Oklahoma Law Review

Volume 65 | Number 4

2013

Tinker Takes on Tatro: The Minnesota Supreme Court's Missed Opportunity

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NOTE

Tinker Takes on *Tatro*: The Minnesota Supreme Court's Missed Opportunity

I. Introduction

The First Amendment rights of public school students have long been respected and defended. The Supreme Court has declared that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[1] This protection is especially true with regard to public universities, which have long been considered the "'marketplace of ideas.'"[2] However, the development of social media, while arguably a positive educational tool, has greatly complicated First Amendment jurisprudence. Social media sites such as Facebook, MySpace, and Twitter have allowed for the rapid dissemination of thoughts and expressions that were once private and personal. Often, these expressions are deeply disturbing and place school administrators concerned about student safety on high alert.

University administrators may certainly act when safety is a genuine concern. School officials need not sit back and wait for violence to erupt. However, administrators must work within the confines of constitutional boundaries in order to maintain the balance between First Amendment freedoms and student safety. In *Tatro v. University of Minnesota*, the Minnesota Supreme Court missed an opportunity to correct the court of appeal's misunderstanding and provide guidance to universities attempting to maintain this balance.[3] In evaluating social media speech by a college student, the Minnesota Court of Appeals bypassed the true threat standard and instead relied on the *Tinker* substantial disruption test to punish student speech.[4] It failed to realize that the *Tinker* standard only constrains a university's ability to act when student safety is a concern. Simultaneously, the court's dismissive consideration of the true threat test failed to comprehend the standard's true potential.

Instead of correcting the court of appeals, the Minnesota Supreme Court affirmed the decision on different, narrower grounds and avoided

1. Shelton v. Tucker, 364 U.S. 479, 487 (1960).
2. Healy v. James, 408 U.S. 169, 180 (1972).
3. *See* 816 N.W.2d 509, 524 (Minn. 2012).
4. *See* Tatro v. Univ. of Minn., 800 N.W.2d 811, 821 (Minn. Ct. App. 2011), *aff'd on other grounds*, 816 N.W.2d 509 (Minn. 2012).

distinguishing between the true threat and *Tinker* tests.[5] The state supreme court determined that the university's discipline was justified because the student violated a professional program's rules of conduct.[6] By deciding the case on narrow grounds, the Minnesota Supreme Court opted not to provide guidance to university administrators currently struggling to deal with the friction between First Amendment freedoms and student safety.

This note contains three main arguments. First, it argues that the *Tinker* standard should not be applicable at the university level because the United States Supreme Court formulated it with primary and secondary students in mind and premised it on the in loco parentis theory. Second, pure application of *Tinker* demands a narrow focus that severely constrains a school's ability to act; thus, it is counterproductive to university interests when safety is a concern. Third, the true threat test is the appropriate standard for college speech. The standard allows for a predictive, multifactor analysis that makes quick, decisive action possible. Furthermore, despite misconceptions, the true threat standard is inherently proactive and allows for preventative measures.

Part II of this note discusses the law before *Tatro*, focusing on the *Tinker* decision and the substantial disruption test, as well as how subsequent courts have attempted to predict substantial disruptions. Part II also discusses the true threat standard in public schools, recent precedent regarding off-campus Internet speech in high schools, and the role of the First Amendment in public universities. Part III provides an overview of the facts and holdings in *Tatro*. Part IV asserts that when safety is a concern, colleges should rely on the true threat standard, not the substantial disruption test. Specifically, Part IV argues that *Tinker* should not be applicable at the university level, pure application of the substantial disruption test is counterproductive to university interests, and the true threat standard's multifactor analysis and proactive focus can adequately meet university needs.

II. Legal Background

Two predominant tests have emerged for determining the proper scope of First Amendment rights in public schools. The *Tinker* standard requires a substantial disruption, foreseeability of a substantial disruption, or an invasion of the rights of others before a school may act to restrict speech.[7]

5. *Tatro*, 816 N.W.2d at 524.
6. *Id.*
7. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513-14 (1969).

Recently, the Third Circuit sitting en banc indicated that the *Tinker* standard is not satisfied when applied to off-campus Internet speech.[8]

The second predominant standard is the true threat test, which analyzes numerous factors including context, the conditional nature of the alleged threat, and whether the threat was made in the course of political debate.[9] The true threat test also considers "whether a reasonable person would foresee that the statement would be interpreted . . . as a serious expression of intent to harm or assault."[10] When evaluating college speech and determining which standard applies, the legal community must acknowledge that minor students and college students have historically been granted different degrees of First Amendment protection in public schools.

A. The Substantial Disruption Test: Tinker v. Des Moines Independent Community School District *and Its Exceptions*

In 1969, the Supreme Court issued its watershed opinion regarding students' First Amendment rights in public high schools.[11] In *Tinker*, administrators suspended two high school students and a junior high student for wearing black armbands as symbols of opposition to the Vietnam War.[12] The district court dismissed their father's prayer for an injunction, the Eighth Circuit affirmed when it was equally divided sitting en banc, and the Supreme Court granted certiorari and reversed.[13] Perhaps the most cited phrase regarding student speech to date is the declaration that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[14]

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8. J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 929-31 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012) (en banc) (finding that the *Tinker* substantial disruption test was not met because the student-created profile was made private and did not target the school); Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 216 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012) (en banc) (affirming that a school could not punish a student for a profile created off-campus while noting that "[i]t would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities");

9. Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam).

10. Lovell *ex rel.* Lovell v. Poway Unified Sch. Dist., 90 F.3d 367, 372 (9th Cir. 1996) (quoting United States v. Orozco-Santillan, 903 F.2d 1262, 1265 (9th Cir. 1990)) (internal quotation marks omitted).

11. *See Tinker*, 393 U.S. 503.

12. *Id.* at 504.

13. *Id.* at 504-05, 514.

14. *Id.* at 506.

However, the Court also explained that First Amendment rights must be "applied in light of the special characteristics of the school environment."[15] The Court held that the school punished the students for "silent, passive expression of opinion, unaccompanied by any disorder or disturbance."[16] The expression did not interfere with the school's work or collide "with the rights of other students to be secure and to be let alone."[17] While some students made hostile remarks, the work of the school was not disrupted.[18] The Court held that even if concerns regarding potential disruption existed, undifferentiated fear or apprehension would not suffice.[19] A school need not wait for disruption to occur, but more than a "desire to avoid the discomfort and unpleasantness" is necessary to punish speech.[20] Thus, the test was established: a public high school may not punish student speech unless the speech substantially interferes with the work of the school or intrudes upon the rights of others.[21] Furthermore, predictions regarding disruption must meet a high threshold and be based on more than mere fear or apprehension.[22]

Since *Tinker*, several narrow exceptions have emerged. In *Bethel School District No. 403 v. Fraser*, the Supreme Court held that a high school may prohibit speech that is lewd, indecent, offensive, or vulgar because such speech interferes with the school's duty to instill students with values central to citizenship and civility.[23] In *Hazelwood School District v. Kuhlmeier*, the Court held that a high school may censor speech in a school-sponsored newspaper if the censorship is "reasonably related to legitimate pedagogical concerns."[24] Finally, in *Morse v. Frederick*, the Court held that a high school may prohibit student speech at a school-sponsored event when the speech is reasonably viewed as promoting illegal drug use.[25]

15. *Id.*
16. *Id.* at 508.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at 509.
21. *Id.* at 514.
22. *Id.* at 509, 514.
23. 478 U.S. 675, 683, 685-86 (1986).
24. 484 U.S. 260, 273 (1988).
25. 551 U.S. 393, 410 (2007).

B. Predicting a Substantial Disruption in Public Schools

The *Tinker* decision did not explicitly discuss what factors a court should look to when attempting to predict a substantial disruption. Thus, lower courts have been free to develop the standard, and a wide array of approaches has emerged. In *West v. Derby Unified School District No. 260*, the Tenth Circuit considered whether a middle school was justified in punishing a student for drawing the Confederate flag during class.[26] The court found that the school could reasonably predict disruption under *Tinker* because the same symbol had led to violence in the past.[27] A Confederate flag headband had incited a fight, and drawings of the symbol on notebooks and students' arms had led to incidents.[28] In fact, the school board had passed the school's racial harassment and intimidation policy in direct response to these incidents, prohibiting racially divisive depictions.[29]

In *Barr v. Lafon*, the Sixth Circuit faced a similar predicament when a principal forced a high school student to cover his Confederate flag shirt in order to comply with the school's dress code.[30] Although the Confederate flag itself had not yet led to outright violence at the school, the Sixth Circuit found that the prevalence of racially motivated slurs, graffiti, and circulating "hit lists" justified the school's prediction of disruption.[31] The "hit lists" alone had already caused educational disruption because they led to calls from parents, as well as parents showing up at the school.[32] Furthermore, African American students had begun to miss school on account of fear, and a lockdown had to be implemented due to the threat of racial violence.[33] The Sixth Circuit emphasized that, in *Tinker*, no evidence in the record would have led authorities to forecast a substantial disruption.[34] In contrast, the record in *Barr* justified the prediction.[35]

In *LaVine v. Blaine School District*, the Ninth Circuit held that a student's poem vividly describing a school shooting could potentially lead to a substantial disruption.[36] The student had a history of disciplinary

26. *See* 206 F.3d 1358, 1361 (10th Cir. 2000).
27. *Id.* at 1366.
28. *Id.* at 1362.
29. *Id.*
30. 538 F.3d 554, 560 (6th Cir. 2008).
31. *Id.* at 566-67.
32. *Id.* at 566.
33. *Id.* at 567.
34. *Id.* at 566.
35. *Id.*
36. 257 F.3d 981, 990 (9th Cir. 2001).

problems, and the school was aware that he was reportedly stalking an ex-girlfriend.[37] Furthermore, the student's family history, psychological problems, and recent school shootings in nearby cities were all relevant factors in predicting a substantial disruption.[38]

Determining whether Internet speech will disrupt the school environment complicates the analysis because the immediate context is often not apparent. In *Doninger v. Niehoff*, a high school student wrote an angry blog entry after the school faculty allegedly cancelled a much-anticipated concert.[39] She posted the message on a website that was unaffiliated with the school; however, the student's message was publicly accessible.[40] The blog urged fellow students to confront faculty members regarding the cancellation.[41] The student even testified that the purpose of the blog entry was to encourage others to take action.[42] The Second Circuit held that a substantial disruption was foreseeable given the call to action.[43] Similarly, in *Boucher v. School Board of the School District of Greenfield*, the Seventh Circuit found that an underground school newspaper explaining how to hack into the school's computer system and urging students to do so had the potential to disrupt school activities.[44] The article explained how to figure out faculty passwords and promised to provide further hacking tips in the future.[45] The Seventh Circuit held that the article was an explicit blueprint and form of encouragement.[46]

C. The True Threat Standard as Applied to Public Schools

In addition to the *Tinker* substantial disruption test, the true threat standard has been used to evaluate student speech. *Watts v. United States* was the first Supreme Court case to contemplate the nature of a true threat.[47] The case considered whether the petitioner had violated a statute that prohibited threats to take the life of or inflict bodily harm upon the President of the United States.[48] The alleged threat was made at a public

37. *Id.* at 989-90.
38. *Id.*
39. 642 F.3d 334, 339-41 (2d Cir. 2011).
40. *Id.* at 340.
41. *Id.* at 341.
42. *Id.*
43. *Id.* at 348-49.
44. 134 F.3d 821, 822, 828 (7th Cir. 1998).
45. *Id.* at 822.
46. *Id.* at 828.
47. *See* 394 U.S. 705, 708 (1969) (per curiam).
48. *Id.* at 705.

rally by an eighteen-year-old man.[49] While not clearly defining a true threat, *Watts* indicated that factors for courts to consider include context, the conditional nature of the speech, and whether the speech was made in the course of political debate.[50] Lower courts have been left to articulate the proper standard. As this survey of cases indicates, when student speech is at issue, the line between mere expressive rhetoric and a true threat is often difficult to decipher.

True threat evaluations in public schools often consider how a reasonable person would interpret the speech. In *Doe v. Pulaski County Special School District*, the Eighth Circuit held that a student's letter expressing his desire to kill an ex-girlfriend constituted a true threat.[51] Although the letter itself was not personally delivered to the ex-girlfriend, the court found important that the student had shared the letter with a fellow classmate.[52] The student knew this classmate would likely inform the targeted ex-girlfriend.[53] Furthermore, the student admitted to the ex-girlfriend that he had written the letter about killing her.[54] The Eighth Circuit held that the letter was a true threat because a reasonable person would interpret it that way.[55] The language was explicit, unconditional, and specifically directed at the ex-girlfriend.[56] In *Lovell ex rel. Lovell v. Poway Unified School District*, the Ninth Circuit held that a student could be punished under the true threat standard for telling her guidance counselor that she would shoot her unless she changed her class schedule.[57] A reasonable person would interpret the language as a true threat.[58] While considering the backdrop of recent school violence, the Ninth Circuit also focused on the fact that the threat was specific and unequivocal.[59]

In addition to reasonable person inquiries, true threat jurisprudence in public schools has focused largely on broad factors and the totality of circumstances. In *In re Douglas D.*, the Supreme Court of Wisconsin found that a violent story had been written for a creative writing class and contained "hyperbole and attempts at jest"; thus, it could not constitute a

49. *Id.* at 706.
50. *Id.* at 708.
51. 306 F.3d 616, 626 (8th Cir. 2002) (en banc).
52. *Id.* at 624.
53. *Id.*
54. *Id.* at 625.
55. *Id.* at 626.
56. *Id.* at 625.
57. 90 F.3d 367, 368, 373 (9th Cir. 1996).
58. *Id.* at 372.
59. *Id.*

true threat.[60] Furthermore, there was no evidence that the student had made threats in the past or "had a propensity to engage in violence."[61] In *D.G. v. Independent School District No. 11*, a high school student wrote a poem expressing her desire to kill her teacher.[62] The Northern District of Oklahoma considered factors such as the prevalence of school violence, a psychologist's opinion that the poem was merely expressive in nature, and the fact that the student did not have a history of violence.[63] The court held that the poem was not a true threat.[64]

In *Boman v. Bluestem Unified School District No. 205*, the District of Kansas considered the fact that a student had a history of artistic expression, yet no record of violence, when evaluating a violent poster created and displayed by the student.[65] The characters depicted in the poster were fictional.[66] Furthermore, the student created the poster in class and made no attempt to conceal it.[67] In *Mahaffey ex rel. Mahaffey v. Aldrich*, a student's violent website was not considered a true threat.[68] The student created the website, which contained a list of individuals he wished would die, because he was bored.[69] The student did not intend for anyone to view the website, and it was meant to be humorous, as indicated by a disclaimer.[70]

In *Latour v. Riverside Beaver School District*, violent rap lyrics were at issue.[71] A student wrote the lyrics at home and never brought them to school.[72] The lyrics contained metaphorical language, the school itself did not take action immediately, and the student did not have a history of violence.[73] Furthermore, the lyrics were not directly communicated to the alleged targets, and they did not feel threatened when they learned of the lyrics.[74] Thus, the Western District of Pennsylvania did not find a true

60. 2001 WI 47, ¶ 39, 243 Wis. 2d 204, 626 N.W.2d 725, 741.
61. *Id.* ¶ 37, 243 Wis. 2d at 234, 626 N.W.2d at 741.
62. No. 00-C-0614-E, 2000 U.S. Dist. LEXIS 12197, at *3 (N.D. Okla. Aug. 21, 2000).
63. *Id.* at *13-14.
64. *Id.* at *15.
65. No. 00-1034-WEB, 2000 WL 297167, at *3 (D. Kan. Jan. 28, 2000).
66. *Id.* at *2.
67. *Id.* at *1.
68. 236 F. Supp. 2d 779, 786 (E.D. Mich. 2002).
69. *Id.* at 781-82.
70. *Id.* at 786.
71. No. Civ.A. 05-1076, 2005 WL 2106562, at * 1 (W.D. Pa. Aug. 24, 2005).
72. *Id.*
73. *Id.* at *2.
74. *Id.*

threat.[75] In contrast, in *Jones v. Arkansas*, the totality of circumstances led to a determination that violent rap lyrics were a true threat.[76] The writer had a criminal background and delivered the lyrics personally to the alleged victim, and the threat was explicit and immediate as opposed to conditional.[77] The target believed that the student was capable of carrying out the threat because he had spent time in a juvenile detention facility.[78] As exemplified by these cases, true threat determinations consider the totality of circumstances and analyze numerous factors.

D. Off-Campus Internet Speech in High Schools: Layshock ex rel. Layshock v. Hermitage School District *and* J.S. ex rel. Snyder v. Blue Mountain School District

In addition to deciphering true threats and predicting substantial disruptions, and in light of rampant social media use, courts have struggled to articulate the proper First Amendment standard for Internet speech that originates off-campus. In 2011, the Third Circuit became the highest court to decide a case regarding a school's authority over off-campus Internet speech. A rare en banc hearing was held to resolve the issue because in 2010, two different three-judge panels of the court reached conflicting opinions.[79]

In *Layshock ex rel. Layshock v. Hermitage School District*, the three-judge panel of the Third Circuit affirmed a district court ruling in favor of a student who, while off-campus, created a fake MySpace page for his high school principal.[80] The profile contained inaccurate and inappropriate information about the principal's personal life.[81] The profile was widely viewed and prompted the creation of similar parody profiles.[82] The Third

75. *Id.*

76. 64 S.W.3d 728, 736 (Ark. 2002).

77. *Id.*

78. *See id.* at 730, 736.

79. *Compare* J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 593 F.3d 286, 291, 308 (3d Cir. 2010) (finding that a student's First Amendment rights were not violated when she was suspended for creating a fake MySpace profile from a home computer which alleged that her principal was a sex addict and pedophile), *aff'd in part, rev'd in part*, 650 F.3d 915 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012), *with* Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 593 F.3d 249, 252-53, 263 (3d Cir. 2010) (finding that a student's First Amendment rights were violated when he was punished for creating a fake and inappropriate MySpace profile for his principal while off-campus), *aff'd in part*, 650 F.3d 205 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012).

80. 593 F.3d at 251-52, 263.

81. *Id.* at 252-53.

82. *Id.* at 253.

Circuit panel's opinion held that it would be "dangerous precedent to allow" a school "to reach into a child's home and control [his] actions there to the same extent" that it can while the child is on-campus.[83] In contrast, in *J.S ex rel. Snyder v. Blue Mountain School District*, a Third Circuit three-judge panel affirmed the Middle District of Pennsylvania's ruling in favor of the school district when a high school student was suspended for using an off-campus computer to create a fake MySpace profile for her principal.[84] The profile alleged that the principal was a pedophile and sex addict.[85] The profile was initially public but was eventually made private; thus, access was limited.[86] However, the Third Circuit relied on the foreseeable substantial disruption prong of *Tinker* to justify regulation of speech that occurred off-campus and online, reasoning that numerous members of the middle school community viewed and discussed the profile.[87] Several students approached the teachers and the principal regarding the profile and a breakdown in discipline was apparent after creation of the profile.[88]

These conflicting opinions were resolved when *J.S.* was reversed and *Layshock* was affirmed, both en banc.[89] In deciding to reverse the prior *J.S.* decision, the en banc court found that the *J.S.* record lacked any facts that would predict a substantial disruption.[90] The profile did not identify the principal by name or location, and the profile was "so juvenile and nonsensical that no reasonable person could take its content seriously."[91] The court explained that the student "did not even intend for the speech to reach the school" and took precautions to ensure that the profile remained private.[92] The court suggested that the school district's response to the off-campus speech actually exacerbated the situation.[93] While not explicitly

83. *Id.* at 260.
84. 593 F.3d at 290.
85. *Id*.
86. *Id.* at 292.
87. *Id.* at 300-01.
88. *Id.* at 300.
89. J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 933 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012); Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 219 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012).
90. *J.S.*, 650 F.3d at 930-31.
91. *Id.* at 929.
92. *Id.* at 930.
93. *Id.* at 931.

deciding whether *Tinker* applies to off-campus speech, the Third Circuit strongly implied that it does not.[94]

Furthermore, even if off-campus speech is subject to school regulation, it will be scrutinized and subjected to a high threshold. In affirming *Layshock* en banc, the Third Circuit reiterated that a public school cannot censor speech unless it meets one of the established exceptions.[95] The court did not address *Tinker* directly because the school district did not argue the issue.[96] However, the Third Circuit affirmed that allowing a school to punish off-campus, non-disruptive speech would be dangerous precedent.[97] In sum, both *Layshock* and *J.S.* indicate a growing reluctance to punish off-campus, online speech in high schools.

E. First Amendment Rights in Public Universities

Numerous cases have recognized that college students retain their full First Amendment rights in public universities. In *Healy v. James*, the Supreme Court found that a public college violated First Amendment rights by refusing to recognize a campus chapter of Students for a Democratic Society.[98] The Court asserted, "[S]tate colleges and universities are not enclaves immune from the sweep of the First Amendment."[99] The Court also held that First Amendment rights on college campuses should be afforded the same degree of protection they receive when exercised in the community at large.[100]

In *Sweezy v. New Hampshire*, the Supreme Court held that a guest speaker at a public university could refuse to answer the New Hampshire attorney general's questions regarding both his political associations and a controversial political speech he had delivered on campus.[101] Justice Frankfurter's concurrence emphasized that universities were designed "to provide that atmosphere which is most conducive to speculation,

94. *Id.* at 930-31 (taking into consideration the fact that the student took steps to make the profile private and did not intend for the speech to reach the school).

95. Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 211-14 (3d Cir. 2011) (en banc) (reviewing the *Fraser*, *Hazelwood*, and *Morse* exceptions to *Tinker*'s general rule disallowing speech-based student punishment), *cert. denied*, 132 S. Ct. 1097 (2012).

96. *Id.* at 216.

97. *Id.*

98. 408 U.S. 169, 170, 194 (1972).

99. *Id.* at 180.

100. *Id.*

101. 354 U.S. 234, 235, 243-44 (1957).

experiment and creation."[102] Furthermore, a sense of freedom is essential when pursuing the arts and scientific research.[103] Thus, although *Sweezy* did not discuss student speech, it is important precedent because it established the proper academic atmosphere for public universities.

More recently, in *McCauley v. University of the Virgin Islands*, the Third Circuit found provisions of a public university's speech code unconstitutional.[104] The court pointed to the distinction between the limited First Amendment rights afforded to high school students and the broad rights enjoyed by college students.[105] The court stated that "[p]ublic university 'administrators are granted *less leeway* in regulating student speech than are public elementary or high school administrators'"[106] and, "At a minimum, the teachings of *Tinker, Fraser, Hazelwood, Morse*, and other decisions involving speech in public elementary and high schools, cannot be taken as gospel in cases involving public universities."[107] Similarly, in *DeJohn v. Temple University,* the Third Circuit enjoined the university from enforcing a broad harassment policy because it prohibited an array of protected speech that would not constitute a substantial disruption.[108] As later reflected in *McCauley*,[109] *DeJohn* noted important differences in the pedagogical goals of high schools and universities.[110] In conclusion, courts have long recognized that First Amendment rights in public universities deserve greater protection than primary and secondary student speech.

III. Tatro v. University of Minnesota*: The Minnesota Supreme Court Fails to Clarify Proper Application of the True Threat and* Tinker *Tests*

A. Facts

Amanda Tatro was a mortuary student at the University of Minnesota.[111] Upon enrollment, Tatro attended an orientation program, which addressed

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102. *Id.* at 263 (Frankfurter, J., concurring in the result) (quoting THE OPEN UNIVERSITIES IN SOUTH AFRICA 11 (Witwatersrand Univ. Press 1957)) (internal quotation marks omitted).

103. *Id.*

104. 618 F.3d 232, 253 (3d Cir. 2010).

105. *Id.* at 242 (citing DeJohn v. Temple Univ., 537 F.3d 301, 314-15 (3d Cir. 2008)).

106. *Id.* (quoting *DeJohn*, 537 F.3d at 316).

107. *Id.* at 247.

108. 537 F.3d at 317, 320.

109. *See McCauley*, 618 F.3d at 242.

110. *DeJohn*, 537 F.3d at 315.

111. Tatro v. Univ. of Minn., 800 N.W.2d 811, 814 (Minn. Ct. App. 2011), *aff'd on other grounds*, 816 N.W.2d 509 (Minn. 2012).

proper student conduct, and "signed a disclosure form indicating that she . . . agreed to abide by the [university's] rules."[112] In November and December 2009, Tatro posted comments on her private Facebook page asserting that she was looking forward to taking out her aggression during an upcoming embalming session.[113] Furthermore, Tatro claimed that she "want[ed] to stab a certain someone in the throat with a trocar" and intended to spend the weekend updating her "Death List."[114] A fellow mortuary student became concerned about the comments and alerted school administrators.[115] University police were notified, and Tatro was not allowed to return to class until the police concluded that no crime had been committed.[116]

In 2010, a panel from the campus committee on student behavior issued a disciplinary decision.[117] Tatro was found responsible for violations of the university rules relating to the mortuary program, the anatomy lab, and the anatomy-bequest program disclosure form.[118] Tatro received a failing grade in one course.[119] The committee "requir[ed] her to enroll in a clinical ethics course; write a letter to . . . faculty addressing the issue of respect . . .; and complete a psychiatric evaluation."[120] The committee also placed her "on academic probation for the remainder of her undergraduate career."[121] Tatro appealed to the university provost, who upheld the sanctions.[122] Tatro then challenged the university's decision, contending "that a university may only limit or discipline student speech that constitutes a 'true threat.'"[123] She alleged "that the university's rules did not authorize the university to act and that its actions were arbitrary, lacked evidentiary support, and violated her constitutional right to free speech."[124]

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112. *Id.*
113. *Id.*
114. *Id.* "A trocar is an instrument used during embalming that has a long hollow needle with a sharp end, used to aspirate fluids and gases out of the body." *Id.* at 814 n.3.
115. *Id.* at 814.
116. *Id.*
117. *Id.* at 815.
118. *See id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.* at 820.
124. *Id.* at 815.

B. The Minnesota Court of Appeals Holding

The Minnesota Court of Appeals upheld the university's decision.[125] Tatro claimed that her Facebook posts were created off-campus and that the university thus lacked authority to punish her for the comments.[126] The Minnesota Court of Appeals, however, held that the university was authorized to apply the student code to off-campus conduct that "has an adverse effect on a substantial university interest and indicates potential danger" to others.[127] The court rejected Tatro's argument that a university could not punish student speech unless it constituted a true threat and held that it would not depart from *Tinker* and its progeny.[128] The court reasoned that student speech "need not reach the true-threat threshold before a public school" can take action.[129] The court also saw no practical reason for a distinction between speech standards in universities and high schools.[130] The court asserted that "state colleges and universities 'are not enclaves immune from the sweep of the First Amendment.'"[131] The court, however, also stated that "'the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.'"[132]

While affirming that disruptions may look different at the university level, the court stated that "these differences do not per se remove the *Tinker* line of cases from the analysis."[133] In determining that there had, in fact, been a substantial disruption, the court recognized that faculty members and students had expressed concerns about Tatro.[134] One teacher in particular believed the comments were directed toward him because he had recently had a disagreement with Tatro over a parking space.[135] After affirming the finding of a substantial disruption, the court discussed the negative effect Tatro's comments could potentially have on the integrity of the mortuary program.[136] The court emphasized that the particular academic program relied heavily on the continued faith of cadaver donors.[137]

125. *Id.* at 813-14.
126. *Id.* at 816.
127. *Id.*
128. *Id.* at 820-21.
129. *Id.* at 821.
130. *Id.*
131. *Id.* at 820 (quoting Healy v. James, 408 U.S. 169, 180 (1972)).
132. *Id.* (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986)).
133. *Id.* at 821.
134. *Id.* at 822.
135. *Id.* at 817-18.
136. *Id.* at 822.
137. *Id.*

C. The Minnesota Supreme Court Holding

On appeal, the Minnesota Supreme Court affirmed the appeals court's decision on the free speech issue, but used a different analysis.[138] The state supreme court declined to apply *Tinker* because it did not meet the purpose of the university's sanctions.[139] The university disciplined Tatro because her Facebook posts violated the mortuary program's rules, not because they created a substantial disruption.[140] The university did not violate Tatro's free speech rights because the program rules were narrowly tailored and directly related to established professional conduct standards.[141] Upon enrollment in the program, Tatro signed an agreement that she would comply with the program rules.[142] The rules "prohibited 'blogging' about the anatomy lab or cadaver dissection."[143] Furthermore, "[t]he instructor for the anatomy lab course testified that 'blogging' was intended to be a broad term" and that students were told "during orientation that blogging included Facebook and Twitter."[144] The Minnesota Supreme Court emphasized that its "decision [was] based on the specific circumstances of [the] case."[145]

IV. Analysis

By affirming *Tatro v. University of Minnesota* on narrow grounds, the Minnesota Supreme Court missed an opportunity to correct the appellate court's misunderstanding regarding proper application of the true threat and *Tinker* tests. Furthermore, the Minnesota Supreme Court failed to provide guidance to universities concerned about maintaining both student safety and First Amendment freedoms. The true threat test should be used to evaluate college student speech. The *Tinker* test was designed to only assess the speech of primary and secondary students and is premised on the in loco parentis theory; thus, it is inapplicable in the university context. Furthermore, pure application of *Tinker* constrains a school because it demands a narrow analysis. The true threat standard should be used because it requires a predictive, multifactor analysis and allows for quick and

138. Tatro v. Univ. of Minn., 816 N.W.2d 509, 521 (Minn. 2012).
139. *Id.* at 519-20.
140. *Id.* at 520.
141. *Id.* at 521, 524.
142. *Id.* at 512.
143. *Id.*
144. *Id.*
145. *Id.* at 524.

decisive action. Despite misconceptions, the true threat standard is proactive and allows for preventive university measures.

A. The Substantial Disruption Test Is Not Applicable at the University Level Because It Was Created for Primary and Secondary Students

The substantial disruption test should not be applied at the university level. The court of appeals in *Tatro* quoted *Bethel School District No. 403 v. Fraser* in its determination "that 'the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.'"[146] However, the appellate court ignored the fact that most college students are adults and should not be treated as juveniles. The court recognized the correct view that adults are afforded a higher degree of First Amendment protection, while it simultaneously failed to apply this standard. By declining to depart from *Tinker* and its progeny, the court ignored precedent and well-informed rationale.

The *Tinker*, *Fraser*, *Hazelwood*, and *Morse* tests were articulated with primary and secondary students in mind. The in loco parentis theory is premised on the idea that primary and secondary schools are to prepare students for citizenship and instill them with manners and civility.[147] Thus, administrators are to stand in the shoes of the parent in order to protect and nurture minors who lack maturity and are incapable of making informed decisions. In contrast, universities are charged with providing intellectual challenge and stimulation; the Supreme Court has held that university "[s]cholarship cannot flourish in an atmosphere of suspicion and distrust."[148] In *McCauley v. University of the Virgin Islands*, the Third Circuit outlined these differing roles and reprimanded the district court for

146. *Tatro*, 800 N.W.2d 811, 820 (Minn. Ct. App. 2011) (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986)), *aff'd on other grounds*, 816 N.W.2d 509 (Minn. 2012).

147. *Fraser*, 478 U.S. at 683 ("The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order."); *id.* at 684 ("These cases recognize 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."); *see also* Morse v. Frederick, 551 U.S. 393, 419 (2007) (Thomas, J., concurring) ("Several points are clear: (1) Under *in loco parentis*, speech rules and other school rules were treated identically; (2) the *in loco parentis* doctrine imposed almost no limits on the types of rules that a school could set while students were in school; and (3) schools and teachers had tremendous discretion in imposing punishments for violations of those rules.").

148. Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

its assumption that *Tinker* was applicable to universities.[149] While a university certainly has a duty to protect students from threats and violence, it is not required to shield students from mere disruptive conduct.[150] Yet, this is the precise goal of the *Tinker* substantial disruption test.

B. Pure Application of the Substantial Disruption Test Is Problematic and Ultimately Counterproductive to a University's Interests

Although the standard has been manipulated, a pure application of the *Tinker* substantial disruption test should focus solely on how speech will affect the educational process. In such an application, only factors related to the speech itself should be considered when attempting to predict a potential substantial disruption.[151] The Minnesota Court of Appeals in *Tatro* was reluctant to depart from the *Tinker* standard, and implied that the substantial disruption standard alone would provide the school with flexibility and discretion.[152] The court misconstrued the parameters of the test, however, and failed to recognize that proper application of the standard does not focus on speaker characteristics, general context, or other helpful factors, thus eliminating an entire realm of potential insights. Thus, *Tinker* is counterproductive to a university seeking to prevent potential violence.

The landmark *Tinker* decision itself encouraged pure application of the substantial disruption test. The Supreme Court chose not to inquire into the backgrounds and personal characteristics of Mary Beth and John Tinker.[153] The Court did not discuss whether the students had caused disruption in the

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149. 618 F.3d 232, 242-48 (3d Cir. 2010). The court added:

> We reach this conclusion in light of the differing pedagogical goals of each institution, the *in loco parentis* role of public elementary and high school administrators, the special needs of school discipline in public elementary and high schools, the maturity of the students, and, finally, the fact that many university students reside on campus and thus are subject to university rules at almost all times.

Id. at 242-43.

150. *See id.* at 243, 248.

151. Shannon M. McMinimee, Note, LaVine v. Blaine School District*: Fear Silences Student Speech in the Ninth Circuit*, 77 WASH. L. REV. 545, 566 (2002) ("The factors used to support a forecast of disruption are limited to factors used to evaluate the potential effect of the speech itself, such as past disturbances occurring as a result of the type of speech in question.").

152. Tatro v. Univ. of Minn., 800 N.W.2d 811, 821 (Minn. Ct. App. 2011) ("And most courts hold that student expression need not reach the true-threat threshold before a public school may take appropriate disciplinary action in the interest of protecting the work and safety of its community."), *aff'd on other grounds*, 816 N.W.2d 509 (Minn. 2012).

153. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).

past or exhibited other traits that would indicate a tendency to cause commotion. Even more importantly, the Court did not analyze the potential effect of the armbands against the tumultuous political background of the late 1960s. Instead, the Court only considered the fact that the armbands were no more than two inches wide, were used to express political beliefs, and caused mere discussion among students.[154] If the Court had envisioned a broader inquiry regarding potential substantial disruption, one would assume that it would have pointed to relevant factors in its watershed case regarding student speech.

More recent cases also suggest a pure application of the *Tinker* substantial disruption test. It is important to note that pure application of *Tinker* does not require proof that the speech in question has caused disruption in the past. Schools are simply restrained and required to consider a narrow realm of relevant factors. For example, in *Barr v. Lafon*, the Sixth Circuit focused on specific instances associated with the message behind the Confederate flag.[155] Racial graffiti and "hit lists" were not at all divorced from the Confederate flag symbol.[156] The Sixth Circuit did not inquire into the student's background or discuss recent instances of racially motivated violence in nearby school districts.[157] Similarly, in *Doninger v. Niehoff*, the Second Circuit focused on the language of the student's blog, its misleading information, and its call to action.[158] The court avoided consideration of the student's personal reputation or background.[159]

Pure application of *Tinker* demands consideration of only those factors related to the speech itself because only those factors are helpful in predicting substantial disruptions. A narrow focus forces the school to isolate the speech and its potential effects. Broad considerations are likely to distract the school from truly focusing on the probability of disruption. While broad considerations may be relevant in a threat analysis, a student's background and general outbreaks of school violence around the country have nothing to do with the potential disruptive effect of specific speech under *Tinker*. The Ninth Circuit made this mistake in *LaVine v. Blaine School District* by focusing on non-relevant factors such as nearby violence, recent family issues, and the student's psychological history.[160]

154. *See id.*
155. 538 F.3d 554, 567 (6th Cir. 2008).
156. *Id.* at 566-67.
157. *See id.*
158. *See* 642 F.3d 334, 348 (2d Cir. 2011).
159. *See id.*
160. *See* 257 F.3d 981, 989-91 (9th Cir. 2001).

The court even considered the fact that the student reportedly stalked an ex-girlfriend, a logical consideration under the true threat standard, but a factor unrelated to the poem's potential for educational disruption.[161]

In sum, the Minnesota Court of Appeals suggested that the substantial disruption test was appropriate in the university context.[162] However, this standard has little predictive value and is counterproductive to university interests when student safety is a concern. By not correcting this misunderstanding, the Minnesota Supreme Court left university officials with an incorrect view of the *Tinker* standard's capabilities.

C. The True Threat Test Is the Appropriate Standard for College Speech

1. The True Threat Standard Allows for a Multifactor Analysis Which Has Substantial Predictive Value

In contrast to the constraints of a pure substantial disruption test, the true threat doctrine lends itself to a multifactor, detailed analysis that has greater predictive value when violence is a concern. In *Lovell v. Poway Unified School District,* the Ninth Circuit stated that "'[a]lleged threats should be considered in light of their entire factual context, including the surrounding events and the reaction of the listeners.'"[163] Furthermore, in *United States v. Dinwiddie*, the Eighth Circuit provided a number of factors relevant to a true threat analysis.[164] These factors include the reaction of the recipient, "whether the threat was communicated directly," and, among others, "whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence."[165] The true threat analysis in the educational context should focus on the likelihood that the threat will transpire. Thus, in contrast to the *Tinker* substantial disruption test, the true threat test allows analysis of broad factors unrelated to the speech itself. Furthermore, because the consequences of a threat are serious, consideration of all potentially relevant information is warranted. This tradeoff is not warranted when mere educational disruption is the concern.

The true threat standard's multifactor analysis requires that the predictive value of each specific factor be weighed and afforded proper consideration. Analyzing a criticism of the true threat standard exemplifies how this

161. *See id.* at 989.

162. *See* Tatro v. Univ. of Minn., 800 N.W.2d 811, 821 (Minn. Ct. App. 2011), *aff'd on other grounds*, 816 N.W.2d 509 (Minn. 2012).

163. 90 F.3d 367, 372 (9th Cir. 1996) (alterations in original) (quoting United States v. Orozco-Santillan, 903 F.2d 1262, 1265 (9th Cir. 1990)).

164. *See* 76 F.3d 913, 925 (8th Cir. 1996).

165. *Id.*

balance is achieved and maintained. Critics are quick to condemn general consideration of school violence around the country,[166] a factor that the true threat standard allows in its analysis. Indeed, *Lovell* states that "[i]n light of the violence prevalent in schools today, school officials are justified in taking very seriously student threats against faculty or other students."[167] Many fear that this factor would be given undue weight and would lead to fear based decisions.[168] However, the Eighth Circuit has emphasized that the presence or absence of any one element is not dispositive for the true threat standard.[169]

Furthermore, courts that have used the multifactor true threat test have done so with admirable success and have remained committed to the idea that First Amendment rights should never depend on the political or social climate alone. In *Lovell*, the Ninth Circuit considered the increasing prevalence of school violence.[170] However compelling the considered school violence statistics may have been, the factor did not dominate the analysis because the Ninth Circuit emphasized that a reasonable person's reaction to the alleged threat must also be considered.[171] In addition, the specificity and unequivocal nature of the speech were considered.[172] Likewise, although *Bauer v. Sampson* involved the speech of a community college professor, as opposed to a student, the case illustrated correct application of the multifactor analysis and proper weighing of various factors.[173] In addition to a turbulent campus community, the Ninth Circuit considered the political nature of the professor's speech, former verbal incidents, and the speaker's lack of past physical violence both on and off

166. *See, e.g.*, LaVine *ex rel.* LaVine v. Blaine Sch. Dist., 279 F.3d 719, 728 (9th Cir. 2002) (Kleinfeld, J., dissenting from denial of rehearing en banc) ("Constitutional law ought to be based on neutral principles, and should not easily sway in the winds of popular concerns, for that would make our liberty a weak reed that swayed in the winds."); Robert D. Richards & Clay Calvert, *Columbine Fallout: The Long-Term Effects on Free Expression Take Hold in Public Schools*, 83 B.U. L. REV. 1089, 1095 (2003) ("It could be that [the school shooting at] Columbine provided a ready excuse to justify restricting other forms of disagreeable student expression, not simply those with an allegedly violent theme or intimation.").

167. *Lovell*, 90 F.3d at 372 (applying the true threat standard).

168. *See* sources cited *supra* note 166.

169. *Dinwiddie*, 76 F.3d at 925 ("This list [of factors] is not exhaustive, and the presence or absence of any one of its elements need not be dispositive.").

170. *Lovell*, 90 F.3d at 372 & n.4 (citing United States v. Lopez, 514 U.S. 549, 619 (1995) (Breyer, J., dissenting)).

171. *Id.* at 372.

172. *Id.*

173. *See* 261 F.3d 775, 779, 783-84 (9th Cir. 2001).

campus.[174] Thus, a single factor did not dominate the analysis.[175] The true threat standard's multifactor analysis has predictive value and ensures that a single factor does not distort the analysis. Thus, the true threat test, as opposed to the *Tinker* substantial disruption test, should be used when student safety is a concern at the university level. The Minnesota Supreme Court in *Tatro* should have clarified the capabilities of this test.

2. Unlike the Substantial Disruption Test, the True Threat Standard Allows for Quick and Decisive Action

The substantial disruption test delays and complicates a school's ability to act. To begin with, *Layshock* and *J.S.* indicate a growing reluctance to punish even off-campus high school speech under the substantial disruption test.[176] Both cases implied that if a school desires to punish off-campus speech under *Tinker*, it will have to meet a high disruption threshold.[177] In addition, the *Tinker* analysis is time consuming and complicated because it requires a school to anticipate whether speech will substantially interfere with the work of the school.[178] When predicting substantial disruption, a school should focus on factors related to the speech itself. As exemplified by *Barr v. Lafon*, deciphering these factors will likely be fact intensive and require extensive research.[179] In *Barr*, the Sixth Circuit compiled a tedious record to determine whether the school's forecast of a substantial disruption regarding a Confederate flag was reasonable.[180] The court analyzed specific racially motivated fights, confrontations, slurs, "hit lists," and even absentee rates among African American students.[181] In addition to being time consuming, there will almost always be debate regarding whether the factors are, in fact, related to the speech at hand.

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174. *Id.* at 783-84.

175. *See id.*

176. J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 933 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012); Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 216 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012).

177. *J.S.*, 650 F.3d at 933 ("Neither the Supreme Court nor this Court has ever allowed schools to punish students for off-campus speech that is not school-sponsored or at a school-sponsored event and that caused no substantial disruption at school."); *Layshock*, 650 F.3d at 216 ("Nevertheless, the concept of the 'school yard' is not without boundaries and the reach of school authorities is not without limits.").

178. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969).

179. *See* 538 F.3d 554, 566-67 (6th Cir. 2008).

180. *See id.*

181. *Id.*

In contrast, simple true threat factors such as social climate, student background, and general context are quick and easy to ascertain. In determining that a student-created poster did not represent a true threat, the *Boman* court relied on quickly decipherable factors such as the fact that the poster was created in the context of an art class and that the student did not have a history of behavioral problems.[182] The absence of a single factor is not dispositive;[183] thus, a school can move through its analysis without having to waste time scrounging for evidence. When student safety is a concern, the true threat standard is appropriate because it allows a university to react quickly without complication.

3. The True Threat Standard Is Inherently Proactive; a School Need Not Wait for Violence to Occur

It appears that the Minnesota Court of Appeals, in *Tatro*, feared that the higher threshold associated with the true threat test would prevent the university from being proactive.[184] Indeed, the court noted: "[M]ost courts hold that student expression need not reach the true-threat threshold before a public school may take appropriate disciplinary action in the interest of protecting the work and safety of its community."[185] However, violence prevention was a central component behind formulation of the true threat standard.[186] Indeed, *Virginia v. Black* held that one of the rationales behind the true threat doctrine was "to protect[] people 'from the possibility that the threatened violence will occur.'"[187] We do not punish threats for their rhetoric alone. Rather, we punish threats in order to detain individuals before they have opportunities to act.

Despite *Black*'s indication that a "speaker need not actually intend to carry out the threat,"[188] in analyzing student threats, courts have scrutinized the likelihood that the threatened act will transpire.[189] Student threat cases are less concerned with punishing threats in order to protect individuals from ongoing fear than preventing the disruption that an alleged threat

182. Boman v. Bluestem Unified Sch. Dist. No. 205, No. 00-1034-WEB, 2000 WL 297167, at *2-4 (D. Kan. Jan. 28, 2000).

183. United States v. Dinwiddie, 76 F.3d 913, 925 (8th Cir. 1996).

184. *See* Tatro v. Univ. of Minn., 800 N.W.2d 811, 821 (Minn. Ct. App. 2011), *aff'd on other grounds*, 816 N.W.2d 509 (Minn. 2012).

185. *Id.*

186. Virginia v. Black, 538 U.S. 343, 359-60 (2003).

187. *Id.* at 360 (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992)).

188. *Id.*

189. *See, e.g.*, Jones v. State, 64 S.W.3d 728, 736 (Ark. 2002).

conveys.[190] While these are admirable goals, pursuing them would lead to curtailment of First Amendment rights and chill student speech. Indeed, pursuit of these broad goals would give administrators "'carte blanche to do what they want,'" even if the threat is unsupportable and unreasonable.[191] Thus, student threat cases have instead adhered to the well-established concept that a threat should be "so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution."[192] Threatening language alone is not sufficient for a school to act; there must also be a likelihood of execution. Of course, this is not an exact science. We do not expect school administrators or courts to make precise predictions. Rather, we ask that they use the true threat standard to analyze relevant factors and predict the general likelihood that the threat will be carried out.

For instance, in *Boman v. Bluestem Unified School District No. 205*, the student openly created a violent poster in class.[193] Presumably, if the student had wanted to avoid early interference with her violent plans, she would not have made her intentions known. The student also had a history of obscure artistic expression that had never resulted in violence.[194] Thus, the poster was not a true threat because it was unlikely that violence would transpire.[195]

Similarly, in *In re Douglas D.*, the Supreme Court of Wisconsin placed considerable weight on the fact that the violent story at issue "contain[ed] hyperbole and attempts at jest."[196] Humor, as opposed to violence, appeared to be the motivation behind the story; thus, it was unlikely that violence would result.[197] In *Mahaffey ex rel. Mahaffey v. Aldrich*, the Eastern District of Michigan determined that a student's website listing people he wished would die was not a true threat.[198] The plaintiff created the website "for

190. *Cf.* Andrew P. Stanner, Note, *Toward an Improved True Threat Doctrine for Student Speakers*, 81 N.Y.U. L. REV. 385, 398 (2006) ("Quite apart from the fear and disruption that threats themselves may cause, courts seem much more willing to punish threats of violence when it seems that such punishment might prevent *actual* violence.").

191. Elizabeth Bernstein, *Schools Struggle With Dark Writings,* WALL ST. J. (May 20, 2008), http://online.wsj.com/public/article/SB121124048245705393-he36IPc1fRYvtCSQdDKeNCVlOTg_20080618.html?mod=tff_main_tff_top.

192. United States v. Kelner, 534 F.2d 1020, 1027 (2d Cir. 1976).

193. No. 00-1034-WEB, 2000 WL 297167, at *1 (D. Kan. Jan. 28, 2000).

194. *Id.* at *3.

195. *Id.* at *3-4.

196. 2001 WI 47, ¶ 39, 243 Wis. 2d 204, 626 N.W.2d 725, 741.

197. *Id.* ¶¶ 37-41, 243 Wis. 2d at 234-37, 626 N.W.2d at 741-42.

198. 236 F. Supp. 2d 779, 786 (E.D. Mich. 2002).

laughs" and never intended for anyone to view it.[199] Furthermore, a humorous disclaimer warned readers that they should not engage in violence as a result of the website's content.[200] In *Latour v. Riverside Beaver School District*, the Western District of Pennsylvania highlighted that the school itself did not remove the student from class or contact a counselor regarding the feared rap lyrics.[201] The school was familiar with the student and did not fear that violence would transpire; thus, the speech was not a true threat.[202] In contrast, a student's violent lyrics in *Jones v. Arkansas* constituted a true threat because the writer presented the song's content directly to the targeted student, the threat was explicit as opposed to conditional, and the writer had a criminal history.[203] Thus, a reasonable person would expect that the threat would be executed.[204] Although criminal history is arguably not a reliable indicator, *Boman*, *Latour*, and *Jones* all focused on whether the students had histories of violence, a further indication that true threat evaluations in the educational context are concerned with the likelihood that violence will actually transpire.

In the educational context, courts have focused on whether threats are likely to transpire because not all threats are equal.[205] Students often pose threats to attract attention or vent frustrations.[206] Indeed, in *D.G. v. Independent School District No. 11*, the Northern District of Oklahoma found that a student's poem was not likely to lead to violence because it was merely "a way to express her frustration and anger with [her] Teacher."[207]

Perhaps we should punish threats regardless of the likelihood of violence in order to deter this type of expression. However, this concept implicates a whole array of questions regarding the line between expressive and threatening language. This would also be an inappropriate university goal. Colleges are not responsible for teaching manners and civility. Furthermore, denying a forum for expression of these sentiments might be

199. *Id.*

200. *Id.* at 781-82, 786.

201. No. Civ.A. 05-1076, 2005 WL 2106562, at *1-2 (W.D. Pa. Aug. 24, 2005).

202. *Id.* at *3.

203. 64 S.W.3d 728, 735-36 (Ark. 2002).

204. *Id.* at 736.

205. MARY ELLEN O'TOOLE, FBI, NAT'L CTR. FOR THE ANALYSIS OF VIOLENT CRIME, THE SCHOOL SHOOTER: A THREAT ASSESSMENT PERSPECTIVE 5, *available at* http://www.fbi.gov/stats-services/publications/school-shooter (last visited July 5, 2013).

206. *Id*. at 6.

207. No. 00-C-0614-E, 2000 U.S. Dist. LEXIS 12197, at *14 (N.D. Okla. Aug. 21, 2000).

counterproductive and lead to resentment and retaliation. Violent, yet cathartic, speech is preferable to violent action. This concept was articulated in Judge Kleinfeld's dissent denying a rehearing en banc in *LaVine ex rel. LaVine v. Blaine School District*.[208] Judge Kleinfeld argued that "[s]uppression of speech may reduce security as well as liberty."[209] Thus, we should scrutinize accordingly by using the multifactor true threat test and focusing on the likelihood that the threat will transpire.

Despite the Minnesota Court of Appeal's implications,[210] universities do not have to choose between applying *Tinker* and waiting for students to commit violence. The true threat test gives universities a powerful tool to predict and prevent potential violence. The Minnesota Supreme Court should have explained the advantages of this standard.

V. Conclusion

The Minnesota Supreme Court affirmed *Tatro v. University of Minnesota* on narrow grounds. In doing so, the court missed an opportunity to correct the court of appeal's flawed assumption that *Tinker* is the applicable standard for evaluating college speech. Furthermore, the Minnesota Supreme Court failed to explain that the true threat standard can meet university needs when safety is a concern. First, the *Tinker* standard was formulated with primary and secondary students in mind and is premised on the in loco parentis theory; thus, it is not applicable in the university context. Second, pure application of *Tinker* demands a narrow analysis that inhibits a university's ability to act. Third, the true threat standard would have met the university's needs. The true threat standard allows for a predictive, multifactor analysis and makes quick, decisive action possible. Furthermore, the true threat standard facilitates preventive measures; thus, a university need not wait for violence to transpire. A true threat evaluation can meet university needs while still preserving and respecting the role of First Amendment rights in public universities.

Tracey Wirmani

208. *See* 279 F.3d 719, 729-30 (9th Cir. 2002) (Kleinfeld, J., dissenting from denial of rehearing en banc).

209. *Id.* at 729.

210. *See* Tatro v. Univ. of Minn., 800 N.W.2d 811, 821 (Minn. Ct. App. 2011), *aff'd on other grounds*, 816 N.W.2d 509 (Minn. 2012).