THE NEXT STEP IN STUDENT SPEECH ANALYSIS? HOW THE EIGHTH CIRCUIT FURTHER COMPLICATES THE FIRST AMENDMENT RIGHTS OF UNIVERSITY STUDENTS IN KEEFE V. ADAMS

I. INTRODUCTION

In the seminal student speech case, Tinker v. Des Moines Independent Community School District,1 the United States Supreme Court concluded that high school officials violated students' First Amendment rights when they were punished for expressing their opposition to the Vietnam War.2 The Court decided that school officials may discipline a student for speech made on school premises only if the speech causes a material and substantial interference with school activities or the rights of other students.3 Following Tinker, the Court addressed other instances in which high school officials may regulate student speech.4 In Hazelwood School District v. Kuhlmeier,5 the Court held that high school officials were permitted to regulate student speech conducted in school-sponsored expressive activities so long as the regulation was reasonably related to legitimate pedagogical concerns.6 Relevant to both Tinker and Hazelwood was the situa-

---

2. See generally Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969) [hereinafter Tinker III] (deciding that students wearing black armbands in opposition to the Vietnam War did not materially and substantially interfere with the work of the school or impinge on the rights of other students).
3. See Tinker III, 393 U.S. at 509 (“Certainly where there is no finding and no showing that engaging in the forbidden conduct would ‘materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,’ the prohibition cannot be sustained.”).
6. See Hazelwood III, 484 U.S. at 273 (“[W]e hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”).
tional context: in both cases the students the schools respectively disciplined were high school students.\footnote{7}

Since \textit{Hazelwood}, however, courts have struggled to determine the applicable legal standard for assessing the First Amendment rights of students at the university level and beyond.\footnote{8} Further complicating this issue, the advent, evolution, and widespread use of social media has muddled any First Amendment analysis conducted by a court in the context of higher education.\footnote{9} To date, the United States Supreme Court has consistently refused to hear cases on this issue, offering no guidance on what standard is applicable and leaving courts mired in confusion regarding off-campus speech in a university setting.\footnote{10}

In \textit{Keefe v. Adams},\footnote{11} the United States Court of Appeals for the Eighth Circuit held that the First Amendment rights of a nursing student were not violated when his university dismissed him for statements he made on his personal Facebook account.\footnote{12} Mr. Keefe’s statements included: wanting to give someone a hemopneumothorax with an electric pencil sharpener; needing to take anger management; and referring to another student as a stupid bitch.\footnote{13} The Eighth Cir-

\begin{itemize}
\item \footnote{7} See id. at 262 (contemplating school authority’s ability to censor a high school student newspaper); see also \textit{Tinker III}, 393 U.S. 503 at 504 (assessing school authorities’ ability to discipline high school students’ expression of political views). \textit{But see Keefe v. Adams}, 840 F.3d 523, 526 (8th Cir. 2016) [hereinafter \textit{Keefe II}](explaining that the disciplined student was enrolled in a two-year degree program studying to become a registered nurse).
\item \footnote{8} See \textit{Wynar v. Douglas Cty. Sch. Dist.}, 728 F.3d 1062, 1067 (9th Cir. 2013) (quoting \textit{Morse}, 551 U.S. at 401). All of these cases involved the speech of high school students at school or school-sanctioned events. \textit{Id.} Beyond that context, the Court has noted only that “[t]here is some uncertainty at the outer boundaries as to when courts should apply school speech precedents.” \textit{Morse}, 551 U.S. at 401.
\item \footnote{9} See \textit{Tatro v. Univ. of Minn.}, 816 N.W.2d 509, 517 (Minn. 2012) [hereinafter \textit{Tatro II}] (assessing the legal standard for a university’s regulation of a student’s posts on Facebook); Josh Constine, \textit{Facebook Now Has 2 Billion Monthly Users . . . and Responsibility}, TECHCRUNCH (June 27, 2017), https://techcrunch.com/2017/06/27/facebook-2-billion-users/ (demonstrating the dramatic rise in social media use).
\item \footnote{10} See, e.g., \textit{Keefe II}, 840 F.3d 523, cert. denied, 137 S. Ct. 1448 (2017); \textit{Yoder v. Univ. of Louisville}, 526 F. App’x 537 (6th Cir. 2013), cert. denied, 134 S. Ct. 790 (2013); \textit{Oyama v. Univ. of Haw.}, 813 F.3d 850 (9th Cir. 2015), cert. denied, 136 S. Ct. 2520 (2016) [hereinafter \textit{Oyama II}]. The United States Court of Appeals for the Ninth Circuit has stated that “[w]hile aspects of student speech doctrine are relevant here, the Supreme Court has yet to extend this doctrine to the public university setting.” \textit{Oyama II}, 813 F.3d at 862.
\item \footnote{11} 840 F.3d 523 (8th Cir. 2016).
\item \footnote{12} \textit{See Keefe II}, 840 F.3d at 533 (affirming district court’s grant of summary judgment against Mr. Keefe’s First Amendment claim).
\item \footnote{13} \textit{Id.} at 527. The medical term “hemopneumothorax” describes when both blood and air are present in the chest cavity. Mr. Keefe’s comment meant that he wanted to stab someone in the chest with a mechanical pencil sharpener such that blood and air would flood their chest cavity. \textit{Chest Trauma Haemothorax}, TRAUMA (Feb. 2004), http://www.trauma.org/archive/thoracic/CHESThaemo.html.
\end{itemize}
cuit applied both *Hazelwood* and *Tinker*, reasoning speech that violated established professional nursing standards was subject to administrative discipline.¹⁴

This Note will first present the facts and holding of *Keefe v. Adams*.¹⁵ Next, this Note will discuss the development of the student speech doctrine leading up to the *Keefe* decision.¹⁶ Finally, this Note will argue that the Eighth Circuit erred when it failed to apply the directly related to and narrowly tailored test to assess Central Lakes College’s expulsion of Mr. Keefe for violating professional conduct standards because *Tinker* and *Hazelwood* are inapplicable to a university student’s off-campus, non-school-sponsored speech.¹⁷

II. FACTS AND HOLDING

In *Keefe v. Adams*,¹⁸ Craig Keefe brought claims against several administrators at Central Lakes College’s Brainerd campus (collectively, “CLC”), alleging that the basis for his dismissal violated his First Amendment rights.¹⁹ CLC dismissed Mr. Keefe from its Associate Degree Nursing Program (“Program”) for a series of offensive statements he posted on his public Facebook account.²⁰ CLC adminis-

---

¹⁴. *Keefe II*, 840 F.3d at 533. The court stated “[l]ikewise, because compliance with the Nurses Association Code of Ethics is a legitimate part of the Associate Degree Nursing Program’s curriculum, speech reflecting non-compliance with that Code that is related to academic activities ‘materially disrupts’ the Program’s ‘legitimate pedagogical concerns.’” Id.

¹⁵. See infra notes 18-45 and accompanying text.

¹⁶. See infra notes 46-155 and accompanying text.

¹⁷. See infra notes 156-217 and accompanying text.

¹⁸. 840 F.3d 523 (8th Cir. 2016).


²⁰. Keefe v. Adams, 44 F. Supp. 3d 874, 878-79 (D. Minn. 2014) [hereinafter *Keefe I]*. The student’s statements included:

Glad group projects are group projects. I give her a big fat F for changing the group power point at eleven lastnight [sic] and resubmitting. Not enough whiskey to control that anger.

Very interesting. Apparently even if a male student has his Dr. Send [sic] letters to the instructors and director of the nursing program for test taking considerations they dont get them. But if your [sic] a female you can go talk to the instructors and get a special table in the very back of the class with your back facing everyone and get to wear ear plugs. And behind me at bat. And you really shoulndt [sic] go around telling everyone that you beat the system and didnt need to follow the school policy and get a medical diagnosis to get special considerations. I think its [sic] just one more confirmafion of the prejudice in the program. Im [sic] taking notes thou [sic] . . . .

Doesnt [sic] anyone know or have heard of mechanical pencils. [sic] Im [sic] going to take this electric pencil sharpener in this class and give someone a hemopneumothorax with it before to [sic] long. I might need some anger management.

LMAO, you keep reporting my post and get me banded [sic]. I don’t really care. If that’s [sic] the smartest thing you can come up with than I completely understand why your [sic] going to fail out of the RN program you stupid bitch . . . . And quite [sic] creeping on my page. Your [sic] not a friend of mine.
trators determined that Mr. Keefe’s posts violated the Student Conduct Code ("Code") because the posts demonstrated behavior unbecoming of the nursing profession, a breach of confidentiality, and a transgression of professional boundaries.\textsuperscript{21} The Code required students to uphold and adhere to the Nursing Association Code of Ethics ("NACE"), which illustrated the professional and ethical standards for nursing professionals.\textsuperscript{22} CLC dismissed Mr. Keefe from the Program, citing his conduct as an academic program violation under both the Code and NACE.\textsuperscript{23}

Soon thereafter, Mr. Keefe brought a 42 U.S.C. § 1983 action against CLC in the United States District Court for the District of Minnesota alleging that his dismissal from the Program violated his First Amendment rights.\textsuperscript{24} The district court disagreed, concluding that Mr. Keefe’s First Amendment rights had not been violated because CLC was permitted to require Program students adhere to nursing profession standards.\textsuperscript{25} However, the court’s reasoning did not address the specific issue of whether a professional school may discipline a student for comments made on an online, off-campus Facebook post.\textsuperscript{26} Instead, the court focused on whether a professional school was within its authority to dismiss a student for violating professional standards.\textsuperscript{27}

On appeal, the United States Court of Appeals for the Eighth Circuit affirmed the district court’s grant of summary judgment to CLC on Mr. Keefe’s First Amendment claim.\textsuperscript{28} Mr. Keefe argued that First Amendment’s protections extended to students’ off-campus speech, such as online Facebook posts.\textsuperscript{29} The Eighth Circuit rejected Mr. Keefe’s argument, determining that administrators may discipline students for violations of professional standards both on and off campus so long as their regulation is reasonably related to pedagogical

---

\textsuperscript{21} \textit{Keefe II}, 840 F.3d at 528.

\textsuperscript{22} \textit{Id.}

\textsuperscript{23} \textit{Id.} at 529.

\textsuperscript{24} \textit{Keefe I}, 44 F. Supp. 3d at 887.

\textsuperscript{25} \textit{Id.} at 888-89.

\textsuperscript{26} \textit{Id.} at 887-89. The district court noted only that CLC was within its authority to dismiss Mr. Keefe because he violated the professional standards. \textit{Id.}

\textsuperscript{27} \textit{Id.}

\textsuperscript{28} \textit{Keefe II}, 840 F.3d at 533. Mr. Keefe also alleged that he was denied due process by CLC in his dismissal. \textit{Id.}

\textsuperscript{29} \textit{Id.} at 531.
concerns. The court noted *Tinker v. Des Moines Independent Community School District* authorized the discipline of public school students for off-campus social media posts when it was reasonably foreseeable that the posts would reach the school community and cause a material and substantial interference to the educational setting. The court reasoned that because compliance with NACE was a legitimate part of the Program’s curriculum, academic speech that violated those standards constituted a material disruption of the Program’s legitimate pedagogical concerns.

Moreover, the Eighth Circuit stated that other circuits similarly recognized the greater significance the curriculum possesses at the university level as compared to the high school context the United States Supreme Court, in *Hazelwood School District v. Kuhlmeier*, addressed. Against this backdrop, the court cited to a case from the United States Court of Appeals for the Sixth Circuit, *Ward v. Polite*, where the Sixth Circuit stated that when the curriculum is available for all to see, it will be nearly impossible for students to exercise a First Amendment claim against them. The court further rejected Mr. Keefe’s argument that his Facebook posts were unrelated to academic assignments or requirements under *Hazelwood*, reasoning that the record conclusively established that his Facebook posts were directed at peers, discussed their activities in the Program, and contained a physical threat related to their coursework. Accordingly, the Eighth Circuit affirmed the district court’s grant of summary judgment.

Judge Kelly dissented to the majority’s decision, asserting that a genuine issue of material fact existed as to whether the school acted within its constitutional authority to discipline Mr. Keefe’s non-academic assignments or requirements under *Hazelwood*, reasoning that the record conclusively established that his Facebook posts were directed at peers, discussed their activities in the Program, and contained a physical threat related to their coursework. The court further rejected Mr. Keefe’s argument that his Facebook posts were unrelated to academic assignments or requirements under *Hazelwood*, reasoning that the record conclusively established that his Facebook posts were directed at peers, discussed their activities in the Program, and contained a physical threat related to their coursework. Accordingly, the Eighth Circuit affirmed the district court’s grant of summary judgment.

---

30. Id. (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988)).
32. Id. (citing S.J.W. ex rel. Wilson v. Lee’s Summit R–7 Sch. Dist., 696 F.3d 771, 777 (8th Cir. 2012)). The Eighth Circuit in *Wilson* applied *Tinker* to the high school’s punishment of the student’s racial and ethnic slurs on a blog post to find their First Amendment rights had not been violated. Id.
33. See id. (applying both *Hazelwood’s* legitimate pedagogical concern and *Tinker’s* material disruption standard to assert that “because compliance with the Nurses Association Code of Ethics is a legitimate part of the Associate Degree Nursing Program’s curriculum, speech reflecting non-compliance with that Code that is related to academic activities ‘materially disrupts’ the Program’s ‘legitimate pedagogical concerns’”).
35. *Keefe II*, 480 F.3d at 532-33.
36. 667 F.3d 727 (6th Cir. 2012).
38. Id. at 532.
39. Id. at 533.
Judge Kelly argued that Hazelwood was inapplicable to the issue at hand because Mr. Keefe’s Facebook posts were off-campus, were not school-sponsored, and could not be attributed to the school. Furthermore, Judge Kelly disagreed with the majority’s position that Mr. Keefe’s speech was curricular, reasoning the posts were not made in connection to fulfilling a Program requirement and did not indicate an intent to break specific curricular rules. Judge Kelly reasoned that the Court precedent rejected the conclusion that Mr. Keefe’s posts were not curricular speech simply because the posts were directed at peers and discussed their conduct in the Program. Additionally, Judge Kelly rejected the broad contention that Mr. Keefe’s mere use of a medical training term could equate his post to curricular speech. In conclusion, Judge Kelly argued that the Eighth Circuit improperly relied on cases not applicable to speech made off campus and unrelated to academic assignments.

III. BACKGROUND

A. TINKER v. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT: SETTING THE STAGE FOR THE HIGH SCHOOL STUDENT SPEECH DOCTRINE

In Tinker v. Des Moines Independent Community School District, the United States Supreme Court ruled that high school officials may discipline a student for speech made on school premises, if school authorities forecast that the speech will cause a material and substantial interference with school activities or the rights of others. In Tinker, high school students John Tinker and Christopher Eckhardt, along with junior-high school student Mary Beth Tinker (collectively, “Students”), attempted to wear black armbands to school in protest of the Vietnam War. Administrators prohibited the Stu-

40. Id. at 544 (Kelly, J., dissenting).
41. Id. at 542.
42. Id. at 543.
43. See id. Judge Kelly explained that “the Supreme Court’s decisions in Morse and Fraser foreclose the court’s contention that Mr. Keefe’s posts are equivalent to curricular speech simply because they were directed at classmates and involved their conduct in the Nursing Program.” Id.
44. Id. at 544.
45. See id. (quoting Bystrom ex rel. Bystrom v. Fridley High Sch., 822 F.2d 747, 750 (8th Cir. 1987)) (“[I]n comparison with regulating speech on school grounds, the burden to justify restrictions on off-campus speech ‘would be much greater, perhaps even insurmountable . . . .’”)
48. Tinker III, 393 U.S. at 504.
dents from returning until they removed the armbands. In response, the Students sued the Des Moines Independent Community School District, its board of directors, administrative officials, and faculty (collectively, “School”), alleging the School’s disciplinary sanctions violated their First Amendment rights.

The Students filed suit in the United States District Court for the Southern District of Iowa. The district court dismissed the complaint, determining that the School was permitted to impose disciplinary sanctions against the Students. The court reasoned that the sanctions were reasonable to prevent a disturbance of the disciplined atmosphere of the classroom. The Students then appealed to the United States Court of Appeals for the Eighth Circuit, which considered the case en banc. An equally divided Eighth Circuit affirmed the district court’s decision without an opinion.

The Students appealed to the United States Supreme Court, which reversed. The Court found that the Students’ First Amendment rights were violated because there was no evidence that school authorities could forecast that the Students’ conduct would materially disrupt classwork, evoke substantial disorder, or collide with the rights of other students. The Court promulgated the material disruption standard, which stipulates that punishment of student speech on school property is unconstitutional unless the conduct materially disrupted school work, evoked substantial disorder, or invaded the rights of others. The Court reasoned that punishment of the Students’ passive, silent expression of opinion unaccompanied by any disturbance or disorder impermissibly violated their First Amendment rights. For these reasons, the Court reversed and remanded the case to the United States District Court for the Southern District of Iowa, with instructions to ascertain the appropriate form of relief to be

49. Id.
52. See id. at 973. The district court stated, “the regulation of the defendant school district was, under the circumstances, reasonable and did not deprive the plaintiffs of their constitutional right to freedom of speech.” Id.
53. Id.
55. Tinker II, 383 F.2d at 988.
56. Tinker III, 393 U.S. at 505.
57. Id. at 514.
58. See id. at 513 (stating a school’s regulation of student speech could not be justified unless “the students’ activities would materially and substantially disrupt the work and discipline of the school”).
59. Id. at 508.
granted to the Students for the School’s violation of their First Amendment rights.60

B. **Bethel School District No. 403 v. Fraser: The Supreme Court Explains Constitutional Rights of Children Are Not Automatically Coextensive With the Rights of Adults**

In [*Bethel School District No. 403 v. Fraser*](https://supreme-court.gov/cases/bethel-school-district-no-403-v-fraser-1986-478-us-675), the United States Supreme Court held that Bethel High School (“School District”) did not violate student Matthew Fraser’s First Amendment rights when the School District disciplined him for a speech he gave during a school assembly.62 In *Bethel*, Fraser sued the School District, alleging it violated his First Amendment rights when he was punished for inappropriate comments made in a student government nominating speech.63 Fraser’s speech included sexual references and comments.64 The United States District Court for the Western District of Washington found that the School District violated Fraser’s First Amendment rights when it disciplined him for his speech.65

The School District appealed to the United States Court of Appeals for the Ninth Circuit.66 The School District argued the disciplinary sanctions were permissible because Fraser made the nominating speech during a school-sponsored event, thus the assembly was an extension of the school program.67 The Ninth Circuit reasoned that although public schools are permitted wide discretion over speech within a school’s curriculum, Fraser’s speech was part of an extracurricular student activity.68 The Ninth Circuit held that the School Dis-

---

60. *Id.* at 514.
63. *Bethel II*, 478 U.S. at 677-78.
64. *Id.* at 687 (Blackmun, J., concurring). Fraser stated in nominating speech:

> I know a man who is firm—he’s firm in his pants, he’s firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he’ll take an issue and nail it to the wall. He doesn’t attack things in sports—he drives hard, pushing and pushing until finally—he succeeds. Jeff is a man who will go to the very end—even the climax, for each and every one of you. So vote for Jeff for A.S.B. vice-president—he’ll never come between you and the best our high school can be.

65. *Fraser v. Bethel Sch. Dist. No. 403*, 755 F.2d 1356, 1358 (9th Cir. 1985) [hereinafter *Bethel I*].
67. See *id.* at 1358-59 (rejecting the School District’s argument that Fraser’s speech was impermissible under *Tinker* because it failed to demonstrate that Fraser’s comments “substantially disrupted or materially interfered in anyway with the educational process”).
68. *Id.* at 1363-64.
district violated Fraser's First Amendment rights when it punished him for his comments.\textsuperscript{69}

The School District appealed to the United States Supreme Court, which assessed whether the First Amendment prohibited a school from disciplining a student for lewd speech conducted during a school assembly.\textsuperscript{70} The Court reversed, holding that Fraser's First Amendment rights had not been violated by the School District's disciplinary sanctions.\textsuperscript{71} The Court assessed Fraser's First Amendment rights in light of role and purpose of the public school system: to teach and instill specific fundamental values and lessons.\textsuperscript{72} The Court explained that school authorities undertook specific obligations when acting \textit{in loco parentis}.\textsuperscript{73} The Court emphasized that the First Amendment rights of minors in public schools are not automatically coextensive with adults.\textsuperscript{74} The Court reasoned students at this academic level required a heightened level of censorship and restriction, partly because of their lack of maturity and impressionability.\textsuperscript{75} Therefore, the Court reversed the Ninth Circuit's decision.


In \textit{Hazelwood School District v. Kuhlmeier},\textsuperscript{76} the United States Supreme Court held that school officials were permitted to regulate student speech conducted via school-sponsored expressive activities so long as the regulation was reasonably related to legitimate pedagogical concerns.\textsuperscript{77} In \textit{Hazelwood}, staff members of the Hazelwood East High School newspaper sued the Hazelwood School District, alleging that school officials violated the staff member's First Amendment rights when they deleted several articles in an issue of the school-

\begin{itemize}
  \item \textsuperscript{69} Id. at 1365.
  \item \textsuperscript{70} Bethel II, 478 U.S. at 677.
  \item \textsuperscript{71} Id. at 685.
  \item \textsuperscript{72} See id. at 681 (quoting Ambach v. Norwick, 441 U.S. 68, 76-77 (1979)) (describing “the objectives of public education as the ‘inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system’”).
  \item \textsuperscript{73} Id. at 684. The Court stated that “[t]hese cases 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.” Id. \textit{In Loco Parentis} is a Latin term meaning “in [the] place of a parent” or “instead of a parent.” \textit{Loco Parentis, CORNELL L. SCH.: WEX, https://www.law.cornell.edu/wex/in_loco_parentis} (last visited Feb. 2, 2018). The phrase refers to the legal responsibility of a school to perform and maintain some of the functions or responsibilities of a parent. Id.
  \item \textsuperscript{74} Bethel II, 478 U.S. at 684.
  \item \textsuperscript{75} Id. The Court recognized that children must be protected from “exposure to vulgar and offensive spoken language.” Id.
  \item \textsuperscript{76} 484 U.S. 260 (1988).
  \item \textsuperscript{77} Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).
\end{itemize}
sponsored newspaper. One article included stories describing the experiences of three Hazelwood East students’ experiences with pregnancy; the other article discussed the impact of divorce on students at Hazelwood East. The United States District Court for the Eastern District of Missouri held that the censorship had not violated the staff members’ First Amendment rights. The district court reasoned the school officials’ actions were legitimate and reasonable in light of administrators’ privacy concerns.

The staff members appealed to the United States Court of Appeals for the Eighth Circuit, claiming that the district court erred in finding that the school officials’ censorship did not violate the staff members’ First Amendment rights. The Eighth Circuit reversed, holding that the school officials’ censorship of the newspaper violated the staff members’ First Amendment rights. Applying the standard in Tinker v. Des Moines Independent Community School District, the Eighth Circuit concluded that the First Amendment rights of the staff members had been violated because the newspaper was a public forum and could only be censored if the content violated Tinker’s material disruption standard. The Eighth Circuit, held that the newspaper’s content did not violate Tinker’s material disruption standard because the speech did not materially and substantially interfere with discipline or work of the school, nor did it invade the rights of others.

Hazelwood School District appealed to the Court, which held that the First Amendment rights of the staff members were not violated because the school officials’ censorship was reasonably related to legitimate pedagogical concerns. The Court distinguished the case before it from Tinker, reasoning that Tinker’s material disruption standard controlled the regulation of expression on school premises.

---

78. Hazelwood III, 484 U.S. at 262.
79. Id. at 263.
82. Kuhlmeier v. Hazelwood Sch. Dist., 795 F.2d 1368, 1371 (8th Cir. 1986) [hereinafter Hazelwood II].
83. Hazelwood II, 795 F.2d at 1370.
85. See Hazelwood III, 484 U.S. at 265. (“Spectrum’s status as a public forum precluded 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.’”).
86. Id. at 266.
87. Id. at 272-73.
88. Id. at 270-71.
however, applied to school-sponsored expressive activities, such as school-sponsored newspapers and theatrical productions.\footnote{89} The Court reasoned that school officials were granted greater discretion when regulating school-sponsored expressive activities because it bore the imprimatur of the school.\footnote{90} Student speech that bears the imprimatur of the school is speech that an observer would perceive to be endorsed or promoted by the school.\footnote{91} School officials are permitted greater discretion in regulating speech that bears the imprimatur of the school in order to prevent the speech from being erroneously attributed to the school because schools are not required to promote speech that is inconsistent with their basic educational mission.\footnote{92} This authority is why schools are permitted to regulate student speech that is ungrammatical or poorly written, profane, prejudiced, or otherwise inappropriate for the audience's level of immaturity.\footnote{93} Speech that bears the imprimatur of the school will typically be considered part of the school's curriculum, regardless of whether the speech takes place in a traditional classroom setting, so long as it is supervised by a faculty member and it is designed to impart special knowledge or skills to students and audiences.\footnote{94} The Court acknowledged that although the school would be permitted to censor the students' speech in this instance, the school was precluded from censoring the speech outside the school.\footnote{95} In conclusion, the Court remanded to the Eighth Circuit, which vacated its holding and affirmed the district court's decision that the First Amendment rights of the Staff Members had not been violated.\footnote{96}

Justice Brennan dissented to the Court's establishment of the new Hazelwood standard, reasoning that an application of Tinker would yield the same conclusion.\footnote{97} More significantly, however, Justice Brennan argued that student speech outside of the curricular context would be less likely to materially disrupt any legitimate pedagogical concerns.\footnote{98} Thus, a school's regulation of non-curricular student speech would be more likely to violate the First Amendment.\footnote{99}
D. Ward v. Polite: The Sixth Circuit’s Expansion of Hazelwood to School-Sponsored Expressive Activities into The University and Professional School Level

In Ward v. Polite, the United States Court of Appeals for the Sixth Circuit determined summary judgment in favor of the defendant was improper because a jury should decide whether a student’s First Amendment rights were violated when she was dismissed for contravening the American Counseling Association’s code of ethics. In Ward, Eastern Michigan University dismissed Ward from its graduate-level counseling-degree program (“Program”) for refusing to counsel students on anything related to the subject of homosexuality during a required practicum. School officials cited to the Program’s nondiscrimination policy as the basis for Ward’s dismissal. The United States District Court for the Eastern District of Michigan granted summary judgment in favor of the University, reasoning that Ward’s dismissal was a permissible enforcement of the University’s curriculum, rather than retaliation for expressing her religious beliefs.

Ward appealed to the Sixth Circuit, which reversed and remanded. The Sixth Circuit reasoned that summary judgment was improper because a reasonable jury could have concluded Ward’s dismissal from the Program was based on the University’s hostility towards her speech and religion, rather than the nondiscrimination policy. The Sixth Circuit’s reasoning focused on the curricular nature of the practicum, emphasizing the discretion schools have under Hazelwood School District v. Kuhlmeier in regulating curricular speech. The court applied Hazelwood to the university level, reasoning that Hazelwood permitted great deference to educational institutions in furthering their legitimate curricular objectives at any level. As a result, the Sixth Circuit declined to distinguish Hazelwood’s regulation of school-sponsored expressive activities at the university or high school level.

100. 667 F.3d 727 (6th Cir. 2012).
102. Ward II, 667 F.3d at 730.
105. Ward II, 667 F.3d at 732.
106. Id. at 730.
108. Ward II, 667 F.3d at 733-34.
109. Id. at 733.
110. Id. at 733-34.
Furthermore, the Sixth Circuit mimicked Justice Brennan’s dissent in *Hazelwood*, reasoning that the closer expressive activity comes to school-sponsored speech, the less likely it falls within the protection of the First Amendment.\textsuperscript{111} The Sixth Circuit noted that speech unrelated to the Program’s curriculum or a school-sponsored activity is less likely to further a legitimate pedagogical concern.\textsuperscript{112} Thus, the Sixth Circuit stated such speech should be analyzed under the *Tinker v. Des Moines Independent School District*\textsuperscript{113} material disruption standard.\textsuperscript{114} In conclusion, the court determined that Ward’s First Amendment claim deserved to go to a jury because although the school was permitted to regulate Ward’s curricular speech, the question remained if Ward’s discipline was genuinely based on violation of the Program’s nondiscrimination policy or religious bias.\textsuperscript{115}

E. *Tatro v. University of Minnesota*: Regulation of University Student’s Speech Must Be Directly Related and Narrowly Tailored to Established Professional Conduct Standards

In *Tatro v. University of Minnesota*,\textsuperscript{116} the Supreme Court of Minnesota held that a university student’s First Amendment rights were not violated when she was punished for her statements on Facebook, because the program rules were narrowly tailored and directly related to recognized professional conduct standards.\textsuperscript{117} In *Tatro*, mortuary science student Amanda Tatro appealed to the Court of Appeals of Minnesota by writ of certiorari, challenging the University of Minnesota’s decision to place her on probation for the remainder of her undergraduate career.\textsuperscript{118} The University concluded Tatro violated the Student Conduct Code (“SCC”) rules when she posted several statements on Facebook referencing a human cadaver she dissected in anatomy lab.\textsuperscript{119} The SCC prohibited students from blogging about

\textsuperscript{111} 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.’”); see also *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 283 (1988) (Brennan, J., dissenting) (“[S]tudent speech in the noncurricular context is less likely to disrupt materially any legitimate pedagogical purpose.”).
\textsuperscript{112} Ward II, 667 F.3d at 734.
\textsuperscript{113} 393 U.S. 503 (1969).
\textsuperscript{114} Ward II, 667 F.3d at 734.
\textsuperscript{115} Id. at 730.
\textsuperscript{116} 816 N.W.2d 509 (Minn. 2012).
\textsuperscript{117} Tatro v. Univ. of Minn., 816 N.W.2d 509, 511 (Minn. 2012).
\textsuperscript{118} *Tatro II*, 816 N.W.2d at 515. In Minnesota, “the only method available for judicial review of a university decision’ is by writ of certiorari to [the Minnesota Court of Appeals].” Brenny v. Bd. of Regents, 813 N.W.2d 417 (Minn. Ct. App. 2012) (citing *Shaw v. Bd. of Regents*, 594 N.W.2d 187, 191 (Minn. Ct. App. 1999)).
\textsuperscript{119} *Tatro II*, 816 N.W.2d at 512.
their experiences with cadaver dissection or studies. The Court of Appeals of Minnesota upheld the University’s decision, concluding Tatro’s First Amendment rights were not violated. The court concluded that the disciplinary sanctions were permissible under *Tinker v. Des Moines Independent School District* because Tatro’s Facebook posts caused a material and substantial disruption to the University.

Tatro appealed to the Supreme Court of Minnesota, requesting a review of whether a public university violates a student’s First Amendment rights when the student is disciplined for his or her online, off-campus speech. The court’s initial inquiry assessed what legal standard should apply. The court declined to apply *Hazelwood School District v. Kuhlmeier*, reasoning that it was only applicable to school-sponsored speech that an observer might reasonably conclude bore the imprimatur of the school. The court asserted that Tatro’s Facebook posts could not be categorized as school-sponsored speech because a reasonable person would not conclude that Tatro’s speech bore the imprimatur of the school. Furthermore, the court distinguished between the values underlying *Hazelwood’s* appli-

---

120. *Id.*
121. *Tatro v. Univ. of Minn.*, 800 N.W.2d 811, 822 (Minn. Ct. App. 2011) [hereinafter *Tatro I*]. Tatro’s statements included:

> Gets to play, I mean dissect, Bernie today. Let’s see if I can have a lab void of reprimanding and having my scalpel taken away. Perhaps if I just hide it in my sleeve.

> Is looking forward to Monday’s embalming therapy as well as a rumored opportunity to aspirate. Give me room, lots of aggression to be taken out with a trocar.

> Who knew embalming lab was so cathartic! I still want to stab a certain someone in the throat with a trocar though. Hmm . . . perhaps I will spend the evening updating my “Death List # 5” and making friends with the crematory guy. I do know the code . . . .

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

123. *Tatro I*, 800 N.W.2d at 822.
124. *Tatro II*, 816 N.W.2d at 515.
125. *Id.* at 516. The parties argued that different First Amendment standards applied. *Id.*
127. *Id.* at 518. The court stated, “[f]irst, we 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.’” *Id.*
128. *Id.* The court stated, “[a]s the Supreme Court has explained, the legitimate pedagogical concerns standard applies to ‘expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.’” *Id.*
cability at the high school level and the values implicated at the university level.129

Unlike the Minnesota Court of Appeals, the Supreme Court of Minnesota declined to extend Tinker’s material disruption standard to the University’s regulation of Tatro’s Facebook posts.130 The court acknowledged that other circuits have extended Tinker to the regulation of a student’s internet speech.131 However, the court reasoned that the impetus behind the University’s disciplinary sanctions was not that Tatro’s conduct evoked any material disruption, but that Tatro’s posts violated established program rules that obligated students to uphold certain values when working with human cadavers.132

Recognizing the certainty of an applicable standard, the court deferred to the United States Supreme Court’s repeated assertion that the First Amendment rights of students must be applied in light of the special qualities of the school’s environment.133 Assessing the special qualities of the Mortuary Science Program’s environment, including its professional and ethical obligations, the court adopted the legal standard that a university is permitted to regulate a student’s speech that violates academic program rules, so long as the regulation is narrowly tailored and directly related to established professional conduct standards.134 The Tatro court acknowledged the concern of implementing a broad rule that would permit a university to regulate a student’s personal expression at any place, at any time, for any curricular-based reason.135 The Supreme Court of Minnesota ultimately affirmed the court of appeals holding, concluding the University’s regulations regarding appropriate treatment of a cadaver was narrowly tailored and directly related to established professional con-

---

129. See id. (noting that at a high school level, legitimate pedagogical concerns include values such as “discipline, courtesy, and respect for authority”); see also Yoder v. Univ. of Louisville, 526 F. App’x 537, 545 (6th Cir. 2013) (explaining the United States Supreme Court student speech doctrines failed to consider the unique circumstances of nursing student being disciplined for myspace posts that described, in excruciating details, her experience witnessing a birth for a required birthing class). But see Raleigh Levine, Freedom of Speech Rights for College Students, ACLU Minn. (Nov. 14, 2017), https://www.aclu-mn.org/en/cases/tatro-v-university-minnesota. The ACLU argued that Tinker should not apply to college students because of the significant differences between secondary and post-secondary schools, including “their educational goals, disciplinary needs, and the age and maturity of students.” Id.

130. Tatro II, 816 N.W.2d at 519.

131. Id. at 518. See e.g., J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1107 (C.D. Cal. 2010) (“[T]he majority of courts will apply Tinker where speech originating off campus is brought to school or to the attention of school authorities . . . .”).

132. Tatro II, 816 N.W.2d at 519-20.

133. Id. at 520.

134. Id. at 520-21.

135. Id. at 522-24.
In conclusion, the court noted although other courts have considered the seriousness of the disciplinary sanctions imposed, Tatro was only given a failing grade for the course. 137

F. **Oyama v. University of Hawaii: The Ninth Circuit Provides Additional Support that Regulation of Off-Campus Student Speech Must Be Directly Related and Narrowly Tailored to Defined and Established Professional Standards**

In *Oyama v. University of Hawaii*, the Ninth Circuit held that a university’s regulation of a student’s speech does not violate the First Amendment when the discipline is directly related and narrowly tailored to established professional standards. 139 In *Oyama*, Mark Oyama (“Mr. Oyama”) sued the University of Hawaii after the university rejected his application to the Student Teaching Program (“Teaching Program”) because of concerning comments Mr. Oyama made regarding teaching students with disabilities and regarding sexual relationships between students and adults. 140

The United States District Court for the District of Hawaii concluded that Mr. Oyama’s First Amendment rights had not been violated by the university’s decision. 141 The district court reasoned that under *Hazelwood School District v. Kuhlmeier*, the university’s decision to impose disciplinary sanctions against Mr. Oyama was reasonably related to the Teaching Program’s legitimate pedagogical purpose because it was based on administrator’s professional judgment that Oyama failed to meet the Hawaii and national teacher standards. 143

Mr. Oyama appealed to the Ninth Circuit, which affirmed the district court’s grant of summary judgment. 144 The Ninth Circuit con-

---

136. *Id.* at 524. The court explained that the university’s sanctions were appropriate in light of Tatro’s violation of statutory requirement that morticians treat cadavers with dignity and respect. *Id.*

137. *Id.*

138. 813 F.3d 850 (9th Cir. 2015).

139. *Oyama v. Univ. of Haw.*, 813 F.3d 850, 868-69 (9th Cir. 2015).

140. *Oyama II*, 813 F.3d at 856. Oyama stated in his evaluation: “Personally, I think that online child predation should be legal, and find it ridiculous that one could be arrested for comments they make on the Internet. I even think that real life child predation should be legal, provided that the child is consensual [sic]. Basically from my point of view, the age of consent should be either 0, or whatever age a child is when puberty begins.”


143. *Oyama II*, 813 F.3d at 859-60.

144. *Id.* at 855.
cluded the university’s decision did not violate Mr. Oyama’s First Amendment rights because his rejection was directly related to established professional standards and narrowly tailored to serving the university’s core objective of evaluating student’s suitability for teaching.\footnote{145} The Ninth Circuit first addressed which student speech doctrine should be applied.\footnote{146} Recognizing the hybrid nature of Mr. Oyama’s claim under both student speech and public employee speech doctrines, the Ninth Circuit rejected either as directly applicable.\footnote{147} Instead, the court elected to draw certain components from both doctrines in order to appropriately address the unique nature of Mr. Oyama’s claim.\footnote{148}

In assessing the student speech doctrines, the Ninth Circuit looked to both \textit{Tinker v. Des Moines Independent School District}\footnote{149} and \textit{Hazelwood School District v. Kuhlmeier}\footnote{150} as the controlling framework of analysis.\footnote{151} The Ninth Circuit asserted that the student speech doctrines failed to account for the crucial importance of academic liberty at public colleges and universities.\footnote{152} Recognizing the limited applicability of the student speech doctrines, the court declined to apply the various student speech doctrines at a public university level.\footnote{153} The Ninth Circuit ultimately held that Mr. Oyama’s First Amendment rights were not violated because the Teaching Program’s rejection of his application was directly related to established professional standards, was narrowly tailored to furthering the Teaching Program’s core objectives, and was based on professional judgment.\footnote{154}

\footnote{145} Id.
\footnote{146} Id. at 860.
\footnote{147} Id. at 860-61.
\footnote{148} Id. at 860.
\footnote{149} 393 U.S. 503 (1969).
\footnote{150} 484 U.S. 260 (1988).
\footnote{151} \textit{Oyama II}, 813 F.3d at 861-62.
\footnote{152} See id. at 863-64 (relying on the United States Supreme Court holding in \textit{Sweezy v. New Hampshire}, 354 U.S. 234 (1957)); see also McCauley v. Univ. of the V.I., 618 F.3d 232, 246 (3d Cir. 2010) (“Considerations of maturity are not nearly as important for university students, most of whom are already over the age of 18 and entrusted with a panoply of rights and responsibilities as legal adults.”).
\footnote{153} \textit{Oyama II}, 813 F.3d at 863. Under the student speech doctrine, the key rationales justifying the restriction of students’ speech are to ensure that students “are not exposed to material that may be inappropriate for their level of maturity” and “learn whatever lessons the activity is designed to teach.” Id. Neither of these rationales is relevant because concerns about student maturity cannot justify restrictions on adult speech. Id.
\footnote{154} Id. at 868.
IV. ANALYSIS

In *Keefe v. Adams*, the United States Court of Appeals for the Eighth Circuit determined that former student Craig Keefe’s First Amendment rights had not been violated when Central Lakes College dismissed him from the CLC Program for statements Mr. Keefe made on Facebook that the CLC perceived as concerning. On appeal, the Eighth Circuit addressed the question of whether a university is permitted to regulate a student’s off-campus, online Facebook posts. The court analyzed Mr. Keefe’s First Amendment rights under both *Tinker v. Des Moines Independent School District* and *Hazelwood School District v. Kuhlmeier*, determining that the College was permitted to require students to comply with established professional nursing standards. The court reasoned that student speech that violated established professional standards materially disrupted the Program’s legitimate pedagogical concerns. The Eighth Circuit rejected Mr. Keefe’s argument that his Facebook posts were unrelated to any academic activities because Mr. Keefe’s use of the medical term hemopneumothorax and statements toward classmates directly supported that Mr. Keefe’s posts were related to academic activities.

First, this Analysis will argue that *Tinker* and *Hazelwood* are inapplicable to off-campus student speech that is not conducted via a school-sponsored expressive activity because those tests are reserved exclusively to high school student speech that implicated the school in some way, either in the context school-sponsored expressive activities or student expression on school grounds. Next, this Analysis will argue that the appropriate framework for assessing whether a university may discipline students for statements they made on Facebook is whether the policy is directly related and narrowly tailored to an established professional standard. Finally, this Analysis will argue that because Mr. Keefe’s Facebook posts were off campus and not school sponsored, the Eighth Circuit’s application of the student speech doctrines in *Keefe* was erroneous because the directly related

---

155. 840 F.3d 523 (8th Cir. 2016).
156. See *Keefe v. Adams*, 840 F.3d 523, 533 (8th Cir. 2016) (affirming the district court’s determination that Mr. Keefe’s First Amendment rights had not been violated).
161. *Id.*
162. *Id.* at 532
163. See infra notes 166-184 and accompanying text.
164. See infra notes 185-200 and accompanying text.
and narrowly tailored to established professional standards was the correct test to apply. 165

A. **Tinker v. Des Moines Independent Community School and Hazelwood School District v. Kuhlmeier Are Inapplicable to Off-Campus Student Speech That is Not School Sponsored**

*Tinker v. Des Moines Independent School District* 166 and *Hazelwood School District v. Kuhlmeier* 167 are not the appropriate tests for assessing the First Amendment rights of a university student’s off-campus, non-school-sponsored speech because the age and maturity considerations addressed by the United States Supreme Court limited its importance and applicability to high school students. 168 The Court consistently held that the First Amendment rights of children are not automatically coextensive with adults in similar circumstances. 169 The underlying rationales of the *Tinker* and *Hazelwood* analysis include: (1) the level of maturity of the students; and, (2) the responsibilities of schools under the doctrine of *in loco parentis* to protect children from inappropriate speech. 170 Given these specific considerations, the Court extended great constitutional deference to schools when regulating student speech at the high school level. 171

165. See infra notes 201-217 and accompanying text.
168. See Oyama v. Univ. of Haw., 813 F.3d 850, 862 (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.”); see also *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 n.7 (1988) (reserving the question of “whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level”).
169. *Hazelwood III*, 484 U.S. at 266. The Court recognized that “First Amendment rights of students in the public schools are not automatically coextensive with the rights of adults in other settings, and must be applied in light of the special characteristics of the school environment.” *Id.* Accord *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986). Prior to *Hazelwood*, the Court asserted “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.” *Bethel II*, 478 U.S. at 682.
170. Compare *Hazelwood III*, 484 U.S. at 271 (reasoning secondary school educators are entitled greater control over material that may be inappropriate for students’ level of maturity), and *Bethel II*, 478 U.S. at 684 (“[C]lasses 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.”), with *Keefe v. Adams*, 840 F.3d 523, 531-32 (8th Cir. 2016) (determining that *Hazelwood* was applicable without considering the age and maturity concerns).
171. See, e.g., *Bethel II*, 478 U.S. at 685 (holding that the First Amendment did not prohibit the school from disciplining student for lewd and indecent speech); *Hazelwood III*, 484 U.S. at 267 (“The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board . . . rather than
These considerations are not applicable when assessing the First Amendment rights of students at the university level. Moreover, the Court has granted university students a significant amount of academic freedom because of the universities’ objectives in developing future professionals. As a result, certain circuits have appropriately declined to extend the student speech doctrines to the university level. Therefore, Hazelwood is inapplicable at the university level because it incorporates and addresses concerns specific to the high school level.

Additionally, Hazelwood is not the appropriate analysis for assessing whether a university may discipline a student for non-school-sponsored speech because the speech would not bear the imprimatur of the school. The Court made clear that Hazelwood was only applicable to the regulation of student speech conducted during school-sponsored, expressive activities. Furthermore, Hazelwood specifically

with the federal courts.

172. Compare Oyama II, 813 F.3d at 863 (recognizing none of the key rationales supporting the student speech doctrine are applicable to the university setting), with Hazelwood III, 484 U.S. at 271 (“Educators are entitled to exercise greater control over this second form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.”).

173. See Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (“The essentiality of freedom in the community of American universities is almost self-evident . . . ; [t]o impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation . . . .”); see also Oyama II, 813 F.3d at 863 (recognizing the Court’s reasoning that students are afforded significant academic freedoms at the university level).

174. See Oyama II, 813 F.3d at 862 (declining to extend the student speech doctrine to the university level); see also Tatro v. Univ. of Minn., 816 N.W.2d 509, 518 (Minn. 2015) (declining to extend Hazelwood to the university setting).

175. Compare Tatro II, 816 N.W.2d at 518 (declining to extend Hazelwood to the university level because it considered values such as “discipline, courtesy, and respect for authority”), and Ward II, 667 F.3d 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.”), with Keefe II, 840 F.3d at 531 (applying Hazelwood without considering values such as a student’s maturity levels and in loco parentis).

176. Compare Hazelwood III, 484 U.S. at 270-72 (stating high school educators are permitted to regulate school-sponsored expressive activities that bear the imprimatur of the school), Tatro II, 816 N.W.2d at 518 (stating Tatro’s Facebook posts were not school sponsored speech because a reasonable observer would not perceive the posts to bear the imprimatur of the school), and Morse v. Frederick, 551 U.S. 393, 405 (2007) (holding that Hazelwood “does not control this case because no one would reasonably believe that [a student’s] banner bore the school’s imprimatur”), with Keefe II, 840 F.3d at 520 (determining that Hazelwood was applicable to Mr. Keefe’s Facebook posts).

177. See Hazelwood III, 484 U.S. at 273 (holding “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns”).
cally addresses the question of whether a school is required to lend its name to student speech that could reasonably be perceived to bear the imprimatur of the school.178 School-sponsored activities that a reasonable observer would conclude bore the imprimatur of the school include those activities that appear to be part of the school's curriculum.179 In the event that a reasonable observer could not conclude that the speech bore the imprimatur of the school, it cannot be categorized as school-sponsored speech.180

Similar to Hazelwood, Tinker is also inapplicable to the regulation of off-campus student speech that is unrelated to academic activities because it is limited to on-campus student speech.181 The Court has maintained that Tinker is limited to student speech conducted on school premises.182 Furthermore, even if Tinker was applicable to the regulation of off-campus student speech, it would not apply to speech that did not materially disrupt a legitimate curricular function or disturb the rights of other students.183 Thus, Hazelwood and Tinker are not the appropriate standards for evaluating whether a university

178. Id. at 270-71. The focus of Hazelwood was to address “whether the First Amendment requires a school affirmatively to promote particular student speech.” Id.

179. Id. at 271. Hazelwood concerns educators’ authority over school-sponsored expressive activities, such as:

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.

180. Compare Tatro II, 816 N.W.2d at 518 (noting Hazelwood is inapplicable because Tatro’s Facebook posts would not be school-sponsored speech as it did not bear the imprimatur of the school), with Keefe II, 840 F.3d at 531 (applying Hazelwood to assess whether university was permitted to regulate off-campus Facebook posts).

181. Compare Hazelwood III, 484 U.S. at 271 (noting the question addressed in Tinker is whether educators are permitted to regulate a student’s personal expression that occurs on school grounds), and Bystrom ex rel. Bystrom v. Fridley High Sch., 822 F.2d 747, 750 (8th Cir. 1987) (explaining that in comparison with regulating speech on school grounds, the burden to justify restrictions on off-campus speech “would be much greater, perhaps even insurmountable”), with Keefe II, 840 F.3d at 531 (“College administrators 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.’”).

182. See Hazelwood III, 484 U.S. at 271 (stating Tinker addresses the “educators’ ability to silence a student’s personal expression that happens to occur on the school premises”).

183. See Tinker III, 393 U.S. at 511 (1969) (“[T]he prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.”); see also Hazelwood III, 484 U.S. 260 at 283 (1988) (Brennan, J., dissenting) (“Under Tinker, school officials may censor only such student speech as would ‘materially disrupt[it]’ a legitimate curricular function.”).
may regulate a student’s off-campus speech that is non-school-sponsored and unrelated to academic activities.\textsuperscript{184}

B. \textbf{The Directly Related to and Narrowly Tailored to Established Professional Standards Test Is the Appropriate Test for Assessing Whether a University May Discipline Students for Off-Campus Facebook Posts That Violate Professional Conduct Standards}

Courts have struggled to determine which legal standard should apply to a university’s regulation of student speech.\textsuperscript{185} When assessing a university’s regulation of curricular speech, courts have been willing to extend the student speech doctrines to the university level.\textsuperscript{186} The speech at issue in these cases, and thereby their extension of \textit{Hazelwood School District v. Kuhlmeier},\textsuperscript{187} has been exclusively limited to speech that relates to the curriculum or academic activities.

\textsuperscript{184} Compare \textit{Tinker III}, 393 U.S. at 511 (“[T]he prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.”), \textit{Hazelwood III}, 484 U.S. at 270-72 (stating high school educators are permitted to regulate school-sponsored expressive activities that bear the imprimatur of the school), and \textit{Keefe II}, 840 F.3d at 542 (Kelly, J., dissenting) (arguing \textit{Hazelwood} should not apply because “Keefe’s speech was off-campus, was not school-sponsored, and cannot be reasonably attributed to the school”), with id. at 531 (majority opinion) (applying \textit{Tinker} and \textit{Hazelwood} to assess whether university was permitted to regulate student’s off-campus Facebook posts that were not school sponsored and unrelated to academic activities).

\textsuperscript{185} See \textit{Oyama v. Univ. of Haw.}, 813 F.3d 850, 863 (9th Cir. 2015) (“Concerns about student maturity cannot justify restrictions on speech in this context [at the university level] because certification candidates are adults.”); see also McCauley v. Univ. of the V.I., 618 F.3d 232, 246 (3d Cir. 2010) (“Considerations of maturity are not nearly as important for university students, most of whom are already over the age of 18 and entrusted with a panoply of rights and responsibilities as legal adults.”); \textit{Yoder v. Univ. of Louisville}, 526 F. App’x 537, 545 (6th Cir. 2013) (explaining that United States Supreme Court student speech doctrine failed to consider the unique circumstances of nursing student being disciplined for myspace posts that described, in excruciating details, her experience witnessing a birth for a required birthing class).

\textsuperscript{186} See \textit{Ward v. Polite}, 667 F.3d 727, 730 (6th Cir. 2012) (applying \textit{Hazelwood} to “curricular speech”); \textit{Keeton v. Anderson-Wiley}, 664 F.3d 865, 868-71, 873-75 (11th Cir. 2011) (permitting university to require student to complete remediation plan before participating in clinical practicum because she informed her peers and professors that she planned to violate practicum rules); \textit{Axson–Flynn v. Johnson}, 356 F.3d 1277, 1289 (10th Cir. 2004) (finding \textit{Hazelwood}’s analysis “applicable in a university setting for speech that occurs in a classroom as part of a class curriculum”).

\textsuperscript{187} 484 U.S. 260 (1988).
activities. But what about speech that is entirely unrelated to the curriculum or academic activities?

Assessing a university’s regulation of student speech in violation of professional conduct standards further complicates which legal standard applies. Students in professional schools are generally required to adhere to established professional standards, including ethical and confidentiality considerations. Furthermore, many universities’ rules provide for disciplinary action against students who violate those professional standards. Thus, in this context, a university may punish a student’s personal expression at any place, at any time, so long as they cite a violation of professional standards.

Faced with this complexity, certain circuits have developed the directly related to and narrowly tailored to established professional standards test. This test specifically addresses the special characteristics involved in a professional school in light of the unique circum-

---

188. Compare Oyama II, 813 F.3d at 872 (emphasizing that “[t]here was no evidence that the University relied upon any statements Oyama may have made outside [the context of his certification program] or communicated to a broader audience” in denying his student teaching application), with Ward II, 667 F.3d at 730 (noting that student spoke pursuant to a required counseling practicum).

189. Compare Tatro II, 816 N.W.2d at 523 (rejecting Tatro’s argument that she had merely engaged in satirical literary expression unrelated to any course work because Tatro violated the anatomy lab rule that required “conversational language” about cadaver dissection be respectful and discreet), with Keefe II, 840 F.3d at 544 (Kelly, J., dissenting) (“Keefe’s mere use of a word we associate with medical training does not make his post equivalent to curricular speech—such a finding would sweep far too broadly.”).

190. See Oyama II, 813 F.3d at 861 (assessing whether student’s First Amendment rights were offended when he violated professional conduct standards); see also Tatro II, 816 N.W.2d at 520-21 (determining whether mortuary science student’s First Amendment rights were violated when she breached professional conduct standards).

191. Compare Tatro II, 816 N.W.2d at 520 (noting Tatro’s Facebook posts “violated established program rules that require respect, discretion, and confidentiality in connection with work on human cadavers”), and Keeton, 664 F.3d at 876 (“The entire mission of [the university’s] counseling program is to produce ethical and effective counselors in accordance with the professional requirements of the ACA.”), with Hazelwood III, 484 U.S. at 272 (asserting secondary school’s role is to awaken the child to cultural values, prepare them for later professional training, and to help them adjust normally to his or her environment).

192. See Tatro II, 816 N.W.2d at 524 (stating academic rules permitted university to give Tatro a failing grade in laboratory course because her Facebook posts violated professional conduct standards).

193. See id. at 521 (stating this “broad rule would allow a public university to regulate a student’s personal expression at any time, at any place, for any claimed curriculum-based reason”).

194. See id. (holding “that a university does not violate the free speech rights of a student enrolled in a professional program when the university imposes sanctions for Facebook posts that violate academic program rules that are narrowly tailored and directly related to established professional conduct standards”); see also Oyama II, 813 F.3d at 868 (holding “that the University of Hawaii’s decision to deny Oyama’s student teaching application did not offend the First Amendment because it related directly to defined and established professional standards, was narrowly tailored to serve the Uni-
stances presented when student conduct is governed by established professional conduct standards. The directly related to and narrowly tailored test limits a university’s ability to regulate a student’s personal expressions, outside of and unrelated to the program. Subsequently, in *Oyama v. University of Hawaii*, the United States Court of Appeals for the Ninth Circuit expanded this test by including an additional safeguard that assesses whether the university’s regulation reflected reasonable professional judgment. By incorporating this additional element, the directly related and narrowly tailored to established professional standards test now addresses whether the university’s regulation of student speech was truly based on professional judgment, or mere impermissible personal disagreement with the student’s views. Given the considerations addressed in this test, the directly related to and narrowly tailored test is the appropriate analysis for assessing the First Amendment rights of a university student in a professional school environment.

---

195. *Tatro II*, 816 N.W.2d at 520. Considerations supporting the directly related and narrowly tailored to established professional standards test include the professional nature of the academic environment, such as the ethical considerations involved in the profession and adherence to professional norms. *Id.* at 521.

196. *Oyama II*, 813 F.3d at 850 (9th Cir. 2015).

197. *Compare Oyama II*, 813 F.3d at 874 (applying reasonable professional judgment safeguard in regard to the school’s rejection of Mr. Oyama’s teaching certification application for concerning comments involving the permissibility sexual relationship between students and teachers), *with Tatro II*, 816 N.W.2d at 521 (requiring only that university’s regulation of student speech is directly related and narrowly tailored to professional conduct standards).

198. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969) (“In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views . . . [and] school officials cannot suppress ‘expressions of feelings with which they do not wish to contend.’”).

199. *Compare Hazelwood III*, 484 U.S. at 273 (assessing the First Amendment rights of a high school student school-sponsored speech under the legitimate pedagogical concerns standard), *with Oyama II*, 813 F.3d at 868 (assessing the First Amendment rights of a professional school student when violating student professional standards).
2018 | THE NEXT STEP IN STUDENT SPEECH ANALYSIS?

C. **The Eighth Circuit’s Application of Tinker and Hazelwood as the Applicable Legal Standard Was Erroneous Because the Directly Related and Narrowly Tailored To Test Is the Correct Test for Assessing Whether a University Is Permitted to Discipline a Student for Off-campus Speech That Violates Professional Conduct Standards**

The Eighth Circuit’s application of *Hazelwood School District v. Kuhlmeier*\(^1\) in *Keefe v. Adams*\(^2\) was erroneous because Facebook is not a school-sponsored expressive activity.\(^3\) The legitimate pedagogical concerns framework is only applicable to student speech conducted during school-sponsored activities.\(^4\) The essence of school-sponsored expressive activities is that the activity is part of the school’s curriculum and bears the imprimatur of the school.\(^5\) Mr. Keefe’s Facebook posts cannot be characterized as school-sponsored expressive activities under *Hazelwood* because a reasonable observer would not perceive Facebook as bearing the imprimatur of CLC under explanations that other courts have provided.\(^6\) Additionally, Mr. Keefe’s speech cannot be categorized as part of the curriculum or re-

\(\text{\footnotesize 1. 484 U.S. 260 (1988).} \)

\(\text{\footnotesize 2. 840 F.3d 523 (8th Cir. 2016).} \)

\(\text{\footnotesize 3. Compare Tatro v. Univ. of Minn., 816 N.W.2d 509, 518 (Minn. 2012) (‘[B]ecause the public would not reasonably perceive Tatro’s Facebook posts to bear the imprimatur of the University, the Facebook posts cannot be characterized as ‘school-sponsored speech.’’), with Keefe v. Adams, 840 F.3d 523, 531-33 (8th Cir. 2016) (applying *Hazelwood*’s legitimate pedagogical concerns standard to determine that the University’s regulation discipline of Mr. Keefe for his Facebook posts was constitutionally permissible), and Keefe II, 840 F.3d at 542 (Kelly, J., dissenting) (‘*Keefe’s speech was off-campus, was not school-sponsored, and cannot be reasonably attributed to the school.*’).} \)

\(\text{\footnotesize 4. See Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (‘*Educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.?*’); see also Morse v. Frederick, 551 U.S. 393, 405 (2007) (holding that *Hazelwood* ‘does not control this case because no one would reasonably believe that [a student’s] banner bore the school’s imprimatur’).} \)

\(\text{\footnotesize 5. See *Hazelwood III*, 484 U.S. at 270 (asserting school-sponsored, expressive activities such as a school-sponsored newspaper or school-sponsored theatrical production may be characterized as part of the curriculum because they are perceived to bear the imprimatur of the school).} \)

\(\text{\footnotesize 6. Compare Tatro II, 816 N.W.2d at 518 (asserting Tatro’s Facebook posts would not be school-sponsored speech under *Hazelwood* because a reasonable observer would not conclude the posts bore the imprimatur of the school), and Oyama v. Univ. of Haw., 813 F.3d 850, 862 (9th Cir. 2015) (recognizing that ‘*[b]ecause the certification process necessarily implicates the University’s ‘imprimatur,’ the University is entitled to deference in determining how to ‘lend its name’ to certification candidates*’), with Keefe II, 840 F.3d at 531 (applying *Hazelwood* to assess whether the university was permitted to discipline student for off-campus Facebook posts).} \)
lated to any academic activities.\textsuperscript{207} Statements that are directed toward classmates and involve their conduct at school does not equate to curricular speech.\textsuperscript{208} Rather, the Eighth Circuit’s characterization of Mr. Keefe’s Facebook posts is more akin to a university’s impermissible regulation of student speech that the university disagrees with.\textsuperscript{209}

The Eighth Circuit’s application of \textit{Tinker v. Des Moines Independent School District}\textsuperscript{210} in \textit{Keefe v. Adams} was erroneous because \textit{Tinker} is only applicable to a school’s regulation of student expression that occurs on school premises.\textsuperscript{211} Mr. Keefe’s Facebook posts were not conducted on campus, and thus are not an example of student expression that occurs on school grounds.\textsuperscript{212} Because Mr. Keefe’s Facebook posts were off-campus and non-school-sponsored, the Eighth

\begin{itemize}
\item \textsuperscript{207} Compare \textit{Keefe II}, 840 F.3d at 532 (stating that Mr. Keefe’s Facebook posts “were directed at classmates, involved their conduct in the Nursing Program, and included a physical threat related to their medical studies—‘I’m [sic] going to . . . give someone a hemopneumothorax’”), \textit{Ward v. Polite}, 667 F.3d 727, 730 (6th Cir. 2012) (noting that Ward’s request to refer gay clients to another counseling student was part of a required counseling practicum), and \textit{Keefe II}, 840 F.3d at 544 (Kelly, J., dissenting) (“Keefe’s mere use of a word we associate with medical training does not make his post equivalent to curricular speech—such a finding would sweep far too broadly.”).
\item \textsuperscript{208} Compare \textit{Morse}, 551 U.S. at 405 (noting Fraser’s inappropriate comments directed towards and involving classmates would have been protected if Fraser delivered the same speech outside of the school context), and \textit{Keefe II}, 840 F.3d at 543 (Kelly, J., dissenting) (“The Supreme Court’s decisions in \textit{Morse} and \textit{Fraser} foreclose the court’s contention that Keefe’s posts are equivalent to curricular speech simply because they were directed at classmates and involved their conduct in the Nursing Program.”), \textit{id.} at 532 (majority opinion) (asserting Mr. Keefe’s Facebook posts were related to course requirements and assignments because they were directed at classmates and involved their conduct).
\item \textsuperscript{209} Compare \textit{Tinker v. Des Moines Indep. Cnty. Sch. Dist.}, 393 U.S. 503, 508 (1969) (determining that high school administrators violated the First Amendment rights of students when they sought to ban and punish students for “a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners”), and \textit{Tatro II}, 816 N.W.2d at 521 (“[T]he University cannot impose a broad rule that would prohibit mortuary science students from criticizing faculty members or posting offensive statements that are unrelated to the study of human cadavers.”), \textit{with Keefe II}, 840 F.3d at 527 (stating the University expelled Mr. Keefe for Facebook posts that included criticizing a teacher for a grade she received in her class, wanting to give someone hemopneumothorax, and antagonizing the student who reported him to administrators).
\item \textsuperscript{210} 393 U.S. 503 (1969).
\item \textsuperscript{211} \textit{Compare Hazelwood III}, 484 U.S. at 270-71 (asserting \textit{Tinker} focuses on a school’s authority to regulate a student’s personal expression that happens to occur on school grounds), and \textit{Tatro II}, 816 N.W.2d at 519 (declining to apply \textit{Tinker} to the regulation of Tatro’s off-campus Facebook posts), \textit{with Keefe II}, 840 F.3d at 531 (applying \textit{Tinker} to assess Mr. Keefe’s First Amendment claim).
\item \textsuperscript{212} \textit{Compare Keefe II}, 840 F.3d at 543-44 (Kelly, J., dissenting) (“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.”), \textit{with Hazelwood III}, 484 U.S. at 266 (“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.”).}

Circuit erred in applying *Tinker* when assessing Mr. Keefe’s First Amendment rights.\footnote{213. Compare *Keefe II*, 830 F.3d at 542 (Kelly, J., dissenting) (asserting Mr. Keefe’s speech was off-campus), with *Tatro II*, 816 N.W.2d at 518 (reasoning *Tinker* is not the appropriate standard to apply to a “university student’s Facebook posts when the university has imposed disciplinary sanctions for violations of academic program rules”).}

Because the student speech doctrine cannot apply to Mr. Keefe’s off-campus, non-school-sponsored speech, the Eighth Circuit erred when it failed to apply the directly related and narrowly tailored to established professional standards test.\footnote{214. See *Tatro II*, 816 N.W.2d 509 at 521 (stating the applicable legal standard for assessing whether a school’s regulation of a university student’s speech on Facebook is whether the school’s actions are narrowly tailored and directly related to established professional standards).} The directly related and narrowly tailored to established professional standards test specifically addresses the question of whether a professional school may discipline a student for violations to established professional conduct standards, including those on Facebook.\footnote{215. See id. (developing the directly related and narrowly tailored to established professional standards test to assess whether a university is permitted to discipline a professional school student for violations of established professional conduct standards); see also *Oyama II*, 813 F.3d at 868 (applying the directly related and narrowly tailored to established professional standards test to test assess the unique nature of a professional student’s First Amendment rights).} The Eighth Circuit should have applied the directly related and narrowly tailored to established professional standards test because Mr. Keefe’s posts were off campus and non-school sponsored, Mr. Keefe was enrolled in a professional school program, and he was expelled for violating established professional conduct standards.\footnote{216. Compare *Keefe II*, 840 F.3d at 526 (noting Mr. Keefe was enrolled in the CLC Nursing Program and made the Facebook posts on his personal account), and id. at 542 (Kelly, J., dissenting) (“Keefe’s speech was off-campus, was not school-sponsored, and cannot be reasonably attributed to the school.”), with *Tatro II*, 816 N.W.2d at 521 (considering that Tatro was a professional school student enrolled in the Mortuary Science Program and was bound by the mortuary science professional standards).} Taking into account the specific facts of *Keefe*, the student speech doctrine was inappropriately applied, and the Eighth Circuit should have applied the directly related and narrowly tailored to test.\footnote{217. Compare *Oyama II*, 813 F.3d at 868 (applying the directly related and narrowly tailored to established professional standards test to test assess the university’s decision to reject Mr. Oyama’s teaching certification application because Mr. Oyama was a professional school student who violated established professional conduct standards), and *Tatro II*, 816 N.W.2d at 521 (holding that university did not violate mortuary science student’s First Amendment rights when student was disciplined for off-campus Facebook posts because discipline was directly related and narrowly tailored established professional standards), with *Keefe II*, 840 F.3d at 531-33 (applying *Tinker*’s “material disruption” and *Hazelwood*’s “legitimate pedagogical concerns” test to determine that Mr. Keefe’s First Amendment rights were not violated when he was expelled for violating professional conduct standards).}
V. CONCLUSION

In Keefe v. Adams, the United States Court of Appeals for the Eighth Circuit determined that former student Craig Keefe’s First Amendment rights had not been violated when the CLC dismissed him for statements Mr. Keefe made on Facebook.  The Eighth Circuit applied both Tinker v. Des Moines Independent School District and Hazelwood School District v. Kuhlmeier reasoning that because CLC was permitted to require students to comply with established professional nursing standards, speech that violated those standards and was related to academic activities materially disrupted the Program’s legitimate pedagogical concerns.

The Eighth Circuit’s use of the student speech doctrine was erroneous because Tinker and Hazelwood do not apply to off-campus, non-school-sponsored speech. Furthermore, the correct test for assessing whether a university is permitted to discipline a professional school student for violations of professional conduct standards is the directly related and narrowly tailored to test established professional standards. The Eighth Circuit erred in failing to use the directly related and narrowly tailored to established professional standards test in Keefe v. Adams.

According to Keefe v. Adams, a university may now expel a professional school student for unsavory or critical Facebook posts that are entirely unrelated to their academic studies, so long as it cites to a violation of professional standards. This is the exact outcome that

---

218. 840 F.3d 523 (8th Cir. 2016).
219. See Keefe v. Adams, 840 F.3d 523, 533 (8th Cir. 2016) (affirming district court’s grant of summary judgment against Mr. Keefe’s First Amendment claim).
222. See Keefe II, 840 F.3d at 533 (“Because compliance with the Nurses Association Code of Ethics is a legitimate part of the Associate Degree Nursing Program’s curriculum, speech reflecting non-compliance with that Code that is related to academic activities ‘materially disrupts’ the Program’s ‘legitimate pedagogical concerns.’”).
223. See supra notes 166-184 and accompanying text.
224. See supra notes 185-200 and accompanying text.
225. See supra notes 201-217 and accompanying text.
226. Although not directly addressed by the Eighth Circuit in its opinion, there is another line of student speech cases that specifically deal with off-campus, threatening, or violent student speech. In those cases, courts have applied Tinker’s material disruption standard to off-campus threats of violence. See, e.g., Wisniewski v. Bd. of Educ. 494 F.3d 34, 37 (2d Cir. 2007) (applying Tinker’s material disruption standard to “true threats” of violence); Kowalski v. Berkeley Cty. Sch., 652 F.3d 565, 567 (4th Cir. 2011) (applying Tinker to off-campus MySpace page that ridiculed another student). This line of cases may reflect the Eighth Circuit’s deference to CLC given Mr. Keefe’s comment threatening to stab someone. See Keefe II, 840 F.3d at 543 (Kelly, J., dissenting) (“While I agree Keefe could have been disciplined for speech that qualified as a ‘true threat’ or a ‘substantial disruption,’ the district court made no findings with respect to whether Keefe’s Facebook posts qualified for these categorical exceptions to the First Amend-
the Supreme Court of Minnesota sought to avoid when they applied the directly related and narrowly tailored to established professional standards test to assess the First Amendment rights of a professional school student who was punished for the student’s off-campus Facebook posts. Furthermore, the Eighth Circuit’s holding reaches far beyond the authority permitted under the current student speech doctrine.

The Eighth Circuit’s highly deferential standard only adds to the uncertainty of what test lower courts should apply when faced with a similar issue. Moving forward, other courts facing this issue should apply the directly related and narrowly tailored to established professional standards test to assess a university’s regulation of a professional school student’s speech for violations of professional conduct standards for the reasons set forth in this Note.

*Kai Wahrmann-Harry, ’19*