William Mitchell Law Review

Volume 38 | Issue 4 Article 5

2012

# Tinker Goes to College: Why High School Free-speech Standards Should Not Apply to Post-Secondary Students—Tatro V. University of Minnesota

Meggen Lindsay

# *TINKER* GOES TO COLLEGE: WHY HIGH SCHOOL FREE-SPEECH STANDARDS SHOULD NOT APPLY TO POST-SECONDARY STUDENTS— *TATRO V. UNIVERSITY OF MINNESOTA*

Meggen Lindsay[†]



† J.D. Candidate, William Mitchell College of Law, 2014; M.S., Northwestern University, 2001; B.A., Miami University (Ohio), 2000. The author would like to thank her husband for his endless reserves of patience, and Professor Raleigh Levine for her invaluable support and guidance on this topic.

## I. INTRODUCTION

In the age of the Internet, students' free-speech rights are in peril. Students still "talk" to one another, but they are just as likely to e-mail, text, instant message, blog, status update, and tweet their speech.[1] And while students have caught up to the technology, the judiciary has not. The U.S. Supreme Court has drawn clear lines for the First Amendment[2] rights of secondary students while they physically are in classrooms, but so far it has failed to give cyberspeech the analysis and protection it requires. In the absence of clear judicial standards for student speech that has increasingly moved online, this issue has emerged in the lower courts in the context of K-12 schools.[3] In due time, the Supreme Court likely

1. According to a 2009 survey by the Pew Research Center, ninety-three percent of American teens use the Internet, with seventy-three percent using social networking sites like Facebook and Myspace, and thirty-seven percent sharing their own creations, like art, stories, or videos. *Trend Data For Teens*, PEW INTERNET & AM. LIFE PROJECT, http://www.pewinternet.org/Trend-Data-for-Teens/Online-Activites-Total.aspx (last updated May 2011). The survey also found that seventy-five percent of teens had a mobile phone, and sixty-nine percent owned laptop or personal computers. *Teen Gadget Ownership*, PEW INTERNET & AM. LIFE PROJECT, http://www.pewinternet.org/Trend-Data-for-Teens/Teen-Gadget-Ownership.aspx (last visited Apr. 4, 2012).

2. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

3. An Indiana federal district court judge noted that such issues are "ripe for disposition" in an August 2011 case regarding online student speech. T.V. *ex rel.* B.V. v. Smith-Green Cmty. Sch. Corp., No. 1:09-CV-290-PPS, 2011 WL 3501698, at *1 (N.D. Ind. Aug. 10, 2011). The conflict that Chief Judge Simon sets up is typical of many of the controversies to be discussed:

will determine how far, if at all, a school's jurisdiction extends to online student speech. In 2011, the Court denied three writs of certiorari in online student-speech cases.[4] Nevertheless, the increased scrutiny may perhaps raise the likelihood that the high court at some point will clarify how far a school's authority extends to off-campus, online speech.

A tension has arisen between protecting students' freedom of speech and shielding schools from real and perceived threats of student violence. This is particularly apparent against the deadly backdrop of the fatal shooting sprees at Virginia Tech,[5] the Red Lake reservation,[6] and Columbine High School.[7] But in attempting to safeguard campuses, some courts and school administrators have overreached in their restriction of student speech, particularly when it is online and off-campus.

This unfortunate tendency is illustrated in the recent decision of *Tatro v. University of Minnesota*,[8] in which the Minnesota Court of

> The case poses timely questions about the limits school officials can place on out of school speech by students in the information age where Twitter, Facebook, MySpace, texts, and the like rule the day. The school argues that they ought to be allowed to regulate this speech while the students claim that their First Amendment rights are being violated.

*Id.*

4. Kowalski v. Berkeley Cnty. Schs., 652 F.3d 565 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1095 (2012); J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012); Doninger v. Niehoff, 642 F.3d 334 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 499 (2011).

5. On April 16, 2007, student Seung-Hui Cho opened fire in classrooms and a dormitory at Virginia Polytechnic Institute and State University, killing thirty-two people and wounding twenty-five others before taking his own life; the massacre was the deadliest mass shooting in U.S. history. *Virginia Polytechnic Institute and State University*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/organizations/v/virginia_polytechnic_institute_and_state_university/index.html (last updated Mar. 14, 2012).

6. On March, 21, 2005, on the northern Minnesota Indian reservation of Red Lake, sixteen-year-old Jeff Weise shot his grandfather to death and then went to the high school, where he shot students and teachers at random. *What Happened at Red Lake?*, MINN. PUB. RADIO (Mar. 2005), http://news.minnesota.publicradio.org/projects/2005/03/redlake/. Ten died and seven others were injured. *Id.*

7. "On the morning of April 20, 1999, Eric Harris, 18, and Dylan Klebold, 17, walked into Columbine High School, outside Denver, and shot to death 12 fellow students and a teacher" before killing themselves. Gina Lamb, *Columbine High School*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/organizations/c/columbine_high_school/index.html (last updated Apr. 17, 2008). "Their actions were the result of a yearlong plot that included plans to blow up the school and kill as many as 500 people." *Id.*

8. 800 N.W.2d 811 (Minn. Ct. App. 2011).

Appeals upheld the university's discipline of a student for her online, off-campus speech.[9] In *Tatro*, a three-judge panel[10] of the appeals court held that school administrators did not violate the First Amendment rights of mortuary-science student Amanda Tatro when they disciplined her for her off-color Facebook status updates.[11] Tatro's Facebook comments, which she has claimed were satirical,[12] referenced her desire to "stab a certain someone in the throat" with a cadaver lab instrument.[13]

*Tatro*'s ruling represents an overly broad judicial reach and is troubling for student speech. The decision allows school administrators far too much leeway in limiting student speech online. Equally troubling, it also wrongly equates high school and university speech standards. Fortunately, the Minnesota Supreme Court agreed in 2011 to take Tatro's appeal, and heard oral arguments on February 8, 2012. At the time of this writing, a decision in the case had not been published. The state's highest court should overturn this flawed decision. If left to stand, *Tatro*'s disquieting logic could have a chilling effect on the freedom of student expression and could encourage post-secondary educators to treat speech that is merely critical as threatening.

Part II of this article traces the history of the U.S. Supreme Court's analysis of students' free-speech rights.[14] Part III details *Tatro*'s controversial holding and reasoning.[15] This article posits that the Minnesota Court of Appeals wrongly decided *Tatro* on four distinct grounds.

Part IV examines the first of these four areas: the improper application of the so-called *Tinker*[16] standard to a university setting.[17] The *Tinker* standard allows school officials to sanction student speech if they reasonably conclude that the speech will "materially and substantially disrupt the work and discipline of the school."[18] This standard should be restricted to K–12 student speech, not extended to adults at the post-secondary level.

9. *Id.* at 813–14.
10. Judges Bjorkman, Halbrooks, and Hudson sat on the Court of Appeals panel.
11. *Id.* at 822–23.
12. *Id.* at 816.
13. *Id.* at 817.
14. *See infra* Part II.
15. *See infra* Part III.
16. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).
17. *See infra* Part IV.
18. *Tinker*, 393 U.S. at 513.

Part V argues that even if *Tinker* were the proper lens through which to view *Tatro*, *Tinker* should not be applied to this type of off-campus speech.[19] Tatro's online speech was off-campus speech that did not occur at a school-sponsored event, and as such, it amounts to protected conduct under the rubric of school-speech cases. Part VI explains that even if *Tinker* should apply to college-level, off-campus speech, the substantial-disruption standard was unmet.[20] The result of Tatro's speech does not qualify as a "substantial disruption" under *Tinker* or its progeny. Part VII discusses the final way that the court of appeals erred in its reasoning.[21] The court should have applied the "true-threat" standard,[22] instead of the *Tinker* standard, to determine if Tatro's speech was protected. The First Amendment does not shield true threats, but this article suggests that Tatro's online comments clearly did not amount to true threats. The Facebook posts, while in bad taste, could not reasonably have been seen as a true threat to a particular individual, or to her classmates more generally.

Finally, Part VIII analyzes the potential ramifications of the decision for students in the age of social media, particularly in lowering the threshold for speech to "materially and substantially disrupt the work and discipline of the school."[23] It then urges the Minnesota Supreme Court to overturn the appeals court's ruling and safeguard student-speech protections.

## II. HISTORY OF STUDENT-SPEECH PROTECTIONS

To properly analyze *Tatro* and the progeny of cases it purports to follow, it is critical to examine the U.S. Supreme Court's jurisprudence around student speech. In the tetralogy of student speech cases, there are two important ambiguities. First, none of the cases involved college students, and the Court has not expressly extended its more deferential standards for high school speech restrictions to universities. The second unaddressed issue is how far off campus, if at all, a school's jurisdiction extends over student

19. *See infra* Part V.
20. *See infra* Part VI.
21. *See infra* Part VII.
22. Under a true-threat analysis, "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals" are not protected under the First Amendment. Virginia v. Black, 538 U.S. 343, 344, 359 (2003).
23. *Tinker*, 393 U.S. at 513; *see infra* Part VIII.

speech.

The seminal case on student speech came in 1969, with *Tinker v. Des Moines Independent Community School District*.[24] The majority's 7-2 decision[25] held that the First Amendment applied to students in public schools and that administrators would have to demonstrate constitutionally valid reasons for any specific regulation of speech in the classroom.[26] The court affirmed: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[27] But while the First Amendment conclusively protects the free-speech rights of students in school, those rights must be "applied in light of the special characteristics of the school environment."[28] The *Tinker* court held that "to justify prohibition of a particular expression of opinion," school officials must prove that "the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."[29] The Court determined that Des Moines junior and senior high students who wore black armbands to school in a silent, passive protest of the Vietnam War did not cause a substantial disruption to educational activities, and therefore, the students' speech was protected.[30] In order to justify the prohibition of an expression, the Court noted that "[school officials] must be able to show that [their] action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[31]

Lower courts have interpreted *Tinker* to mean that school authorities are not obligated to wait until an actual disruption occurs, but can regulate student expression if they can reasonably forecast that a disruption will occur.[32] The Sixth Circuit noted that "[s]chool officials have an affirmative duty to not only ameliorate the harmful effects of disruptions, but to prevent them from

24. 393 U.S. 503 (1969).
25. Justice Abe Fortas authored the landmark *Tinker* opinion. *Id.*
26. *Id.* at 511.
27. *Id.* at 506.
28. *Id.*
29. *Id.* at 509.
30. *Id.* at 508–09.
31. *Id.* at 509.
32. *Id.* at 514 (stating that speech cannot be restricted if the record fails to "demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities").

happening in the first place."[33]

*Tinker* and its "substantial-disruption" test set the broad and general rule for when school speech may be regulated, and a trio of subsequent cases have whittled away at *Tinker's* protection, carving out narrow exceptions to its test. The first exception came in *Bethel School District v. Fraser*,[34] which held that school officials are permitted to regulate "lewd," "vulgar," and "indecent" speech at school.[35] The Court held that the discipline of Bethel High School student Matthew Fraser, who was suspended after giving a speech filled with sexual innuendos at a school assembly, did not violate the First Amendment.[36] The Court determined that the rights of students "are not automatically coextensive with the rights of adults in other settings" and that "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board."[37] By not employing the "substantial-disruption" test, *Fraser* established that "the mode of analysis set forth in *Tinker* is not absolute."[38]

The second exception to *Tinker* was addressed in *Hazelwood School District v. Kuhlmeier*, in which the Court held that school officials are allowed to impose reasonable restrictions on school-sponsored publications.[39] The Court determined that a Missouri high school principal who removed articles on divorce and teen pregnancy from a school-sponsored newspaper did not violate the First Amendment.[40] "[E]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[41]

The final narrowing of *Tinker* came in *Morse v. Frederick*, where the issue was whether school administrators violated the free-speech rights of Juneau-Douglas High School student Joseph Frederick.[42] Frederick had displayed a banner that read "BONG

33. Lowery v. Euverard, 497 F.3d 584, 596 (6th Cir. 2007).
34. 478 U.S. 675, 683, 685 (1986).
35. *Id.* at 685.
36. *Id.* at 685–86.
37. *Id.* at 682–83.
38. Morse v. Frederick, 551 U.S. 393, 405 (2007).
39. 484 U.S. 260, 273 (1988).
40. *Id.* at 276.
41. *Id.* at 273.
42. *Morse*, 551 U.S. at 396.

HiTS 4 JESUS" at a school-sanctioned and supervised event held across the street from the school during the 2002 Olympic Torch Relay.[43] The Court held that "a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use."[44] The Court declined to apply the *Tinker* standard, noting that neither *Hazelwood* nor *Frazer* did.[45] In concluding the speech was not protected, the Court noted the "serious and palpable" danger that drug use poses to the health and safety of students.[46] While Frederick was off-campus, the Court emphasized that school events and field trips off school grounds were subject to the school's rules of conduct.[47]

Therefore, under *Fraser*, a school may prohibit lewd, vulgar, or profane language on school property or at school-sanctioned events.[48] Under *Hazelwood*, a school may regulate school-sponsored speech on the basis of any legitimate pedagogical concern.[49] Under *Morse*, a school may regulate speech that poses a direct threat to the safety of students.[50] "Speech falling outside of these categories is subject to *Tinker's* general rule: it may be regulated only if it would substantially disrupt school operations or interfere with the right of others."[51]

43. *Id.* at 397.
44. *Id.* at 403.
45. *Id.* at 405–06.
46. *Id.* at 408; *see* Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765, 769 (5th Cir. 2007). The *Ponce* court held that, based on *Morse*, school administrators do not need to "evaluate the potential for disruption caused by speech advocating drug use; it is *per se* unprotected because of the scope of the harm it potentially foments." *Id.* The court held that disciplinary action against a student who kept an extended notebook diary, in which he detailed his Nazi-like group plan to shoot up the high school, did not violate his First Amendment rights. *Id.* at 766. This is because this speech "pose[d] a direct threat to the physical safety of the school population." *Id.*
47. *Morse*, 551 U.S. at 401–02.
48. Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683 (1986).
49. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).
50. *Morse*, 551 U.S. at 410.
51. Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 214 (3d Cir. 2001). *Tinker* mandates that there be a "specific and significant fear of disruption, not just some remote apprehension of disturbance." *Id.* at 211.

## III. *TATRO V. UNIVERSITY OF MINNESOTA*

The circumstances surrounding *Tatro* could have been lifted from HBO's dark drama, *Six Feet Under*.[52] Tatro was enrolled in the University of Minnesota's undergraduate mortuary-science program.[53] The program prepares students to be funeral directors or morticians, and its required laboratory classes include anatomy, embalming, and restorative art.[54] The lab courses use cadavers donated through the university's anatomy-bequest program.[55] Tatro attended an orientation program that discussed appropriate conduct toward the cadavers and signed a disclosure form indicating that she understood and would follow the program rules.[56]

She posted status updates on her Facebook page in November and December 2009, making comments such as, "Give me room, lots of aggression to be taken out with a trocar."[57] She referred to the cadaver she was practicing on at the university lab as "Bernie."[58] Another post read: "Who knew embalming lab was so cathartic! I still want to stab a certain someone in the throat with a trocar though. Hmm. . .[sic] perhaps I will spend the evening updating my 'Death List # 5' and making friends with the crematory guy. I do know the codeFalse[sic]."[59] Tatro's settings allowed her posts to be viewed by "friends" and "friends of friends," a group that

52. *Six Feet Under* was a television drama that was broadcast on the cable network HBO from 2001–2005. The award-winning series detailed the lives of the Fisher family, an eccentric clan, who operated a funeral home. *Six Feet Under: About the Show*, HBO, http://www.hbo.com/six-feet-under/index.html#/six-feet-under/about/index.html (last visited Apr. 4, 2012). It won nine Emmy Awards, three Screen Actors Guild Awards, three Golden Globe Awards, and a Peabody Award. *Awards for "Six Feet Under,"* IMDB, http://www.imdb.com/title/tt0248654/awards (last visited Apr. 4, 2012).

53. Tatro v. Univ. of Minn., 800 N.W.2d 811, 814 (Minn. Ct. App. 2011).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* "A trocar is an instrument used during embalming that has a long hollow needle with a sharp end, used to aspirate fluids and gases out of the body." *Id.* at 814 n.3.

58. *Id.* at 814. *Weekend at Bernie's* is a 1989 film starring Andrew McCarthy, Jonathan Silverman, and Catherine Mary Stewart. *Weekend at Bernie's*, IMDB, http://www.imdb.com/title/tt0098627 (last visited Apr. 4, 2012). The comedy's plot involves two young men who pretend their murdered boss is still alive as a "frustrated hit man" continues to try to kill him. *Id.*

59. *Tatro*, 800 N.W.2d at 814.

included hundreds of people.[60] A student reported concerns about the postings to university officials.[61] The director of the mortuary-science program contacted university police on December 14, 2009, and told Tatro not to return to class.[62] After police concluded she had not committed a crime, she was allowed to return to class a few days later.[63]

The university's Office for Student Conduct and Academic Integrity submitted a formal complaint against Tatro on December 29, 2009, alleging violations of the university's student-conduct code.[64] The complaint alleged that she "engaged in threatening, harassing, or assaultive conduct . . . [and] in conduct contrary to university rules related to the mortuary-science program, anatomy-laboratory course rules, and the rules listed on the anatomy-bequest-program disclosure form."[65]

A panel of the Campus Committee on Student Behavior (CCSB) held a hearing in March 2010.[66] In April of that year, the CCSB issued a written decision, finding Tatro responsible for the violations and imposing several sanctions, including a failing grade in her anatomy-laboratory course and academic probation for the duration of her undergraduate career.[67] Tatro appealed the decision to the provost's appeal committee (PAC), which upheld the CCSB's findings and sanctions.[68] The appellate court considered four issues in taking her appeal, including whether the university's sanctions violated her constitutional rights.[69]

60. *Id.* Facebook describes its privacy settings this way:

> When you select an audience for your friend list, you are only controlling who can see it on your profile. We call this a profile visibility control . . . . For example, if you select "Only Me" as the audience for your friend list, but your friend sets her friend list to "Public," anyone will be able to see your connection on your friend's profile.

*Data Use Policy*, FACEBOOK, https://www.facebook.com/about/privacy/your-info-on-fb#controlprofile (last visited Apr. 4, 2012).

61. *Tatro*, 800 N.W.2d at 814.

62. *Id.*

63. *Id.*

64. *Id.* at 814–15.

65. *Id.* at 815.

66. *Id.*

67. *Id.* Tatro also was required to enroll in a clinical ethics course, write a letter to mortuary-science department faculty addressing the issue of respect within the department and profession, and complete a psychiatric evaluation. *Id.*

68. *Id.* The provost issued a final decision, which referred to Tatro's Facebook posts as '"disrespectful, unprofessional, and reasonably interpreted as threatening."' *Id.*

69. *Id.* The other issues Tatro unsuccessfully argued on appeal were that: (1)

Tatro framed the constitutional argument in two ways. She argued first that the *Tinker* standard does not apply in a university setting.[70] She further argued that the university could only limit speech under the true-threat doctrine.[71] In writing for the appeals court panel, Judge Bjorkman flatly rejected these arguments[72] and squarely invoked *Tinker*, holding that "Tatro's Facebook posts materially and substantially disrupted the work and discipline of the university," and therefore, the university did not violate her First Amendment rights by disciplining her.[73]

## IV. THE *TINKER* TEST SHOULD NOT APPLY TO PUBLIC UNIVERSITIES

### *A.* Tinker *Invoked, But Not Applied*

The Supreme Court has not yet held explicitly that *Tinker* or its progeny do not apply to college speech, but the Court also has never applied *Tinker* in a post-secondary-speech case. The Supreme Court has, however, referenced the line of cases as it laid out the framework of student-speech protections in college cases. This lack of express guidance has left the federal circuits split to some degree in interpreting the free-speech rights of post-secondary students. In *Healy v. James*, the Supreme Court's first college speech case (decided just three years after *Tinker*), the Court began its discussion by quoting the language of *Tinker*: "First Amendment rights must always be applied 'in light of the special characteristics of the [school] environment . . . .'"[74] However, the *Healy* Court immediately took a step back: "Yet, the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large."[75]

the university did not have the authority to conduct the disciplinary hearing because the student code of conduct did not apply to off-campus conduct and course-specific rules are not covered by the code; (2) the university lacked evidence to support the determination that Tatro violated university rules; and (3) the university did not have the authority to change Tatro's course grades as a sanction. *Id.*

70. Relator's Brief and Addendum at 34–38, Tatro v. Univ. of Minn., 800 N.W.2d 811 (Minn. Ct. App. 2011) (No. A10-1440), 2010 WL 7131428 at *34–38.

71. *Id.*

72. *Tatro*, 800 N.W.2d at 821.

73. *Id.* at 822.

74. Healy v. James, 408 U.S. 169, 180 (1972) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).

75. *Id.*

While the Court was willing to nod to *Tinker*, it was not willing to apply it.

The Court itself explicitly acknowledged this tension. In a *Hazelwood* footnote, for instance, the Court refused to determine whether the regulations it applied to high school students should carry over to college students.[76] Justice Souter, in his 2000 *Board of Regents v. Southworth* concurrence, wrote: "[Our] cases dealing with the right of teaching institutions to limit expressive freedom of students have been confined to high schools . . . whose students and their schools' relation to them are different and at least arguably distinguishable from their counterparts in college education."[77]

### *B. Differing Pedagogies*

A more deferential view of college-student speech is appropriate, given the vast difference between the student bodies and the educational missions of secondary and post-secondary institutions. Students enrolled at public universities should have a greater degree of free-speech protections than high school and junior high students. There is a glaring disparity in imposing the same restrictions on twenty-two-year-olds as on twelve-year-olds. The students have widely different levels of emotional maturity and brain development.[78]

Perhaps more importantly, the pedagogies for these different ages are vastly different. Lower-level schools aim to teach collective values and mores, molding young people into productive members of society. Indeed, discipline is an educational component of primary and secondary schools. The *Fraser* Court emphasized this necessity:

> The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the

76. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 n.7 (1988) ("We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level.").

77. Bd. of Regents v. Southworth, 529 U.S. 217, 238 n.4 (2000) (Souter, J., concurring).

78. *See* Richard Knox, *The Teen Brain: It's Just Not Grown Up Yet*, NPR (Mar. 1, 2010), http://www.npr.org/templates/story/story.php?storyId=124119468 (explaining that recent studies have shown that human brains develop based on levels of myelin, a "fatty coating" that allows "nerve signals to flow freely").

> shared values of a civilized social order. . . . [T]eachers—and indeed the older students—[must] demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class.[79]

Elementary and high school education, thereby, is a mandatory system that seeks to inculcate students with collective principles of society and to protect impressionable minds from sensitive material.

Colleges and universities, on the other hand, serve as entirely voluntary endeavors for their students, most of whom are legal adults. Universities aim to better society and encourage intellectual growth. The goal is to promote freedom of thought, to expose students to myriad viewpoints, and to encourage deep inquiry into the world. Justice Brennan famously wrote that "the classroom is peculiarly the marketplace of ideas," and the significance of safeguarding academic freedom in American society cannot be overestimated.[80] As one scholar suggests, the Court's own descriptions of universities, which have emphasized an "unbridled dialogue as an essential component of the academic endeavor, stand [. . .] in sharp contrast to the functions the Court has assigned to primary and secondary schools, which are to keep students safe and cultivate their moral and civic character."[81]

Equating primary school speech with college speech wrongly negates these distinctions. University students have discrete rights that younger students do not. There is not the strict control over students via an *in loco parentis* relationship.[82] College professors and

79. Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683 (1986).

80. Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (internal quotation marks omitted). Justice Brennan wrote that academic freedom "is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." *Id.* He further quoted from *Sweezy v. New Hampshire*, in which the Court held, "Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." 354 U.S. 234, 250 (1957).

81. Kelly Sarabyn, *The Twenty-Sixth Amendment: Resolving the Federal Circuit Split Over College Students' First Amendment Rights*, 14 TEX. J. C.L. & C.R. 27, 28 (2008).

82. *In loco parentis*, Latin for "in the place of a parent," is defined as, "[o]f, relating to, or acting as a temporary guardian or caretaker of a child, taking on all or some of the responsibilities of a parent. The Supreme Court has recognized that during the school day, an elementary or high school teacher or administrator

administrators do not stand in for students' parents.[83] Therefore, the *in loco parentis* relationship that elementary, middle, and high schools have with students, and that can justify restricting speech that undercuts the values that those schools are trying to indoctrinate, cannot justify such restrictions at the college level. College students are adults and should enjoy the same broad swath of First Amendment protections at school as they would in any other setting.

### *C. U.S. Supreme Court Precedents Protect College Speech*

In fact, the Supreme Court has never upheld a student-speech restriction at the university level. The significance of this jurisprudence is underscored by the Court's approach to speech concerns at the primary school level. Indeed, the post-secondary cases' outcomes stand in opposition to the Court's history on restraining secondary-student speech. After *Tinker*, it sustained the speech restriction in every subsequent case.[84] But the Court has ruled for students in five cases addressing university students' speech.[85] Four involved the funding of student groups on campus, and one involved a student who distributed a newspaper on campus.[86]

While the facts in those cases are admittedly dissimilar from *Tatro*, what is crucial is the level of deference the Court repeatedly has afforded to the protection of college-level speech. It has not linked high school- and college-speech rights. The Court made

may act in loco parentis." BLACK'S LAW DICTIONARY 858 (9th ed. 2009) (citing Vernonia Sch. Dist. v. Acton, 515 U.S. 646 (1995)).

83. *See* David L. Hudson Jr., *Cyberspeech*, FIRST AMENDMENT CENTER (Apr. 9, 2002, *updated* Aug. 2008), http://www.firstamendmentcenter.org/cyberspeech. The author explains that some commentators and courts "argue that school officials do not have jurisdiction over student Internet expression that takes place off campus. The matter would be one for parental, not school, discipline, they argue." *Id.* Hudson notes that former First Amendment Center Executive Director Ken Paulson has written: '"There is no legal justification for censoring a student's expression in the privacy of his home.'" *Id.*

84. *See* Sarabyn, *supra* note 81, at 41. The author argues that this contrast "speaks strongly in support of a sharp distinction between student speech at a secondary school and student speech at a university." *Id.*

85. The cases are: *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000); *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667 (1973); and *Healy v. James*, 408 U.S. 169 (1972).

86. *See* cases cited *supra* note 85.

clear in *Healy* that "state colleges and universities are not enclaves immune from the sweep of the First Amendment."[87] Rather, the Court noted, when the need for university students to work in an atmosphere free of disruption competes with the interest for students to have freedom of expression, "the First Amendment, made binding on the States by the Fourteenth Amendment, strikes the required balance."[88]

One year after *Healy*, in *Papish v. Board of Curators of the University of Missouri*, the Court again affirmed this principle, holding that "*Healy* makes it clear that the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'"[89] The *Papish* Court determined that a political cartoon, depicting policemen raping the Statue of Liberty and a newspaper article entitled "M—f— Acquitted," were not constitutionally obscene or unprotected speech.[90]

### *D. Circuits Fractured; Third Circuit Decisions Get it Right*

In the absence of explicit guidance from the Supreme Court, the federal circuits have developed contradictory standards concerning the First Amendment rights of college students during the past thirty-some years. But two recent decisions, both in the Third Circuit Court of Appeals, have analyzed the issue from the proper perspective and strengthened the broad rights afforded to college students. In the 2008 case of *DeJohn v. Temple University*,[91] and again two years later in *McCauley v. University of Virgin Islands*,[92] the Third Circuit affirmed that greater speech protections are afforded to students at public universities than in primary schools.[93]

To varying degrees, other circuits also have been reluctant to apply a secondary standard to post-secondary speech. The First, Second, and Sixth Circuits have granted greater speech protections to university students.[94] The First Circuit unequivocally asserted

87. 408 U.S. at 180 (holding that the non-recognition of a student group at Central Connecticut State College stifled the exercise of the group's First Amendment rights).
88. *Id.* at 171.
89. 410 U.S. at 668.
90. *Id.* at 670.
91. 537 F.3d 301 (3d Cir. 2008).
92. 618 F.3d 232 (3d Cir. 2010).
93. *Id.* at 242; *DeJohn*, 537 F.3d at 315.
94. *See* Kincaid v. Gibson, 236 F.3d 342, 352 (6th Cir. 2001). The court held

that *Hazelwood* "is not applicable to college newspapers."[95] The remaining circuits, on the other hand, have unfortunately applied a more deferential standard for post-secondary speech. The Eleventh Circuit, for instance, analyzed a college-speech case directly under the rubric of the *Tinker* line of cases, implicitly adopting the rule that college and high school students have the same First Amendment rights.[96] The Tenth Circuit followed suit and directly applied a high school standard.[97] The Fifth, Seventh, and Ninth Circuits have applied secondary standards to universities in a more "piecemeal"[98] fashion, however.[99]

that administrators could not withhold publication of a Kentucky State University yearbook for being inappropriate and of poor quality. *Id.* at 356–57. The court did not reject secondary standards outright, however. *See id.* at 346 n.5; *see also* Husain v. Springer, 494 F.3d 108, 113 (2d Cir. 2007) (holding that a public college president's decision to cancel a student government election because of content published in the school newspaper violates the First Amendment rights of the student journalists).

95. Student Gov't Ass'n v. Bd. of Trs., 868 F.2d 473, 480 n.6 (1st Cir. 1989). There is one Eighth Circuit college-speech decision—albeit twenty-nine years old—that affirmed full First Amendment protection to University of Minnesota students. In *Stanley v. Magrath*, 719 F.2d 279 (8th Cir. 1983), the appeals court held that a university cannot withhold funding for a student newspaper because it does not like the content. "A public university may not constitutionally take adverse action against a student newspaper, such as withdrawing or reducing the paper's funding, because it disapproves of the content of the paper." *Id.* at 282. Nowhere in *Stanley* did the court invoke *Tinker*.

96. Ala. Student Party v. Student Gov't Ass'n of Univ. of Ala., 867 F.2d 1344, 1347 (11th Cir. 1989) (holding that regulations which banned and limited the distribution of campus literature before an election were reasonably related to the university's legitimate interest in "minimiz[ing] the disruptive effect of campus electioneering").

97. Axson-Flynn v. Johnson, 356 F.3d 1277 (10th Cir. 2004). A Mormon acting student at the University of Utah sued the school after determining that her refusal to use swear words during classroom acting exercises would force her to leave the program. *Id.* at 1283. The court found that the classroom was a nonpublic forum and that the student's speech constituted "school-sponsored speech" and was governed by *Hazelwood*. *Id.* at 1285.

98. *See* Sarabyn, *supra* note 81, at 47. The author analyzes the three circuit approaches and concludes that while they fall short of the "direct-application approach" employed by the Tenth and Eleventh Circuits, they have applied the standards in a "confused, piecemeal fashion." *Id.*

99. The Seventh Circuit, in *Hosty v. Carter*, employed a narrow view of the protections afforded to student publications at public universities. 412 F.3d 731 (7th Cir. 2005) (en banc). *Hosty* held that the same standard that governs censorship of student speech in primary and secondary schools also applies to speech in colleges and universities. *Id.* at 735. In response, the Illinois legislature passed the Campus Press Act, which took effect in 2008 and designated student publications as public forums that are free from censorship. 110 ILL. COMP. STAT. 13/1–13/97 (2011); *Moore v. Watson*, 738 F. Supp. 2d 817, 831 (N.D. Ill. 2010).

But in justifying its application of *Tinker* to student speech on college campuses,[100] the *Tatro* court only quoted the Third Circuit, a circuit that recognizes a need for "caution" in applying *Tinker*.[101] *Tatro* misinterpreted *DeJohn* and wrongly asserted that the Third Circuit analyzed a university's speech policy for overbreadth under the framework of *Tinker*.[102] To the contrary, *DeJohn* took pains to show that simply applying a secondary-speech framework to a university setting is insufficient, because university "administrators are granted *less leeway* in regulating student speech."[103]

In *DeJohn*, the Third Circuit found that the sexual harassment policy at Temple University was facially unconstitutional because it was overbroad.[104] It determined that the policy could have a chilling effect on speech related to gender issues.[105] The *DeJohn* court went on to hold that a secondary school's ability to restrict certain speech does not mean that public colleges could restrict the same speech.[106] The court further noted that:

> Discussion by adult students in a college classroom should not be restricted. Certain speech, however, which *cannot* be prohibited to adults *may* be prohibited to public elementary and high school students. This is particularly true when considering that public elementary and high school administrators have the unique responsibility to act *in loco parentis*.[107]

In *McCauley*, the Third Circuit further delineated the differences between the free-speech rights afforded to secondary and post-secondary students.[108] It again struck down speech codes, this time a section of the harassment policy at the University of the Virgin Islands.[109] It reaffirmed the rule from *DeJohn* that public colleges and universities have "significantly less leeway in regulating

100. Tatro v. Univ. of Minn., 800 N.W.2d 811, 821 (Minn. Ct. App. 2011).
101. DeJohn v. Temple Univ., 537 F.3d 301, 318 (3d Cir. 2008).
102. In fact, *DeJohn* actually employed the overbreadth analysis it used in *Saxe v. State College Area School District*, 240 F.3d 200, 214 (2001). In doing so, the court pointed out that "there is a difference between the extent that a school may regulate student speech in a public university setting as opposed to that of a public elementary or high school." *DeJohn*, 537 F.3d at 315.
103. *Id.* at 316 (citing Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 260 (3d Cir. 2002)).
104. *Id.* at 304, 320.
105. *Id.*
106. *Id.* at 315.
107. *Id.* (citation omitted).
108. McCauley v. Univ. of the Virgin Is., 618 F.3d 232, 242–47 (3d Cir. 2010).
109. *Id.* at 250.

student speech than public elementary or high schools."[110] *McCauley* then articulated five factors for reaching this conclusion: (1) the different "pedagogical goals of each institution," (2) "the *in loco parentis* role of public elementary and high school administrators," (3) the discipline needs of public elementary and high schools, (4) student maturity, and (5) the fact that many university students live on campus and are continually subject to university rules.[111]

### *E.* Tatro *Fails to Recognize Crucial Distinctions Between Speech Protections at Primary and University Levels*

The Minnesota Court of Appeals, however, did not appear to see the distinctions between university and primary and secondary students as critical. The court was unconcerned about whether the *Tinker* substantial-disruption test should apply in a university setting.[112] The court noted that it could "discern no practical reasons for such a distinction" and simply observed that other lower courts have applied the *Tinker* standard to public universities.[113] The court ceded that what comprises a substantial disruption "in a primary school may look very different in a university. But these differences do not per se remove the *Tinker* line of cases from the analysis."[114]

Without further consideration, the court applied *Tinker*.[115] But its own explicit acknowledgment of the differences between the institutions should have entered, if not altered, its analysis. Nevertheless, it did not. The court failed to consider how a substantial disruption might look different on a college campus than in a high school classroom. It failed to touch on *why* caution would be prudent in applying *Tinker* and how the pedagogical goals

110. *Id.* at 247 (citing *DeJohn*, 537 F.3d at 316). The court continued:

> At a minimum, the teachings of *Tinker*, *Fraser*, *Hazelwood*, *Morse*, and other decisions involving speech in public elementary and high schools, cannot be taken as gospel in cases involving public universities. Any application of free speech doctrine derived from these decisions to the university setting should be scrutinized carefully, with an emphasis on the underlying reasoning of the rule to be applied.

*Id.*

111. *Id.* at 242–43.

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

113. *Id.*

114. *Id.* (citation omitted).

115. *Id.*

of high schools and colleges are extraordinarily different.

Instead, in a reflexive manner, the Minnesota Court of Appeals applied the *Tinker* standard, a standard that is rarely used on college students in such an exacting manner. Although it upheld *DeJohn*, the court regrettably did not follow the spirit of the Third Circuit's jurisprudence. It ignored *McCauley* outright. It did not afford university leaders less leeway when they disciplined Tatro for her speech. Rather, it allowed them to sanction her off-campus speech under a standard other courts likely would have been reluctant to apply to junior high students blogging in class.

## V. ONLINE SPEECH LIKE TATRO'S IS PROTECTED SPEECH

### *A. U.S. Supreme Court Has Not Ruled on Student Internet Speech Rights*

Even if the *Tinker* standard were found to carry over to university speech, it should not apply to off-campus speech like Tatro's. Nowhere in its student-speech cases has the Supreme Court expressly authorized the restriction of off-campus speech. Whether speech is on campus or off, therefore, becomes a threshold question in determining whether it is protected.[116] Moreover, signals from the Court support the proposition that students can be sanctioned only for speech that occurs on campus. The Court in *Morse* emphasized that, if the sanctioned speech in question had occurred off campus, it would have been protected.[117] Although *Morse* did involve the sanctioning of speech that was technically off campus, it notably occurred during a school event.[118] In writing for the majority in *Morse*, Chief Justice Roberts stated that the speech restriction applied off campus because the student was at a school-sponsored event.[119] He referred to the Court's decision in *Bethel*, noting that "[h]ad Fraser delivered the same speech in a public forum outside the school context, [he] would have been protected."[120] Likewise, Justice Brennan's *Bethel* concurrence stated that "[i]f respondent had given the same

116. When courts have allowed the restriction of students' off-campus speech, it typically is in the context of speech that is directed at the school and brought on campus. *See* LaVine *ex rel.* LaVine v. Blaine Sch. Dist., 257 F.3d 981, 991–92 (9th Cir. 2001) (upholding expulsion of a student who brought a poem he wrote at home about shooting fellow students to school and showed his English teacher).

117. Morse v. Frederick, 551 U.S. 393, 394 (2007).

118. *Id.* at 400–01.

119. *Id.* at 401.

120. *Id.* at 405 (citing Cohen v. California, 403 U.S. 15 (1971)).

speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate."[121]

The very premise of *Tinker*—that students do not shed their First Amendment right to free speech at the "schoolhouse gate"[122]—indicates that the restrictions at stake occur at school. Outside of school, students' First Amendment rights should be firmly in place.[123] The modern inquiry has become whether school officials can extend their authority from the schoolhouse gate to students' online activity, much of which is done at home, on their own phones and computers.

The Court has never decided an Internet speech case, so it has not delineated whether online activity amounts to on- or off-campus activity. However, the absence of Supreme Court precedent over the extension of First Amendment protections to student cyberspeech has not slowed the volume of cases addressing the issue. Particularly in 2011, there was a flurry of circuit decisions around the off-campus nature of student cyberspeech.[124]

### *B. Recent Case Law Concludes Online, Off-Campus Speech is Protected*

The *Tatro* court wrongly applied the *Tinker* analysis to Tatro's online, off-campus posts. The court held that the university did not violate Tatro's free-speech rights because her online posts fell within the confines of the university's Student Conduct Code.[125]

121. 478 U.S. 675, 688 (1986) (Brennan, J., concurring) (citing *Cohen*, 403 U.S. at 15).

122. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

123. *See* Thomas v. Bd. of Educ., 607 F.2d 1043, 1044–45 (2d Cir. 1979). The *Thomas* court stated:

> [O]ur willingness to defer to the schoolmaster's expertise in administering school discipline rests, in large measure, upon the supposition that the arm of authority does not reach beyond the schoolhouse gate. When an educator seeks to extend his dominion beyond these bounds, therefore, he must answer to the same constitutional commands that bind all other institutions of government.

*Id.*

124. The circuit rulings regarding online student speech released in 2011 include *Kowalski v. Berkeley County Schools*, 652 F.3d 565 (4th Cir. 2011); *J.S. ex rel. Snyder v. Blue Mountain School District*, 650 F.3d 915 (3d Cir. 2011) (en banc); *Layshock ex rel. Layshock v. Hermitage School District*, 650 F.3d 205 (3d Cir. 2011) (en banc); *D.J.M. ex rel. D.M. v. Hannibal Public School District*, 647 F.3d 754 (8th Cir. 2011); and *Doninger v. Niehoff*, 642 F.3d 334 (2d Cir. 2011).

125. Tatro v. Univ. of Minn., 800 N.W.2d 811, 816 (Minn. Ct. App. 2011). The Code of Conduct covers off-campus activity that "adversely affects a substantial

Nowhere in its decision did the court acknowledge that there was even the hint of a question in applying *Tinker* to off-campus speech. But a growing body of federal case law supports the proposition that high school students' online posts, published off-campus, are protected speech.[126]

Two similar, but separate, Third Circuit cases, both decided *en banc* with opinions simultaneously issued one month before *Tatro*, clearly prevent school officials from disciplining students based on online, off-campus speech. In *Layshock ex rel. Layshock v. Hermitage School District*, the appeals court unanimously held that a high school could not punish a student for online speech merely because the speech was vulgar and reached the school.[127] And in *J.S. ex rel. Snyder v. Blue Mountain School District*, the Third Circuit, in an 8-6 decision, noted that the Supreme Court has never allowed "schools to punish students for off-campus speech that is not school-sponsored or at a school-sponsored event and that caused no substantial disruption at school."[128] To do so would "significantly broaden school districts' authority over student speech and would vest school officials with dangerously overbroad censorship discretion."[129]

The Third Circuit in *Blue Mountain* held that a Pennsylvania student who mocked her principal on Myspace could not be disciplined because the speech did not cause a material disruption of school activities and "could not reasonably have led school officials to forecast substantial disruption."[130] The court further held that a student's speech that originally was made off campus did not become on-campus speech when another student brought

University interest and . . . indicates that the student may present a danger or threat to the health or safety of the student or others." *Id.*

126. *See, e.g.*, *Blue Mountain*, 650 F.3d 915; *Layshock*, 650 F.3d 205; T.V. e*x rel.* B.V. v. Smith-Green Cmty. Sch. Corp., No. 1:09-CV-290-PPS, 2011 WL 3501698 (N.D. Ind. Aug. 10, 2011); Evans v. Bayer, 684 F. Supp. 2d 1365 (S.D. Fla. 2010); Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446 (W.D. Pa. 2001); Emmett v. Kent Sch. Dist., 92 F. Supp. 2d 1088 (W.D. Wash. 2000).

127. *Layshock*, 650 F.3d at 207.

128. *Blue Mountain*, 650 F.3d at 933. In 2010, two three-judge panels of the Third Circuit Court of Appeals issued conflicting decisions in *Layshock* and *Blue Mountain*, which present similar facts and issues. *See* J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 593 F.3d 286 (3d Cir. 2010); Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 593 F.3d 249 (3d Cir. 2010). Due to the inconsistencies, the Third Circuit vacated the rulings and re-heard the cases *en banc* in 2011.

129. *Id.*

130. *Id.* at 920.

a copy of it to school.[131] The school district could not punish the student for use of profane language outside the school, during non-school hours.[132] While the majority opinion expressly left open the question of whether *Tinker* applies to off-campus speech in the first place, five judges signed on to a concurrence that opined that it does not.[133] Judge Smith wrote, "[T]he First Amendment protects students engaging in off-campus speech to the same extent it protects speech by citizens in the community at large."[134]

The Third Circuit also overruled the district court's contention that even if the speech was not a material and substantial disruption under *Tinker*, it was still prohibited speech under the *Fraser* exception.[135] The school district had argued its discipline was justified because the speech "was lewd, vulgar, and offensive [and] had an effect on the school and the educational mission of the District."[136] But the Third Circuit concluded that *Fraser* did not apply to off-campus speech:

> Under these circumstances, to apply the *Fraser* standard to justify the School District's punishment of J.S.'s speech would be to adopt a rule that allows school officials to punish any speech by a student that takes place anywhere, at any time, as long as it is *about* the school or a school official, is brought to the attention of a school official, and is deemed "offensive" by the prevailing authority.[137]

*Layshock*, the other Third Circuit case, also involved a Myspace parody of a principal. Again, the court held that a school district did not have authority to punish a student for expressive conduct outside of school that the district considered lewd and offensive.[138] The student, Pennsylvania high school senior Justin Layshock,

131. *Id.* at 932.

132. *Id.* The eighth-grade student (J.S.) and her friend used her home computer to create a Myspace profile making fun of her principal. *Id.* at 920. The fake profile contained profane attacks and "sexually explicit content." *Id.* The day it was posted, it could be viewed by anyone who knew the URL or who was searching Myspace. *Id.* at 921. The students made it "private" the next day, limiting access to only people they had "friended" on the site. *Id.* The principal requested that another student bring in a printout of the profile. *Id.* After the principal obtained a copy of the profile, he suspended J.S. for ten days. *Id.* at 922.

133. *Id.* at 936 (Smith, J., concurring).

134. *Id.*

135. *Id.* at 932 (majority opinion).

136. *Id.*

137. *Id.* at 933.

138. Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 207 (3d Cir. 2011).

along with three other students, created an offensive bogus profile that mocked and degraded the school's principal.[139] When Layshock allowed other students to view the profile, word of it "spread like wildfire" among the students at Hickory High.[140] Layshock was suspended for ten days, placed in an alternative high school, banned from all extracurricular activities, and prevented from attending his graduation ceremony.[141]

The court determined that although Layshock had cut and pasted a picture of the principal from the school's web site, that action alone did not create a sufficient nexus between the school and the online profile.[142] The relationship between his conduct and the school was too attenuated, and Layshock could not be punished simply because the speech reached inside the school.[143]

The Fifth Circuit also has protected student speech made off campus. In *Porter v. Ascension Parish School Board*, the court upheld summary judgment for a school principal based on the defense of qualified immunity,[144] but determined that a student's violent sketch, drawn two years earlier and accidentally brought to school by his little brother, was protected speech.[145]

An Indiana district court judge expressly followed *Layshock* and *Blue Mountain* in August 2011, holding that school administrators exceeded their authority when they disciplined high school girls who posed for sexually suggestive pictures and posted them online during a summer sleepover party.[146] The girls did not bring the

139. *Id.* at 207–08.
140. *Id.* at 208.
141. *Id.* at 210.
142. *Id.* at 215–16.
143. *Id.* at 216. The court made clear what was at stake:

> It would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities. Allowing the District to punish Justin for conduct he engaged in while at his grandmother's house using his grandmother's computer would create just such a precedent, and we therefore conclude that the district court correctly ruled that the District's response to Justin's expressive conduct violated the First Amendment guarantee of free expression.

*Id.*

144. The defense of qualified immunity shields school officials from liability for civil damages when their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).
145. 393 F.3d 608 (5th Cir. 2004).
146. T.V. *ex rel.* B.V. v. Smith-Green Cmty. Sch. Corp., No. 1:09-CV-290-PPS,

images to school, and all the activity took place off campus. The court in *T.V. ex rel. v. Smith-Green Community School Corp.* stated that the district's contention—that the photographs were not entitled to First Amendment protection because they were lewd and vulgar under *Fraser*—"fails at the outset[,]" because the case does not apply to off-campus speech.[147]

Federal case law protecting online speech has been wide-ranging in recent years. In the 2010 case of *Evans v. Bayer*, a federal magistrate judge ruled that a Florida high school student's Facebook posts were off-campus, protected speech.[148] In *Emmett v. Kent School District No. 415*, the court granted a preliminary injunction to prevent the five-day suspension of a high school student who created a mock "obituaries" site from his home computer.[149] In addition to the satirical obituaries written about two of his friends, the site allowed visitors to vote on who would "die" next and become the subject of the subsequent obituary.[150] The court found that school officials presented no evidence that the web site "intended to threaten anyone, did actually threaten anyone, or manifested any violent tendencies whatsoever."[151]

In *Flaherty v. Keystone Oaks School District*, a district court determined that the disciplinary action taken against a high school student for posting Internet messages on an online message board was unconstitutional.[152] The student posted three messages from

2011 WL 3501698 (N.D. Ind. Aug. 10, 2011). The teenage plaintiffs, T.V. and M.K., posted suggestive pictures of themselves with phallic-shaped lollipops and added vulgar captions to the photos. The photographs were taken and posted at home onto Myspace and Facebook accounts, where they were generally available to students who had been granted "Friend" status. *Id.* at *2. Another student's mother brought printouts of the pictures to the district superintendent, reporting that the photos were causing "divisiveness" among students on the girls' volleyball teams. *Id.* The girls ultimately were suspended from extracurricular activities for a portion of the year. *Id.* at *3.

147. *Id.* at *9. In granting summary judgment to the teenage plaintiffs, Chief Judge Simon wisely noted that "[n]ot much good takes place at slumber parties for high school kids, and this case proves the point." *Id.* at *1.

148. 684 F. Supp. 2d 1365 (S.D. Fla. 2010). The court in *Evans* denied the district's motion to dismiss, determining that officials who disciplined student Katherine Evans after she created a Facebook group aimed at criticizing a teacher, violated her First and Fourteenth Amendment rights. *Id.* The page was created off-campus, did not occur at a school-sponsored activity, and was not accessed at school. *Id.* at 1372. Therefore, the connection to campus was too attenuated. *Id.*

149. 92 F. Supp. 2d 1088, 1090–91 (W.D. Wash. 2000).

150. *Id.* at 1089.

151. *Id.* at 1090.

152. 247 F. Supp. 2d 698 (W.D. Pa. 2003).

his parents' home and one from school.[153] The student handbook prohibited speech that was abusive, harassment, inappropriate, and offensive, but did not geographically limit the school's authority to discipline speech.[154] The court found that the handbook policies were constitutionally overbroad because they were not linked to speech that substantially disrupted school operations.[155] The court also determined that the policies were overbroad since they could be read to cover speech that occurred off the school's campus and that was not school related.[156]

The issue of whether school officials have legal authority to regulate student cyberspeech is far from settled. However, the most recent case law suggests that much of students' online speech is clearly protected, particularly when it was not directed at campus, not accessed on campus, and caused no substantial disruption of educational activities on campus.[157]

### *C. Cases That Have Upheld Restrictions of Online Speech are Inapposite to* Tatro

The courts are divided on several important legal questions about online speech that is created off campus, including whether school officials have more authority to regulate online speech if it links to the school's web site and is aimed directly at the school's audience.[158] A key case that stands for the proposition that it matters to whom the online speech is aimed is *J.S. ex rel. H.S. v. Bethlehem Area School District*, in which the Pennsylvania Supreme Court was confronted with a web site created by a student on his home computer.[159] The site was titled "Teacher Sux" and "consisted of a number of web pages that made derogatory, profane, offensive and threatening comments, primarily about the student's algebra teacher . . . ."[160] The court found that the speech was on-campus because the student "facilitated the on-campus nature of the speech by accessing the web site on a school computer in a classroom, showing the site to another student, and

153. *Id.* at 700.
154. *Id.* at 702.
155. *Id.* at 705.
156. *Id.* at 705–06.
157. *See* discussion *infra* Part V.C.
158. *See* Hudson, *supra* note 83.
159. 807 A.2d 847 (Pa. 2002).
160. *Id.* at 851.

by informing other students at school of the existence of the web site."[161]

Following in the vein of *Bethlehem*, a body of case law suggests that school officials can discipline students for online, off-campus speech. The Minnesota Court of Appeals drew a parallel between *Tatro* and one of these cases,[162] but the case the court relied on is not analogous and neither is the line of cases that have restricted online speech. They are distinguishable from *Tatro* in two keys ways. One line of cases has upheld the regulation of online speech when the speech was targeted at the school and did in fact cause an *actual* substantial disruption on campus. In the other line of cases, the regulated speech threatened violence and could also have been restricted under the "true-threat" doctrine. Moreover, given that the violence threatened in those cases would have occurred on campus if carried out, there was a reasonable argument that, as students and staff heard about the threats, the speech would meet *Tinker*'s standard.

Therefore, even if *Tinker* could be applied to off-campus, online speech, it does not apply to speech that is not likely to cause a material and substantial disruption on campus. Neither line of cases applies to *Tatro*, and the appeals court wrongly made the link. Tatro's postings did not cause—and were not reasonably likely to cause—a material and substantial disruption to the work and discipline of the university.[163] Her Facebook posts could not reasonably be construed as threatening actual violence, and any actual disruption on campus was the result of the university's overreaction, not the expression itself.[164]

161. *Id.* at 865. The court also found it significant that the "web site was aimed not at a random audience, but at the specific audience of students and others connected with this particular School District . . . ." *Id.* The court therefore held: "[W]here speech that is aimed at a specific school and/or its personnel is brought onto the school campus or accessed at school by its originator, the speech will be considered on-campus speech." *Id.*

162. The *Tatro* court cites *Wisniewski v. Board of Education*, 494 F.3d 34 (2d Cir. 2007). Tatro v. Univ. of Minn., 800 N.W.2d 811, 821 (Minn. Ct. App. 2011).

163. *See* discussion *infra* Part VI.

164. *See* discussion *infra* Parts VI, VII.

### *D. Online Speech Restricted Where it Targeted School and Caused Actual Substantial Disruption*

The Minnesota Court of Appeals used a 2007 Second Circuit case, *Wisniewski v. Board of Education*,[165] to stand for the proposition that *Tinker*'s substantial-disruption standard should apply to off-campus student speech that could be "reasonably understood as urging violent conduct."[166] Applying the *Tinker* analysis, the court in *Wisniewski* held that it was reasonably foreseeable that a student's online communication would cause a substantial disruption within the school, and as such, the school district did not violate the student's First Amendment rights by disciplining him.[167] But the *Tatro* comparison to *Wisniewski*, which involved outside messages that threatened violence inside the school, falls short. Parents of eighth-grader Aaron Wisniewski appealed his semester-long suspension for sharing with multiple friends, via online instant messages, an icon that depicted the shooting and killing of his junior high English teacher.[168] The drawings he e-mailed to classmates displayed a gun shooting someone in the head, dots representing splattered blood, and the words "kill" along with the name of Wisniewski's teacher.[169] The court determined it was "reasonably foreseeable" that the picture would reach the teacher and administrators and that it would "create a risk of substantial disruption."[170]

165. 494 F.3d 34 (2d Cir. 2007). The Third Circuit in *Blue Mountain* expressly disputed the dissenting opinion that the majority decision was creating a split with the Second Circuit in *Wisnewiski*. J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 931 n.8 (3d Cir. 2011). The Third Circuit noted that each case was decided on the facts and rejected an assertion that the Second Circuit had determined "that off-campus hostile and offensive student internet speech that is directed at school officials results in a substantial disruption of the classroom environment." *Id.* The court wrote:

> "[O]ff-campus hostile and offensive student internet speech" will not necessarily create a material and substantial disruption at school nor will it reasonably lead school officials to forecast substantial disruption in school. Further, the facts of the cases cited by the dissent in support of its proposition that we have created a circuit split differ considerably from the facts presented in this case.

*Id.*

166. *Tatro*, 800 N.W.2d at 821.

167. *Wisniewski*, 494 F.3d at 39–40.

168. *Id.* at 35–36.

169. *Id.*

170. *Id.* The court further stated that "[t]he fact that Aaron's creation and transmission of the IM icon occurred away from school property does not

Although the investigating police officer concluded that the drawing was meant in jest, the teacher quit teaching that class for the remainder of the year. His position had to be replaced, and students were taken from class and interviewed about the messages.[171] This caused an actual disruption to classroom activities in a way that Tatro's posts did not.[172]

The Eighth Circuit was one of four circuits to issue a ruling on restricting student cyberspeech in 2011. In August, with *D.J.M. ex rel. D.M. v. Hannibal Public School District No. 60,* it held that a Missouri high school student's instant messages from his home computer to a friend about shooting his classmates did not constitute protected speech under either a "true-threat" analysis or *Tinker's* substantial-disruption test.[173] "D.J.M." was in the fall of his sophomore year when he sent messages indicating that, if he could get a gun, a certain named classmate "would be the first to die."[174] The student he had been chatting with online brought the messages to school administrators, who alerted the police.[175] D.J.M. was placed in juvenile detention, a psychiatric hospital, and ultimately was suspended for the remainder of the school year.[176] His parents sued the school, alleging that the suspension violated his First Amendment rights.

The Eighth Circuit concluded that the messages amounted to a true threat.[177] True threats are not protected under the First Amendment, and school administrators "reasonably feared D.J.M. had access to a handgun and was thinking about shooting specific classmates at the high school."[178] The Eighth Circuit did not stop at its true-threat analysis, however, but went further and invoked *Tinker*, holding that "it was reasonably foreseeable that D.J.M.'s threats about shooting specific students in school would be brought

necessarily insulate him from school discipline." *Id.* at 39.

171. *Id.* at 36.

172. *See* discussion *infra* Part VI.

173. 647 F.3d 754 (8th Cir. 2011).

174. *Id.* at 758.

175. *Id.* at 759.

176. *Id.*

177. *Id.* at 764. The court quoted its definition of a true threat from *Doe v. Pulaski County Special School District*: "a 'statement that a reasonable recipient would have interpreted as a serious expression of an intent to harm or cause injury to another.'" *Id.* at 762 (quoting Doe v. Pulaski Cnty. Special Sch. Dist., 306 F.3d 616, 624 (8th Cir. 2002) (en banc)). The speaker must have intended to communicate his statement to another, which includes a third party. *Id.*

178. *Id.* at 764.

to the attention of school authorities and create a risk of substantial disruption within the school environment."[179] The court did note that "[s]chool officials cannot constitutionally reach out to discover, monitor, or punish any type of student speech."[180] But when there was a threat of a student shooting specific classmates on campus, the off-campus messages became punishable when brought on school grounds.[181]

In another 2011 decision, the Fourth Circuit in *Kowalski v. Berkeley County Schools* upheld the suspension of a high school student who created a discussion group web page on Myspace, with the heading "S.A.S.H.," (apparently an acronym for "Students Against Shay's Herpes") referring to a classmate who was the topic of the page's ridicule.[182] Senior Kara Kowalski, who created the page and invited one hundred of her Myspace friends to join the group on her home computer, argued that her conduct was shielded by the First Amendment because the speech not only occurred off campus, but was not school-related.[183]

The school district contended that they could regulate off-campus behavior as long as the behavior created a foreseeable risk of reaching the school and causing a substantial disruption to the work and discipline of the school.[184] The court agreed that Kowalski's conduct met this standard, finding that the "targeted, defamatory nature of Kowalski's speech, aimed at a fellow classmate," created actual substantial disorder and disruption at school.[185]

The court found that it was foreseeable that the expression would reach the school because students accessed the web site on campus, and Kowalski's conduct involved substantial disruption of and interference with the work and the discipline of the school.[186] She used the Internet to "orchestrate a targeted attack on a classmate, and did so in a manner that was sufficiently connected to the school environment as to implicate the School District's recognized authority to discipline speech . . . ."[187] But the court

179. *Id.* at 766.
180. *Id.* at 765.
181. *Id.*
182. 652 F.3d 565, 567 (4th Cir. 2011).
183. *Id.*
184. *Id.* at 571.
185. *Id.* at 574.
186. *Id.*
187. *Id.* at 567.

also noted that there is a limit to the "scope of a high school's interest in the order, safety, and well-being of its students when the speech at issue originates outside the schoolhouse gate."[188]

The Second Circuit Court of Appeals released an opinion in 2011 that sent a mixed message for student speech. In *Doninger v. Niehoff*, the appeals court upheld summary judgment for a school district, on the grounds of qualified immunity, against a claim that the district violated a blogging high school student's First Amendment rights.[189] The court ruled that school administrators did not violate "clearly established" First Amendment precedent, either when they disciplined senior Avery Doninger for her off-campus blog or when they prevented her from wearing a "Team Avery" T-shirt at a school assembly to protest the initial discipline.[190] The narrow ruling turned solely on qualified immunity, however, and the court explicitly declined to address whether Doninger's free-speech rights had been violated.[191]

Doninger was prohibited from running for class secretary after she posted a vulgar and misleading message on an independently operated, public blog about the supposed cancellation of a school event, an annual battle-of-the-bands concert.[192] She called school administrators "douche bags" on the blog and, in an e-mail, encouraged others to contact the superintendent "to piss her off

188. *Id.* at 573. The court continued:

> But we need not fully define that limit here, as we are satisfied that the nexus of Kowalski's speech to Musselman High School's pedagogical interests was sufficiently strong to justify the action taken by school officials in carrying out their role as the trustees of the student body's well-being.
>
> Of course, had Kowalski created the "S.A.S.H." group during school hours, using a school-provided computer and Internet connection, this case would be more clear-cut, as the question of where speech that was transmitted by the Internet "occurred" would not come into play. To be sure, a court could determine that speech originating outside of the schoolhouse gate but directed at persons in school and received by and acted on by them was in fact in-school speech. . . . We need not resolve, however, whether this was in-school speech and therefore whether *Fraser* could apply because the School District was authorized by *Tinker* to discipline Kowalski, regardless of where her speech originated . . . .

*Id.*

189. 642 F.3d 334, 338 (2d Cir. 2011). This case is referred to as *Doninger III*. The Second Circuit upheld a 2007 district court decision that denied the plaintiff student's motion for a preliminary injunction. *Doninger v. Niehoff*, 527 F.3d 41, 43 (2d Cir. 2008).

190. *Doninger*, 642 F.3d at 346, 351.

191. *Id.*

192. *Doninger*, 527 F.3d at 45.

more."[193] After she was banned from running for class office, and others started a write-in campaign for her, she contemplated but was prohibited from wearing a "Team Avery" t-shirt during a school assembly.[194]

Doninger argued that her First Amendment rights were so clearly established that no reasonable jury could conclude otherwise.[195] The court did not determine that the post had necessarily caused the requisite substantial disruption to school activities, and it did not rule on whether her First Amendment rights had been violated.[196] It noted that "the controversy over [the battle-of-the-bands concert's] scheduling had already resulted in a deluge of phone calls and emails, several disrupted schedules, and many upset students even before Doninger posted her comments . . . ."[197] But the court determined that First Amendment law is so muddled and difficult that even "lawyers, law professors, and judges" are unclear what standards apply.[198] If those in the legal profession have difficulty reconciling student-speech protections, the court reasoned, then school administrators should not be held personally liable under such circumstances when a reasonable jury could find that they got it wrong.

The fact that the Second Circuit refused to decide whether Doninger's First Amendment rights were violated appears to be an indication that the court was not willing to extend jurisdiction over online speech that far. The *Doninger* case exemplifies off-campus, online conduct that was far more direct and targeted than Tatro's. The facts suggest more strongly that an actual material disruption happened on campus, and Doninger's conduct clearly was aimed at the school. But the court still declined to find that her speech was unprotected.

Tatro did not intend for her speech to reach the school. Her Facebook settings were configured so that only her friends and their friends could view her posts (a number admittedly in the hundreds).[199] Many of the lower courts have held that schools

193. *Doninger*, 642 F.3d at 340–41.
194. *Id.* at 343.
195. *Id.* at 346.
196. *Id.* at 348–49.
197. *Id.* at 349.
198. *Id.* at 353. The court continued, "The relevant Supreme Court cases can be hard to reconcile, and courts often struggle to determine which standard applies in any particular case." *Id.*
199. Tatro v. Univ. of Minn., 800 N.W.2d 811, 814 (Minn. Ct. App. 2011).

cannot discipline students for online speech unless it has a "nexus with the school."[200] Courts have used varied approaches in determining what comprises this nexus.[201] In *Blue Mountain*, for instance, the court found it significant that the student (like Tatro) did not intend for her off-campus speech to reach the school—"in fact, she took specific steps to make the profile 'private' so that only her friends could access it."[202]

If there is a rule then that can be discerned from the multiple and seemingly disparate circuit decisions, it is that for online speech to be considered within a school's jurisdiction, it must be (1) directed at the school, (2) threatening, and (3) likely to cause a substantial disruption to educational activities on campus. *Layshock* and *Blue Mountain* clearly stand for the principle that students cannot be punished for online speech, created outside of school, that fails to cause a substantial and material disruption on campus.[203] In the rulings that upheld restrictions of online speech, as in *Weisnewski*, the threatening behavior directed at the school caused a material and substantial disruption to classroom activities. Tatro's speech was far more satirical than it was threatening, and the expression itself was not what caused a material and substantial disruption on campus, if there was one at all.

## VI. TATRO'S SPEECH DID NOT CAUSE A MATERIAL AND SUBSTANTIAL DISRUPTION

### *A. University Overreaction Caused Disruption, If There Was One, Not Tatro's Speech*

Assuming, arguendo, that the K-12 *Tinker* standard should apply to university students and that it also should carry over to off-campus, online speech, Tatro's posts still should be protected under the First Amendment. Even if the *Tinker* standard were the proper one, the standard has not been met in this case. Under *Tinker*, a school may regulate student speech that creates a material and substantial disruption to the school's work or discipline, or where school officials could reasonably "forecast substantial

200. *See* 1 RONNA GREFF SCHNEIDER, EDUCATION LAW: FIRST AMENDMENT, DUE PROCESS AND DISCRIMINATION LITIGATION § 2:26 (2011).

201. *Id.*

202. J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 930 (3d Cir. 2011).

203. *See supra* notes 127–143 and discussion.

disruption of or material interference with school activities."[204] There simply is no evidence to suggest that Tatro's posts caused such a disruption to the university—or that school officials could have reasonably predicted that it would.

Furthermore, if there was such a disruption to school activities, it occurred as a result of the overreaction of university administrators to the Facebook posts. School officials cannot bootstrap the limited exceptions to the protection of the First Amendment into restricting speech they find unpleasant or uncomfortable. This type of bootstrapping, however, is exactly what happened in *Tatro*. After a single student complained about the Facebook post, the department head contacted the university police, who investigated and determined that there was no real threat of violence.[205] The posts themselves appear obviously satirical, even if in poor humor and lacking sensitivity to the families of the cadaver donors. No facts amount to a material and substantial disruption. Rather, the disruption the administration and the court seemed most concerned about is that Tatro's posts "presented substantial concerns about the integrity of the anatomy-bequest program."[206] This is because donors and funeral directors eventually contacted the university about Tatro's conduct and the professionalism of the program.[207] If this disruption does indeed qualify as substantial under *Tinker*, it was the result of the university's reaction and subsequent media attention, not Tatro's expression itself.

### *B. Any Disruption on Campus Did Not Rise to Requisite Level*

A wide body of school-speech jurisprudence supports the proposition that facts like those in *Tatro* do not give rise to a substantial disruption of the work and discipline of the school. In *Tinker*, when students "neither interrupted school activities nor sought to intrude in the school affairs or the lives of others . . . [and] caused discussion outside of the classrooms, but no

204. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).
205. Tatro v. Univ. of Minn., 800 N.W.2d 811, 814 (Minn. Ct. App. 2011).
206. *Id.* at 822.
207. Minnesota media reported on the University of Minnesota's discipline of Tatro. *See, e.g.*, Jenna Ross, *Student Banned from U After Facebook Posts*, STARTRIBUNE (Dec. 15, 2009, 11:23 PM), http://www.startribune.com/local/minneapolis/79361082.html. Local media outlets have also covered Tatro's appeals. *See, e.g.*, Jane Pribek, *U of M Action Upheld in Facebook Incident*, MINN. LAW., July 18, 2011, at 2.

interference with work and no disorder . . . [the] Constitution does not permit officials of the State to deny their form of expression."[208] Courts have repeatedly emphasized that the "mere desire to avoid 'discomfort' or 'unpleasantness' is not enough to justify restricting student speech under *Tinker*."[209]

In *Blue Mountain*, for instance, school officials claimed that the mock online profile disrupted school because there were general "rumblings" regarding it.[210] More than twenty students viewed the Myspace parody online, students talked about it in class, and staff had to adjust their schedules to meet with J.S. and her parents.[211] However, the Third Circuit found that none of this amounted to a material disruption.[212] The court further noted that it was the principal's response to the parody that "exacerbated rather than contained the disruption in the school."[213]

Similarly, in the case of the high school students who posted racy photos of themselves online, the court held that any "actual disruption" caused by the photographs "does not come close" to meeting the *Tinker* standard.[214] The court found that the acts of officials responding to two complaints from parents on the girls' volleyball team and students sniping at one another amounted only to "unremarkable dissension."[215] Likewise, a California district court determined that a YouTube video, in which students made

208. *Tinker*, 393 U.S. at 514.

209. Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 212 (3d Cir. 2001) (quoting West v. Derby Unified Sch. Dist., 206 F.3d 1358, 1366 (10th Cir. 2000)); s*ee also Tinker*, 393 U.S. at 509; Shanley v. Ne. Indep. Sch. Dist., 462 F.2d 960, 970 (5th Cir. 1972) (holding that a school board could not discipline students for the distribution of an off-campus newspaper where "[a]s a factual matter there were no disruptions of class; there were no disturbances of any sort, on or off campus"). The court refused to rule on the remaining threshold question of whether the *Tinker* standard could ever apply to off-campus conduct, however. *Shanley*, 462 F.2d at 974.

210. J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 922 (3d Cir. 2011).

211. *Id.* at 922–23.

212. *Id.* at 928.

213. *Id.* at 931. *But cf.* Lowery v. Euverard, 497 F.3d 584, 596 (6th Cir. 2007) (holding that punishment was justified, under the *Tinker* standard, where students circulated a petition to fellow football players calling for the ouster of their football coach, causing the school to have to call a team meeting to ensure "team unity," and "eroding [the coach's] authority and dividing players into opposing camps").

214. T.V. *ex rel.* B.V. v. Smith-Green Cmty. Sch. Corp., No. 1:09-CV-290-PPS, 2011 WL 3501698, at *12 (N.D. Ind. Aug. 10, 2011).

215. *Id.* at *13.

"derogatory, sexual, and defamatory" statements about a thirteen-year-old classmate, did not rise to the level of a substantial disruption of classroom activities.[216] On summary judgment, the court found that five students missing some part of class, an angry parent calling, and one student who would not go to class was not enough.[217] "The mere 'buzz' about the profile, standing alone, was not sufficient under *Tinker* to constitute a substantial disruption."[218]

Even in instances where the speech at issue originated off campus but was brought on campus, courts have reaffirmed that disliking the speech is not enough to justify its restriction under *Tinker*. In *Killion v. Franklin Regional School District*, a student was suspended after he created a vulgar and derogatory "top ten" list about the high school athletic director and e-mailed it to other students from his home computer.[219] In granting summary judgment to the student, the district court held that the school district failed to "adduce any evidence of actual disruption."[220] "[T]he list was on school grounds for several days before the administration became aware of its existence, and at least one week passed before the [administration] took any action."[221] The speech, although upsetting, was not threatening and "did not cause any faculty member to take a leave of absence."[222] The court noted that although the coach was upset and had a hard time doing his job and that a librarian "was almost in tears," the events did not rise to the level of a substantial disruption.[223]

As these high school speech cases make clear, speech that causes a substantial disruption must be more than an irritant or an embarrassment. Even where the speech is threatening, courts have

216. J.C. *ex rel.* R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1108, 1117 (C.D. Cal. 2010). The fact that the conduct occurred outside of school did not prevent that school from disciplining the plaintiff student for such conduct, especially because it was reasonably foreseeable that the video made by the student would find its way to campus. *Id.* at 1107–08. Although the court held that *Tinker* applies to both on- and off-campus speech, the court found that there was no substantial disruption of school activities and no reasonably foreseeable risk of substantial disruption of school activities as a result of the video. *Id.* at 1117. Discipline of the student thus violated the First Amendment regardless of where the speech took place. *Id.* at 1122–23.

217. *Id.* at 1117—19.

218. *Id.* at 1112.

219. 136 F. Supp. 2d 446 (W.D. Pa. 2001).

220. *Id.* at 455.

221. *Id.*

222. *Id.*

223. *Id.* at 455–56.

determined that there must be a specific, imminent threat directed at an individual on campus for there to be a substantial disruption. In *Murakowski v. University of Delaware*, for instance, although the court improperly used *Tinker's* substantial disruption test to analyze the speech of a university student who posted violent writings against women and homosexuals, it found that the student's speech could not be sanctioned.[224]

Maciej Murakowski, a nineteen-year-old student at the University of Delaware, created a website in 2005 on the university's servers that included violent, sexually explicit material, including musings on the rape and torture of women.[225] A fellow female student, who lived in Murakowski's residence hall, "manifested both verbally and by her appearance abject terror of Murakowski and fear for her safety to the point that she had to change her academic schedule. She also sought counseling. The brother of a female student complained to University police about Murakowski's essays."[226] Another parent also complained.[227] But these community and student concerns were not enough for the court: "Although complete chaos is not required, something more than distraction or discomfiture created by the speech is needed."[228] The court determined that the university did not present evidence "which reasonably led it to forecast material interference with campus education and activities."[229] And the university also did not show that the student's writings "were intentionally aimed at disrupting the college environment and actually materially did so in a concrete fashion."[230]

The speech itself must cause or be reasonably likely to cause a substantial and material disruption within the school environment, not simply an inconvenience or worry for school officials. Therefore, Tatro's Facebook posts simply do not meet this standard. They did not create a substantial disruption. Classes did not stop. Teachers continued to teach. The facts do not indicate any sort of wide-ranging concern among the student body. One

224. Murakowski v. Univ. of Del., 575 F. Supp. 2d 571, 592 (D. Del. 2008).
225. *Id.* at 576–78. Murakowski wrote, among other things, a how-to guide depicting how he would go about kidnapping, raping, torturing, killing, and then disposing of women's bodies. *Id.*
226. *Id.* at 591.
227. *Id.*
228. *Id.*
229. *Id.* at 592.
230. *Id.*

student came forward to complain about the posting, which Tatro had not directed at the school in any way. Police determined there was not a real threat. Had the university not overreacted to the posts, none of the disruption would have happened. It is disingenuous, circular logic to lay blame for any disruption on the student speech, when it was the reaction to the student speech that caused the disruption.

## VII. TRUE-THREAT STANDARD MORE APPLICABLE THAN *TINKER* IN EVALUATING *TATRO*

### *A. Adult Speech Should Be Evaluated Under a Higher Standard*

The University of Minnesota's discipline of Tatro was inappropriate under the *Tinker* standard. As an attempt to punish Tatro for the content of her speech, the university's disciplinary measures were content-based speech restrictions, which are protected under the First Amendment unless an exception applies. As discussed, *Tinker* and the Court's subsequent decisions define an exception for K-12 students who are on campus or at a school event, and whose speech is likely to cause a material and substantial disruption, is lewd or offensive, or is in opposition to the school's educational mission. *Tatro v. University of Minnesota* does not fall within these exceptions.

A more appropriate First Amendment exception from which to analyze Tatro's speech is the "true-threat" doctrine. While the First Amendment protects nearly all adult speech, it does not provide an absolute shield. One exception, for instance, is for a true threat. Speech that constitutes a "true threat" is not entitled to First Amendment protection under the Court's holding in the 1969 case of *Watts v. United States*.[231] Thirty-four years later, in *Virginia v. Black*, the Court held that "'true threats' . . . encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a

231. 394 U.S. 705 (1969). In 1966, a protestor on the Washington Monument grounds, in opposition to the draft, said that he wanted to get his sights on the President of the United States if the government forced him to carry a rifle. *Id.* at 706. He was charged and convicted for violating a federal law that prohibited threats against the president. *Id.* But the Court found that his words amounted to political hyperbole and were not true threats within the statutory meaning. *Id.* at 708. The Court held that speech loses the protection of the First Amendment when the government proves that it constitutes a "true 'threat.'" *Id.*

particular individual or group of individuals."[232]

### *B. True Threats Must be Understood by Reasonable Person as Expressing Violent Intent*

While *Watts* made it clear that true threats are not protected speech, the Court arguably has not adopted a clear standard to determine when caustic or violent speech is a true threat.[233] The question that courts have struggled with is determining the level of intent necessary for the speech to be considered a true threat. Although *Black* suggests a subjective standard of intent, the federal circuit courts have split as to what speech constitutes a true threat. As First Amendment scholar David Hudson notes, some courts have determined that a speaker must intend to threaten someone.[234] "This doesn't mean that the speaker must actually intend to carry out the threat. It does mean, however, that the speaker must subjectively intend that his or her comments be interpreted as a true threat."[235] But other courts have required only that the speaker "knowingly intended" to communicate to someone.[236] "These courts do not require that it be proven that the speaker subjectively intended to threaten someone. Rather, they focus on whether there was an intent to communicate and whether an objective or reasonable recipient would regard it as a serious expression of harm."[237]

232. 538 U.S. 343, 359 (2003) (internal citation omitted). In Justice O'Connor's plurality opinion, she also wrote that a "prohibition on true threats protect[s] individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur." *Id.* at 360 (internal quotation marks omitted) (alteration in original).

233. *See, e.g.*, Steven G. Gey, *A Few Questions About Cross Burning, Intimidation, and Free Speech*, 80 NOTRE DAME L. REV. 1287, 1294 (2005) (analyzing several layers of conflicting messages in *Virginia v. Black*); Paul T. Crane, Note, *'True Threats' and the Issue of Intent*, 92 VA. L. REV. 1225, 1244–48 (2006) (discussing how lower courts have interpreted true threats under *Virginia v. Black*).

234. David L. Hudson Jr., *True Threats*, FIRST AMENDMENT CENTER (June 1, 2010), http://www.firstamendmentcentral.org/Speech/personal/topic.aspx?topic=true_threats.

235. *Id.*

236. *Id.*

237. *Id.* The Ninth Circuit applied the subjective-intent test in *United States v. Cassel*, 408 F.3d 622, 633 (9th Cir. 2005), while the Fifth Circuit applied the objective recipient test in *Porter v. Ascension Parish School Board*, 393 F.3d 608, 616 (5th Cir. 2004). In addition, in *United States v. Dinwiddie* the Eighth Circuit identified five factors to analyze in determining whether speech is a true threat. 76 F.3d 913, 925 (8th Cir. 1996). The *Dinwiddie* factors are (1) "whether the threat

In the Eighth Circuit, the test for distinguishing a true threat from constitutionally protected speech is whether an objectively reasonable recipient would interpret the threat "as a serious expression of an intent to harm or cause injury to another."[238] This rule stems from the 2002 case *Doe v. Pulaski County Special School District* where the Eighth Circuit ruled that a student's violent, off-campus speech was not protected.[239] In *Pulaski*, an eighth grade student, "J.M.," was expelled for writing two letters describing how he planned to rape and murder a classmate who had broken up with him.[240] He kept the letters at home and never delivered them to his ex-girlfriend, but she found out about them nonetheless.[241] The court ruled that J.M.'s free-speech rights were not violated because the letters were true threats. The court concluded that "J.M. intended to communicate the letter and is therefore accountable if a reasonable recipient would have viewed the letter as a threat."[242] This element "is satisfied if the speaker communicates the statement to the object of the purported threat *or* to a third party."[243]

*Pulaski* is not the only instance of a court applying a true-threat analysis to school speech that is perceived as threatening.[244] In *Hannibal*, the Eighth Circuit held that a high school student's instant messages about shooting his classmates were not protected

was conditional," (2) the reaction of the listeners, (3) "whether the threat was communicated directly to its victim," (4) "whether the maker of the threat had made similar statements to the victim in the past," and (5) "whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence." *Id.*

238. Doe v. Pulaski Cnty. Special Sch. Dist., 306 F.3d 616, 624 (8th Cir. 2002) (en banc).

239. *Id.* at 619; *see also* Riehm v. Engelking, 538 F.3d 952, 958, 963–64 (8th Cir. 2008) (applying *Pulaski* and a true-threat analysis in holding that a decision to place a high school student who wrote a "fantasy murder-suicide" in protective custody did not violate his First Amendment rights).

240. *Pulaski*, 306 F.3d at 619.

241. *Id.* at 619–20.

242. *Id.* at 624.

243. *Id.*

244. *See, e.g.*, Lovell *ex rel.* Lovell v. Poway Unified Sch. Dist., 90 F.3d 367, 371 (9th Cir. 1996). The court upheld, on true-threat grounds, the discipline of a high school student who said she would shoot a school counselor, declining to apply *Tinker* because threatening conduct is not protected, regardless of whether or not it happened at school. *Id.* Other courts have declined to apply a true-threat analysis. *See, e.g.*, Wisniewski v. Bd. of Educ., 494 F.3d. 34, 38–39 (2d Cir. 2007) (applying *Tinker* to analyze a student's speech and rejecting *Pulaski*, stating that "school officials have significantly broader authority to sanction student speech" than the true-threat standard allows).

under *Tinker* or a true-threat standard.[245] The court found that the speech constituted a true threat because (1) the teen intentionally communicated his threats to a third party; (2) his speech could be reasonably understood as a true threat (taken in the context of his depression, access to weapons, and statement that he wanted Hannibal "to be known for something"); and (3) his statements were sufficiently serious.[246]

Under both the subjective and objective tests—which analyze the speaker's intent—the speech must be understood by a reasonable person as expressing an intent to commit violence in order to qualify as a true threat.[247] Therefore, the belief that there is an actual threat must be reasonable within the context it was made.

### *C. Tatro's Speech Does Not Qualify as a True Threat*

Although other courts have employed a true-threat analysis, *Tatro* sidestepped it. The Minnesota Court of Appeals stated that most courts have held that "student expression need not reach the true-threat threshold before a public school may take appropriate disciplinary action in the interest of protecting the work and safety of its community."[248] This rule acknowledges that it is possible for speech to cause a substantial disruption under *Tinker*, but not rise to the level of a true threat. The fact that the true-threat doctrine presents a higher barrier to restricting speech is exactly why it should provide the basis for analyzing university speech. Applying a true-threat analysis to the speech of an adult student at a public university is more appropriate than applying *Tinker*, particularly when the speech in question was off campus.

Arguably, the court did not undertake a true-threat analysis because Tatro's speech clearly did not constitute a true threat. While the true-threat doctrine would have been a better starting point for the court's analysis of her speech, Tatro nevertheless should not have been disciplined under it. In *Murakowski v. University of Delaware*, for instance, even where a university student posted graphic and violent acts—including rape, kidnap, and murder—on a web site he created on the school's server, a court

245. D.J.M. *ex rel.* D.M. v. Hannibal Pub. Sch. Dist., 647 F.3d 754, 765–66 (8th Cir. 2011); *see id.* at 762–64.
246. *Id.* at 762–64.
247. *See* State v. Cook, 947 A.2d 307, 315 (Conn. 2008).
248. Tatro v. Univ. of Minn., 800 N.W.2d 811, 821 (Minn. Ct. App. 2011).

held that his acts did not amount to true threats.[249] The court found that while the student's comments "clearly impl[y] an interest in raping and/or murdering women," they did not "constitute a true threat."[250] Although many of his postings were directed to women as a whole, they were not directed at "specific individuals, a particular group[,] or even to women on the University's campus."[251] Furthermore, while at least one female student (who lived in the same dormitory) was frightened, others did not take the student's rants seriously, and a doctor found that while they were indeed offensive, they did not pose a threat.[252]

Similarly, the University of Minnesota police determined that Tatro's Facebook posts about wanting to stab a "certain someone" and having a "Death List" were not criminal.[253] But in bypassing the issue, the court nullified the findings of the police investigation. While one faculty member was frightened by the posts, there was no rational basis for this fear. Tatro had neither a propensity for nor a history of violence. She did not identify whom she wanted to harm in the posts, for which the audience was her friends and family who presumably understood her dark sense of humor. There was no context that would lead a reasonable person to believe that there was a serious basis for the conclusion that the online posts were truly threatening.

## VIII. CONCLUSION

### *A. Offensive Speech is Protected Speech*

Tatro's posts on Facebook were inappropriate, in bad taste, and most certainly offended the families who had bequeathed cadavers to the University of Minnesota's mortuary-science program. But the posts, however offensive, were protected speech. A hallmark of the First Amendment is that speech does not lose its protection merely for offense and discomfiture. The standard remains that all speech is protected unless its content falls within an exception that removes free-speech safeguards. And in this case, Tatro's Facebook posts did not fall within such an exception. They were neither a true threat nor a substantial disruption to the

249. 575 F. Supp. 2d 571, 590–91 (D. Del. 2008).
250. *Id.* at 590.
251. *Id.*
252. *Id.* at 580, 582, 591.
253. *Tatro*, 800 N.W.2d at 816, 822.

university's classes or other educational endeavors. The basis, therefore, used by the Minnesota Court of Appeals to uphold the university's sanctioning is an unconstitutional extension of exceptions to the First Amendment.

Tatro argued that the Facebook posts, "when read in context, were obviously literary expression, intended to be satirical, vent emotion, and incorporate popular culture references."[254] This is a highly reasonable explanation, particularly given the fact that she was a mortuary-science student with an acknowledged "sarcastic" and "morbid sense of humor."[255] She had never handled or used a trocar before posting on Facebook about this instrument.[256] The teacher of the lab class in which a trocar would be used said she had never seen Tatro do or say anything threatening, considered her a good student, and did not ask her for an explanation about the Facebook posts.[257] The posts did not amount to a "serious expression of an intent to commit an act of unlawful violence"[258] as required under the true-threat doctrine.

It appears, based on the unsavory facts of this case, that the Minnesota Court of Appeals was looking for a way to uphold Tatro's discipline. Since it could not do so using the standard appropriate for adult speech, the true-threat standard, it simply rejected its use. The court instead chose a standard set forth by *Tinker* and its progeny, which traditionally has been applied to far younger students.

The *Tinker* standard simply does not fit. First, it ignores the crucial difference between the relatively limited First Amendment rights of high school students and the more vigorous rights of college students. In addition, online speech is off-campus speech, particularly when the nexus between the speech and the campus is attenuated, and the speech contains no direct threats aimed at the school. Furthermore, critically, her speech did not create a material and substantial disruption on campus. There may have been a low-level concern on campus, but nothing that caused a disruption of school activities that would rise to the level required under *Tinker*. Finally, the university's attempt to bolster its

254. *Id.* at 817.
255. Relator's Brief and Addendum at 6, Tatro v. Univ. of Minn., 800 N.W.2d 811 (Minn. Ct. App. 2011) (No. A10-1440), 2010 WL 7131428, at *6.
256. *Id.* at 5.
257. *Id.* at 7.
258. Virginia v. Black, 538 U.S. 343, 344 (2003).

disruption claim by pointing to the phone calls it received from alumni and donors does not hold up. This "disruption" came as a result of media reports released after campus officials initially overreacted and banned Tatro from campus. The university should not be allowed to bootstrap the disruption caused by its own overreaction to the speech onto the initial speech itself. Staunching negative publicity, clearly an underlying concern in this case, is not a legitimate reason to impinge on free-speech rights.

### *B. Implications of* Tatro *for Student Speech*

By blithely extending the *Tinker* standard that governs on-campus junior high and high school speech to off-campus university speech, the Minnesota Court of Appeals has watered down First Amendment protections for college students. Yet the off-campus speech of college students in particular should be held to the same standards as that of adults in any other setting. Furthermore, by determining that Tatro's off-campus posts caused a substantial disruption on campus, the appeals court came dangerously close to establishing a zero-tolerance policy for jokes that refer to violent behavior. Judge Bjorkman acknowledged as much, noting that it did not matter if Tatro intended the language to be threatening:

> Whether or not Tatro intended her posts to be satire or mere venting does not diminish the university's substantial interest in protecting the safety of its students and faculty and addressing potentially threatening conduct. Indeed, the realities of our time require that our schools and universities be vigilant in watching for and responding to student behavior that indicates a potential for violence.[259]

But this distinction does matter. Common sense should still count. While there is a "fine line between ill-advised social media rants and truly threatening posts, . . . there's a mini-trend in court to collapse the two categories."[260] One reason that the U.S. Supreme Court has required a demanding showing for speech to be deemed a true threat is that plenty of "ambiguous language—or even language that says nothing threatening on the surface—could

259. *Tatro*, 800 N.W.2d at 816–17.

260. Eric Goldman, *Mortuary Sciences College Student Disciplined for Threatening Facebook Posts*—Tatro v. University of Minnesota, TECH. & MARKETING L. BLOG (July 12, 2011), http://blog.ericgoldman.org/archives/2011/07/mortuary_scienc.htm.

be seen as threatening by some readers or listeners."[261] Simply because someone believes language to be threatening does not reasonably make it so.

The court's discussion above seemingly invites an examination of Tatro's conduct as a true threat. But instead, the court applied *Tinker*, and in doing so, lowered the threshold for speech to cause a substantial disruption to classroom activities. The court's deference essentially granted carte blanche authority to university officials to censor broad swaths of online postings that they determine to be a substantial disruption.

Noted First Amendment scholar and UCLA law professor Eugene Volokh astutely expressed concern that under the logic espoused by the Minnesota Court of Appeals, "overly cautious university police" could investigate blog posts that simply criticize faculty or express support for students to be allowed to carry concealed weapons.[262] In addition, "a student's allegedly racist, sexist, anti-gay, anti-Muslim, anti-Christian, anti-Israel, etc. posts could easily create a 'substantial disruption' by alienating donors, prospective clients, and the like."[263] Indeed, if the test for substantial disruption is whether university donors are unhappy, this end-run around the First Amendment would greatly chill college students' free speech. Universities could use this justification to silence students' speech that alienates donors or other boosters, regardless of actual threats or resulting disruption.

### *C. Minnesota Supreme Court Should Overturn* Tatro

*Tatro* is a rare example of a published appellate opinion that addresses the off-campus speech rights of college students. If left to stand, the decision is likely to have a threefold negative impact on student speech—in its application of *Tinker* to a university, its restriction of online speech, and its relaxed view of what constitutes a substantial disruption that *Tinker* requires. The *Tatro* decision should not be allowed to become binding precedent in Minnesota

261. Eugene Volokh, *Court Upholds Discipline of University Student Based on Speech, Citing* Tinker, THE VOLOKH CONSPIRACY (July 11, 2011 6:17 PM), http://volokh.com/2011/07/11/court-upholds-discipline-of-university-student-based-on-speech-citing-tinker/.

262. *Id.*

263. *Id.* Volokh suggests that if the Minnesota Court of Appeals had chosen to uphold Tatro's discipline on a contract theory—that Tatro had signed away rights when she agreed to participate in the program and its conditions on confidentiality and respect—the outcome would be perhaps less objectionable. *Id.*

and persuasive jurisprudence elsewhere.

The Minnesota Supreme Court should overrule the appellate court, on the grounds that it misapplied the *Tinker* standard. It should not further dilute *Tinker* by extending it to off-campus, online, college speech. The state's highest court instead should analyze Tatro's speech under the more proper framework for restricting the content of adult speech—the true-threat doctrine. And under that doctrine, Tatro's speech should be afforded protection under the First Amendment because it does not rise to the level of a true threat.

*Tatro* exemplifies precisely the type of speech that must be protected. It was in poor taste and offensive—but that has never been the test for speech that can be sanctioned. Indeed, it is the unpopular statements that need the most protection. The sanctioning of Tatro's speech was not the result of a material and substantial disruption of on-campus educational activities. Rather, it was brought on by school administrators' "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[264] Furthermore, Tatro's Facebook posts were made away from school and not directed at anyone at the university. As speech continues to move online, educators will continue to grapple with what falls under their authority and is perceived as on-campus speech, and what does not. And while the line undoubtedly needs to be drawn to distinguish when students' cyberspeech may become subject to school restrictions, the speech at issue here clearly falls on the protected side of that line.

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