WHY DO PUBLIC STUDENTS IN HIGH SCHOOLS GET MORE FREE SPEECH PROTECTION THAN IN UNIVERSITIES?: A COMPARATIVE ANALYSIS OF "OFF-CAMPUS" FREE SPEECH IN SECONDARY AND POST-SECONDARY PUBLIC SCHOOLING

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I. ABSTRACT

This comment explores the current landscape of First Amendment[1] *free speech protections, specifically comparing the "off-campus" rights of public students in high school versus college.*[2] *The 2022 legal landscape in the United States is such that students' First Amendment right to free speech is better safeguarded in public high school than in public post-secondary education. The most recent Supreme Court case on the matter, Mahanoy Area School District v. B.L., decided in 2021 in favor of protecting a high school student's online speech, leaves out college and university students.*[3] *Instead, courts ruling on public higher education students' speech will likely look to Tatro v. University of Minnesota, decided in 2012, for guidance.*[4] *In Tatro, the Minnesota Supreme Court found a university student's online posts violative of the program's policy and gave the university free rein to punish her speech.*[5] *The differing rulings in B.L. and Tatro might have some plausible explanations as to the divergent treatment the students received, but at the end of the day, it leaves courts ruling inconsistently.*

This paper examines the two cases mentioned above in greater detail and within the context of the Tinker test developed for student free speech in 1969.[6] *Possible explanations to account for the relatively opposite rulings including: (1) the specific wording of each student's posts; (2) the specific conduct violation of which each student was accused; (3) the difference in thinking about*

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[1] The text of the First Amendment to the United States Constitution reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

[2] The private secondary and post-secondary landscape will not be explored in this paper, as it would consist of an entirely different analysis. This paper is limited in scope to comparing public high school and college or university students' free speech protections.

[3] Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2043 (2021); *Id.* at 2049 n.2 (Alito, J., concurring).

[4] Tatro v. Univ. of Minn., 816 N.W.2d 509 (Minn. 2012).

[5] *Id.* at 522–524.

[6] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969); *see infra* III.1 *Case Law Breakdown.*

what "off-campus" means in high school versus college; and (4) the differing technological landscape at the time of each ruling.[7]

Normative arguments in this context include: (1) whether postsecondary students should have equal or more free speech protections; and (2) the role of the courts and their ability to keep up with modern and rapidly evolving technology.[8] *Ultimately, the primary difference between B.L. and Tatro is that the courts have not been able to evolve rapidly to keep up with modern technology. Consequently, an appropriate standard for off-campus, online speech has yet to emerge. This paper concludes that Tinker is not the correct test to evaluate off-campus speech, and a new one is necessary.*[9]

II. INTRODUCTION

Two nearly identical cases bring the question of what students can post online to the forefront of this free speech analysis. Both *B.L.* and *Tatro* involve a female student who was disciplined for the content of speech she made on her own private social media accounts while not physically in the school.[10] Both students were accused of violating school and program-specific rules with their posts.[11] The former was a high school student and the latter a college student.[12] Yet, the resulting opinions have starkly different outcomes and messages: the free speech protections granted in *B.L.* do not apply to college students, such as in *Tatro*. This paper argues they should.

This paper will proceed in Part III with background and an analysis of the cases; Part IV makes arguments, including normative ones, about the model that should be adopted; and Part V concludes with final thoughts and areas to explore.

III. ANALYSIS

B.L. and *Tatro* are similar cases that convey important takeaways about what is permissible online, or off-campus, speech in a school environment. Yet, the lessons they impart are opposite, as *B.L.* does not apply to college students. This section proceeds in Part 1 by exploring the seminal context for

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7 *See infra* III.2 *Discussion*.

8 *See infra* IV *Normative Argument*.

9 *See infra* V *Conclusion*.

10 *See* Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2042–2043 (2021); Tatro v. Univ. of Minn., 816 N.W.2d 509, 511, 519 n.5 (Minn. 2012).

11 *See B.L.*, 141 S. Ct. at 2043; *Tatro*, 816 N.W.2d at 511.

12 *See B.L.*, 141 S. Ct. at 2042; *Tatro*, 816 N.W.2d at 511.

student free speech, *Tinker*. Part 2 consists of a discussion about the cases, and Part 3 explores possible factors that could account for the different outcomes.

A. Tinker's Jurisprudence

Tinker v. Des Moines Independent Community School District[13] is perhaps the best-known student free speech case—if not the best-known free speech case—in U.S. history.[14] *Tinker* involved students wearing black armbands to school in protest of the Vietnam war,[15] a novel and unpopular opinion at the time. The students were suspended until they ended their protest, which they concluded after a few weeks.[16] The Supreme Court found the protest was protected under the First Amendment, and the school's punishment was an unconstitutional infringement on the students' rights.[17]

A key part of the opinion was the Court's discussion of when schools can restrict student speech.[18] The *Tinker* analysis notably stated that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[19] At the same time, since *Tinker*, the Court has clarified: "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings"[20] and must be "applied in light of the special characteristics of the school environment."[21] To that end, a "school need not tolerate student speech that is inconsistent with its 'basic educational mission,' even though the government could not censor similar speech outside the school."[22] A school must balance when it is appropriate to restrict students' speech according to some measure, though.

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13 393 U.S. 503 (1969).

14 *See, e.g.*, Meggen Lindsay, Tinker *Goes to College: Why High School Free-Speech Standards Should Not Apply to Post-Secondary Students* – Tatro v. University of Minnesota, 38 WM. MITCHELL L. REV. 1470, 1475 (2012) (referring casually to *Tinker* as "seminal") [hereinafter "*Tinker Goes to College*"].

15 *Tinker*, 393 U.S. at 504.

16 *Id.*

17 *Id.* at 505-06, 508, 514.

18 *Id.* at 512-13.

19 *Id.* at 506.

20 Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 682 (1986).

21 *Tinker*, 393 U.S. at 506.

22 Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) (citing *Fraser*, 478 U.S. at 685).

Known as the "substantial interference" test, or the *Tinker* test, the balance weighs the school's (government-approved) interest in providing education against students' free speech right.[23] The *Tinker* test concludes that student speech and conduct can be restricted or punished if it "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school."[24]

For any institution to be able to limit one's free speech rights, the body must show there is a compelling interest in doing so and that it only imposes the limitation in a way that is narrowly tailored; for example, educating students is a compelling state interest, and limitations such as forbidding speech that substantially interferes with the school or other students is a narrowly tailored limitation.[25] For a school to be able to regulate speech, there must be unique special interests that outweigh the First Amendment rights of students.[26]

As is true for all kinds of speech, even off-campus speech will have limits. The Supreme Court summarizes some types of off-campus behavior that can be punished:

> [S]erious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices, including material maintained within school computers.[27]

Specific kinds of speech, whether on- or off-campus, can also be punished; for example, "fighting words."[28] "Hate speech" is also famously not tolerated, though many scholars advocate for accepting speech that borders on hate

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[23] *Tinker*, 393 U.S. at 512-13.

[24] *Id.* at 505 (citing Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

[25] *Tinker*, 393 U.S. at 509.

[26] *B.L.*, 141 S. Ct. at 2045.

[27] *Id.* For a further discussion of the acceptability of banning threatening speech, see *Tatro*, 816 N.W.2d at 519, 524; *see also* Feminist Majority Found. v. Hurley, 911 F.3d 674, 688 (4th Cir. 2018) (discussing a university's ability to control threatening speech even through anonymous and off-campus social media).

[28] *B.L.*, 141 S. Ct. at 2046.

speech on university campuses.[29] And post-*Tinker*, another limitation on students' free speech includes when it substantially interferes with others' rights or ability to function.[30]

An example of substantial interference is disrupting other students' ability to learn. Acts including "aggressive, disruptive action or even group demonstrations" are examples of what would cause that kind of interference.[31] Though a demonstration, the *Tinker* protest created no such disruption.[32]

The *Tinker* test serves as guidance for when student free speech can be restricted in a multitude of cases, such as in *B.L.*, discussed below.[33] Even when not ultimately used, the test is often discussed as a possible means to determine permissible discipline, such as in the *Tatro* case below.[34]

B. B.L. and Tatro Breakdown

In *Mahanoy Area Sch. Dist. v. B.L.*, a public high school student, B.L., was suspended from the school's cheerleading team for a year for posting vulgar messaging[35] on her private Snapchat account after school hours and off

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[29] *See generally* SIGAL R. BEN-PORATH, FREE SPEECH ON CAMPUS (2017) (arguing for more free speech protections on college campuses, and striving towards an inclusive community with these tactics); *see also* Erwin Chemerinsky, *More Speech Is Better*, 45 UCLA L. REV. 1635, 1637 (1998) (advocating for free speech protections to allow 'freer' speech on college campuses, which should even extend to private universities). Some scholars even go so far as to rail against any kind of limitation on free speech on college campuses. *See, e.g.*, Christopher J. Roederer, *Free Speech on the Law School Campus: Is It the Hammer Or the Wrecking Ball That Speaks*, 15 U. ST. THOMAS L.J. 26, 46-47, 76, 86 (2018) (advocating for the value free speech provides, and pushing back against recent regulations such as the "Dear Colleague" letter and other "trends" such as trigger warnings and banning micro-aggressions, arguing it hinders free speech).

[30] *Tinker*, 393 U.S. at 511.

[31] *Id.* at 508.

[32] *Id.* at 508-13. Within this portion of the opinion, the Court explains: "Our problem involves direct, primary *First Amendment* rights akin to 'pure speech.' The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students."
Id. at 508.

[33] *See B.L.*, 141 S. Ct. at 2047-48.

[34] *See Tatro*, 816 N.W.2d at 518-19.

[35] B.L. posted an image to her Snapchat "story" – enabling the image to be viewed by all Snapchat "friends" for 24 hours – which showed B.L. and a friend raising their middle fingers and was captioned: "Fuck school fuck softball fuck cheer fuck everything." 141 S.Ct. at 2043.

school grounds.[36] The coaches for the cheerleading team found – and subsequently, the athletic director, principal, superintendent, and school board agreed – that "because the posts used profanity in connection with a school extracurricular activity, [B.L.'s posts] violated the team and school rules."[37] Even if B.L. did violate the policy, the question for the Court was whether such a policy violation is so problematic that it creates a compelling interest on the school's part to disregard a student's free speech rights.[38]

The Court ultimately concluded that B.L.'s Snapchat was not a "substantial interference" of a school activity, nor did it threaten to harm the rights of others; consequently, the school's punishment was not a justified limitation on B.L.'s speech.[39]

In general, it has also been harder to establish that there is such a compelling interest on the school's part when the speech occurs "off-campus," which itself can be a complicated determination. It can be difficult to know what conduct truly happens "off-campus" with the advent of the internet and social media, where the messaging refers back to schools and can be discussed in them.[40] Even when given the opportunity here, the Supreme Court declined to set a bright-line rule regulating what is considered "off-campus" speech and where the line is drawn.[41]

The Court, instead, set general guidelines of what could make the school's interest in suppressing student speech weakened, which have to do with the fact that the speech occurred elsewhere; the guidelines consequently strengthen a student's argument for the speech not to be censored.[42] The guidelines include: (1) the school's inability to stand *in loco parentis* and

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[36] *Id.* at 2042-43.

[37] *Id.* at 2043.

[38] *Id.* at 2044; *Tinker*, 393 U.S. at 509.

[39] *Id.* at 2047-48 (citing *Tinker*, 393 U.S. at 514).

[40] *See, e.g.*, *infra* note 65 (discussing a case addressing this very question, in which a student blog affected the classroom learning); *see also Tatro*, 816 N.W.2d at n.5 ("We note that courts have struggled with the question of whether postings on social networking sites constitute on-campus or off-campus speech, given 'the somewhat "everywhere at once" nature of the internet.' *Blue Mountain Sch. Dist.*, 650 F.3d at 940 (Smith, J., concurring). Although Tatro stresses that her Facebook posts were prepared off campus, our analysis does not make a distinction between on-campus and off-campus Facebook posts.").

[41] *B.L.*, 141 S.Ct. at 2045 (stating "we do not now set forth a broad, highly general First Amendment rule stating just what counts as "off campus" speech").

[42] *Id.* at 2046.

protect students while the students are off grounds; (2) skepticism of attempts to control all speech students make 24 hours a day; and (3) a school's duty to protect a student's unpopular expression.[43] For B.L., all the aforementioned factors were present: the school was not acting in the place of her parents; the court was skeptical of a school's attempt to control her speech at any hour of the day, and regardless of the actual content of the speech; and the school should actually strive to protect B.L.'s expressing criticism of the school and cheerleading program.[44]

B.L.'s speech was ultimately found to be an expression of her irritation with and criticism of the school and cheerleading community, and her vulgarity merely encompassed a message to that effect.[45] Her speech was not, for example, bullying or harassment targeting specific individuals, nor was it "fighting words," or another obvious exception to free speech discussed above.[46] B.L.'s speech instead was closer to the "pure speech" discussed in *Tinker*, and if said by an adult, would not be punished at all.[47] Consequently, B.L. won her case and the school's punishment was overturned.[48]

However, this ruling was extremely limited. It was specific to off-campus speech, unlike *Tinker*. Yet, the Court refused to define what "off-campus" speech even means.[49] The ruling also applied only to public high school students, not college students.[50] Instead, courts looking to college student off-campus free speech case law will likely look to *Tatro*.

In *Tatro v. Univ. of Minn.*, a University of Minnesota Mortuary Science student, Amanda Tatro, was disciplined for her Facebook posts, which reference the cadaver used in her anatomy course.[51] The university imposed

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43 *Id.*

44 *Id.* at 2047.

45 *Id.*

46 *Supra* notes 27-29 and accompanying text.

47 *See B.L.*, 141 S. Ct. at 2046-47 ("B. L. uttered the kind of pure speech to which, were she an adult, the First Amendment would provide strong protection.") (citing Cohen v. California, 403 U.S. 15, 24 (1971)).

48 *Id.* at 2048.

49 *See supra* notes 40-41 and accompanying text.

50 *See B.L.*, 141 S. Ct. at 2049 n.2 (Alito, J. concurring) ("This case does not involve speech by a student at a public college or university.").

51 816 N.W.2d 509, 511 (Minn. 2012). Tatro's Facebook posts were the following:

a punishment for this speech.[52] Tatro brought this suit to challenge the constitutionality—specifically through alleged First Amendment violations—of the imposed sanctions, as she argued they were made outside of her professional educational activities and constituted "off-campus" speech.[53]

The University of Minnesota instead argued that there was no free speech violation for enforcing "reasonable academic program rules" seeking to further "legitimate pedagogical objectives."[54] The Mortuary Science program had rules, including "Rule #7" which forbid "blogging" about the lab or the cadaver dissection.[55] The Minnesota Supreme Court found that the Mortuary

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> (1) "**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]; (2) "**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]; (3) "**Amanda Beth Tatro** Who knew embalming lab was so cathartic! I still want to stab a certain someone in the throat 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]; and (4) "**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].
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> *Id.* at 512-13.

[52] *Id.* at 514-15. The university imposed the following sanctions: 1. Changing Tatro's grade in MORT 3171 – the anatomy class in which she used the cadaver – 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. 5. Placement on probation for the remainder of Tatro's undergraduate career. Notably, the punishment referenced only posts (1), (2), and (4), and not post (3), which contained the most obvious example of potential violence – that is generally not considered protected speech. The opinion does not get into the separate treatment of post (3), and it is possible Tatro faced discipline for that post alone and which she left unchallenged; perhaps because she would have very little room to dispute that the post violated a campus code of conduct. However, this conclusion is speculative, and it is not possible to say definitively why the *Tatro* court did not address post (3). What we do know is that the court affirmatively did not consider the threatening nature of that post in reaching its conclusion. *See id.* at 524 ("[W]e do not consider the threatening speech as a stand-alone violation, particularly since the complaint and sanctions here appear to have been based on the totality of the posts. . . . Therefore, we affirm the sanctions imposed [including the failing grade] without separately addressing Tatro's threatening speech.").

[53] *Id.* at 516.

[54] *Id.*

[55] *Id.* at 514. Anatomy Laboratory Rule #7 provides in part that "[b]logging about the anatomy lab or the cadaver dissection is not allowable."

Science's academic program rules were narrowly tailored and directly related to established professional conduct standards – requirements to be satisfied in upholding alleged First Amendment violations.[56] Thus, the University finding Tatro guilty of violating the policy through her posts did not violate Tatro's free speech rights.[57]

The Court also acknowledged Tatro's concerns in its ruling. Tatro first argued that her posts were "off-campus" and that her Facebook posts should be given the same free speech protections as those made by members of the general public.[58] Tatro also feared that a broad rule permitting this punishment meant a public university would be permitted to regulate a student's personal expression at any time, any place, and for any reason.[59]

The University of Minnesota contrastingly argued that universities may constitutionally enforce academic program rules that are "reasonably related to the legitimate pedagogical objective of training Mortuary Science students to enter the funeral director profession," even when those rules extend to "off-campus" conduct.[60]

The Minnesota Supreme Court rejected both of these approaches, finding Tatro's argument as well as the "legitimate pedagogical concerns standard" inappropriate in this context.[61] The court held that that because Tatro agreed to the student conduct standards, including the anatomy lab rules, the standards count as "professional conduct standards," which a university is allowed to enforce.[62] Ultimately, the court held that Tatro's concerns were

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[56] *Id.* at 521-24.

[57] *Id.*

[58] *See id.* at 517-18 (citing Healy v. James, 408 U.S. 169, 180 (1972), which stated that "state colleges and universities are not enclaves immune from the sweep of the First Amendment," and that "[t]he college classroom with its surrounding environs is peculiarly the 'marketplace of ideas'").

[59] *Id.* at 521.

[60] *Id.* at 518 (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988), which stated, "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").

[61] *Id.* at 518-19.

[62] *See id.* at 520 ("[C]onsequently we must consider the special characteristics of the academic environment of the Mortuary Science Program and its professional requirements when deciding the standard that applies.").

unfounded because no matter where her speech occurred, it violated the program policy.[63]

The Minnesota Supreme Court considered—and rejected—applying the *Tinker* test to First Amendment questions here.[64] Though *Tinker* might apply to some situations involving a student posting on their own account outside of school when it creates a disruption in school,[65] that is not always the appropriate standard for this kind of issue.[66] Here, the Minnesota Supreme Court distinguished a *Tinker*-appropriate case from Tatro's situation, in that the University of Minnesota was not punishing Tatro for the disruption she created in her class, but rather for violating program rules.[67] Consequently, and as will be discussed further in the below analysis, the court also declined to distinguish between on-campus and off-campus Facebook posts.[68]

C. Discussion

What accounts for the possible differences in outcome between *B.L.* and *Tatro*?

On the surface, both cases seem extremely similar: they involve a female student who posted on her private social media for all her account's friends[69] to see, which ostensibly violated a specific school program's policies and/or

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[63] *See id.* at 521 ("[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.").

[64] *See id.* at 519 ("Even though courts have applied *Tinker* to speech originating off campus that reaches the attention of school authorities, at least in the K-12 setting, we decline to apply the *Tinker* substantial disruption standard to Tatro's Facebook posts.").

[65] *See, e.g.*, J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 869 (Pa. 2002) (concluding that a school could punish an eighth-grade student for creating a threatening website directed at his algebra teacher where the website "created disorder and significantly and adversely impacted the delivery of instruction" at the school).

[66] *See Tatro*, 816 N.W.2d at 520 ("[T]he Supreme Court has explained that the 'mode of analysis set forth in Tinker is not absolute' and that courts must consider 'the special characteristics of the school environment.' Morse v. Frederick, 551 U.S. 393, 405, 127 S. Ct. 2618, 168 L. Ed. 2d 290 (2007) (quoting *Tinker*, 393 U.S. at 506)").

[67] *Tatro*, 816 N.W.2d. at 520.

[68] *See Id.* at 519, n.55 ("We note that courts have struggled with the question of whether postings on social networking sites constitute on-campus or off-campus speech, given 'the somewhat 'everywhere at once' nature of the internet.' Although Tatro stresses that her Facebook posts were prepared off campus, our analysis does not make a distinction between on-campus and off-campus Facebook posts." (citing *Blue Mountain Sch. Dist.*, 650 F.3d at 940 (Smith, J., concurring))).

[69] And Tatro's posts were also able to be viewed by "friends of friends." *Id.* at 512.

code of conduct, and for which the student was punished.[70] Yet, the *B.L.* court ruled for the student and the *Tatro* court for the university.[71]

Most obviously, the first difference is that *Tatro* involved a university and university student, and *B.L.* involved a high school and high school student.[72] Normative arguments about expectations for each of these groups are discussed below.[73]

Another possible difference lies in the specific conduct violation of which each student was accused: Tatro was accused of violating specific policies, for which she signed a contract;[74] B.L. was accused of generally violating the academic and programmatic standards for her vulgarity.[75] The latter is certainly more vague, which also makes it easier for a court to find the school overstepped, as its rules were not narrowly tailored enough.

However, it seems the alleged violations are still quite similar – Tatro, in fact, also argued her speech was not clearly violative of the program policy. She tried to advance the position that the policy was not narrowly tailored enough: it was designed to protect the identity of the cadaver, not to prevent students from discussing dissections at all.[76]

Yet, a court might–and did–find one to be a specific professional conduct standard violation, whereas the other was merely offensive because it used adult language, without threatening violence or targeting an individual.

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[70] *B.L.*, 141 S. Ct. at 2043; *Tatro*, 816 N.W.2d at 511.

[71] *B.L.*, 141 S. Ct. at 2043; *Tatro*, 816 N.W.2d at 524.

[72] *Tatro*, 816 N.W.2d at 511; *B.L.*, 141 S. Ct. at 2043.

[73] *See infra* Part **Error! Reference source not found.**.

[74] *See Tatro*, 816 N.W.2d at 512–513 (noting that Tatro signed a contract "acknowledging that she understood and agreed to comply with the program rules, as well as 'additional laboratory policies' stated in the course syllabus" and that Tatro's Facebook posts "violated the anatomy lab rules and the policies of the Anatomy Bequest Program").

[75] *See B.L.*, 141 S. Ct. at 2042–43 (noting that B.L.'s posts used "vulgar language" and "violated team and school rules").

[76] *See Tatro*, 816 N.W.2d at 521 ("Tatro understood that there were limitations on what she could post on Facebook about her work with human cadavers. As an extreme example, one of the instructors in the Mortuary Science Program testified at the CCSB hearing about an incident that occurred at a medical school in New York where a student posted a picture of a human cadaver on Facebook. According to the instructor, state health officials were considering sanctions against the medical school. Although Tatro does not dispute that the University could impose a narrow rule that would prohibit a mortuary science student from identifying a human donor on Facebook, she argues that the University cannot impose a broad rule that would prohibit mortuary science students from criticizing faculty members or posting offensive statements that are unrelated to the study of human cadavers.").

Though Tatro's posts allegedly violated a more specific policy, the court's decision might have more to do with its general deference to universities' disciplinary processes, rather than because it also agreed with the specific violation itself.

Relatedly, another potential difference lies in the divergence in treatment that the types of institutions receive. The courts' deference to universities' decision-making, especially when it comes to disciplining students, is common.[77] *Tatro*'s ruling is therefore consistent with this deference. Though the Supreme Court has previously explained that courts are the final "arbiter of the question whether a public university has exceeded constitutional constraints" and *technically* "owe no deference to universities" in making their determination,[78] that is not the Court's usual practice.[79] Instead, the Supreme Court here explains, "'[c]ognizant that judges lack the on-the-ground expertise and experience of school administrators,' administrators' decisions related to pedagogical approaches of a professional program, including outside of the classroom, 'are due decent respect.'"[80]

So, with what jurisprudence are observers left? Perhaps one might argue that *Tatro* only applies in Minnesota, as the decision comes from the Minnesota Supreme Court. However, the standard that the Minnesota Supreme Court interprets in *Tatro* is the First Amendment.[81] Certainly, the Supreme Court is free to correct that interpretation, should it so choose, but it has not. Through the *B.L.*'s opinion's non-adoption of the standard for college students, the Supreme Court did not address the discrepancy it was creating between that decision and *Tatro*. As a result, because *Tatro* remains

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[77] Mary-Rose Papandrea, *The Free Speech Rights of University Students*, 101 MINN. L. REV. 1801 (2017) [hereinafter "*Free Speech Rights of University Students*"].

[78] *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 664, 686 (2010).

[79] *Tatro*, 816 N.W.2d at 516.

[80] *Id.* (citing *Christian Legal Soc'y v. Martinez*, 561 U.S. at 686 (2010)).

[81] *See Tatro*, 816 N.W.2d at 516 ("Because the Minnesota constitutional right to free speech is coextensive with the First Amendment, we look primarily to federal law for guidance.). *See 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 proceeded to interpret free speech protections according to First Amendment jurisprudence, including reviewing "constitutional free speech issues de novo" (per *Wicklund*, 589 N.W.2d at 797). *Id.* The Court continued, "In a recent school speech case, the United States Supreme Court explained that courts are 'the final arbiter of the question whether a public university has exceeded constitutional constraints,'" citing *Christian Legal Soc'y v. Martinez, U.S.*, 130 S. Ct. 2971, 2988 (2010). *Id.*

the highest court ruling in the land on *college students'* First Amendment right to–or more aptly here, restriction of–free speech, that opinion will serve as the most appropriate guidance on the question of public university students' free speech.

A final possible difference lies in the punishment each received. It is perhaps easier for a court to find the school overstepped when it banned B.L. from cheerleading for a year,[82] whereas Tatro did not face suspension at all.[83] Tatro did receive multiple punishments, though, including a failing grade in the specific course for which she was found to have violated the code of conduct.[84] This could certainly be analogized to B.L.'s suspension from one activity. However, Tatro could have been suspended from her major or even from the University of Minnesota, which would have been a more extreme punishment, and perhaps, in the court's mind, more akin to B.L.'s suspension. Regardless, the courts never say they are acting out of a response to the harshness of the punishment, and a policy argument for whether they should act on such bases is best left for another discussion.[85]

Though both students were accused of conduct code violations, the underlying specific speech they used could be a possible further reason for the divergent court opinions. B.L. essentially got in trouble because the post included a curse word, the kind of speech that would certainly be protected if she were an adult.[86] Tatro, on the other hand, not only spoke crudely about a real person's body, but also vaguely threatened violence a few times.[87]

Universities, especially in the aftermath of Columbine and other campus safety scares, are extremely nervous about violence and are quick to discipline students for even indications of that potential.[88] Yet, the Minnesota Supreme Court specifically says Tatro and the University handled the concern regarding threats separately, and the core of Tatro's argument is about the other, non-

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82 *B.L.*, 141 S.Ct. 2038.

83 *Tatro*, 816 N.W.2d 509.

84 *Tatro*, 816 N.W.2d at 514-15.

85 My own personal belief would be no: if rights are violated, they should be vindicated by the courts, regardless of the harshness of punishment.

86 *B.L.*, 141 S.Ct. at 2047.

87 *See Tatro*, 816 N.W.2d at 512 (showing the text of Tatro's posts, including her potential misuse of a scalpel).

88 *See, e.g.*, *Tinker Goes to College*, *supra* note 14, at 1472-73 (arguing free speech is improperly cut short when perceived safety is at stake, in the wake of incidents such as Columbine, and positing that *Tatro* was improperly decided as a direct result).

threatening posts.[89] The court, therefore, should not–and said it did not–use the threatening nature of some of the posts as the basis for its conclusion.[90]

IV. ARGUMENT

A. Normative Argument: Public University Students Should Receive Greater Free Speech Protections Than Public High School Students

Courts have wrestled with the question of whether comparable free speech standards should apply in the postsecondary setting. In *Tatro*, the court acknowledged a circuit split on this very question.[91] Some considerations include the differences in expectations of power, goals, responsibility, and student maturity each institution should have.[92] Yet, the *Tatro* court resolved–or, perhaps more aptly, ignored–this question by simply saying, "[b]ecause we do not rely on any established free speech standards, we need not consider the issue here."[93] Consequently, this is an unresolved conflict and determination.

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[89] *See Tatro*, 816 N.W.2d at 524 ("[W]e do not consider the threatening speech as a stand-alone violation, particularly since the complaint and sanctions here appear to have been based on the totality of the posts. . . . Therefore, we affirm the sanctions imposed [including the threatening speech] without separately addressing Tatro's threatening speech.").

[90] *Id.*

[91] *See Tatro*, 816 N.W.2d at 519 n.5 ("We also recognize that controversy exists over whether the free speech standards that developed in K-12 school cases apply in the university setting. *See generally* Kelly Sarabyn, *The Twenty-Sixth Amendment: Resolving the Federal Circuit Split over College Students' First Amendment Rights*, 14 TEX. J. C.L. & C.R. 27, 28-49 (2008). For example, the Third Circuit has indicated that '[p]ublic universities have significantly less leeway in regulating student speech than public elementary or high schools.' McCauley v. Univ. of V.I., 618 F.3d 232, 247, 54 V.I. 849 (3d Cir. 2010) (citing 'the differing pedagogical goals of each institution, the in loco parentis role of public elementary and high school administrators, the special needs of school discipline in public elementary and high schools, the maturity of the students, and, finally, the fact that many university students reside on campus and thus are subject to university rules at almost all times'). The Sixth Circuit, while acknowledging the differences between K-12 students and university students, has indicated that courts can account for different levels of maturity in the application of the standard. Ward v. Polite, 667 F.3d 727, 733-34 (6th Cir. 2012). Further, the Ninth Circuit has pointed out that in the context of academic decisions, 'arguably the need for academic discipline and editorial rigor increases as a student's learning progresses.' Brown v. Li, 308 F.3d 939, 950, 951 (9th Cir. 2002).").

[92] *Id.*

[93] *Tatro*, 816 N.W.2d at 519 n.5.

Legal and adolescent scholars both advocate for a difference in the treatment of high school and college free speech.[94] Primarily due to differences in development,[95] the discrepancy in treatment would mean more deference to college student speech, without as many restrictions. However, does evolving development also necessitate a change in treatment by law? This normative question has yet to be answered.

As Tatro herself argued, colleges and universities are known as the marketplace of ideas and are widely accepted, even by courts, as providing this value to students.[96] Courts and legal scholars alike reference how important free speech is in achieving this assumed ideal.[97] Some put forth the argument that universities should overhaul their current policies to protect free speech thoroughly.[98]

The ideal ascribed to universities is not the same conception the public holds about public schools. In *Fraser*, the Supreme Court recounts the role and purpose of the American public school system:

> "[Public] education must prepare pupils for citizenship in the Republic . . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation." C. Beard & M. Beard, New Basic History of the United States 228 (1968). In *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979), we echoed the essence of this statement of the objectives of public education as the

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94 *See, e.g.*, *Tinker Goes to College*, *supra* note 14, at 1481 n.78 (arguing that the *Tinker* standard was improperly applied to the university setting, and does so by including references to adolescence research, such as Richard Knox's *The Teen Brain: It's Just Not Grown Up Yet*).

95 *See Id.* at 1481 ("There is a glaring disparity in imposing the same restrictions on twenty-two-year-olds as on twelve-year-olds. The students have widely different levels of emotional maturity and brain development.").

96 *See Tatro*, 816 N.W.2d at 517-18.

97 *See, e.g.*, *Free Speech Rights of University Students*, *supra* note 77, at 1803 (concluding that the authority of public universities to restrict student speech is, or at least should be, quite narrow).

98 *See* Darryn Cathryn Beckstrom, *Who's Looking at Your Facebook Profile - The Use of Student Conduct Codes to Censor College Students' Online Speech*, 45 WILLAMETTE L. REV. 261, 265 (2008) (arguing that for "public institutions of higher education to preserve . . . the principles of the First Amendment," there must be some modification to student conduct codes furthering the protection of "off-campus speech unless such speech is a true threat or constitutes a crime under existing law.").

> "[inculcation of] fundamental values necessary to the maintenance of a democratic political system."[99]

Further sources synthesize the vast powers public schools hold as the basis for shaping students' rights jurisprudence.[100]

At a basic level, courts must consider the differences in each type of schooling that may make different standards appropriate at different levels.[101] Law review comments argue college students should be afforded more protection, and, perhaps more poignantly, that university officials should have less leeway to punish students for their speech.[102] Universities having less discretion seems especially relevant where the boundaries have yet to be established, such as speech that occurs off-campus on social media: at a minimum, it is harder for unclear policies to satisfy the 'narrowly tailored' requirement to restrict speech.

B. Off-Campus Speech is Fundamentally Different Than On-Campus Speech and Should Be Weighed Differently

It is worth considering whether *Tinker* is the appropriate standard to evaluate if a student should be forbidden from–or can later be punished for–their online speech. When discussing First Amendment protections, a court must weigh the interest of the state (the school) against the infringement on an individual (student)'s liberty. In that context, a basic weighing mechanism is if the speech disrupts classroom activity or other students' ability to learn. Fundamentally, that explains why a court might suspend an individual's right to free speech, especially in the context of cyberbullying or the like.

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[99] Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 681 (1986) (citing Ambach v. Norwick, 441 U.S. 68, 76-77 (1979)).

[100] *See* Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49, 53 (1996) (discussing how the Supreme Court's rulings in this area have impacted public school powers and students rights jurisprudence).

[101] *See, e.g.*, *Tatro*, 816 N.W.2d at 519 n.5 (discussing the increased need for "'academic discipline and editorial rigor'" as student's progress through learning) (quoting Brown v. Li, 308 F.3d 939, 950, 951 (9th Cir. 2002)); *Id.* at 520 (explaining that the analysis in *Tinker* is not absolute and that courts "'must consider special characteristics'" with respect to each individual school environment) (quoting Morse v. Frederick, 551 U.S. 393, 405, 127 S. Ct. 2618, 168 L.Ed.2d 290 (2007)).

[102] *See* Karyl Roberts Martin, *Demoted to High School: Are College Students' Free Speech Rights the Same as Those of High School Students*, 45 B.C. L. REV. 173, 204 (2003) (advocating for an approach that does not afford college officials the same deference to censor postsecondary student speech as is allowed in primary and secondary school settings).

Taking a step back, is *Tinker* the correct standard to apply for off-campus speech, and is it appropriate to apply to both high school and college students? Increasingly more courts and scholars see the complexities a *Tinker* analysis involves and have disregarded it.[103] Perhaps the *Tinker* standard is even less appropriate for evaluating off-campus speech.

Tinker assisted schools in balancing free speech rights against other students' right to learn without disruption. In 1969 that was the most effective way to tell if someone's individual right infringed on another's. Today, bullying, and even cyber-bullying, can still be appropriately weighed according to this measure, as a bully's words can impact the victim's ability to concentrate on school and learn. This standard, however, does not necessarily translate to the modern world otherwise. Aside from situations such as cyber-bullying, what about other online speech when it has no specific target? Like B.L., expressing her general anger cannot be viewed the same.

It seems strange that the substantial interference test merely evaluates the impact of the speech used, rather than the words themselves. Essentially, to determine the appropriateness of the speech, it would be up to others in the class to create a disruption about a post. It does not look to the content of the student's post. Even in 2012, the *Tatro* court recognized the difficulty in applying *Tinker* to off-campus speech and declined to use it.[104]

It often does not make sense to try to make the *Tinker* test's circular peg fit into the square hole of today's modern technological landscape. Off-campus speech is different than publishing content in a school newspaper,[105] displaying a cryptic poster at a school event,[106] or making graphic sexual

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[103] *See, e.g.,* Morse v. Frederick, 551 U.S. 393, 405 (2007) ("*Fraser* established that the mode of analysis set forth in *Tinker* is not absolute. Whatever approach *Fraser* employed, it certainly did not conduct the 'substantial disruption' analysis prescribed by *Tinker*[.]") (quoting Tinker v. Des Moines Indep. Comm. Sch. Dist., 393 U.S. 503, 514 (1969) and citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 n.4 (1988)).

[104] Tatro v. Univ. of Minn., 816 N.W.2d 509, 518-21 (Minn. 2012). Instead, the court ruled merely on whether Tatro's posts violated a school policy.

[105] *See Kuhlmeier*, 484 U.S. at 272-73 (finding educators do not violate students' Constitutional rights by "exercising editorial control" over articles in a school newspaper, including choosing not to publish articles, as long as their actions are reasonably related to legitimate pedagogical concerns).

[106] *See Morse*, 551 U.S. at 397, 410 (finding a student's sign bearing the phrase "BONG HiTS 4 JESUS" displayed at a school event during school hours to be speech promoting illegal drug use, which the school could regulate).

innuendos during a speech in an assembly.[107] These acts all take place on school property. Thus, their substantial interference with learning makes sense because they created some form of a distraction from learning. The latter two also included some form of inappropriate content.[108]

C. Courts Might Not Be the Appropriate Body for Trying to Set the Standard to Balance Students' Free Speech Rights in Online Speech

Overall, these complexities with the court system make it harder to resolve the other issues mentioned in this section. One is still left wondering: what the appropriate standard should be to evaluate off-campus free speech cases; if high school and college students should be treated the same for developmental and legal reasons; and how a court can implement these various concerns, when the judiciary is bogged down by time, method, and practice.

These questions become harder to resolve due to underlying issues that inherent to the judiciary. A court may only address the specific issue in front of them, otherwise the opinion is considered hypothetical and merely dicta.[109] This in and of itself limits the court's power to make broad-reaching standards and rules. However, the court's inability to create broad rulings can be framed as a positive, in that it prevents guessing about how a standard might play out in dissimilar circumstances.

A further issue that comes with courts creating these standards lies in the fundamental difficulties of the litigation process: it is slow, limited by the parties themselves, and ultimately decided by typically unelected and non-representative decision-makers. *Tatro*, for example, which concerned Facebook posts written in 2009, was decided in 2012; Tatro herself is not the "ideal" plaintiff and her borderline-disturbing posts are not likely to get sympathy from a court; and the Minnesota Supreme Court Justice who

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[107] *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683, 687 (1986) (finding a school's prohibition on the use of "vulgar and offensive terms in public discourse" to be "a highly appropriate function of public school education" in suspending a student who used the following language in a school assembly: "he's firm in his pants . . . his character is firm," "a man who takes his point and pounds it in," and "a man who will go to the very end–even the climax, for each and every one of you").

[108] *Id.* at 683; Dupre, *supra* note 100, at 55.

[109] *See, e.g.*, the text preceding note 93 (providing an example of a court not resolving questions that are not directly about the issue in front of it).

authored the opinion was 58 years old at the time, making her 36 years post-college graduation.

V. CONCLUSION

Perhaps students in public high schools and public universities deserve differing levels of protection on their free speech rights for off-campus speech. Regardless of whether students *should* have varying protections, they do, and the protection swings in a surprising direction: as it stands today, high school students currently have more thorough free speech rights than do university students. This inconsistency is due to a 2021 Supreme Court ruling in favor of a high school student, which left unaddressed the issues inherent in a Minnesota Supreme Court decision in favor of a university disciplining a student. Though the facts between the cases have some discrepancies that could possibly contribute to the disparate outcomes, the two nearly-identical cases being treated so differently is notable, at the very least.[110]

There are also areas for further exploration within this topic. It is still undetermined where the line is drawn between off-campus and on-campus speech.[111] Normative questions also persist, such as how much speech is appropriate and what are acceptable limitations to put on students and institutions. Finally, how to evaluate this balance is still open, as maybe moving forward, *Tinker* should not apply to off-campus speech.

The inconsistency and counterintuitive application of free speech principles speaks to many issues with the courts: they are slow, limited in scope by design, and often unable to keep up with modern technology. In the higher education context, public universities can work with students to form clear goals and policies around free speech, maybe even to grant rights on par with those afforded to public school students. And in both settings, everyone is impacted by the state and federal laws our policymakers set, who are perhaps better equipped to move faster and in accordance with their constitutents' goals.

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[110] While recognizing that many paragraphs of this paper (*see supra* Part C.) focused on the differences between the cases, at the end of the day, the posts, plaintiffs, alleged violations, and other context at issue were functionally identical. None of the differences explored above, as already concluded, explain the vastly divergent treatment and outcomes of the cases.

[111] *See e.g.,* Mahanoy Area Sch. Dist. v. B.L., 141 S.Ct. 2038, 2045 (2021).