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Opening the Schoolhouse Gate: Why the Supreme Court Should Adopt the Standard Announced in *Tatro v. Supreme Court of Minnesota* to Permit the Regulation of Non-Curricular Student Speech in Professional Programs

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OPENING THE SCHOOLHOUSE GATE: WHY THE SUPREME COURT SHOULD ADOPT THE STANDARD ANNOUNCED IN *TATRO v. UNIVERSITY OF MINNESOTA* TO PERMIT THE REGULATION OF CERTAIN NON-CURRICULAR STUDENT SPEECH IN PROFESSIONAL PROGRAMS

Abstract: Free speech in public schools has long been a divisive and intriguing issue. The topic is particularly contentious in post-secondary education where many of the maturity-driven and family surrogate rationales for restricting student speech fall away. Furthermore, with the advent of the Internet and the explosion of social media, it is now nearly impossible to draw a meaningful line between student speech rights on school grounds and student speech rights beyond them. This Note examines what happens when a student enrolled in a post-secondary program violates an established code of conduct or professional ethics using a non-curricular form of Internet communication. This Note argues that the most effective way to regulate speech in this context is by adopting the standard announced by the Minnesota Supreme Court in 2012 in *Tatro v. University of Minnesota*, which states that a university is entitled to impose academic sanctions for Internet communication that violates academic program rules provided that those rules are "narrowly tailored and directly related to established professional conduct standards."

INTRODUCTION

Consider the following hypothetical situations: a public university student takes a picture of a cadaver during an anatomy lab and posts that picture on Instagram; a student at a public medical school posts about a patient's medical condition on Facebook; a student at a public law school reveals private client information in a public blog.[1]

In these three examples, a student may have violated both program rules and an established code of professional conduct or ethics.[2] Assuming that the

[1] *See* Tatro v. Univ. of Minn., 816 N.W.2d 509, 511 (Minn. 2012) (providing the basis for the defining characteristics of these hypotheticals). Defining characteristics include the involvement of a student in a post-secondary program, the existence of an established professional code of conduct, and off-campus, non-curricular student speech in violation of those professional codes of conduct. *See id.*

[2] *See id.* (discussing the appropriateness of sanctions against a mortuary science student for Facebook posts that violated academic program rules and professional conduct standards).

student's speech occurred in a non-curricular setting, however, the current jurisprudence on free speech in public schools would more than likely insulate that student from academic sanctions.[3] In other words, the student's university could not lawfully alter the student's grades, suspend the student, or otherwise punish the student in any way.[4]

This strange result occurs because these non-curricular "professional program" incidents occupy a very small niche relative to other non-curricular speech in the student speech landscape.[5] Indeed, public universities are not generally permitted to police or restrict off-campus student speech that occurs through social media outlets like Facebook, Twitter, Instagram, and other public blogging sites.[6] In today's world of hyper-connectivity, university control over such speech would enable a school to reach far beyond its curricular purview, nearly without restriction, into the personal lives of students.[7]

The U.S. Supreme Court has decided speech cases involving both primary and secondary schools, but has yet to consider a student speech case relating to

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[3] *See* Will Creeley & Greg Lukianoff, *New Media, Old Principles: Digital Communication and Free Speech on Campus*, 5 CHARLESTON L. REV. 333, 335 (2011) (pointing to a "consistent string of legal precedent dating back more than two decades, making clear that speech codes—university regulations prohibiting expression that would be constitutionally protected in society at large—are unconstitutional at public universities"); Emily Gold Waldman, *University Imprimaturs on Student Speech: The Certification Cases*, 11 FIRST AMEND. L. REV. 382, 392 (2013) (noting that although educational concerns are relevant in non-curricular professional cases, those concerns alone must fail to "tell the whole story" because it is "very unlikely" that a school could otherwise constitutionally punish student speech in such a situation). "Non-curricular" speech is any speech occurring away from school grounds that could not be reasonably construed as reflecting the school's imprimatur. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988).

[4] *See* Creeley & Lukianoff, *supra* note 3, at 335; Waldman, *supra* note 3, at 392. Notably, even if a public university student signs an agreement, which would otherwise constitute a binding contract, a university generally "cannot impose a course requirement that forces a student to agree to otherwise invalid restrictions on her free speech rights." *See Tatro*, 816 N.W.2d at 521 n.6.

[5] *See* Waldman, *supra* note 3, at 388 (identifying professional speech cases as a limited exception within the university setting where the general presumption of greater First Amendment protection does not hold true either "factually or normatively"). This Note defines "professional programs" as post-secondary programs that offer degrees in professional fields guided by an established code of professional conduct or ethics. *See Tatro*, 816 N.W.2d at 520.

[6] *See* Greg Lukianoff & Will Creeley, *Facing Off Over Facebook*, PHOENIX, Mar. 2, 2007, http://thephoenix.com/boston/news/34242-facing-off-over-facebook, *archived at* http://perma.cc/MT58-NPUU (demonstrating the potential for First Amendment violations where speech codes are permitted to reach beyond school campuses and into social media).

[7] *See Tatro*, 816 N.W.2d at 521 (acknowledging that adopting a broad rule allowing social media regulation would "allow a public university to regulate a student's personal expression at any time, at any place, for any claimed curriculum-based reason"); Angela Thomas, *'MSN Was the Next Big Thing After Beanie Babies': Children's Virtual Experiences as an Interface to Their Identities and Their Everyday Lives*, 3 E–LEARNING 126, 126 (2006), *available at* http://www.wwwords.co.uk/pdf/validate.asp?j=elea&vol=3&issue=2&year=2006&article=2_Thomas_ELEA_3_2_web, *archived at* http://perma.cc/AX9G-FJFZ?type=pdf (arguing that, for children, their virtual and physical spaces are seamlessly integrated).

a university.[8] Because of the danger that overreaching regulation poses to free speech in universities, however, it is critical to apply those cases narrowly when developing appropriate regulation for professional speech.[9] Specifically, any regulation of speech must be narrowly tailored and directly related to the restriction of non-curricular professional code violations and must not be so overbroad as to offend the First Amendment rights of students.[10]

This Note argues that the U.S. Supreme Court should adopt the standard articulated in 2012 by the Minnesota Supreme Court in *Tatro v. University of Minnesota* for university regulation of non-curricular professional speech.[11] Part I of this Note examines four U.S. Supreme Court student speech cases and their varied adaptations by lower courts to the modern age of virtual communication.[12] Part II of this Note explains that either the extension of U.S. Supreme Court precedent or the adoption of *Tatro v. University of Minnesota* would be a viable framework for the regulation of student speech in professional programs.[13] Finally, Part III of this Note argues that both positive and normative reasons exist for allowing schools to regulate student speech in some instances of non-curricular professional student speech and that the standard announced in *Tatro* is the most effective way to accomplish that goal without unduly infringing upon the First Amendment rights of students.[14]

I. The Evolution of the Schoolhouse Gate: Mapping the Boundaries of Free Speech in Public Schools

The degree to which the First Amendment protects speech in public schools has long been debated.[15] Indeed, as recently as 2007 the U.S. Supreme Court did not unanimously agree that the First Amendment was originally in-

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[8] *See* McCauley v. Univ. of the Virgin Is., 618 F.3d 232, 247 (3d Cir. 2010) (cautioning that because the U.S. Supreme Court has only decided cases in the context of public elementary and high schools, the rulings "cannot be taken as gospel" in the university setting); Waldman, *supra* note 3, at 384 (stating that the U.S. Supreme Court has decided only four student speech cases, all of which concerned K-12 public education).

[9] *McCauley*, 618 F.3d at 247 (explaining that when applying the student speech doctrine from the U.S. Supreme Court in the university setting, the decision should be "scrutinized carefully, with an emphasis on the underlying reasoning of the rule to be applied").

[10] *See Tatro*, 816 N.W.2d at 521 (acknowledging the potential for overbroad university regulations to reach impermissibly into the personal lives of students); Waldman, *supra* note 3, at 423 (reiterating that students "need more autonomy in the non-curricular realm").

[11] *See infra* notes 159–208 and accompanying text.

[12] *See infra* notes 15–105 and accompanying text.

[13] *See infra* notes 106–158 and accompanying text.

[14] *See infra* notes 159–208 and accompanying text.

[15] *See* Morse v. Frederick, 551 U.S. 393, 413–15 (2007) (Thomas, J., concurring) (discussing cases dating back to the early 1800s regarding the restriction and punishment of school speech); Mark W. Cordes, *Making Sense of High School Speech After* Morse v. Frederick, 17 Wm. & Mary Bill Rts. J. 657, 657 (2009) (stating that "constitutional analysis for free speech in public schools has long generated controversy and confusion").

tended to protect student speech rights.[16] At their conception, public schools were largely substitutes for private schools, and as such subjected students to the strict enforcement of rules meant to instill a core of common values and self-control.[17] During this time, teachers operated with nearly unlimited discretion in their classrooms and in the punishment of their students through the doctrine of *in loco parentis*.[18] Student rights, including free speech rights, were severely limited if they existed at all.[19]

Rightly or wrongly, however, the U.S. Supreme Court has developed limited jurisprudence protecting free speech in public schools.[20] As the law evolved, the Supreme Court briefly granted students full First Amendment protection, to be coextensive with adults in other contexts.[21] In four seminal cases, however, the Court would eventually identify a number of exceptions to that protection, which would again limit the First Amendment rights of students in public schools.[22] Although those cases dealt exclusively with the actions of

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[16] *See Morse*, 551 U.S. at 410–11 (Thomas, J., concurring) ("In my view, the history of public education suggests that the First Amendment, as originally understood, does not protect student speech in public schools."). Justice Thomas cited a string of cases involving strong deference to schools in the restriction and punishment of student speech stretching from the early 1800s through the 1960s to support his proposition that if some right to free speech in schools had existed, the courts would have acted to protect it. *See id.* at 413–15.

[17] *See id.* at 411; ALONZO POTTER & GEORGE BARRELL EMERSON, THE SCHOOL AND THE SCHOOLMASTER: A MANUAL 125 (1843) (arguing that although education should aim to sharpen the intellect, it must also "generate a spirit of subordination to lawful authority" such that it may operate upon "moral sentiments and habits" to create "better citizens").

[18] *Morse*, 551 U.S. at 416 (Thomas, J., concurring). *In loco parentis*, a theory rooted in English common law, allows for a parent to delegate partial parental authority to a tutor or schoolmaster for their child. 1 WILLIAM BLACKSTONE, COMMENTARIES *441. Courts in the United States began using the doctrine to enforce school discipline and subordinance in public schools as early as 1837. *See Morse*, 551 U.S. at 413–14 (Thomas, J., concurring) (citing State v. Pendergrass, 19 N.C. (2 Dev. & Bat. Eq.) 365, 365–66 (N.C. 1837)) ("One of the most sacred duties of parents, is to train up and qualify their children . . . . [T]his duty cannot be effectually performed without the ability to command obedience . . . . The teacher is the substitute of the parent . . . and in the exercise of these delegated duties, is invested with his power.").

[19] *See* Raul R. Calvoz et al., *Cyber Bullying and Free Speech: Striking an Age-Appropriate Balance*, 61 CLEV. ST. L. REV. 357, 365 (2013) (quoting JOHN SOGARD, PUBLIC SCHOOL RELATIONSHIPS: CHAPTERS ON THE INTERRELATIONSHIPS OF THE SCHOOL OFFICERS, THE TEACHERS, THE PUPILS AND THE COMMUNITY 122–23 (1909)) ("The relationship between teacher and pupil on the school-grounds is very different from that existing between the same boy and a policeman in a city park or in a courthouse yard. The teacher may arrest, try, judge and punish. The policeman may only do the first."). Early American colleges largely mirrored the English model, which "fostered absolute institutional control of students by faculty both inside and outside the classroom." Brian Jackson, Note, *The Lingering Legacy of* In Loco Parentis*: An Historical Survey and Proposal for Reform*, 44 VAND. L. REV. 1135, 1140 (1991).

[20] *Morse*, 551 U.S. at 410; *Hazelwood*, 484 U.S. at 271 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512–13 (1969).

[21] *See* W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 626 (1943).

[22] *Morse*, 551 U.S. at 410; *Hazelwood*, 484 U.S. at 271; *Fraser*, 478 U.S. at 685; *Tinker*, 393 U.S. at 512–13.

high school students occurring on school grounds or during school-sponsored activities, lower courts have since adapted those cases to allow the regulation of post-secondary student speech as well as non-curricular and Internet-based student speech.[23]

Section A of this Part summarizes the existing U.S. Supreme Court precedent on free speech in public schools.[24] Section B discusses Internet speech and lower court cases addressing whether schools can regulate student speech that originates off school grounds.[25] Section C of this Part addresses how lower courts have applied the Supreme Court's precedents in the high school setting to curricular student speech in the university and professional program context.[26] Finally, Section D discusses *Tatro*, where the Minnesota Supreme Court addressed non-curricular professional student speech that violates professional program rules and a professional code of ethics.[27]

A. Building the Schoolhouse Gate: The U.S. Supreme Court Weighs in on Free Speech Rights in Primary and Secondary Schools

The issue of free speech in public schools first came before the U.S. Supreme Court in the 1940s, when challenges arose to state statutes requiring students to salute the American flag.[28] In 1943, only three years after upholding such statutes as constitutional, the U.S. Supreme Court in *West Virginia Board of Education v. Barnette* held that these statutes, requiring the expression of a particular viewpoint in a public forum, unconstitutionally offended the First Amendment rights of students in public schools.[29] In the wake of *Barnette*, students enjoyed the same free speech rights as those guaranteed to adults in other contexts.[30] Since 1943, however, the U.S. Supreme Court has

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[23] *See infra* notes 49–105 and accompanying text.

[24] *See infra* notes 28–48 and accompanying text.

[25] *See infra* notes 49–69 and accompanying text.

[26] *See infra* notes 70–91 and accompanying text.

[27] *See infra* notes 92–105 and accompanying text.

[28] *See Barnette*, 319 U.S. at 626; Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 599 (1940), *overruled by Barnette*, 319 U.S. at 626.

[29] *See Barnette*, 319 U.S. at 626 (overturning *Gobitis* by holding that students cannot be compelled to "declare a belief"); *Gobitis*, 310 U.S. at 599 (upholding statutes requiring that students salute to the American flag in public schools as constitutional).

[30] *See* James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335, 1347–48 (2000) (arguing that when the U.S. Supreme Court in *Barnette* framed the issue as whether the government could force an American citizen to publicly profess a certain statement or belief, it was tacitly refusing to separate the rights of students from the rights of citizens in general); *see also* Calvoz et al., *supra* note 19, at 372 ("[The *Barnette*] holding is remarkable when one considers that the Court essentially held that the free speech rights of a first grader in her public school classroom are the same as those of any other citizen."). Adults are generally limited only by certain types of speech, including "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

established four limited situations in which schools may restrict student speech.[31]

First, the First Amendment does not protect student speech that either potentially or actually causes a material disturbance to a school or otherwise invades the rights of others.[32] Accordingly, in 1969 in *Tinker v. Des Moines Independent Community School District*, the U.S. Supreme Court held that a high school could not suspend students for wearing armbands to protest the war in Vietnam where the bands caused no actual or foreseeable disturbance to the school.[33] In its holding, the Court stated that schools may regulate student speech when it "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school" or when that speech invades the rights of others.[34] In applying its new standard, however, the Court implied that a school may also prohibit speech that could be *reasonably forecast* to lead to a substantial disruption or material interference.[35] Therefore, although the Court held that the prohibition on armbands was unconstitutional, the Court's holding based on the reasonable anticipation of material disruption delegated a substantial degree of discretion to school administrators and marked a significant retreat from the holding of *Barnette*.[36]

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[31] *Morse*, 551 U.S. at 410; *Hazelwood*, 484 U.S. at 271; *Fraser*, 478 U.S. at 685; *Tinker*, 393 U.S. at 512–13. As the U.S. Supreme Court has explained in its post-*Barnette* cases, the "rights of students in public school[s] are not automatically coextensive with the rights of adults in other settings." *Fraser*, 478 U.S. at 682.

[32] *Tinker*, 393 U.S. at 512–13.

[33] *Id.* In *Tinker*, the Court noted that wearing armbands to express a certain view was a "symbolic act" akin to "pure speech," which the Court has repeatedly given comprehensive protection. *Id.* at 505. Although the students knew armbands were banned by the administration, they chose to wear them as planned and were subsequently suspended. *Id.* at 504. In upholding the students' rights to wear the armbands, the Court stated that "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506. It has been noted that although the second sentence is perhaps the more cited part of this quotation, the limiting conditional language of the first sentence has "dominated the Court's subsequent schoolhouse jurisprudence." Calvoz et al., *supra* note 19, at 372.

[34] *Tinker*, 393 U.S. at 512–13 (internal quotations omitted). The Court refined this statement further by noting that, "In order for . . . school officials to justify [the] prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 509.

[35] *See id.* at 514 ("[T]he record does not demonstrate any facts which might reasonably have led school authorities to *forecast* substantial disruption of or material interference with school activities . . . .") (emphasis added).

[36] *Compare Tinker*, 393 U.S. at 512–13 (holding that public schools can restrict student speech that could foreseeably interfere with the operation of the school), *with Barnette*, 319 U.S. at 626 (holding that the rights of students were coextensive with those of adults in other contexts); *see also* Calvoz et al., *supra* note 19, at 373–74 (explaining that by adding foreseeability to its test, the U.S. Supreme Court substantially pared back student speech rights).

Second, the First Amendment does not protect student speech that would "undermine [a] school's basic educational mission."[37] Accordingly, in 1986 in *Bethel School District No. 403 v. Fraser*, the U.S. Supreme Court held that it was well within the discretion of school officials to punish a student who delivered a speech with pervasive sexual innuendos during a school assembly.[38] The Court reasoned that both the school's role in inculcating the "habits and manners of civility" as well as the "sensibilities" of fellow students were to be considered in such a case.[39] The *Fraser* decision marked a relatively narrow retreat from *Barnette*, however, because it focused largely on the immaturity of younger students and the role of K-12 schools in teaching social etiquette.[40]

Third, the First Amendment does not prohibit schools from regulating expressive activities such as theatrical productions and publications, which the "public might reasonably perceive to bear the imprimatur of the school," so long as the school's actions are "reasonably related to legitimate pedagogical concerns."[41] Thus, in 1988 in *Hazelwood School District v. Kuhlmeier*, the U.S. Supreme Court upheld the right of a school administrator to restrict the content of a school-sponsored newspaper that was produced as part of the school's journalism curriculum.[42] In creating the standard, the Court reasoned that the mere toleration of student speech—which it addressed *Tinker*—was a wholly different issue than the affirmative promotion of student speech, which was before the Court in *Hazelwood*.[43] This new standard allowed school officials much greater latitude in regulating school speech bearing the imprimatur of the school.[44] In fact, the Court held that not only may a school regulate school-sponsored speech that might substantially interfere with the school as provided by *Tinker*, but further that the school might also limit school-

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[37] *Fraser*, 478 U.S. at 685.

[38] *Id.* at 677–78. The *Fraser* decision highlights the *in loco parentis* role of public schools in the K–12 context. *See id.* at 684 (noting that the Court's jurisprudence has "recognize[d] 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").

[39] *Id.* at 681.

[40] *Compare Fraser*, 478 U.S. at 685 (focusing on the sensibilities and morals of younger students to justify the moderation of age-inappropriate speech), *with Barnette*, 319 U.S. at 626 (referring to students as general members of the citizenry in protecting their rights).

[41] *Hazelwood*, 484 U.S. at 271.

[42] *Id.* at 273, 276. In *Hazelwood*, a school principal removed two articles—one concerning three students' experiences with pregnancy and the other concerning divorce—from a school-sponsored newspaper. *Id.* at 263. The Court noted that activities bearing the imprimatur of a school "may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting." *Id.* at 271.

[43] *Id.* at 270–71.

[44] *Id.* "It is only when the decision to censor a school-sponsored publication, theatrical production, or other vehicle of student expression has *no* valid educational purpose that the First Amendment is so directly and sharply implicated, as to require judicial intervention to protect students' constitutional rights." *Id.* at 273 (emphasis added) (internal quotations omitted).

sponsored speech that was simply "ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences."[45]

Finally, the First Amendment does not prohibit the regulation of student speech at school-sponsored events that might be reasonably viewed as promoting illegal drug use.[46] Accordingly, in 2007 in *Morse v. Frederick*, the U.S. Supreme Court held that a school could suspend a student for unveiling a banner at a school-sponsored event reading "BONG HiTS 4 JESUS."[47] The Court reasoned that because a failure to act would have arguably condoned the student's message, the school was well within its rights to suspend the student.[48]

B. Struggling with the Internet and Virtual Space: The Courts Divide Over Tinker

The advent of the Internet—and with it social media—has created a significant gap for lower courts in the already limited U.S. Supreme Court jurisprudence on student speech.[49] As the accessibility of the Internet and the prevalence of social media have increased, lower courts have been forced to consider both "where" Internet speech occurs and the intrusive implications that result if Internet speech can be regulated based simply upon where it is accessed.[50]

Although *Tinker*'s "schoolhouse gate" once served as a bright line separating the rights of students inside school and out, the Internet has called into question the usefulness and accuracy of such a physical distinction.[51] One

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[45] *Id.*

[46] *Morse*, 551 U.S. at 410.

[47] *Id.* at 396.

[48] *Id.* at 410. The Court noted that Congress has provided billions of dollars to support state drug-prevention programs and has declared that schools are partially responsible for educating students on the dangers of illegal drug use. *Id.* at 408.

[49] *See* Kara D. Williams, Comment, *Public Schools vs. MySpace & Facebook: The Newest Challenge to Student Speech Rights*, 76 U. CIN. L. REV. 707, 710 (2008) (observing that the U.S. Supreme Court has yet to hear a student speech case involving the Internet, while lower courts have decided the issue multiple times).

[50] Benjamin F. Heidlage, Note, *A Relational Approach to Schools' Regulation of Youth Online Speech*, 84 N.Y.U. L. REV. 572, 589 (2009) (arguing that Supreme Court jurisprudence is more difficult to apply to online speech because it is accessible everywhere and is therefore ever more likely to become subject to regulation); *see also infra* notes 55–69 and accompanying text (discussing several courts and commentators struggling with the application of U.S. Supreme Court precedent to student speech online).

[51] *See* Heidlage, *supra* note 50, at 588–89; *see also supra* note 33 and accompanying text (discussing *Tinker*'s "schoolhouse gate"). The Internet complicates the school speech analysis largely because it can be viewed either in physical or virtual space with different analytic results. *See* Orin S. Kerr, *The Problem of Perspective in Internet Law*, 91 GEO. L.J. 357, 357 (2003). Virtually, the Internet can be construed as its own independent space, while physically, the Internet is simply a communication network, which may be fixed to the actual locations of its users. *See id.* at 359–60. The difficulty is that

scholar has noted that, "[f]or children, there is no dichotomy of online and offline, or virtual and real; the digital is so much intertwined into their lives and psyche that the one is entirely enmeshed with the other."[52] This shrinking divide between home and campus life caused by the Internet creates a high risk that any regulation of student cyberspeech will be especially invasive.[53] The omnipresent character of the Internet has resulted in a split among courts and scholars, with some favoring a "geographic" approach and others favoring an "impact" approach to regulating student cyberspeech.[54]

A shrinking group of courts and commentators advocate for a "geographic" approach to school speech regulation.[55] Drawing from the "schoolhouse gate" language of *Tinker*, the geographic approach requires that a student's online activity must physically occur or be physically accessed on school grounds before a court can proceed to *Tinker*'s substantial disruption analy-

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both constructions are perfectly legitimate and therefore it becomes exceptionally difficult to pinpoint "where" Internet speech occurs. *See* Heidlage, *supra* note 50, at 588.

[52] Thomas, *supra* note 7 at 126. Teens today have been called the "Facebook Generation or digital natives" because of their close identification with technology. Masuma Ahuja, *Teens Are Spending More Time Consuming Media, on Mobile Devices*, WASH. POST, Mar. 13, 2013, http://www.washingtonpost.com/postlive/teens-are-spending-more-time-consuming-media-on-mobile-devices/2013/03/12/309bb242-8689-11e2-98a3-b3db6b9ac586_story.html, *available at* http://perma.cc/Z6CJ-6RYX (internal quotations omitted) ("Today's teens spend more than 7 1/2 hours a day consuming media—watching TV, listening to music, surfing the Web, social networking, and playing video games . . . .").

[53] *See* Heidlage, *supra* note 50, at 588–89 (arguing that because the Internet expands the "potential reach of communication," what once might have been a message from one person to another now may easily be forwarded and shared, creating the immediate potential for substantial disruption and consequentially enabling or necessitating school discipline).

[54] *See* Heidlage, *supra* note 50, at 589; *see also infra* notes 55–69 and accompanying text (discussing the arguments for and against each approach by commentators and courts). It should be noted that, to date, courts have almost exclusively applied *Tinker* to off-campus student cyberspeech. Williams, *supra* note 49, at 719. This is because the rationale of *Hazelwood*—that speech must reflect the imprimatur of the school—has generally been considered inconsistent with the nature of non-curricular student speech. *Id.*

[55] *See, e.g.*, Mahaffey v. Aldrich, 236 F. Supp. 2d 779, 783–84 (E.D. Mich. 2002) (applying the geographic approach); Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) (refusing to apply *Tinker* because the student's speech was "entirely outside of the school's supervision or control"); J.S. *ex rel*. H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 865 (Pa. 2002) (applying the geographic approach); Clay Calvert, *Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground*, 7 B.U. J. SCI. & TECH. L. 243, 285 (2001) (arguing that only when a student's online content is physically accessed on a school-controlled computer by the student or through his encouragement should the *Tinker* material disruption test be applied); Aaron H. Caplan, *Public School Discipline for Creating Uncensored Anonymous Internet Forums*, 39 WILLAMETTE L. REV. 93, 140–42 (2003) (arguing that *Tinker* is inapplicable beyond the schoolhouse gate and simply does not apply to student's off-campus lives); Jacob Tabor, Note, *Students' First Amendment Rights in the Age of the Internet: Off-Campus Cyberspeech and School Regulation*, 50 B.C. L. REV. 561, 578–79 (2009) ("If *Tinker* was intended to apply to all off-campus student speech, 'the schoolhouse gates' would be meaningless; students would have the same free speech rights at home as they would at school regardless of which side of the 'gate' they were on.").

sis.[56] For example, in 2002, in *Mahaffey v. Aldrich*, the U.S. District Court for the Eastern District of Michigan applied a geographic *Tinker* analysis by holding that a student who created a satirical webpage off campus could not be punished by his school.[57] The court reasoned that *Tinker* dealt with activities that occurred on school property and that, "the evidence simply [did] not establish that any of the complained of conduct occurred on [school] property."[58]

Also in 2002, in *J.S. ex rel. H.S. v. Bethlehem Area School District*, the Supreme Court of Pennsylvania applied a similar geographic analysis to a student-created website, but held in favor of the school.[59] The court observed that although the disputed site was created off campus, its student creator accessed the site at school and showed it to fellow students at school.[60] Those facts, the court concluded, created a sufficient nexus between the site and the school's campus for it to be considered on-campus speech under *Tinker*.[61]

By contrast, foreseeing the potential for remote speech to substantially disrupt activities on school grounds, some courts have engaged in a simple "impact" analysis, which applies the material disruption test of *Tinker* without regard to the origin of the speech.[62] This approach, which many scholars also advocate, focuses on how students' online activities affect the school community rather than on whether that speech had a sufficient nexus to school grounds.[63] For example, in 1998, in *Beussink v. Woodland R-IV School District*, the U.S. District Court for the Eastern District of Missouri enjoined a high school from suspending a student for creating a web page on his home

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[56] Heidlage, *supra* note 50, at 580; *see also supra* note 33 and accompanying text (discussing *Tinker*'s "schoolhouse gate").

[57] *See* 236 F. Supp. 2d at 783–84.

[58] *Id.*

[59] *See* 807 A.2d at 865.

[60] *Id.*

[61] *Id.*

[62] *See, e.g.*, Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34, 39 (2d Cir. 2007) (applying the impact approach); Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001) (same); Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998) (applying *Tinker* without discussing academic nexus); *see also* Thomas v. Bd. of Educ., Granville Cent. Sch. Dist., 607 F.2d 1043, 1052 n.17 (2d Cir. 1979) (anticipating the potential for "remote speech" to incite a widespread disturbance on school grounds, even before the widespread use of the Internet).

[63] Heidlage, *supra* note 50, at 583 (explaining the impact approach applies *Tinker* "without engaging the threshold question that the geographical approach attempts to answer—whether at the time of speaking the speaker was subject to the disciplinary reach of the school"); *see* Christi Cassel, Note, *Keep Out of MySpace!: Protecting Students from Unconstitutional Suspensions and Expulsions*, 49 WM. & MARY L. REV. 643, 673–74 (2007) (advocating a test that balances the First Amendment rights of students outside of campus with the right of schools to prevent actual material disruption on campus); Renee L. Servance, Comment, *Cyberbullying, Cyber-Harassment, and the Conflict Between Schools and the First Amendment*, 2003 WIS. L. REV. 1213, 1216 (arguing that where a student is targeted by "cyber-speech," and that speech has a negative impact which interferes with the school's "education mission," it should be subject to regulation by the school).

computer that was highly critical of school administrators.[64] Although the court found for the student in the case because there was no showing that the student's conduct would materially affect the school, the court applied *Tinker* without any mention of *Tinker's* potential geographic limitations.[65]

Using the same approach in 2007 in *Wisniewski v. Weedsport Central School District*, the U.S. Court of Appeals for the Second Circuit held that neither the off-campus origin of a high school student's cyberspeech nor the exclusively off-campus transmission of that speech was sufficient to insulate that student from discipline.[66] In *Wisniewski*, a student sent an Instant Message ("IM") icon saying "Kill Mr. VanderMolen" to a friend.[67] The court, applying *Tinker*, explained that it was "reasonably foreseeable" that school officials would become aware of the icon, which would cause a substantial disturbance.[68] The court concluded that the foreseeable disturbance that such a message could cause would "permit school discipline, whether or not [the student] intended his IM icon to be communicated to school authorities or, if communicated, to cause a substantial disruption."[69]

C. Curricular Speech in Professional Programs: Hazelwood *Gains Traction in University Classrooms*

In the university context, the rationale behind the U.S. Supreme Court precedent on student free speech is often altered, weakened, or entirely inapplicable.[70] For example, one scholar has pointed out that the traditional justifica-

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[64] 30 F. Supp. 2d at 1182. The web page employed vulgar language to convey the student's opinion about various members of the school administration and invited readers to contact the school's principal to voice their own opinions. *Id.* at 1177. The student's site was accessed by several students on school grounds, and after being alerted to the page, the principal of the school suspended the student for ten days. *Id.* at 1178.

[65] *Id.* at 1180. Although the court recognized that the student developed the page off campus and neither accessed nor promoted the page on campus, the court did not discuss the significance of those facts. *See id.* at 1178–79. Similarly, in 2001, in *Killion v. Franklin Regional School District*, the U.S. District Court for the Western District of Pennsylvania applied *Tinker*'s substantial disruption standard to an email message composed outside of school, a hard copy of which was later brought on campus by a student other than the writer. 136 F. Supp. 2d at 455. After applying *Tinker*, and without any discussion about the email's geographic origin, the court found that no substantial disruption had occurred. *Id.*

[66] *See* 494 F.3d at 39. The *Wisniewski* court cited its decision in *Thomas v. Board of Education, Granville Center School District* to support its finding that the location of conduct was immaterial in cases of substantial disruption. *Id.* (quoting *Thomas*, 607 F.2d at 1052 n.17).

[67] *Id.* at 36. An IM icon is generally composed of a set of animated pictures and/or words sent over an online chat service. *Id.* at 35.

[68] *Id.* at 39–40.

[69] *Id.* at 40. Significantly, this statement allows for the expansive regulation of student speech. Heidlage, *supra* note 50, at 587. Although in a subsequent off-campus speech case the U.S. Court of Appeals for the Second Circuit stated that it was acutely aware of the need to restrict schools to matters of legitimate pedagogical concern, it again opted to resolve the case without undergoing a threshold geographic inquiry. *Id.* (discussing Doninger v. Niehoff, 527 F.3d 41, 48 (2d Cir. 2008)).

[70] *See McCauley*, 618 F.3d at 247; Waldman, *supra* note 3, at 387–88.

tions for administrative regulation of student speech, such as the school's role in teaching and monitoring ethics, fundamental values, and age-appropriateness, are not valid in a university setting.[71] Indeed, no court has ever applied either *Fraser* or *Morse* to a university case.[72]

Furthermore, as described by Justice William Brennan, Jr. in *Keyishian v. Board of Regents*, a university is "peculiarly the marketplace of ideas."[73] Therefore, both scholars and courts have argued that the ability of a university to regulate student speech should be subject to much greater limitation and scrutiny than in the K-12 context.[74] Although this view is not universal, it is clear that different attendant circumstances accompany free speech in the university context, and courts have struggled to determine exactly how far to extend the U.S. Supreme Court's student speech jurisprudence beyond the high school setting.[75]

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[71] Waldman, *supra* note 3, at 387–88. One scholar argues that the protective justifications of *Fraser* and *Hazelwood*—aiming to shield students from age-inappropriate material—as well as *Morse*'s justification of aiming to shield young students from drug-related peer pressure, are all far less applicable to more mature post-secondary students. *Id.* at 387. Although *Tinker*'s substantial disruption concerns are still relevant, this scholar argues that "the larger, more diffuse nature of university campus life" coupled with the greater maturity of post-secondary students greatly reduces the likelihood of any one student's speech causing "widespread unrest." *Id.* Similarly, in 2010, in *McCauley v. University of the Virgin Islands*, the United States Court of Appeals for the Third Circuit argued that the mission of a university—encouraging "inquiry and challenging *a priori* assumptions"—is different than that of a K–12 school which "prioritizes the inculcation of societal values." 618 F.3d at 243. Furthermore, the *McCauley* court argued that elements of previous U.S. Supreme Court frameworks, such as *Tinker*'s "schoolhouse gate," are less applicable in the university setting. *Id.* at 247. For example, many university students reside on campus and therefore would find themselves within the "schoolhouse gate" and subject to speech regulations at almost all hours of the day. *Id.*

[72] Waldman, *supra* note 3, at 388.

[73] 385 U.S. 589, 603 (1967) (internal quotations omitted).

[74] Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (arguing that that in American universities there exists a simple "essentiality of freedom" and that to "impose any straight jacket" upon the members of such institutions as they question the norms of society and seek new understanding would "imperil the future of our Nation"); *McCauley*, 618 F.3d at 247 (arguing that in view of the undeniably different pedagogical missions of public universities and public elementary and high schools as well as the ranging "emotional maturity" of the respective audiences in those settings, any application of U.S. Supreme Court free speech doctrine to the university setting "should be scrutinized carefully, with an emphasis on the underlying reasoning of the rule to be applied"); Waldman, *supra* note 3, at 387–88 (arguing that both the protective and educational rationales behind the U.S. Supreme Court student speech precedent "counsel toward limited application" of that precedent and asserting that it "makes perfect sense" that university students receive "greater First Amendment protection than do their K-12 counterparts").

[75] *See* Waldman, *supra* note 3, at 385 n.16 (comparing U.S. Circuit Court cases extending *Hazelwood* or declining to do so); *see also* Ward v. Polite, 667 F.3d 727, 734 (6th Cir. 2012) ("Nor, it is worth adding, does the university setting invariably mean that educators have less discretion over their curriculum and class-related speech. It may be true that university students can handle more mature themes, but it is also true that they are not forced to be there, something that cannot be said about most students at public high schools.").

In the context of *curricular* student speech, however, some circuits have applied *Hazelwood* in the university setting.[76] Notably, courts have employed the rule and rationale of *Hazelwood*'s pedagogical concern standard in several cases to regulate students' curricular speech—or lack thereof—in the context of professional training programs.[77] For example, in 2012 in *Ward v. Polite*, the U.S. Court of Appeals for the Sixth Circuit applied the "pedagogical concern" standard of *Hazelwood* to a counseling student's curricular speech, reasoning that no true "stop-go" distinction exists between student speech at the high school and university levels.[78] In *Polite*, the administration at Eastern Michigan University expelled a student from a graduate-level counseling program for refusing to counsel a same-sex client due to the student's Christian faith.[79] Only four courses short of a degree, the student enrolled in her required practicum, but when asked to counsel a same-sex client, she requested that her supervisor either refer the client or permit her to begin counseling with the understanding that a referral could be made if she was asked to affirm the relationship.[80] The student's supervisor referred the client, but the university commenced disciplinary action against the student alleging that she had violated two provisions of the American Counseling Association ("ACA") Code of Ethics, violated the university's blanket ban on counseling referrals, and contravened the university's strong policy on value-affirmation.[81] The Sixth Circuit, however, held against the university.[82] The court explained that the student had not in fact violated any ACA provision and the university had failed to demonstrate any evidence of a no-referrals policy in existence at the time the student was expelled.[83]

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[76] Hosty v. Carter, 412 F.3d 731, 735 (7th Cir. 2005) (extending *Hazelwood* to the university setting and citing similar cases from the Tenth and Eleventh Circuits with approval); Axson–Flynn v. Johnson, 356 F.3d 1277, 1293 (10th Cir. 2004) (applying *Hazelwood* to evaluate curricular student speech at a university); *see* Bishop v. Aronov, 926 F.2d 1066, 1074 (11th Cir. 1991) (applying *Hazelwood* to permit the regulation of certain curricular speech in a university classroom).

[77] *See Polite*, 667 F.3d at 734; Keeton v. Anderson-Wiley, 664 F.3d 865, 876 (11th Cir. 2011); *Axson-Flynn*, 356 F.3d at 1293; Brown v. Li, 308 F.3d 939, 952 (9th Cir. 2002).

[78] *Polite*, 667 F.3d at 733–34 (explaining that the use of the *Hazelwood* standard in the university context would allow for schools and courts to account for the "level of maturity" of university students).

[79] *See id.* at 729–30.

[80] *Id.*

[81] *Id.* at 731.

[82] *Id.* at 738. The court concluded that a reasonable jury could find that the university had expelled the student for her religious beliefs rather than for legitimate pedagogical concerns. *Id.* The holding mirrored the Tenth Circuit's decision in *Axson-Flynn v. Johnson*, where a Mormon student was encouraged to withdraw from the University of Utah's Actor Training Program after refusing to use the word "fuck" or take the Lord's name in vain. 356 F.3d at 1280. The University argued that performing the exercises as written was an important part of the curriculum and that they were chosen specifically to prepare students for professional careers by enhancing their "true acting" skills. *See id.* at 1291. The court held, however, that in light of the facts of the case, a jury should determine if the school's stated pedagogical concern was not instead a pretext for religious discrimination. *Id.* at 1293.

[83] *Polite*, 667 F.3d at 736.

Some universities have been more successful in asserting *Hazelwood*'s pedagogical concern standard to justify the restriction of student speech.[84] In 2011, in *Keeton v. Anderson-Wiley*, the U.S. Court of Appeals for the Eleventh Circuit held that Augusta State University ("ASU") had a legitimate pedagogical concern in teaching students in its Counselor Education Program to comply with the ACA Code of Ethics.[85] In *Keeton*, a student was seeking her master's degree in school counseling from ASU, but after her first year was asked to complete a "remediation plan" before entering the program's clinical practicum.[86] ASU assigned the remediation plan after determining that the student had expressed an intent to violate "several provisions" of the ACA Code of Ethics, which prohibits discrimination based on sexual orientation.[87] Applying *Hazelwood*, the court concluded that the school's interest in teaching students to comply with the ACA Code of Ethics was in fact a legitimate pedagogical concern in the context of a student practicum.[88]

Similarly, in 2002, in *Brown v. Li*, the U.S. Court of Appeals for the Ninth Circuit ruled that the University of California at Santa Barbara could restrict a master's degree candidate from filing his dissertation because of its unprofessional content.[89] The court explicitly held that *Hazelwood*'s legitimate pedagogical concern standard was the "appropriate" standard in cases of "*curricular* speech."[90] In applying *Hazelwood*, the court concluded that the university's actions against the student were related to the legitimate pedagogical objective of "teaching [the] Plaintiff the proper format for a scientific paper," and noted that the student was even given instructions requiring that he "comply with [the] professional standards governing his discipline."[91]

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[84] *See Keeton*, 664 F.3d at 876 (extending *Hazelwood* to the university setting); *Brown*, 308 F.3d at 952 (same).

[85] *Keeton*, 664 F.3d at 876.

[86] *Id.* at 867. The student had previously expressed her plans to convert homosexual clients to heterosexuality, to inform homosexual clients that such behavior was morally wrong, and to tell clients that it was "not okay to be gay." *Id.* at 868.

[87] *Id.* at 869. The student withdrew claiming that she would be unable to complete the university's remediation plan and that the actions of the school violated her free speech rights. *Id.* at 871.

[88] *Id.* at 876 (reasoning that ASU must follow the ACA's Code of Ethics for accreditation purposes and that "the entire mission of its counseling program is to produce ethical and effective counselors in accordance with the professional requirements of the ACA").

[89] *Brown*, 308 F.3d at 955. The content in question was a "'Disacknowledgements' section" that the student attempted to add to his dissertation that included "special *Fuck You's*" to various staff, school officials, and even a former California Governor. *Id.* at 943.

[90] *Id.* at 949.

[91] *Id.* at 952.

D. Beyond the Campus Gates: Tatro *Permits the Regulation of Non-curricular Student Speech in a Professional Program*

The professional speech cases discussed in Section C of this Part allowed for a relatively straightforward application of *Hazelwood*.[92] Each occurred in a setting that the courts could fairly characterize as "curricular" and, therefore, as within the academic purview of university regulation.[93] Where a *non-curricular* violation of professional standards occurs through social media in a university setting, however, the complications of cyberspeech clash with the U.S. Supreme Court's minimal guidance on the applicability of its secondary school precedent to the university setting.[94]

In *Tatro*, the Minnesota Supreme Court decided a case involving a non-curricular violation of professional ethics and course rules that occurred through social media.[95] In *Tatro*, the plaintiff was a junior enrolled in a Mortuary Science Program for undergraduate upperclassmen at the University of Minnesota.[96] The required laboratory courses in the program used human cadavers supplied through the Anatomy Bequest Program by individual donors to the University.[97] In order to participate in the program, students were required to sign a form acknowledging and agreeing to follow the rules of the Anatomy Bequest Program as well as additional lab rules designed to "promote respect for the cadaver."[98] These rules allowed some discreet conversation outside the lab but prohibited "blogging" about the lab or dissection.[99]

During the plaintiff's lab semester, the director of the Mortuary Science Program became aware of several posts the plaintiff had made to her Facebook page regarding the anatomy lab and dissection.[100] The plaintiff's posts referenced playing with a cadaver, the "cathartic" nature of embalming, and included some "violent satirical fantasy."[101] In reaction to the potential violence in

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[92] *See supra* notes 70–91 and accompanying text.

[93] *See supra* notes 70–91 and accompanying text.

[94] *See infra* notes 95–105 and accompanying text.

[95] *Tatro*, 816 N.W.2d at 511.

[96] *Id.* The court noted that the primary "purpose" of the program was to "prepare students to be licensed funeral directors and morticians." *Id.* at 511–12.

[97] *Id.* at 512.

[98] *Id.* The rules also served to "educate students concerning the professional and ethical responsibilities of the funeral service profession, and to maintain the viability of the Anatomy Bequest Program." *Id.* at 516–17. Adherence to such rules was required for accreditation of the program. *Id.* at 517.

[99] *Id.* at 512. The court noted that the professor had explained to the students that "blogging" was intended to be defined broadly and covered Facebook and Twitter. *Id.*

[100] *Id.* It is worth noting that at the time of her posts, "Tatro's Facebook privacy settings allowed her 'friends' and 'friends of friends' to see what she had posted. Tatro had 'hundreds' of Facebook friends." *Id.*

[101] *Id.* at 512–513. One such post read: "Amanda Beth Tatro is looking forward to Monday's embalming therapy as well as a rumored opportunity to aspirate. Give me room, lots of aggression to be taken out with a trocar." *Id.* at 512.

her posts, the director of the program told the student to "stay away" from the department while the matter was investigated.[102]

The student testified at her disciplinary hearing that she had intended her posts to be read only by "friends and family who would understand her sarcasm, morbid sense of humor, and references to popular movies and songs."[103] Nevertheless, the university imposed a number sanctions against her because she had violated laboratory rules designed to "set standards for behavior" that students would "carry into the profession."[104] Despite the plaintiff's claim that the university violated her constitutional right to free speech because her Facebook posts did not identify or threaten anyone, the court held that she did not have the right to "engage in unprofessional and unethical conduct" without academic consequences.[105]

II. The Jurisprudence puzzle: Does Existing U.S. Supreme Court Precedent Permit Professional Programs to Restrict Certain Non-Curricular Speech?

As a general rule, public universities cannot restrict the non-curricular social media speech of students, which falls beyond the reach of the U.S. Supreme Court's student speech standards and would otherwise be protected outside of the university context.[106] That is not to say that such regulation does not occur; in fact, according to a recent survey done by the Foundation for Individual Rights in Education (FIRE) for the 2009-2010 school year, over two-thirds of the 390 public universities they examined had "speech codes" that

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[102] *Id.* at 513. Believing herself suspended, Tatro reported her story to the local media and appeared on local television, spurring a number of concerned responses from donor families and the general public regarding Tatro's "lack of professionalism" and the steps the university would take to prevent such an event in the future. *Id.* Tatro was subsequently allowed to complete the course and received a "C+," but was informed that she was being investigated for her violation of the University's Student Conduct Code. *Id.*

[103] *Id.* at 514.

[104] *Id.* The University mandated that (1) Tatro's lab grade be changed to an F; (2) Tatro complete a course in clinical ethics; (3) Tatro compose a letter to a Mortuary professor addressing respect in the program and profession; (4) Tatro undergo a psychiatric evaluation and comply with any recommendations made; and (5) Tatro be placed on probation for the remainder of her undergraduate career. *Id.* at 514–15.

[105] *Id.* at 524. The court noted that Minnesota's right to free speech was "coextensive" with federal law, and thus the court relied on federal doctrine in deciding the case. *See id.* at 516.

[106] *See* Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1180 (6th Cir. 1995) (striking down a university discriminatory harassment policy for violating the First Amendment); Roberts v. Haragan, 346 F. Supp. 2d 853, 872 (N.D. Tex. 2004) (explaining that beyond the University's nonpublic forum areas, students have a right to the freedom of expression protected by the First Amendment); Creeley & Lukianoff, *supra* note 3, at 335 (pointing to over twenty years of precedent holding that public university regulation of student speech, which would be constitutionally protected outside of the university setting, is unconstitutional).

were unconstitutional.[107] These code violations are especially puzzling because the university system in the United States is regarded as a unique marketplace of ideas with an emphasis on free exchange and a lack of government interference.[108]

When a student in a professional program is punished for speaking in violation of an established code of ethics, however, the circumstances may fall within a niche where even non-curricular speech in the university setting may be constitutionally restricted.[109] Part A of this Section examines the applicability of the 1988 U.S. Supreme Court case *Hazelwood School District v. Kuhlmeier* to non-curricular speech in professional programs.[110] Part B then explores how the 1969 U.S. Supreme Court case *Tinker v. Des Moines Independent Community School District* could be applied to the same set of circumstances.[111] Finally, Part C discusses and analyzes the approach taken in 2012 by the Minnesota Supreme Court in *Tatro v. University of Minnesota*.[112]

A. Extending Hazelwood *to Non-Curricular Speech in Professional Programs*

One way that courts could theoretically allow professional programs to regulate non-curricular student speech is by extending the *Hazelwood* standard to violations of professional ethics.[113] To support such an extension, it is instructive to consider the policies behind cases where *curricular* speech has

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[107] Creeley & Lukianoff, *supra* note 3, at 334; Williams, *supra* note 48, at 724–25. Unconstitutional speech codes are simply university regulations that prohibit certain forms of student expression that would otherwise be constitutionally protected outside the university setting. *See* Creeley & Lukianoff, *supra* note 3, at 334. For example, in 2008, the University of Oklahoma informed students that their university e-mail accounts could not be used to "endorse or oppose a [political] candidate, including the forwarding of political humor/commentary." *Id.* at 339. The University rescinded the policy following a letter from FIRE. *Id.* at 339–40.

[108] *See* Creeley & Lukianoff, *supra* note 3, at 333–35 (noting that despite the characterization of American universities as a marketplace of ideas, many college campuses remain "stubbornly hostile to freedom of expression and First Amendment rights").

[109] *See* Tatro v. Univ. of Minn., 816 N.W.2d 509, 520–21 (Minn. 2012) (noting that both parties agreed that the University could regulate "off-campus conduct that violate[s] specific professional obligations," namely "established professional conduct standards"); Waldman, *supra* note 3, at 388 (arguing that although university students generally receive greater First Amendment protections, that generalization breaks down both "factually [and] normatively" when a university student violates a professional code of conduct).

[110] *See infra* notes 113–131 and accompanying text.

[111] *See infra* notes 132–145 and accompanying text.

[112] *See infra* notes 146–159 and accompanying text.

[113] *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988) (allowing regulation where an activity is "designed to impart particular knowledge of skills," whether or not occurring in the classroom, for speech that is under the auspices of the university); Waldman, *supra* note 3, at 388 (arguing that the rationale and rule of *Hazelwood* are applicable to professional programs).

been limited in professional programs using *Hazelwood*.[114] For example, in 2011, in *Keeton v. Anderson-Wiley*, the United States Court of Appeals for the Eleventh Circuit upheld sanctions against a professional student for curricular speech that would have allegedly violated the American Counseling Association ("ACA") Code of Ethics.[115] The *Keeton* court relied on *Hazelwood* to hold that a university had a legitimate pedagogical concern in ensuring that the students in its counseling program did not violate the professional conduct standards to which they would one day be required to professionally adhere.[116] The court noted that this was both because "the entire mission" of the school's program was "to produce ethical and effective counselors" and because adherence was necessary to protect the school's accreditation.[117]

The *Hazelwood* standard further requires, however, that a student's speech bear the imprimatur of the school.[118] The court in *Keeton* reasoned that this standard was satisfied because the clinical practicum was a "school-sponsored" activity designed to impart "particular knowledge" upon students, which the general public might reasonably perceive to bear the imprimatur of the school.[119] Accordingly, the imprimatur requirement was satisfied because the clinic, as a forum, was sufficiently curricular to permit speech regulation under the policy in *Hazelwood*.[120]

The legitimate pedagogical concerns that are present in a non-curricular speech case such as *Tatro* are often exactly the same as the pedagogical concerns that are present in a curricular speech case such as *Keeton*.[121] Neither the location nor the medium of a student's speech alters the university's concern in

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[114] *See*, *e.g.*, Ward v. Polite, 667 F.3d 727, 734 (6th Cir. 2012) (applying *Hazelwood* to curricular speech in a university clinical setting); Keeton v. Anderson-Wiley, 664 F.3d 865, 875 (11th Cir. 2011) (applying *Hazelwood* to limit curricular speech in a university clinical setting); Bishop v. Aronov, 926 F.2d 1066, 1074 (11th Cir. 1991) (same).

[115] 664 F.3d at 868 (upholding sanctions where a counseling student planned to inform clients that it was "not okay to be gay"); *see supra* notes 85–88 and accompanying text (discussing *Keeton* in greater detail). The U.S. Supreme Court has held that a government actor need not "allow events to unfold to the extent that the disruption . . . is manifest before taking action." Connick v. Myers, 461 U.S. 138, 152 (1983).

[116] *Keeton*, 664 F.3d at 876; *see Hazelwood*, 484 U.S. at 271.

[117] *Keeton*, 664 F.3d at 876.

[118] *Hazelwood*, 484 U.S. at 271 (holding that schools have authority over "activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school").

[119] *Keeton*, 664 F.3d at 875. In *Hazelwood*, the Court specified that school sponsored expressive activities "may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised . . . and designed to impart particular knowledge . . . ." *Hazelwood*, 484 U.S. at 271.

[120] *Keeton*, 664 F.3d at 875.

[121] *See Keeton*, 664 F.3d at 876 (explaining that the school had a legitimate pedagogical concern in teaching students to adhere to the ACA Code of Ethics as required for school accreditation); *Tatro*, 816 N.W.2d at 516–17 (explaining the two pedagogical concerns of the university: teaching students the ethics of the funeral service profession while maintaining the program through accreditation and the Anatomy Bequest Program).

ensuring the fitness of its students for their professions or in ensuring the continued viability of its programs.[122] In *Tatro*, for example, despite the fact that speech occurred off campus through social media, it violated the professional code to which the student had agreed to adhere.[123] The program rules in *Tatro* existed, like those in *Keeton*, both to educate students on the "professional and ethical responsibilities" of their professions and to preserve the "viability" of the program.[124]

The problem, however, is that despite this legitimate pedagogical concern, a student's *non-curricular* social media post is unlikely to reflect the imprimatur of the school as that concept is currently construed.[125] The requirement that a student's actions bear the imprimatur of the school—the second part of the *Hazelwood* standard—is satisfied in cases such as *Keeton* only because student speech has occurred in a "curricular" setting as defined by *Hazelwood*.[126]

On the other hand, the policy in *Hazelwood* exists to allow schools to control their own curricula and to disassociate from student speech that might appear to be school sanctioned.[127] The case of non-curricular student speech that violates a professional code of conduct is unique because it can have an effect on the school's curriculum through the school's accreditation require-

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[122] *See Keeton*, 664 F.3d at 876; *Tatro*, 816 N.W.2d at 516–17.

[123] *Tatro*, 816 N.W.2d at 520–21.

[124] *See Keeton*, 664 F.3d at 876; *Tatro*, 816 N.W.2d at 516–17.

[125] *See Tatro*, 816 N.W.2d at 518 (suggesting that evenly largely public social media posts do not bear the imprimatur of a university); James M. Patrick, Comment, *The Civility-Police: The Rising Need to Balance Students' Rights to Off-Campus Internet Speech Against the School's Compelling Interests*, 79 U. CIN. L. REV. 855, 889 (2010) (suggesting that a student webpage would need to be accompanied by something like the school district's official emblem to fall under *Hazelwood*). Although most instances of social media speech generated off campus fall beyond the reach of *Hazelwood*, at least one scholar has argued that, in the case of professional student speech that violates an established code of ethics, the imprimatur standard would in fact be satisfied. Waldman, *supra* note 3, at 388. This policy has been called the "certification rationale." *Id.* In such a case, when granting a student a professional degree, arguably a university implicitly "certifies" that student as fit to practice in that profession. *Id.* With that certification, that student then bears the imprimatur of the school. *Id.* at 393. This rationale can be read into cases such as *Keeton* and *Polite* where the students would have received counseling degrees certifying them to practice as professional counselors. *See Polite*, 667 F.3d at 734–35; *Keeton*, 664 F.3d at 875; Waldman, *supra* note 3, at 388. If a university is unable to take actions to restrict such speech, even speech occurring outside the curricular setting, the university will be forced to certify students that it may not in fact deem fit to bear its imprimatur. Waldman, *supra* note 3, at 388.

[126] *See Keeton*, 664 F.3d at 875 (discussing a university counseling student enrolled in a supervised clinical practicum designed to impart specific vocational skills to students); *see also Polite*, 667 F.3d at 734–35 (presenting similar facts). The Court in *Hazelwood* considered "curricular" those activities that, whether occurring in a traditional classroom setting or not, were school-sponsored expressive activities supervised by the faculty and designed to impart particular knowledge or skills to student participants or audiences. *Hazelwood*, 484 U.S. at 271.

[127] *Hazelwood*, 484 U.S. at 271 ("Educators are entitled to exercise greater control over [curricular activities] to assure that participants learn whatever lessons the activity is designed to teach . . . and that the views of the individual speaker are not erroneously attributed to the school.").

ments.[128] In these limited professional cases, the student in some sense constructively speaks for the school because the school may ultimately be held responsible for that speech by the accreditation board.[129] The difference between this situation and a traditional imprimatur case under *Hazelwood* is that the school bears the burden of the student's speech through its accreditation requirements rather than through the interpretation of the general public.[130] Although the distinction between these cases has prevented such non-curricular speech from falling within the actual bounds of *Hazelwood*'s rule, the similarities between them suggest that *Hazelwood*'s rationale could indeed be used to support the restriction of non-curricular speech in certain circumstances.[131]

B. Extending Tinker *to Non-Curricular Speech in Professional Programs*

Courts could also regulate non-curricular violations of professional codes of conduct by using the standard articulated in *Tinker*.[132] In dealing with non-curricular Internet speech cases to date, courts have almost exclusively applied *Tinker*.[133]

Although some courts have utilized a "geographic" approach, which first asks if a sufficient nexus exists between student speech and the school campus,

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[128] *See Tatro*, 816 N.W.2d at 516–17 (noting that the academic program rules served both to "maintain the viability of the Anatomy Bequest Program" and to meet "accreditation standards").

[129] *Id.*

[130] *Compare Keeton*, 664 F.3d at 875 (explaining that student speech in a counseling practicum could be interpreted by the general public to reflect the imprimatur of the school), *with Tatro*, 816 N.W.2d at 516–17 (implying that student violations of rules established by the University of Minnesota, which narrowly prohibited certain social media use in connection with a forensics lab, could adversely affect the accreditation of the program). The *Keeton* court also noted the potential for the adverse impact student speech could have on the school's accreditation standards, but did not need to go further because it concluded that the student's practicum was curricular and thus satisfied the *Hazelwood* standard. *Keeton*, 664 F.3d at 870.

[131] *See Keeton*, 664 F.3d at 875; *Tatro*, 816 N.W.2d at 516–17.

[132] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513–14 (1969) (permitting the regulation of student speech that causes or might reasonably be forecast to cause "substantial disruption of or material interference with school activities").

[133] *See* Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34, 39 (2d Cir. 2007) (applying *Tinker* to student cyberspeech); J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1107 (C.D. Cal. 2010) (observing that "the majority of courts will apply *Tinker* where speech originating off campus is brought to school or to the attention of school authorities"); Layshock v. Hermitage Sch. Dist., 412 F. Supp. 2d 502, 507 (W.D. Pa. 2006) (applying *Tinker* to student cyberspeech); Mahaffey v. Aldrich, 236 F. Supp. 2d 779, 783–84 (E.D. Mich. 2002) (same); Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001) (same); Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) (same); Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998) (same); J.S. *ex rel.* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 865 (Pa. 2002) (same); *see also* Williams, *supra* note 48, at 719 ("[A]lmost every student Internet speech case is analyzed under *Tinker*.").

the majority of courts favor an "impact" test.[134] These courts have completely disregarded this threshold geographic inquiry and have instead moved immediately to *Tinker's* substantial disruption test.[135] Courts in such cases have held that it is not whether the student is in or out of school, but how the student's actions affect the school community that should determine the applicability of student speech regulations.[136]

This suggests that many courts do not feel that a school's academic purview ceases at the schoolhouse gate—at least in some situations that implicate important school functions.[137] The problem with this expansive rule, however, is that it may give schools the power to reach too far into the personal lives of students.[138] For example, the court in *Tatro* expressly acknowledged the concern that a broad rule would "allow a public university to regulate a student's personal expression at any time, at any place, for any claimed curriculum-based reason."[139] Despite this concern, it appears that at least some courts are willing to extend this rule so long as the student activity affects a "matter of legitimate concern to the school community."[140]

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[134] *See, e.g.*, *Wisniewski*, 494 F.3d at 39 (applying the impact approach); *Killion*, 136 F. Supp. 2d at 455 (same); *Beussink*, 30 F. Supp. 2d at 1180 (same); Calvoz et al., *supra* note 19, at 382 (asserting that courts increasingly apply the impact test); *see also Tinker*, 393 U.S. at 506 (supplying the basis for geographic and impact frameworks by implying that at least some differentiation of student speech rights occurs "at the schoolhouse gate"); *supra*, notes 55–69 and accompanying text (discussing the geographic and impact approaches of *Tinker*).

[135] *See Killion*, 136 F. Supp. 2d at 455 ("The overwhelming weight of authority has analyzed student speech (whether on or off campus) in accordance with *Tinker*."); *Beussink*, 30 F. Supp. 2d at 1180 (applying *Tinker* without discussing an academic nexus); Heidlage, *supra* note 50, at 583–87 (explaining that many courts have moved away from the "hard-line geographical approach" by addressing only substantial disruption).

[136] *See Tinker*, 393 U.S. at 513 (stating that "conduct by the student, in class or out of it . . . [is] not immunized by the constitutional guarantee of freedom of speech"); *Wisniewski*, 494 F.3d at 39 (recognizing that because off-campus conduct can "create a foreseeable risk of substantial disruption within a school," a student is not insulated from academic discipline for acts committed outside of school); *Killion*, 136 F. Supp. 2d at 455 (focusing on the absence of disruption caused by off-campus student cyberspeech rather than its location).

[137] *See, e.g.*, *Wisniewski*, 494 F.3d at 40 ("The fact that . . . [the] creation and transmission of the IM icon occurred away from school property does not necessarily insulate [the student] from school discipline."); *Killion*, 136 F. Supp. 2d at 455 (implying that the regulation of off-campus student cyberspeech would not violate First Amendment rights in the face of substantial disruption); *Beussink*, 30 F. Supp. 2d at 1180 (declining to permit discipline only because no reasonable fear of substantial disruption existed).

[138] *See Tatro*, 816 N.W.2d at 521 (noting that a broad rule would allow a school to "impermissibly reach into a university student's personal life outside of and unrelated to the program"); Heidlage, *supra* note 50, at 587 ("Under [the *Wisniewski*] approach, it is unclear what, if any, speech is beyond the reach of school officials.").

[139] *Tatro*, 816 N.W.2d at 521.

[140] Doninger v. Niehoff, 527 F.3d 41, 48 (2d Cir. 2008); *see Wisniewski*, 494 F.3d at 40; *Killion*, 136 F. Supp. 2d at 455; *supra* notes 62–69 and accompanying text (discussing the impact approach to *Tinker*).

A violation of program rules in a professional program could trigger a number of academic concerns, which might be construed as a foreseeable material disruption under *Tinker*.[141] Here again, the academic concerns of a university are not necessarily altered simply because speech occurs in a non-curricular setting.[142] Whether committed on or off campus, a violation of established program rules would both affect the student's compliance with professional ethics and endanger the viability of the program.[143] For example, in an extreme incident from a New York medical school, a student posted a picture of a human cadaver on Facebook, leading state health officials to consider sanctions against the school.[144] Non-curricular speech such as this, which threatens the viability of a program, could easily be construed as a foreseeable material disturbance and permissibly regulated under *Tinker*.[145]

C. Tatro*'s Take: Creating New Precedent for Non-Curricular Speech in Professional Programs*

Instead of permitting the regulation of non-curricular student speech in professional programs by stretching the frameworks of *Tinker* and *Hazelwood*, courts could alternatively develop a new legal framework to address that par-

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[141] *See Tinker*, 393 U.S. at 514 (permitting schools to regulate foreseeable substantial disruption or interference to school activities).

[142] *See* Thomas v. Bd. of Ed., Granville Cent. Sch. Dist., 607 F.2d 1043, 1058 (2d Cir. 1979) ("[T]erritoriality is not necessarily a useful concept in determining the limit of [school administrators'] authority."); *see also Keeton*, 664 F.3d at 869 (discussing pedagogical concerns arising from a student's curricular speech); *Tatro*, 816 N.W.2d at 516–17 (discussing the same pedagogical concerns arising from a student's non-curricular speech).

[143] *See Keeton*, 664 F.3d at 869 (implying that a student's speech in a curricular counseling practicum could adversely affect the program's accreditation); *Tatro*, 816 N.W.2d at 516–17 (implying that non-curricular student speech that violated both program rules and a professional code of conduct in a mortuary science program could adversely affect the accreditation of the professional program).

[144] *See Tatro*, 816 N.W.2d at 521 (citing the incident); Josh Einiger, *Cadaver Photo Comes Back to Haunt Resident*, ABC, Feb. 2, 2010, http://abclocal.go.com/story?section=news/local&id=7253275, *available at* http://perma.cc/6VSJ-JH38 (discussing the same incident); *see also* Megan Gibson, *Nursing Students Expelled for Posting Photo of a Placenta on Facebook*, TIME, Jan. 4, 2011, http://newsfeed.time.com/2011/01/04/nursing-students-expelled-for-posting-photo-of-a-placenta-on-facebook/, *archived at* http://perma.cc/63HL-HFQ3 (reporting a similar incident in which four students were suspended from a nursing program for posting a photo of themselves posing with a human placenta on Facebook).

[145] *See Tatro*, 816 N.W.2d at 519–20 (implying that *Tinker* could be used to regulate the speech at issue in the case, but declining to do so). The *Tatro* court explained that the University enacted its program rules not only for accreditation purposes, but also because the Anatomy Bequest Program relied upon "maintaining the trust of the individuals who donate their bodies" to the program. *Id.* at 523. After the student elected to disseminate her posts widely through the news media, the University received a number of calls from donor families and the public about the student's "poor judgment and lack of professionalism." *Id.* Consequently, the student's subsequent comments threatened not only the Mortuary Science Program in the opinion of the court, but all of the departments at the University of Minnesota that rely on donated human cadavers to further research and education. *Id.* at 524.

ticular issue.[146] The latter approach is the one that the Minnesota Supreme Court pursued in *Tatro* by forging a new standard that was narrowly tailored to the ethical rules it sought to protect.[147]

In *Tatro*, the Minnesota Supreme Court declined to apply *Tinker* or *Hazelwood*.[148] First, although the court recognized that *Hazelwood* had been construed to extend far beyond the classroom in the high school setting, it declined to support such an extension of authority to universities.[149] The court reasoned that *Hazelwood* applies only to student speech that could be perceived as school sanctioned and concluded that the Facebook posts at issue simply did not give rise to such an imprimatur situation.[150]

The court also noted that *Tinker* has often been applied in secondary school cyberspeech cases, including cases where speech originated off campus.[151] The court reasoned, however, that the "driving force" behind the student's sanction was not the fear of a substantial disruption on campus or in her program, but that her posts violated the established rules of academic conduct.[152] The court concluded, therefore, that the *Tinker* standard simply "[did] not fit the purposes of [the student's] sanctions."[153]

Instead, the *Tatro* court drew from the policy and language of the U.S. Supreme Court in *Tinker*, which stated that courts must consider "the special characteristics of the school environment."[154] In *Tatro*, the program was a "professional program that train[ed] students to be funeral directors and morticians."[155] In the context of such a program, it was essential that the university

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[146] *See supra* notes 113–145 and accompanying text. In addition to *Tinker* and *Hazelwood*, the non-curricular speech of professional students may also indirectly implicate the policy rationale of Bethel School District No. 403 v. Fraser. *See* 478 U.S. 675, 681 (1986). Although never previously applied in the university setting, the Court in *Fraser* noted the important role that primary and secondary schools play in inculcating certain morals, habits, and values into K–12 students. *See id.* This same logic could ostensibly apply to professional programs, which strive to produce ethical and effective members of a given profession in accordance with that profession's established code of conduct. *See Keeton*, 664 F.3d at 876; *Tatro*, 816 N.W.2d at 516–17.

[147] *Tatro*, 816 N.W.2d at 516–17.

[148] *Id.* at 518–20.

[149] *Id.* at 518. The court held that "[a]pplying the legitimate pedagogical concerns standard to a professional student's Facebook posts would give universities wide-ranging authority to constrain offensive or controversial Internet activity by requiring only that a school's actions be 'reasonably related' to 'legitimate pedagogical concerns.'" *Id.*

[150] *Id.*

[151] *Id.* ("[W]e recognize that courts often have applied the *Tinker* substantial disruption standard . . . to the regulation of student speech over the Internet.").

[152] *Id.* at 520 (noting that the rules required "respect, discretion, and confidentiality in connection with work on human cadavers").

[153] *Id.* at 519–20.

[154] *Id.* at 520 ("In deciding the constitutional rights of students, the Supreme Court has explained that the mode of analysis set forth in *Tinker* is not absolute and that courts must consider the special characteristics of the school environment.") (internal quotations omitted).

[155] *Id.*

be entitled to teach professional norms through the enforcement of "reasonable course standards."[156] In light of these facts, the court held that "a university does not violate the free speech rights of a student enrolled in a professional program when the university imposes sanctions for Facebook posts that violate academic program rules that are narrowly tailored and directly related to established professional conduct standards."[157] Furthermore, the court held that the plaintiff did not have the right under the First Amendment to "engage in unprofessional and unethical conduct" without academic consequences.[158]

III. ADOPTING *TATRO*: ESTABLISHING A CAREFULLY CONFINED FRAMEWORK FOR REGULATING NON-CURRICULAR PROFESSIONAL STUDENT SPEECH

Given the exceptional First Amendment concerns that accompany the regulation of non-curricular student speech in professional programs, the U.S. Supreme Court should adopt a new and particularized standard that balances the rights of students with the needs of universities and the ethical constraints of the professions.[159] Section A of this Part argues that the U.S. Supreme Court should reject the antiquated notion that speech regulation must be limited by the origination or access locale of student speech and should instead be responsive to the prevalence of virtual communication by focusing on the ultimate effects of that speech.[160] Section B asserts that the extension of either the 1988 U.S. Supreme Court standard from *Hazelwood School District v. Kuhlmeier* or the 1969 U.S.

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[156] *Id.*

[157] *Id.* at 521; *see also* United States v. Crandon 173 F.3d 122, 128 (3d Cir. 1999) (holding that a special condition placed upon defendant was a permissible restriction upon his First Amendment rights because the condition was "narrowly tailored and . . . directly related to" a legitimate government interest). In applying this standard, the court in *Tatro* concluded that the university's program rules prohibiting "blogging" were directly related to the established professional conduct standard codified by Minnesota law, which requires mortuary science professionals to treat human cadavers with "dignity and respect." *Tatro*, 816 N.W.2d at 522–23. Furthermore, the court concluded that the course rules—allowing "'respectful and discreet' conversational language of cadaver dissection outside the laboratory, but prohibiting blogging about cadaver dissection or the anatomy lab"—were sufficiently narrowly tailored to satisfy its new test. *Id.* at 523.

[158] *Tatro*, 816 N.W.2d at 524; *see supra* note 104 and accompanying text (discussing the sanctions imposed upon student in *Tatro*).

[159] *See* Patrick, *supra* note 125, at 892 ("[I]f schools are allowed to regulate off-campus speech, a test needs to be implemented that properly balances the interests of all parties involved."); Jeffrey C. Sun et al., *A (Virtual) Land of Confusion with College Students' Online Speech: Introducing the Curricular Nexus Test*, 16 U. PA. J. CONST. L. 49, 93 (2013) (advocating for a standard that would permit "a program to take action on academic grounds for out-of-class student speech with an appropriate curricular nexus, such as legitimate and documented professionalism standards," which would adequately balance the interests of students, schools, and the professions); *see also* Tatro v. Univ. of Minn., 816 N.W.2d 509, 521–22 (Minn. 2012) (discussing the adoption of a new test, designed to give credence to established professional ethics, the academic needs of universities, and student speech rights).

[160] *See infra* notes 163–174 and accompanying text.

Supreme Court standard from *Tinker v. Des Moines Independent Community School District* would lead to an imprecise and overbroad law, exposing otherwise constitutional student speech to needless and unconstitutional regulation.[161] Finally, Section C maintains that the standard articulated in 2012 by the Minnesota Supreme Court in *Tatro v. University of Minnesota* properly addresses the concerns arising out of such regulation and should therefore be adopted by the U.S. Supreme Court.[162]

A. Rejecting Geographic Limitations: Virtual Communication Renders the Schoolhouse Gate a Relic

In order to allow universities to regulate non-curricular student speech that violates professional ethics, it is necessary to focus on the effects of that speech rather than its origin or imprimatur.[163] Potential critics of such a framework, such as proponents of *Tinker*'s "geographic" approach, might argue that before any standard may be applied to student speech, a sufficient academic nexus must exist between the speech itself and school grounds.[164] Such an academic nexus, however, may not always be present in non-curricular speech cases—meaning that the imposition of a preliminary geographic threshold would make it nearly impossible for schools to reach many violations of professional ethics and corresponding course rules.[165]

Detractors from the geographic approach to *Tinker* have argued that U.S. Supreme Court precedent for the regulation of student speech does not neces-

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[161] *See infra* notes 175–185 and accompanying text.

[162] *See infra* notes 186–208 and accompanying text.

[163] *See* Keeton v. Anderson-Wiley, 664 F.3d 865, 869 (11th Cir. 2011) (implying that in order to comply with accreditation requirements and the American Counseling Association ("ACA") Code of Ethics, the university needed to regulate the plaintiff's speech in a clinic); *Tatro*, 816 N.W.2d at 516–17 (suggesting that to comply with accreditation requirements and the relevant professional codes of conduct, the University necessarily had to regulate some of the plaintiff's non-curricular speech such as blogging about a lab or cadaver dissection).

[164] *See, e.g.*, Mahaffey v. Aldrich, 236 F. Supp. 2d 779, 786 (E.D. Mich. 2002) ("[R]egulation of Plaintiff's speech on the website without any . . . on campus activity in the creation of the website was a violation of Plaintiff's First Amendment rights."); J.S. *ex rel.* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 865 (Pa. 2002) (analyzing whether cyberspeech would eventually circulate on school property before applying *Tinker*); Calvert, *supra* note 55, at 285 (arguing that so long as student cyberspeech remains "outside the proverbial schoolhouse gate" students should be subject only to the civil and criminal justice system rather than facing school discipline); Caplan, *supra* note 55, at 140–42 (arguing that *Tinker* necessarily limited itself to speech within the schoolhouse gate and that students therefore have "the ordinary complement of First Amendment rights outside those gates"); Heidlage, *supra* note 50, at 580–82 (summarizing advocates of the geographic approach).

[165] *See Mahaffrey*, 236 F. Supp. 2d at 784 (holding that a school could not punish a student for cyberspeech because "the evidence simply [did] not establish that any of the complained of conduct occurred on [school] property"); *Tatro*, 816 N.W.2d at 519 n.5 (acknowledging that the court's own analysis and framework did not distinguish between on-campus and off-campus Facebook posts in order to combat the limitations created by the "somewhat everywhere at once nature of the internet") (internal quotations omitted).

sarily require a geographic nexus.[166] Publically disseminated unethical speech, regardless of its medium or physical location, has the potential to damage academic programs themselves, as well as the clients, patients, or other persons with whom students interact.[167] Therefore, a professional student who commits a non-curricular violation of an established code of ethics should not be able to escape academic discipline while his or her status as a student simultaneously tempers his or her professional responsibility.[168] Where a university program places a student in the role of a professional, that university should be able to supervise and, where appropriate, discipline that student just as the profession would supervise and discipline any of its members.[169]

Furthermore, a number of normative arguments may be made in favor of rejecting a geographic analysis in the non-curricular professional student setting.[170] Perhaps most importantly, instances of unethical and unprofessional behavior such as taking a social media photograph with a cadaver or posting private client information online carry little to no societal value.[171] Such speech is

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[166] *See, e.g.*, Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34, 39 (2d Cir. 2007) (applying the impact approach); Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001) (same); Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998) (applying the impact approach without discussing the relevance of geographic facts presented); Cassel, *supra* note 63, at 673–74 (advocating a test that balances the First Amendment rights of students off campus with the right of schools to prevent actual material disruption on campus); Servance, *supra* note 63, at 1235 (arguing for an impact approach because a bright-line geographic approach "ignores the relationship between the speaker and the target of the speech").

[167] *See Keeton*, 664 F.3d at 869 (explaining that the plaintiff intended to recommend conversion therapists to gay clients and that such statements would constitute a violation of the ACA Code of Ethics, which the program was required to adopt in order to receive accreditation); *Tatro*, 816 N.W.2d at 523–24 (explaining that "respectful treatment of human cadavers is imperative to maintaining the trust of the individuals who donate their bodies to the Anatomy Bequest Program," and that "the consequences of any violation of trust caused by a student . . . would extend far beyond the Mortuary Science Program to other University programs that rely on donated human cadavers for their research and education missions").

[168] *Tatro*, 816 N.W.2d at 519 n.5 (explaining that the plaintiff argued that she was not subject to academic discipline because her Facebook posts were generated offline, and implying further that the plaintiff was shielded from a degree of professional discipline as she had no Mortuary Science License to lose).

[169] *See id.* at 518 (implying that universities are required to enact course rules reflecting professional ethics to offer students the opportunity to work in a professional capacity without certification or license); *see also Keeton*, 664 F.3d at 869 (explaining that the professional program was "required to adopt and teach" the ACA Code of Ethics in order to offer an accredited program, thereby implying that the university must be free to enforce those rules).

[170] *See* Waldman, *supra* note 3, at 388 (arguing that the assumption that high school policies apply less to university cases is neither factually nor normatively true in the professional program setting).

[171] *See* Randy Cohen, *When Med Students Post Patient Pictures*, N.Y. TIMES MAG., Feb. 11, 2011, *available at* http://www.nytimes.com/2011/02/13/magazine/13FOB-Ethicist-t.html?_r=2&, *archived at* http://perma.cc/CJ83-3NF2 (arguing that when a medical student posts a potentially identifiable photograph to Facebook, it is "inappropriate and unprofessional," has the potential to damage the doctor-patient relationship, and can dehumanize the patient); *see also* Chaplinsky v. New Hampshire, 315 U.S.

not, for example, protected in the professional fields these students hope to enter—indeed, professionals are often legally bound not to violate the professional ethics of their respective fields.[172] The lack of value makes this type of speech similar to classes of speech that are not protected by the First Amendment in society at large.[173] With these positive and normative considerations in mind, courts should adopt a framework that focuses on the content of student speech—that is, whether or not it violates the professional ethics of a student's field—rather than on the origin or eventual access locales of that speech.[174]

B. Rejecting Hazelwood *and* Tinker*: Frameworks too Cumbersome to Efficiently Regulate Non-Curricular Professional Student Speech*

If courts accept that a university may sanction a student for professionally unethical speech, courts must then determine which standard should guide schools in promulgating such regulations.[175] Although *Hazelwood* and *Tinker*

568, 571–72 (1942) (excluding certain classes of speech from First Amendment protection because they have little societal value). The *Chaplinsky* Court explained that, "it has been well observed that such utterances are no essential part of any exposition of ideas, and 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." *Id.* at 572.

[172] *See, e.g.*, Hammonds v. Aetna Cas. & Sur. Co., 243 F. Supp. 793, 801 (N.D. Ohio 1965) (stating that "every patient has a right to rely upon the warranty of silence" contained in the Hippocratic Oath and asserting that "when a doctor breaches his duty of secrecy, he is in violation of part of his obligations"); *In re* Baska, 641 S.E.2d 533, 534–35 (Ga. 2007) (upholding plaintiff's denial of admission to the Georgia Bar for lack of candor because plaintiff had previously lost his Vermont medical license before the State of Vermont Board of Medical Practice for violating the American Medical Association's Code of Medical Ethics); Cincinnati Bar Ass'n v. Lacinak, 348 N.E.2d 723, 724–25 (Ohio 1976) (disbarring an attorney permanently in the State of Ohio for several violations of the Code of Professional Responsibility and the Cannons of Professional Ethics).

[173] *See Chaplinsky*, 315 U.S. at 571–72. In society at large, adult speech is limited only by "the lewd and obscene, the profane, the libelous, the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.* The U.S. Supreme Court has held that the government may render further categories of speech unprotected by demonstrating the "inextricable connection necessary between the evil sought to be prevented and the speech sought to be proscribed." United States v. Stevens, 533 F.3d 218, 236–37 (3d Cir. 2008) (Cowen, J., dissenting), *aff'd* 559 U.S. 460 (2010) (discussing New York v. Ferber, 458 U.S. 747, 763–64 (1982)). In *Stevens*, however, the court cautioned that lower courts should "hesitate before extending the logic of *Ferber*" to create new categories of unprotected speech as the U.S. Supreme Court has done so only in the context of child pornography. *Id*. at 225.

[174] *Tatro*, 816 N.W.2d at 519 n.5 (explaining that in order to overcome the omnipresent nature of the Internet, it is necessary to employ a standard that does not distinguish between on-campus and off-campus speech).

[175] *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (authorizing the regulation of student speech in school-sponsored expressive activities so long as that regulation is "reasonably related to legitimate pedagogical concerns"); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512–14 (1969) (authorizing the regulation of student speech that might be reasonably forecast to "materially and substantially disrupt the work and discipline of the school"); *Tatro*, 816 N.W.2d at 521 (holding that a "university does not violate the free speech rights of a student enrolled in a professional program when the university imposes sanctions for Facebook posts that violate academic pro-

could, at least in theory, be extended into professional programs, such an approach is neither the most practical nor the most desirable way to regulate such a narrow issue.[176]

Extending *Hazelwood* into the non-curricular professional program setting would create confusion and stretch the *Hazelwood* doctrine far beyond its original intent.[177] In order to do so, a student's off-campus social media posting would need to be construed as reflecting the imprimatur of the school—or in other words, as "curricular."[178] Although a school's need to protect and maintain the viability of its programs might conceivably support this view, the Court in *Hazelwood* sought only to permit schools to disassociate themselves from student speech that the public might view as being issued under the school's imprimatur.[179] A student's private social media post is simply not speech that the public might reasonably view as being affirmatively sanctioned by the school.[180] Therefore, although the policy of *Hazelwood* strongly favors the ability of schools to regulate certain non-curricular professional student speech, the letter of *Hazelwood* would need to be stretched nearly beyond recognition to support that result.[181]

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gram rules that are narrowly tailored and directly related to established professional conduct standards").

[176] *See Tatro*, 816 N.W.2d at 518–20 (discussing the practical limitations of *Tinker* and *Hazelwood* in the context of professional programs and explaining why a new standard would be both more useful and more appropriate).

[177] *See Hazelwood*, 484 U.S. at 271 (restricting its own application to student speech bearing the imprimatur of the school); *Tatro*, 816 N.W.2d at 518 (noting the impermissibly wide-ranging authority that would be granted to schools over controversial Internet activity in professional programs if *Hazelwood* were extended).

[178] *See Hazelwood*, 484 U.S. at 271 (explaining that activities bearing the imprimatur of the school, and therefore within the reach of administrative regulation, "may fairly be characterized as *part of the school curriculum*, whether or not they occur in a traditional classroom setting, so long as they are supervised . . . and designed to impart particular knowledge") (emphasis added); *Keeton*, 664 F.3d at 875 (explaining that professional student speech in a clinical practicum could be regulated under *Hazelwood* because the practicum was "*part of the school curriculum* . . . supervised by faculty members and designed to impart particular knowledge or skills") (internal quotations omitted) (emphasis added).

[179] *See Hazelwood*, 484 U.S. at 271 (explaining that a school must be free to disassociate itself not only from speech that would substantially interfere with the school, but also from speech that is "poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences" when that speech is disseminated under the school's auspices).

[180] *See Tatro*, 816 N.W.2d at 518 (explaining that *Hazelwood* was an inappropriate standard to apply both because it would "give universities wide-ranging authority to constrain offensive or controversial Internet activity" and because the public would simply not "reasonably perceive" the plaintiff's Facebook posts as school-sponsored speech).

[181] *Id.* The court in *Tatro* did note that "the universe of legitimate pedagogical concerns" had previously been stretched broadly enough to include core values such as "discipline, courtesy, and respect for authority" at the high school level. *Id.* (internal quotations omitted) (discussing Poling v. Murphy, 872 F.2d 757, 762 (6th Cir. 1989)). The *Tatro* court argued, however, that such a sweeping expansion was neither practical nor desirable at the university level. *Id.*

Likewise, extending *Tinker* to reach non-curricular professional student speech would both unduly stretch the reasoning of that case and, in sweeping broadly to include professional student speech, would subject a wide swath of non-professional student speech to university regulation.[182] Furthermore, as the court in *Tatro* pointed out, *Tinker* was intended to control substantial disruption in schools, which is not the primary goal of restricting professional student speech.[183] Although endangering the viability of a professional program could potentially be characterized as a "disruption," the policy behind restricting professional student speech is to ensure compliance with established professional codes and ethical guidelines.[184] Therefore, although *Tinker*, like *Hazelwood*, could be stretched to regulate certain non-curricular professional student speech, its reasoning is similarly ill-suited to the task.[185]

C. Adopting Tatro*: A Carefully Considered Standard Prepared to Combat the Complications of Virtual Communication*

The *Tatro* standard solves many of the problems associated with extending *Hazelwood* and *Tinker* by building upon the underlying policies of those cases while remaining limited in its own application to certain professional student speech.[186] Specifically, the limiting language of this standard avoids over breadth by requiring that program rules be directly related and narrowly tailored to professional conduct standards.[187]

This framework grants schools deference over the exact form and administration of program rules so long as those rules pertain explicitly to student speech concerning the specific course and are derived from a relevant profes-

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[182] *See Tinker*, 393 U.S. at 512–14 (focusing on speech that could foreseeably "materially disrupt[] classwork or involve[] substantial disorder or invasion of the rights of others"); *Tatro*, 816 N.W.2d at 519–20 ("The *Tinker* substantial disruption standard does not fit the purposes of the sanctions here."); Heidlage, *supra* note 50, at 587 (noting that using a pure impact test under *Tinker* would allow school officials to regulate beyond school grounds almost limitlessly).

[183] *See Tinker*, 393 U.S. at 513; *Tatro*, 816 N.W.2d at 520.

[184] *See Tatro*, 816 N.W.2d at 520 ("The driving force behind the University's discipline was not that [the student's] violation of academic program rules created a substantial disruption . . . but that her Facebook posts violated established program rules that require respect, discretion, and confidentiality in connection with work on human cadavers."); Waldman, *supra* note 3, at 391.

[185] *See Tatro*, 816 N.W.2d at 521.

[186] *See id.* at 522–23.

[187] *Id.* ("Tying the legal rule to established professional conduct standards limits a university's restrictions on Facebook use to students in professional programs and other disciplines where student conduct is governed by established professional conduct standards."). In requiring this direct relationship and mandating that program rules be narrowly tailored to established professional conduct standards, the court aimed to "limit the potential for a university to create overbroad restrictions that would impermissibly reach into a university student's personal life outside of and unrelated to the program." *Id.*

sional code of conduct or ethics.[188] Therefore, although courts would defer to schools' choices in actually forming conduct standards, they would not defer to schools with regard to the scope of those standards.[189] One commentator has explained that the "directly related and narrowly tailored" standard is essential, especially in cases where a university is being permitted to reach beyond traditional curricular speech and into spaces such as student Facebook accounts.[190] This standard exists to prevent universities from creating "overbroad restrictions" that have the potential to "impermissibly reach into a university student's personal life outside of and unrelated to the program."[191]

When examining whether program rules are narrowly tailored to accomplish compliance with an established code of conduct, courts should look to the university's restrictions on the mode, manner, and place of student speech.[192] A school's program rules should not be "substantially broader than necessary" to achieve compliance with a professional code, but they also need not be the least restrictive nor the least intrusive means of doing so.[193] For example, the program rules in *Tatro* permitted "respectful and discreet" discussion on dis-

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[188] *See id.* at 522. Schools are often given deference over the form and institution of their own rules because those decisions are decidedly curricular. *Id.* at 522–23. The court in *Tatro* found it significant on this point that the program rules in the case before it did not require "respectful and discreet behavior on Facebook generally, but explicitly pertain[ed] to statements about cadaver dissection and the anatomy lab." *Id.* at 522.

[189] *See id.* at 522–23; Brown v. Li, 308 F.3d 939, 952 (9th Cir. 2002). The wording used by the court in *Tatro* appears to implicate cases such as *Grutter v. Bollinger*, decided by the U.S. Supreme Court in 2003. *See* 539 U.S. 306, 334 (2003) (employing a standard of strict scrutiny). In such cases, a university is entitled to deference in creating rules and goals it deems as being necessary to its educational mission, although it is entitled to no deference on the means it chooses to attain those goals, which must be narrowly tailored. *Id.*

[190] *See* Waldman, *supra* note 3, at 423–24 (asserting that where a university is regulating noncurricular speech, the university should have to show "that its concerns were 'narrowly tailored and directly related to established professional conduct standards,'" rather than requiring that the student demonstrate "that the university's concerns reflected a 'substantial departure from professional norms,' and deferring to the university's conceptions of professionalism and competence").

[191] *Tatro*, 816 N.W.2d at 521; *see* Waldman, *supra* note 3, at 423. Many public university programs have, at least at one time, employed speech codes that were unconstitutional. Williams, *supra* note 49, at 724–25. The court in *Tatro* noted explicitly that even if a student signs an agreement that conditions his or her participation in a lab or course upon her compliance with the course rules, a university generally cannot impose a course requirement that forces a student to agree to otherwise invalid restrictions on his or her free speech rights. *Tatro*, 816 N.W.2d at 521 n.6.

[192] Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989) (providing a test for "time, place, or manner" of speech restrictions); *Tatro*, 816 N.W.2d at 523 (applying the test articulated in *Rock Against Racism*).

[193] *See Rock Against Racism*, 491 U.S. at 800, 803 (holding a city regulation requiring the city's sound technician to control the volume level during concerts was "a reasonable regulation of the place and manner of expression" because it was "narrowly tailored to serve the substantial and content-neutral government interests" of limiting excessive volume without overly restricting city channels of communication); *Tatro*, 816 N.W.2d at 523 (holding that the course rules imposed by the University of Minnesota were "narrowly tailored" because they were not "substantially broader than necessary" to ensure that cadavers were treated in compliance with professional conduct standards).

section outside the lab but prohibited blogging about dissection.[194] That rule protected private conversation yet prohibited online discussion that could potentially be viewed by thousands.[195] The course rules imposed by the Mortuary Science Program in *Tatro* existed to teach students to comply with professional ethics and to protect the program itself, but were applied narrowly to ensure respect for both the cadavers and for students' constitutional rights.[196]

For these reasons, applying the *Tatro* standard to permit universities to regulate non-curricular professional student speech would be preferable to reaching that result by extending either *Hazelwood* or *Tinker*.[197] Nevertheless, applying the *Tatro* standard gives rise to two possible problems that courts would need to resolve.[198] First, professional rules can often be vague or unclear.[199] Courts may safely resolve that concern, however, because they possess both the experience and the expertise necessary to clarify vague rules.[200]

Second, some professional rules are enforced despite being unwritten.[201] Such rules include customary guidelines that emerge over time within a profession.[202] Enforcing unwritten rules too permissibly could allow universities to

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[194] *Tatro*, 816 N.W.2d at 522.

[195] *Id.* at 523. Although Tatro argued that no one was identified or threatened by her comments, the court observed that her posts were undoubtedly in reference to her human cadaver and that her commentary was simply "incompatible with the notions of respect and dignity for the individual who chose to donate his body." *Id.* at 515, 523. The court noted further that this conclusion was reinforced when "the publicity surrounding [the student's] posts resulted in letters and calls to the Anatomy Bequest Program from donor families and the public regarding [the student's] poor judgment and lack of professionalism." *Id.* at 532.

[196] *See id.* at 532.

[197] *See supra* notes 186–196 and accompanying text.

[198] *See infra* notes 199–206 and accompanying text.

[199] *See, e.g.*, MINN. STAT. § 149A.70 (2014) (defining unprofessional conduct as including the "failure to treat with dignity and respect the body of the deceased, any member of the family or relatives of the deceased, any employee, or any other person encountered while within the scope of practice, employment, or business"); AMA, CODE OF MEDICAL ETHICS, Opinion 6.02–Fee Splitting (updated June 1994) ("A physician may not accept payment of any kind, in any form, from any source . . . for prescribing or referring a patient to said source."); ABA MODEL CODE OF PROFESSIONAL ETHICS, Canon 21 (1970) ("The lawyer has the obligation to represent his client with complete loyalty.").

[200] *See Tatro*, 816 N.W.2d at 521–22 (interpreting a Minnesota statute on treating cadavers with dignity and respect); *see also* Martello v. Santana, 874 F. Supp. 2d 658, 671 (E.D. Ky. 2012), *aff'd*, 713 F.3d 309 (6th Cir. 2013) (interpreting Opinion 6.02 of the American Medical Association Code of Ethics on Fee Splitting); Robles Sanabria, *ex parte*, MC-90-21, 1993 WL 840029 (P.R. June 25, 1993) (interpreting Canon 21 of the 1970 Code of Professional Ethics on loyalty to legal clients).

[201] *See* Ward v. Polite, 667 F.3d 727,739 (6th Cir. 2012) (allowing evidence from university textbooks, professors, studies, and experts to demonstrate that values-based referrals were accepted practice under the ACA Code of Ethics); Waldman, *supra* note 3, at 424.

[202] *See Polite*, 667 F.3d at 739; *Tatro*, 816 N.W.2d at 521 (discussing Tatro's argument that the university was, in effect, seeking to enforce unwritten social norms).

punish students under the pretext of university regulation.[203] Although courts have not yet established a consistent rule for dealing with this situation, at least one commentator has argued that, when relying upon an unwritten standard, courts should simply require universities to establish that the standard is "firmly established in the field."[204] This rule, if adopted, would prevent abuse and limit the ability of universities to use a professional code as a pretext to punish students' protected speech.[205] Although this may not be the only tenable rule, when an unwritten or uncodified standard is at issue, a high degree of scrutiny should be applied to ensure both that the standard is established in the relevant professional field and that the student was made aware of that standard in advance of his or her unprotected speech.[206]

Despite these potential downsides, the standard articulated in *Tatro* is the most effective way to deal with non-curricular professional speech that violates an established code of ethics.[207] The *Tatro* framework balances the rights of students, the needs of universities, and the ethical constraints of the professions.[208]

CONCLUSION

Non-curricular speech violations of professional ethics by students in professional programs occupy a niche in the student speech setting. Although the policy underlying the U.S. Supreme Court's decisions in *Hazelwood* and *Tinker* supports the regulation of professional student speech, simply relying on those cases to support such regulation would lead to imprecision and overbreadth. In 2012, however, in *Tatro v. University of Minnesota*, the Minnesota Supreme Court offered an alternative legal platform to support the regulation of professional student speech. The *Tatro* standard permits universities to protect their programs from speech that is otherwise beyond the scope of educational speech limitations, prevents overbroad university codes from unconstitu-

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[203] *See Polite*, 667 F.3d at 737 (implying skepticism about an unwritten policy and noting that unwritten yet-to-be-enforced policies are often the hallmark of pretextual cases); *Tatro*, 816 N.W.2d at 524.

[204] *See* Waldman, *supra* note 3, at 424; *cf. Polite*, 667 F.3d at 737 (discussing the comparative values of a written code of ethics and unwritten, "yet-to-be-enforced" course rules).

[205] *See Polite*, 667 F.3d at 739.

[206] Waldman, *supra* note 3, at 424 (students should receive "prior notice about engaging in the speech in question").

[207] *See Hazelwood*, 484 U.S. at 271 (limiting itself to curricular activity); *Tinker*, 393 U.S. at 512–13 (allowing broad regulation of speech that might substantially interfere with the operation of a school); *Tatro*, 816 N.W.2d at 518–20 (explaining the shortcomings of *Hazelwood* and *Tinker* in the non-curricular professional speech context and providing a test designed to avoid over-breadth).

[208] *See Tatro*, 816 N.W.2d at 521–22 (discussing its new test, designed to give credence to established professional ethics, the academic needs of universities, and student speech rights); *see also* Patrick, *supra* note 125, at 892 (explaining the need to balance the interests of all involved parties when regulating student speech); Sun et al., *supra* note 159, at 93 (advocating for a balanced standard in the professional program context).

tionally infringing upon students' rights, and has a strong basis in the past policies articulated by the U.S. Supreme Court. For that reason, courts faced with questions involving the regulation of professional speech should look beyond the *Hazelwood* and *Tinker* decisions and instead adopt the *Tatro* standard as a basis to conclude that otherwise professionally sanctionable student speech in a university professional program does not enjoy First Amendment protection.

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