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"Narrowly Tailored" and "Directly Related": How the Minnesota Supreme Court's Ruling in *Tatro v. University of Minnesota* Leaves Post-Secondary Students Powerless to the Often Broad and Indirect Rules of their Public Universities

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**“NARROWLY TAILORED” AND “DIRECTLY RELATED”:
HOW THE MINNESOTA SUPREME COURT’S RULING IN
TATRO V. UNIVERSITY OF MINNESOTA
LEAVES POST-SECONDARY STUDENTS POWERLESS TO
THE OFTEN BROAD AND INDIRECT RULES OF THEIR
PUBLIC UNIVERSITIES**

*Ashley C. Johnson**

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I. INTRODUCTION

Students must have the opportunity to connect, associate, and communicate freely and without interference on the Internet except in cases of clear threat of harm or imminent danger.¹ Supreme Court precedent does not suggest that First Amendment protections should apply with less force when public students utilize technology in their private time.² The protection

¹ *Virginia v. Black*, 538 U.S. 343, 344 (2003) (stating that the First Amendment permits a State to ban “true threats,” which are statements where the speaker means to communicate a serious expression of intent to commit an unlawful and violent act, regardless of actual intent to carry out the threat, to protect individuals from the fear of violence and disruption); LORI ANDREWS, *I KNOW WHO YOU ARE AND I SAW WHAT YOU DID: SOCIAL NETWORKS AND THE DEATH OF PRIVACY* 89 (2012) (arguing employees and students deserve free speech rights and there is a necessity to create a Constitution for the web protecting internet expression).

² *See Healy v. James*, 408 U.S. 169, 180 (1972). A state-supported college denied Petitioner’s application requesting official campus recognition of a local Students for Democratic Society chapter. *Id.* at 179. The Supreme Court further noted, “[t]he college classroom with its surrounding environs is peculiarly the ‘marketplace of ideas,’ and we break

of constitutional freedoms is nowhere more vital than in the community of American schools.³ Courts have struggled to draw a line that protects both the pedagogical concerns of educational curriculums and the often controversial, yet essential, student voice under the First Amendment since the early 1900s.⁴

In the meantime, social networking platforms have revolutionized the way people communicate.⁵ There are currently more than one billion www.Facebook.com (“Facebook”) users worldwide.⁶ More than sixty-five percent of American adults and nearly ninety-five percent of younger age groups use social networking websites.⁷ Society encourages children to acquire computer skills at a young age, understanding the importance of these skills in what has become a technological world.⁸ Users make their thoughts instantly accessible to millions by posting comments, videos, or pictures from nearly any location, presenting new and important First Amendment issues for courts across the country.⁹ Without guidance from the United States Supreme Court, lower courts have struggled to determine if

no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom.” *Id.* at 180–81. *See also* *Keyishian v. Bd. of Regents of Univ. of N.Y.*, 385 U.S. 589, 603 (1967).

³ *Healy*, 408 U.S. at 180; *Keyishian*, 385 U.S. at 603; *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) (stating “[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools . . . [s]cholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate”); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

⁴ *Healy*, 408 U.S. at 197 (Douglas, J., concurring) (“[Student] interests and concerns are often quite different from those of the faculty. They often have values, views, and ideologies that are at war with the ones which the college has traditionally espoused or indoctrinated. When they ask for change, they, the students, speak in the tradition of Jefferson and Madison and the First Amendment”).

⁵ John Browning, *Universities Monitoring Social Media Accounts of Student-Athletes: A Recipe for Disaster*, 75 TEX. B. J. 840, 842 (2012) (discussing the discipline of student athletes for information shared on social networking websites).

⁶ *Id.*

⁷ *Id.* On February 4, 2004, “The Facebook” launched and became available to students at Harvard University. DAVID KIRKPATRICK, *THE FACEBOOK EFFECT: THE INSIDE STORY OF THE COMPANY THAT IS CONNECTING THE WORLD* 30 (2010). By the following fall semester, eighty-five percent of American college students were users of the site, which had dropped the “The” to become known as simply “Facebook.” *Id.* at 149. Facebook later became available to non-college students and its growth continued world-wide. *Id.* at 150.

⁸ ANDREWS, *supra* note 1, at 77 (arguing that we do not let children drive until they are sixteen or drink until they are twenty-one and allowing a child to access a social networking website can be the equivalent of handing them the car keys in terms of the damage they can do to both themselves, as well as others).

⁹ Eric D. Bentley, *He Tweeted What? A First Amendment Analysis of the Use of Social Media by College Athletes and Recommended Best Practices for Athletic Departments*, 38 J.C. & U.L. 451, 452–53 (2012) (addressing the legality of limiting or restricting the use of social media by college athletes).

and when educational institutions can punish students for speech that occurs online.¹⁰

The First Amendment signifies a profound commitment to the fundamental principle that debate on public issues should be uninhibited.¹¹ This principle exists because “speech concerning public affairs is more than self-expression; it is the essence of self-government.”¹² As society advances, issues continue to arise which present questions unforeseen by the Framers of the Constitution.¹³ In such cases, the Constitution is treated as a living document, adaptable to new situations, and time-honored principles must be applied consistently.¹⁴ Accordingly, constitutional protections must not yield to the developing technological world.¹⁵

In 2009, the University of Minnesota punished Amanda Tatro, a junior in the Mortuary Science Program, for a number of disturbing status updates to her Facebook profile.¹⁶ Tatro appealed the University-imposed sanctions.¹⁷ The Minnesota Supreme Court ultimately held that a university may discipline students for statements made on a social networking website without infringing upon the First Amendment if the speech violates “narrowly tailored” academic rules which are “directly related” to professional standards of conduct.¹⁸ The *Tatro* decision exposes Minnesota students to a wide range of ramifications for otherwise protected, off-campus, First Amendment speech.¹⁹ The precedent set by the Minnesota

¹⁰ Mickey Lee Jett, *The Reach of the Schoolhouse Gate: The Fate of Tinker in the Age of Digital Social Media*, 61 CATH. U. L. REV. 895, 896–97 (2012) (suggesting the inconsistency in lower court opinions is rooted in the difficulty of applying traditional school-speech precedent to “cyberspeech”).

¹¹ *N. Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (stating that the constitutional commitment to wide-open freedom of expression “may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials” but remains protected).

¹² *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964) (stating further that since erroneous and often unpleasant statements are inevitable in free debate, they must be protected if freedoms of expression are to endure); see also *Cohen v. California*, 403 U.S. 15, 25–26 (1971) (stating that the word “fuck” should be protected even though it is often less palatable than other swear words, because words are often chosen as much for their otherwise inexpressible emotive as their cognitive force).

¹³ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 682–83 (1952) (affirming that the Constitution was intended to endure the unforeseen transformations of American society).

¹⁴ *Id.*

¹⁵ ANDREWS, *supra* note 1, at 89 (arguing that internet speech should be as protected with as much force, if not more, than traditional speech under the First Amendment).

¹⁶ *Tatro v. Univ. of Minn.*, 816 N.W.2d 509, 512 (Minn. 2012) (discussing Tatro’s involvement in the Mortuary Science Department at the University of Minnesota, as well as its requirements).

¹⁷ *Id.* at 509.

¹⁸ *Id.* at 511.

¹⁹ See *id.* at 524. The Minnesota Supreme Court states in their decision that *Tatro* “is based on the specific circumstances of [the] case—a professional program that operates

Supreme Court in *Tatro* contravenes the long-standing principle that student expression cannot constitutionally be confined to approved sentiments.²⁰ Students must be able to express themselves freely on their social networking websites under the First Amendment, just as they would in any other off-campus forum, absent cases of clear threat of harm or danger.²¹

Part II of this article examines Tatro's battle to have the University sanctions reversed, beginning with the University's formal appeals process through the Minnesota Supreme Court's final opinion.²² Part III discusses modern social media, the regulation and punishment for otherwise protected First Amendment speech, and how public universities have used the Internet to monitor post-secondary students and applicants.²³

Part IV argues that off-campus conduct is not interrelated to on-campus conduct, and therefore should not be punished as such.²⁴ Further, Part IV contends that broad professional standards and often vague university rules should not be enforced by university regulation of students' social networking activity that occurs off campus.²⁵ Part IV also asserts that, without clear direction from the U.S. Supreme Court, students and public schools are left to wrestle with the difficult, uncertain, and inconsistent lower-court decisions that are arising in cases like Tatro's throughout the country.²⁶ Finally, Part IV argues that absent a clear threat of imminent harm, the First Amendment should protect a student's Internet speech from university regulation.²⁷

under established professional conduct standards . . . and measured discipline that was not arbitrary or a pretext for punishing the student's protected views." *Id.*

²⁰ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969) (holding that student speech may not be regulated absent facts showing a material and substantial interference with the discipline and operation of a school).

²¹ ANDREWS, *supra* note 1, at 89 (suggesting that the First Amendment's protections should apply with as much, if not more, force in instances of social media for students and employees).

²² *See infra* Part II (showing the procedural history of *Tatro* beginning with the University of Minnesota's own appeal process through treatment by the Minnesota Supreme Court).

²³ *See infra* Part III (discussing the pertinent history of First Amendment student speech in public grade schools, how courts have applied the resulting case law to the post-secondary setting, and the wide scope of professional standards sought to be taught by post-secondary universities).

²⁴ *See infra* Part IV.A (asserting that the justifications for limiting First Amendment protections when speech occurs on campus are not similar enough to off-campus speech to warrant similar regulation by public schools).

²⁵ *See infra* Part IV.B (arguing that the potential audience for off-campus speech is too vast to warrant the same protection and regulation of on-campus speech).

²⁶ *See infra* Part IV.C (suggesting that public schools are left at a loss, just as their students are, for applying the shaky rules that result from misdirected opinions such as *Tatro*).

²⁷ *See infra* Part IV.D (arguing that the First Amendment should extend to protect students from regulation of their internet speech).

II. STATEMENT OF THE CASE

Amanda Tatro, like many of her classmates, used Facebook to keep in touch with friends and family while she attended school.²⁸ The administration informed Tatro during orientation for her anatomy laboratory course that discreet conversation regarding the class would be allowed, but blogging would not.²⁹ Much controversy existed regarding whether Tatro's instructor ever explained what she intended the term "blogging" to include; however, it was commonplace for students to post about the program on their own Facebook pages.³⁰ What makes Tatro's experience different than that of her classmates is the reaction that followed when a student brought the posts to the attention of the department.³¹

A. The Posts

In the fall of 2009, Tatro was enrolled in the Bachelor of Science Mortuary Science Program at the University of Minnesota's Medical School offered to upper-class and undergraduate students.³² The program requires students to successfully complete classes such as science, business, grief psychology, death and dying across cultures, embalming, and a clinical rotation in a funeral home.³³ The program does not, however, offer or require a specific ethics course.³⁴ The primary purpose of the program is to prepare mortuary students to be morticians and funeral directors.³⁵

²⁸ See *infra* note 43 and accompanying text (discussing Tatro's use of Facebook as her "whole social outlet" while studying at the University of Minnesota).

²⁹ See *infra* note 41 and accompanying text (stating that Tatro's instructor felt defining the term "blogging" was unnecessary because anybody could look it up in the dictionary).

³⁰ See *infra* note 41 and accompanying text (stating the professor testified that she did not provide the definition of "blogging" in any of her course materials).

³¹ See *infra* note 40 and accompanying text (discussing that it was common for other students to make comments regarding lab and course work on Facebook).

³² Respondent's Brief, *Tatro v. Univ. of Minn.*, 800 N.W.2d 811 (Minn. Ct. App. 2011) (No. A10-1440), 2010 WL 7131429 at *3 (discussing the requirements of the University of Minnesota's Mortuary Science Program).

³³ Relator's Brief and Addendum, *Tatro v. Univ. of Minn.*, 800 N.W.2d 811 (Minn. Ct. App. 2011) (No. A10-1440), 2010 WL 7131428 at *2 (explaining the required courses for completion of the Mortuary Science Program at the University of Minnesota).

³⁴ *Id.*

³⁵ *Id.* at *1. Tatro developed an interest in mortuary science after caring for her mother, who had suffered a severe brain injury, and serving as her mother's legal guardian. *Id.* at *2. Prior to her mother's injury, Tatro also struggled with her own physical limitations due to a handicap of her central nervous system. *Id.* Tatro's disability caused her to be completely immobile for many years until medical advances allowed electric spinal cord stimulators to be implanted and enabled her to move. *Id.* Tatro felt these experiences familiarized her with dying and grieving. Relator's Brief and Addendum, *supra* note 33, at *2. At the same time, she believed that she needed to joke and express humor, or "[she would] be the most miserable person on the planet." *Id.*

The Mortuary Department required laboratory courses using human cadavers from the University's Anatomy Bequest Program, which relied on individuals to donate their bodies to the University after death.³⁶ Tatro enrolled in three of the required laboratory courses in the fall of 2009 and received orientation and instructions on the Anatomy Bequest Program policies and the syllabus rules which governed each laboratory course.³⁷ Tatro signed the Anatomy Bequest Program Human Anatomy Access Orientation Disclosure Form, acknowledging that she understood and agreed to comply with both the program rules, as well as the additional laboratory policies stated in course syllabi.³⁸ Course rules allowed respectful and discreet “[c]onversational language of cadaver dissection outside the laboratory,” but prohibited “blogging” about the cadaver dissection or anatomy lab.³⁹ Tatro’s lab instructor, who drafted the course syllabus, testified that she intended “blogging” to be a broad term inclusive of discussion on Facebook and Twitter.⁴⁰ However, the University did not define “blogging” in any of the course criterion or its campus-wide rules and policies.⁴¹ The lab instructor told students that failure to adhere to these rules may result in their removal from the laboratory and anatomy course.⁴²

³⁶ Tatro v. Univ. of Minn., 816 N.W.2d 509, 512 (Minn. 2012). The University’s medical, dental, physical therapy, occupational therapy, medical device engineering, and mortuary departments all rely on donations through the bequest program for teaching and research purposes. *Id.* More information regarding the University’s professional schools may be found at: <https://webappsprd.oit.umn.edu/pcas/viewCatalogProgram.do?programID=194&strm=1129&campus=UMNTC>. Each of these respected programs also seeks to teach respective professional standards. *Id.*

³⁷ Respondent’s Brief, *supra* note 32, at *4. The first three hour session of Tatro’s laboratory course was devoted almost entirely to orientation materials including a fourteen minute Anatomy Bequest Program video which gave examples of disrespectful conversation outside of the lab such as one where two students were overheard discussing dissection in lab on a bus by a potential donor. *Id.* at *4–5.

³⁸ *Id.* at *7–8. The course syllabus for Tatro’s anatomy lab class included rules intended to promote respect for the cadaver. *Id.* at *5.

³⁹ *Id.*

⁴⁰ *Id.* at *6. Tatro later appealed the University sanctions to the University of Minnesota’s Office for Student Conduct and Academic Integrity (OSCAI) board, which administers student discipline. Respondent’s Brief, *supra* note 32, at *12–13. The instructor testified during the OSCAI hearing that she told students blogging included Facebook, Twitter, and MySpace; however, in response to the question, “So you specifically tell them that essentially any Internet sites like Facebook is not acceptable to write about the dissection or the cadaver?” There is no recorded response. Relator’s Brief and Addendum, *supra* note 33, at *10. Tatro testified that there was no discussion of what constituted blogging at orientation and that it was common for students to make general comments about lab classes on Facebook. *Id.* Jesse Clarkson, a mortuary student who testified on behalf of the University, did not recall if the instructor had mentioned anything about Facebook, Twitter, or MySpace in reference to blogging when he attended orientation. *Id.*

⁴¹ Relator’s Brief and Addendum, *supra* note 33, at *10. Tatro’s instructor testified that it was not necessary to define blogging because it was a term that anyone could look up in the dictionary. *Id.* The instructor claimed at the hearing that she relied on the

Tatro, like many students, used Facebook as a means to keep in contact with her family and friends while attending school.⁴³ On December 11, 2009, one of Tatro's classmates notified Mortuary Science Program staff of a handful of Tatro's Facebook posts which the student felt were offensive in relation to a laboratory cadaver.⁴⁴ The University ultimately claimed that the following four posts violated University program and rules:

Amanda Beth Tatro Gets to play, I mean dissect, Bernie today. Let's see if I can have a lab void of reprimanding and having my scalpel taken away. Perhaps if I just hide it in my sleeve . . . (November 12[, 2009])⁴⁵

Amanda Beth Tatro Is looking forward to Monday's embalming therapy as well as a rumored opportunity to aspirate. Give me room, lots of aggression to be taken out with a trocar. (December 6[, 2009])⁴⁶

definition of a blog from Webster dictionary; however, she did not share this definition in any of her course materials. *Id.*

⁴² Respondent's Brief, *supra* note 32, at *8. There was no mention of any other disciplinary consequences in the course materials. Relator's Brief and Addendum, *supra* note 33, at *13.

⁴³ Relator's Brief and Addendum, *supra* note 33, at *2 (citation omitted). In fact, Tatro described Facebook as her "whole social outlet." *Id.* Tatro's Facebook friends included hundreds of personal friends outside of the Mortuary Science Program, family, and classmates. *Id.* During the fall of 2009, Tatro's Facebook privacy settings allowed friends, as well as friends of friends to view her Facebook page. *Id.* Tatro later restricted her privacy settings so that only friends could view her account. *Id.* Tatro later claimed she did not believe that her Facebook posts fell within the scope of the blogging prohibition. *Tatro v. Univ. of Minn.*, 816 N.W.2d 509, 514 (Minn. 2012).

⁴⁴ Respondent's Brief, *supra* note 32, at *8–9 (emphasis added). Tatro stressed she made the posts off campus. *Tatro*, 816 N.W.2d at 524 n.5.

⁴⁵ Relator's Brief and Addendum, *supra* note 33, at *3. Tatro later explained that her reference to the donor as "Bernie" came from one of her favorite movies *Weekend at Bernie's*. *Id.* at *8 (citation omitted). The instructor had allowed past students to name donors as long as the names were respectful. *Id.* (citation omitted). Although Tatro did not mention her reasoning behind the name in any of her Facebook posts, the instructor later testified that she believed the name was in poor taste do to the plot in the movie where characters bring a deceased individual with them as if he was still alive. *Id.* (citation omitted). The director of the program, Michael LuBrant, testified that there was fear about Tatro hiding a scalpel up her sleeve. *Id.* at *6 (citation omitted). LuBrant claimed this post violated the Mortuary Department's policy to treat deceased persons with "proper care and dignity." *Id.* (citation omitted).

⁴⁶ Relator's Brief and Addendum, *supra* note 33, at *3 (emphasis added). A trocar is an instrument for embalming used to aspirate fluids and gases. *Id.* at 5 (citation omitted). The use of a trocar requires force to penetrate the body's tissue. *Id.* at 7 (citation omitted). Tatro later explained that her comment about aggression was made in reference to a prior

[Amanda Beth Tatro] Who knew embalming lab was so cathartic! I still want to stab a certain someone in the neck with a trocar though. Hmm . . . perhaps I will spend the evening updating my ‘Death List #5’ and making friends with the crematory guy. I do know the code . . . (December 7[, 2009])⁴⁷

Amanda Beth Tatro Realized with great sadness that my best friend, Bernie, will no longer be with me as of Friday next week. I wish to accompany him to the retort. Now where will I go or who will I hang with when I need to gather my sanity? Bye, bye Bernie. Lock of hair in my pocket. (Undated)⁴⁸

According to the director of the Mortuary Science Department Program, Michael LuBrant, staff members grew concerned for their safety.⁴⁹ Based on these concerns, LuBrant notified University police about the posts.⁵⁰ LuBrant told Tatro to stay away from the Mortuary Science Department and its staff while the matter was under investigation.⁵¹ According to the police report, LuBrant told police Tatro was suspended,

incident where a classmate had to use both hands to insert the trocar. *Id.* (citation omitted). At that time, other students joked about aggression. *Id.*

⁴⁷ *Id.* at *3. LuBrant testified he believed Tatro’s Facebook entries about stabbing a certain someone as threats to harm another person. Relator’s Brief and Addendum, *supra* note 33, at *7 (citation omitted). Tatro did not mention or indicate on Facebook any specific person she wanted to stab; however, later testified that she was referring to an ex-boyfriend. *Id.* at *6 (citation omitted). Tatro was also upset because she had just given permission for her mother to undergo an operation. *Id.* (citation omitted). She assumed that her Facebook friends would know she was not serious, but speaking sarcastically. *Id.* (citation omitted).

⁴⁸ *Id.* at *3 (emphasis added). Within a week of the Facebook post, Tatro had written “I heart Bernie” on the blackboard in class. *Id.* at *8 (citation omitted). The instructor did not tell Tatro at that time that she felt referencing him as Bernie was inappropriate. Relator’s Brief and Addendum, *supra* note 33, at *8. Tatro later testified that “Lock of hair in my pocket” referenced on of her favorite Black Crow songs. *Id.* at *9 (citation omitted). Tatro further explained during the OSCAI hearing that she believed she could be humorous on Facebook regarding her classes, but knew there were limitations as to the information she could share with non-classmates which “is precisely why I didn’t go into graphic detail on what I do in embalming labs or in the anatomy lab.” *Id.* (citation omitted).

⁴⁹ *Id.* at *5. LuBrant testified he was “very much concerned” when he saw the posts because he “didn’t know what they meant or what they were referring to, who they were talking about.” *Id.* LuBrant claimed that he later heard the post regarding stabbing someone in the neck may have been referring to him. *Id.* LuBrant met with Tatro on December 14, 2009, but never asked Tatro who or what she was referring to in her posts. Relator’s Brief and Addendum, *supra* note 33, at *5.

⁵⁰ *Id.* at *12.

⁵¹ *Id.*

however, later claimed the police report was inaccurate and that no one had ever told Tatro she was suspended from the program.⁵²

Tatro contacted the media in an attempt to bring attention to what she believed was a suppression of her First Amendment right to free speech.⁵³ The Anatomy Bequest Program began to receive letters and phone calls following the media coverage from donor families who expressed concern about Tatro's behavior.⁵⁴ University police ultimately determined that Tatro had not acted criminally, and on December 16, 2009, two days after she had been told to stay away from the department, staff allowed Tatro to return to complete her coursework and final examinations.⁵⁵ Tatro's laboratory instructor notified Tatro via email on December 22, 2009, that her grade had been entered for "MORT 3171" as a "C+", but that the instructor was submitting a formal complaint to the Office of Student Conduct and Academic Integrity ("OSCAI") and recommending a grade change to an "F" as a sanction for the Facebook posts.⁵⁶

B. Challenging the OSCAI before the University of Minnesota's Campus Committee on Student Behavior

Tatro challenged the OSCAI complaint in a formal hearing before the Campus Committee on Student Behavior ("CCSB").⁵⁷ Tatro testified at the hearing, explaining that she only intended her friends and family who would understand her sarcasm and morbid humor, as well as her references to her favorite movies and songs, to read her Facebook posts.⁵⁸ She further explained that her post regarding stabbing a "certain someone" was meant to be seen by her ex-boyfriend, who had broken up with her the night before.⁵⁹

⁵² *Id.*

⁵³ *Id.* at 40 n.5.

⁵⁴ Respondent's Brief, *supra* note 32, at *12.

⁵⁵ Relator's Brief and Addendum, *supra* note 33, at *12.

⁵⁶ *Id.* at *12–13. LuBrant asserted that Tatro did not believe she had done anything wrong and because she had not expressed remorse for her actions, he and the core faculty of the Mortuary Science Department felt she should be expelled. *Id.* at *13 (citation omitted). None of the faculty members who recommended expulsion asked Tatro what she intended by any of her Facebook posts. *Id.* (citation omitted).

⁵⁷ *Tatro v. Univ. of Minn.*, 816 N.W.2d 509, 514 (Minn. 2012).

⁵⁸ *Id.* at 513. Tatro testified that she gave her cadaver the name "Bernie" referencing the movie "Weekend at Bernie's"; that "Death List #5" was a reference to another one of her favorite movies, "Kill Bill"; and, that the phrase "Lock of hair in my pocket" was a reference to a song by the Black Crowes, one of her favorite bands. *Id.* Further, her post from December 7, 2009, "I still want to stab a certain someone in the throat with a trocar though" was a reaction to her long distance boyfriend who had recently ended their relationship; something her friends and family knew she had been upset by. *Id.* at 514. There is no evidence, aside from her Facebook posts, that Tatro discussed her anatomy laboratory or personally identifiable facts regarding the human donor with non-classmates. *See id.* at 521–22. Further, there is no evidence to suggest that Tatro physically handled the cadaver in a disrespectful way as her "lock of hair in my pocket" reference may suggest. *See id.*

⁵⁹ *Tatro*, 816 N.W.2d at 514. According to a study done in February of 2012 by the Pew Center's Internet and American Life Project, the average Facebook user has 245

LuBrant, two of the programs' instructors, and the President of the Mortuary Science Student Association also testified at the hearing about the program's focus on teaching respect, dignity, and professionalism.⁶⁰ The CCSB found Tatro responsible for violating the Student Conduct Code, which prohibits threatening conduct, and violating University rules, which prohibit conduct that violates departmental regulations.⁶¹ The CCSB's decision stated that Tatro's behavior was inappropriate for an individual within the mortuary profession.⁶² The CCSB required Tatro to seek professional guidance to facilitate her personal and professional development, and imposed the following sanctions:

1. Changing Tatro's grade in MORT 3171 to an "F";
2. Completion of a "directed study course" in clinical ethics;
3. A letter to one of the faculty members in the Mortuary Science Program addressing the issue of respect within the program and the profession;
4. A psychiatric evaluation at the student health service clinic and completion of any recommendations made by their evaluation; and
5. Placement on probation for the remainder of Tatro's undergraduate career.⁶³

"friends." Hayley Tsukayama, *Your Facebook Friends Have More Friends Than You*, WASH. POST, Feb. 3, 2012. These friends as well as often "friends of friends" may access any post made by the user. *Id.* Users can reach an average of 150,000 other people through friends of friends. *Id.* Less than five percent of users hide content from other users on their Facebook feeds. *Id.* Further explanation, as well as a link to the Pew Center's statistical findings, can be found at: http://www.washingtonpost.com/business/technology/your-facebook-friends-have-more-friends-than-you/2012/02/03/gIQAuNUlmQ_story.html.

⁶⁰ *Tatro*, 816 N.W.2d at 514.

⁶¹ *Id.* Such violations included: "(1) Anatomy Laboratory Rule #7, which provides in part that '[b]logging about the anatomy lab or the cadaver dissection is not allowable'; and (2) the rules listed on the Anatomy Bequest Program Human Anatomy Access Orientation Disclosure Form." *Id.* (alteration in original).

⁶² *Id.* (indicating that "the reason that these rules are strict is to set standards for behavior from the beginning of the program that will carry into the profession").

⁶³ *Id.* at 514–15.

Tatro subsequently appealed the CCSB's decision to the Provost's Appeal Committee, comprised of a panel that makes nonbinding recommendations for the Provost's review and ultimate decision.⁶⁴ Provost E. Thomas Sullivan issued a final decision, which affirmed the findings and imposed CCSB sanctions.⁶⁵

C. Appealing to the Minnesota Court of Appeals

Tatro appealed the University's decision to the Minnesota Court of Appeals by writ of certiorari.⁶⁶ Tatro alleged, among other things, that the sanctions violated her constitutional right to free speech.⁶⁷ The court of appeals determined the University's sanctions were constitutional if staff reasonably concluded that Tatro's posts would "materially and substantially disrupt the work and discipline of the school under the *Tinker* standard."⁶⁸ The court found that Tatro's Facebook activity had, in fact, substantially disrupted the work and discipline of the University, as well as the faith and confidence potential donors had in the bequest program.⁶⁹ Beyond the University's concern for the safety and security of its campus, the appeals court believed that Tatro's Facebook posts had resulted in substantial issues regarding the integrity of the University's Anatomy Bequest Program when concerned families and funeral directors contacted the University to complain following the resulting media coverage.⁷⁰ The court found these

⁶⁴ *Id.* at 515.

⁶⁵ *Tatro*, 816 N.W.2d at 515.

⁶⁶ *See* *Tatro v. Univ. of Minn.*, 800 N.W.2d 811 (Minn. Ct. App. 2011); 17 STEPHEN F. BEFORT, MINNESOTA PRACTICE, EMPLOYMENT LAW AND PRACTICE § 14:52, at n.21 (3d ed. 2012) (explaining that judicial review of quasi-judicial decisions may be invoked only by writ of certiorari to the Minnesota Court of Appeals absent a statute or appellate rule authorizing review to the district court).

⁶⁷ Realtor's Brief and Addendum, *supra* note 33, at *34. Tatro classified her Facebook posts as literary and satirical expression traditionally covered by the First Amendment. *Id.* at *35. Tatro further alleged that "[t]he 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.'" *Id.* at *34 (quoting *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 670 (1973)).

⁶⁸ *Tatro*, 800 N.W.2d at 813. In *Tinker*, two high-school students and one junior-high student violated school policy when they wore black armbands to school to protest U.S. involvement in the Vietnam war. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969). When they refused to remove the armbands, the students were suspended. *Id.* The Supreme Court subsequently held that the school's authorities had violated the students' First Amendment rights to free speech because the school had no reason to anticipate a "substantial disruption of or material interference with school activities," and no such disruption had occurred. *Id.* at 514. *Tinker* represents the beginning of a long line of United States Supreme Court cases which held that schools may limit or discipline student expression only when school officials reasonably determine that the otherwise protected First Amendment speech will materially and substantially disrupt the school's work and discipline. *See, e.g., Tinker*, 393 U.S. at 513; *Tatro*, 800 N.W.2d at 820.

⁶⁹ *Tatro*, 800 N.W.2d at 822.

⁷⁰ *Id.*

disruptions substantial, and upheld the University imposed sanctions citing *Tinker*.⁷¹

D. The Final Opinion by the Minnesota Supreme Court

The Minnesota Supreme Court granted certiorari to hear Tatro's case.⁷² Tatro argued that the *Tinker* standard, which deals with the regulation of speech in high schools, provided an improper framework to analyze the discipline of a post-secondary student.⁷³ The Minnesota Supreme Court agreed that *Tinker* was not the appropriate standard, but affirmed the sanctions as constitutional, holding that because the academic rules under which the sanctions were imposed were "narrowly tailored" and "directly related" to established professional standards, the University did not violate Tatro's free speech rights.⁷⁴

⁷¹ *Id.* at 813, 822–23.

⁷² *See* Tatro v. Univ. of Minn., 816 N.W.2d 509, 515 (Minn. 2012). Tatro initially sought review solely on the single issue of "[w]hether a public university violates constitutional free speech rights by disciplining a student for Facebook posts that contain satirical commentary and violent fantasy about her school experience but do not identify or threaten anyone." *Id.* However, after the court accepted review of Tatro's petition, Tatro attempted to further argue in her brief that the University lacked jurisdiction to conduct a disciplinary hearing, the University presented insufficient evidence to support the rule violations, and the University lacked authority to change a passing grade to a failing grade. *Id.* The Rules of Civil Appellate Procedure require a petitioning party to include a "statement of the legal issues sought to be reviewed" in the petition for review. MINN. R. CIV. APP. P. 117, subd. 3(a). As a result, the court declined to review the non-constitutional issues that Tatro did not specifically raise in her petition for review. *Tatro*, 816 N.W.2d at 515. The Minnesota Supreme Court allowed for briefing solely on the issue of free speech under the Minnesota and federal constitutions. *Id.*

⁷³ Appellant's Brief and Addendum, Tatro v. Univ. of Minn., 816 N.W.2d 509 (Minn. 2012) (No. A10-1440), 2011 WL 8203726 at *23. Tatro argued, "[t]he court of appeals . . . committed serious error by relying almost exclusively on case law setting forth the boundaries of free speech in high schools and junior high schools rather than colleges and universities." *Id.* Tatro further argued that *Healy v. James*, which stated that "colleges and universities are not enclaves immune from the sweep of the First Amendment," established that public university students are entitled to the same free speech rights as members of the general public. *Tatro*, 816 N.W.2d at 517–18 (citing *Healy v. James*, 408 U.S. 169, 180–81 (1972) (stating that "[t]he college classroom with its surrounding environs is peculiarly the 'marketplace of ideas'")). Conversely, the University asserted that it may enforce academic program rules that are reasonably related to legitimate pedagogical objectives of training students to enter the funeral director profession without violating the student's First Amendment rights, even when those rules extend to conduct that takes place off campus. *Id.* at 518 (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (stating that "educators 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"))).

⁷⁴ *Tatro*, 816 N.W.2d at 510–11, 524. Because the Minnesota constitutional right to free speech is coextensive with the First Amendment, the court looked primarily to federal law for guidance. *Id.* at 516 (citing *State v. Wicklund*, 589 N.W.2d 793, 798–801 (Minn. 1999) (declining to extend the free speech protections of the Minnesota Constitution "beyond those protections offered by the First Amendment"))).

The court determined that *Tinker* was inapplicable because the driving force behind Tatro's discipline was not the traditional substantial disruption to academic activities, but a violation of program rules pertinent to professional standards.⁷⁵ The court instead considered the special characteristics of the Mortuary Department's academic environment to determine whether punishment of Tatro's otherwise protected First Amendment speech was constitutional.⁷⁶ The court's new standard focused on the special characteristics of the University's curricular rules which, according to the University, were specifically designed to teach professional conduct standards.⁷⁷ The court reasoned that confining the newly established legal standard to solidified professional conduct guidelines would limit a university's ability to create overbroad restrictions that would impermissibly reach a student's personal and unrelated Facebook activity.⁷⁸

The court first determined that the University rules were directed to professional standards.⁷⁹ The court applied the professional standards of

⁷⁵ *Id.* at 519–20. The United States Supreme Court has explained that, in deciding the constitutional rights of students, the analysis set forth in *Tinker* is not absolute, but that courts must consider the special characteristics of the school environment at issue. *Id.* at 520 (quoting *Morse v. Fredrick*, 551 U.S. 393, 405 (2007)). In *Morse*, the Court considered the special circumstances of an off-campus, school sanctioned, and school supervised event, in which the student displayed a banner promoting illegal drug use. *Morse*, 551 U.S. at 393. The banner read “BONG HiTS 4 JESUS.” *Id.* The superintendent of the school explained that the student was disciplined, not because the school disagreed with his message, but because his speech appeared to suggest the school advocated the use of illegal drugs. *Id.* at 398. The Supreme Court held that the school's principal did not violate the student's First Amendment rights by confiscating the banner. *Id.* at 410.

⁷⁶ *Tatro*, 816 N.W.2d at 520 (stating that in *Morse*, the Court concluded that governmental interest in stopping student speech allowed the school to confiscate a banner promoting illegal drug use from a student off campus during a school sponsored event).

⁷⁷ *Id.* at 521. The court's opinion states:

We acknowledge the concerns expressed by Tatro and supporting amici that adoption of a broad rule would allow a public university to regulate a student's personal expression at any time, at any place, for any claimed curriculum-based reason. Nonetheless, the parties agree that a university may regulate student speech on Facebook that violates established professional conduct standards. This is the legal standard we adopt here, with the qualification that any restrictions on a student's Facebook posts must be narrowly tailored and directly related to established professional conduct standards.

Id. The court states that the factual situation presented in *Tatro* has not been addressed in any published court decision and, consequently, the constitutional standard that applies in the context is unsettled. *Id.* at 517.

⁷⁸ *Id.* at 521. “Accordingly, we hold that a university does not violate the free speech rights of a student enrolled in a professional program when the university imposes sanctions for Facebook posts that violate academic program rules that are narrowly tailored and directly related to established professional conduct standards.” *Id.*

⁷⁹ *Tatro*, 816 N.W.2d at 520 (stating that ethics are a fundamental part of the University's Mortuary program which trains students to be funeral directors and morticians)

morticians and funeral directors in Minnesota, as governed by statute, to determine if the University's rules were reasonably related.⁸⁰ The court concluded that the University, as well as course rules, Tatro was found to have violated were directly related to established professional standards that require professionals within the mortuary field to treat all individuals encountered within the scope of the profession with dignity and respect.⁸¹

The court also determined that the program rules were narrowly tailored to the relevant professional standards.⁸² In examining the scope of the program rules, the court considered whether the University's restrictions on the mode, manner, and place of student speech were "substantially broader than necessary" to achieve the desired objective.⁸³ While some professional standards are written with very precise language, others, which are less detail-oriented, are in practice very broad.⁸⁴ Nonetheless, the court concluded that the University's sanctions were grounded in narrowly tailored rules which regulated widely disseminated Facebook posts because the University was not sanctioning Tatro for a private conversation, but for posts that could be viewed by thousands, as well as for sharing the Facebook posts

and that the University is entitled to set and enforce reasonable course standards designed to teach professional norms).

⁸⁰ *Id.* at 521–22.

⁸¹ *Id.* at 522–23. "Giving deference to the curriculum decisions of the University, we conclude that the academic program rules imposed on Tatro as a condition of her access to human cadavers are directly related to established professional conduct standards." *Id.*; see also MINN. STAT. §149A.70, subd. 7(3) (2007) (defining unprofessional conduct within the mortuary field as failure to treat any person encountered while within the scope of the practice, employment, or business with dignity and respect, which the court analyzed in *Tatro*).

⁸² *Tatro*, 816 N.W.2d at 523.

⁸³ *Id.* (relying on *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) which held that regulation of time, place, or manner of protected speech must be narrowly tailored to serve the government's interests, but need not be the least restrictive means of doing so).

⁸⁴ Compare 52 MINN. STAT. ANN., LAWYERS PROF. RESP. BD., OPINION 21 (2009) (giving precise details regarding a lawyer's duty to consult with a client about the lawyer's own malpractice) with MINN. STAT. § 148B.59 (2007) (allowing revocation of a counselor's license if the professional board determines that the counselor engaged in fraudulent, deceptive, or dishonest conduct, whether or not the conduct relates to the practice of licensed professional counseling). For example, the University in *Tatro* stated that their undergraduate and graduate programs intended to educate students for entry into the many professions that carry with them obligations of discretion, confidentiality, and professionalism. *Tatro*, 816 N.W.2d at 520 (noting that the driving force behind the University's discipline was not a substantial disruption, as in *Tinker*, but that Tatro's Facebook posts violated established program rules that required respect, discretion, and confidentiality in connection with work on human cadavers). To prepare students for those professions, the University must train them in the ethical and professional standards to which they will be held. *Id.* The court in *Tatro*, however, did not specify whether constitutional interference with a student's otherwise protected First Amendment speech by a university's application of "narrowly tailored" and "directly related" university rules would also apply to broadly professional standards or only those which are also "narrowly tailored." *Id.* at 521–22.

with the media.⁸⁵ Applying the narrowly tailored and directly related standards, the court determined that the Mortuary Science Program rules required students to conduct themselves accordingly and that punishment for violation of such standards did not violate Tatro's First Amendment rights.⁸⁶

Tatro's attorney, Jordan Kushner, stated in an interview with a Minneapolis newspaper, *The Star Tribune*, that Tatro wanted to appeal her case to the United States Supreme Court.⁸⁷ However, Tatro died just days after the Minnesota Supreme Court issued its opinion.⁸⁸ Jordan Kushner has recently begun another lawsuit which is, at first glance, seemingly similar to Tatro's, in what appears to be his ongoing attempt to assert that Facebook is the student's and not the public university's, "business."⁸⁹

⁸⁵ *Id.* at 523 (holding that the school's rules prohibiting blogging about cadaver dissection were not substantially broader than necessary to achieve desired results).

⁸⁶ *Id.* at 523. The Minnesota Supreme Court stated:

In this case, the University is not sanctioning Tatro for a private conversation, but for Facebook posts that could be viewed by thousands of Facebook users and for sharing the Facebook posts with the news media. Accordingly, we conclude that the University's sanctions were grounded in narrowly tailored rules regulating widely disseminated Facebook posts.

Id. The court further noted that courts have previously considered the severity of punishment in student speech cases and, in Tatro's case, she was not expelled or even suspended from the Mortuary program, but instead continued within the Mortuary Science Program with a failing grade in one laboratory course. *Tatro*, 816 N.W.2d at 524.

⁸⁷ Abby Simmons, *U Grad in Facebook Case Dies*, STAR TRIB., June 26, 2012.

⁸⁸ *Id.* Tatro was thirty-one when she passed away. *Id.* Kushner described Tatro as "largely bionic" due to a condition which affected her nervous system. *Id.* Tatro, prior to her death, graduated from the University's Mortuary Science Program. *Id.* According to Kushner, she had a difficult time finding work due to her disability. *Id.* She eventually did find work with a funeral home; however, complications from her condition prevented her from working fulltime. Simmons, *supra* note 87. Tatro's cause-of-death was not released to the media, and her family declined to comment. *Id.* However, Minneapolis police stated that they did not consider her death to be suspicious. *Id.*

⁸⁹ David Hanners, *Student Expelled from Brainerd Nursing School for Facebook Comment Sues*, TWIN CITIES PIONEER PRESS, Feb. 17, 2013. On February 8, 2013, Kushner filed a complaint on Craig Keefe's behalf. Complaint, *Keefe v. Adams*, 13-CV-00326-JNE-LIB, (D. Minn. Feb. 8, 2013). Keefe, who was just one semester away from finishing his degree to become a registered nurse, was expelled for allegedly posting the phrase "stupid bitch" on his Facebook page, as well as another comment about there not being enough whiskey for anger management. *Id.* at 5. Keefe alleges in his complaint:

Defendants, acting under color of state law, deprived Plaintiff Craig Keefe of his rights, privileges and immunities secured by the Constitution and laws of the United States, in violation of 42 U.S.C. § 1983, specifically in violation of his First Amendment Rights to Free Speech, by removing him from an academic program because of he exercised of his basic and fundamental right to free expression on his personal time and in a context that has nothing to do with his obligations as a student.

Id. at 9. The complaint further states:

III. BACKGROUND

The Supreme Court has remained silent on the issue of otherwise protected, off-campus speech.⁹⁰ While some courts have allowed both K-12, as well as post-secondary schools, to regulate and sanction students for speech occurring on the Internet, others have found this activity unconstitutional.⁹¹ In response to these inconsistent or potentially undesirable results, state legislatures have taken the matter into their own hands to limit monitoring of student's social networking activity.⁹²

[The school administrator] then asked Keefe for an explanation, while refusing to let him see the documents. Keefe stated that the comment about whiskey was a joke, that his Facebook account had been hacked a couple of weeks ago and he had tried to delete comments which had been posted. [The administrator] then told Keefe that he was going to be removed from the nursing program. She held up a stack of papers which was allegedly Keefe's entire Facebook page and told him she had read the whole page and found it disturbing. [She] refused to allow Keefe to see the documents. [She] also refused to tell Keefe how she accessed his private Facebook page, but stated she realized it was a violation of his First Amendment rights.

Id. at 5. Keefe further asserts that the University deprived him of his right to due process when the expulsion took place without notice or the opportunity to be heard. *Id.* at 8.

⁹⁰ Mary Sue Backus, *OMG! Missing the Teachable Moment and Undermining the Future of the First Amendment – TISNF!*, 60 CASE W. RES. L. REV. 153, 165–67 (2009) (stating that recent Supreme Court cases regarding student speech are limited to on-campus activity or speech which occurred off school grounds, but during a school-supervised event and that the Supreme Court has never directly addressed the contours of a student's free speech rights when such speech originates off campus).

⁹¹ *Compare Tatro*, 816 N.W.2d at 510–11 (holding that the University did not violate Tatro's free speech rights because the academic program rules under which the sanctions were imposed were narrowly tailored and directly related to established professional conduct standards) *with J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 933 (3d Cir. 2011) (holding that because neither the Supreme Court nor the Third Circuit has ever allowed schools to punish students for off-campus speech that is not school sponsored or at a school-sponsored event, and because under the *Tinker* standard the district could not have reasonably foreseen an on-campus substantial disruption would have occurred, the school district should not have punished the student for creating a fake MySpace.com profile using her principle's picture and accusing him of being a pedophile and sex addict outside of school, during non-school hours).

⁹² David L. Hudson Jr., *Site Unseen: Schools, Bosses Barred from Eyeing Students', Workers' Social Media*, 98-NOV A.B.A. J. 22, 22–23 (2012) (stating that counteracting legislation arose in a number of states in 2012 to prohibit academic institutions from requiring students or applicants for admission to disclose passwords or account related information to gain access to the student's social media profiles).

A. Modern Social Media

Social networking has revolutionized the way people communicate.⁹³ Individuals can, and do, access Facebook and MySpace wherever they go.⁹⁴ To some, technology is not a tool, but literally a way of life.⁹⁵ Social networking websites allow an individual to post pictures and information about themselves at the touch of a button.⁹⁶ The reality, however, is that nothing a person posts on Facebook remains completely confidential.⁹⁷

MySpace was one of the nation's earliest widespread social networking websites.⁹⁸ MySpace co-founder, Tom Anderson, believed that MySpace's success was due, in part, to its appeal to those he termed "fakesters."⁹⁹ So-called fakesters could create a personal profile on MySpace using any identity they liked by making their page look any way they wanted.¹⁰⁰ However, because MySpace allowed members the ability to portray themselves as anyone, it made limiting connections to genuine friends difficult for users.¹⁰¹ MySpace also became known for its sexual influences.¹⁰² The website's policy required users to be at least sixteen, but

⁹³ See Browning, *supra* note 5, at 842 (discussing the discipline of student-athletes for information shared on social networking websites).

⁹⁴ ANDREWS, *supra* note 1, at 3 (explaining that at one point, cell phones and internet were banned in certain places like, for example, courthouses, but now social institutions have largely accepted the prevalent use of technology and abandoned restrictions on use).

⁹⁵ LARRY D. ROSEN, REWIRED: UNDERSTANDING THE iGENERATION AND THE WAY THEY LEARN 27 (2010). The author states that when he asked a friend's daughter why she liked technology so much, the daughter replied: "What do you mean why do I like technology? Isn't everything technology? I guess I don't even think about it. It's sorta like the sky, ya know. I don't think about the sky. I just know that when I look up it's there. Same with technology. It's just everywhere." *Id.*

⁹⁶ KIRKPATRICK, *supra* note 7, at 75–76 (noting that social networking sites, like MySpace, allow a user to have control over what information is posted).

⁹⁷ *Id.* at 204 (explaining that the company's privacy statement reads that any of an individual's personal data "may become publically available" after being posted on Facebook).

⁹⁸ *Id.* at 77 (discussing the introduction and evolution of social networking).

⁹⁹ *Id.* at 74–75 (suggesting that MySpace was different from its competition Friendster by allowing members to create their own webpage designs and being less rigid about who could join than other social networks).

¹⁰⁰ *Id.* (noting that users were able to create profiles using any identity they liked because co-founders Tom Anderson and Chris DeWolfe put very few restrictions on how subscribers could use the website).

¹⁰¹ *Id.* at 75 (suggesting that some people began adding friends regardless of whether they knew them almost in a competitive way because the more friends you had, the better).

¹⁰² KIRKPATRICK, *supra* note 7, at 75–76 (stating that because MySpace advertised to nightclubs and bars and had few restrictions for its users, Myspace became known as a "digital club" where wild behavior was welcome).

many younger teens and children created profiles.¹⁰³ In February, 2004, the same month Facebook was launched to the first group of eligible students at Harvard University, MySpace was becoming the nation's dominant social networking website with more than one million members.¹⁰⁴

Conversely, Facebook, originally known as TheFacebook, offered users limited functionality and personalization when compared to MySpace.¹⁰⁵ One of the most notable differences, at the time of launch, was that Facebook was only available to students enrolled at elite universities.¹⁰⁶ Unlike MySpace, privacy restrictions ensured that Facebook users were likely connecting to real people who were accurately portraying themselves.¹⁰⁷ As time progressed, the social networking site became available to non-students, and by September, 2008, Facebook reached 100 million active users world-wide.¹⁰⁸ As Facebook expanded, the company relaxed the website's strict privacy settings, and personal and private user information is now shared by Facebook with its partner websites and used to target advertisers.¹⁰⁹

With the help of Facebook and MySpace, social networking has drastically changed the way in which students communicate with one another.¹¹⁰ However, as individuals continue to utilize technology making their private information and thoughts widely accessible, it remains unclear

¹⁰³ *Id.* (explaining that it was not unusual for girls as young as thirteen to post pictures of themselves wearing only undergarments and parents across the country became increasingly alarmed about the dangers of social media).

¹⁰⁴ *Id.* at 77 (discussing the reputation of MySpace prior to Facebook's launch in 2004).

¹⁰⁵ *Id.* at 77 (explaining that Facebook, or what was then called TheFacebook, had a contrasting tone to MySpace because it limited users' ability to customize their personal pages).

¹⁰⁶ *Id.* (explaining that Facebook was the first social network created exclusively for college students).

¹⁰⁷ *Id.* at 83 (expressing that later lawsuits alleged Facebook founder Mark Zuckerberg stole the idea of a college-centered social networking site which would require users to register with their ".edu" email addresses to ensure safe connections).

¹⁰⁸ KIRKPATRICK, *supra* note 7, at 303 (discussing the growth of Facebook.com and the on-going efforts by its CEO Mark Zuckerberg to keep the website relevant and growing).

¹⁰⁹ ANDREWS, *supra* note 1, at 126 (explaining the erosion of Facebook's privacy policy from 2005 through April, 2010). Although we may sign on to our social networking sites believing them to be a private place, personal information is routinely pulled from our social networking pages. *Id.* Andrews argues that social networking companies waited to pull the rug out from under users by changing their policies on private information only after so many users were "hooked." *Id.*

¹¹⁰ ROSEN, *supra* note 95, at 27 (stating that preteens and teens are accessing and using technology at all hours of the day).

exactly what rules and principles should govern this new social networking nation.¹¹¹

B. Striking the Balance: First Amendment Speech in Public K-12 School Systems

The United States Supreme Court first addressed First Amendment student speech rights in *Tinker v. Des Moines Independent Community School District*.¹¹² The Court began its opinion by stating, “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,” however, “the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.”¹¹³ Therefore, when a student’s exercise of First Amendment speech conflicts with the rules of their respective public schools, courts are required to reconcile the two important but competing interests.¹¹⁴

Tinker concerned the potential impact students’ display of black armbands in protest of the Vietnam War had on both a school’s productivity, as well as the rights of other students to be secure.¹¹⁵ Faculty and staff had no indication that the armbands would interfere with the school’s work or the non-protesting students’ rights and, therefore, the school had no reason to anticipate a substantial disruption to productivity.¹¹⁶ The school’s desire to avoid a disagreement in opinion regarding hot button topics among its students was not enough to allow them to silence student speech on campus.¹¹⁷ Because the school district was unable to point to any specific instances of violence or threats of violence as a result of the students’ display of their black armbands, the Court held the resulting suspensions were unconstitutional.¹¹⁸

¹¹¹ See ANDREWS, *supra* note 1, at 14 (arguing that the very structure of social networking websites like Facebook prevent an individual from reinventing themselves, and that pictures and information posted can be perpetually used against an individual).

¹¹² Benjamin T. Bradford, *Is it Really MySpace? Our Disjointed History of Public School Discipline for Student Speech Needs a New Test for an Online Era*, 3 J. MARSHALL L. J. 323, 326 (2010) (discussing *Tinker* as the first case in which the Supreme Court was asked to determine the limits of a public school student’s First Amendment right to expression).

¹¹³ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506–07 (1969).

¹¹⁴ *Id.* at 507.

¹¹⁵ *Id.* at 508.

¹¹⁶ *Id.* at 509–10. A few students made hostile remarks to the students; however, no threats or acts of violence took place on the school’s premises. *Id.* at 508.

¹¹⁷ *Id.* at 509. “In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” *Tinker*, 393 U.S. at 509.

¹¹⁸ *Id.* at 508. The Court further explained that the *Tinker* principle is applicable not only to the supervised speech that takes place in the classroom, but speech throughout the

Since *Tinker*, the Supreme Court has upheld limited regulation of student expression in public grade schools.¹¹⁹ Accordingly, school administrators have limited discretion in disciplining on-campus student speech.¹²⁰ Supreme Court precedent suggests that at least four types of student speech may be regulated in public grade schools: on-campus speech that materially and substantially disrupts school activities; on-campus lewd or offensive speech; speech that advocates the use of illegal drugs; and finally, speech which falls into one of the prior three categories and occurs at school-sponsored events (presumably off campus).¹²¹ Currently, the Court has declined to hear any major appeal involving student speech that occurs entirely off campus, including the Internet speech of either a K-12 or post-secondary student.¹²²

Silence by the Supreme Court on the issue of off-campus student speech has led to the monitoring and punishment of students for communication on social networking websites by many public K-12 schools

inevitable activities occurring on campus during school hours, such as in the cafeteria or on athletic fields, to accommodate the students required by law to attend. *Id.* at 512–13.

¹¹⁹ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271–73 (1988) (holding that two high school principals’ decision to remove two pages from a student newspaper on the ground that the articles unfairly impinged on privacy rights of pregnant students did not violate student writers’ First Amendment speech rights); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685–86 (1986) (determining that a school district did not violate a student’s First Amendment rights to free speech when it expelled him for referring to a fellow student in terms of elaborate, graphic, and explicit sexual language during a school assembly).

¹²⁰ *Bradford*, *supra* note 112, at 331 (noting that while schools have been given more power to censor student speech occurring on campus, it is important to note that the Supreme Court has yet to rule on student speech occurring off campus, after school hours).

¹²¹ *Id.* (discussing that there are at least four types of student speech which clearly regulate student speech occurring on campus in public grade schools); *see also Morse v. Frederick*, 551 U.S. 393, 408–10 (2007) (holding that while *Tinker* warned that schools may not prohibit student speech because of undifferentiated fear or apprehension of disturbance, a school district did not offend a student’s constitutional rights following his display of a sign promoting illegal drug use at a school sponsored event); *Hazelwood*, 484 U.S. at 271–73 (holding that the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to student expression and that lewd and offensive speech in a school newspaper could be censored and punished with expulsion without violating a student’s First Amendment rights); *Bethel Sch. Dist.*, 478 U.S. at 688–89 (holding that, although vulgar speech at an assembly is unlike *Tinker* in that it does not concern political viewpoints, the First Amendment does not prevent the school officials from determining under the same standard that to permit a vulgar and lewd speech such as respondent’s would undermine the school’s basic educational mission).

¹²² *See Bradford*, *supra* note 112, at 331–33 (arguing that Supreme Court precedent provides “ample rationale as to why schools must be allowed to control student expression at school, but when the tests outlined in those cases are extended to student speech occurring at places and times when the students are no longer under school supervision, the logic behind each of the tests begins to crack, if not completely crumble . . . [h]owever, because the Court did not outline a method for determining how speech that occurs off campus can become school speech, lower courts were left to formulate their own tests”).

across the country.¹²³ Conversely, however, some public K-12 schools have struggled to hold students accountable for gross violations of curricular rules.¹²⁴ In both *Snyder v. Blue Mountain School District* and *Layshock v. Hermitage School District*, the Third Circuit Court of Appeals held that a student who ridicules a school principal online cannot be punished by school authorities when the speech occurs entirely off campus and does not substantially disrupt school activities.¹²⁵

I. Snyder v. Blue Mountain School District and Layshock v. Hermitage School District

In *Snyder*, a Pennsylvania middle school student was suspended following her creation, from her home computer, of an Internet profile on MySpace.com, using her principal's photograph.¹²⁶ The profile did not identify the principal by name, school, or location; however, it presented a parody depicting a bisexual Alabama middle school principal named "M-Hoe."¹²⁷ Statements made on the MySpace.com profile insinuated, among other things, that the principal was both a sex addict and a pedophile.¹²⁸

Similarly, in *Layshock*, a high school student, using his grandmother's home computer, created a fake MySpace.com profile for his principal containing the principal's first and last name, his photograph from the school district's website, and fabricated answers to survey questions

¹²³ Hudson, *supra* note 92, at 22–23 (arguing that there are multiple incidents throughout the nation where schools are invading the privacy rights of K-12 students by observing their social media pages).

¹²⁴ J.S. *ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 933–40 (3d Cir. 2011) (holding that because neither the Supreme Court nor the Third Circuit has ever allowed schools to punish students for off-campus speech that does not occur at a school-sponsored event, and because under the *Tinker* standard the district could not have reasonably foreseen an on-campus substantial disruption would have occurred, the school district should not have punished the student for creating a fake MySpace.com profile using her principal's picture and accusing him of being a pedophile and sex addict outside of school, during non-school hours); *see also Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 219 (3d Cir. 2011) (deciding, as in *Snyder*, that a school district's limited authority to punish off-campus conduct does not extend to suspending a student for the creation of an equally vulgar fake MySpace.com account using a student's high school principal's full name and photograph).

¹²⁵ *Snyder*, 650 F.3d at 931 (stating that the school district could not have reasonably foreseen that a substantial, on-campus disruption would have occurred); *see also Layshock*, 650 F.3d at 219 (stating "[w]e need not now define the precise parameters of when the arm of authority can reach beyond the schoolhouse gate because, as we noted earlier, the district court found that Justin's conduct did not disrupt the school").

¹²⁶ *Snyder*, 650 F.3d at 920.

¹²⁷ *Id.*

¹²⁸ *See id.* at 921. For example, the "About Me" portion of the profile read as follows: "HELLO CHILDREN[,] yes. it's your oh so wonderful, hairy, expressionless, sex addict, fagass, put on this world with a small dick PRINCIPAL[,] . . . I love children, sex (any kind), dogs, long walks on the beach, tv, being a dick head, and last but not least my darling wife who looks like a man (who satisfies my needs) . . ." *Id.* (alteration in original).

intended to assist users in creating their account.¹²⁹ The student answered the “tell me about yourself” questions to include answers such as: “Birthday: too drunk to remember”; “Are you a health freak: big steroid freak”; “In the past month have you smoked: big blunt”; “In the past month have you gone Skinny Dipping: big lake, not big dick”; etc.¹³⁰

In an attempt to follow *Tinker* and subsequent student speech cases, the Third Circuit held in both cases that because the students’ creation of the MySpace.com profiles did not cause a substantial disruption within the schools, the districts violated the students’ First Amendment rights when they suspended them for making the MySpace pages.¹³¹ The two school districts filed a joint appeal to the United States Supreme Court following the Third Circuit Court of Appeals’ decisions.¹³² The petition argued:

The legal uncertainty is generating tremendous confusion and wasting resources in thousands of school districts across the country, where these issues arise on nearly a daily basis. At the moment, school officials are stuck between a rock and a hard place: They are responsible for protecting students and teachers from online harassment, but in doing so, they might trigger a lawsuit from a student claiming that his or her First Amendment rights have been violated. School officials cannot afford to wait any longer for a definitive answer.¹³³

On January 17, 2012, the Supreme Court denied the parties’ petition for writ of certiorari.¹³⁴ Although both *Snyder* and *Layshock* concern student harassment of a principal, educators and parents have grown increasingly concerned, as similar incidents directed at classmates have had harmful effects on youth.¹³⁵

¹²⁹ *Layshock*, 650 F.3d at 207–08.

¹³⁰ *Id.* at 208.

¹³¹ *Snyder*, 650 F.3d at 931 (stating that there was no reasonably foreseeable disruption the district could have anticipated); *see also Layshock*, 650 F.3d at 219 (stating that the student’s conduct did not disrupt the school and that none of the narrow circumstances that would allow the school to punish for off-campus conduct occurred).

¹³² Petition for a Writ of Certiorari, *Blue Mountain Sch. Dist. v. Snyder*, No. 11-502 (Oct. 18, 2011), 2011 WL 5014761 at *1.

¹³³ *Id.* at *2–3.

¹³⁴ Petition for a Writ of Certiorari, *Blue Mountain Sch. Dist. v. Snyder*, 132 S. Ct. 1097 (Jan. 17, 2012) (No. 11-502). The United States Supreme Court did not provide any explanation for the denial. *Id.*

¹³⁵ NANCY E. WILLARD, *CYBERBULLYING AND CYBERTHREATS: RESPONDING TO THE CHALLENGE OF ONLINE SOCIAL AGGRESSION, THREATS, AND DISTRESS 1* (2007) (discussing strategies for school administrators, counselors, psychologists, school resource officers, teachers, and others in dealing with cyberbullying and cyberthreats among youth). Children and youth who are targets of bullying can become tense, anxious, and afraid. *Id.* at 47.

2. Cyberbullying in K-12 Public Schools

Nancy Willard, executive director of the Center for Safe and Responsible Internet Use, defines cyberbullying as the sending or posting of harmful or aggressive material using the Internet or other digital technology.¹³⁶ She further defines cyberthreats to include the sending or posting of direct threats that suggest the student may be considering committing an act of violence against him or herself, or another person.¹³⁷ As young students become increasingly connected to the Internet and digital technology, educators are faced with challenging issues when off-campus cyberbullying and cyberthreats, which may be considered protected speech, affect students on campus.¹³⁸ Educators are left with uncertain standards to determine when they can intervene in cases of off-campus cyberbullying.¹³⁹

Cyberbullying is a relatively new phenomenon.¹⁴⁰ As a result, its effects have not been widely studied and results of limited studies are largely inconsistent.¹⁴¹ The prevalence of cyberbullying and cyberthreats is largely unknown due, in part, to the fact that children and teens rarely report the abuse.¹⁴² Unlike traditional on-campus bullying, cyberbullying can occur at any time of the day or night, making it often inescapable for victims.¹⁴³ Cyberbullies are also often able to remain completely anonymous, saying

Bullying can have long-term consequences, even years after the bullying has stopped. *Id.* at 48. Adults who were bullied as children have higher levels of depression and poorer self-esteem than other their age. *Id.* It is possible that the effects of cyberbullying can be more emotionally damaging than traditional bullying for a number of reasons including that targets of in-school bullying have the ability to escape when at home, while cyberbullying can occur at all hours of the day. *Id.*

¹³⁶ *Id.* at 1. Willard provides a number of examples illustrative of how cyberbullying may occur including the following example: “Mary, an obese high school student, was changing in the locker room after gym class. Jessica took a covert picture of her with her cell phone camera. Within seconds, the picture was flying around the cell phones at school.” WILLARD, *supra* note 135, at 1.

¹³⁷ *Id.* at 2. However, different researchers have labeled specific acts including cyberbullying and cyberthreats differently. *Id.* at 32.

¹³⁸ *Id.* at 2.

¹³⁹ *Id.* at 101.

¹⁴⁰ Renee L. Servance, *Cyberbullying, Cyber-Harassment, and the Conflict Between Schools and the First Amendment*, 2003 WIS. L. REV. 1213, 1216 (2003) (suggesting that although the use of the Internet to bully is a relatively new phenomenon, the only real difference between cyberbullying and traditional bullying is that it takes place on the Internet).

¹⁴¹ WILLARD, *supra* note 135, at 32 (stating that it is probable that inconsistencies in the limited studies that have taken place on cyberbullying may be due, in part, to the differences in labeling for specific acts).

¹⁴² *Id.* at 49 (suggesting that many teens think the adults they would otherwise go to for help will not understand the Internet and their online world or know how to respond to the bullying and be unable to help).

¹⁴³ *Id.* at 48 (suggesting that a cyberbully can target their victim any time they use a technological device, or even when they are not using the device by creating a defaming website that remains visible to others on the Internet at all times).

things they might not otherwise say in person as a result.¹⁴⁴ Furthermore, unlike traditional bullying, Internet-created harassment can make the communication widely available and accessible by countless others when comments are sent using email or by posting on a public forum such as MySpace or Facebook.¹⁴⁵ Finally, hurtful comments may remain on the Internet indefinitely, and victims are unable to escape the harassment.¹⁴⁶ Because teens spend an increased amount of time using the Internet to communicate, online harassment has become prevalent.¹⁴⁷

Like school administrators who risk violating a student's First Amendment rights by taking action against a cyberbully, educators who do not respond to student threats may also risk liability.¹⁴⁸ As of 2009, twenty states had adopted laws to combat cyberbullying in K-12 public schools.¹⁴⁹ These state laws, however, only cover incidents of cyberbullying within the limited authority of public schools over on-campus student speech and, therefore, leave cyberbullying that occurs off campus and during after-school hours unpunishable.¹⁵⁰ Additionally, parents and victimized students may bring tort or criminal actions for such harassment in absence of cyberbullying laws.¹⁵¹ Finally, when harmful speech is significantly damaging to a student's emotional well-being and interferes with a student's

¹⁴⁴ Alison Virginia King, *Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech*, 63 VAND. L. REV. 845, 850 (2010) (discussing the evolution of bullying from the playground to the Internet and suggesting that the ease of remaining anonymous on the Internet can make it hard for victims to initially respond to their bullies).

¹⁴⁵ *Id.* (stating that, even worse, some websites are specifically dedicated to online criticism and exist solely for cyberbullies to post photos and insulting captions).

¹⁴⁶ *Id.* at 850–51 (arguing that the relative ease with which bullies can harass online creates disproportionate effects for the target who may be unable to escape the presence of a comment that they cannot remove from the Internet).

¹⁴⁷ WILLARD, *supra* note 135, at 32 (arguing that despite the difficulty in determining precise incident rates of cyberbullying and cyberthreats, such harassment has become as great a concern as traditional bullying, if not greater).

¹⁴⁸ Servance, *supra* note 140, at 1215. Schools have been held liable for failing to respond to instances of peer-to-peer harassment. *Id.* Following the Columbine shootings, parents of survivors and families of students who were killed sued the Jefferson County school district in Colorado for failing to protect their children from peer-to-peer danger. *Id.* at 1215 n.11. See, e.g., Peter G. Chronis, *Victims' Cases Seen as Rocky Ground for Lawyers*, DENVER POST, May 21, 1999, at A7.

¹⁴⁹ King, *supra* note 144, at 858; see, e.g., MINN. STAT. § 121A.0695 (2007) (stating “[e]ach school board shall adopt a written policy prohibiting intimidation and bullying of any student. The policy shall address intimidation and bullying in all forms, including, but not limited to, electronic forms and forms involving Internet use”).

¹⁵⁰ King, *supra* note 144, at 860 (arguing that these laws apply only to peer-to-peer harassment and that non-students cannot be punished by a school district they do not attend).

¹⁵¹ *Id.* at 852 (suggesting that this is not a sufficient remedy for victims of cyberbullying because tort and criminal laws are not specifically designed to counteract Internet harassment).

ability to learn, courts may be inclined to support district intervention under the material and substantial disruption language set forth in *Tinker*.¹⁵²

School officials are not helpless, however, even when questioned speech does not fall under enacted state cyberbullying statutes, tort law, or criminal law.¹⁵³ Informal intervention, without punishment, to address incidents of cyberbullying may provide an effective solution for a K-12 administration seeking to avoid liability for the suppression of First Amendment rights.¹⁵⁴ Educators can do this by informally involving parents, school counselors, teachers, and school staff.¹⁵⁵

C. The Monitoring of College Applicants' and Student-Athletes' Social Media Accounts by Public Universities

As social networking websites have grown, access to the information they contain has become increasingly simple for post-secondary educational institutions and programs.¹⁵⁶ Some state legislatures have responded by forbidding post-secondary and K-12 schools from monitoring students' social networking activity.¹⁵⁷

A survey in 2008 revealed that one in every ten college admissions officers used social networking websites to view applicant activity as a part of their decision-making process.¹⁵⁸ Of the admissions officers viewing applicant web pages, thirty-eight percent said that viewing the pages had a negative impact on the students' admissions evaluations.¹⁵⁹ Likewise, many public colleges and universities across the country are mandating that student-athletes install software applications on their computers and wireless

¹⁵² WILLARD, *supra* note 135, at 114–15 (suggesting that determining whether the threat will likely result in a material and substantial disruption requires an assessment of the overall situation as well as the degree of harmfulness of the speech). *Tinker* references a public K-12 school's ability to protect the rights of other students to be let alone and free from harm who are required by law to attend during school hours and therefore cannot avoid exposure to the offensive speech. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969).

¹⁵³ WILLARD, *supra* note 135, at 115–16 (stating that there are ways to intervene informally to address incidents of cyberbullying occurring off campus when educators become concerned for the impact it is having on students or otherwise on campus).

¹⁵⁴ *Id.* at 115.

¹⁵⁵ *Id.*

¹⁵⁶ ANDREWS, *supra* note 1, at 126 (arguing that personal information about social network users is routinely viewed without users knowing it as a result of Facebook's eroding privacy policy).

¹⁵⁷ Browning, *supra* note 5, at 843 (discussing the response of state legislatures to post-secondary monitoring of student speech on social networking websites).

¹⁵⁸ ANDREWS, *supra* note 1, at 122 (discussing how seemingly innocuous postings have been used to make judgments about people by schools, employers, mortgage brokers, credit card companies, and many other social institutions).

¹⁵⁹ *Id.* One admissions officer stated that a potential applicant had been rejected when the officer viewed the student's posts bragging that he felt he had aced the application process for the school, but that he did not feel he wanted to attend. *Id.*

devices which monitor their activity and search for key words suggestive of discussion regarding use of alcohol or illegal drugs, obscenities or offensive comments, or references to NCAA violations including the offering of bribes or solicitation of agents.¹⁶⁰

In an attempt to protect students, legislatures in Maryland, Delaware, and California have passed legislation forbidding both K-12, as well as post-secondary educational institutions and programs, from requiring students to provide login information, passwords, or installing monitoring software.¹⁶¹ Courts have also responded to protect First Amendment interests on social media where legislatures have not.¹⁶² In one unpublished decision, *R.S. v. Minnewaska Area School District No. 2149*, a Minnesota Federal District Court held that school officials violated a student's First and Fourth Amendment rights by forcing her to turn over her Facebook and private email passwords.¹⁶³

Although universities have considerable reputational and tangible interests at stake when admitting students to participate in their educational, as well as athletic, programs, constitutional protections do not cease to exist for these students.¹⁶⁴ With recent legislation prohibiting the monitoring of student speech on social networking websites, it is logical to assume that similar future statutes may arise to protect the First Amendment rights of student-applicants, enrolled students, and student-athletes.¹⁶⁵

¹⁶⁰ Browning, *supra* note 5, at 841–42 (arguing that university monitoring of potentially objectionable social-networking activity by student athletes requires such students to relinquish their right to privacy and protections under the First, Fourth, and Fourteenth Amendments to the U.S. Constitution).

¹⁶¹ *Id.* at 843. These laws have largely been inspired by those prohibiting employers from forcing employees or job applicants from turning over passwords for social media accounts. *Id.*

¹⁶² *Id.* “[W]hile several courts have justified certain invasions of a student-athlete’s Fourth Amendment rights in cases involving random drug testing, recent decisions in the digital age have come down on the side of protecting a students [sic] right to expression via social media.” *Id.*

¹⁶³ *R.S. v. Minnewaska Area Sch. Dist. No. 2149*, Civ. No. 12-588 (MJD/LIB), 2012 WL 3870868, at *1 (D. Minn. Sept. 6, 2012) (holding that if the facts alleged in the complaint are true, the Minnesota middle-school student’s constitutional rights were violated by requiring she provide her Facebook password); Browning, *supra* note 5, at 843 n.9.

¹⁶⁴ Browning, *supra* note 5, at 841 (arguing that it becomes tricky for post-secondary schools and athlete programs for constitutional purposes when the content of a student-athlete’s social media page is not materially or substantially disruptive, but may be classified as First Amendment speech).

¹⁶⁵ *Id.* at 843 (stating that as of December, 2012, ten other states were considering legislation similar to California, Illinois, and Maryland’s laws prohibiting schools from requiring students to turn over social media passwords).

IV. ANALYSIS

School administrators and students alike need guidance to determine what, if any, off-campus Internet speech may be regulated by public universities and K-12 school systems.¹⁶⁶ *Tatro* establishes new and dangerous precedent for Minnesota students by suggesting that public universities may punish for any violation of a course or campus-wide rule if the administration can establish a connection between the violation and a correlating professional standard.¹⁶⁷ The rule the University claimed *Tatro* violated was not only overly broad; it was undefinable even by faculty.¹⁶⁸ Additionally, the professional standards the court believed the Mortuary Department rules sought to teach and enforce were vague, subjective, and nearly all-inclusive.¹⁶⁹ Some courts have held the opposite of *Tatro*, however, and have reasoned that K-12 students cannot be punished for speech taking place off campus unless a resulting material disruption occurs on campus.¹⁷⁰ The First Amendment is deeply rooted within a strong commitment to the fundamental principle that debate on public issues should be uninhibited.¹⁷¹ No less should be said for a student's participation in a public debate on a social networking website.¹⁷² Social networking students

¹⁶⁶ See *supra* text accompanying note 133 (arguing that the legal uncertainty of how schools may treat off-campus Internet speech is generating tremendous confusion and wasting resources in thousands of school districts across the country).

¹⁶⁷ See *supra* note 84 and accompanying text (discussing how the *Tatro* court did not specify how broad or narrow the professional rules a University can impose and punish under can be).

¹⁶⁸ See *supra* note 40 and accompanying text (noting that *Tatro*'s instructor did not respond when asked if she had informed her students what constituted "blogging" during orientation, but that she intended it to be an all-encompassing term).

¹⁶⁹ See *supra* note 81 and accompanying text (discussing the definition of unprofessional conduct of morticians under MINN. STAT. § 149A.70, subd. 7(3), which includes any failure to treat any person within the scope of practice, employment, or business with dignity and respect as a statutory violation).

¹⁷⁰ See *supra* note 91 and accompanying text (holding in *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 933 (3d Cir. 2011) that because neither the Supreme Court nor the Third Circuit has ever allowed schools to punish students for off-campus speech that is not school-sponsored or at a school-sponsored event, and because under the *Tinker* standard the district could not have reasonably foreseen an on-campus substantial disruption would have occurred, the school district should not have punished the student for creating a fake MySpace.com profile using her principle's picture and accusing him of being a pedophile and sex addict outside of school, during non-school hours).

¹⁷¹ See *supra* note 11 and accompanying text (stating that the constitutional commitment to freedom of expression remains wide-open and protected despite the fact that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials).

¹⁷² See *supra* note 1 and accompanying text (suggesting that social networkers deserve the same free speech rights as those offline and there is a necessity to create a social networking constitution).

must have the ability to connect and speak freely on the Internet except in cases of clear threat of harm or danger.¹⁷³

A. Punishment for Off-Campus Speech is not Interrelated to On-Campus Speech and Should not Be Punished as Such

Supreme Court student speech cases, which have dealt exclusively with incidents occurring either on campus or during school-sponsored events, are ill-suited to decide off-campus internet speech cases.¹⁷⁴ Landmark decisions such as *Tinker* and *Morse* have afforded educators authority to control student speech during school hours, but the logic behind those cases does not extend to off-campus student speech.¹⁷⁵ Recent lower court decisions are illustrative of this fact.¹⁷⁶ Lower courts have been left to formulate their own tests for determining when off-campus speech becomes a legitimate educational concern that may be regulated.¹⁷⁷ As evidenced by decisions like *Tatro*, *Layshock*, and *Snyder*, resulting decisions have been largely inconsistent.¹⁷⁸ Off-campus Internet speech is unlike the on-campus speech that educators in K-12 schools may regulate under Supreme Court precedent.¹⁷⁹ Supreme Court student speech cases beginning with *Tinker* seek to protect students who are required by law to attend class and therefore cannot avoid an on-campus disruption caused by another classmate without allowing educational intervention of the otherwise protected

¹⁷³ See *supra* note 12 and accompanying text (stating further that since erroneous and often unpleasant statements are inevitable in free debate, they must be protected if freedoms of expression are to endure).

¹⁷⁴ See *supra* note 90 and accompanying text (explaining that the Supreme Court has never directly addressed the issue of educational control over or punishment for otherwise protected First Amendment student speech).

¹⁷⁵ See *supra* note 122 and accompanying text (arguing that the logic behind Supreme Court student speech opinions cracks, if not completely crumbles, when applied to off-campus student speech).

¹⁷⁶ See *supra* note 124 and accompanying text (holding that a school district's limited authority to punish off-campus conduct does not extend to suspending a student for the off-campus use of a social networking website).

¹⁷⁷ See *supra* note 122 and accompanying text (stating that because the Court has not outlined a method for determining when off-campus speech can become school speech, lower courts have been left to create their own tests).

¹⁷⁸ See *supra* text accompanying note 10 (stating that without any guidance from the United States Supreme Court, lower court decisions concerning Internet speech have been inconsistent); see also *supra* text accompanying note 91 (explaining that while some courts have allowed schools to regulate and sanction students for speech occurring on the Internet, others have found such regulation to be an unconstitutional violation of students' First Amendment rights).

¹⁷⁹ See *supra* text accompanying note 121 (stating that Supreme Court precedent suggests K-12 schools may be able to regulate speech in at least four instances: when it occurs on campus and materially disrupts the activities of the school; when the speech occurs on campus and is lewd or offensive; when the speech advocates illegal drug use; or when speech falls into one of the first three categories and occurs at a school-sponsored event).

demonstration.¹⁸⁰ K-12 students are not, however, also legally required to sign on to the Internet and view what may have been posted by their classmates when they return home after school hours.¹⁸¹ Therefore, while *Tinker* seeks to protect students from what they cannot otherwise avoid, the same concern does not exist for speech that occurs off campus and online.¹⁸² As a result, cases concerning off-campus speech cannot fully rely upon the precedent of Supreme Court opinions regarding on-campus student speech.¹⁸³

1. Authority Afforded by the Supreme Court for Educators Concerning On-Campus Students is Limited

In *Tinker*, the Supreme Court held that a K-12 public school district violated students' First Amendment rights by suspending them for displaying black armbands during school hours in protest of the Vietnam War.¹⁸⁴ The Court held that because the school had no reason to anticipate a substantial and material disruption of school activities, and because no actual substantial disruption had occurred, the school could not limit or discipline the students for their First Amendment, anti-war expression.¹⁸⁵ Under *Tinker*, speech that does or is substantially likely to cause a material and substantial disruption on campus may be regulated by a public K-12 school.¹⁸⁶ This type of regulation is allowed to protect the rights of other students who are required

¹⁸⁰ See *supra* notes 118, 152 and accompanying text (referencing *Tinker*'s holding that a public K-12 school must be able to protect the rights of other students to be let alone and free from harm when they are required by law to attend during school hours and therefore cannot avoid exposure to the offensive speech).

¹⁸¹ See *supra* text accompanying notes 93–111 (discussing the evolution of social networking and companies' such as MySpace and Facebook's constant attempts to seek new members who can choose to access, join, or abstain from using the websites).

¹⁸² See *supra* notes 118, 152 and accompanying text (holding that educators must be able to protect their students who are required by law to attend classes and cannot otherwise avoid offensive First Amendment demonstrations).

¹⁸³ See *supra* note 122 and accompanying text (arguing that Supreme Court student speech precedent cannot be properly applied to off-campus student speech).

¹⁸⁴ See *supra* note 68 and accompanying text (describing that when the students refused, upon request, to remove their armbands, the administration subsequently suspended the students).

¹⁸⁵ See *supra* note 68 and accompanying text (stating that *Tinker* represents the beginning of a long line of United States Supreme Court precedent requiring the anticipation or occurrence of a material and substantial disruption on campus to justify suppression of otherwise protected First Amendment student speech).

¹⁸⁶ See *supra* note 118 and accompanying text (explaining that the *Tinker* principle is applicable not only to the supervised speech that takes place in the classroom, but speech throughout the inevitable activities occurring on campus during school hours such as in the cafeteria or on athletic fields).

by law to attend and therefore cannot otherwise avoid exposure to the offensive and disruptive speech.¹⁸⁷

In *Morse*, the Supreme Court considered the special circumstances of off-campus student speech occurring during a school-sanctioned and school-supervised event.¹⁸⁸ During the event, a student displayed a banner promoting illegal drug use.¹⁸⁹ The superintendent later explained that the student was disciplined for refusing to take down the banner not because the school disagreed with the message the student wished to convey, but because the banner's presence appeared to suggest the school supported the use of illegal drugs.¹⁹⁰ The Court held that, due to the special characteristics of the school environment at issue in *Morse*, the school had not violated the student's First Amendment rights by confiscating his banner.¹⁹¹

2. The Concerns Surrounding On-Campus Speech Are not Present in Off-Campus Student Speech Cases

Amanda Tatro's Facebook posts do not present the same concerns protected by the Supreme Court in *Tinker* or *Morse*.¹⁹² Nonetheless, the Minnesota Court of Appeals relied almost exclusively on *Tinker*, and the Minnesota Supreme Court relied almost exclusively on *Morse*, in reaching their opinions.¹⁹³ Unlike what is required under the *Tinker* standard for suppression of otherwise protected student expression, Tatro's posts did not

¹⁸⁷ See *supra* note 118 and accompanying text (explaining that educators must be able to regulate student speech that causes a substantial and material disruption on campus to accommodate the students required by law to attend).

¹⁸⁸ See *supra* note 75 and accompanying text (holding under *Morse* that the court may consider the special circumstances of off-campus, school sanctioned, and supervised events).

¹⁸⁹ See *supra* note 75 and accompanying text (stating that the banner read "BONG HiTS 4 JESUS").

¹⁹⁰ See *supra* note 75 and accompanying text (stating that due to the fact that the event was school-sponsored and supervised, the speech appeared to suggest the school also advocated the use of illegal drugs).

¹⁹¹ See *supra* note 75 and accompanying text (holding that the *Tinker* standard requiring a material and substantial disruption on campus is not absolute, and the court may consider the school environment at issue).

¹⁹² See *supra* note 75 and accompanying text (stating that a banner soliciting illegal drug use could constitutionally be confiscated from a student because its presence otherwise appeared to suggest the school advocated the illegal activity); see also *supra* note 68 and accompanying text (stating that *Tinker* represents the first of many Supreme Court cases requiring a material and substantial disruption on campus in order to justify suppression of student speech).

¹⁹³ See *supra* text accompanying note 69 (explaining that the Minnesota Court of Appeals applied *Tinker's* substantial and material disruption to Tatro's case); see also *supra* note 75 and accompanying text (stating that the Minnesota Supreme Court relied on *Morse* and held that the substantial and material disruption standard is not absolute and that the court must consider the special characteristics of the school environment at issue).

result in a material and substantial disruption with school activities.¹⁹⁴ In fact, before the Facebook posts were brought to the Mortuary Department's attention, Tatro had written "I heart Bernie" on the blackboard in her laboratory classroom in reference to the cadaver.¹⁹⁵ The same instructor who found Tatro's nickname for the donor offensive did not, at that time, tell Tatro she felt her actions were inappropriate or a violation of school rules.¹⁹⁶ Class continued, undisrupted, as usual despite the fact that the speech was nearly the same as that at issue in Tatro's Facebook posts.¹⁹⁷ Unlike public K-12 students protected under *Tinker*, Tatro's classmates were not required by law to attend during school hours and therefore unable to avoid exposure to her speech.¹⁹⁸ Unlike a K-12 student, any one of Tatro's classmates could have left to avoid her offensive comments if they had occurred during class or on campus.¹⁹⁹ Therefore, Tatro's classmates did not require the protection of the University if they felt Tatro's comments were unpleasant.²⁰⁰

Likewise, Tatro's Facebook posts do not fit squarely within the precedent set forth by *Morse*.²⁰¹ Unlike the student in *Morse* who displayed a banner during a school-supervised and sponsored event, the presence of the Facebook posts on Tatro's personal page did not suggest the University would be seen as an advocate or supporter of her opinions.²⁰² A student who posts on a blog or webpage speaks not to the limited audience of a classroom, but an immeasurable group of social networkers.²⁰³ More

¹⁹⁴ See *supra* note 20 and accompanying text (holding that a material and substantial interference with school activities is required for a school to discipline a student for otherwise protected speech).

¹⁹⁵ See *supra* note 48 and accompanying text (explaining that Tatro had written "I heart Bernie" on the blackboard of her laboratory classroom).

¹⁹⁶ See *supra* note 48 and accompanying text (explaining that Tatro was never told by the instructor that her reference was inappropriate and no material disruption occurred as a result of Tatro's on-campus conduct).

¹⁹⁷ See *supra* text accompanying notes 44–50 (demonstrating that it was not until December 11, 2009, when one of Tatro's classmates brought her Facebook activity to the attention of a professor, that the Mortuary Department became concerned and notified campus police).

¹⁹⁸ See *supra* note 118 and accompanying text (explaining that the *Tinker* principle is applicable to the inevitable activities occurring on campus during school hours required by law).

¹⁹⁹ See *supra* note 118 and accompanying text (holding that *Tinker* applies not only to speech that occurs in the classroom, but during school hours while K-12 students are performing other activities).

²⁰⁰ See *supra* note 44 and accompanying text (noting that Tatro stressed she made the posts off campus).

²⁰¹ See *supra* note 75 and accompanying text (holding in *Morse* that an educational institution does not violate a student's First Amendment rights by confiscating a banner when its presence suggests school-sponsored support).

²⁰² See *supra* note 75 and accompanying text (discussing that a banner promoting illegal drug use alludes to support by the school when present at a school-supervised and school-sponsored activity).

²⁰³ See *supra* text accompanying note 108 (discussing that in September, 2008, Facebook reached 100 million active users and strives to keep growing); see also *supra* note

importantly, a student who expresses an unpopular opinion on a social networking webpage does not do so as a member of an educational institution, but as one of millions participating in the ongoing exchange of information online.²⁰⁴ Allowing a post-secondary university to regulate what its students say, removed from the classroom or any school-sponsored event, means that every Internet post containing any form of speech, written or otherwise, may be scrutinized against the educational goals of the university.²⁰⁵ As demonstrated by inconsistent lower court opinions, Supreme Court precedent does not support punishment for the wide-range of potential behavior that occurs online.²⁰⁶

Unlike the *Tatro* court, the Third Circuit found in *Layshock* and *Snyder* that a school district's limited authority under the First Amendment to restrict student speech should not be extended to off-campus speech without Supreme Court guidance.²⁰⁷ The Third Circuit reached this result interpreting the same cases that the *Tatro* court considered.²⁰⁸ The inconsistencies in lower court decisions have inevitably led to confusion for both students as well as public educational institutions.²⁰⁹ Furthermore, the decisions demonstrate that on-campus speech is unlike off-campus speech and the two cannot be treated synonymously.²¹⁰ The Court has left public schools puzzled as they attempt to determine for themselves when they may

59 and accompanying text (stating that according to a study done in 2012, the average Facebook user has 245 "friends" and that users reach an average of 150,000 other people through friends of friends when they publish a post).

²⁰⁴ See *supra* note 59 and accompanying text (explaining that the average Facebook user has about 245 friends who they select to share personal information with on Facebook).

²⁰⁵ See *supra* note 78 and accompanying text (holding that a university may punish a student for what it believes to be a violation of university rules that are narrowly tailored and directly related to professional standards).

²⁰⁶ See *supra* text accompanying notes 132–134 (discussing the confusion that exists for educators attempting to apply on-campus precedent to off-campus Internet speech cases).

²⁰⁷ See *supra* note 124 and accompanying text (holding that the creation of a vulgar fake MySpace profile using a principal's full name does not justify a public school's punishment of a student).

²⁰⁸ See *supra* notes 124–125, 131 and accompanying text (reasoning that because the Supreme Court has never allowed a school to punish student conduct occurring off campus unless during a school-sponsored event as in *Morse*, and because no substantial disruption occurred on campus under the *Tinker* standard, the Third Circuit would not attempt to extend those cases to the off-campus conduct that occurred in *Layshock* and *Snyder*).

²⁰⁹ See *supra* note 10 and accompanying text (arguing that inconsistent lower court opinions are largely a result of difficulty in applying student-speech precedent to off-campus cases).

²¹⁰ See *supra* text accompanying note 133 (explaining that such inconsistencies have resulted in wasted resources and fear of being sued in response to punishment of a student for their off-campus Internet conduct).

reach beyond the schoolhouse gate to regulate and discipline for speech occurring off campus.²¹¹

B. Professional Standards and University Rules are Not Meant to be Enforced by a University Acting as a Facebook “Friend”

No matter how fair and impartial a particular educational forum may seem, giving educators and staff the green light to regulate off-campus Internet speech, so long as it relates to a course or university rule and corresponding professional standard, will unavoidably result in ill-motivated or illegitimate means of student punishment.²¹² The United States Supreme Court has consistently held that shocking or overtly distasteful speech remains protected under the First Amendment.²¹³ While a student would hope that the majority of educators and administrative staff would be trustworthy, the First Amendment seeks to protect against the select few who will undoubtedly abuse their authority.²¹⁴

1. Legislative Movement to Prevent Monitoring by Public Universities of College Students’ Demonstrates Legislative Interest to Protect the First Amendment

Although universities have significant interests at stake in the admission of students to their educational, as well as athletic programs, students have an equally, if not more, important interest in maintaining their constitutional freedom of expression.²¹⁵ If years later, public universities are able to review past social networking activity prior to admitting a new applicant, legal yet offensive First Amendment activity may prevent an

²¹¹ See *supra* text accompanying note 133 (describing the tremendous confusion and wasted resources in thousands of school districts across the country attempting to address issues arising from off-campus speech).

²¹² See *supra* note 4 and accompanying text (explaining that student interests are often at odds with faculty interests, and that often these differences in value, view, and ideology ask for change directly in the tradition of the First Amendment).

²¹³ See *supra* note 12 and accompanying text (holding that the word “fuck” is protected because of its cognitive force and that erroneous and unpleasant statements must be protected if freedoms of expression are expected to endure); see also *supra* note 117 and accompanying text (holding that for the State to justify prohibition of a particular expression, it must be able to identify something more than a mere desire to avoid the discomfort and unpleasantness that accompany an unpopular viewpoint).

²¹⁴ See *supra* note 68 and accompanying text (stating the United States Supreme Court has held that school authorities violated students’ First Amendment right to free speech when it suspended them for making a political statement on campus).

²¹⁵ See *supra* text accompanying note 164 (explaining that universities have both tangible as well as reputational interests at stake when they admit a student into their university or athletic program, as well as when they offer that student a financial benefit to attend).

individual from obtaining a college degree or financial scholarship.²¹⁶ Posts published by future students could remain online for decades to come making it nearly impossible for children to reinvent themselves as adults.²¹⁷ State legislatures in Maryland, Delaware, and California have passed legislation prohibiting universities from requiring students to waive their First Amendment rights and provide their public schools with passwords, login information, or install monitoring software.²¹⁸ This movement demonstrates a legitimate legislative interest in protecting the constitutional rights of both K-12, as well as post-secondary, students by preventing universities from using Facebook and MySpace as a tool to monitor current and future students.²¹⁹ As many as ten other states have considered adopting similar legislation.²²⁰

College applicants' personal information is viewed routinely by the admission departments of many public colleges.²²¹ Admissions departments have, as a result of what they view on a student's Facebook or MySpace account, chosen not to admit otherwise qualified students.²²² Similarly, colleges with athletic programs have gone as far as requiring student athletes to waive their First Amendment rights and install spy software on to their personal computers.²²³ Such software can monitor the student's activity on social networking websites and search for key-words that they have used which may suggest the student is discussing illegal drug use, alcohol use, or using obscene or offensive language.²²⁴ Additionally, the software's key-

²¹⁶ See *supra* note 103 and accompanying text (suggesting that parents became alarmed concerning the potential repercussions of their children's actions).

²¹⁷ See *supra* note 97 and accompanying text (explaining that Facebook provides that users' public information may become publically available after being posted).

²¹⁸ See *supra* notes 161–162 and accompanying text (explaining that such laws were largely inspired by similar legislation preventing employers from requiring the same information from their employees).

²¹⁹ See *supra* text accompanying notes 161–162 (explaining that there has been a response by state legislatures to protect students from the monitoring of their private activity on social networking websites by their public schools and universities).

²²⁰ See *supra* note 161 and accompanying text (suggesting that as of December, 2012, these were the only three states to enact the student aimed legislation); see also *supra* note 165 and accompanying text (stating that as of December, 2012, ten other states were considering legislation similar to the laws discussed above of Maryland, Delaware, and California).

²²¹ See *supra* text accompanying notes 158–160 (discussing a 2008 survey which revealed that one in ten public universities accessed applicant's social networking information in determining whether to admit them to their school).

²²² See *supra* note 159 and accompanying text (suggesting that one admissions officer reported a specific instance where a student was rejected for bragging on his Facebook page that he had aced the application process but did not feel as though he would be attending that particular university).

²²³ See *supra* text accompanying note 160 (suggesting that some public colleges are making such software mandatory for student athletes).

²²⁴ See *supra* text accompanying note 160 (explaining the functionality of the monitoring software being used by some public colleges).

word search can scan for discussion referencing NCAA and potential violations under the NCAA rules.²²⁵

Technology is not necessarily a tool for today's children, but inevitably a significant part of their daily lives.²²⁶ Children as young as thirteen have been known to post inappropriate content on their social networking pages.²²⁷ Social networking activity can remain for long periods of time making it difficult for adults to leave their past decisions behind.²²⁸ State legislatures have demonstrated that there is a need to protect a child or student's private decisions from their future universities.²²⁹

2. Tatro Allows for Broad Punishment of Expansive Rules Indirectly Related to Professional Standards

The Minnesota Supreme Court's holding in *Tatro* suggests that public universities may punish for a broad range of student behavior if a rational connection can be made between the otherwise protected speech and a professional standard.²³⁰ In *Tatro*, the court held that Tatro could constitutionally be punished for university rules that were "narrowly tailored" and "directly related" to the professional standards taught by the mortuary program.²³¹ Despite the University's insistence that the Mortuary Program sought to emphasize and teach professional standards as a vital part of its curriculum, the mortuary department did not offer any ethics courses to its mortuary students.²³² Furthermore, it is clear that what constituted "blogging" about the laboratory course was likely never explained to Tatro

²²⁵ See *supra* text accompanying note 160 (explaining that the key-word search can scan for references to NCAA violations including, for example, the offering of bribes or solicitation by agents).

²²⁶ See *supra* note 95 and accompanying text (quoting a young girl who stated "Isn't everything technology? . . . I don't think about [it] . . . [i]t's just everywhere").

²²⁷ See *supra* note 103 and accompanying text (explaining that it was not unusual for girls as young as thirteen to post inappropriate pictures of themselves on MySpace).

²²⁸ See *supra* note 97 and accompanying text (explaining that Facebook provides that users' public information may become publically available after being posted).

²²⁹ See *supra* note 103 and accompanying text (suggesting that parents became alarmed concerning the potential repercussions of their children's actions).

²³⁰ See *supra* text accompanying note 18 (holding that a post-secondary university may punish a student without infringing upon their First Amendment right to free speech if such punishment is the result a violation of a university rule that is narrowly tailored and directly related to professional conduct standards); see also *supra* note 81 and accompanying text (explaining that the *Tatro* standard gives great deference to a university in determining when a connection exists between a professional standard and student conduct that is offensive or inconsistent with such professional standards).

²³¹ See *supra* text accompanying note 18 (using the language "narrowly tailored" and "directly related" to establish what the court considered the sufficient nexus to allow educational punishment of otherwise protected, off-campus speech).

²³² See *supra* text accompanying notes 33–34 (explaining that while the University of Minnesota's Mortuary Program requires classes such as science, business, grief and dying across cultures, embalming, and a clinical rotation to a funeral home, it did not offer a specific ethics course when Tatro was a student).

and her classmates.²³³ Tatro was unaware not only that her expressive conduct violated the subjectively written laboratory course rule, but likely, that a connection could be made to a professional standard regarding dignity and respect of a body.²³⁴

The professional rule the University claimed Tatro's Facebook posts violated states in relevant part that no licensee or intern shall engage in unprofessional conduct, "including but not limited to . . . failure to treat with dignity and respect the body of the deceased . . . or any other person encountered while within the scope of practice, employment, or business."²³⁵ Allowing regulation of this professional standard by a university means that a student can be punished for failing to treat any person with dignity and respect under any university standard or rule.²³⁶ Furthermore, the statutory language "including but not limited to" suggests that the scope of the rule may extend beyond the explicit language of the statute and include unmentioned behavior.²³⁷

The *Tatro* holding leaves unquestionably broad discretion for the regulation of professional standards through application of university rules, not only for mortuary students, but the numerous professional programs that are offered to Minnesota post-secondary students.²³⁸ For example, the Minnesota statute regulating professional conduct for family counselors states that a counselor's license may be revoked if the professional board determines he or she engaged in "dishonest conduct," whether or not the conduct relates to their employment.²³⁹ Under *Tatro*, students studying to be licensed therapists can be punished for violating any university or course rule which relates to dishonest conduct even if that conduct does not relate to

²³³ See *supra* notes 40–41 and accompanying text (stating that Tatro testified there was no discussion of what constituted blogging; Tatro's classmate who testified on behalf of the University did not recall if the instructor had ever mentioned anything about Facebook, Twitter, or MySpace in reference to blogging, and the professor felt defining something students could look up in the dictionary unnecessary).

²³⁴ See *supra* notes 40–41 and accompanying text (explaining not only Tatro testified there was no discussion of what constituted blogging at orientation, but that when asked if she had specifically told students it was not acceptable to write on Facebook regarding the course, Tatro's professor was unable to respond on the record).

²³⁵ See *supra* note 81 and accompanying text (stating that Minn. Stat. § 149A.70, subd. 7(3) (2007), which the Minnesota Supreme Court found the university rule against "blogging" to correlate to, regulates the professional conduct of funeral directors).

²³⁶ See *supra* note 79 and accompanying text (suggesting that the University is entitled to enforce professional norms through the creation and regulation of university and course rules).

²³⁷ See *supra* note 79 and accompanying text (stating that ethics are a fundamental part of an educational program and therefore can be regulated by public educators and staff).

²³⁸ See *supra* note 84 and accompanying text (stating that the University of Minnesota offers many programs at both the graduate, as well as undergraduate level, which concern professional standards).

²³⁹ See *supra* note 84 and accompanying text (discussing MINN. STAT. § 148B.59 (2007) regulating the professional conduct of a counselor).

their status as a student or future employee.²⁴⁰ Where the *Tatro* court would draw the line, however, and disallow university suppression of student speech is unclear.²⁴¹

C. Without Clear Direction from the U.S. Supreme Court, Public Schooling at all Levels is Stuck between a Rock and a Hard Place in Applying Tatro-like Standards

The Minnesota Supreme Court failed to draw a definable line in *Tatro* and, as a result, Minnesota students and public schools remain vulnerable.²⁴² Courts have struggled to balance First Amendment, on-campus, student speech with the educational goals of public universities since *Tinker*.²⁴³ Attempting to implement on-campus precedent to off-campus Internet speech has led to confusing and inconsistent decisions.²⁴⁴ Guidance from the United States Supreme Court is essential to the resolution of future *Tatro* like cases.²⁴⁵

1. The Vital Protection of Student Expression under the First Amendment

Sanctioning students for violating broad curricular rules which may or may not correlate to expansive professional standards, poses the danger of overshadowing otherwise protected speech in the interest of maintaining potentially outdated professional norms.²⁴⁶ American students are notorious for challenging professional norms under the broad protection of the First Amendment.²⁴⁷ Society depends on the encouragement of fresh, young

²⁴⁰ See *supra* note 79 and accompanying text (stating that a University may enforce professional norms through application of campus rules).

²⁴¹ See *supra* text accompanying note 78 (suggesting that the *Tatro* court did not specify how the breadth of professional standards affects a university's ability to punish for student expression).

²⁴² See *supra* note 89 and accompanying text (stating that a student who was just one semester away from graduating from nursing school was kicked out of a Minnesota public university's program for calling someone a "stupid bitch" on his Facebook page).

²⁴³ See *supra* note 68 and accompanying text (discussing the United States Supreme Court's holding in *Tinker* where courts first limited a public school's ability to regulate on-campus student speech).

²⁴⁴ See *supra* text accompanying note 133 (stating that tremendous confusion exists in thousands of school districts regarding off-campus speech leading to wasted resources).

²⁴⁵ See *supra* note 120 and accompanying text (stating that while schools have been given power through student speech cases to regulate on campus, the Supreme Court has not addressed regulation of off-campus speech).

²⁴⁶ See *supra* note 2 and accompanying text (regarding a state-supported college's denial of Petitioner's application requesting recognition of a controversial political student organization).

²⁴⁷ See *supra* note 4 and accompanying text (stating that student interests and concerns are often quite different from those of the faculty, result from values, views, and ideologies that are at war with the ones which the college has traditionally espoused or

perspectives to continue forward movement on an innovative path toward global growth.²⁴⁸ It is clear that Tatro's Facebook posts were not only offensive, but unlikely to propel academia forward.²⁴⁹ However, the *Tatro* decision extends far beyond Tatro's unpleasant posts.²⁵⁰ Under *Tatro*, any unpopular thought or political speech considered reasonably related to a professional standard may now, should a public university choose, be regulated and punished regardless of when, where, or how it occurs.²⁵¹ The United States Supreme Court must exercise its power to determine what Internet student speech may be suppressed in the interest of an educational program and what must continue to be protected under the First Amendment in the interest of post-secondary student privacy, as well as academic growth.²⁵²

2. Protecting Youth against Cyberbullying and Cyberthreats does not Require Suppression of the First Amendment

Concern for cyberbullying and cyberthreats has left many concerned students, parents, and educators fearful that public schools lack the power to address attacks on K-12 children without suppressing the bully's free speech rights.²⁵³ In an attempt to regulate cyberbullying, schools are left with the same inconsistent precedent to determine what role they can play in regulating off-campus Internet speech.²⁵⁴

Students, who use the Internet to harass classmates, threaten violence, or to make false statements of criminal activity, should reasonably

indoctrinated, when such students ask for change, the students speak in the tradition of Jefferson and Madison and the First Amendment); *see also supra* note 12 and accompanying text (stating that often unpleasant statements are inevitable in free debate and must be protected).

²⁴⁸ *See supra* note 4 and accompanying text (explaining that when students ask for change, it is typically at odds with the ideologies of the university).

²⁴⁹ *See supra* text accompanying notes 44–48 (quoting Tatro's Facebook posts deemed offensive and inappropriate under professional conduct standards by the University of Minnesota).

²⁵⁰ *See supra* text accompanying note 18 (holding that a public university may punish a student for any conduct that violates a narrowly tailored university rule that the university can show is related to a professional standard).

²⁵¹ *See supra* note 44 and accompanying text (noting that Tatro stressed she made the posts off campus).

²⁵² *See supra* note 3 and accompanying text (holding that scholarship cannot flourish in the absence of First Amendment protections).

²⁵³ *See supra* text accompanying note 138 (stating that educators are faced with challenging issues when off-campus cyberbullying that is potentially protected from school interference under the First Amendment has a clear effect on their students).

²⁵⁴ *See supra* text accompanying note 133 (arguing that school districts are faced with confusing standards regarding off-campus speech).

be punished for their actions.²⁵⁵ Internet harassment may have an extreme impact on victims.²⁵⁶ Students, parents, and educators may address issues of cyberbullying and cyberthreats under state law, as well as through informal methods without infringing upon a student's First Amendment rights, such as school counseling or by contacting parents.²⁵⁷

Conflicting lower court opinions suggest that a school must prepare for the possibility of lengthy and expensive litigation in response to any punishment of a student for Internet conduct.²⁵⁸ The Supreme Court must determine when student speech occurring off campus and on the Internet may be regulated by K-12 schools to protect both victims of cyberbullying as well as the constitutional rights of students.²⁵⁹ Until the Supreme Court accepts an Internet student speech case, violent threats may continue, in some instances, to go unpunished while activist students remain at risk for punishment as a result of their unpopular opinions.²⁶⁰ As is evidenced by the Third Circuit Court of Appeals, some educators are expected to maintain a total hands-off approach to the regulation of off-campus Internet speech absent a direct threat of violence.²⁶¹ Regardless of which court has it right, wrong, or otherwise, it is clear that the holdings are, at best, unpredictable and resolution of the issue is fundamental to future student speech cases.²⁶²

²⁵⁵ See *supra* text accompanying notes 153–155 (suggesting that intervention by school officials without student punishment may sometimes allow for effective action while avoiding liability for suppression of First Amendment rights).

²⁵⁶ See *supra* note 135 and accompanying text (discussing the long-term, damaging effects that bullying can have on children immediately, as well as later as adults).

²⁵⁷ See *supra* text accompanying notes 150–155 (explaining that victims of cyberbullying, parents, and concerned teachers may rely on state bullying laws, criminal law, or tort law, as well as attempt to address the situation informally without suppressing student speech under the First Amendment to counteract cyberbullying).

²⁵⁸ See *supra* text accompanying note 133 (stating that confusing standards have led to the concern that schools might trigger a lawsuit claiming violation of First Amendment rights for regulating off-campus student speech that occurs online).

²⁵⁹ See *supra* note 12 and accompanying text (suggesting that unpopular and often unpleasant thought must be protected under the First Amendment); see also *supra* text accompanying note 133 (suggesting that school officials cannot afford to wait any longer for a definitive answer as to when they may intervene to protect students who are being targeted by internet bullies).

²⁶⁰ See *supra* note 12 and accompanying text (stating that erroneous and unpleasant statements must be protected under the First Amendment); see also *supra* note 89 and accompanying text (discussing the expulsion of a student for posting the phrase “stupid bitch” on Facebook and stating that there was not enough whiskey in the world for anger management).

²⁶¹ See *supra* note 91 and accompanying text (holding that because neither the Third Circuit nor the United States Supreme Court has ever allowed an educational institution to punish for off-campus speech, the Pennsylvania Supreme Court will not do so now).

²⁶² See *supra* note 91 and accompanying text (comparing the holding of *Tatro* to *Snyder* and its application of the *Tinker* standard).

Technology plays an intricate and vital role in the way individuals communicate.²⁶³ Internet accessibility and its capability of connecting individuals with literally anyone in the world presents problems far removed from the traditional on-campus student speech that the Supreme Court has analyzed.²⁶⁴ The Supreme Court must draw a clear line for lower courts to apply to student speech cases like *Tatro*.²⁶⁵ Without such direction, inconsistencies will remain, innocent students will be sanctioned for exercising their constitutional rights, and violence may at times go unpunished by concerned educators.²⁶⁶

D. Absent Clear Harm or Imminent Threat, the First Amendment Should Extend to all Social Network Speech

The First Amendment should extend to all student speech on social networking websites except in cases of clear threat of harm or imminent danger.²⁶⁷ The Supreme Court has never punished student speech that occurs entirely off campus and is unrelated to a school sponsored activity.²⁶⁸ To allow public K-12 school districts and public post-secondary universities to regulate and punish for expressive student speech would create the opportunity for egregious punishment by educators.²⁶⁹

²⁶³ See *supra* text accompanying note 5 (stating that social networking has revolutionized the way in which people communicate); see also *supra* note 1 and accompanying text (holding that the First Amendment permits a state to ban “true threats,” to protect individuals from the fear of violence and disruption).

²⁶⁴ See *supra* note 122 and accompanying text (arguing that the logic behind Supreme Court student speech opinions crumbles when applied to off-campus student speech).

²⁶⁵ See *supra* text accompanying note 133 (explaining schools are stuck between a rock and a hard place without direction from the Supreme Court on the First Amendment rights of students off campus and online, and their public K-12 schools to punish students for it when necessary).

²⁶⁶ See *supra* text accompanying note 133 (stating that K-12 public schools are responsible for protecting students and teachers from online harassment).

²⁶⁷ See *supra* note 1 and accompanying text (arguing that a Social Networking Constitution should be created to protect freedom of expression online under the First Amendment).

²⁶⁸ See *supra* note 90 and accompanying text (asserting that Supreme Court student speech cases are limited to on-campus activity or speech which occurred during a school-supervised event and that the Supreme Court has yet to address the contours of a student’s free speech rights when such speech originates off campus).

²⁶⁹ See *supra* note 2 and accompanying text (suggesting that any leeway for punishment of employees and students could lead to unconstitutional results).

1. Punishment for Off-Campus Speech Offends a Students' First Amendment Rights

Democracy is grounded in the ability of citizens to speak freely and critically.²⁷⁰ To say otherwise, offends the protections provided by the First Amendment.²⁷¹ The Supreme Court has stated that the vigilant protection of First Amendment protection is nowhere more vital than in American schools.²⁷² Student interests are traditionally at odds with those of their educational institutions.²⁷³ Yet the Court has stated, time and time again, that unpopular or offensive student demonstration is, and must continue to be, constitutionally protected.²⁷⁴

While K-12 students, who are required by law to attend class, occasionally need protection from substantial disruptions occurring on campus, students do not require the same protection for the conduct of their classmates that occurs off campus.²⁷⁵ In expressing potentially unpopular opinions, students contribute a fresh perspective within the academic community, call for change to outdated standards, and work to advance society.²⁷⁶ To ensure the growth of academia, teachers and students alike must remain free to inquire and evaluate under First Amendment protections.²⁷⁷

²⁷⁰ See *supra* note 12 and accompanying text (stating that unpleasant statements must be protected in free debate).

²⁷¹ See *supra* note 12 and accompanying text (suggesting that such unpleasanties must be tolerated if constitutional protections are expected to endure).

²⁷² See *supra* note 3 and accompanying text (holding that teachers and students must always remain free to inquire, to study, and to evaluate).

²⁷³ See *supra* note 4 and accompanying text (suggesting that often student values are at war with those traditionally espoused or indoctrinated by the college).

²⁷⁴ See *supra* notes 2-4, 20, 73 (holding that a K-12 school system's ability to regulate speech is highly limited); see also *supra* text accompanying note 121 (suggesting that at least four exceptions exist which allow regulation of student speech: (1) on-campus speech that substantially or materially disrupts school activities; (2) lewd or offensive speech occurring on campus; (3) speech that advocates the use of illegal drugs; or (4) speech that falls into one of the first three categories and occurs off campus, but during a school sponsored event).

²⁷⁵ See *supra* notes 118, 152 and accompanying text (holding that educators must be able to act to protect the interests of their students who are required by law to attend classes).

²⁷⁶ See *supra* note 4 and accompanying text (arguing that when students ask for change, they speak directly to the spirit of Jefferson, Madison, and the First Amendment).

²⁷⁷ See *supra* note 3 and accompanying text (asserting that scholarship cannot flourish in an atmosphere of suspicion and distrust).

2. Schools Can Still Protect Students against Cyberbullies if Social Networking Speech is Protected under the First Amendment

Extending First Amendment protection to student speech occurring on the Internet would not, however, wholly prevent a public K-12 school district from addressing cyberbullying or cyberthreats.²⁷⁸ Educators may informally involve parents, school counselors, teachers, and school staff to address potential cyberbullies.²⁷⁹ Victims of online harassment and their parents may also seek remedies for questioned speech that falls under enacted state tort or criminal law.²⁸⁰ Most importantly, as with any speech that may otherwise fall under the First Amendment, threats of violence or imminent harm are not constitutionally protected and will always justify K-12 or post-secondary intervention.²⁸¹ These alternative remedies suggest that confining the First Amendment in student speech cases will not effectively resolve the on-going issues with cyberbullies and cyberthreats.²⁸²

Tatro, however, never made true threats of violence or intent to cause imminent harm in her Facebook posts.²⁸³ Tatro explained that her December 6, 2009 post stating, “[g]ive me room, lots of aggression to be taken out with a trocar” referenced a previous incident where a classmate had to use both hands to insert a trocar.²⁸⁴ Tatro also explained that her December 7, 2009 post which read “[w]ho knew embalming lab was so cathartic! I still want to stab a certain someone in the neck with a trocar though” was regarding an ex-boyfriend whom she had recently broken up with.²⁸⁵ Tatro assumed that her Facebook friends would know she was speaking

²⁷⁸ See *supra* text accompanying notes 154–155 (noting that there are less formal ways to address cyberbullying and cyberspeech than to punish a student by expelling or suspending them).

²⁷⁹ See *supra* text accompanying notes 154–155 (suggesting that such informal intervention may take place when faculty and staff become concerned that the off-campus speech may be affecting a student on campus).

²⁸⁰ See *supra* text accompanying note 151 (stating that students experiencing harassment online may be protected by state law).

²⁸¹ See *supra* note 1 and accompanying text (holding that the First Amendment permits a State to ban “true threats” regardless of actual intent to carry out the threat, to protect individuals from the fear of violence and disruption).

²⁸² See *supra* text accompanying notes 151–155 (discussing the many alternatives that exist for victims of cyberbullying as well as those acting in the cyberbully or victim’s interest to prevent future harassment).

²⁸³ See *supra* text accompanying notes 45–48 (quoting Tatro’s Facebook posts November 12, 2009, December 6, 2009, December 7, 2009, and one undated that became the subject of her punishment and later litigation).

²⁸⁴ See *supra* note 46 and accompanying text (indicating that at that time, other students in Tatro’s laboratory class had joked about aggression).

²⁸⁵ See *supra* note 47 and accompanying text (suggesting that Tatro was upset due to her breakup as well as the fact that she had recently given permission for her mother to undergo surgery).

sarcastically and in reaction to the breakup.²⁸⁶ University police reviewed the posts and determined that Tatro's posts did not amount to criminal threats.²⁸⁷ Although the content of her posts was clearly distasteful, the status updates did not suggest that Tatro was planning or intending to commit any unlawful or violent act from which individuals must be protected.²⁸⁸ The Supreme Court has never upheld punishment of a student for expressive activity occurring off campus with the exception of school-sponsored events for K-12 students.²⁸⁹ The Minnesota Supreme Court's extension of on-campus precedent to off-campus control of post-secondary students is unfounded in student-speech cases.²⁹⁰

Post-secondary students, like Tatro, who use Facebook to express their private thoughts, should not be required to take a leave of absence from their First Amendment rights until they have graduated from their respective universities.²⁹¹ The Constitution was written to stand the test of time and, absent a true threat, the First Amendment therefore extends to student speech on the Internet.²⁹²

V. CONCLUSION

In this country, we do not allow children to drive cars without supervision until they are at least sixteen years of age.²⁹³ Similarly, we do not consider an individual to be a legal adult until they are eighteen years old.²⁹⁴ It is not until they reach the age of twenty-one, three years after they have reached legal adulthood that they are able to enter a bar and purchase an

²⁸⁶ See *supra* note 47 and accompanying text (explaining that Tatro assumed her Facebook friends would know that she was not seriously considering using the laboratory tool as a weapon).

²⁸⁷ See *supra* text accompanying note 55 (stating that University Police ultimately determined that Tatro had not acted criminally).

²⁸⁸ See *supra* text accompanying note 55 (explaining that University police determined Tatro had not acted criminally when she posted regarding the Mortuary Science Program on Facebook).

²⁸⁹ See *supra* note 75 and accompanying text (holding in *Morse* that a school district does not violate a student's First Amendment rights by confiscating a banner promoting illegal drug use at a school-sponsored event when the presence of the banner suggests the school's support of illegal activity).

²⁹⁰ See *supra* text accompanying note 121 (discussing the four categories of United States Supreme Court cases which have allowed a school to suppress student speech).

²⁹¹ See *supra* note 15 and accompanying text (arguing that speech occurring online should be as, if not more, protected than First Amendment speech occurring offline).

²⁹² See *supra* note 1 and accompanying text (arguing that a Social Networking Constitution should be created to protect freedom of expression online under the First Amendment).

²⁹³ See *supra* note 8 and accompanying text (suggesting that allowing a child to use social networking websites may be just as dangerous as handing them the keys to a car).

²⁹⁴ See *supra* note 8 and accompanying text (arguing that while the U.S. Constitution generally protects freedom of expression, the issue becomes particularly tricky when dealing with underage students).

alcoholic beverage.²⁹⁵ Our society imposes these age restrictions, among other reasons, to protect the child or young adult from decisions they have not become mature enough to make.²⁹⁶ Children of all ages, however, use technology without supervision or similar legal protection.²⁹⁷ In fact, we encourage children to acquire computer skills knowing their significance in our modern world.²⁹⁸ *Tatro* suggests that a student waives his or her First Amendment right to free speech and subsequently opens him or herself up to punishment when his or her Internet post contravenes a legitimate educational rule related to a professional standard.²⁹⁹ If this is true, we must come to accept that, under cases like *Tatro*, a child may waive deeply rooted constitutional rights before he or she is even old enough to open a checking account.³⁰⁰

²⁹⁵ See *supra* note 8 and accompanying text (noting that individuals are not legally allowed to drink until they have reached the age of 21).

²⁹⁶ See *supra* note 8 and accompanying text (arguing that we do this to protect children who are not ready to face the potential consequences of such dangerous activities).

²⁹⁷ See *supra* note 95 and accompanying text (quoting an underage student explaining that technology is everywhere and a part of her daily life).

²⁹⁸ See *supra* text accompanying note 8 (explaining that society encourages the use of technology by students of a young age due to its prevalence in society).

²⁹⁹ See *supra* note 86 and accompanying text (holding that *Tatro* could be punished for a Facebook post which could have been viewed by thousands on Facebook).

³⁰⁰ See *supra* note 8 and accompanying text (suggesting that we encourage use of technology by young people yet, restrict their ability to drink, drive and engage in otherwise dangerous activities to protect them).