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When a Student's Speech Belongs to the University: *Keefe*, *Hazelwood*, and the Expanding Role of the Government Speech Doctrine on Campus

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WHEN A STUDENT'S SPEECH BELONGS TO THE UNIVERSITY: *KEEFE*, *HAZELWOOD*, AND THE EXPANDING ROLE OF THE GOVERNMENT SPEECH DOCTRINE ON CAMPUS

Lindsie Trego*

INTRODUCTION

Every semester, students of myriad professions are plagued by the frustration of group projects. Every semester, students take to social media such as Facebook and Twitter to complain about group projects. In November, 2012, one student at Central Lakes College in Minnesota took to Facebook to complain about his group project woes: "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."[1] This was not the end of this student's angsty use of social media. Nursing student Craig Keefe also posted complaints about unfair grading, sexism in the nursing program, and his failed attempts to receive special accommodations for medical reasons.[2]

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[1] Keefe v. Adams, 840 F.3d 523, 526–27 (8th Cir. 2016), *cert. denied*, 137 S. Ct. 1448 (2017).

[2] *Id. See also* Keefe v. Adams, 44 F. Supp. 3d. 874, 878–80 (D. Minn. 2014), *aff'd*, 840 F.3d 523 (8th Cir. 2016), *cert. denied.*, 137 S. Ct. 1448 (2017). Keefe's other posts included: "Very interesting. Apparently even if a male student has his Dr. Send letters to the instructors and director of the nursing program for test taking considerations they dont get them. But if your 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 shouldnt 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 just one more confirmafion of the prejudice in the program. Im taking notes thou...." "So . . . are you saying that you have never said Laura likes me I will make it, or She will let me do it for the test. Just wondering why and for what reason you were creeping on my page. Its really not your fault that the whole sexism thing happens in the nursing program. But its really bull shit that you say the door distracts you on your test and there was four other seats in the classroom that was in normal position not to mention that you choose to sit where you sit. I moved, but not that I still sit like the rest of the class, and I followed the guidelines of the college and still wasn't able to do what you did. Which is fine. I am way better than that. I don't need to grasp for straws. Without your faithful sidekick you aint shit. You tried coming up to me when your sidekick wasnt there on your clinical and asking me how to give your

These comments ultimately resulted in Keefe being administratively removed from his program for exhibiting "behavior unbecoming of the profession and transgression of professional boundaries."[3] The District Court for the District of Minnesota and the Eighth Circuit upheld his suspension.[4] While the First Amendment's protection of freedom of speech generally applies to students at public institutions,[5] the Eighth Circuit's decision in *Keefe*, as well as similar decisions by other courts, have carved out an exception: a student may be academically disciplined for speech that fails to comport with the professional standards of the student's chosen profession.[6]

Since the Supreme Court's 1969 decision in *Tinker v. Des Moines Independent Community School District*,[7] there has been no question that public students enjoy First Amendment protection. The *Tinker* court determined that school officials may only restrict student expression when there is a reasonable suspicion that the expression will create a substantial disruption to the classroom environment or will impede upon the rights of others.[8] While *Tinker* considered the rights of a junior high school student, it has often been applied in the college setting. Although this decision seemingly made clear the standard for First Amendment rights for students, the Supreme Court crafted an exception to the *Tinker* standard in *Hazelwood School District v. Kuhlmeier*.[9] In *Hazelwood*, the Court determined that,

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solu-medrol WTF read your MAR. How can you give it is the first thing I would have asked myself, but of course you didnt even know the drug existed. Its a very common drug. Im going to tell you one more time. Dont come on my page and try to justify your shit. I was kind enough to not put names in and ID individuals, but you ID yourself. You creeped my page. Spend your spare time studying, you could use it. Don't make me go where I don't need to or want to cuz I will. Leave it alone." *Id*.

[3] *Keefe*, 840 F.3d at 527–28.

[4] *Keefe*, 44 F. Supp. at 888–89.

[5] *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) ("The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth."); Healy v. James, 408 U.S. 169, 180 (1972) ("[S]tate colleges and universities are not enclaves immune from the sweep of the First Amendment."); *see also* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) (holding that students enjoy First Amendment speech protections).

[6] *See, e.g.*, *Keefe*, 840 F.3d at 532–33 (holding that schools do not violate the First Amendment when disciplining professional students for violating their chosen professions' codes of conduct); Oyama v. Univ. of Haw., 813 F.3d 850, 861–64 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2520 (2016) (holding that universities may legally act against students for their speech when such actions meet a three-part test, including being related to established professional standards).

[7] 393 U.S. 503 (1969).

[8] *Id.* at 509.

[9] 484 U.S. 260, 273 (1988).

at least in the K-12 setting, student expression that bears the imprimatur of the school (such as school newspapers and school plays) can be regulated for "legitimate pedagogical" reasons—a much lower standard than that found in *Tinker*.[10]

In a footnote, the *Hazelwood* majority made clear that they did not consider whether the *Hazelwood* standard should apply to the higher education context, as the *Hazelwood* case related to K-12 students.[11] While some courts have applied *Hazelwood* to school-sponsored college student speech,[12] others have declined to do so.[13] Additionally, the language of *Hazelwood* suggests that it is properly applied only in cases dealing with school-sponsored speech, not in cases of individual student expression.[14] In crafting an exception to the First Amendment as it applies to professional students, the Eighth Circuit and similarly situated courts have erroneously applied *Hazelwood* to restrict the individual speech by professional students, which does not bear the school's imprimatur. In the context of recent decisions that expand the reach of the definition of government speech, such as *Walker v. Texas Div., Sons of Confederate Veterans*,[15] the misapplication of *Hazelwood* in these cases imagines the government's imprimatur is affixed to wide swathes of individual student speech, thereby further expanding that speech which public schools may more freely regulate.

This Note examines the recent development of the professional student speech doctrine as a potential thread of the general expansion of the government speech doctrine, using the Eighth Circuit's recent decision in *Keefe v. Adams* as a lens for

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[10] *Id.*

[11] *Id.* at 273 n.7.

[12] *See, e.g.*, Axson-Flynn v. Johnson, 356 F.3d 1277, 1284–85 (10th Cir. 2004); Ward v. Polite, 667 F.3d 727, 733 (6th Cir. 2012); Ala. Student Party v. Student Gov't Ass'n, 867 F.2d 1344, 1347 (11th Cir. 1989).

[13] Among federal appellate courts, only the First Circuit has expressly rejected the application of *Hazelwood* to college student speech. Student Gov't Ass'n v. Bd. Of Trs. of the Univ. of Mass., 868 F.2d 473, 480 n.6 (1st Cir. 1989). Other courts have declined to allow administrative regulation of student expression after applying *Hazelwood*'s framework, but have not explicitly rejected application of *Hazelwood* to college student expression. *See* McCauley v. Univ. of the V.I., 618 F.3d 232, 247 (3d Cir. 2010) (finding that *Hazelwood*'s forum analysis "cannot be taken as gospel" in the college context).

[14] *Hazelwood*, 484 U.S. at 270–73 (holding 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").

[15] 135 S. Ct. 2239 (2015) (holding that specialty license plates constitute government speech and therefore decisions about specialty license plate designs need not be made in a content-neutral fashion).

this discussion. Analysis follows in five parts: Part I discusses the *Hazelwood* line of cases, including a review of seminal student and university speech cases such as *Tinker v. Des Moines Community School District*[16] and *Keyishian v. Board of Regents*.[17] Part II explores how various courts have approached the question of First Amendment rights of professional students, often applying *Hazelwood* to find that professional students' speech may be constitutionally regulated. Part III discusses the facts and background surrounding *Keefe* specifically. Part IV discusses the misapplication of *Hazelwood* and the government speech doctrine in these cases, as well as potential consequences of these misapplications. Part V proposes addressing concerns with professional students' expression by means less obstructive to students' First Amendment rights.

I. *HAZELWOOD* & STUDENT SPEECH LAW

The Supreme Court has long expressed the importance of protecting free expression on public college campuses. Nearly half a century ago in *Keyishian v. Board of Regents,*[18] the Court announced that, "The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth."[19] The Court reaffirmed this sentiment in *Healy v. James*,[20] "not[ing] that state colleges and universities are not enclaves immune from the sweep of the First Amendment."[21]

A couple years after its decision in *Keyishian*, the Supreme Court clearly established that students enjoy the protection of the First Amendment while in school.[22] In *Tinker*, as discussed above, the Supreme Court held that administrators had violated a junior high school student's First Amendment rights when they disciplined her for wearing a black armband in peaceful protest of the Vietnam War.[23] Administrators at public schools, the Supreme Court said, are state actors, and thus are barred by the First Amendment from censoring student expression unless it is likely to pose a substantial disruption to the classroom environment or infringe upon the rights of other

[16] 393 U.S. 503 (1969).
[17] 385 U.S. 589 (1967).
[18] *Id.*
[19] *Id.* at 603.
[20] 408 U.S. 169 (1972).
[21] *Id.* at 180.
[22] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505–06 (1969).
[23] *Id.*

students.[24] While *Tinker* dealt with the First Amendment rights of a junior high student, courts have widely applied the substantial disruption test in postsecondary institutions as well.[25] Additionally, some federal courts have noted that student speech jurisprudence such as *Tinker* is not protective enough in the college setting, and that college students' speech must instead be examined with the same level of protection as other adults' expression.[26]

As noted even in *Tinker*, though, First Amendment rights for students are not absolute.[27] This was further demonstrated in the 1988 Supreme Court ruling in *Hazelwood School District v. Kuhlmeier*,[28] in which the Court scaled back First Amendment protection for K-12 student journalists writing for school-sponsored newspapers by importing the forum doctrine to the high school student press.[29] The forum doctrine is a complex First Amendment doctrine that holds certain spaces," such as sidewalks and parks, to be open to all protected expression (i.e., "open forums" or "public forums"); other spaces to be open to only certain kinds of expression or only expression from certain people (i.e., "designated forums" or "limited forums"); and a third category of spaces, such as courtrooms, to be closed to most expression (i.e., "closed forums").[30] While usually applied to physical spaces, in *Hazelwood*, the Court held that if a school designates a publication as open for student expression, the publication becomes an open forum and the *Tinker* test applies, meaning censorship is barred unless the expression can reasonably be expected to substantially disrupt the educational environment.[31] However, classroom-based student publications that are a part of the curriculum are not open forums, and administrators can "exercis[e] editorial control over the style and content . . . so long as [administrators'] actions are reasonably related to legitimate pedagogical concerns."[32]

This "legitimate pedagogical concerns" test allows school administrators greater latitude in regulating school-

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[24] *Id.* at 514.

[25] *See*, *e.g.*, *Healy*, 408 U.S. at 180; Papish v. Bd. of Curators of Univ. of Mont., 410 U.S. 667, 670 (1973); Hosty v. Carter, 412 F.3d 731, 735 (7th Cir. 2005) (en banc); McCauley v. Univ. of the V.I., 618 F.3d 232, 249 (3d Cir. 2010).

[26] *See, e.g.*, DeJohn v. Temple Univ., 537 F.3d 301, 318 (3d Cir. 2008).

[27] *Tinker*, 393 U.S. at 503, 509 (holding that student speech may be regulated when it is likely to cause a substantial disruption to the classroom environment).

[28] 484 U.S. 260 (1988).

[29] *Id.* at 269–70.

[30] *Id.*

[31] *Id.* at 269.

[32] *Id.* at 273–274 (alteration in original).

sponsored student speech than they were afforded under *Tinker*'s more stringent "substantial disruption" standard.[33] While under *Tinker* administrators were required to show that a student's expression was likely to cause a substantial disruption to the school in order to regulate the expression, under *Hazelwood*, an administrator need only demonstrate that regulation of school-sponsored student speech has an educational purpose.[34] The *Hazelwood* case itself offers a practical example of this difference: The Court appeared to agree that a student newspaper publishing articles about teen pregnancy and parental divorce likely would not cause a disruption on campus.[35] However, the Court nonetheless held that no First Amendment violation had occurred when an administrator censored those articles because the administrator had legitimate pedagogical reasons for the regulation, such as concern for students' maturity levels.[36]

Because the *Hazelwood* Court heavily considered younger students' inferior maturity levels in coming to its decision,[37] and because the decision included a footnote cautioning that the Court did not decide whether the *Hazelwood* test would be appropriate in higher education,[38] early scholarship did not expect *Hazelwood* to curb the First Amendment rights of college students.[39] But in a notable application of *Hazelwood* to the college setting, the Seventh Circuit held that if a college-sponsored publication is not designated as a public forum, a college is also permitted to restrict the publication for legitimate pedagogical reasons.[40] Under *Hosty v. Carter*,[41] colleges can discipline collegiate media that are not designated as public forums—such as by means of removing editors, defunding the publication, or instituting other forms of restrictions—for practicing pedagogically inappropriate reporting.[42] On the other hand, some courts have

[33] *Id.* at 272–73.
[34] *Id.* at 271–73.
[35] *Id.*
[36] *Id.*
[37] *Id.* at 272.
[38] *Id.* at 273 n.7.
[39] *See, e.g.*, J. Marc Abrams & S. Mark Goodman, *End of an Era? The Decline of Student Press Rights in the Wake of* Hazelwood School District v. Kuhlmeier, 1988 DUKE L.J. 706, 707 (1988) (stating that collegiate media, unlike high school press, would "retain the vitality derived from the history of student press litigation in the past twenty years").
[40] *See* Hosty v. Carter, 412 F.3d 731, 734–36 (7th Cir. 2005) (superseded in statute as stated in Moore v. Watson, 738 F. Supp. 2d 817, 830 (2010)).
[41] *Id.*
[42] *See id.* at 735. For example, in *Hazelwood*, students wrote about teen pregnancy and parental divorce, which administrators deemed to be inappropriate for the immature

refused to apply *Hazelwood* in higher education.[43] Additionally, some state legislatures have passed statutes resetting the *Tinker* test as the appropriate test for determining whether administrative regulation of student journalism is permissible.[44]

This jurisdictional split leaves open the question of how much deference is due to college administrators in regulating the content of students' expression when their expression can be interpreted to bear the imprimatur of the college. Looking to other areas of First Amendment jurisprudence, there are indications that the trend is toward granting more deference to the government—including state colleges and universities—to determine when regulation is required to serve the interests of government programs.[45] In the educational setting, this has led to deference to administrators in determining regulations that may only loosely be related to pedagogy.[46] This trend includes the recent adoption of the "professional standards" doctrine.[47]

II. PREVIOUS PROFESSIONAL STUDENT SPEECH EXCEPTIONS

Hints of the professional standards doctrine date back to *Keeton v. Anderson-Wiley*,[48] a 2011 case in which the Eleventh Circuit determined that a university did not violate the First Amendment by requiring a remediation plan for a counseling graduate student who intended to impose her adverse views about homosexuality on her clients.[49] The *Keeton* court held that

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high school audience. *Id.* at 740. The Court agreed that this rationale was a legitimate pedagogical reason for prohibiting the students from publishing this reporting. *Id.*

[43] *See* Student Gov't Ass'n v. Bd. of Trs. of the Univ. of Mass., 868 F.2d 473, 480 n.6 (1st Cir. 1989*)*; *Hosty,* 412 F.3d at 735; Axson-Flynn v. Johnson, 356 F.3d 1277, 1284–85 (10th Cir. 2004). For a discussion of how various courts have treated *Hazelwood* in the college setting, see Frank LoMonte, *The Key Word is Student: Hazelwood Censorship Crashes the Ivy-Covered Gates*, 11 FIRST AMEND. L. REV. 305 (2013).

[44] *See, e.g.*, Cal. Educ. Code § 76120 (Deering 2017); Nev. Rev. Stat. Ann. § 388.077 (West 2017); 16 R.I. Gen. Laws Ann. § 16-109-3 (West 2017). Illinois, where *Hosty* took place, passed one such law shortly after *Hosty* was decided. *See* 105 Ill. Comp. Stat. Ann. 80 (2017). For a general discussion of such statutes, including a discussion of how these laws may affect cases like *Hazelwood*, see Robert J. Schoop*, States Talk Back to the Supreme Court: "Students Should be Heard As Well As Seen,"* 59 WEST'S EDUC. L. REP. 579, 581 n.11 (1990). *See also* Tyler J. Buller, *A State Response to* Hazelwood v. Kuhlmeier, 66 ME. L. REV. 89, 149 (2013).

[45] For further discussion of *Hazelwood* and the government speech doctrine, see Mary-Rose Papandrea, *The Free Speech Rights of University Students*, 101 MINN. L. REV. 1801, 1843–48 (2017).

[46] *Id.* at 1837 ("The Court referred to universities as laboratories . . . that must be given considerable deference.") (internal quotation marks omitted).

[47] *See* discussion *infra* Section II.

[48] 664 F.3d. 865 (11th Cir. 2011).

[49] *Id.* at 879. For an earlier predecessor to professional standards cases, see Axson-Flynn v. Johnson, 356 F.3d 1277, 1290 (10th Cir. 2004) ("Thus, we will uphold the

the clinical practicum program at issue was a nonpublic forum, allowing school officials to "'impose restrictions on speech that are reasonable and viewpoint neutral.'" [50] Additionally, the court imported the *Hazelwood* test to determine that the clinical practicum program was a school-sponsored activity that bore the imprimatur of the school, and thus found that the university could regulate the student's speech for the legitimate pedagogical purpose of ensuring compliance with the American Counseling Association (ACA) Code of Ethics.[51]

For the purposes of this discussion, the latter holding bears special importance, as the *Keeton* court used a set of professional standards external to the school or program rules to find a legitimate pedagogical purpose in the university's actions.[52] This type of analysis is also used in *Ward v. Polite*,[53] a 2012 Sixth Circuit case that again dealt with a counseling graduate student with religious objections to "'affirm[ing]' or 'validat[ing]' the 'homosexual behavior' of counseling clients."[54] As part of the graduate program, all students had to complete 40 hours counseling clients in a practicum program.[55] When Ward asked that a homosexual client be reassigned to another counselor, a university review committee concluded that she had violated the ACA Code of Ethics and expelled her from the program. [56] The *Ward* court, however, was unconvinced that referrals violated ethical guidelines for

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ATP's decision to restrict (or compel) that speech as long as the ATP's decision was 'reasonably related to legitimate pedagogical concerns.' We give 'substantial deference' to 'educators' stated pedagogical concerns.'"). *See also* Watts v. Fla. Int'l Univ., 495 F.3d 1289, 1294 (11th Cir. 2007) (holding that a student working in a social work clinic could be treated by the university as an employee rather than a student for First Amendment purposes, and therefore the student could be disciplined for speech as an employee on a matter of private concern).

[50] *Keeton*, 664 F.3d at 872 (quoting Pleasant Grove City v. Summum, 555 U.S. 460, 470 (2009)). It is unclear whether this determination would be valid today, given the Supreme Court's recent decision in *Reed v. Town of Gilbert*, in which the Court held that content-based regulations need not be viewpoint-based in order to require strict scrutiny: "Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227 (2015).

[51] *Keeton*, 664 F.3d. at 875–76.

[52] *See id.* (holding that the University has a legitimate pedagogical concern in teaching its students to follow the ACA Code of Ethics and the guidelines of the American Psychological Association in order to produce ethical and effective counselors).

[53] 667 F.3d. 727 (6th Cir. 2012).

[54] *Id.* at 730.

[55] *Id.*

[56] *Id.* at 731–32.

counselors, finding that they were in fact a common practice in the field.[57] Thus, the Sixth Circuit left for remand at the district court level the question of whether an ethical policy against referrals existed.[58] However, the court indicated that, assuming no such policy existed, the university's expulsion of Ward would not have been for a legitimate pedagogical purpose under *Hazelwood*, and therefore would be violative of Ward's First Amendment rights.[59]

Both the *Keeton* and *Ward* courts applied *Hazelwood*, holding that external ethical and professional guidelines could create a legitimate pedagogical interest in regulating student expression. In other words, the courts determined that the expressive activity of the students in question (a) bore the imprimatur of the schools, (b) did not take place in open forums, and (c) instead took place as part of the curriculum.

The Ninth Circuit recently adopted a carve-out to the First Amendment rights of professional students similar to that created in *Keeton* and *Ward* in *Oyama v. University of Hawaii*,[60] determining that universities may legally act against students for their speech when such actions are "related directly to defined and established professional standards, . . . narrowly tailored to serve the University's foundational core mission . . . , and reflect[ive of] reasonable professional judgment."[61] Unlike *Keeton* and *Ward*, the *Oyama* opinion did not rely heavily on *Hazelwood*.

Mark Oyama was the picture of an unsympathetic plaintiff. Unlike Keefe, who was dismissed for angsty Facebook musings more befitting of a college student,[62] Oyama was prevented from finishing his secondary education graduate program for statements he had made on in-class assignments.[63] Oyama's offending statements included suggestions that age of consent laws should be abolished and assertions that students with special needs should not be included in mainstream classrooms.[64] Program administrators denied Oyama their approval to student teach, effectively removing him from the

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[57] *Id.* at 739.

[58] *Id.* at 740–41. The parties settled before the lower court could decide these issues on remand. *See Ward v. Polite*, ALL. DEFENDING FREEDOM, https://www.adflegal.org/detailspages/case-details/ward-v.-polite (last visited Oct. 26, 2017).

[59] *Ward*, 667 F.3d at 739–40.

[60] 813 F.3d 850 (9th Cir. 2015).

[61] *Id.* at 860–61, 868.

[62] Keefe v. Adams, 840 F.3d 523, 527–28 (8th Cir. 2016), *cert. denied*, 137 S. Ct. 1448 (2017).

[63] *Oyama*, 813 F.3d at 856–57, 868.

[64] *Id.*

program, since student teaching was a requirement for completion.[65]

In deciding that the university's actions did not violate Oyama's First Amendment rights, the Ninth Circuit considered the university's argument that Oyama's statements were "not in alignment with standards set by the Hawaii Department of Education, the National Council for the Accreditation of Teachers (NCATE) and the Hawaii Teacher Standards Board (HTSB)."[66] The Court relied on public employee jurisprudence, analogizing Oyama's position as a potential student teacher to that of a potential university employee.[67] Under the public employee speech cases, the court said, "the University may constitutionally evaluate or restrict the candidate's speech to fulfill its responsibilities to the public and to achieve its institutional objectives."[68] The Ninth Circuit also considered what it referred to as "certification cases," in which some courts have deferred to universities' certification decisions that are "based on defined professional standards."[69]

In discussing *Hazelwood*, the Ninth Circuit found that Oyama's speech implicated the imprimatur of the school because, by certifying or denying Oyama certification for student teaching, the school was forced to speak.[70] "When the University recommends a student for certification," the *Oyama* court said, "it communicates to the world that, in its view, that student is fit to practice the profession; as a result, the University places its "imprimatur" on each student it approves to teach."[71] However, after discussing *Hazelwood* in this fashion, the Ninth Circuit explicitly rejected the idea that *Hazelwood* and other student speech jurisprudence could be properly applied in a case dealing with college, rather than K-12, students.[72] Ultimately, the *Oyama* court relied upon employment and certification cases to establish that universities may legally act against students for their speech when such actions are "related directly to defined and established professional standards, . . . narrowly tailored to serve the University's foundational mission . . . , and reflect[ive of] reasonable professional judgment."[73]

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[65] *Id.* at 857–58.

[66] *Id.* at 857.

[67] *Id.* at 860, 864–68.

[68] *Id.* at 865.

[69] *Id.* at 866–68. For further discussion of "certification cases," see generally Emily Gold Waldman, *University Imprimaturs on Student Speech: The Certification Cases*, 11 FIRST AMEND. L. REV. 382 (2013).

[70] *Oyama*, 813 F.3d at 862.

[71] *Id.*

[72] *Id.* at 862–63.

[73] *Id.* at 860–61.

Under the university's mandate from the state of Hawaii, the university was to "ensure that education professionals possess the appropriate training, preparation, and competencies for teaching, to limit teacher licenses to 'knowledgeable, effective, and caring professionals,' and to confirm that student teachers '[a]ct, speak, and dress' like teachers."[74] Thus, because Oyama did not "speak . . . like [a] teacher[,]" denying him the opportunity to student teach was within the responsibilities of the university.[75] Although the idea of preventing an individual who advocates for legalizing consensual relationships between teachers and their minor students from student teaching seems innocuous, even correct, *Oyama* may present an example of the old adage that bad facts make for bad law.

It is important to note that while the *Oyama* court did not rely heavily on *Hazelwood*, the jurisprudence that the *Oyama* court discussed in depth also invokes issues related to government speech.[76] Like in the context of student speech jurisprudence, government employee speech cases have developed to view more and more employee speech as under the government-employer's reach.[77] For example, in the Supreme Court's most recent government employee speech case, it determined that government employees speaking outside their duties and as citizens on matters of public concern could be subject to "only those speech restrictions that are necessary for their employers to operate efficiently and effectively."[78] Similarly, the certification cases upon which the *Oyama* court relied borrow heavily from *Hazelwood*'s brand of the government speech doctrine.[79] Thus, while the *Oyama* court did not specifically use *Hazelwood*, its decision can still be seen as evidence of the continual expansion of the government speech doctrine on campus. Just as in professional student

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[74] *Id.* at 869.

[75] *Id.*

[76] For example, the *Oyama* Court heavily discussed the "certification cases," a group of cases finding that "universities may consider students' speech in making certification decisions, so long as their decisions are based on defined professional standards." *Id*. at 867. For an in-depth discussion of these cases, see Waldman, *supra* note 70. The *Oyama* Court also discussed public employee speech cases, *id*. at 864–66, which require courts to weight "the interests of the [employee] . . . and the interest of the State, as an employer, in promoting the efficiency of the public services it performs," Pickering v. Bd. of Ed., 391 U.S. 563, 568 (1968).

[77] *See generally* Mary-Rose Papandrea, *The Free Speech Rights of Off-Duty Government Employees*, 2010 B.Y.U. L. REV. 2117 (2010) (arguing for a narrower presumption that the non-work related speech of government employees should be protected under the First Amendment).

[78] Garcetti v. Ceballos, 547 U.S. 410, 419 (2006).

[79] *Oyama*, 813 F.3d at 866–68.

speech cases explicitly invoking *Hazelwood*, the *Oyama* court found that the message of the university—and thus of the state—was implicated in Oyama's expression, and that the university could therefore regulate his speech.[80]

Other courts have created First Amendment exceptions for professional students while refusing to apply *Hazelwood*. In 2012, the Supreme Court of Minnesota broke legal ground in 2012 when it decided *Tatro v. University of Minnesota*,[81] a case in which the court applied a professional standards doctrine to a university student's Facebook post[82] —off-campus speech traditionally considered in First Amendment jurisprudence to be outside the regulatory reach of universities.[83] In *Tatro*, a mortuary science student posted satirical comments about her school experiences, sometimes referring to specific cadavers using pseudonyms.[84] The university determined that Tatro's posts had violated the program rules, and thus changed Tatro's lab grade from a C+ to an F.[85]

Tatro sued, alleging that the school's action violated her First Amendment rights.[86] The *Tatro* court explicitly refused to apply the *Hazelwood* test, finding that Tatro's speech could not reasonably be perceived to bear the imprimatur of the school.[87] However, in determining that the University of Minnesota had not violated Tatro's rights, it created a new "professional standards" exception to First Amendment jurisprudence: "[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."[88]

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[80] *Id.* at 862.
[81] 816 N.W.2d 509 (Minn. 2012).
[82] *Id.* at 521.
[83] *See* Morse v. Frederick, 551 U.S. 393, 404–05 (2007).
[84] *Tatro*, 816 N.W.2d 509 at 511–13. Tatro's Facebook comments 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 . . . ." and "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." *Id.* at 112.
[85] *Id.* at 513–14.
[86] *Id.* at 511.
[87] *Id.* at 518.
[88] *Id.* at 521.

III. *KEEFE V. ADAMS*: FACTS & BACKGROUND

A. Factual Background

As discussed in the introduction above, Craig Keefe was dismissed from the Associate Degree Nursing Program at Central Lakes College (CLC) after classmates complained about Keefe's use of social media.[89] Keefe had previously become a licensed practical nurse after completing the practical nursing program at CLC in June, 2011.[90] Keefe had been dismissed from the Associate Degree program in December, 2011 for failing to maintain the requisite grades in his coursework.[91] However, in the fall of 2012, he reapplied and was readmitted to the program.[92]

Keefe's real trouble began in late November, 2012, when a classmate approached Keefe's instructor to express concern about posts Keefe had made on his Facebook page, which was publicly available.[93] The classmate expressed concerns that Keefe's posts were threatening.[94] When a second classmate complained to instructors about Keefe's Facebook use, saying that the posts "'made her feel extremely uncomfortable and nervous,' and that 'she didn't feel she could function in the same physical space with Craig [Keefe] at the clinical site,'" the instructor separated Keefe from the complaining students and forwarded the complaints to CLC's Director of Nursing, Connie Frisch.[95]

Frisch spoke to the Vice President of Academic Affairs, Kelly McCalla, about the complaints, and was told to meet with Keefe.[96] When Frisch contacted Keefe to set up a meeting, she would not tell Keefe the subject of the meeting.[97] Frisch moved the meeting up a day after receiving word "that Keefe had told someone there would be 'hell to pay for whoever complained about [him].'"[98] At the meeting, Frisch and CLC's Dean of Students, Beth Adams, reviewed the steps of the college's Due Process Policy, and then explained to Keefe "his Facebook posts raised concerns about his professionalism and

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[89] *See* Keefe v. Adams, 840 F.3d 523, 526 (8th Cir. 2016), *cert. denied*, 137 S. Ct. 1448 (2017).
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*

boundary issues."[99] While Frisch did not give Keefe a copy of the concerning posts, she read to him the most concerning posts.[100]

Among Keefe's concerning posts were those quoted in the introduction of this note: comments about needing whiskey to control his anger, about frustration with group projects, about needing anger management, about alleged sexism in the program, and about difficulties Keefe was having getting accommodations for medical reasons.[101] Frisch expressed that she was most concerned about Keefe's post about giving a classmate a hemopneumothorax.[102] After reviewing these concerns, Frisch and Adams gave Keefe an opportunity to explain himself.[103] Keefe claimed that many of his posts were jokes, that his Facebook account had been hacked, and that he was unaware that the page was public.[104] In a later deposition, Keefe admitted to having authored all of the posts in question, but maintained that they were jokes.[105] Frisch was concerned by Keefe's apparent lack of remorse, and thus decided that he could not proceed in the program.[106] Instead, Keefe was told that he could finish his semester's coursework, and that the credits would transfer to another program at CLC.[107]

Keefe's removal from the Associate Degree Nursing Program was based upon the program's student handbook, which Keefe had acknowledged reading, reviewing, and understanding when he enrolled in the program.[108] The handbook states that, "students enrolled in the Associate Degree (AD) Nursing Program and Central Lakes College [] accept the moral and ethical responsibilities that have been credited to the profession of nursing and are obligated to uphold and adhere to the professional Code of Ethics."[109] The handbook goes on to identify the American Nurses Association Code for Nurses as the relevant code of ethics and explains,

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[99] *Id.*
[100] *Id.*
[101] *Id.* at 526–27; *see also* Keefe v. Adams, 44 F. Supp. 3d. 874, 878–79 (D. Minn. 2014), *aff'd*, 840 F.3d 523 (8th Cir. 2016), *cert. denied.*, 137 S. Ct. 1448 (2017).
[102] *Keefe*, 840 F.3d at 527. A "hemopneumothorax" occurs when both blood and air accumulate in the chest cavity, as by puncture. *Hemopneumothorax*, MERRIAM-WEBSTER MED. DICTIONARY, https://www.merriam-webster.com/medical/hemopneumothorax (last visited Oct. 26, 2017).
[103] *Keefe*, 840 F.3d at 527.
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.* at 527–28.
[109] *Id.* at 528.

"Central Lakes College has an obligation to graduate students who will provide safe, competent nursing care and uphold the moral and ethical principles of the profession of nursing."[110] The handbook also states that "students who fail to meet the moral, ethical, or professional behavioral standards . . . are not eligible to progress in the nursing program."[111] The ethical standards identified by the handbook included avoidance of "behavior unbecoming of the Nursing Profession."[112]

The Nurses Association Code of Ethics referenced by the Handbook included provisions requiring nurses to respect "all individuals with whom the nurse interacts[,]" including "preclud[ing] any and all forms of prejudicial actions, any form of harassment or threatening behavior, or disregard for the effect of one's actions on others."[113] The Code also included a provision on professional boundaries, which identified nurse-patient and nurse-colleague relationships as different from "personal and unstructured" relationships, as well as a provision about wholeness of character, which required nurses to "embrace[] the values of the profession."[114]

Keefe appealed his removal from the Associate Degree Nursing Program, and was instructed by Vice President McCalla to abstain from contacting nursing faculty and classmates.[115] Because of this instruction, Keefe stopped attending and failed all of his classes.[116] Keefe took down his Facebook page as part of his appeal, and asked to be allowed to finish the program, arguing that the "punishment [did not] fit the crime."[117] McCalla notified Keefe in early January that his appeal had been denied.[118] When Keefe asked for a contested case hearing to re-appeal his removal from the Program, McCalla denied the request, citing that Keefe had been removed for an academic program violation, and such hearings were only available for students facing disciplinary actions.[119]

B. The District Court Decision

Keefe filed suit against CLC administrators, alleging that his First Amendment and due process rights had been

[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.* at 529.
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.*

violated by his removal from the program.[120] Although Keefe's due process claims provide interesting material and further insight into Keefe's case, this note will focus solely upon Keefe's First Amendment claim. At the District Court for the District of Minnesota, Keefe argued that he was removed from the program "in retaliation for his acts of speech in a context that was unrelated to his school obligations and did not violate any specific school rules." [121] He further argued that his statements did not impose material disruptions to the college, and were not true threats.[122]

The District Court relied heavily on *Tatro*, as well as on *Keeton*, in deciding that CLC had not violated Keefe's First Amendment rights.[123] It cited *Keeton* in determining that Keefe's First Amendment rights had to be considered "in light of the special characteristics of the school environment." [124] Ultimately, the District Court imported the *Tatro* test: As in *Tatro*, the District determined that because of the "'special characteristics of the school environment,'"[125] and because of the program's purpose to "instill[] in students the standards of the nursing profession," the college did not offend the First Amendment in expelling Keefe.[126] In coming to this conclusion, the *Keefe* court cited the Minnesota Board of Nursing's statutory ability to "'deny, revoke, suspend, limit, or condition the license and registration of any person to practice professional, advanced practice registered, or practical nursing' for '[e]ngaging in unprofessional conduct.'"[127]

Also similar to *Tatro*, the district court did not use the *Hazelwood* "legitimate pedagogical purpose" test to determine that the administrative actions in question did not violate the First Amendment, but instead employed external professional standards as the measuring stick for the appropriateness of the college's actions.[128] In fact, the District Court did not cite

[120] *Id.* at 525.

[121] Keefe v. Adams, 44 F. Supp. 3d 874, 887 (D. Minn. 2014), *aff'd*, 840 F.3d 523 (8th Cir. 2016), *cert. denied*., 137 S. Ct. 1448 (2017).

[122] *Id.*

[123] *Id.* at 887–88.

[124] *Id.* at 888 (quoting Keeton v. Anderson-Wiley, 664 F.3d 865, 871 (11th Cir. 2011)).

[125] *Id.*

[126] *Id.* at 888–89.

[127] *Id.* at 888 (citing Minn. Stat. § 148.261, subd. 1(6) (2012)). Notably, "unprofessional conduct" is never defined in the case.

[128] *See generally id.*

Hazelwood at all.[129] Keefe once again appealed, this time to the Eighth Circuit.[130]

IV. MISAPPLICATION OF *HAZELWOOD*: PROFESSIONAL STUDENT SPEECH AS GOVERNMENT/SCHOOL-SPONSORED SPEECH

The Eighth Circuit diverged from the district court in its application of *Hazelwood*. While the district court had not considered *Hazelwood* in coming to its decision and instead had relied on cases such as *Keeton* and *Tatro*, the Eighth Circuit pulled heavily from *Hazelwood* in affirming the lower court and upholding Keefe's removal from the program.[131] In applying *Hazelwood* in *Keefe*, the Eighth Circuit found that although the *Hazelwood* case considered school-sponsored student speech, "the concept has broader relevance to student speech [because] . . . speech reflecting non-compliance with [the] Code that is related to academic activities 'materially disrupts' the Program's 'legitimate pedagogical concerns.'" [132] Thus, the court decided, *Hazelwood* and even the *Tinker* "material disruption" standard could apply to Keefe's case, even though Keefe's speech was made off-campus and not during a curricular activity.[133]

The *Hazelwood* Court recognized that "[a] school need not tolerate student speech that is inconsistent with its 'basic educational mission,' . . . even though the government could not censor similar speech outside the school."[134] The Court considered that a school must be able to manage its own name, and thus must be able to regulate student speech that invokes the school's name in order to ensure "that the views of the individual speaker are not erroneously attributed to the school."[135] Thus, schools may regulate in-school speech that bears the school's imprimatur without violating students' constitutional rights, as long as the regulation is related to a "legitimate pedagogical concern."[136]

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[129] *See generally id.*

[130] Keefe v. Adams, 840 F.3d 523, 526 (8th Cir. 2016), *cert. denied*, 137 S. Ct. 1448 (2017).

[131] *Id.* at 530–32.

[132] *Id.* at 531 (citing Keeton v. Anderson-Wiley, 664 F.3d 865, 876 (11th Cir. 2011)).

[133] *Id.*

[134] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) (citing Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 685 (1986)).

[135] *Id.* at 271.

[136] *Id.* at 273–274.

In some ways, the concerns of the *Hazelwood* court can be seen to mirror the concerns of the Court in government speech cases:[137] When the government speaks, or appears to speak, it need not be content-neutral, and it must be allowed wide latitude to determine its own message.[138] In *Hazelwood*, this philosophy is applied to allow schools that same latitude in determining its message when students appear to speak on behalf of their schools in curricular activities. Like in the recent government speech Supreme Court case *Walker v. Tex. Div., Sons of Confederate Veterans*,[139] the *Hazelwood* court relied, in part, on the reasonable person test to determine when a school's imprimatur is present.[140]

Professional student speech cases such as *Keefe*, *Keeton*, and *Ward*—and even those cases such as *Oyama* and *Tatro*, in which *Hazelwood* was not applied—threaten to extend the *Hazelwood* doctrine, and thus the government speech doctrine, beyond its logical bounds. Scholars have expressed concern that the government speech doctrine is quickly expanding and threatens to swallow the First Amendment, [141] and the professional student speech doctrine is further evidence of this expansion.

Keefe, especially, demonstrates this propensity of the professional student speech doctrine to allow public colleges and universities to expand the reach of their imprimatur, and thus to expand their ability to regulate messages. While it is easier to see how the speech of Keeton and Ward may have been seen as bearing their schools' imprimaturs—since those students were speaking in the context of clinical practicum programs created and maintained by their universities—the case for an imprimatur is more strained in the context of cases such as *Keefe*, in which students speak on their individual social

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[137] *See, e.g.*, Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2253 (2015) (holding that specialty license plates constitute government speech and therefore decisions about specialty license plate designs need not be made in a content-neutral fashion).

[138] Rust v. Sullivan, 500 U.S. 173, 194 (1991) (stating that when the government is advancing certain permissible goals, necessary discouragement of alternative goals is not unconstitutional).

[139] 135 S. Ct. 2239 (2015).

[140] *Hazelwood*, 484 U.S. at 271 (explaining that while the *Tinker* test applies to individual student speech, the *Hazelwood* test applies when "students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school"); *see also Walker*, 135 S. Ct. at 2251 (holding that license plates are government speech, partially because reasonable observers would interpret them as such).

[141] *See, e.g.*, Mary Rose Papandrea, *The Government Brand*, 110 NW. L. REV. 1195, 1198 (2016) ("[T]he Court's new approach to the government speech doctrine threatens the future of free speech rights in this country.").

media platforms that few would "erroneously attribute[] to the school."[142]

Yet, the *Keefe* court was readily willing to read the college's imprimatur onto Keefe's speech—even though the speech took place on a personal social media page—because "the conferral of a degree places the school's imprimatur upon the student as qualified to pursue his chosen profession."[143] But this reasoning leads to the absurdity that *anything* a student ever says bears the imprimatur of that student's school—and thus can be seen as the school (government) speaking—because the school has placed its endorsement upon the student by admitting him and ultimately by granting him a degree.

This absurdity of reading the school's imprimatur on to off-campus social media speech simply because the school has admitted and likely will grant the student a degree matches the absurdity of reading the government's imprimatur on specialty license plates, as the Supreme Court did in *Walker*. There, the Court reasoned that a reasonable person would believe specialty license plates to be government speech because license plates are distributed by the government and have historically been controlled by the government.[144] As Justice Alito argued in his dissent in *Walker*, it is irrational to believe that a reasonable person would believe that a "Rather Be Golfing" plate means Texas's official policy is that it is "better to golf than to work."[145] But it is even more difficult to believe that a reasonable person would assume Central Lakes College endorsed Keefe's posts about whiskey and anger management, or about hemopneumothoraxes and pencil sharpeners, even if the college would confer a degree on Keefe. Even more absurd is the proposition that schools place their imprimaturs on all

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[142] *Hazelwood*, 484 U.S. at 271. The *Keefe* court concluded that Keefe's posts were related to the classroom because "the posts were directed at classmates, involved their conduct in the Nursing Program, and included a physical threat related to their medical studies" and also because of the "potential to impact patient care" by preventing effective communication between nursing students. Keefe v. Adams, 840 F.3d 523, 532 (8th Cir. 2016), *cert. denied*, 137 S. Ct. 1448 (2017). *See also id.* at 532–33 (determining that *Keefe* still diverges from *Oyama*, *Keeton*, and *Ward*, which all involved speech that occurred during normal classroom or clinical activities and that the connection between Keefe's speech and curriculum, while arguably present, is more attenuated than in other cases).

[143] Keefe, 840 F.3d at 533 (citing Doherty v. S. Coll. of Optometry, 862 F.2d 570, 476 (6th Cir. 1988), *cert. denied*, 493 U.S. 810 (1989)).

[144] Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2251 (2015).

[145] *Id.* at 2255 (Alito, J. dissenting); *see also* Papandrea, *supra* note 46, at 1847 (arguing that the government speech doctrine and, by extension, the *Hazelwood* doctrine has the problem of being "incredibly elastic," especially given that "a reasonable person who does not understand the government's obligations under the public forum doctrine might erroneously assume that the government endorses any speech that appears on its property").

students—and on the whole of each student—as inherently qualified professionals, which is the position of the Eighth Circuit in *Keefe*.[146] As Justice O'Connor once wisely said, "The proposition that schools do not endorse everything they fail to censor is not complicated."[147]

Regardless of questions of imprimatur, free speech advocates worry that the professional student speech exception that is growing out of cases such as *Keefe* and *Oyama* could have far-reaching effects on college students' rights to expression.[148] First Amendment attorney Will Creeley noted that this standard could end in some extreme results.[149] He explained, for example, if the University of Minnesota School of Law were to adopt the Minnesota Rules of Professional Conduct (MPRC), this would include the MPRC rule "that attorneys maintain 'a professional, courteous, and civil attitude toward all persons involved in the legal system.'"[150] This could have the outlandish result of law students being dismissed for speaking rudely to a classmate, when "most speech that is not 'civil' or 'courteous' still enjoys constitutional protection."[151]

Oyama additionally provides an example of how the professional student speech doctrine validates viewpoint discrimination, which, according to the Supreme Court in *Reed v. Town of Gilbert*,[152] regulates "speech based on 'the specific motivating ideology or the opinion or perspective of the speaker'" and "is a 'more blatant' and 'egregious form of content discrimination.'" [153] Viewpoint discrimination occurs when a person is punished for expression because of the viewpoint espoused rather than because of the general type of speech, the manner of expression, or some other reason.[154] Oyama was punished not because he dared speak about policy matters, but because he expressed policy viewpoints with which the University of Hawaii administrators took issue. This use of

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[146] *See Keefe*, 840 F.3d at 533.

[147] Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 250 (1990) (O'Connor, J., concurring).

[148] *See, e.g.*, Will Creeley, *A Closer Look at* 'Tatro v. University of Minnesota,' FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (June 22, 2012), https://www.thefire.org/a-closer-look-at-tatro-v-university-of-minnesota/.

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] 135 S. Ct. 2218, 2227 (2015).

[153] *Id.* at 2230 (quoting Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 829 (1995)).

[154] *See* Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 61 (1983); *see also* McCullen v. Coakley, 134 S. Ct. 2518, 2549 (2014) (Alito, J., concurring) (illustrating that viewpoint discrimination would exist where a law permits the expression of positive statements regarding a healthcare facility but criminalizes criticism of the same).

viewpoint discrimination makes sense based on the professional student speech exception's roots in the *Hazelwood* doctrine: under *Hazelwood*, scholars have argued, viewpoint discrimination is arguably explicitly allowed.[155]

Again, while Oyama's views are far from sympathetic, it is important to remember that he never acted on his views, and the university did not indicate that there was any reason to believe Oyama was planning to act in an inappropriate way in the classroom. For example, while Oyama may have believed that age of consent laws should be repealed, there was no indication that he planned to engage in inappropriate relationships with students. To the contrary, Oyama had told his professors that he would comply with the law and report such conduct, even while believing the law was incorrect.

It seems clear, then, that Oyama was punished for holding unpopular viewpoints. While Oyama's viewpoints provide somewhat of an extreme case, it would not be inconceivable for the professional student speech exception to extend to discipline for viewpoints that are not so out of the norm—could a student teacher who espouses the view "all lives matter" in class assignments be kept from the classroom for not sympathizing with marginalized students, or could a transgendered student teacher be kept from student teaching because she does not "dress like a teacher"?

V. ENCOURAGING PROFESSIONALISM WITHOUT TRAMPLING FREE SPEECH

Oyama appealed his case to the Supreme Court, which denied his petition, holding true to a pattern of abstaining from issuing guidance regarding college student speech issues.[156] Without guidance from the highest court, lower courts will continue to struggle to find a balance between allowing

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[155] *See* Waldman, *supra* note 70, at 404–05 (2013) (discussing the *Hazelwood* Court's determination that "schools must retain the ability to censor school-sponsored speech that 'might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with "the shared values of a civilized social order"'" and determining that the need for latitude for viewpoint discrimination is especially important in professional student speech cases, "where the school is placing its imprimatur on students themselves" and has "a legitimate interest in ensuring that [its] graduates will adhere to the programs' *own* standards, even if viewpoint-based, of competence and professionalism").

[156] Oyama v. Univ. of Haw., 813 F.3d 850 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2520 (2016); *see also* B.H. v. E. Area Sch. Dist., 725 F.3d 293 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1515 (2014); J.S. v. Blue Mountain Sch. Dist. 650 F.3d 915 (3d Cir. 2011), *cert. denied*, 565 U.S. 1156 (2012); Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 1166 (2016); Dariano v. Morgan Hill Unified Sch. Dist., 767 F.3d 764 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 1700 (2015).

universities to instill professional standards and allowing students broad free expression rights.

It is possible to protect both students' rights and professional standards. For example, the First Circuit got it right when, in *Hennessy v. City of Melrose*,[157] it found that a student teacher's First Amendment rights had not been violated when he received a failing grade on his student teaching assignment because of outbursts of religious opinions during class and class-related activities.[158] In that case, the student teacher had not only expressed opinions that classrooms should be closer conformed to biblical ideals, but also actually *acted upon* those opinions by interrupting normal classroom activities to proselytize to students and express frustration with the classroom model.[159] Disciplining professional students for unprofessional conduct—as was the case in *Hennessy*—rather than unprofessional speech—as was the case in *Oyama*—serves to balance both free expression and professionalism concerns. For example, if Oyama were to ever abstain from reporting an inappropriate relationship between a teacher and student or were to act in a discriminatory manner toward students with disabilities, he could also be punished without violating the constitution. These guidelines would follow with precedent that holds that while the First Amendment protects speech, it does not protect conduct.[160]

Additionally, professional students should continue to be held to the same free speech exceptions as the public, including restrictions on true threats. For example, if the *Keefe* court felt that Keefe's comments constituted threats to the physical safety of his fellow classmates, it could have upheld Keefe's suspension on the grounds that his speech was not protected—for professional students or for anyone.

While imperfect for the higher education setting, in which students are adults capable of withstanding more distractions than their younger counterparts, the *Tinker* standard may provide a workable avenue for public college

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[157] 194 F.3d 237 (1st Cir. 1999).

[158] *Id.* at 247 (finding that even if the student teacher's actions were expressive, "the school's strong interest in preserving a collegial atmosphere, harmonious relations among teachers, and respect for the curriculum while in the classroom" allowed Hennessy to be disciplined for his actions).

[159] *Id.* at 246–47.

[160] United States v. O'Brien, 391 U.S. 367, 376–77 (1968) (rejecting the idea that all conduct intended to convey a message must receive First Amendment protection, and ruling instead that "a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms").

officials to discipline professional students for speech that disrupts the learning process. For example, in *Keefe*, if the college were to have shown that Keefe's comments were making it difficult for students to complete group projects with Keefe or otherwise disrupting the classroom, *Tinker* may have provided a means of legitimately dismissing Keefe for the sake of maintaining order and education in the classroom.