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Silencing Students: How Courts Have Failed to Protect Professional Students' First Amendment Speech Rights

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Silencing Students: How Courts Have Failed to Protect Professional Students' First Amendment Speech Rights

Shanelle Doher*

Abstract

Over the past two decades, social media has dramatically changed the way people communicate. With the increased popularity of virtual communication, online speech has, in many ways, blurred the boundaries for where and when speech begins and ends. The distinction between on-campus and off-campus student speech has become particularly murky given the normalization of virtual learning environments as a result of the COVID-19 pandemic. In Tinker v. Des Moines Independent Community School District*, the Supreme Court clarified that students retain their First Amendment rights on-campus but that schools may sanction speech that materially and substantially disrupts or interferes with school activities. However, prior to 2021, the Court had never directly addressed whether a school's capacity to sanction speech extended off-campus. This changed with* Mahanoy Area School District v. B. L.*, where the Court implemented a heightened* Tinker *standard for off-campus speech, indicating some hesitation to extend school authority to cyberspace.*

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As monumental as the decision is, it is unlikely that Mahanoy will do much to safeguard professional students' First Amendment rights. In the fifty years following Tinker*, the Supreme Court has consistently denied certiorari in cases involving professional student speech, whether on or off campus. In the absence of such guidance, appellate courts have struggled with how and to what extent to apply* Tinker *and its progeny to professional programs. This has led to inconsistent judicial approaches—almost all favoring universities—that provide professional students with little guidance or reassurance in the strength of their constitutional rights.*

This Note argues that courts have failed to protect professional students' First Amendment speech rights, both on and off campus. The method by which appellate courts have analyzed and applied these doctrines suggests that bad facts are creating bad, or at least incomplete, law. By carefully examining student speech doctrines before exploring professional student speech decisions, this Note asserts that appellate courts have performed relatively cursory reviews of Tinker *and its progeny, resulting in misrepresentations of the Supreme Court's precedent. However, this Note proposes that this is an avoidable outcome that careful, rhetorical analysis of Supreme Court precedent can rectify. When properly analyzed, student speech doctrines should provide a sufficient basis to reliably evaluate professional student speech, so long as courts consider the special characteristics of the professional school environment.*

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INTRODUCTION

In the classroom, Kimberly Diei is known by her peers as a pharmacy student at the University of Tennessee pursuing a doctoral degree in nuclear medicine.[1] She is known online by 20,000 followers on Instagram and 2,000 followers on Twitter under the pseudonym "KimmyKasi."[2] When not on campus, Diei posts what she refers to as "sex positive" content to empower

1. *See* Anemona Hartocollis, *Students Punished for 'Vulgar' Social Media Posts Are Fighting Back*, N.Y. TIMES (Feb 5, 2021), https://perma.cc/9VYX-MWMG ("Ms. Diei graduated from the University of Chicago in 2015 as a biology major, and then taught physics in a charter school. She wants to specialize in nuclear pharmacy, handling radioactive materials. . . . Ms. Diei expects to earn her doctor of pharmacy degree in 2023.").

2. *See id.* ("[U]nder a pseudonym, kimmykasi, she exposed her cleavage in a tight dress and stuck out her tongue. In homage to the rapper Cardi B, one of her idols, she made up some raunchy rap lyrics. . . . [S]he had gained more than 19,500 Instagram followers and 2,000 on Twitter.").

Black women over her social media platforms.[3] The University of Chicago alumnus hopes to eventually monetize her online activity by reaching a wide audience of Black women with "words and phrases common amongst [her] community."[4]

When someone anonymously reported Diei's posts to the University of Tennessee, her on-campus and off-campus identities came into direct conflict.[5] A disciplinary panel reviewed several "objectionable" posts in its inquiry, including photos of Diei in tight clothing and tweets of "raunchy rap lyrics" inspired by female rappers like Cardi B and Meg Thee Stallion.[6] Citing language in the university's student handbook, the panel expelled Diei, describing her posts as not only "vulgar" and "crude" but also "not in keeping with the mores of her chosen profession."[7] Diei recalled feeling "sick to [her] stomach."[8] Diei promptly obtained a lawyer; however, faced with impending litigation, the university reversed her expulsion, requesting instead that Diei minimize her affiliation with the university online.[9]

Despite her expulsion reversal, Diei filed a federal lawsuit, alleging violations of her First Amendment free speech rights.[10]

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3. *See id.* ("'Sex positive,' she called them. . . . Ms. Diei says she crafted her posts for an audience of Black women like herself, and hoped she might become popular enough to make money promoting products.").

4. *Id.*

5. *See id.* ("[A]n anonymous source reported [Diei's social media messages] for a second time . . . . She believes she may have been singled out by the University of Tennessee because she dominated her class, often asking questions, which she said her classmates had complained about on Facebook.").

6. *See id.* ("According to court papers, the school's professional conduct committee, composed of nine faculty members and three students, cited several examples it considered objectionable in Ms. Diei's posts.").

7. *See id.* ("[T]o the university, her social media messages were more than just a bit racy.").

8. *Id.*

9. *See id.* ("The pharmacy dean overruled her expulsion three weeks later, after a telephone conversation in which, Ms. Diei said, the dean asked her to try to block people affiliated with the school from her accounts, and to minimize her affiliation with the university.").

10. *See id.* ("[T]he experience was so jarring, Ms. Diei says, that on Wednesday she filed a federal lawsuit with the help of a pro bono lawyer, arguing that the public university had violated her constitutional right of free expression 'for no legitimate pedagogical reason.'").

Diei remained unsettled by her treatment and apprehensive of her future at the university, asserting that it was "just a matter of time before they come back for another investigation into [her] expression on social media."[11] In an interview, Diei expressed further dissatisfaction with the university's stance on professionalism and sexuality, arguing, "I can be a successful and professional pharmacist as well as a strong woman that embraces her sexuality. The two are not mutually exclusive."[12]

Diei's case is incredibly timely, raising critical questions about how the First Amendment intersects with professional students' constitutional rights in a digital age. In 2005, only 5 percent of adults in the United States used one or more social media platforms.[13] As of 2020, this number has increased to 72 percent, with young adults aged eighteen to twenty-nine encompassing the largest adult group.[14] This is particularly relevant when considering the average ages of undergraduate and graduate students.[15]

Despite noncurricular student speech moving increasingly online, professional students like Diei have found little security in their First Amendment rights.[16] With the rise of social media and online forums, the boundaries for where speech begins and ends have become increasingly blurred.[17] This distinction has become particularly murky in the educational arena, as

11. David L. Hudson Jr., *University Investigates Grad Student's Social Posts; She Sues*, FREE SPEECH CTR. (Feb. 15, 2021), https://perma.cc/EEF7-JEM8.

12. *Id.*

13. *See* Social Media Fact Sheet, PEW RSCH. CTR. (Apr. 7, 2021), https://perma.cc/AEQ8-EMKA ("When Pew Research Center began tracking social media adoption in 2005, just 5% of American adults used at least one of these platforms.").

14. *See id.* ("[T]oday 72% of the public uses some type of social media.").

15. *See, e.g.*, Melanie Hanson, *College Enrollment & Student Demographic Statistics*, EDUC. DATA INITIATIVE (Aug. 7, 2021), https://perma.cc/P8VZ-ZDQL (stating that the average age of undergraduate students is 21.8 years old).

16. *See* Hartocollis, *supra* note 1 ("'It's so hard to fit old First Amendment principles into the social media era,' Mr. Greubel [Diei's pro bono lawyer] said. 'This is one of those areas of law that needs to evolve.'").

17. *See* Brigitte Jordan, *Blurring Boundaries: The "Real" and the "Virtual" in Hybrid Spaces*, 68 HUM. ORG. 181, 181 (2009) (arguing that as people increasingly enter hybrid worlds of online and offline spaces, the physical boundaries between the two begin to fade).

off-campus speech can now reach the school community with greater ease.[18] Yet, when Diei filed her lawsuit in February 2021, the Supreme Court had never directly spoken on a school's capacity to monitor and sanction off-campus speech.[19] This silence has resulted in a lack of consistency among courts when considering whether and to what extent schools can punish students for off-campus speech at any educational level.[20]

Answering calls for clarity,[21] the Court issued its first decision regarding off-campus student speech in June 2021.[22] In *Mahanoy Area School District v. B. L.*,[23] a high school student criticized her school and its cheerleading program with vulgar profanities via Snapchat, resulting in her suspension from the cheerleading team.[24] The Court ultimately sided with the

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18. *See* Mark Walsh, *Biden Administration, Education Groups Back School District in Student Online Speech Case*, EDUC. WK. (Mar. 4, 2021), https://perma.cc/98B3-86XP (summarizing the U.S. Solicitor General's amicus brief to the Supreme Court in Mahanoy Area School District v. B. L., which argues that smart phones are essentially ubiquitous, making students' off-campus, yet online activity reasonably expected to reach the school yard).

19. *See* Debra Cassens Weiss, *Supreme Court Agrees to Hear First Amendment Case of Suspended Cheerleader*, ABA J. (Jan. 11, 2021), https://perma.cc/46NV-R5DF (explaining that the Supreme Court decided to weigh in for the first time in 2021 as to whether its 1969 precedent, allowing school administrators to regulate student's speech that materially disrupts the school environment, extends to speech originating off campus).

20. *See* Elizabeth Nicoll, *University Student Speech and the Internet: A Clusterf****, 47 NEW ENG. L. REV. 397, 397 (2012)

> Students, schools, courts, and academics are all unsure of how to deal with online speech that students make from their homes but that then makes its way into the school environment. The few circuits that have heard these cases seem willing to grant school administrations the authority to punish students for such speech, but they have employed a widely variable collection of tests and have only heard cases involving middle- and high-school students. A growing body of scholarship calls for the Supreme Court to take a case applying its school speech doctrine to a student's online speech.

21. *See id.* ("A growing body of scholarship calls for the Supreme Court to take a case applying its school speech doctrine to a student's online speech.").

22. *See supra* note 19 and accompanying text.

23. 141 S. Ct. 2038 (2021).

24. *See id.* at 2046 (describing how, after B. L. was placed on the junior varsity cheerleading team, she posted a photo on Snapchat with the caption, "Fuck school fuck softball fuck cheer fuck everything").

student, indicating some hesitation to significantly extend school authority to off-campus cyberspace.[25] More importantly, *Mahanoy* seemingly marked a shift in the Court's student speech jurisprudence, which had consistently favored the defendant schools since 1986, carving out case-by-case exceptions.[26]

As monumental as the decision is, it is too early to determine the impact *Mahanoy* will have, particularly in improving clarity among students and schools as to the scope of students' off-campus speech rights. This sentiment may, unfortunately, prove even more poignant when considering *Mahanoy*'s potential impact on professional students like Diei. In the fifty years following the Court's seminal student speech decision, *Tinker v. Des Moines Independent Community School District*,[27] the Court has consistently denied certiorari in cases involving professional student speech, whether on or off campus.[28] In the absence of such guidance, courts have struggled with how and to what extent to apply student speech standards to professional programs, let alone how to distinguish their applicability between on- and off-campus speech.[29]

This Note will focus on the applicability of student speech doctrines to First Amendment claims brought by students in professional programs, with a specific focus on off-campus,

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25. *See id.* ("[T]he school itself has an interest in protecting a student's unpopular expression, especially when the expression takes place off campus, because America's public schools are the nurseries of democracy.").

26. *See infra* Part I.B.2.

27. 393 U.S. 503, 506 (1969).

28. *See* Mary Grace Henley, *Professionally Confusing: Tackling First Amendment Claims by Students in Professional Programs*, 50 STETSON L. REV. 417, 418 (2021) (arguing that, since the Supreme Court has never spoken on student speech rights at the professional school level, no bright line rule exists as to how courts are to apply free speech standards, and in turn, courts have drawn from a range of sources to devise their own rules). The Court has explored student speech rights at the college and university level in two key decisions; however, neither case specifically involved professional students in professional programs. *See infra* Part I.B.1. For this Note, professional programs refer to undergraduate and graduate programs that train or prepare students to apply for professional licensing. For example, medical or nursing students would qualify, while journalism students would not.

29. *See, e.g.*, Tatro v. Univ. of Minn., 816 N.W.2d 509, 520 (Minn. 2012) (stating that the analysis under *Tinker* is not absolute, and therefore the court must consider the "special characteristics of the academic environment" to determine what standard is applicable).

online speech. Part I will begin by exploring Supreme Court student speech doctrines pre-*Mahanoy,* giving careful attention to how the Court has both refined and complicated its on-campus student speech analysis.

The resulting confusion will be explored heavily in Part II by breaking down the recent wave of professional student speech cases at the state and federal appellate levels. Closely examining these opinions makes clear that confusion lies not only in how to apply Supreme Court precedent to varying education levels but also in how to synthesize said precedent into a cohesive body of law.

Part III will then examine the Court's recent decision in *Mahanoy*, exploring off-campus student speech at the high school level. Part III will argue that *Mahanoy* signifies the Court's hesitancy to extend untempered school dominion in such a way that would effectively subject high school students to a 24-hour school day. This concern is equally relevant to professional students off campus.

Finally, Part IV will argue that, when properly analyzed, student speech doctrines provide a sufficient basis for resolving professional student speech disputes, both on and off campus. It will also assert that *Mahanoy* should be extended to professional schools, challenging many of the professional student speech decisions explored in Part II.B.

I. SUPREME COURT STUDENT SPEECH PRECEDENT PRE-*MAHANOY*

In 1969, the Supreme Court addressed on-campus student speech rights under the First Amendment in a case long considered the baseline for student speech jurisprudence.[30] However, due to the multiplicity of ways a single idea or opinion can be expressed and disseminated, sustaining a bright line rule for analyzing student speech has proven challenging.[31] Student

30. *See* Sean R. Nuttall, *Rethinking the Narrative on Judicial Deference in Student Speech Cases*, 83 N.Y.U. L. REV. 1282, 1282 (2008) ("Scholars view Tinker v. Des Moines Independent Community School District as the high-water mark of student speech protection . . . .").

31. *See, e.g.*, C. Eric Wood, *Learning on Razor's Edge: Re-Examining the Constitutionality of School District Policies Restricting Educationally Disruptive Student Speech*, 15 TEX. J. C.L. & C.R. 101, 111–12 (2009) ("Lower courts have struggled to consistently apply Tinker's holding.").

speech jurisprudence is further complicated when courts must determine how and when to apply student speech doctrines to different academic settings with students of different ages and maturity levels.[32] Yet, the Court has been extremely selective over the past fifty years in choosing when to refine its analysis.

This Part will discuss *Tinker* and its progeny, delving into the ways the Court has evolved and tailored its thinking about on-campus student speech. Moreover, Part I.B will explore how these Supreme Court cases build upon one another to form a homogeneous body of law. It additionally will challenge the regrettable ambiguity imbued in these decisions that has led to a lack of uniformity among lower courts when applying student speech doctrines to incongruent education levels.

A. The Tinker *Standard*

The Supreme Court in *Tinker v. Des Moines Independent Community School District* definitively established that students retain their First Amendment rights when attending school.[33] In *Tinker*, school administrators reprimanded three high school students for wearing black armbands to demonstrate their opposition to the Vietnam War.[34] The armbands were part of a planned peaceful protest orchestrated by both students and parents.[35] However, upon learning of the impending protests, local principals adopted student dress

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32. *See infra* Part II.

33. *See* Nuttall, *supra* note 30, at 1293 ("Due to its highly speech-protective tone and the apparent robustness of the 'material and substantial disruption' standard, *Tinker* is commonly understood as requiring school officials to meet a substantial burden of proof regarding the possibility of disruption of the school environment in order to infringe students' First Amendment rights.").

34. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969) ("On December 16, Mary Beth and Christopher wore black armbands to their schools. John Tinker wore his armband the next day. They were all sent home and suspended from school until they would come back without their armbands.").

35. *See id.* ("In December 1965, a group of adults and students in Des Moines held a meeting . . . . The group determined to publicize their objections to the hostilities in Vietnam and their support for a truce by wearing black armbands during the holiday season . . . .").

policies that prohibited such displays on school grounds.[36] The three students were aware of the new policies and wore the armbands in direct defiance.[37] As a result, the students were suspended and did not return to school until the scheduled protest period had concluded.[38]

The three students, through their parents, filed a federal lawsuit against their respective high schools, challenging the schools' policies and disciplinary actions under 42 U.S.C. § 1983.[39] The district court upheld the constitutionality of the schools' actions, finding them "reasonable to prevent disturbance of school discipline."[40] A divided Eighth Circuit panel affirmed the district court's decision, deepening a growing circuit split around the application of First Amendment rights to school campuses.[41]

Granting certiorari, the Supreme Court reversed, holding that the defendant schools impermissibly infringed on the students' First Amendment rights.[42] The Court first articulated

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36. *See id.* ("On December 14, 1965, [the principals of the Des Moines schools] met and adopted a policy that any student wearing an armband to school would be asked to remove it, and if he refused he would be suspended until he returned without the armband.").

37. *See id.* ("Petitioners were aware of the regulation that the school authorities adopted.").

38. *See id.* ("[The three students] were all sent home and suspended from school until they would come back without their armbands. They did not return to school until after the planned period for wearing armbands had expired—that is, until after New Year's Day.").

39. *See id.* (stating that the complaint sought nominal damages and "an injunction restraining the respondent school officials and the respondent members of the board of directors of the school district from disciplining the petitioners").

40. *See id.* at 504–05 ("After an evidentiary hearing the District Court dismissed the complaint. It upheld the constitutionality of the school authorities' action on the ground that it was reasonable in order to prevent disturbance of school discipline.").

41. *See id.* (describing how the Eighth Circuit declined to follow the Fifth Circuit's determination "that the wearing of symbols like the armbands cannot be prohibited unless it 'materially and substantially interfere(s) with the requirements of appropriate discipline in the operation of the school'" (quoting Burnside v. Byars, 363 F.2d 744, 749 (1966))).

42. *See id.* at 514 (stating that petitioners' expression was constitutionally protected speech that school officials could not deny as the students' conduct neither interrupted school activities nor intruded on the rights of other students).

that neither students nor teachers relinquish their First Amendment rights to free speech and expression "at the schoolhouse gate."[43] Yet, the Court qualified its assertion, recognizing that schools have a vested interest in preventing disruption to school operations.[44] In turn, First Amendment rights are considered in light of the "special characteristics of the school environment."[45]

The Court did, however, reject a framework in which a school's "mere desire" to prevent "discomfort and unpleasantness" could provide a basis for sanctioning unpopular opinions.[46] Instead, the Court relied on the Fifth Circuit's approach, prohibiting the sanction of "pure speech" on school grounds unless the school can demonstrate that the expression would "materially and substantially" disrupt or interfere with school activities.[47] Moreover, the Court acknowledged that schools must consider the constitutional rights of all of its students and, accordingly, may restrict student speech where it encroaches on the rights of other students.[48]

*B. Supreme Court Decisions Post-*Tinker

Over the following forty years, questions continued to arise about the reach of *Tinker*'s material and substantial disruption standard to different education levels and different types of speech. This next section will explore the five subsequent Supreme Court decisions involving on-campus student speech, not only at the high school level but also at the college and university levels. It will discuss these cases in two chronological

43. *Id.* at 506.

44. *See id.* at 513 ("[C]onduct by the student, in class or out of it, which for any reason . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.").

45. *Id.* at 506.

46. *Id.* at 509.

47. *See id.* at 513–14 ("[T]he record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred.").

48. *See id.* at 508 ("[T]his case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.").

waves to mark a potential shift in the Court's reasoning—the first favoring the student and the second favoring the school.

1. Supreme Court Decisions Post-*Tinker*: Higher Education On-Campus Speech

Shortly after *Tinker*, in 1972 and 1973, the Court granted certiorari in two seminal cases exploring *Tinker's* applicability to higher education settings.[49] In both cases, relying on *Tinker*, and arguably extending *Tinker* to the university setting, the Supreme Court affirmed that students retain First Amendment speech rights on college campuses.[50]

First, in *Healy v. James*,[51] a college denied campus recognition to a student organization due to its association with a national organization known for "disruptive and violent campus activity."[52] While the student group denied affiliation with the national organization, the university associated the two, imputing the organization's "philosophy of violence and disruption" onto the students.[53] As a result, student members of the local chapter filed suit in federal court, alleging violations of their First Amendment rights.[54]

On appeal from the Second Circuit, the Supreme Court cautioned that universities may "expect students to adhere to

49. 408 U.S. 169 (1972); Papish v. Bd. of Curators of Univ. of Mo., 410 U.S. 667 (1973).

50. *See Healy*, 408 U.S. at 180 ("At the outset we note that state colleges and universities are not enclaves immune from the sweep of the First Amendment. 'It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'" (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969))); *see also Papish*, U.S. 410 at 670 ("We think Healy makes it clear that the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'").

51. 408 U.S. 169 (1972).

52. *See id.* at 169 ("The college president denied recognition because he was not satisfied that petitioners' group was independent of the National SDS, which he concluded has a philosophy of disruption and violence in conflict with the college's declaration of student rights.").

53. *Id.* at 185–87.

54. *See id.* at 177 ("Petitioners' primary complaint centered on the denial of First Amendment rights of expression and association arising from denial of campus recognition.").

generally accepted standards of conduct."[55] Accordingly, administrators may impose "reasonable campus rules"[56] on student organizations associated with the university so long as the rules conform with constitutional requirements.[57] However, the Court made clear that a group's philosophy, even a "philosophy of 'destruction,'" poses no grounds for censorship, as a university "may not restrict speech . . . simply because it finds the views expressed by any group to be abhorrent."[58]

The Court focused on the distinction between "permissible *speech* and impermissible *conduct*,"[59] emphasizing the difference between words that advocate a position, no matter how "abhorrent," and those that produce or incite actual disruptive action.[60] In its opinion, the Court made clear that to conform with First Amendment requirements, reasonable university rules could in no way restrict students' ability to "speak out" on campus to maintain the line between advocacy and action.[61]

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55. *Id.* at 192.

56. *See id.* at 191 ("The College's Statement of Rights, Freedoms, and Responsibilities of Students contains, as we have seen, an explicit statement with respect to campus disruption. The regulation, carefully differentiating between advocacy and action, is a reasonable one. . . .").

57. *See id.* at 189 ("Associational activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education. . . . The line between permissible speech and impermissible conduct [in the 'Student Bill of Rights'] tracks the constitutional requirement.").

58. *Id.* at 187.

59. *Id.* at 189 (emphasis added).

60. *See id.* at 187–88

> The College, acting here as the instrumentality of the State, may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent. . . . The critical line heretofore drawn for determining the permissibility of regulation is the line between mere advocacy and advocacy 'directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action.' (citing Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)).

61. *See id.* at 191–93 (stating that a "regulation, carefully differentiating between advocacy and action, is a reasonable one" such as the regulation here which "in no sense infringed" upon students "freedom to speak out, to assemble, or to petition for changes").

When dealing solely with a student's speech rather than the lawful nature of a student's conduct, the Court cited *Tinker*'s material and substantial disruption standard as the analytical framework for universities to follow.[62] While noting that the "special characteristics of the school environment" should be considered, the Court articulated that a university may regulate student speech if there is an evidentiary basis to find that said speech "posed a substantial threat of material disruption."[63] The Court ultimately reversed the Second Circuit's decision, holding that while petitioners would be bound to follow reasonable school policies, the college's decision was grounded in an "undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression."[64]

As federal and state appellate courts have applied *Tinker* inconsistently to the university setting,[65] some scholars have challenged whether *Healy* extended *Tinker* to the college setting or rather borrowed *Tinker*'s language to affirm the First Amendment's strength on college campuses.[66] In *Healy*, the Supreme Court did emphasize that colleges are "marketplace[s]

62. *See* Jeffrey C. Sun et. al., *A (Virtual) Land of Confusion with College Students' Online Speech: Introducing the Curricular Nexus Test*, 16 U. PA. J. CONST. L. 49, 62 (2013) ("In the formative case of Healy v. James, the Supreme Court, applying the principles articulated in *Tinker*, declared that First Amendment protections apply to public college students' speech.").

63. *Id.* at 189.

64. *Id.* at 191 (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969).

65. *See infra* Part II.

66. *See, e.g.*, *Amdt1.7.8.3 School Free Speech and Government as Educator*, Const. Annotated, https://perma.cc/N2TL-SVTF ("The Court reaffirmed *Tinker* in *Healy v. James* . . . . The Court suggested that how courts strike the balance under the *Tinker* inquiry may differ depending on the students' ages."); *see also* Stephen M. Feldman, *Free Expression and Education: Between Two Democracies*, 16 WM. & MARY BILL RTS. J. 999, 1004 (2008) ("[T]he Healy Court unequivocally applied *Tinker* in the college context"). *But see* Tyler Mlakar, *Reassociating Student Rights: Giving It the Ole College Try*, 74 ARK. L. REV. 751, 780–81 (2022) (asserting that the Court "confirmed that *Tinker* applies to the university setting" but that confusion exists with how the "primary and secondary education case controls the First Amendment rights of full-grown adult[s]" since the Court also insinuated that the First Amendment applies with greater strength on college campuses); *see also* 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, 1481 (2012) ("While the Court was willing to nod to Tinker, it was not willing to apply it.").

of ideas," and, therefore, its precedents "leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large."[67] This language arguably implies that an adult college student should retain significantly greater speech protection than a minor secondary student, not that *Tinker*'s material and substantial disruption standard is mere dicta in college settings.[68] This interpretation is strengthened by the fact that the *Healy* Court expressly referenced the material and substantial disruption standard as the appropriate standard for analyzing the constitutionality of a university policy that permits limited censorship.[69]

Next, in a brief per curium opinion, the Court reinforced its decision in *Healy*.[70] In *Papish v. Board of Curators of the*

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67. Healy v. James, 408 U.S. 169, 180 (1972).

68. *See* Nicoll, *supra* note 20, at 411–12

> The Court broadened the applicability of Tinker's substantial disruption standard, finding that universities may restrict students' First Amendment rights if such expression would materially interfere with the school's pedagogical goals. However, the Court also implied that the bar for behaviors that may substantially interfere with a collegiate environment is higher than for those which may disrupt a high school. In other words, the Court held that high-school administrators should receive greater deference than university administrators because college students are generally of legal majority and more mature.

69. *Healy*, 408 U.S. at 189

> In the context of the "special characteristics of the school environment," . . . . prohibitable are actions which "materially and substantially disrupt the work and discipline of the school." . . . . The 'Student Bill of Rights' at CCSC, upon which great emphasis was placed by the President, draws precisely this distinction between advocacy and action. . . . The line between permissible speech and impermissible conduct tracks the constitutional requirement, and if there were an evidential basis to support the conclusion that CCSC—SDS posed a substantial threat of material disruption in violation of that command the President's decision should be affirmed. (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969)).

70. *See id.* at 670 ("We think Healy makes it clear that the mere dissemination of ideas—no matter how offensive to good taste—on a state

University of Missouri,[71] a journalism graduate student sold newspapers on campus that featured a cartoon image of a "policeman raping the Statue of Liberty" with the caption "M—— f—— Acquitted."[72] As a result, the university found the graduate student in violation of the "general Standards of Student Conduct" prohibiting "indecent speech."[73]

On appeal from the Eighth Circuit, the Supreme Court found in favor of the graduate student, holding that the university violated the student's First Amendment rights.[74] The Court grounded its reasoning in *Healy*, reinforcing that the "mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'"[75]

This decision indicates that impolite or unbecoming language, even on campus, should not be easily regulated under school conduct standards at the higher education level. Lewd or unprofessional speech is at issue in many of the off-campus professional student cases explored in Part II.B. While *Papish* involved speech by a journalism graduate student, not a professional student as understood within the context of this Note,[76] *Papish* should arguably provide significant persuasive authority as the only Supreme Court opinion to explore *Tinker* and *Healy*'s applicability to graduate student speech. Yet, lower courts infrequently *cite Papish* in their analyses of professional student speech.[77]

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university campus may not be shut off in the name alone of 'conventions of decency.'").

71. 410 U.S. 667 (1973).

72. *Id.* at 667.

73. *Id.* at 667–68.

74. *See id.* at 671 (finding in favor of the graduate student "[s]ince the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech").

75. *Id.* at 670.

76. *See supra* note 28 and accompanying text.

77. In the seven professional student speech cases discussed in Part II, only two cite to *Papish*, one of which merely includes *Papish* in the string cite. *See infra* Part II. Moreover, the one case that incorporates *Papish* into its opinion arguably distorts the analysis set forth in *Papish*. *See infra* notes 251–254 and accompanying text.

2. Supreme Court Decisions Post-*Tinker*: High School On-Campus Speech

The next wave of Supreme Court jurisprudence marks a narrowing of First Amendment speech among students; however, it is important to note that each of these decisions involved high school petitioners and high school-level considerations.

First, the Court carved out an exception to *Tinker*'s material or substantial disruption standard for age-inappropriate speech. In *Bethel School District No. 403 v. Fraser*,[78] despite prior warnings from faculty, a high school student gave a speech that contained sexually explicit language at an official school assembly.[79] The student's peers responded in divergent ways, as some students applauded the explicit language and others appeared embarrassed and confused.[80] Following a disciplinary meeting, the student was suspended and removed as a graduation speaker candidate for violating a school policy prohibiting obscene language.[81] The student, by his father as guardian ad litem, brought suit in federal court for alleged violations of the student's First Amendment right to free speech.[82] The district court found in favor of the student, and the

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78. 478 U.S. 675 (1986).

79. *See id.* at 677–78 (stating that during a speech to 600 high school students, many of whom were fourteen years old, Fraser described an "elaborate, graphic, and explicit sexual metaphor," despite being warned by at least two faculty members that the language was inappropriate).

80. *See id.* at 678

> Some students hooted and yelled; some by gestures graphically simulated the sexual activities pointedly alluded to in respondent's speech. Other students appeared to be bewildered and embarrassed by the speech. One teacher reported that on the day following the speech, she found it necessary to forgo a portion of the scheduled class lesson in order to discuss the speech with the class.

81. *See id.* at 678–79 (describing that Fraser was suspended for three days and "removed from the list of candidates for graduation speaker" for violating the school's disciplinary rule, stating that "conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures").

82. *See id.* at 679 ("Respondent alleged a violation of his First Amendment right to freedom of speech and sought both injunctive relief and monetary damages under 42 U.S.C. § 1983.").

Ninth Circuit affirmed, stating that the student's speech was "indistinguishable from the protest armband in *Tinker*."[83]

On appeal, the Supreme Court reversed, refining its analytical framework. While the Court did not disregard *Tinker*, relying in part on its discussion, the Court did not expressly focus on *Tinker*'s material and substantial disruption standard as the basis for its holding.[84] Rather, the Court emphasized two key factors—the school board's authority and the nature of the speech.[85] This divergence indicates that *Tinker*'s material and substantial disruption standard need not be explicitly satisfied if a different framework is more appropriate, at least at the high school level.[86]

First, the Court reasoned that it is within the school board's purview to determine what speech qualifies as offensive.[87] In the context of a school-sanctioned assembly, it would be permissible for a school to censor offensive, sexualized content if officials deemed such content "inappropriate" and in opposition to its

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83. *Id.*

84. *See* 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*."); *see also* Christine Metteer Lorillard, *When Children's Rights "Collide": Free Speech vs. the Right to Be Let Alone in the Context of Off-Campus "Cyber-Bullying"*, 81 MISS. L.J. 189, 212 (2011) ("*Fraser* steps back from *Tinker* in that the Court did not require a 'substantial disruption' within the school to bring the speech outside constitutional protection."); Steve Varel, *Limits on School Disciplinary Authority over Online Student Speech*, 33 N. ILL. U. L. REV. 423, 451 (2013) ("*Tinker* provides more protection for speech than *Fraser* (since *Tinker* requires a showing of substantial disruption even for lewd, vulgar, and indecent speech while such speech may be restricted under *Fraser* without any proof of disruption).").

85. *See* Feldman, *supra* note 66, at 1007 ("Rather than protecting student expression unless it caused material and substantial interference with schoolwork or discipline, the Bethel Court emphasized school officials' discretion to determine whether expression 'would undermine the school's basic educational mission.'"); *see also* Varel, *supra* note 84, at 439 ("The Court found that the First Amendment allowed discipline in this situation, holding that schools may discipline students for lewd, vulgar, and indecent speech even when there is insufficient evidence that school activities were substantially disrupted to satisfy the requirements of *Tinker*.").

86. *See supra* note 84 and accompanying text.

87. *See Fraser*, 478 U.S. at 683 ("The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.").

"basic educational mission."[88] No reference was made to *Papish* or *Healy* and the significant latitude granted to adult students on college campuses, no matter how offensive their speech.[89] However, the Court did indicate that children do not share the same latitude as adults.[90]

Second, the Court differentiated between *Tinker* and the instant case with regard to the nature of the speech, with little focus on its likelihood to cause substantial disruption.[91] The Court emphasized that the Ninth Circuit failed to adequately consider that the protected speech in *Tinker* was political in nature and passively communicated.[92] Here, on the other hand, the speech was characterized as sexually vulgar, making it more likely to undermine the school's role in teaching "our youth" the "shared values of a civilized social order."[93] The opinion does, however, indicate that the age and maturity of the students may limit such school authority.[94] Where, in *Fraser*, the student spoke in a formal capacity to fourteen-year-old students, a

88. *See id.* at 687 ("The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission.").

89. *See supra* note 70 and accompanying text.

90. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986) ("It does not follow . . . that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school.").

91. *See id.* at 685 ("We hold that petitioner School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech. Unlike the sanctions imposed on the students wearing armbands in *Tinker*, the penalties imposed in this case were unrelated to any political viewpoint.").

92. *See id.* at 680 ("The marked distinction between the political 'message' of the armbands in *Tinker* and the sexual content of respondent's speech in this case seems to have been given little weight by the Court of Appeals.").

93. *See id.* at 685 ("The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission.").

94. *See id.* at 684 (exploring First Amendment jurisprudence to "recognize the obvious concern on the part of parents, and school authorities acting *in loco parentis,* to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech").

university may not be as easily able to sanction similar speech made to an adult student audience.[95]

Arguably the most influential decision post-*Tinker* came two years after *Fraser* in 1988 when the Court again narrowed student speech rights to engage—not in vulgar speech—but in social discourse. However, when carving a new exception to *Tinker*, the Court focused more on the medium of the communication than the inflammatory nature of the speech.[96] In *Hazelwood School District v. Kuhlmeier*,[97] a high school principal blocked two student articles from publication in the school's newspaper—one on student experiences with teen pregnancy and the other on the impact of divorce.[98] The principal expressed concerns about the anonymity of the students, the consent of the parents, and the appropriateness of the topics for younger students, specifically those regarding sexual activity and birth control.[99]

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95. *See id.* at 676 ("Under the First Amendment, the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, but it does not follow that the same latitude must be permitted to children in a public school.").

96. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271–72 (1988)

> The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. . . . The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.

97. 484 U.S. 260 (1988).

98. *See id.* at 263 (stating that on May 10, the high school principal rejected two articles scheduled to print in the May 13 issue of the school newspaper, one of which featured three Hazelwood East students' experiences with teen pregnancy, the other discussing the impact of divorce of Hazelwood East students).

99. *See id.* (stating that the principal was concerned that despite the use of false names, students could be readily identified from the pregnancy story, which already featured sexual references inappropriate for younger students, and that parents mentioned in the divorce article deserved a chance to consent or respond prior to publication).

The student journalists brought a federal lawsuit, alleging violations of their First Amendment rights to free speech.[100] Reversing the district court's finding that no violation had occurred, the Eighth Circuit held that the school newspaper was not just a part of the curriculum but a public forum for student viewpoints.[101] In turn, censorship of student speech in such a forum would be unconstitutional unless the school could meet *Tinker*'s material and substantial disruption standard.[102] The Supreme Court granted certiorari and reversed.[103]

In its opinion, the Court laid out new language for evaluating speech communicated through official school mediums. Consistent with *Fraser*, the Court reiterated that "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."[104] However, the Court clarified that central to its decision in *Fraser* was the fact that a student used sexually-explicit speech at an official school assembly, entitling the school to "dissociate itself."[105]

The Court then more clearly articulated its exception to *Tinker*, synthesizing its prior decision.[106] Under the *Hazelwood*

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100. *See id.* at 264 ("Respondents subsequently commenced this action in the United States District Court for the Eastern District of Missouri seeking a declaration that their First Amendment rights had been violated, injunctive relief, and monetary damages.").

101. *See id.* at 265 ("The [Eighth Circuit] held at the outset that Spectrum, the school newspaper, was not only 'a part of the school adopted curriculum,' but also a public forum, because the newspaper was 'intended to be and operated as a conduit for student viewpoint.'" (citing Kuhlmeier v. Hazelwood Sch. Dist., 795 F.2d 1368, 1372–73 (8th Cir. 1986))).

102. *See id.* at 265 (stating that the Eighth Circuit held the newspaper to be a public forum, precluding "school officials from censoring its contents except when 'necessary to avoid material and substantial interference with school work or discipline . . . or the rights of others'").

103. *See id.* at 266 (stating that the Court granted certiorari and then reversed after finding no violation to the student's First Amendment rights).

104. *Id.* at 266 (citing Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986)).

105. *See id.* at 266–67 ("[W]e held in *Fraser* that a student could be disciplined for having delivered a speech that was "sexually explicit" but not legally obscene at an official school assembly, because the school was entitled to "disassociate itself" from the speech . . . .").

106. *See id.* at 281–82 (Brennan, J., dissenting) (explaining that while the previous decisions in *Healy*, *Papish*, and *Fraser* did not clearly identify a distinction between "school-sponsored speech and incidental student

exception, school officials may exercise greater control over student speech communicated through "*school-sponsored* expressive activities" if the speech reasonably bears the "imprimatur of the school."[107] However, the Court qualified its decision, requiring that the school's actions be "reasonably related to legitimate pedagogical concerns."[108] Here, the Court determined that the principal's decision to censor articles regarding family dynamics and teen pregnancy in a school-sponsored newspaper was reasonable, especially considering that the audience included fourteen-year-old students.[109]

Hazelwood and its subsequently dubbed "legitimate pedagogical standard" have been greatly extrapolated by lower courts, especially in off-campus speech cases.[110] The associational piece is a key, albeit often overlooked, component

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expression" in their opinions, the Court here finds the distinction dispositive to its analysis).

107. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988)

> The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.

108. *Id.* at 273.

109. *See id.* at 274–75 ("The girls did comment in the article, however, concerning their sexual histories and their use or nonuse of birth control. It was not unreasonable for the principal to have concluded that such frank talk was inappropriate in a school-sponsored publication distributed to 14-year-old freshmen . . . .").

110. *See infra* Part II; *see also* Brad Dickens, *Reclaiming Hazelwood: Public School Classrooms and A Return to the Supreme Court's Vision for Viewpoint-Specific Speech Regulation Policy*, 16 RICH. J.L. & PUB. INT. 529, 542 (2013) ("Unfortunately, many federal courts have overextended *Hazelwood*, applying it to virtually any speech occurring in a school context in such a way that public school boards have almost unlimited regulatory authority over speech in that environment. Courts have reconfigured *Hazelwood* from a limited exception into a general rule.").

of the *Hazelwood* analysis.[111] To sanction student speech that poses no threat of material disruption under *Tinker*, the speech must be so intricately tied to the school that it can reasonably be understood as being sponsored or co-signed by the school.[112] This is a steep standard to meet, especially when the expression is moved off campus, physically dissociating the student from the school.

Yet, when lower courts have incorporated *Hazelwood* into their opinions, the "legitimate pedagogical interest" language is often overemphasized, and, in contrast, the "bear the imprimatur of the school" language is either discarded or trivialized.[113] Further, courts and scholars have argued that *Hazelwood* applies to all curricular speech.[114] The *Hazelwood* Court articulated how expressive activities that bear the imprimatur of the school, like a school newspaper, may be curricular in nature.[115] However, it does not follow that all speech in curricular settings would be reasonably attributable to the school itself.[116]

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111. *See infra* notes 230–240 and accompanying text; *see also* Dickens, *supra* note 110, at 542 ("*Hazelwood* presents itself merely as a device to protect schools from having their names attached to speech reasonably perceived as presenting their own points of view.").

112. *See supra* note 107 and accompanying text; *see also* Dickens, *supra* note 110, at 531 ("*Hazelwood*, by its own language, applies only to speech that could be interpreted as government-endorsed; it acts as a narrow exception to the general rule from *Tinker*, rather than a new separate standard for public school policy.").

113. *See infra* notes 230–240 and accompanying text.

114. *See, e.g.*, Adam Hoesing, "*School Sponsorship" and Hazelwood's Protection of Student Speech: Appropriate for all Curriculum Contexts?*, 4 NEB. L. REV. BULL. 1, 16 ("*Hazelwood*'s exception to *Tinker* was intended to apply in curriculum contexts that meaningfully risk the erroneous supposition of school-sponsorship . . . [S]chools are not 'entitled to exercise greater control' over student speech when the views of the student cannot be 'erroneously attributed to the school.'" (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484U.S. 260, 270 (1988))).

115. *See* Dickens, *supra* note 110, at 549 ("The Court intended its holding in *Hazelwood* to apply only to a specific set of circumstances: namely, theatrical productions, publications, and other publicly accessible activities that could reasonably bear the school's imprimatur.").

116. *See, e.g.* William C. Nevin, *Neither* Tinker*, Nor* Hazelwood*, Nor* Fraser*, Nor* Morse*: Why Violent Student Assignments Represent A Unique First Amendment Challenge*, 23 WM. & MARY BILL RTS. J. 785, 849 (2015)

Moreover, *Tinker* and *Hazelwood* are often pitted against one another as dueling standards.[117] However, *Hazelwood* did not overturn *Tinker*'s material and substantial disruption standard but rather carved out an exception for regulating student speech disseminated over school-sponsored outlets.[118] Therefore, where *Tinker* is applicable, the question should not be whether *Hazelwood* or *Tinker* is a more effective standard but whether the speech triggers an accompanying *Hazelwood* analysis.

The final Supreme Court case in the historical framework, relatively contemporary in comparison to its counterparts, once again extended school control over student speech. Unlike in *Hazelwood*, where the Court focused on school-sponsored speech, in *Morse v. Frederick*,[119] the Court reconsidered individual speech.[120] The 2007 case explored the ten-day suspension of a high school student for waving a banner stating "BONG HiTS 4 JESUS" at a school-supervised event.[121] The

> Hazelwood . . . would be inapplicable where a student was expressing a personal opinion during the course of an assignment. Still, however, some courts broadly interpret or ignore the imprimatur requirement or otherwise fail to apply Hazelwood correctly, resulting in a departure from the text of the decision and an expansion in its application.

117. *See* Jacqueline Rodriguez, *Compromise at the Schoolhouse Gate: Balancing Professionalism Standards and First Amendment Rights in Graduate Counseling Programs*, 23 TEMP. POL. & C.R. L. REV. 265 (2013) (arguing that because the distinction "between the questions being addressed in [*Tinker* and *Hazelwood*]" is often unclear, "[t]he inherent difficultly in drawing the line between the two types of speech has led courts to apply *Hazelwood* in a manner that assumes that *Tinker* has been overruled").

118. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272–73 ("Accordingly, we conclude 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 the dissemination of student expression.").

119. 551 U.S. 393 (2007).

120. *See* Rodriguez, *supra* note 117, at 275 ("The Supreme Court decision in Morse v. Frederick continued the trend of creating exceptions to *Tinker*. The exception from Morse applies when student speech might advocate illegal drug use.").

121. *See Morse*, 551 U.S. at 393 ("At a school-sanctioned and school-supervised event, petitioner Morse, the high school principal, saw students unfurl a banner stating "BONG HiTS 4 JESUS," which she regarded

student filed a federal lawsuit for First Amendment rights violations.[122] The Ninth Circuit agreed with the student, stating that the school failed to demonstrate that the student's speech "threatened substantial disruption" under *Tinker*.[123]

On appeal, the Supreme Court sided with the school, holding that the First Amendment does not obligate schools to ignore potentially dangerous promotions of illegal drug use at a school-sponsored event.[124] Considering the special characteristics of the high school environment in light of Congress's declaration "that part of the school's job is educating students about the danger of illegal drug use," the Court found that such speech posed a "serious and palpable" danger warranting reasonable school action.[125]

Arguably more interesting is the Court's discussion around speech in "public forums outside the school context."[126] The Court clarified its decision in *Fraser*,[127] asserting that the student in *Fraser* would not have been sanctioned for speaking sexual profanities *outside* the school context, insinuating that off-campus speech garners greater First Amendment protection than on-campus speech.[128]

While the Court does not definitively address how to apply its precedent off campus, *Morse* indicates some concern when schools reach beyond their physical boundaries.[129] Part III will

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as promoting illegal drug use. . . . Frederick was disciplined because his banner appeared to advocate illegal drug use in violation of school policy.").

122. *Id.* at 399.

123. *See id.* at 393 ("Accepting that Frederick acted during a school-authorized activity and that the banner expressed a positive sentiment about marijuana use, the [Ninth Circuit] nonetheless found a First Amendment violation because the school punished Frederick without demonstrating that his speech threatened substantial disruption.").

124. *See id.* at 410 ("It was reasonable for [Morse] to conclude that the banner promoted illegal drug use—in violation of established school policy—and that failing to act would send a powerful message to the students in her charge . . . .").

125. *Id.* at 408.

126. *Id.* at 405.

127. *See supra* notes 78–95 and accompanying text.

128. *See Morse*, 551 U.S. at 394 ("Had Fraser delivered the same speech in a public forum outside the school context, he would have been protected.").

129. *See* Scott Dranoff, Tinker*-ing with Speech Categories: Solving the Off-Campus Student Speech Problem with A Categorical Approach and A Comprehensive Framework*, 55 WM. & MARY L. REV. 649, 657 (2013) ("Morse v.

explore the Court's recent stance on off-campus speech in *Mahanoy* and its potential impacts on higher education and professional students. However, *Morse* should arguably have provided a greater guide for lower courts when evaluating professional speech off campus. Unfortunately, courts have seemingly overlooked this. Part II.B will explore this shortfall in greater depth.

II. APPLICATION TO PROFESSIONAL PROGRAMS ON AND OFF CAMPUS

While courts have split regarding the applicability of high school speech doctrines to higher education, most appellate courts at the state and federal levels have, in some manner, incorporated Supreme Court precedent into their discussions.[130] Part II.A will explore how courts have approached sanctions for on-campus speech by professional students. Part II.B will then explore four key off-campus speech cases, each involving online speech. Exploring how lower courts have interpreted student speech doctrines makes clear that courts lack a uniform understanding regarding (1) how to synthesize the Supreme Court caselaw from *Tinker* to *Morse*; and (2) when, if at all, to apply *Tinker* and its progeny of exceptions to professional speech disputes. This has led to varied approaches—almost all favoring universities—that have produced vastly divergent standards that ultimately provide students with little guidance and little protection.

A. *On-Campus Speech by Professional Students in Higher Education*

In 2012, the Sixth Circuit explored the relevance of student speech doctrines to speech within a professional program but fell slightly short in its application of *Hazelwood*. In *Ward v. Polite*,[131] Ward, a graduate-level counseling student, objected to

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Frederick slightly expanded the reach of *Tinker* to include off-campus speech at school-sponsored events, and reaffirmed the Court's willingness to restrict certain categories of student speech.").

130. *See, e.g.*, Oyama v. Univ. of Hawaii, 813 F.3d 850, 863 (9th Cir. 2015) ("'Our sister circuits are split on the question' of whether *Hazelwood* applies in the university setting.").

131. 667 F.3d 727 (6th Cir. 2012).

counseling a gay client during an experiential learning practicum, despite the university's anti-discrimination policy.[132] A devout Christian, Ward requested that the university refer the client to a different student in the program, either prior to the client's first session or at a later time, should sessions shift focus to relationship concerns with partners of the same sex.[133] The faculty advisor referred the client to another student; however, the university subsequently pursued disciplinary action against Ward, leading to her expulsion for ethical violations.[134] Ward sued the school for violating her First Amendment rights,[135] arguing that the university unlawfully expelled her due to her curricular speech.[136]

Turning to Supreme Court precedent, the Sixth Circuit surveyed student speech doctrines, giving credence to both the similarities and differences between high school and professional school settings. The Sixth Circuit first extended *Hazelwood*'s pedagogical concern exception to the professional school setting. [137] The court argued that nothing in *Hazelwood* indicated an inapplicability to the university environment, emphasizing one key similarity—that both high schools and

132. *See id.* at 730 ("In three years with the program, Julea Ward frequently expressed a conviction that her faith (Christianity) prevented her from affirming a client's same-sex relationships as well as certain heterosexual conduct, such as extra-marital relationships.").

133. *See id.* ("When the university asked Ward to counsel a gay client, Ward asked her faculty supervisor either to refer the client to another student or to permit her to begin counseling and make a referral if the counseling session turned to relationship issues.").

134. *See id.* ("The faculty supervisor referred the client. The university commenced a disciplinary hearing into Ward's referral request and eventually expelled her from the program.").

135. Under the First Amendment, Ward raised both free-speech and free-exercise of religion claims, as well as a Fourteenth Amendment claim. *See id.* at 732 ("Ward filed this § 1983 action . . . . Her expulsion from the program, she claimed, violated her free-speech and free-exercise rights under the First and Fourteenth Amendments."). This Note only discusses Ward's free-speech claims.

136. *See Ward*, 667 F.3d at 730 (stating that "curriculum choices are a form of school speech").

137. *See id.* at 733 ("*Hazelwood* respects the latitude educational institutions—at any level—must have to further legitimate curricular objectives. All educators must be able 'to assure that participants learn whatever lessons the activity is designed to teach.'").

universities service *students*.[138] Moreover, as prescribed in *Tinker* and developed in its progeny,[139] the Sixth Circuit considered the "special characteristics of the [professional] school environment."[140] The Sixth Circuit recognized that the heightened maturity of university students would likely raise the bar as to what speech qualified as offensive or contrary to university interests.[141]

The Sixth Circuit ultimately recognized a material issue and chose to remand the case to better assess why Ward was truly sanctioned—for the views expressed in her speech, which it deemed an impermissible sanction, or for her resistance to curricular requirements, which it considered a permissible sanction under *Hazelwood*.[142] While the Sixth Circuit did acknowledge that *Hazelwood*'s legitimate pedagogical concern exception is more narrowly applicable than *Tinker*,[143] the court's

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138. *See id.* at 733 ("The key word is student.").

139. *See supra* notes 78–85 and accompanying text.

140. *Ward*, 667 F.3d at 733.

141. *See id.* at 734

> By requiring restrictions on student speech to be 'reasonably related to legitimate pedagogical concerns,' *Hazelwood* allows teachers and administrators to account for the 'level of maturity' of the student. Although it may be reasonable for a principal to delete a story about teenage pregnancy from a high school newspaper, the same could not (likely) be said about a college newspaper. (citation omitted).

142. *See id.* at 734 ("[T]he less the speech has to do with the curriculum and school-sponsored activities, the less likely any suppression will further a 'legitimate pedagogical concern,' which is why the First Amendment permits suppression under those circumstances only if the speech causes 'substantial disruption of or material interference with school activities.'").

143 *See id.* at 734

> *Hazelwood* also features a question crucial to the resolution of all school-speech cases, whether at the high school or university level: Whose speech is it? The closer expression comes to school-sponsored speech, the less likely the First Amendment protects it. And the less the speech has to do with the curriculum and school-sponsored activities, the less likely any suppression will further a "legitimate pedagogical concern[ ]," which is why the First Amendment permits suppression under those circumstances only if the speech causes "substantial disruption of or material interference with school activities." (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S.

discussion of *Hazelwood* showcases confusion by both courts and scholars regarding *Hazelwood*'s reach.[144]

The Sixth Circuit seemingly asserted that a student's internal resistance to curricular requirements could trigger the *Hazelwood* exception.[145] Under the interpretation prescribed in *Ward*, speech in curricular settings or speech regarding curricular requirements would essentially be akin to school-sponsored speech. However, as argued in Part I, the *Hazelwood* exception is only triggered when a student's speech would reasonably be "perceived to bear the imprimatur of the school."[146]The Supreme Court made clear that *Tinker*'s material and substantial disruption standard applies to speech that a school must tolerate, while *Hazelwood*'s legitimate pedagogical concern exception applies to speech that a school would be required "affirmatively to promote."[147] It does not follow that a student's internal resistance to program requirements, while curricular in nature, would automatically qualify as speech bearing the university's seal of approval.[148]

> 260, 271, 273 (1988); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969)).

144. *See supra* notes 110–118 and accompanying text.

145. *See supra* note 116 and accompanying text; *see also* Ward v. Polite, 667 F.3d 727, 733 (6th Cir. 2012) ("Public educators may limit 'student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.' The neutral enforcement of a legitimate school curriculum generally will satisfy this requirement . . . ." (quoting *Hazelwood,* 484 U.S. at 273)).

146. *See supra* notes 110118 and accompanying text.

147. Hazelwood*,* 484 U.S. at 270–71; *see also* Dickens, *supra* note 110, at 542 ("*Hazelwood* presents itself merely as a device to protect schools from having their names attached to speech reasonably perceived as presenting their own points of view.").

148. *See supra* notes 110–118 and accompanying text; *see also* Dickens, *supra* note 110, at 542 ("[S]tudent-teacher relationships involve expressions of exclusively private student voice, and thus operate outside of *Hazelwood*'s bounds. Classroom assignments and projects necessarily solicit personal viewpoints and expression from students; consequently, it is not reasonable to expect those activities to be understood as the official voice of the school."); *see also* Frank D. LoMonte, *"The Key Word Is Student": Hazelwood Censorship Crashes the Ivy-Covered Gates*, 11 FIRST AMEND. L. REV. 305, 305–06 (2013)

> Ward follows an increasingly common pattern in which colleges assert the Hazelwood level of control over their students' speech: A student voices opposition to school curriculum, often on moral or religious

Other circuits have incorporated analytic frameworks distinct from student speech doctrines into their opinions, highlighting deep inconsistencies in how courts may resolve professional student speech cases. For example, in *Keeton v. Anderson-Wiley*,[149] the Eleventh Circuit raised a creative hybrid argument, evaluating professional student speech under both student speech and employee speech doctrines.[150] Keeton, a master's student seeking her degree in school counseling, repeatedly expressed to professors and classmates that she believed the LGBTQ community suffered from identity confusion.[151] Keeton expressed her intention to attempt conversion therapy on LBGTQ-identifying students during counseling sessions.[152] Upon learning of Keeton's on-campus speech, university officials held her in violation of the American Counseling Association's Code of Ethics.[153]

Before participating in the program's clinical practicum, the university required Keeton to complete a remediation plan to address compliance concerns and improve Keeton's ability to competently counsel students of diverse backgrounds and

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> grounds, in ways that the college's administration believes reflect unfitness for the student's course of study. The expansion of Hazelwood into these factual settings exemplifies how the decision has become unmoored from its foundations.

149. 664 F.3d 865 (11th Cir. 2011).

150. *See id.* at 877 (explaining that because Keeton was essentially a school employee when working in its clinical practicum, Supreme Court precedent, such as that in *Watts v. Florida International University,* 495 F.3d 1289 (11th Cir. 2007), provides support for finding that the university did not violate his First Amendment rights).

151. *See id.* at 868 ("[Keeton] holds several beliefs about homosexuality that she views as arising from her Christian faith. . . . [Keeton] expressed to professors in class and fellow classmates in and out of class that she believed that the GLBTQ population suffers from identity confusion . . . .").

152. *See id.* ("[S]he expressed . . . that she intended to attempt to convert students from being homosexual to heterosexual. Keeton also said that it would be difficult for her to work with GLBTQ clients and to separate her views about homosexuality from her clients' views.").

153. *See id.* at 869 ("ASU's officials determined . . . Keeton expressed her intent to violate several provisions of the American Counseling Association's (ACA) Code of Ethics, which ASU was required to adopt and teach in order to offer a counseling program accredited by the Council for Accreditation of Counseling and Related Educational Programs.").

sexualities.[154] During several meetings discussing the remediation plan, Keeton alleged that university officials told her that her religious beliefs were incorrect and that she could not maintain such views as a counselor.[155] In response, Keeton filed a federal action, alleging that university officials violated her First Amendment free speech rights.[156]

Akin to the Sixth Circuit's analysis in *Ward*, the Eleventh Circuit determined *Hazelwood* to be the proper standard, interpreting the clinical practicum in question as a curricular, school-sponsored student activity.[157] As such, the court granted the university deference to exert reasonable control over Keeton's speech, deeming student speech in a clinical setting to reasonably "bear on the imprimatur of the school."[158] Moreover, the court held that the university's disciplinary actions were reasonable under *Hazelwood*, concluding that teaching professional students to comply with licensing codes was a "legitimate pedagogical concern."[159]

The court then pivoted to explore Keeton's First Amendment rights under a different theory—that while serving real clients in a practicum setting, Keeton was not only a

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154. *See id.*

> Before Keeton could participate in the program's clinical practicum, in which she would have engaged in one-on one counseling with a student, ASU's officials asked her to participate in a remediation plan, to help her learn how to comply with the ACA Code of Ethics and improve her "ability to be a multiculturally competent counselor, particularly with regard to working with [GLBTQ] populations."

155. *See id.* at 870 (stating that Keeton alleged "officials told her that 'you couldn't be a teacher, let alone a counselor, with those views,' asked her to alter some of her beliefs, and said that she had a choice of adhering to the Bible or to the ACA Code of Ethics").

156. *See id.* at 867 ("Keeton filed this action pursuant to 42 U.S.C. § 1983, alleging that requiring her to complete the remediation plan violated her First Amendment free speech and free exercise rights.").

157. *See id.* ("[A] significant concern underlying *Hazelwood*—the deference that courts must show to a school's curricular choices—applies here, as enjoining ASU from imposing its remediation plan on Keeton, and forcing ASU to allow Keeton to participate in the clinical practicum, would interfere with ASU's control over its curriculum.").

158. *Id.*

159. *Id.*

student but an employee of the university.[160] The court ultimately held that the university could plausibly regulate Keeton's speech under student speech or employee speech doctrines without offending Keeton's First Amendment rights.[161] While employee speech is outside the scope of this Note, the inclusion of employee speech doctrines in *Keeton* highlights how unpredictable appellate courts have been in their review of professional student speech.

With many fact-intensive questions encompassing student speech analysis—is the content disruptive, is the mode of communication school-sponsored, does the speech address political or social concerns, does the speech encourage illegal activity, does the speech reach minors or adults—courts have frequently chosen to distinguish their case facts from Supreme Court precedent to forge their own student speech tests. For example, in *Oyama v. University of Hawaii,*[162] the Ninth Circuit analyzed a professional student case under both student and employee speech doctrines, only to deem both incompatible and settle on its own "institutional responsibility" standard.[163]

160. *See* Keeton v. Anderson-Wiley, 664 F.3d 865, 76–77 (11th Cir. 2011) ("A final and key consideration with respect to Keeton's viewpoint discrimination claim is the role that the clinical practicum plays in the curriculum. . . . Keeton . . . effectively would have been the school's employee in the clinical practicum.").

160. The Eleventh Circuit turned to its own precedent in *Watts v. Florida International University*, 495 F.3d 1289 (11th Cir. 2007) where the court deemed a master's student not only a student but an employee when participating in a supervised field practicum with real patients. *See Watts*, 495 F.3d at 1294 ("The action that led to the results about which Watts complains is his termination from employment in the practicum, and to that pivotal action the *Pickering* test applies.").

161. *See Keeton*, 664 F.3d at 877 ("Relying on a series of Supreme Court cases concerning the government's power, as an employer, to limit the speech of its employees when the employee speaks on a matter of private concern . . . we rejected Watts's claim that the school's actions violated his First Amendment free speech rights."). In *Connick v. Meyers*, 461 U.S. 138 (1983), the Supreme Court deemed employees' interests in free speech to be greatly displaced by that of their public employers when employees speak on issues of private concern. *See id.* at 152–53 (citing *Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410,* 415 n.4 (1979)) ("Private expression . . . may in some situations bring additional actors to the *Pickering* calculus.").

162. 813 F.3d 850 (9th Cir. 2015).

163. *See id.* at 867–68 ("[U]niversities may consider students' speech in making certification decisions, so long as their decisions are based on defined

Oyama, a student at Hawaii's only accredited institution to recommend secondary teacher candidates for state licensing, met all academic requirements to qualify for a student teacher position within his program.[164] However, the university denied his student teacher application due to his on-campus statements.[165] Oyama appealed the decision to the Dean of the College of Education, who affirmed on grounds that the university held a duty to only recommend students for licensing who the university believed met all expectations set by the state.[166] Oyama subsequently filed a First Amendment claim in federal court.[167]

As in *Keeton*, the Ninth Circuit considered both employee and student speech doctrines. To begin, the court was skeptical of extending employee speech precedent to First Amendment disputes with professional students.[168] The Ninth Circuit rejected the sentiment that students engaged in clinical or actual practice work are, in essence, university employees while completing their curricular hours.[169] Moreover, the Ninth

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professional standards, and not on officials' personal disagreement with students' views.").

164. *See id.* at 855 ("The University of Hawaii at Manoa is Hawaii's only nationally accredited institution that recommends students for certification as secondary school teachers.").

165. *See id.* at 857–58 ("Oyama's understanding of sexual relationships between adults and minors, as well as between teachers and students, was contrary to the 'legal and ethical guidelines imposed by the State.' . . . He recounted several comments by Oyama that 'demonstrated a lack of empathy and understanding of students with disabilities.'").

166. *See id.* at 859 (stating that the dean found that Oyama had notice of the program's standards as outlined in the program's handbook and therefore the university had appropriate basis to reject Oyama's student teaching application).

167. *Id.*

168. *See id.* at 864 ("*Pickering* 'requires a court evaluating restraints on a public employee's speech to balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."'" (quoting City of San Diego v. Roe, 543 U.S. 77, 82 (2004); Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968))).

169. *See id.* at 865–66 ("However useful public employee speech doctrine may appear, however, it cannot control our analysis of Oyama's First Amendment claim. The first and most basic problem is that Oyama was not a government employee."). The court rooted its holding in the fact that Oyama and similarly situated students are not one, but two steps removed from qualifying for certification and employment, as they are required not only to

Circuit took issue with the disparate purposes of employment versus education, arguing that students are not enrolled to serve an employer but to share their ideas and gain new understanding and maturity through learning.[170]

Next, turning to student speech doctrines, the Ninth Circuit initially seemed to recognize the applicability of Supreme Court precedent to professional students. For example, the court argued that a state's interest in curbing illegal drug use in high schools, as in *Morse*, was akin to a state's interest in safeguarding its teaching profession from candidates who lack the professionalism to oversee a classroom.[171] Moreover, the court suggested that *Hazelwood* could provide a basis for censoring Oyama's speech. During the certification process, the university would have to publicly communicate that it deems its students qualified for practice, inevitably implicating the imprimatur of the university.[172]

By preventing Oyama from accessing upper-level courses that would qualify him for state certification, the court found the university's actions to be in accordance with *Hazelwood*.[173] In the eyes of the court, the university merely acted preemptively, protecting itself from endorsing student speech that conflicted with its legitimate pedagogical purpose—

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complete student teaching coursework but to do so successfully. *See id.* at 866 ("Oyama was two steps removed from government employment: he was an applicant to a university *program* . . . Even then, only if Oyama satisfactorily performed as a student teacher, and met other requirements, would the University recommend him for certification and actual employment by the state.").

170. *See id.* at 866 ("As a student at the University of Hawaii, Oyama enjoyed greater freedom to test his ideas, critique professional conventions, and develop into a more mature professional than he would as a government employee.").

171. *See id.* at 862 ("This institutional responsibility, like the 'governmental interest in stopping student drug abuse' in *Morse,* may allow the University to deny a student teaching application based on speech demonstrating that the applicant lacks the professional skills and disposition to enter a classroom, even as a student teacher.").

172. *See id.* ("Because the certification process necessarily implicates the University's 'imprimatur,' the University is entitled to deference in determining how to 'lend its name' to certification candidates.").

173. *See id.* ("Here, this 'imprimatur' concept resonates not because the views of a certification candidate may be 'erroneously attributed to the school,' but rather because the act of certification forces the university to speak." (citing Hazelwood Sch. Dist. v. Kuhlmeier*,* 484 U.S. 260, 271–72 (1988))).

training students fit for the teaching profession.[174] In essence, the Ninth Circuit suggests that, by graduating a student, the student would bear the university's imprimatur.[175] This determination seems very far removed from the types of expressive student activities that would bear the imprimatur of a school as described in *Hazelwood*, such as a school-sponsored newspaper.[176]

Nevertheless, the Ninth Circuit rejected student speech doctrines altogether as a basis for resolving Oyama's complaint, citing a circuit split as to whether *Hazelwood*'s pedagogical concern exception applies at the university level in the first place.[177] The circuit court further declined to extend the *Hazelwood* framework to the case at bar, distinguishing the pedagogical concerns raised in *Hazelwood* from those raised in *Oyama*.[178] For example, the Ninth Circuit emphasized that in *Hazelwood*, school officials were apprehensive about exposing minors to material beyond their maturity level.[179] In contrast, Oyama and his peers were adults, making such concerns tangential.[180] Moreover, in *Hazelwood*, school officials expressed

174. *See id.* ("[T]he act of certification forces the university to speak. When the University recommends a student for certification, it communicates to the world that, in its view, that student is fit to practice the profession.").

175. Mark P. Strasser, *Student Dismissals from Professional Programs and the Constitution*, 68 Case W. Res. L. Rev. 97, 136 (arguing that the *Oyama* court's interpretation of *Hazelwood* "makes it very broad").

176. *See supra* note 118 and accompanying text.

177. *See* Oyama v. Univ. of Hawaii, 813 F.3d 850, 862–63 (9th Cir. 2015) ("While aspects of student speech doctrine are relevant here, the Supreme Court has yet to extend this doctrine to the public university setting. . . . 'Our sister circuits are split on the question of whether *Hazelwood* applies in the university setting.'" (citing Flint v. Dennison, 488 F.3d 816, 829 n.9 (9th Cir. 2007))).

178. *See id.* at 863 ("This case presents no occasion to extend student speech doctrine to the university setting.").

179. *Id.* As an aside, this distinction appears to be slightly nebulous, given the fact that while his questionable statements occurred primarily in a higher education classroom setting, Oyama would have been working directly with minor middle or high school students of lesser maturity level during the student teaching position and once certified.

180. *See id.* ("Concerns about student maturity cannot justify restrictions on speech in this context because certification candidates are adults; indeed, a prerequisite for enrollment in the Program is graduation from a four-year institution of higher education."). As an aside, this distinction appears to be slightly nebulous, given the fact that while his questionable statements

concern with teaching students lessons, while, in *Oyama*, university officials expressed concern with safeguarding certification from unqualified students.[181]

The *Oyama* court ultimately adopted its own certification framework yet, ironically, anchored its analysis in professional school cases like *Keeton* and *Ward*, both of which relied heavily on student speech doctrines.[182] The Ninth Circuit ignored this fact, instead using the two cases to highlight a trend among its sister circuits to uphold university actions against student speech deemed incompatible with professional standards.[183]

Potentially more interesting, however, is the fact that the Ninth Circuit completely disregarded *Healy* and *Papish*—the Supreme Court's two higher education cases—in its analysis.[184] Instead, the court only discussed *Tinker*, *Hazelwood*, *Fraser*, and *Morse*—its four high school-level cases.[185] By doing so, the court was able to argue that student speech precedent was incompatible, "fail[ing] to account for the vital importance of academic freedom at public colleges and universities."[186] This argument completely discounts the fact that the Supreme Court had already explored *Tinker*'s applicability to the university setting in *Healy* and *Papish*.[187] The Ninth Circuit could have acknowledged this and still attempted to distinguish between

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occurred primarily in a higher education classroom setting, Oyama would have been working directly with minor middle or high school students of lesser maturity level during the student teaching position and once certified.

181. *See id.* ("The University's purpose was not to teach Oyama any lesson; rather, it was to fulfill the University's *own* mandate of limiting certification recommendations to students who meet the standards for the teaching profession.").

182. *See* Oyama v. Univ. of Hawaii, 813 F.3d 850, 867–68 (9th Cir. 2015) (citing to Keeton v. Anderson–Wiley and Ward v. Polite, as well as other sister circuit opinions).

183. *See id.* ("[W]hile these decisions lack a common doctrinal foundation, they appear to provide a rule we find instructive here: universities may consider students' speech in making certification decisions, so long as their decisions are based on defined professional standards, and not on officials' personal disagreement with students' views.").

184. *See supra* notes 49–77 and accompanying text.

185. *See Oyama*, 813 F.3d at 861 (9th Cir. 2015) ("All of these cases involved the speech of high school students at school or school-sanctioned events.").

186. *Id.* at 863.

187. *See supra* notes 49–77 and accompanying text.

professional and non-professional university programs. By failing to acknowledge *Healy* and *Papish*, or the fact that *Tinker* would arguably apply even if *Hazelwood* did not, *Oyama* exposes a key problem that will prove poignant in the off-campus speech cases—that courts do know how to, or choose not to, properly synthesize the caselaw from *Tinker* to *Morse*.

B. Off-Campus Speech by Professional Students in Higher Education

Cases dealing with off-campus speech are no more consistent with Supreme Court precedent. *Tatro v. University of Minnesota*[188] is one of few state-appellate court decisions to receive academic scrutiny by tackling off-campus speech at the professional school level; however, the court did not do so by applying student speech doctrines.[189]

Tatro involved a mortuary science student who shared a series of social media posts that violated program rules.[190] While an undergraduate rather than a graduate degree, the Mortuary Science Program prepared students for state licensing.[191] As such, Amanda Tatro was actively engaged in laboratory work with cadavers, subjecting her to university-imposed academic rules and professional ethics codes.[192]

Tatro was a junior in the Mortuary Science Program at the University of Minnesota when she posted to Facebook about one of her deceased subjects named "Bernie" in what has been

188. 816 N.W.2d 509 (Minn. 2012).

189. *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 posts.").

190. *See id.* at 512 (restating the Facebook posts relating to her work with cadavers, one of which stated "I still want to stab a certain someone in the throat with a trocar though").

191. *See id.* at 511–12 ("The Mortuary Science Program is a Bachelor of Science program for upperclass undergraduate students. The Program Director testified that the primary purpose of the program —its 'mission'—is to prepare students to be licensed funeral directors and morticians.").

192. *See id.* at 516 ("As a condition of access to human cadavers in her laboratory courses, Tatro was required to follow certain academic program rules, which included the Mortuary Science Student Code of Professional Conduct, the rules of the Anatomy Bequest Program, and the anatomy lab rules.").

described as "satirical commentary and violent fantasy about her school experience."[193] Examples include "Gets to play, I mean dissect, Bernie today" and "[P]erhaps I will spend the evening updating my 'Death List # 5' and making friends with the crematory guy. I do know the code."[194] The program director subsequently met with Tatro, claiming that students and faculty were fearful for their safety following Tatro's posts about "stab[bing] a certain someone in the throat with a trocar."[195] Tatro's anatomy instructor reported her online conduct to the Office of Student Conduct and Academic Integrity for sanctioning.[196] While Tatro defended her actions, arguing that she made the online posts in jest without the intention of provoking fear amongst her peers, the university deemed her conduct sufficiently threatening to find Tatro in violation of the Student Conduct Code.[197]

The Supreme Court of Minnesota placed significant weight on the fact that Tatro, in essence, acknowledged the university's right to regulate her online activity.[198] Prior to commencing the laboratory courses in question, Tatro signed a disclosure form agreeing to comply with laboratory professionalism rules, one of which prohibited online blogging about the lab or its work with cadavers.[199] Since Tatro voluntarily enrolled in a university that

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193. *Id.* at 511.

194. *Id.* at 512–13.

195. *See id.* at 513 ("The Director testified that '[t]here was a lot of fear' surrounding Tatro's post about stabbing someone with a trocar and hiding a scalpel in her sleeve. According to the Director, the staff members 'were very much concerned for their safety,' particularly given other well-known episodes of school violence outside of Minnesota.").

196. *See id.* (stating that Tatro could rejoin the lab and take her exams as the process for her disciplinary investigation would take time).

197. *See id.* ("Tatro also testified at the CCSB hearing, explaining that she uses humor and jokes to release anxiety and to stave off depression due to her unique life circumstances. . . . The CCSB found Tatro responsible for violating the Student Conduct Code provision prohibiting threatening conduct.").

198. *See id.* at 520–21 ("Despite her starting point, which equates the free speech rights of university students with those of the general public, Tatro acknowledges that the University may constitutionally regulate 'off-campus conduct that violate[s] specific professional obligations.'").

199. *See id.* ("Tatro then signed the Anatomy Bequest Program Human Anatomy Access Orientation Disclosure Form . . . . The anatomy lab rules allowed 'respectful and discreet' '[c]onversational language of cadaver

enforces student contracts under its student code, the court asserted that the university could regulate Tatro's online, off-campus student speech because both parties, in essence, agreed.[200] The court's analysis did not explicitly rest on contractual rules, the opinion noting that a university could not impose unconstitutional restrictions on a student's speech through a contractual mechanism.[201] The court added the caveat that any regulation of off-campus speech rights must be "narrowly tailored and directly related to established professional conduct standards" to prevent overly broad restrictions on students' personal lives.[202]

The court ultimately found the university's rules to be sufficiently tailored to professional conduct standards, as the university's rules did not speak to "respectful and discreet behavior on Facebook generally, but explicitly pertain[ed] to statements about cadaver dissection and the anatomy lab."[203] Moreover, the court determined that the rules were not overly broad, as the rules were aimed at online activities like Facebook that garnered substantial viewership.[204] The court did insinuate that a rule regulating private, off-campus conversations of sufficient intimacy may not survive the narrowly tailored and directly related standard, even if under the guise of promoting professionalism.[205]

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dissection outside the laboratory,' but prohibited 'blogging' about the anatomy lab or cadaver dissection.").

200. *See id.* at 512, 514 ("Without signing the [disclosure] form, Tatro would not have been allowed to participate in the laboratory courses. . . . [T]he Student Conduct Code prohibit[s] 'conduct that violates University, collegiate, or departmental regulations that have been posted or publicized, including provisions contained in University contracts with students.'").

201. *See id.* at 521 n.4 ("Tatro's free speech argument does not depend on Tatro's agreement to restrict her speech as a condition of participating in the laboratory courses. We concur with Tatro that a university cannot impose a course requirement that forces a student to agree to otherwise invalid restrictions on her free speech rights.").

202. *Id.*

203. *Id.* at 522.

204. *See id.* at 523 ("The academic program rules allow 'respectful and discreet' conversational language of cadaver dissection outside the laboratory, but prohibit blogging about cadaver dissection or the anatomy lab.").

205. *See id.* ("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.").

Even though both the student and the school argued in terms of Supreme Court precedent,[206] the *Tatro* court rejected both arguments in favor of its own standard, described above, finding student speech doctrine insufficient in the professional school setting.[207] The court did correctly recognize that *Hazelwood*'s proposed legitimate pedagogical concern standard only extends to speech in very specific contexts, namely those in which a person could reasonably perceive a student's speech as school-sponsored or endorsed.[208] Contrary to speech shared through a school newspaper or during an organized assembly, the court deemed speech shared through a student's personal Facebook posts unlikely to reasonably "bear the imprimatur of the University."[209] To apply the legitimate pedagogical concerns standard to a professional student's unsavory online communications without further qualification would be to impermissibly expand the holding in *Hazelwood*.[210]

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206. Tatro relied on the Court's language in *Healy*, namely that universities are not exempt from adhering to the First Amendment. *See id.* at 517–18 ("Tatro's basic argument is that public university students are entitled to the same free speech rights as members of the general public with regard to Facebook posts." (citing Healy v. James, 408 U.S. 169, 180 (1972))). In contrast, the university analyzed its program rules and disciplinary measures under Court's decision in *Hazelwood*, pointing to rhetoric regarding the legitimate pedagogical concern standard. *See id.* ("In contrast, the University argues that it 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." (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988))).

207. *See* Tatro v. Univ. of Minn., 816 N.W.2d 509, 518 (Minn. 2012) ("We conclude that neither of the standards proposed by the parties nor the standard applied by the court of appeals is appropriate in the context of a university student's Facebook posts when the university has imposed disciplinary sanctions for violations of academic program rules.").

208. *See id.* ("[W]e observe that the *Hazelwood* legitimate pedagogical concerns standard proposed by the University applies to 'school-sponsored' speech and addresses the question 'whether the First Amendment requires a school affirmatively to promote particular student speech.'" (citing *Hazelwood*, 484 U.S. at 270–71, 273)).

209. *See id.* ("[B]ecause the public would not reasonably perceive Tatro's Facebook posts to bear the imprimatur of the University, the Facebook posts cannot be characterized as 'school-sponsored speech.'").

210. *See id.* ("Applying the legitimate pedagogical concerns standard to a professional student's Facebook posts would give universities wide-ranging authority to constrain offensive or controversial Internet activity by requiring

However, the court too quickly dismissed *Tinker* and its material and substantial disruption standard.[211] The court argued that *Tinker* was inapplicable since the university did not censor Tatro to prevent an on-campus disturbance but to punish her conduct code violation.[212] This assessment essentially gave the court free reign to devise its own standard of review.[213] As the Supreme Court has neither taken a professional student case nor considered the role professional programs play in preparing students for licensing, it is understandable that courts may seek to develop their own exceptions to *Tinker* on public policy grounds. While it is true that the Supreme Court has established case-by-case exceptions to *Tinker*,[214] the absence of a substantial disruption should be a red flag that a school may be overextending its reach.

In contrast, the Eighth Circuit relied heavily on Supreme Court precedent in its review of professional student speech. However, it created a muddied test for evaluating off-campus speech by failing to recognize that *Hazelwood*'s legitimate pedagogical concern exception only triggers where a student's speech can be imputed onto the school.[215] In *Keefe v. Adams*,[216] a clinical nursing student pursuing an Associate Degree posted threatening Facebook messages online directed at his peers.[217]

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only that a school's actions be 'reasonably related' to 'legitimate pedagogical concerns.'").

211. *See* William Bush, *What You Sign Up for: Public University Restrictions on "Professional" Student Speech After Tatro v. University of Minnesota*, 20 WASH. & LEE J. CIV. RTS. & SOC. JUST. 547, 576 (2014) ("[*Tatro*] is particularly noteworthy that the Minnesota Supreme Court abandoned the lower appeals court's analysis along the *Tinker* line of substantial disruption cases, and instead crafted a new standard related to established professional conduct codes.")

212. *See id.* at 520 ("The driving force behind the University's discipline was not that Tatro's violation of academic program rules created a substantial disruption on campus or within the Mortuary Science Program, but that her Facebook posts violated established program rules that require respect, discretion, and confidentiality in connection with work on human cadavers.").

213. *See supra* note 211 and accompanying text.

214. *See supra* Part I.B.2.

215. *See, e.g.*, Morse v. Frederick, 551 U.S. 393, 405 (2007) (stating that *Hazelwood* did not control because "no one would reasonably believe that [the high school student's] banner bore the school's imprimatur").

216. 840 F.3d 523 (8th Cir. 2016).

217. *See, e.g.*, *id.* at 526–27.

After multiple students complained, the program's Director of Nursing met with Keefe and ultimately dismissed him from the degree program, deeming his posts unprofessional and his attitude unremorseful.[218] While Keefe later removed the posts and issued an apology letter, the university denied his administrative appeal.[219] Keefe subsequently filed suit, arguing that the university unconstitutionally removed him from the program for personal speech made outside school curriculum, online and off campus.[220]

To begin, the Eighth Circuit considered whether ethics-based curricular requirements based on professional standards should, on their face, survive First Amendment scrutiny.[221] Turning to persuasive authority in cases like *Oyama* and *Ward*, the Eighth Circuit recognized a growing trend among its sister circuits to hold professional students to professional

> I give her a big fat F for changing the group power point at eleven last night and resubmitting. Not enough whiskey to control that anger. . . . Im going to take this electric pencil sharpener in this class and give someone a hemopneumothorax with it before to long. I might need some anger management. . . . [Y]ou keep reporting my post and get me banded. I don't really care. If thats the smartest thing you can come up with than I completely understand why your going to fail out of the RN program you stupid bitch.

218. *See id.* at 527 ("Frisch [The Director of Nursing] testified that Keefe was not receptive to her concern that the posts were unprofessional. Based on Keefe's 'lack of remorse, lack of concern, not recognizing, not saying he wanted to change,' Frisch decided to remove him from the Associate Degree Program. . . .").

219. *See id.* at 529 ("Keefe submitted a lengthy 'Due Process Appeal' letter, stating he had removed offensive comments from his Facebook page and 'removed myself from the social media network.' . . . [The Vice President of Academic Affairs] left a phone message in early January informing Keefe that his appeal was being denied.").

220. *See id.* ("Keefe argues that defendants violated his First Amendment right to free speech by removing him from the Nursing Program at a public college 'for comments on the internet which were done outside of class and unrelated to any course assignments or requirements, and did not violate any specific rules.'").

221. *See id.* at 530 ("Given the strong state interest in regulating health professions, teaching and enforcing viewpoint-neutral professional codes of ethics are a legitimate part of a professional school's curriculum that do not, at least on their face, run afoul of the First Amendment.").

conduct codes on campus.[222] Despite the fact that the plaintiffs in *Oyama* and *Ward* were not, in fact, licensed professionals but students, the Eighth Circuit followed suit, holding that a university could censor professional student speech under professionalism standards.[223]

The Eighth Circuit then rejected Keefe's argument that off-campus speech traditionally protected by the First Amendment should be categorically exempt from university-imposed professionalism standards.[224] Where a student is lawfully subject to university-imposed professionalism standards, as detailed above,[225] the court saw no reason to treat a student's on-campus and off-campus speech as categorically distinct.[226] Instead, the court devised a new analytical framework to evaluate "unprofessional" speech, whether on or off campus.[227] Informed in part by the *Hazelwood* dissenters,[228] the Eighth Circuit held that violations of

222. *See id.* ("Many courts have upheld enforcement of academic requirements of professionalism and fitness, particularly for a program training licensed medical professionals.").

223. *See id.* ("Given the strong state interest in regulating health professions, teaching and enforcing viewpoint-neutral professional codes of ethics are a legitimate part of a professional school's curriculum that do not, at least on their face, run afoul of the First Amendment.").

224. *See id.* at 531 ("A serious question raised by Keefe in this case is whether the First Amendment protected his unprofessional speech from academic disadvantage because it was made in on-line, off-campus Facebook postings. . . . We reject this categorical contention.").

225. *See supra* notes 221–223 and accompanying text.

226. *See* Keefe v. Adams, 840 F.3d 523, 531 (8th Cir. 2016).

> A student may demonstrate an unacceptable lack of professionalism off campus, as well as in the classroom, and by speech as well as conduct. Therefore, college administrators and educators in a professional school have discretion to require compliance with recognized standards of the profession, both on and off campus, "so long as their actions are reasonably related to legitimate pedagogical concerns." (citations omitted).

227. *See id.* ("[C]ollege administrators and educators in a professional school have discretion to require compliance with recognized standards of the profession, both on and off campus, 'so long as their actions are reasonably related to legitimate pedagogical concerns.'" (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988))).

228. *See id.* ("The *Hazelwood* dissenters noted that an 'educator may, under *Tinker*, constitutionally "censor" poor grammar, writing, or research

university codes that mirror professional conduct standards "'materially disrupt[]' the [p]rogram's 'legitimate pedagogical concern[s]'" in teaching students how to comply with licensing standards.[229]

In essence, the *Keefe* standard blends *Tinker*'s material and substantial disruption standard and *Hazelwood*'s legitimate pedagogical concerns exception into a new rule arguably incompatible with either decision. First, *Tinker* made clear that a school's "mere desire" to prevent "discomfort and unpleasantness" provides no constitutional basis to censor "unpopular opinions."[230] Instead, schools must look for more specific expression that would "materially and substantially interfere with the operation of the school."[231] *Tinker* provides some guidance as to what such speech may look like, such as that which "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."[232] It is hard to equate a deviation from professional standards, without more, to a material disruption akin to that described in *Tinker*.

Moreover, the Eighth Circuit arguably trivializes the Court's decision in *Hazelwood*.[233] Courts frequently cite *Hazelwood*'s legitimate pedagogical concern exception as a foil to *Tinker*'s material and substantial disruption standard, an alternate approach for evaluating student speech sanctions.[234] However, courts often disregard the specific contexts that trigger *Hazelwood*, permitting them to displace *Tinker*.[235] In *Hazelwood*, the Supreme Court was clear—"the standard articulated in *Tinker* for determining when a school may punish

because to reward such expression would "materially disrupt" the [student] newspaper's curricular purpose.'" (citing *Hazelwood*, 484 U.S. at 284 (Brennan, J., dissenting))).

229. *Id.*

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

231. *Id.*

232. *Id.* at 513.

233. *See* David L. Hudson, Jr., *Thirty Years of Hazelwood and Its Spread to Colleges and University Campuses*, 61 HOW. L.J. 491, 516–17 (2018) ("The *Keefe* decision is disturbing not only for allowing college administrators to rely on broad notions of professionalism but also because it allows colleges and universities to punish students for speech they make anywhere at any time.").

234. *See supra* notes 110–118 and accompanying text.

235. *See supra* note 118 and accompanying text.

student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression."[236] In other words, *Hazelwood*'s legitimate pedagogical concerns exception only triggers where a student's speech can reasonably be attributed to the school as if the school itself supports or endorses the speech.[237] When the Eighth Circuit asserted that "college administrators and educators in a professional school have discretion to require compliance with recognized standards of the profession, both on and off campus, 'so long as their actions are reasonably related to legitimate pedagogical concerns,'"[238] it missed this crucial qualification.[239] And that is without considering the unsoundness of the court's decision to lump on-campus and off-campus speech into one blanket standard, given the fact that the Supreme Court had already alluded to off-campus speech garnishing greater protection in *Fraser* and *Morse*.[240]

In comparison, the Tenth Circuit relied heavily on Supreme Court precedent, not to resolve an off-campus professional student speech issue but to showcase a lack of clarity on how to apply student speech doctrines in the first place. However, the Tenth Circuit provided an arguably surface-level analysis of Supreme Court caselaw, ignoring poignant language in the decisions that arguably provide more direction than the court allowed.

In *Hunt v. Board of Regents of the University of New Mexico*,[241] a university disciplined a medical student for his off-campus Facebook activity, which the university deemed "unprofessional conduct" in violation of its "Respectful Campus

236. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272–73 (1988).

237. *See, e.g.*, Morse v. Frederick, 551 U.S. 393, 405 (2007) (stating that *Hazelwood* did not control because "no one would reasonably believe that [the high school student's] banner bore the school's imprimatur").

238. Keefe v. Adams, 840 F.3d 523, 531 (8th Cir. 2016).

239. Neal H. Hutchens, *Professionalism Standards and College Students First Amendment Rights*, EDUC. L. REP. 16, 24 (2017) ("Cases such as *Keefe* or *Oyama* push the boundary of the concept of school-sponsored speech so as to encompass student speech that is seemingly independent in nature.").

240. *See supra* note 128 and accompanying text.

241. 792 F. App'x 595 (10th Cir. 2019).

Policy."[242] In a series of posts following the 2012 presidential election, Hunt equated abortion to murder and genocide, condemning Democrats and pro-choice supporters of reproductive rights with explicit language.[243] Upon learning of his online commentary, the university's Committee on Student Promotions and Evaluation issued Hunt a professionalism citation and mandated that he complete a series of professionalism assignments, including a rewrite of his political sentiments in a professional manner.[244] Hunt completed his "professionalism prescription" in 2014, yet filed suit in 2016, claiming infringement of his First Amendment rights.[245]

The *Hunt* court separated Supreme Court caselaw into two waves: (1) the initial reinforcement of *Tinker* and strong student speech rights at the university level in *Healy* and *Papish*; and (2) the later narrowing of *Tinker* and student speech rights at the high school level in *Fraser*, *Hazelwood*, and *Morse*. For the first wave of post-*Tinker* jurisprudence, the Tenth Circuit recognized that *Healy* and *Papish* effectively extended *Tinker*'s material and substantial disruption standard to universities for on-campus speech.[246] Yet, the court's analysis selectively extracted language from these cases, ignoring critical discussion points.

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242. *Id.*

243. *See id.* at 598

> The Republican Party sucks. But guess what. Your party and your candidates parade their depraved belief in legal child murder around with pride. . . . You're WORSE than the Germans during WW2. Many of them acted from honest patriotism. Many of them turned a blind eye to the genocide against the Jews. But you're celebrating it. . . . So, sincerely, fuck you, Moloch worshiping assholes.

244. *See id.* at 599 ("CSPE found the Facebook post violated the policies at issue and was imposing "a professionalism enhancement prescription" consisting of an ethics component and a professionalism component, each with different faculty mentors.").

245. *See id.* ("Hunt filed suit in state court against UNM's Board of Regents, Dr. Carroll, members of CSPE, and UNMSOM's Dean, raising claims under the First and Fourteenth Amendments and seeking monetary damages and injunctive and declaratory relief.").

246. *See id.* at 602 (stating that, three years after *Tinker*, in *Healy*, "the Court extended *Tinker* to the university setting").

For example, the Tenth Circuit echoed favorable language from *Healy* that acknowledged that universities may "expect that [their] students adhere to generally accepted standards of conduct."[247] While it is true that *Healy* suggests that student groups may be subject to "reasonable regulations with respect to the time, the place, and the manner in which student groups conduct their speech-related activities,"[248] the Tenth Circuit failed to discuss the distinction between "advocacy, which is entitled to full protection, and action, which is not."[249] This distinction was pivotal to the Court's discussion in *Healy*, as Justice Powell emphasized: "The critical line heretofore drawn for determining the permissibility of regulation is the line between mere advocacy and advocacy directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action.'"[250] By failing to acknowledge the distinction between a university's regulation of speech and regulation of action or speech with the propensity to produce disruptive action, the Tenth Circuit arguably trivialized the Court's position in *Healy*.

The Tenth Circuit provided similar treatment to *Papish*, relying on a footnote that suggested a university could regulate some student speech without substantial disruption.[251] Extrapolating the proposition that universities may permissibly regulate the time, place, and manner in which on-campus speech is disseminated, the Tenth Circuit asserted that *Papish* left discretionary room for universities to censor student speech that conflicts with professional standards.[252] This interpretation is arguably in direct conflict with *Papish*, which reiterated that

247. *Id.* at 605 (citing Healy v. James, 408 U.S. 169, 192 (1972)).

248. *Healy*, 408 U.S. at 192–93.

249. *Id.* at 192.

250. *Id.* at 189 (citing Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)).

251. *See* Hunt v. Bd. of Regents of Univ. of N.M., 792 F. App'x 595, 602 (10th Cir. 2019) (stating that *Papish* explained that "in the absence of any disruption of campus order or interference with the rights of others, the sole issue was whether a state university could proscribe this form of expression" (quoting Papish v. Bd. of Curators of the Univ. of Mo., 410 U.S. 667, 670 n.6 (1973))).

252. *See id.* ("*Healy* and *Papish* appear to leave space for administrators to operate as the circumstances demand when confronted with speech by students in professional schools that appears to be at odds with customary professional standards.").

"the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in name alone of 'conventions of decency.'"[253] It is hard to see where *Papish* provides the wiggle room for professionalism standards that the court in *Hunt* suggests, especially where student speech is questioned for its lewd or offensive contents, not its timing or mode of circulation.[254]

For the second wave of free speech jurisprudence, all of which took place at the high school level, the court in *Hunt* again arguably failed to acknowledge the nuanced undertones in the Court's decisions. For example, in its analysis of *Fraser*, the Tenth Circuit focused entirely on language articulating the responsibility of primary and secondary schools to teach students "the shared values of a civilized social order."[255] What is completely missing, however, from the Tenth Circuit's analysis is the distinction made in *Fraser* between "adult public discourse" and that of children in public schools.[256]

In *Fraser*, the Court reiterated its holding in *Cohen v. California*,[257] which upheld the First Amendment rights of adults to publicly express political viewpoints, even if done through highly offensive terms.[258] *Fraser* differentiated the speech from that in *Cohen* on grounds that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults."[259] In other words, "simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, [it does not follow that] the same latitude must

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253. *Id.* at 602–03 (citing *Papish*, 410 U.S. at 670).

254. *See* Papish v. Bd. of Curators of the Univ. of Mo., 410 U.S. 670 (1973) (suggesting that while a university has "legitimate authority to enforce reasonable regulations," when a graduate student is disciplined for the "disapproved content" of her speech "rather than the time, place, or manner of its distribution," such discipline "cannot be justified as a nondiscriminatory applicable of reasonable rules governing conduct").

255. *Hunt*, 792 F. App'x at 603 (citing Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986)).

256. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986).

257. 403 U.S. 15 (1971).

258. *See Fraser*, 478 U.S. at 682 ("A sharply divided Court upheld the right to express an antidraft viewpoint in a public place, albeit in terms highly offensive to most citizens.").

259. *Id.*

be permitted to children in a public school."[260] It seems oddly misplaced to extend *Fraser*'s holding to professional students without qualification for the fact that professional students are likely to be adults, not children. [261] Thus, the Tenth Circuit's *Fraser* analysis is incomplete at best.

In the end, the Tenth Circuit quickly resolved the matter in favor of the university, but not by applying its sparse, school-friendly interpretation of Supreme Court precedent to the facts at hand.[262] Instead, *Hunt* highlighted ambiguity among courts in applying student speech doctrines to differing education levels as a basis to ignore it altogether. [263] Hunt's Facebook posts neither caused a material disruption under *Tinker* nor bore on the imprimatur of the university under *Hazelwood*; yet, the Tenth Circuit held that student speech doctrines provided "insufficiently clear signals" to warn officials that their censorship of off-campus speech could be found unconstitutional.[264] Since Hunt failed to provide a case that found in favor of the professional student and his or her off-campus speech rights, the Tenth Circuit gave the win to the university.[265]

Despite its shortfalls, the *Hunt* court did raise three valid questions about the Supreme Court's student speech precedent

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260. *See id.* ("[T]his Court upheld a New York statute banning the sale of sexually oriented material to minors, even though the material in question was entitled to First Amendment protection with respect to adults." (citing Ginsberg v. New York*,* 390 U.S. 629, 636 (1968))).

261. *See* Hunt v. Bd. of Regents of Univ. of N.M., 792 F. App'x 595, 604 (10th Cir. 2019) ("[T]he majority itself [in *Morse*] acknowledged '[t]here is some uncertainty at the outer boundaries as to when courts should apply school speech precedents.'" (citing Morse v. Frederick, 551 U.S. 393, 401 (2007))).

262. *See id.* at 606 ("Mr. Hunt and the amici have provided a patchwork of cases connected by broad legal principles, but the law in late 2012 and 2013 would not have given the defendants notice that their response to the Facebook post was unconstitutional.").

263. *See id.* ("Mr. Hunt has 'failed to identify a case where [a medical school administrator] acting under similar circumstances as [the defendants in this case] was held to have violated the [First] Amendment.'" (White v. Pauly, 580 U.S. 73, 79 (2017)).

264. *See id.* ("[T]he Supreme Court's K-12 cases of *Tinker*, *Fraser*, *Hazelwood*, and *Morse* and its university cases of *Papish* and *Healy* fail to supply the requisite on-point precedent. Moreover, decisions from our court and other circuits have not bridged the unmistakable gaps in the case law . . . .").

265. *See supra* note 263 and accompanying text.

that challenges its easy application to professional student's online, off-campus speech: "(1) [whether] *Tinker* applies off campus; (2) [whether] the on-campus/off-campus distinction applies to online speech; and (3) [whether] *Tinker* provides an appropriate framework for speech by students in graduate-level professional programs."[266] The next Part will answer the first two questions, which explores the Supreme Court's recent case regarding off-campus, online speech at the high school level.[267] While the third question remains open, *Tinker* and its progeny arguably provide greater guidance than has been recognized.

The facts alleged in the professional student speech cases surveyed in Part II are arguably controversial, if not downright disturbing. However, the way state and federal appellate courts have analyzed and applied student speech doctrines suggests that bad facts are creating bad, or at least incomplete, law. Appellate courts have performed relatively cursory reviews of *Tinker* and its progeny, resulting in misrepresentations of the Supreme Court's precedent. With courts creating inconsistent, unpredictable standards that consistently favor universities, professional students are left little reassurance in the strength of their constitutional rights.

III. SUPREME COURT LOOKS OFF CAMPUS

Despite subtle nods to off-campus speech in *Tinker* and its progeny, the Supreme Court had never definitively spoken on *Tinker*'s applicability to off-campus speech prior to 2021.[268] Ambiguity around off-campus speech set the stage for the Supreme Court showdown in *Mahanoy Area School District v. B. L.*[269] In *Mahanoy*, a high school denied a student admission to the varsity cheer team, prompting her to share an off-campus story on her Snapchat social media account attacking the school

266. Hunt v. Bd. of Regents of Univ. of N.M., 792 F. App'x 595, 606 (10th Cir. 2019).

267. *See infra* Part III.

268. *See First Amendment—Free Speech—Public Schools*—Mahanoy v. B. L., 135 HARV. L. REV. 353, 355 (2021) ("The United States Supreme Court granted certiorari to consider, for the first time, the constitutionality of public school authority to regulate off-campus student speech.").

269. *See generally* Mahanoy Area Sch. Dist. v. B. L., 141 S. Ct. 2038 (2021).

and the cheerleading program with vulgar language.[270] In response, the school then suspended her from the junior varsity squad.[271] The student, along with her parents, sued the school district, alleging that her punishment violated her First Amendment rights.[272] Both the district court and the Third Circuit found in favor of the student.[273] However, in doing so, the Third Circuit decided to "forge [its] own path" and deviate from its sister circuits, holding that even if the speech was substantially disruptive, *Tinker* did not extend to off-campus speech.[274]

After the Supreme Court granted its petition for certiorari, the school district garnered support from the Biden Administration and other educational groups via amicus curiae briefs.[275] Both stressed the need for schools to intervene regardless of where disruptive speech originates, social media making student speech essentially ubiquitous.[276] Acting U.S. Solicitor General Elizabeth Prelogar further argued that the pandemic and virtual learning has only magnified the effect,

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270. *See id.* (describing how, after B. L. was placed on the junior varsity cheerleading team, she posted a photo on Snapchat with the caption "Fuck school fuck softball fuck cheer fuck everything").

271. *See id.* (explaining how B. L. was suspended from the junior varsity team by her coaches, who claimed the post violated school rules).

272. *See id.* at 2043–44 ("B. L., together with her parents, filed this lawsuit in Federal District Court. . . . [T]he District Court declared that B. L.'s punishment violated the First Amendment, and it awarded B. L. nominal damages and attorneys' fees and ordered the school to expunge her disciplinary record.").

273. *See* B. L. v. Mahanoy Area Sch. Dist., 964 F.3d 170, 189 (3d Cir. 2020), *aff'd,* 141 S. Ct. 2038 (2021) (holding that *Tinker* does not apply to off-campus speech, and thus, B. L.'s Snapchat story was protected under the First Amendment from punishment by the school).

274. *Id.*

275. *See* Mark Walsh, *Biden Administration, Education Groups Back School District in Student Online Speech Case*, Educ. Wk. (Mar. 4, 2021), https://perma.cc/98B3-86XP ("The administration and others filing friend-of-the-court briefs . . . stress the need for schools to be able to respond to threats of violence as well as speech that bullies other students."); *see also Mahanoy Area School District v. B. L.*, SCOTUSblog, https://perma.cc/C2BC-UZFU/ (listing all amicus filings).

276. *See* Walsh, *supra* note 275 (summarizing the Biden Administration's brief, which stressed the necessity for schools to be able to intervene when off-campus threats are made toward the school or its students).

with off-campus student speech now reasonably expected to reach the school ecosystem.[277]

In an 8–1 ruling, Court ultimately issued a win for the "swearing cheerleader."[278] Justice Stephen Breyer, writing for the majority, acknowledged the Third Circuit's concern with widely extending school oversight outside campus and school hours, emphasizing the importance of approaching censorship or punishment of off-campus speech with increased skepticism.[279] However, the Court ultimately rejected the Third Circuit's proposition to completely eliminate *Tinker*'s applicability to all off-campus speech.[280]

While rejecting any hardline rule for school administrators to regulate off-campus speech, the Court recognized three key factors that distinguish on-campus and off-campus speech and that require courts to approach off-campus censorship with heightened skepticism: (1) the school does not stand in place of the parent off campus; (2) regulation of off-campus speech

277. *See id.* ("When it comes to online activity—especially salient during the current pandemic—many of students' contacts and social-media 'friends' are likely to be fellow students, so anything they post online reasonably could be expected to 'reach' the school.").

278. *See generally* Jessica Levinson, *Supreme Court's Swearing Cheerleader Is a Win for Students—But Questions Remain*, MSNBC (June 24, 2021), https://perma.cc/T7ES-SAJR.

279. *See Mahanoy*, 141 S. Ct. at 2046 ("[F]rom the student speaker's perspective, regulations of off-campus speech, when coupled with regulations of on-campus speech, include all the speech a student utters during the full 24-hour day. That means courts must be more skeptical of a school's efforts to regulate off-campus speech . . . .").

280. *See id.* at 2045

> Unlike the Third Circuit, we do not believe the special characteristics that give schools additional license to regulate student speech always disappear when a school regulates speech that takes place off campus. The school's regulatory interests remain significant in some off-campus circumstances. The parties' briefs, and those of *amici*, list several types of off-campus behavior that may call for school regulation. These include serious 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.

essentially results in a 24-hour school day; and (3) unpopular speech, especially off campus, should be encouraged by schools as "nurseries of democracy."[281] The Court recognized that a school's right to regulate off-campus speech is significantly diminished; however, it adopted a case-by-case approach for future courts to determine what, if any, speech rises to the level of being "severely disruptive" when applying this heightened *Tinker* standard to off-campus speech.[282]

Considering the facts in light of previous precedent and the new analytical factors defined for off-campus speech, the Court determined that the cheerleader's speech did not reach that level.[283] First, the Court considered the vulgarity of the cheerleader's off-campus speech in light of its decisions in *Fraser* and *Morse*.[284] The Court held that while *Fraser* and *Morse* are still good law for *on-campus* speech, any anti-vulgarity interest a school may have is significantly diminished when a student speaks contrary to the school's mission *off campus*.[285] Second, applying *Tinker*, there was no evidence of substantial disruption on campus as a result of the cheerleader's off-campus speech.[286]

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281. *Id.*

282. *See id.*

> Given the many different kinds of off-campus speech, the different potential school-related and circumstance-specific justifications, and the differing extent to which those justifications may call for First Amendment leeway, we can, as a general matter, say little more than this: Taken together, these three features of much off-campus speech mean that the leeway the First Amendment grants to schools in light of their special characteristics is diminished. We leave for future cases to decide where, when, and how these features mean the speaker's off-campus location will make the critical difference.

283. *See id.* at 2048 ("Although we do not agree with the reasoning of the Third Circuit's panel majority, for the reasons expressed above, resembling those of the panel's concurring opinion, we nonetheless agree that the school violated B. L.'s First Amendment rights.").

284. *See id.* at 2047 (revisiting *Morse* and *Fraser* and a school's interest in regulating inappropriate speech over school-sanctioned forums).

285. *See id.* (applying *Morse* and *Fraser*, the Court held that "the strength of an anti-vulgarity interest is weakened considerably by the fact that B. L. spoke outside the school on her own time").

286. *See id.* at 2047–48 (detailing that there was no serious decline in team morale or any more than a five-to-ten minute delay in class as a result of the speech, failing to reach to threshold for a substantial disruption).

Since the speech failed to reach the lower bar set in *Tinker* for on-campus speech, the Court found no basis under its heightened standard to warrant an encroachment on the student's First Amendment rights.[287]

This decision, in its infancy, resolves the lower court split, holding that courts may use *Tinker* to evaluate off-campus speech regulation, at least in the context of secondary schools.[288] However, it raises the bar for how courts must apply *Tinker* and its material and substantial disruption standard in cases of off-campus speech censorship.[289]

Potentially more interesting is the Court's lack of reliance on *Hazelwood*. While the Court does briefly cite to *Hazelwood*, the opinion does not discuss the legitimate pedagogical concern exception to *Tinker*. In fact, *Mahanoy* is completely void of key language from *Hazelwood* that has received significant attention, such as "reasonably related to legitimate pedagogical concerns" or "bear the imprimatur of the school."[290] This omission may indicate that the Court recognized that the *Hazelwood* exception would be challenging to trigger in an off-campus context, as speech off campus is less likely to be reasonably attributable to the school itself.

It is not yet clear whether courts will attempt to incorporate *Mahanoy* and its heightened *Tinker* standard into their analyses when faced with issues involving off-campus speech by professional students. Nor is it clear that courts, if they choose to, will do so effectively. Part IV will argue that student speech doctrines, including *Mahanoy*, should be the basis for evaluating professional student speech rather than arbitrary

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287. *See id.* at 2048 "[S]imple 'undifferentiated fear or apprehension . . . is not enough to overcome the right to freedom of expression.' It might be tempting to dismiss B. L.'s words as unworthy of the robust First Amendment protections discussed herein. But sometimes it is necessary to protect the superfluous in order to preserve the necessary.").

288. *See* Meghan K. Lawrence, *Tinker Stays Home: Student Freedom of Expression in Virtual Learning Platforms*, 101 B.U. L. REV. 2249, 2262 (2021) ("Prior to *Mahanoy*, circuit courts filled this gap in Court precedent through a variety of different tests, creating a circuit split.").

289. *See* Mahanoy Area Sch. Dist. v. B. L., 141 S. Ct. 2038, 2046 (2021) (holding that "the leeway the First Amendment grants to schools in light of their special characteristics is diminished" when student speech originates off-campus).

290. *See supra* notes 97–101 and accompanying text.

professionalism standards that provide students with little First Amendment protection.

IV. RESHAPING PROFESSIONAL SCHOOL ANALYSIS IN LIGHT OF *MAHANOY*

A. Student Speech Doctrines Should Apply to Professional Student Speech

Professional student speech should be analyzed under student speech doctrines, not under professionalism codes. Many courts have argued that universities may hold professional students to standards akin to the profession they intend to join, rendering student speech doctrines inapplicable to the professional school setting.[291] What courts have failed to properly acknowledge is that a line remains between licensed professionals and professional students. The Supreme Court has defined schools as "marketplace[s] of ideas, [t]he Nation's future depend[ing] upon leaders trained through wide exposure to that robust exchange of ideas."[292] While in school and not under the observance of a licensing board, professional students are still students, served not only by the coursework that prepares them for licensing but by an environment anchored in the free flow of thought.[293]

Moreover, in *Healy*, the Supreme Court acknowledged *Tinker*'s material and substantial disruption standard as a relevant framework for analyzing student speech in universities and colleges.[294] This acknowledgment strengthens the assertion that student speech doctrines should apply to professional student speech. Accordingly, *Tinker*'s material and substantial disruption standard should remain the baseline for evaluating professional student speech, both on and off campus.

291. *See supra* Part II.

292. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512 (1969).

293. *See supra* note 138 and accompanying text.

294. *See supra* Part I.B.1.

B. Courts Should Apply Hazelwood's Exception Cautiously

When applying student speech doctrines to professional students, courts should apply *Hazelwood*'s legitimate pedagogical concern exception cautiously to only capture speech that bears the professional program's imprimatur. The Supreme Court has made clear that *Hazelwood*'s legitimate pedagogical concern exception to *Tinker* only triggers where a student's speech can reasonably be imputed onto the school as if the school itself endorses the speech.[295] Despite creative arguments by courts, professional students themselves should not bear the imprimatur of their professional programs simply because their education may later lead to professional licensing. To set a precedent that professional students themselves bear the imprimatur of their school would be to grossly overextend *Hazelwood*, resulting in an impermissible infringement on student speech rights.[296]

C. Mahanoy Should Be Extended to Universities and Professional Programs

Courts should adopt the heightened *Tinker* standard defined in *Mahanoy* to analyze off-campus professional student speech. The Court in *Mahanoy* offered three reasons for raising the bar for off-campus student speech: (1) the school does not stand in place of the parent off campus; (2) regulation of off-campus speech essentially results in a 24-hour school day; and (3) unpopular speech, especially off campus, should be encouraged by schools as "nurseries of democracy."[297] Justice Alito, in his concurrence, recognized that off-campus speech by higher education students would likely raise different concerns than those raised in *Mahanoy*.[298] However, *Tinker* was similarly geared toward high school-level concerns, and yet, the Court still explored and applied its principles to university student

295. *See, e.g.*, Morse v. Frederick, 551 U.S. 393, 405 (2007) (stating that *Hazelwood* did not control because "no one would reasonably believe that [the high school student's] banner bore the school's imprimatur").

296. *See supra* notes 145–148 and accompanying text.

297. *Id.*

298. *See Mahanoy*, 141 S. Ct. at 2049 (Alito, S., concurring) ("[I]t is important that our opinion not be misunderstood.").

speech disputes in *Healy* and *Papish*.[299] In fact, when applying *Tinker* in light of the "special characteristics of the school [university] environment," the Supreme Court appears to insinuate that university students are likely to receive greater First Amendment protections than their high school counterparts, due in part to their increased age and maturity levels.[300] Thus, it would make little sense to disregard *Mahanoy* in off-campus, professional student speech disputes, especially given the fact that a major concern in *Mahanoy*—protecting students from being subjected to a 24-hour school day—remains highly applicable to students in professional schools.[301] Under *Mahanoy*, professional programs should only be allowed to sanction off-campus student speech that has reached the "severely disruptive" threshold.

D. The Supreme Court Should Grant Certiorari in a Professional Student Speech Case

Despite compelling direction provided through student speech doctrines, the Supreme Court should grant certiorari in a professional student speech case to reduce inconsistencies among courts. As the Supreme Court has not yet taken a professional student case nor considered the role professional programs play in preparing students for licensing, courts have sought to develop their own professional school exceptions.[302] This is not entirely surprising given the fact that the Supreme Court itself has expressed a willingness to make case-by-case exceptions for public policy reasons, as in *Morse* (speech promoting illegal activity) and in *Fraser* (speech inappropriate for minor audiences).[303] Thus, even if student speech doctrines are scrupulously applied, courts will likely continue to invent

299. *See supra* Part I.B.1.

300. *See supra* notes 65–69 and accompanying text.

301. *See Mahanoy*, 141 S. Ct. at 2040 ("[F]rom the student speaker's perspective, regulations of off-campus speech, when coupled with regulations of on-campus speech, include all the speech a student utters during the full 24-hour day. That means courts must be more skeptical of a school's efforts to regulate off-campus speech, ...").

302. *See supra* Part II.

303. *See supra* Part I.B.2. However, it is prudent to note that both these cases indicated an apprehensive with extending such exceptions to off-campus speech. *See supra* note 128 and accompanying text.

new case-by-case exceptions at the expense of professional students.[304] By granting certiorari, the Court can provide clearer guidance, not only on how to analyze professional student speech on and off campus, but also on how to devise and apply any relevant exceptions to the professional school setting.

CONCLUSION

Courts have failed to adequately safeguard professional students' First Amendment speech rights, both on and off campus, due to their surface-level analysis and inconsistent application of student speech doctrines. However, as argued in this Note, courts can avoid this outcome with careful, rhetorical analysis of Supreme Court precedent. When properly analyzed, student speech doctrines should provide a sufficient basis to reliably evaluate professional student speech, so long as courts consider the special characteristics of the professional school environment. Still, it may take the Supreme Court directly weighing in on professional student speech to increase consistency among courts.

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304. *See supra* Part II.