitutional boundaries. The final part of this Comment attempts to create a constitutional framework that school officials can look to for guidance in responding to student threats.<sup>152</sup>

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<sup>149</sup> See *id.* at 17.

<sup>150</sup> The *J.S.* court came closest to acknowledging this fact when it declared that [w]hether or not these expressions could be redressed outside the public education context, and whether or not they were likely to incite an immediate mutiny, the expressions were clearly of such a nature as to invite the concerned attention of [the] School District and its employees. [W]e exercise deference to the judgment of those entrusted with the daily activities of public education with respect to their decision to discipline students for advocating violence against teachers.

*Id.* at 16.

<sup>151</sup> See, e.g., *Bystrom*, 686 F. Supp. at 1393; see also *J.S.* at 10. Professors Philip T.K. Daniel and Patrick D. Pauken reach a similar conclusion within the context of electronic communications, finding that "while the government may not be able to prosecute an individual for certain inappropriate speech [such as threats] he or she sends to other individuals by electronic media, school officials might be able to punish students for the same communication sent . . . over school computers." Philip T.K. Daniel & Patrick D. Pauken, *Educators' Authority & Students' First Amendment Rights on the Way to Using the Information Highway: Cyberspace and School*, 54 WASH. U. J. URB. & CONTEMP. L. 109, 142 (1998).

<sup>152</sup> State constitutional law also may affect a school's authority to control student expression. The analysis proposed in Part IV is based upon the language and spirit of the United States Constitution, but states may choose to give their citizens broader First Amendment rights. For example, the Massachusetts Supreme Court has declared that high school students legally may utter vulgar speech within the school environment as long as the vulgarity does not disrupt school activities. See Daniel &

Modern communications technologies — the Internet and the World Wide Web — have complicated the student threat issue.<sup>153</sup> Although schools arguably should not treat Internet communications as if they are fundamentally different from traditional communication,<sup>154</sup> these technologies alter constitutional analysis.<sup>155</sup> At least two scholars claim that no communications technology of the twentieth century presents as much opportunity for uninhibited expression as does the Internet.<sup>156</sup> The far-reaching influence of the Internet is even more pronounced within the demographic of today's students.<sup>157</sup> Students are intense users of the new medium, employing the technology for both recreational and school-related purposes.<sup>158</sup> The Internet, however, has also presented students with an

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Pauken, *supra* note 151, at 147 (citing *Pyle v. School Comm. of South Hadley*, 667 N.E.2d 869 (Mass. 1996)).

<sup>153</sup> See Bruce W. Sanford & Michael J. Lorenger, *Teaching an Old Dog New Tricks: The First Amendment in an Online World*, 28 CONN. L. REV. 1137, 1137 (1996). Internet communications are fundamentally different from traditional mass communications given the infinite number of information sources, the lack of a "gatekeeper" (meaning that no individual or entity controls the distribution of information on the Internet), and that users of the Internet are frequently also the creators of information on the Internet. *See id.* at 1141-42.

<sup>154</sup> See Weng, *supra* note 22, at 832. According to Weng, if educators fail to appreciate and understand the nature of Internet communications, but rather choose to harshly and indiscriminately discipline electronic expression, they will violate the Constitution. *See id.* Instead, Weng insists that schools should draft definite policies regarding their students' use of the Internet and continue to follow the mandate of the First Amendment when deciding whether electronic communication should be punished. *See id.*

<sup>155</sup> See Greenberg, *supra* note 49, at 694 ("Some say that the same principles that governed free speech in the past should govern these new technologies. Others argue that this technology is so revolutionary that it calls for fundamental changes to the standard framework of First Amendment analysis.").

<sup>156</sup> See Sanford & Lorenger, *supra* note 153, at 1137 ("No technological advance in communications during the 20th century offers as much opportunity for robust, uninhibited self-expression as the freewheeling Internet.").

<sup>157</sup> See Michael Wolff, *Why Your Kids Know More About the Future Than You Do*, NEW YORK, MAY 17, 1999, at 30. Wolff explains that "[a]s Internet media becomes pervasive media — pervasive like rock and roll — it will no doubt precipitate a shift in teen personality, behavior, [and] aspirations." *Id.* Moreover, Wolff analogizes the thrill for today's teenagers of 'cybering' or 'surfing' the Internet to the sexual experimentation and freedom of the 1970s. *See id.* Another scholar describes the younger generation as Internet-savvy individuals who are distrustful of government and committed to individual economic and personal freedom, as symbolized by the freedom of the Internet. *See Pavela, supra* note 22, at 166 (citing John Katz, *Netizen: Birth of a Digital Nation*, WIRED, Apr. 1997, at 49).

<sup>158</sup> See Weng, *supra* note 22, at 765-66. Weng describes how students use the Internet to socialize, conduct research, gather news, shop, and play games. *See id.* Teachers at many post-secondary schools, including law schools, are using the Internet to distribute information concerning classes and assignments and are also utilizing the Internet to communicate with and instruct students. *See id.* at 763-64.

unprecedented opportunity to candidly ridicule their schools and teachers.<sup>159</sup> Therefore, the prevalent use of this technology by students, along with the unique characteristics of this new medium, are considerations that must be addressed in creating a constitutional framework for school administrators to follow.

My solution for school officials who seek to punish threatening student speech, but fear constitutional repercussions, involves a fact-specific analysis that focuses on three factors.<sup>160</sup> First, guided by the rationale of cases such as *Klein v. Smith* and *J.S. v. Bethlehem Area School District*, the officials should examine how, when, and within what circumstances the threat was made. Second, the school should study the language of the threat itself to ascertain how a reasonable person would perceive the specific utterance. Finally, the school should assess whether the speech did, or will, disrupt the educational environment.

Pursuant to the first factor, if the student uttered the threat as part of a school-sponsored forum, for example, during an assembly or within a student publication, the school should have the authority to reasonably punish, and thereby disassociate itself from, the student speech. If the speech occurred within the school environment but does not bear the imprimatur of the school, then school officials should assess whether the school indirectly sponsored the speech. For example, if the threat was sent electronically, either via e-mail or posted on a web site, the school officials should discover whether the student utilized school equipment to send or create the threatening message. According to the Supreme Court in *Hazelwood School District v. Kuhlmeier*, if a school is somehow subsidizing the student speech, then school officials can control the content of the speech.<sup>161</sup> Thus, if the student is using school resources, such as school computers or school-provided Internet access, to create the speech, the officials

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<sup>159</sup> See Terry McManus, *Internet Raises New Rights Issues for Students*, CHI. TRIB., Apr. 21, 1998, at 1 ("Underground newspapers have long been part of the scholastic experience, from grade school on up, but the Web has given students an unprecedented ability to openly ridicule their schools and even individual teachers.").

<sup>160</sup> These three factors are a distillation from the federal and state court opinions previously discussed. Several scholarly publications, however, also have identified these factors. For example, Professors Daniel and Pauken state that a school's constitutional authority to limit student speech rights will likely depend on the type of expression, whether the expression is school sponsored, and whether the expression has a negative or disruptive impact on the school environment or the rights of other students. See Daniel & Pauken, *supra* note 151, at 154-55.

<sup>161</sup> See *Hazelwood*, 484 U.S. at 271-72; see also *supra* notes 89-94 and accompanying text (analyzing *Hazelwood*).

have a right to control the expression that is produced.<sup>162</sup>

For the second inquiry, the officials should objectively evaluate the language of the threat and employ the *Lovell* "reasonable person" test. Although this test may be viewed as a "true threat" test, the *Lovell* court utilized the test within the context of a student threat — therefore, it is appropriate for use within this analysis. School officials should determine whether a reasonable person in the student's position would anticipate that the teacher, school administrator, or fellow student would interpret his statement as an earnest expression of an intent to commit violence.<sup>163</sup> In reaching this conclusion, school officials should observe the exact language of the threat, the medium by which the student communicated it, and the circumstances surrounding the making of the threat. This analysis is especially important because a court's characterization of the student expression is frequently pivotal to its ultimate conclusion as to whether the speech can be censored.<sup>164</sup>

An example of some of the aforementioned issues involved a middle school teacher who received an anonymous e-mail message<sup>165</sup> from a student telling the teacher to "make Friday's test easy or else."<sup>166</sup> When the teacher received the message, he had no way of knowing the identity or true intentions of the sender.<sup>167</sup> The sender could have been a student with a history of discipline for violent behavior, or the sender might have been a student who was known for harmless pranks.<sup>168</sup> This inability to evaluate the seriousness of the threat led the teacher to err on the side of safety and treat the

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<sup>162</sup> See Weng, *supra* note 22, at 815 ("[A] school could attempt to place almost any manner of restriction on student Internet expressions made through school accounts by claiming furtherance of its mission to uphold its good name, credibility, and reputation . . .").

<sup>163</sup> See *supra* note 62 and accompanying text (describing *Lovell's* objective test).

<sup>164</sup> Compare *Buessink*, 30 F. Supp.2d at 1182 (holding that the school could not punish the student's "provocative and challenging speech"), with *J.S.* at 10 ("We conclude that the expression was not constitutionally protected because it . . . advocated violence against school staff.").

<sup>165</sup> A student can easily ensure that the message he sends is anonymous by utilizing an "anonymous remailer" service. See Greenberg, *supra* note 49, at 678-79. "Anonymous remailers are relay stations on the Internet that cloak the identity of every user who sends a message through them." *Id.* at 678. These services have been criticized because they allow users to make threats without fear of being identified. See *id.* at 679.

<sup>166</sup> Interview with C.J. DeSantis, Former Teacher at Manasquan High School, in Manasquan, N.J. (Aug. 14, 1999).

<sup>167</sup> See *id.*

<sup>168</sup> See *id.*

threat cautiously.<sup>169</sup> A court would likely find that any reasonable teacher would be frightened by these anonymous e-mail messages and that the student who sent the e-mails could be punished.<sup>170</sup> As the court did in *Lovell*, school officials should highlight the violent tendencies of today's youth in order to demonstrate the reasonableness of a teacher's fears.<sup>171</sup> Ultimately, if school officials answer this second inquiry in the affirmative and decide that a reasonable person would have been frightened by the menacing speech, the school could constitutionally punish the student for his threats.

If the answer to the second question is "no," or even an uncertain "yes," however, the school must utilize the *Tinker* test to make a final evaluation of the effect the threat had on the learning environment.<sup>172</sup> Courts universally disfavor speech that interferes with the school's educational goals, goals that include helping students acquire knowledge and ensuring that students learn tolerance, civility, and interpersonal skills.<sup>173</sup> As Judge Simpson stated in *J.S.*, school officials do not have to wait for potential harm to come to fruition before they can take precautionary measures; school officials only have to demonstrate a substantial basis for concluding that the speech would result in harm to students.<sup>174</sup> As with the creation of the web site in *J.S.* or the dissemination of the

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<sup>169</sup> See *id.* The teacher contacted school administrators and police and asked America Online to divulge the identity of the student. See *id.*

<sup>170</sup> In this case, the student was given a verbal warning but was not otherwise punished. See *id.*

<sup>171</sup> See *Lovell*, 90 F.3d at 374 (recognizing the violence that is prevalent in today's public schools). Schools can also point to studies that indicate that minors are being conditioned to enjoy violence. See Jo Myers, *A World Awash with Violence*, THE EVENING STANDARD (Palmerston North, New Zealand), Aug. 28, 1999, at 7. Dave Grossman, a former military psychologist and professor of psychology at West Point, declares that today's society is teaching children how to kill and to enjoy the act of killing. See *id.* According to Grossman, today's video and computer games are virtually murder simulators, so effective that the Army has adapted various games for its own combat training. See *id.* Grossman concludes that some children are actually better at killing than are law enforcement professionals because of the violence and physiological arousal inherent in the games that children are conditioned to enjoy at a very young age. See *id.* Another study indicates that the rate at which teenage boys killed increased 300% between 1980 and 1995, with many of the homicides occurring on or near school property. See *News Conference* (statement of Troy Eid, chief counsel to Colorado governor Bill Owens), *supra* note 2.

<sup>172</sup> See *supra* notes 73-78 and accompanying text (discussing *Tinker*).

<sup>173</sup> See Weng, *supra* note 22, at 777-78 (describing the goals of public education).

<sup>174</sup> See *J.S.* at 11-12 ("It is clear the school authorities need not wait for a potential harm to occur before taking protective action . . . . Nor must the school district be able to predict with certainty that a certain number of students in all grades would be harmed.") (citations omitted).

underground newspapers in *Bystrom*, a student's expression can be punished even if the expression did not directly cause a material disruption to the school environment. Such student expression is punishable as long as it was foreseeable that the school environment would be disturbed by the controversy that resulted from other students reading and discussing the controversial expression during classes.<sup>175</sup> Yet, pursuant to *Tinker*, schools must have a reasonable basis for concluding that the student speech is likely to, and not merely has the potential to, substantially disrupt the learning environment.<sup>176</sup>

Once again, the characteristics of electronic communication may complicate the analysis under the third factor. Author Sally Greenberg suggests that the standards courts utilize for determining whether expression is a "true threat" focus on whether the communication is directed toward an identifiable person or group of persons frightened as a result of the threats.<sup>177</sup> Web sites, however, are not sent to anyone in particular; they merely exist for anyone who chooses to access them. Therefore, a student web site that mentions vandalizing a teacher's home but does not identify a specific teacher is not likely to be deemed a "true threat." School officials, however, may find that the author of the web site causes material disruption to school activities because other pupils visit or discuss the web site during classes, or because the web site incites students to commit vandalism.

When school officials can document a substantial disruption in the educational environment, they should be able to punish the student speech that caused this disruption without fearing that they will violate the First Amendment.<sup>178</sup> Courts must consider and respect that educators simply wish to perform their jobs as effectively as possible and have a strong desire to avoid litigation and the uncertainties of the courtroom.<sup>179</sup> Nonetheless, schools officials must

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<sup>175</sup> See *J.S. v. Bethlehem Area Sch. Dist.*, No. 1998-CE-7696, (Pa. C. filed July 23, 1999); *Bystrom v. Fridley High Sch.*, 686 F. Supp. 1387 (D. Minn. 1987).

<sup>176</sup> See *Tinker*, 393 U.S. at 737 ("[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.").

<sup>177</sup> See Greenberg, *supra* note 49, at 680.

<sup>178</sup> Before school administrators implement punishment, however, they must provide a student with notice and some type of hearing, otherwise the school administrators will violate the student's due process rights. See *Goss v. Lopez*, 419 U.S. 565, 574, 581 (1975) (holding that students' interest in education is a property interest that cannot be taken away without providing minimum procedures, namely, notice and an opportunity for a hearing).

<sup>179</sup> See *News Conference* (statement of Chief Judge Wilkinson, United States Court of

remember that they do not have unlimited discretion to censor nonthreatening speech simply because they disagree with the underlying message or because the speech casts the school in an unfavorable light.<sup>180</sup> When high school student Sean O'Brien created a web site that described his band teacher as "an overweight middle-aged man who doesn't like to get haircuts," he was suspended for eight days and threatened with expulsion.<sup>181</sup> O'Brien and his parents filed suit against the school for \$500,000, alleging that his First Amendment rights had been violated.<sup>182</sup> In a sensible move, the school district settled the case out-of-court, paying O'Brien \$30,000 and apologizing for censoring his speech.<sup>183</sup> It should have been clear to administrators that, even in these violent times, no reasonable educator could have viewed O'Brien's web site as threatening. The school could not rely upon *Fraser* to argue that these comments were vulgar or profane, nor could the school rely upon *Tinker* to claim that the web site was substantially disruptive to the school environment.

#### CONCLUSION

Punishment of pure speech may be a necessary evil within the educational setting.<sup>184</sup> Many scholars and educators, however, argue

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Appeals, Fourth Circuit), *supra* note 2. Chief Judge Wilkinson stated:

So we're now in a society which freely and instinctively litigates routine public school decisions in the federal judiciary . . . . [L]itigation is not what school teachers and principals and school board members do or desire to do for a living. Why did they go into education? Not to litigate. They went into education because they wished to devote their lives as professional educators to improving the minds and broadening the horizons of their students. They did not plan to spend their time fending off these same students, either in the hallway or in court. Time spent in court is time out of the classroom. Answering depositions educates no one. A teacher or principal probably wants to be in court about as much as you or I want to be in the hospital. They would do anything to avoid it . . . .

*Id.*

<sup>180</sup> See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 837 (1995) (holding that the University of Virginia's denial of school funding to a student publication based on the religious nature of the publication violated the First Amendment guarantee of free speech).

<sup>181</sup> *McManus*, *supra* note 159.

<sup>182</sup> *See id.*

<sup>183</sup> *See id.*

<sup>184</sup> Boston College Professor William Kilpatrick, who teaches and writes on adolescent psychology, concludes that 70% of character formation is the formation of good behavior habits. See *News Conference* (statement of William Kilpatrick, author and professor), *supra* note 2. Kilpatrick believes that formation of these behavioral habits requires that parents and educators discipline students and provide consistent standards of conduct for them. *See id.* Another expert expresses the view that



that punishments such as suspension or expulsion address the obvious manifestations of a student's problems, but fail to address the underlying difficulties that cause students to utilize threatening speech.<sup>185</sup> Other experts claim that singling out and punishing eccentric students will only further alienate and enrage these students.<sup>186</sup> Even more alarming is that students who are punished and removed from the school can still find a way to inflict harm.<sup>187</sup>

Punishment acts as more than a remedy or deterrent, however, because it ensures that educators, school psychologists, and parents are informed that a particular student has a social or behavioral problem.<sup>188</sup> As students advance in grade level or change schools, a record of prior punishment may forewarn school administrators who might otherwise not regard a student's threats as serious. Furthermore, parents who are negatively affected by their child's punishment, because they either have to pay a fine or civil damages or stay home with a suspended child, will be motivated to prevent a recurrence of the offending behavior.<sup>189</sup>

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students need "moderate, progressive discipline, coupled with dialogue designed to promote self-realization." Pavela, *supra* note 22, at 164. Pavela also notes that a single-minded reliance upon punishment will not effectively combat incivility and cruelty, but rather, the offending students may be converted into First Amendment martyrs. *See id.* at 166.

<sup>185</sup> *See News Conference* (statement of Ann Beeson, attorney with the ACLU), *supra* note 2 (claiming that, according to the National Association of School Psychologists, an expulsion does not change a student's behavior; rather, the best solution is to instruct these students how to think, act, and deal with their anger).

<sup>186</sup> *See* James Alan Fox & Jack Levin, *The Hard (But Doable) Job of Making Schools Safe*, THE BOSTON GLOBE, Aug. 22, 1999, at F1. Fox, the Lipman Family Professor of Criminal Justice at Northeastern University, and Levin, the Brudnick Professor of Sociology and Criminology at Northeastern University, argue against strict punishment and disciplinary measures because such tactics may further alienate at-risk teenagers. *See id.*

<sup>187</sup> *See* Simpson, *supra* note 5. Simpson noted that alleged killer Kip Kinkel was suspended the day before he began firing shots into his school's cafeteria. *See id.*

<sup>188</sup> Many experts even suggest implementing anonymous tip lines and encouraging students to trust their teachers enough to utilize the tip lines and to warn officials about problematic peers before violence occurs. *See Students Hold Key*, *supra* note 17. One problem confronting school administrators is that many parents refuse to believe that their child has a behavioral problem or poses a danger to himself or others. *See* Francis X. Clines, *Computer Project Seeks to Avert Youth Violence*, N.Y. TIMES, Oct. 24, 1999, at 20. New computer software programs are currently being designed to assist administrators in identifying these potentially dangerous students and to provide doubting parents with documentation of their child's problems. *See id.*; *see also infra* notes 191-194 (discussing new technological approaches to confronting student threats).

<sup>189</sup> *See News Conference* (statement of William Kilpatrick, author and professor), *supra* note 2 ("Over the last 30 years, various court decisions and legislative acts have had the effect of inhibiting both school and parental discipline" and "many

Other scholars suggest that school administrators can prevent threatening student speech and the violence that may accompany it by making the school more of a community. Such scholars advocate decreasing class and school size, increasing educational and psychological staffs, and implementing longer school hours.<sup>190</sup> Some even advocate combating violence by using the very technology that today's students find so familiar. New software, created by researcher Alice Ray, is teaching students how to handle grief, prevent violence, cope with teasing, and respond to student threats.<sup>191</sup> Ray hopes that schools will use the software to take a preventive approach to student violence.<sup>192</sup> Additionally, the Federal Bureau of Alcohol, Tobacco and Firearms, in conjunction with a company specializing in threat evaluation, is developing a national pilot program for December 1999, known as Mosaic-2000, that utilizes computer data to identify students who pose a significant risk of committing violent acts.<sup>193</sup> The program involves twenty schools across the country that will use the software to help identify potentially violent students, as well as students who are prone to commit violent acts because they feel victimized by their school or by their peers.<sup>194</sup>

Ultimately, though, the decision of how most effectively to prevent and punish student misconduct must remain within the discretion of educators. As Chief Judge Wilkinson of the Fourth Circuit noted, more federal lawsuits will not improve the environment within today's schools.<sup>195</sup> According to Chief Judge Wilkinson, a better solution is to free educators from the burdens of

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parents . . . simply hope that the schools will take care of disciplining their children, but as I've suggested, the schools don't want to get involved.").

<sup>190</sup> See Fox & Levin, *supra* note 186.

<sup>191</sup> See *Could Software Prevent the Next School Shooting?*, PR NEWSWIRE, Apr. 27, 1999. Ray developed a "multimedia database of social topics and life skill training with a hip look and feel." *Id.* The database is the result of years of research that led Ray to conclude that "all people who hurt people lacked at least one of seven key social-emotional skills." *Id.* The "School Safety Needs Assessment Tool" is available free on the Internet at <<http://www.rippleeffects.com/relateforteens/>>. See *id.*

<sup>192</sup> See *id.*

<sup>193</sup> See Clines, *supra* note 188. The Mosaic programs "use carefully worded questions about student behavior based on case histories of people who have turned violent" and helps "officials discern a real threat amid the innocuous, if frightening, outbursts that regularly cause concern." *Id.*

<sup>194</sup> See *id.* The ACLU dismissed the program as a "technological Band-Aid," while the developer of the program claims that the system provides organization of and expert opinion concerning information about students that principals already possess. See *id.*

<sup>195</sup> See *News Conference* (statement of Chief Judge Wilkinson, United States Court of Appeals, Fourth Circuit), *supra* note 2.

litigation and provide them with a greater role in the administration of their schools.<sup>196</sup>

The *Bystrom* court recognized that First Amendment cases pose difficult questions with high-stakes outcomes.<sup>197</sup> The court noted that the preservation of constitutional freedoms depends upon courageous citizens who have the conviction to challenge those who would encroach upon those freedoms.<sup>198</sup> At the same time, the court recognized that citizens who would rely on the Constitution for protection of frivolous or malicious conduct threaten the dilution of those very constitutional freedoms.<sup>199</sup> The court explained that a definite line does not conveniently divide these two circumstances.<sup>200</sup>

As courts attempt to draw this line in the context of student threats, they must remember that adolescents are still learning responsibility, civility, and maturity, and consequently need to grow into their constitutional rights. Courts must recognize that students like Columbine killer Eric Harris, who declared on his web site, "I am the law. If you don't like it, you die,"<sup>201</sup> fail to realize that they must respect the rights of others before they can enjoy those same rights.<sup>202</sup> Instead of just focusing on the value of individual freedom, as courts seem inherently to do, schools can and must provide the socially valuable service of encouraging and developing society's shared values. Courts would do well to follow the lead of Judges Wilkinson and Simpson in acknowledging that educational professionals must

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<sup>196</sup> See *id.*

<sup>197</sup> See *Bystrom*, 686 F. Supp. at 1395-96.

<sup>198</sup> See *id.* at 1395.

<sup>199</sup> See *id.* at 1395-96.

<sup>200</sup> See *id.* at 1396.

<sup>201</sup> See *News Conference* (statement of Troy Eid, chief counsel to Colorado governor Bill Owens), *supra* note 2.

<sup>202</sup> See *News Conference* (statement of Chief Judge Wilkinson, United States Court of Appeals, Fourth Circuit), *supra* note 2. Chief Judge Wilkinson stated:

Rights are a precious thing in America . . . . But the rights of adolescents are not in all respects the same as the rights of adults, and it is sensible to insist that students grow gradually into their exercise . . . . Responsibility involves a respect for rights also, not only for one's own rights but for the rights of others. Responsibilities go hand in hand with rights, and the former must be learned before the latter can ever be enjoyed.

*Id.*

be granted ample discretion in order to regulate and punish student threats and keep America's schools productive and safe.<sup>205</sup>

*Lisa M. Pisciotta*

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<sup>205</sup> *See id.* Chief Judge Wilkinson declared that the causes and cures of the problems of school violence . . . are not simple. I . . . believe, however, that school order will be improved in this country with fewer federal lawsuits, and that one small part of the solution lies in backing up school authorities and in giving principals, teachers, parents and communities themselves a greater freedom from federal litigation and hence a greater hand in governance of their own schools.

*Id.*; *see also* Fischer, *supra* note 70, at 292 (arguing that the entry of the law into the education process has not improved education and that society must ensure that the law does not destroy "the elusive process of education and the unique environment of the academy which has been a mainstay of our democratic system").