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STANDARDS OF PROFESSIONAL CONDUCT AS LIMITATIONS ON STUDENT SPEECH

R. GEORGE WRIGHT*

I. INTRODUCTION

Even as private-sector unions have declined in the United States, the prevalence of occupational licensing and related forms of accreditation has increased and entry to hundreds of occupations now requires licensing. While the percentage is higher for graduate and, of course, for professional programs and schools, "about 29 per cent of the workforce is required to obtain a license from either the federal, state or local government to work for pay." Thus, professional accrediting and licensing, and the standards and requirements thereunder in particular, merit serious attention.

The interaction of professional conduct standards and the speech of students enrolled in professional programs was recently addressed by the Minnesota Supreme Court's opinion in Tatro v. University of Minnesota. Declining to apply either the Tinker v. Des Moines Independent Community School District or the Hazelwood School

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2. See id. at 677.
3. Id.
4. 816 N.W.2d 509 (Minn. 2012). See generally William Creeley, A Closer Look at 'Tatro v. University of Minnesota,' FIRE (June 22, 2012), http://thefire.org/article/14615.html (arguing that while the grounds for ruling against the student's free speech claim were not as broad as they might have been, the decision was still troubling in that the adopted grounds might permit, for example, a law school to prohibit some otherwise protected law student speech on the grounds of its presumed incompatibility with academic program rules seeking to permissibly instill and promote officially adopted professional standards).
District v. Kuhlmeier\textsuperscript{6} student speech regulation tests, the court sought to resolve the case on somewhat different grounds.\textsuperscript{7} Whether those grounds are unequivocally narrower than either Tinker or Hazelwood is not entirely clear. Nor is the court's statement of its own holding entirely uncontroversial.

For the moment, though, we can say that the Tatro court perceived the case to involve "a university's imposition of disciplinary sanctions for a student's Facebook post that violated academic program rules."\textsuperscript{8} The court sought to articulate its holding as follows: "[T]he University did not violate the free speech rights of Tatro by imposing sanctions for her Facebook posts that violated academic program rules where the academic program rules were narrowly tailored and directly related to established professional conduct standards."\textsuperscript{9}


There is of course a substantial literature on the Hazelwood case more generally. See, e.g., Emily Gold Waldman, Returning to Hazelwood's Core: A New Approach to Restrictions On School-Sponsored Speech, 60 Fla. L. Rev. 63, 65 (2008) (arguing that "Hazelwood has been pulled in so many directions that its underlying standard has lost coherence"). For discussion of the specific question of whether Hazelwood, as appropriately adapted, should be applied in public college and university contexts, see, for example, Jessica Golby, Note, The Case AgainstExtending Hazelwood v. Kuhlmeier's Public Forum Analysis to the Regulation of University Student Speech, 84 WASH. U. L. Rev. 1263 (2006); Laura Merritt, Note, How the Hosty Court Muddled First Amendment Protections by Misapplying Hazelwood to University Student Speech, 33 J.C. & U. L. 473 (2007); Jeff Sklar, Note, The Presses Won't Stop Just Yet: Shaping Student Speech Rights in the Wake of Hazelwood's Application to Colleges, 80 S. Cal. L. Rev. 641 (2007).

7. See Tatro, 816 N.W.2d at 517–19.
8. Id.
9. Id. at 511.
This Article briefly addresses the Tatro holding. A broader analysis then considers some possible implications of the underlying logic of Tatro and similar cases in the context of professional program requirements, accreditation standards, and various binding or even aspirational professional organizational and licensing standards, as interpreted and applied in disciplining student speech.

To anticipate the argument: Despite the court's aspirations, in limited respects, to free speech constitutional rigor, the Tatro court actually adopted, rightly or wrongly, a highly deferential form of mere minimum scrutiny. The University's focus on blogs, however interpreted, and the court's focus on whether Facebook posts, on or off campus, as well as the more general fact that Tatro's speech appeared via social media rather than through traditional or "legacy" media, might well have impacted the outcome of the Tatro case itself. But these interesting aspects of Tatro may be far less significant, ultimately, for the broad, ultimate reach of the case's underlying, basic logic.

In fact, on the Tatro case's logic, even the weight, proven or speculative, of the school's interest in restricting the student's speech appears to be of limited constitutional significance as well. Thus, for example, the underlying logic of Tatro recognizes no significant constitutional difference, in these sorts of contexts, between student speech that is believed to indicate a deficiency in the speaker's ability to competently and fairly treat socially marginalized groups, and student speech with no such implications. That is, by Tatro's logic, and that of other comparable cases, all binding professional standards are in this crucial respect created equal.

Thus apart from certain realistically avoidable exceptional cases, and apart from any of several substantial changes in the relevant constitutional law, free speech-based challenges to school discipline on the basis of relevant professional conduct standards and accreditation requirements are likely to be unavailing.

A professional-program student thus might prevail if, for example, a court chose to apply the Hazelwood standard, as modified for the professional-program context, but only if the court then: broadened the idea or scope of school-sponsored speech; interpreted Hazelwood to

10. See infra Part II.
11. See infra Part III.
require that the restrictions on student speech be viewpoint-neutral; and, more importantly, radically reconceived and dramatically narrowed the range of speech regulations that would count as viewpoint-neutral, and thus narrowed the meaning of "viewpoint-neutrality" itself.

In particular, a university speech regulation that seeks to retain a program's accreditation by preparing students to follow specified professional standards in the treatment of all clients, including historically marginalized or vulnerable group members, would have to count as viewpoint-based, rather than as viewpoint-neutral. This would be in distinct contrast to current Tatro-style opinions, which assume that the regulations in question target not speech viewpoints, but the student's failure to follow specified established professional conduct norms. Again, this is not to argue for or against any such changes. The aim is instead simply to clarify the real import and potential impact of Tatro and related cases.

Another possible means by which professional-program students might commonly prevail on their free speech claims would require that courts abandon the quite substantial degree of deference they have traditionally accorded to graduate and professional programs, especially in matters of academic standards and the evaluation of students. This, clearly, would require a dramatic change in the law in a number of contexts.12

Finally, professional-program students whose speech is restricted under Tatro-like cases might prevail: where they can argue that the

12. See, generally Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. ___, 130 S. Ct. 2971, 2988–89 (2010) (ruling that courts should refrain from replacing the judgment of school authorities with their own); Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214 (1985) (holding that judges should show great deference to the professional judgment of faculty); Bd. of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78, 91–92 (1978) (deciding that "[e]ven assuming that the courts can review under an [arbitrary and capricious] standard . . ." there was no such showing in this case); Keyishian v. Bd. of Regents of the Univ. of N.Y., 385 U.S. 589 (1967) (ruling the university faculty members' interests of academic freedom outweighed the state's interests in overturning a law requiring faculty members to certify they were not a communist as unconstitutional); Sweezy v. New Hampshire, 354 U.S. 234 (1957) (holding that the state could not require plaintiff to answer questions regarding a lecture he gave at the state university). For an analysis of these cases, see generally R. George Wright, The Emergence of First Amendment Academic Freedom, 85 NEB. L. REV. 793 (2007).
program's relevant rules are simply not "established," either formally or informally; where the rules are contrary to binding law; where the rules are unconstitutionally vague, ambiguous, or mutually inconsistent; or where the rules are being applied, generally or in the present case, in an arbitrary, politically biased, or merely pretextual way. Each of these latter issues, however, can presumably be avoided by reasonable conscientiousness and uniformity of approach on the part of the academic program in question, and by focusing on consistent and consistently-applied judgments as to the interests of future clients, along with the integrity of the profession and its gate-keeper programs.

Realistically, then, absent a substantial change in the law, or questionably managed program policies, it is difficult to imagine a student free speech claim prevailing in Tatro-like cases. The fact that the restricted speech is that of a student, or a student-intern, who may not yet be actually working in the program's targeted profession, makes no relevant fundamental difference in this respect.

This is again not to draw any normative conclusions as to this particular state of constitutional affairs. As we shall briefly see below, it is possible to argue that along with the benefits of such institutions, policies, and First Amendment rules, there may well be accompanying costs, including costs in general liberty as well as speech. And it is also possible that these benefits and costs may vary with the degree of emerging rights-consciousness, on various fronts, and as well with the degree of political self-sorting and polarization that is characteristic of the society at any given time.

II. TATRO AND RELATED CASES

Amanda Tatro, a college-level junior, had enrolled in the University of Minnesota's Mortuary Science Program. Eventually, Tatro posted on her Facebook page several status updates arguably suggesting a certain degree of light-hearted irreverence toward the

13. See infra Part III.
14. See Tatro, 816 N.W.2d at 511.
15. Tatro's Facebook page was then accessible by "friends" and "friends of friends," but it is not clear that the court's analysis hinges, at any point, on the relatively broad accessibility of the status updates at issue. Id at 512.
particular human cadaver to which she was assigned, but which Tatro herself characterized as “satirical commentary and violent fantasy about her school experience.” The campus disciplinary process resulted in a key finding that “Tatro had violated the Student Conduct Code and academic program rules governing the privilege of access to human cadavers.” Summarizing its holding, the Minnesota Supreme Court declared that “the University did not violate the free speech rights of Tatro by imposing sanctions for her Facebook posts that violated academic program rules where the academic program rules were narrowly tailored and directly related to established professional conduct standards.”

According to the University and amici curiae, the rules in question served to educate students as to their future professional and ethical responsibilities, stabilize the Anatomy Bequest Program, and promote compliance with the relevant professional education accrediting standards. At a particularized level, Tatro had agreed to program rules to the effect that “[c]onversational language of cadaver dissection outside the laboratory should be respectful and discreet’ and that [b]logging about the anatomy lab or the cadaver dissection is not allowable.” The anti-blogging rule, it should thus be noted, was not limited to even arguably disrespectful, indiscreet, or privacy-implicating material.

As for the appropriate constitutional free speech standard to apply, the court understandably declined to apply either the Hazelwood

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16. Id. at 511.
17. Id.
18. Id.
19. See id. at 516–17.
20. See id. at 517.
21. See id.
22. It is important to note that the court relied in this respect on the (sufficient) establishment of these program rules, and not on the presumed fact that Tatro herself had explicitly agreed to follow those particular rules. See id. at 521 n.6.
23. The court determined that Facebook posts, in the form presumably of typical status updates on one’s own page, fell within the scope of the term “blogging.” See id. at 512.
24. Id. at 516 (alteration in original).
25. See id. at 518 (discussing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988)).
or the *Tinker* standards. Briefly put, the court declined to apply *Hazelwood* because, whatever the possible adverse consequences or implications of Tatro’s Facebook postings, they would not be perceived by a reasonable observer as school-sponsored curricular speech apparently bearing the approval or imprimatur of the school.

The court also declined to apply *Tinker*’s “risk of substantial disruption” standard. The court on this point sensibly concluded that

> 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.

The *Tatro* court concluded instead that “in certain professional programs, valid curricular requirements can encompass compliance with professional and ethical obligations.” On the basis of the accumulated record, the court found the applicable program rules to be sufficiently established, non-pretextual, directly related to the relevant program standards, and, crucially, “narrowly tailored” to the interests at stake.

Now, it must be said that there is clearly some sense in which the broad, flat, exception-less universal prohibition of any and all

27. *Id.* at 518.
28. See *id.* at 518–20 (discussing, among other cases interpreting *Tinker*, J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915, 930–31 (3d Cir. 2011); Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 217 (3d Cir. 2011); Doninger v. Niehoff, 527 F.3d 41, 48 (2d Cir. 2008)).
29. *Id.* at 520.
30. *Id.* (citing and discussing Ward v. Polite, 667 F.3d 727, 732 (6th Cir. 2012); Keeton v. Anderson-Wiley, 664 F.3d 865, 878 (11th Cir. 2011)). The court’s reference to “certain” professional programs is not entirely clear, as it is unclear which professional programs, if any, would fall categorically outside the *Tatro* rule. Perhaps a professional program whose professional or accrediting aegis and authority were at the time in utter disarray, at least on the relevant disciplinary issue.
31. *Id.* at 521, 523.
32. See *id.* at 521–23.
"[b]logging about the anatomy lab or the cadaver dissection" is not genuinely narrowly tailored to any of the relevant professional or academic purposes. This is not a matter of unrealistically insisting on perfection in rule-drafting, or of exaggerating the importance of rare occurrences. It is instead simply difficult to imagine how the assumed public interests at stake require, for example, that the entire broad class of responsible, sensitive, thoroughly professional blog posts about, say, one aspect or another of the anatomy lab be prohibited. Another broad class of lab-related blog posts could be classified as merely innocuous, even if they do not actually further the public interests at stake. Lab-related blog posts addressing matters of genuine public interest, including issues of public policy, would presumably be within the scope of the ban. Entirely legitimate safety warnings to one's colleagues, whether posted or tweeted elsewhere or not, would also seem to fall within the scope of the ban as well. Therefore, even a system requiring pre-clearance of relevant blog posts by a school authority would be substantially more narrowly tailored.

The Tatro court nevertheless held the academic program rules to be narrowly tailored. The key step in the court's logic on this point is the adoption not of the rigorous narrow tailoring requirement for content- or viewpoint-based regulations of speech, but of the less rigorous narrow tailoring requirement for content-neutral regulations of speech. The court thus asked merely whether the speech restrictions at issue were "substantially broader than necessary" to promote the public interests

33. Id. at 516.
34. See supra text accompanying notes 19-21.
35. For an extremely elaborate explanation of such a system in the public employment context, see for example, Snepp v. United States, 444 U.S. 507 (1980); Weaver v. USIA, 87 F.3d 1429 (D.C. Cir. 1996).
36. See Tatro, 816 N.W.2d at 523.
37. See Wright, Content-Based and Content-Neutral Regulation: The Limitations of a Common Distinction, supra note 6, at 353-58.
at stake, quoting at this point the quintessential content-neutral speech regulation case of *Ward v. Rock Against Racism*.

The program’s emphasis on matters such as respect, dignity, and discretion in speech on particular subjects might at least vaguely suggest that the speech regulations at issue were based on the content of the speech in question. But instead, the judicial thinking in this area generally tends to focus on the regulation of professional or pre-professional conduct, as distinct from non-conduct speech, and on the institutional and professional goals, interests, and standards at stake, including the anticipated harms to potential or actual clients. To clarify the point, the government is not seeking to regulate certain secondary effects of speech that are unmediated by anyone’s belief or disbelief in officially disfavored ideas. The government is instead seeking to

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40. 491 U.S. 781, 798–99 (1989) (concluding that the sound volume restrictions on amplified music in Central Park were valid).
41. See *Tatro*, 816 N.W.2d at 514, 516–17, 523.
42. See id. at 523. See also *Ward v. Polite*, 667 F.3d 727, 734 (6th Cir. 2012) ("When a university lays out a program’s curriculum or a class’s requirements for all to see, it is the rare day when a student can exercise a First Amendment veto over them."); *id.* at 739 ("What poses a problem is not the adoption of an anti-discrimination policy; it is the implementation of the policy, permitting secular exemptions but not religious ones and failing to apply the policy in an even-handed, much less a faith-neutral, manner."); *Keeton v. Anderson-Wiley*, 664 F.3d 865, 872 (11th Cir. 2011) ("[T]he remediation plan was imposed because she expressed an intent to impose her personal religious views on her clients, in violation of the ACA Code of Ethics."); *id.* at 872–75 (reaching the conclusion that the student remediation plan "was viewpoint neutral"); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1292–93 (10th Cir. 2004) ("Although we do not second-guess the *pedagogical* wisdom or efficacy of an educator’s goal, we would be abdicating our judicial duty if we failed to investigate whether the educational goal or pedagogical concern was *pretextual.*") (emphasis in original); *Yoder v. Univ. of Louisville*, No. 3:09-cv-00205, 2012 WL 1078819, at *7 (W.D. Ky. Mar. 30, 2012) (noting judicial deference as particularly appropriate in the health care area, where granting a degree "places the school’s imprimatur upon the student as qualified to pursue his chosen profession") (citation omitted). For discussion of the realistic impossibility, if not incoherence, of any relevant government policy’s being ‘neutral’ with respect to the free exercise of religion, see R. George Wright, *Can We Make Sense of “Neutrality” in the Religion Clause Cases?: Seven Rescue Attempts, and a Viable Alternative*, 66 SMU L. REV. 877 (2013).
regulate professional conduct where the conduct in question is believed by the relevant profession to lead to bad outcomes or experiences for clients or other affected persons.\(^44\)

The speech for which the student is disciplined is clearly an element in the causal chain leading to what the profession considers an undesirable outcome or experience for the client. But in another sense, speech by the disciplined student is not an essential element of the logic of the academic or professional discipline imposed.

Let us thus assume, by way of a general example, that a medical student believes that a particular diagnostic machine should be reset or recalibrated in some way whenever the patient is a member of some particular specified group. The student may believe this for any sort of reason, ranging from the purest technical issue to the most overtly political or religious reason. No one, including, crucially, the patient, knows about this resetting process until it is later discovered by third parties.

If the relevant professional group considers this machine resetting to be without sufficient scientific basis and to risk the health of at least some of the patients involved, the professional group might well seek to impose, directly or indirectly, some sort of measured and appropriate professional or academic sanctions on the medical student in question, beyond merely engaging in a debate on the merits. And the basic motive in seeking sanctions—patient medical well-being—would be unaffected by whether the medical student had engaged in speech, and by the content or viewpoint of any possible symbolic speech engaged in by the medical student, precisely in the act of resetting the diagnostic machine. This example also illustrates that any possible reaction by a

\(^{44}\) See supra note 42. For an example of potentially binding professional ethical standards with a direct or indirect effect, of some sort, on speech, see *Ethical Principles of Psychologists and Code of Conduct 2010*, THE AM. PSYCHOLOGICAL ASS’N, http://www.apa.org/ethics/code/index.aspx (last visited Sept. 22, 2012). See, e.g., APA binding Standard 3.01, id. at 5 (“In their work-related activities, psychologists do not engage in unfair discrimination based on age, gender, gender identity, race, ethnicity, culture, national origin, religion, sexual orientation, disability, socioeconomic status or any basis proscribed by law.”). See also non-binding, but potentially educationally adoptable, Principle E, id. at 4 (dealing with respect). Of course, some dubious professional practices can be rendered statutorily illegal pursuant to the exercise of state police power.
patient to student-practitioner speech is not essential to the logic of the relevant sort of professional or academic discipline.

III. SOME CLASSIC ALTERNATIVE PERSPECTIVES ON THE ENFORCEMENT OF PROFESSIONAL STANDARDS

It seems likely that the overall significance of legally enforceable standard setting and related activities by organized professional groups has increased in the U.S. over time. Some of the broad theory seeking to explain why this might have happened has been expounded by the well-regarded economist Mancur Olson.45

The basic policy logic of acculturating future professionals to the technical and ethical standards expected of practitioners, and of practitioners in training, seems intuitively clear. We have suggested some of that policy logic in Section II above. But given the arguably large and increasing significance of this general area of the law, it seems advisable to at least briefly note alternative perspectives, whatever their ultimate import.

Classically, John Stuart Mill strongly valued the idea of universal education, to one degree or another, even if not the idea of broad provision by the state.46 Mill preferred a system of voluntary official certification of educational achievement beyond some specified minimum level.47 In the educational testing context, Mill argued that “[a]ll attempts by the State to bias the conclusions of its citizens on disputed subjects are evil; but it may very properly offer to ascertain and certify that a person possesses the knowledge requisite to make his conclusions on any given subject worth attending to.”48

45. Expanding on his classic work on the logic of collective political action, Olson argues, in brief, that “[s]table societies with unchanged boundaries tend to accumulate more collusions and organizations for collective action over time.” MANCUR OLSON, THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES 41 (1982) (emphasis omitted). For some quantitative data, see supra notes 1-3 and accompanying text.
47. See id. at 177-78.
48. Id. at 178.
Mill elaborates on how the aims of educational certification and state neutrality toward "disputed subjects" or "opinions" can be reconciled along the following lines:

[T]he knowledge required for passing an examination . . . should, even in the higher classes of examinations, be confined to facts and positive science exclusively. The examinations on religion, politics, or other disputed topics should not turn on the truth or falsehood of opinions, but on the matter of fact that such and such an opinion is held, on such grounds, by such authors, or schools, or churches.

Our confidence in the distinction between opinions and inevitably theory-laden matters of fact may well be less robust than was Mill's. But the more important point is that many citizens would prefer some sort of certification—whatever the procedural mechanism—that encompasses more than narrow technical competence. In any sort of therapist or counselor, for example, we doubtless want, say, a knowledge of the names of the relevant bodily parts. But we may well also appreciate a certain degree of sensitivity to who we are. We may certainly be open to appropriate challenges. But we likely do not wish to be humiliated, however unintentionally, or even well-intentioned, by a therapist whose goals or priorities are substantially different from our own. Some of us may even be willing to sacrifice a degree of narrow technical competence for a sense of empathy, responsible reassurance, or connectedness. That a therapist's lack of empathy may take the form of

49. Id.
50. Id.
51. Id. Mill is in general concerned especially about any prospective state monopoly on education. See id. at 176–77. More broadly, some economists have been concerned not so much with producer monopolies in themselves, assuming them to be typically unstable, but with monopolies that acquire some sort of entrenched legal status, and are distinctively "buttressed by public authority." JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 99 (3d ed. 1962).
words, or opinions, and thus speech, is itself of little concern to the patient in question.\footnote{52}

While Mill's approach focuses largely on politics and cultural philosophy, Professor Milton Friedman's critique of occupational licensing adds an economic dimension. Friedman "viewed licensing's entry restrictions as creating undesirable monopoly rents through greater barriers to entry."\footnote{53} Thus Professor Friedman argues that "registration, certification, or licensure, almost inevitably becomes a tool in the hands of a special producer group to obtain a monopoly position at the expense of the rest of the public."\footnote{54} Further, according to Friedman, "the people who might develop an interest in undermining the regulations are kept from exerting their influence. They don't get a license, must therefore go into other occupations, and will lose interest."\footnote{55} The results may include reduced rates of meaningful intra-group experimentation and reduction in the growth of knowledge.\footnote{56} Professor Friedman's critique thus extends beyond possible effects on the liberties of various affected persons, let alone on freedom of speech in particular. To that extent, his critique is beyond the scope of our present concern herein.

We can say, along with Professor Friedman himself, that even government-entrenched professional monopolies must face certain vulnerabilities.\footnote{57} Goods and services produced even by official monopolies can be substituted for, perhaps by newly developed technologies. Monopolies may indeed inadvertently incentivize the

\footnote{52. The opinions expressed by certified professionals, speaking on their own behalf, in venues such as professional journals or peer-reviewed research publications, doubtless raise additional issues. The cost of a profession's stagnation due to enforcement, formal or informal, of an orthodoxy ripe for responsible empirical challenge in such venues could be substantial. For a sense of the scope of such possibilities, see John P.A. Ioannidis, \textit{Why Most Published Research Findings Are False}, 2 PLOS MEDICINE 0696 (2005), available at \url{http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1182327/}.


55. \textit{Id}.

56. \textit{See id. at} 157.

57. \textit{See id. at} 155–56.
development of more or less close substitutes for the monopolized good or service.58

More broadly, the behavior of even officially entrenched professional monopolies may provoke, in the classic categories defined by Professor Albert Hirschman, both “exit” and “voice.”59 Members, or clients, leaving the organization (“exit”) may eventually prompt soul-searching and reassessment by the organization. Disaffected members and clients may also, through voice, “express their dissatisfaction directly to management or to some other authority . . . or through general protest addressed to anyone who cares to listen . . . .”60

As Professor Hirschman uses the term, voice may closely resemble speech, and on some occasions, something akin to free speech generally. Professor Hirschman has gone so far as to argue that “in certain situations, the use of voice can suddenly become a most sought-after, fulfilling activity, in fact, the ultimate justification of human existence.”61 Voice can be more or less spontaneous and uninvited,62 but it can also be institutionalized. Merely one example of the latter would be the American Psychiatric Association’s providing for three rounds of public commentary on proposed revisions to the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders, or DSM-5.63

It goes without saying, though, that not every instance of exit or voice, however pointed and articulate, should on the merits prompt a revision of a professional group’s institutional judgment as to what

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58. See id. Of course, those who undermine an established professional monopoly may, in turn, seek to legally cement their own monopoly power. See id. at 156.


62. See id. (discussing the wide fluctuations of the use of voice according to demands of society).

standards, rules, and policies best serve the interests of its diverse constituencies. And as we have seen, what an organization, in the exercise of its expert but fallible judgment, believes to be injurious professional conduct may, more or less coincidentally, take the form of speech. Some acts of speech are thus subject to reasonably proportionate formal or informal sanction.

IV. CONCLUSION

The Minnesota Supreme Court’s Tatro opinion may at first glance seem narrow in the scope and significance of its holding and reasoning, as it avoids formally extending the Supreme Court’s Hazelwood test to student speech that is sponsored by the school in only the weakest and most attenuated sense. In the context of similar cases, however, the legal and practical significance of Tatro can more properly be recognized as broad. Complications aside, and in default of substantial revision of one or more of the constitutional assumptions referred to above, the Tatro court’s deference, in these general contexts, to the judgment of the relevant professional organizations seems generally well-grounded.

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64. See supra text accompanying note 52.
65. In general, speech may, in a given context, perform many sorts of actions. For a classic discussion, see generally J.L. Austin, How To Do Things With Words (J.O. Urmson, ed. 1976). The fact that assault on a public official, extortion, attempted bribery, impersonating an officer, perjury, and fraud may take the form of speech does not typically complicate their prohibition.
66. See id.
67. Tatro v. Univ. of Minn., 816 N.W.2d 509 (Minn. 2012); see supra Part II.
68. See supra notes 7 & 25 and accompanying text.
69. See supra note 27 and accompanying text.
70. See, e.g., supra notes 30–34, 42 and accompanying text.
71. See supra Part I.
72. This would seem especially clear in cases in which the speech-as-professional-conduct arguably violates a civil rights or privacy rights principle, or arguably tends to undermine the quality of the professional relationship experience for relatively marginalized or vulnerable groups.