"PROFESSIONAL STANDARDS" IN PUBLIC UNIVERSITY PROGRAMS: MUST THE COURT DEFER TO THE UNIVERSITY ON FIRST AMENDMENT CONCERNS?

Emily Deyring[*]

I. INTRODUCTION

Free speech on college campuses has become a contentious issue with some public universities and state legislatures recently implementing policies and guidelines that attempt to prevent "violent, unruly disruptions" on campus.[1] Student groups have made their way to federal court in thus-far-unsuccessful claims that universities violated the First Amendment[2] by closing the campus to controversial outside speakers, such as former Breitbart senior editor Milo Yiannopoulos.[3]

A public university has the right to make its platforms unavailable to speakers who do not further the institution's goals.[4] Nonetheless, it remains unclear exactly how far beyond its physical boundaries the public university may reach into its students' speech without violating their constitutional rights.[5] Furthermore, circuit courts and state courts have struggled to apply the standard set forth in the Supreme Court's *Hazelwood School District v.*

[*] J.D. Candidate, 2020, Seton Hall University School of Law; B.S., San José State University. Thanks to Professor Thomas Healy, Professor Jenny-Brooke Condon, and Dr. Briana Martino for their insightful suggestions, and to Nicklaus Deyring, Thomas Deyring, and Henry Deyring for their support as this Comment was written.

[1] Jeremy W. Peters, *In Name of Free Speech, States Crack Down on Campus Protests*, N.Y. TIMES (June 14, 2018), https://www.nytimes.com/2018/06/14/us/politics/campus-speech-protests.html.

[2] U.S. CONST. amend. I. ("Congress shall make no law . . . abridging the freedom of speech . . .")

[3] Young America's Found. v. Napolitano, No. 17-cv-02255-MMC, 2018 U.S. Dist. LEXIS 70108 (N.D. Cal. Apr. 25, 2018). *See also* Robles v. In the Name of Humanity, We Refuse to Accept a Fascist Am., No. 17-cv-04864-CW, 2018 U.S. Dist. LEXIS 93819 (N.D. Cal. June 4, 2018) (denying plaintiff's claim that the University of California Berkeley violated her First Amendment rights by willfully withholding police protection at a Yiannopoulos event).

[4] *See* Catherine J. Ross, *Campus Discourse and Democracy: Free Speech Principles Provide Sound Guidance Even After the Tumult of 2017*, 20 U. PA. J. CONST. L. 787, 801 (2018).

[5] *See* Mary-Rose Papandrea, *The Free Speech Rights of University Students*, 101 MINN. L. REV. 1801, 1834 (2017).

Kuhlmeier[6] decision—whether the university's censorship of its students' speech is "reasonably related to legitimate pedagogical concerns."[7] Particularly troubling is a string of cases involving "professional standards" at public universities.[8] The Supreme Court has yet to form a test for deciding whether these public university programs can restrict students' free speech rights off-campus under the guise of professional standards.[9] For example, in 2012, Central Lakes College student Craig Keefe was expelled from a nursing program for making incendiary comments about his classmates and instructors on his Facebook page.[10] Keefe sued the school for infringing his First Amendment right to free speech.[11] In 2016, the Eighth Circuit Court of Appeals, in *Keefe v. Adams*, found that the school did not infringe the student's rights.[12] The Eighth Circuit applied the Supreme Court's *Hazelwood* standard that a school can constitutionally restrict student-produced content if the restriction is "reasonably related to legitimate pedagogical concerns."[13]

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[6] 484 U.S. 260 (1988).

[7] *Id.* at 273. *Compare* Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez, 561 U.S. 661, 686 (2010) (citing *Hazelwood* to support deference to the university); Keefe v. Adams, 840 F.3d 523 (8th Cir. 2016) (holding that the *Hazelwood* standard applies to a nursing student who made controversial statements about classmates on his Facebook page); Axson-Flynn v. Johnson, 356 F.3d 1277, 1289 (10th Cir. 2004) (holding that *Hazelwood* is the appropriate standard when evaluating a challenge to a university's acting class that required a student to speak offensive words in a script); Brown v. Li, 308 F.3d 939 (9th Cir. 2002) (applying *Hazelwood* in a case involving a master's thesis); Bishop v. Aronov, 926 F.2d 1066 (11th Cir. 1991) (applying *Hazelwood* in a case involving challenge to university restrictions on professor's classroom speech), *with* Flint v. Dennison, 488 F.3d 816, 829 n.9 (9th Cir. 2007) ("[W]e need not consider whether the principles of *Hazelwood* . . . apply with full force in a university setting—a question neither we . . . nor the Supreme Court . . . have definitively answered."), *and Brown*, 308 F.3d at 957 (Reinhardt, J., dissenting) ("Because the reasons underlying the . . . speech rights of high school youths do not apply in the adult world of college and graduate students . . . I cannot agree with . . . [the] conclusion that the First Amendment standard established in *Hazelwood* applies at the university level.").

[8] *See, e.g.*, *Keefe*, 840 F.3d at 532; Oyama v. Univ. of Haw., 813 F.3d 850 (9th Cir. 2015); Tatro v. Univ. of Minn., 816 N.W.2d 509 (Minn. 2012).

[9] Clay Calvert, *Professional Standards and the First Amendment in Higher Education: When Institutional Academic Freedom Collides with Student Speech Rights*, 91 ST. JOHN'S L. REV. 611, 621 (2017) (quoting Professor Alan Chen, who stated that "the Supreme Court sporadically has made compelling statements about the importance of academic freedom, yet, it has been either unable or unwilling to develop a coherent framework for assessing the scope of constitutional academic freedom rights"). *See also* Michael K. Park, *Restricting Anonymous "Yik Yak": The Constitutionality of Regulating Students' Off-campus Online Speech in the Age of Social Media*, 52 WILLAMETTE L. REV. 405, 427 (2016) ("Thus far the Supreme Court has never . . . provided any guidance as to whether school speech precedents apply with equal force in the university context.").

[10] *Keefe*, 840 F.3d at 525.

[11] *Id.*

[12] *Id.* at 533.

[13] *Id*. at 531 (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988)).

Some commentators have argued that *Keefe* is deeply flawed because it essentially declared that professional students sign away their First Amendment rights by enrolling in a "professional" program that holds students to a corresponding standard.[14] Furthermore, other scholars have criticized *Keefe* because that case involved a nursing student's speech off-campus; *Hazelwood*, in contrast, examined high school students' speech in a curricular setting on-campus (a student newspaper).[15] Despite the Supreme Court's holding in *Hazelwood* that public K-12 schools may constitutionally restrict student journalists, the American Society of News Editors and the Society of Professional Journalists have passed resolutions in support of legislation that they say would protect student publications from retaliation, such as defunding.[16] The Supreme Court declined to review the Eighth Circuit's holding in *Keefe*,[17] potentially eroding university students' free speech protections off-campus.

First Amendment scholar Professor Clay Calvert has proposed a four-pronged test for courts in deciding whether a public university's professional standard is constitutional.[18] Calvert based this test off the Ninth Circuit Court of Appeals' decision in *Oyama v. University of Hawaii*, which upheld a student's expulsion from a teaching program.[19] While the test provides an improved framework for courts' treatment of professional student speech off-campus, it leaves open too many opportunities for universities to burden student speech. If the Supreme Court were to apply this test to recent cases, it would still infringe students' First Amendment rights, causing grave consequences for the students' careers and the industries in which they seek employment.

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[14] *See, e.g.*, Calvert, *supra* note 9, at 613. *See also* Lindsie Trego, Article, *When a Student's Speech Belongs to the University:* Keefe, Hazelwood, *and the Expanding Role of the Government Speech Doctrine on Campus*, 16 FIRST AMEND. L. REV. 98, 115–16 ("Scholars have expressed concern that the government speech doctrine is quickly expanding and threatens to swallow the First Amendment, and the professional student speech doctrine is further evidence of this expansion.").

[15] *See* Kai Wahrmann-Harry, Note, *The Next Step in Student Speech Analysis? How the Eighth Circuit Further Complicates the First Amendment Rights of University Students in* Keefe v. Adams, 51 CREIGHTON L. REV. 425, 442–44 (2018).

[16] AM. SOC'Y OF NEWS EDITORS, RESOLUTION OF THE BOARD OF DIRECTORS OF THE AMERICAN SOCIETY OF NEWS EDITORS IN SUPPORT OF LEGAL PROTECTION FOR STUDENT JOURNALISTS AND ADVISERS (2016), https://s3.amazonaws.com/media.spl/1333_asne_resolution_in_support_of_student_journalists_and_advisers_2016o.pdf; Society of Professional Journalists, Resolution in Support of Enhanced Protections for Student Journalists (2016), https://www.spj.org/res2016.asp#4.

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

[18] Calvert, *supra* note 9, at 648. Under the four prongs of Calvert's suggested test, a court must ensure that a public university's enforcement of a professional standard does not violate a student's right to free speech by evaluating the standard for precision, essentiality, contextuality, and proportionality. *Id.*

[19] 813 F.3d 850 (2015).

This Comment examines how courts adjudicate professionalism requirements as applied to public university student speech off-campus. Specifically, this Comment evaluates Calvert's proposed test for evaluating the constitutionality of universities' professional standard,[20] arguing that the test is too deferential to the university's judgment and could lead to numerous unforeseen consequences that would cause harm to students, especially those vulnerable to being marginalized. Part II focuses on the history of free speech on- and off-campus. Part III addresses the "legitimate pedagogical concern" standard and the role of the university in enforcing professional standards for credentialing professional programs. Part IV critiques Professor Clay Calvert's proposed four-pronged test for professional standards and suggests potential unforeseen adverse consequences that might arise if the Supreme Court were to adopt this analysis; Part IV also offers alternative considerations for scholars and jurists when evaluating professional standards cases through the lens of the First Amendment.

II. HISTORY OF FREE SPEECH ON- AND OFF-CAMPUS

College campuses have long been venues of conflicting interests[21] between students' First Amendment right to free speech and universities' interest in fulfilling their educational goals.[22] Beginning with *The Civil Rights Cases*[23] in 1883, federal courts have laid a groundwork upon which to evaluate the university's role as a state actor. Public universities are considered state actors[24] and are thus bound to uphold the Constitution.[25] The Supreme Court considers schools to be a part of the "marketplace of ideas" and has thus prohibited them from infringing speech based on the

[20] Calvert, *supra* note 9, at 648.

[21] Andrew Hartman, *People Always Think Students Are Hostile to Speech. They Never Really Are.*, WASH. POST (Mar. 15, 2018), https://www.washingtonpost.com/outlook/people-always-think-students-are-hostile-to-speech-they-never-really-are/2018/03/15/cc53cc3a-286c-11e8-bc72-077aa4dab9ef_story.html?utm_term=.a8691f7a0b4b ("The college campus . . . has always been a breeding ground for protest.").

[22] *See, e.g.*, IOTA XI Chapter of Sigma Chi Fraternity v. George Mason Univ., 993 F.2d 386, 393 (4th Cir. 1993) ("We agree wholeheartedly that it is the University officials' responsibility, even their obligation, to achieve the goals they have set. On the other hand, a public university has many constitutionally permissible means to protect female and minority students.").

[23] 109 U.S. 3 (1883).

[24] Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 199 (1988) (White, J., dissenting) ("All agree that . . . a public university, is a state actor . . . .").

[25] *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 723–24 (1961) (establishing that a private business acting in close relationship to the government is sufficient to be considered "state action"). *See also* ERWIN CHEMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS 52–53 (2017).

viewpoints contained therein.[26] Although courts have examined university-level "professional standard" speech off-campus in a few cases,[27] the Supreme Court has not yet addressed the specific issue of university student speech off-campus.[28] This dearth of guidance leaves a sense of uncertainty among students and academic administrators, but also presents an opportunity for the Supreme Court to provide clarity.

A. *Free Speech and Public High Schools*

Through a string of cases, the Supreme Court has established clear First Amendment jurisprudence within non-secondary public schools. In the context of public high school students' speech on campus, *Tinker v. Des Moines Independent Community School District* set forth a test allowing regulation of student speech by high school officials if the speech causes substantial disruption or materially interferes with the learning environment.[29]

> Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. . . . [Students] may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.[30]

Tinker also made clear that while school officials may regulate student speech in limited circumstances of substantial disruption or material interference, students' free speech rights extend beyond "carefully restricted circumstances," such as classroom discussion:[31] "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[32] The question remains: How far and how high does the schoolhouse gate go?

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[26] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 71 (1983) (citing Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)); *accord* Healy v. James, 408 U.S. 169 (1972).

[27] *See, e.g.*, Keefe v. Adams, 840 F.3d 523 (8th Cir. 2016); Tatro v. Univ. of Minn., 816 N.W.2d 509 (Minn. 2012).

[28] Calvert, *supra* note 9, at 621.

[29] 393 U.S. 503, 514 (1969).

[30] *Id.* at 511.

[31] *Id.* at 513. ("We properly read [the Constitution] to permit reasonable regulation of speech-connected activities in carefully restricted circumstances. But we do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom.").

[32] *Id.* at 506.

Although Supreme Court cases following *Tinker* have applied the "substantial disruption and material interference" test to other situations involving students, these cases have generally been restricted to kindergarten through high school.[33] Specifically, in 1986, the Court differentiated between students in public school and "adults in other settings"[34] in *Bethel School District No. 403 v. Fraser*, when it held that a high school may discipline a student for having made an "offensively lewd and indecent speech" at a school assembly.[35]

In 1988, the Court further refined its stance toward speech in high schools in *Hazelwood*, holding that "[a] school need not tolerate speech that is inconsistent with . . . its educational mission."[36] Although *Hazelwood* has been invoked in multiple cases involving student speech, the case arose from a high school newspaper's activity.[37] The Court was clear that restricting student speech activity is permissible *regardless of where it occurs*, provided that the expression can be considered part of the school's curriculum.[38] The Court in *Hazelwood* also emphasized that the decision stood as an exception to the *Tinker* standard, rather than as a revamped standard.[39] This is crucial to note when examining cases where courts have applied both *Hazelwood* and *Tinker* to the university setting. Some scholars have argued that *Hazelwood* applies to viewpoint-specific student speech because "schools have an interest in maintaining their own messaging as they carry out their educational function."[40]

The Court similarly invoked *Fraser* in *Morse v. Frederick* in 2007, when it held that it was constitutional for a high school to confiscate a

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[33] Meg Penrose, *Sharing Stupid $h*t With Friends and Followers: The First Amendment Rights of College Athletes to Use Social Media*, 17 SMU SCI. & TECH. L. REV. 449, 477 (2014).

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

[35] *Id.* at 685.

[36] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) (internal quotation marks omitted).

[37] *Id.* at 262.

[38] *Id.* at 271 (explaining that [t]heatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school . . . may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.).

[39] *Id.* at 272–73 ("[W]e conclude that the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression.").

[40] Brad Dickens, Comment, *Reclaiming* Hazelwood*: Public School Classrooms and a Return to the Supreme Court's Vision for Viewpoint-Specific Speech Regulation Policy*, 16 RICH. J. L. & PUB. INT. 529, 531 (2013).

student's banner and suspend the student on the basis of the student's speech content.[41] In that case, the Court decided that the student's banner, which read "BONG HiTS [sic] 4 JESUS," promotes illegal drug use,[42] and therefore is not protected speech.[43] In his opinion, Justice Roberts compared the facts of the case to those in *Fraser*, noting that if the speech in that case had occurred "outside the school context, it would have been protected."[44] The Court also expressed uncertainty regarding schools' boundaries and student speech,[45] marking the closest it has come to deciding how far a public school can reach student speech off-campus.

B. *Free Speech and Public Universities*

As of 2013, no court had applied *Fraser* or *Morse* to the university student context; furthermore, no court had decided whether extracurricular university student speech off-campus can be restricted.[46] In *Ward v. Polite*, a student seeking a master's degree in counseling was expelled from her program because she had asked to refer her gay and lesbian clients to other counselors, in violation of the American Counseling Association's code of ethics.[47] The Sixth Circuit Court of Appeals held that a school's curriculum itself is protected speech, and that regardless of the age of the student, the *Hazelwood* standard applies.[48] It also decided in *Ward* that the university has a right to adopt anti-discrimination policies.[49] *Ward* sits at the intersection of religious rights, discrimination, and free speech, which this Comment does not seek to resolve. Nevertheless, *Ward* provides an interesting glimpse into how courts treat student speech within a curricular setting ("on-campus").

In the Supreme Court's 1972 *Healy v. James* decision, a public university was held to have unconstitutionally infringed students' rights to free speech when the school refused to recognize a student group.[50] This is an important case for public universities and on-campus extracurricular speech.[51] In the spirit of *Tinker*, *Healy* went a step further to explain that

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41 551 U.S. 393, 397.

42 *Id.* at 397, 401–02.

43 *Id.* at 408.

44 *Id.* at 405.

45 *Id.* at 401 ("There is some uncertainty at the outer boundaries as to when courts should apply school speech precedents.").

46 Emily Gold Waldman, *University Imprimaturs on Student Speech: The Certification Cases*, 11 FIRST AMENDMENT L. REV. 382, 388 (2013).

47 667 F.3d 727, 731–32 (6th Cir. 2012).

48 *Id.* at 733 ("The key word is student.").

49 *Id.* at 738–39.

50 408 U.S. 169, 187–88 (1972).

51 *Id.* at 171.

"state colleges and universities are not enclaves immune from the sweep of the First Amendment."[52] The holding in *Healy* supports an argument against an orthodoxy of opinions on college campuses.[53]

C. *When Student Speech Takes a Hike Off-Campus*

Some judges and scholars nevertheless distinguish the holding in *Hazelwood*, which addressed high school speech, from the rights afforded to students at universities and post-graduate programs.[54] For example, *Hazelwood* has been applied to public professional school students' speech off-campus, which can be problematic and far-reaching when discussing post-graduate student speech in public universities.[55] Courts have also looked to the *Tinker* standard to evaluate whether the off-campus speech caused or could cause a potential disruption to the learning environment.[56] Some courts have explicitly not decided the issue of whether *Tinker* and its progeny apply to off-campus speech.[57]

In 2016, a federal district court held that a public high school did not infringe a student's First Amendment rights when the school suspended that student for having posted bomb threats on his Facebook page.[58] The judge, pointing to *Tinker*, opined that it was not the location of the speech that

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[52] *Id.* at 180.

[53] *Id.* ("The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas.'").

[54] *Keefe*, 840 F.3d at 542 (Kelly, J., dissenting) (distinguishing *Hazelwood* because "Keefe's speech was off-campus, was not school-sponsored, and cannot be reasonably attributed to the school"); McCauley v. Univ. of the V.I., 618 F.3d 232, 247 (3d Cir. 2010) ("[T]he teachings of . . . decisions involving speech in public elementary and high schools[] cannot be taken as gospel in cases involving public universities. Any application of free speech doctrine derived from these decisions to the university setting should be scrutinized carefully."). *See, e.g.*, Wahrmann-Harry, *supra* note 15, at 445–46.

[55] *See* Tatro v. Univ. of Minn., 816 N.W.2d 509, 518 (Minn. 2012) ("Applying the [*Hazelwood*] legitimate pedagogical concerns standard to a professional student's Facebook posts would give universities wide-ranging authority to constrain offensive or controversial Internet activity by requiring only that a school's actions be 'reasonably related' to 'legitimate pedagogical concerns.'") (citing *Hazelwood*, 484 U.S. at 272–73). *But see Keefe*, 840 F.3d at 531 ("College administrators and educators in a professional school have discretion to require compliance with recognized standards of the profession, both on and off campus, 'so long as their actions are reasonably related to legitimate pedagogical concerns.'") (citing *Hazelwood*, 484 U.S. at 273).

[56] *E.g.*, *Keefe*, 840 F.3d at 531 n.6 ("Tinker permits disciplining public school students for off-campus postings 'where it is reasonably foreseeable that the speech will reach the school community and cause a substantial disruption to the educational setting.'") (citing S.J.W. *ex rel.* Wilson v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771, 777 (8th Cir. 2012)).

[57] *See* B.H. *ex rel.* Hawk v. Easton Area Sch. Dist., 725 F.3d 293, 303 n.9 (3d Cir. 2013) (citing J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011)) ("We have not yet decided whether *Tinker* is limited to on-campus speech.").

[58] R.L. v. Cent. York Sch. Dist., 183 F. Supp. 3d 625, 640 (2016).

mattered, but rather that the speech would cause a substantial disruption.[59]

In contrast, the Third Circuit in 2011 decided that an eighth-grader did not cause a substantial disruption when she made fun of her school's principal on her MySpace page, and that the school infringed her First Amendment rights when it suspended her.[60] The court here explicitly stated that "*Fraser* does not apply to off-campus speech."[61]

In 2011, the Third Circuit went further to support a public school student's right to free speech off-campus.[62] It held en banc in *Layshock v. Hermitage School District* that a high school senior should not have been disciplined for posting a "parody profile" of the school principal on MySpace.[63] The student had accessed the profile at times from within the classroom.[64] The school alleged that the student's speech was defamatory and began on campus, and that therefore the school district was justified in regulating the student's conduct.[65] Regardless, there was no allegation of substantial disruption (the *Tinker* standard) caused by the student's MySpace activity.[66]

The Ninth Circuit Court of Appeals decided in 2013's *Wynar v. Douglas County School District* that even though a high school student's off-campus speech (instant messages on MySpace) met the *Tinker* standard to be constitutionally protected, the school was justified in temporarily expelling[67] the student for making an identifiable threat of violence toward the school (school shooting).[68] This case is distinguishable because it would likely be considered a true threat and therefore not protected speech under the First Amendment.[69]

Similar to the circumstances surrounding the Ninth Circuit's decision in *Wynar*, in 2015, the Fifth Circuit Court of Appeals upheld a public high school's discipline of a student who had recorded a rap song (off-campus speech) containing language that described violent acts against school teacher-coaches.[70] The Fifth Circuit reasoned that because the speech was

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59 *Id.*

60 J.S. v. Blue Mountain, 650 F.3d 915, 931 (3d Cir. 2011).

61 *Id.* at 932.

62 Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011).

63 *Id.* at 219.

64 *Id.* at 209.

65 *Id.* at 214.

66 *Id.*

67 The school board expelled the student for ninety days. Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062, 1066 (9th Cir. 2013).

68 *Wynar*, 728 F.3d at 1062.

69 *See, e.g.*, Elonis v. United States, 135 S. Ct. 2001 (2015); Virginia v. Black, 538 U.S. 343 (2003); R.A.V. v. St. Paul, 505 U.S. 377 (1992).

70 Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379 (5th Cir. 2015).

"threatening, harassing, and intimidating," it could cause a reasonable expectation on the part of the faculty that there would be a substantial disruption.[71]

As this Comment examines *infra* in addressing *Tatro*, *Keefe*, and *Oyama*, various courts' applications of the *Tinker* "substantial disruption" standard are inconsistent and should be irrelevant to graduate student speech off-campus. *Tinker* is for pure speech on-campus and in the K-12 context.

D. *Free Speech and the "Professional Program" Student*

Defining a "professional program" presents its own set of challenges for a court. One way to define it would be for a court to consider "professional" programs to be "situations where students are performing duties otherwise performed by professionals, under professional supervision. For example, law school clinics, where students are dealing with clients; or medical school rotations; or student teaching; or . . . interacting with cadavers."[72] This approach fails to address the on-campus/off-campus distinction as outlined in *Morse v. Frederick*,[73] and leaves the university able to reach into most aspects of students' lives before they have attained professional status.

The Court should define this "professional" capacity as narrowly as possible, including only those professions for which the state has agreed to confer statutory licensing requirements. This would provide protection for student journalists, for example, and other non-licensed professions.[74]

Through various circuit court decisions, the university's right to impose professionalism requirements on its students has been consistently upheld.[75] Courts characterize the decision on the part of the university to be academic, not disciplinary.[76] Most cases here do not involve free speech, and are within the world of what should properly be considered curricular conduct, not protected speech off-campus.[77] Courts typically defer to the judgment of the university when finding that a student lacked professionalism in the

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[71] *Id.* at 383.

[72] Will Creeley, *A Closer Look at* Tatro v. Minnesota, FOUND. FOR INDIVIDUAL RTS. IN EDUC. (FIRE) (June 22, 2012), https://www.thefire.org/a-closer-look-at-tatro-v-university-of-minnesota/.

[73] 551 U.S. 393.

[74] *See infra*, Part IV, critique of Calvert's "Essentiality Principle" prong.

[75] *See* Keefe v. Adams, 840 F.3d 523, 531 (8th Cir. 2016); Al-Dabagh v. Case W. Reserve Univ., 777 F.3d 355, 360 (6th Cir. 2015). *See also* Oyama v. Univ. of Haw., 813 F.3d 850, 856 (9th Cir. 2015).

[76] *See* Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 98 (1978); *Al-Dabagh*, 777 F.3d at 360 ("The Committee's professionalism determination is an academic judgment.").

[77] *See, e.g.*, *Al-Dabagh*, 777 F.3d at 359–60.

curricular context (on-campus): "[j]udges are 'ill-equipped' to second-guess the University's curricular choices."[78]

The Supreme Court has also urged deference to the public university's academic decisions, restating its "responsibility to safeguard their academic freedom, 'a special concern of the First Amendment.'"[79] Academic evaluation should not extend to student speech made in a private capacity off-campus, which is otherwise protected by the First Amendment.

1. Amanda Tatro: Worthy of Discipline, Protection, or Both?

A Minnesota Supreme Court case from 2012 examined the tension between professional conduct standards and First Amendment jurisprudence. In *Tatro v. University of Minnesota*, the court evaluated a mortuary science student's Facebook comments and found them to be disrespectful in light of a state statute outlining established standards of professional conduct for that industry.[80] Mortuary student Amanda Tatro's Facebook comments, labeled potentially violent by some,[81] referred to a cadaver in her anatomy lab as "Bernie," presumably as a reference to the movie "Weekend at Bernie's."[82] Tatro posted to her "friends" and "friends of friends,"[83] "[g]ive me room, lots of aggression to be taken out with a trocar."[84] Tatro testified that a "death list" mentioned in one of her Facebook posts was a reference to the movie "Kill Bill"[85]: "Who knew embalming lab was so cathartic! I still want to stab a certain someone in the throat with a trocar though. Hmm . . . perhaps I will spend the evening updating my 'Death List #5'."[86] Equally troubling in light of her own death shortly after the case was decided,[87] she posted: "I wish to accompany [the cadaver] to

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[78] *Id.* at 359 (quoting Doherty v. S. Coll. of Optometry, 862 F.2d 570, 576 (6th Cir. 1988)).

[79] Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 226 (1985) (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

[80] Tatro v. Univ. of Minn., 816 N.W.2d 509, 522 (Minn. 2012).

[81] Andrew Beaujon, *Amanda Tatro Dead at 31; Challenged University's Facebook Policies on First Amendment Grounds*, POYNTER (June 26, 2012), https://www.poynter.org/reporting-editing/2012/amanda-tatro-challenged-universitys-facebook-policies-on-first-amendment-grounds/

[82] *Tatro*, 816 N.W.2d at 512.

[83] *Tatro v. University of Minnesota*, ACLU MINNESOTA, https://www.aclu-mn.org/en/cases/tatro-v-university-minnesota (last visited Nov. 4, 2018).

[84] *Tatro*, 816 N.W.2d at 512. A trocar is "a sharp-pointed surgical instrument fitted with a cannula and used especially to insert the cannula into a body cavity as a drainage outlet." *Trocar*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/trocar (last visited Jan. 9, 2019).

[85] *Tatro*, 816 N.W.2d at 513.

[86] *Id.* at 512.

[87] Tatro died about a week after her case was decided; the cause of death could not be

the retort. Now where will I go or who will I hang with when I need to gather my sanity?"[88]

In *Tatro*, the Minnesota Supreme Court held that the university's rules were "narrowly tailored" and "directly related to established professional conduct standards," which permitted the university to sanction Tatro for her Facebook statements.[89] Tatro, however, argued that the university's disciplinary measures would chill student speech beyond their studies—that the university "cannot impose a broad rule that would prohibit mortuary science students from criticizing faculty members or posting offensive statements that are unrelated to the study of human cadavers."[90]

Indeed, the case underscores the importance of crafting a narrow rule that does not chill student speech[91] so much that students are unable to learn effectively[92]—or, hypothetically, to seek assistance or guidance[93]—within the university program. Students would be less likely to report misconduct among their peers or professors if they perceive it to be potentially career-altering. "If speech loses its First Amendment protection because it causes so many grantors to withdraw their support that a program's viability is threatened . . . then no student may ever feel safe, in any venue, blowing the whistle on wrongdoing."[94]

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confirmed. She was physically disabled and had a central nervous system disorder. Emily Gurnon, *Amanda Tatro Dies; University of Minnesota Student Challenged U's Facebook Policies*, PIONEER PRESS (last updated Nov. 10, 2015, 6:37 PM), https://www.twincities.com/2012/06/25/amanda-tatro-dies-university-of-minnesota-student-challenged-us-facebook-policies/. Tatro had planned to seek further review of the case. *Tatro v. University of Minnesota*, ACLU MINNESOTA, https://www.aclu-mn.org/en/cases/tatro-v-university-minnesota (last visited Nov. 4, 2018).

88 *Tatro*, 816 N.W.2d at 512.

89 *Id.* at 523.

90 *Id.* at 521.

91 *See* Thomas Healy, *Who's Afraid of Free Speech?*, KNIGHT FIRST AMEND. INST. COLUM. U. (July 14, 2017), https://knightcolumbia.org/news/whos-afraid-free-speech ("One of the reasons government censorship is so troubling is that the coercive power of the state is nearly impossible to resist, making its chilling effect not just real but profound.").

92 *See* Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 FLA. L. REV. 395, 416 (2011) ("If schools start policing and punishing off-campus speech, students' views of schools, teachers, and administrators may be altered in a manner that interferes with the learning process itself.").

93 *Cf.* Eugene Volokh, *Okay to Dismiss Professional School Students for Expressing 'Views . . . Deemed Not in Alignment with Standards Set by' Government Authorities*, WASH. POST (Dec. 29, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/12/29/okay-to-dismiss-professional-school-students-for-expressing-views-deemed-not-in-alignment-with-standards-set-by-government-authorities/. Volokh points to the "chill created by such decisions," which will cause students to refrain from expressing views that are "misguided." *Id.* Students could similarly be chilled from expressing views that would evoke an educator's natural concern for the student's well-being.

94 Frank D. LoMonte, *Free Speech Off-Campus Must Be Protected*, CHRON. HIGHER EDUC. (Feb. 5, 2012), https://www.chronicle.com/article/Free-Speech-Off-Campus-Must-

Of course, professional organizations could argue they have a compelling interest against students making such comments in the course of their studies. On behalf of the university in *Tatro*, the American Board of Funeral Service Education (ABFSE) argued in its amicus brief that the university must protect the integrity of "willed body programs," or "whole body donations."[95] The implication is that donors or their next of kin would be less willing to participate in the programs if mortuary students are permitted to express such statements about cadavers in anatomy labs.[96] Willed body programs are largely unregulated and therefore susceptible to "governmental investigations, donor scrutiny, and a diminishing supply."[97] Regardless, the governmental interest in ensuring a supply of whole body donations should not outweigh the student's First Amendment right to free speech off-campus, in a non-curricular environment. The *Tatro* court failed to balance the burden it places on student speech off-campus against the harm it might have caused the university's educational mission for students to engage in disrespectful speech.[98]

Although some of Tatro's comments could be seen as troubling or even vaguely threatening, equally troubling is a "mini-trend" for state actors to blur the already-thin line between social media rant posts and true threats.[99] Allowing students to speak freely off-campus and beyond the curriculum would not prevent the university or legislature from enacting standards to ensure confidentiality, nor would it prevent inquiry into speech that is already not constitutionally protected.

In a positive development for professional-level students, the court in *Tatro* declined to evaluate the case under the *Tinker* standard, acknowledging that the statements were made on Facebook and could not be considered substantially disruptive to the curricular environment.[100] The Fifth Circuit, in contrast, was willing to extend the *Tinker* "substantial

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[95] Joint Brief of Amici Curiae American Council on Education and the Association of American Medical Colleges at 14, Tatro v. Univ. of Minn., 816 N.W.2d 509 (Minn. 2012) (No. A10-1440), https://www.acenet.edu/news-room/Documents/Amicus-Brief-in-Support-of-the-University-of-Minnesota-in-Tatro-v-UMN.pdf.

[96] *See id.* at 15.

[97] Allison Slocum, Note, *Dearly Departed, Dearly Needed*, 24 ELDER L.J. 181, 182 (2016).

[98] Joint Brief of Amici Curiae Student Press Law Center and Foundation for Individual Rights in Education, Inc., at 14, Tatro v. Univ. of Minn., 816 N.W.2d 509 (Minn. 2012) (No. A10-1440), http://mn.gov/law-library-stat/briefs/pdfs/a101440scac1.pdf (stating that the impact is "simply too attenuated—and . . . would invite too much abuse").

[99] Eric Goldman, *Mortuary Sciences College Student Disciplined for Threatening Facebook Posts—Tatro v. University of Minnesota*, TECH. & MARKETING L. BLOG (July 12, 2011), https://blog.ericgoldman.org/archives/2011/07/mortuary_scienc.htm.

[100] Tatro v. Univ. of Minn., 816 N.W.2d 509, 519 (Minn. 2012).

disruption" standard to off-campus speech when dealing with a high school student.[101] The Minnesota Supreme Court declined to do so here, however, when dealing with a professional program student.[102]

Although the court in *Tatro* declined to apply the *Tinker* standard, it invoked the "special characteristics of the academic environment" in deciding that the university was permitted to discipline Amanda Tatro for her statements.[103] This analysis defers to the university's contention that it should be permitted to establish program rules that demand "respect, discretion, and confidentiality" when dealing with willed cadavers.[104] It bears noting that ABFSE does not appear to have stated in its rules that "respect, discretion, and confidentiality" are required, nor did it explain these terms.[105] The court in *Tatro* held that the school's policy could constitutionally restrict student speech off-campus as long as the policy is "narrowly tailored and directly related to established professional conduct standards."[106]

This case opens the door for a public university to discipline a student for any speech off-campus that it deems violative of "any claimed curriculum-based reason."[107] This decision is binding only on the state level, because it is a decision of the Supreme Court of Minnesota. Nevertheless, a state supreme court opinion could be persuasive authority to the Supreme Court when it will inevitably face a similar fact pattern. A Supreme Court decision on the issue would clarify this open question. The Court should make clear that graduate student speech off-campus deserves wide constitutional protection, especially when it cannot reasonably be argued that the speech is "substantially disruptive," per the *Tinker* standard,[108] nor can it be argued that professional students' speech off-campus does not merit the protections in line with the Court's dicta in *Morse v. Frederick*.[109] Furthermore, the age and maturity of professional students bears additional consideration—*Tinker*, *Hazelwood*, and *Morse* all dealt with the K-12

101 Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 391 (5th Cir. 2015).

102 *Tatro*, 816 N.W.2d at 519.

103 *Id.* at 520.

104 *Id.*

105 *Id.* (stating that the mortuary program's rules required "respect, discretion, and confidentiality").

106 *Id.* at 521.

107 *Id.*

108 "The free speech rules in this area are pretty vague and can turn on subtle factual differences." Eugene Volokh, *Teacher Disciplined for "Bullying" Student Who Had Put Up a Swastika*, REASON.COM (Oct. 22, 2018, 8:14 AM), https://reason.com/volokh/2018/10/22/teacher-disciplined-for-bullying-student (discussing whether a student's posting of a swastika on a "Spirit Wall" was constitutionally protected; stating that it's possible the violation could be "seen as disruptive enough to the school's mission to be constitutionally unprotected").

109 Morse v. Frederick, 551 U.S. 393, 401, 405 (2007).

atmosphere.

2. Oyama's Ejection for Curricular Speech

The Ninth Circuit Court of Appeals drew criticism from free speech advocates with its 2015 decision in *Oyama v. University of Hawaii*.[110] Oyama, who sought student teacher certification, wrote in a reflection paper as part of his curricular work that he believed "online child predation should be legal" and that "the age of consent should be either 0, or whatever age a child is when puberty begins."[111]

Although the decision to expel Oyama from the program can be distinguished from the decision in *Tatro* because Oyama's comments were made in the course of academic curriculum ("on campus"), this decision is pertinent to off-campus student speech in the professional program context because of the Ninth Circuit's precedent-setting three-pronged test for evaluating whether a public university violates the First Amendment rights of its students in the professional program context.[112] The professional standard is a constitutional restraint, according to the court, if it is: (1) "directly related to defined and established professional standards";[113] (2) narrowly tailored;[114] and (3) employs "reasonable professional judgment."[115] In *Oyama*, the court found that the student's speech was directly related to defined and established professional standards and was narrowly tailored to serve the university's educational mission.[116] This places *Oyama* more in line with circuit court decisions that urge deference to the university's determination of professionalism within the academic curricular setting.[117]

This decision causes a problem for cases involving student speech in professional programs because it allows the university to make decisions regarding whether the student's speech fits within the orthodoxy of established academic standards. A potential unforeseen downside to this would be that it could keep students from expressing contrarian views within their academic setting. For example, sanctions against students can encourage viewpoint discrimination by empowering universities to quiet

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110 Oyama v. Univ. of Haw., 813 F.3d 850 (9th Cir. 2015). Susan Kruth, *Ninth Circuit Cites 'Professional Standards' in Allowing University to Punish Student Speech*, FOUND. FOR INDIVIDUAL RTS. IN EDUC. (FIRE) (Dec. 30, 2015), https://www.thefire.org/ninth-circuit-cites-professional-standards-in-allowing-university-to-punish-student-speech/.

111 *Oyama*, 813 F.3d at 856.

112 *Id.* at 868. The court drew these prongs from student speech and employee speech doctrines. *Id.*

113 *Id.* at 868.

114 *Id.* at 871.

115 *Id.* at 872.

116 *Id.* at 855.

117 *See, e.g.*, Al-Dabagh v. Case W. Res. Univ., 777 F.3d 355 (6th Cir. 2015).

students who express unpopular opinions but who have no other academic performance problems.[118]

3. *Keefe* and "behavior unbecoming" of a nursing student

The most recent federal case to examine off-campus speech in the professional program context is the Eighth Circuit's 2016 decision in *Keefe v. Adams*.[119] Student Craig Keefe was removed from Minnesota's Central Lakes College nursing program for "behavior unbecoming of the profession and transgression of professional boundaries" through his Facebook posts.[120] On his Facebook page, Keefe had posted: "Doesnt [sic] anyone know or have heard of mechanical pencils. Im [sic] going to take this electric pencil sharpener in this class and give someone a hemopneumothorax [a trauma where the lung is punctured] with it before to [sic] long. I might need some anger management."[121] Keefe also directed a public post at a classmate specifically:

> LMAO [sic] [a classmate], you keep reporting my post and get me banded [sic]. I don't really care. If thats [sic] the smartest thing you can come up with than I completely understand why your [sic] going to fail out of the RN program you stupid bitchFalseAnd quite [sic] creeping on my page. Your [sic] not a friend of mine for a reason. If you don't like what I have to say than [sic] don't come and ask me, thats [sic] basically what creeping is isn't it. Stay off my page . . .[122]

The Eighth Circuit said Keefe violated Central Lakes College's student ethics code, which includes an ethical standard prohibiting "behavior unbecoming of the Nursing Profession."[123] The school's director of nursing testified that she felt she could not teach Keefe, and that he would not be able to attain the level of professionalism required.[124] She testified that she "understood his [First Amendment] rights but this was about professionalism."[125] The Eighth Circuit also said Keefe violated the Nurses Association Code of Ethics, which integrates "personal and professional identities."[126] This causes a disturbing lack of regard for a student's right to

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118 Ari Cohn, *FIRE and Student Press Law Center File Brief in 'Oyama v. University of Hawaii'*, FOUND. FOR INDIVIDUAL RTS. IN EDUC. (FIRE) (Dec. 12, 2013), https://www.thefire.org/fire-and-student-press-law-center-file-brief-in-oyama-v-university-of-hawaii/.

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

120 *Id.* at 525.

121 *Id.* at 527.

122 *Id.*

123 *Id.* at 528.

124 *Id.* at 527.

125 *Keefe*, 840 F.3d at 527.

126 *Id*. at 529.

free speech off-campus. Also troubling, the Eighth Circuit in *Keefe* melded the *Tinker* and *Hazelwood* standards, holding that speech that does not comply with professional standards, regardless of whether that speech is on- or off-campus, necessarily "materially disrupts" the school's "legitimate pedagogical concerns."[127]

It bears repeating that *Keefe* involved an adult student in a professional nursing program, whereas *Tinker* and *Hazelwood* involved public high school, on-campus free speech, and thus "are not the appropriate standards for evaluating whether a university may regulate a student's off-campus speech that is non-school-sponsored and unrelated to academic activities."[128] Judge Kelly's dissent in *Keefe* focused on this distinction, stating that *Hazelwood* "does not allow retaliation against disfavored speech that occurs outside the classroom."[129] Furthermore, the Eighth Circuit erred in comparing *Keefe* to *Ward v. Polite*.[130] The latter involved a student refusing to treat patients based on that student's religious objections to the patients' sexual orientation.[131] The two cases are factually incongruous; Keefe was not dealing in a professional capacity in his Facebook posts. Courts must not look to the standards set forth in *Tinker* and *Hazelwood* but must treat students in professional university programs as mature adults who are not in need of the same paternalistic stance.

The distinction between professional speech and private speech is a special concern when dealing with adults who are students, but who are not yet considered members of a profession. Daniel Halberstam and Robert Post, both constitutional law scholars, distinguish professional speech, defined as "'speech . . . uttered in the course of professional practice,' as distinct from 'speech . . . uttered by a professional.'"[132] This separation of identity, if applied to professional students' speech off-campus, would provide much-needed breathing room for the student while preserving oversight for situations such as *Ward v. Polite*,[133] where a professional student is acting in a professional, curricular capacity. It could also prompt a court to re-examine its reasoning in *Keefe* and more fittingly decide that Keefe's comments on his Facebook page were substantially disruptive, or that they could have constituted true threats.

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127 *Id.* at 531.

128 Wahrmann-Harry, *supra* note 15, at 445–46.

129 *Keefe*, 840 F.3d at 542 (Kelly, J., dissenting) (citing Keeton v. Anderson-Wiley, 664 F.3d 865, 882 (11th Cir. 2011) (Pryor, J., concurring)).

130 *See id.* at 532.

131 Ward v. Polite, 667 F.3d 727, 729 (6th Cir. 2012).

132 Claudia Haupt, *Professional Speech*, 125 YALE L.J. 1238, 1253 (2016) (citing Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 947 (2007)).

133 *See* discussion of *Ward v. Polite*, *supra* Part II.B.

III. "LEGITIMATE PEDAGOGICAL CONCERN" AND THE ROLE OF THE UNIVERSITY IN ENFORCING PROFESSIONAL STANDARDS

Because *Hazelwood* does not properly apply to off-campus graduate/ professional student speech, a crucial part of our analysis is to deconstruct the rationale behind the precedent that a professional standard must be related to "legitimate pedagogical concerns."[134] Defining "legitimate pedagogical concern," although a vague standard to begin with, is more straightforward when in the K-12 context. It becomes a more philosophical question when dealing with adults in the professional/graduate public university setting. As the Third Circuit held in 2010, "[c]onsiderations of maturity are not nearly as important for university students, most of whom are already over the age of 18 and entrusted with a panoply of rights and responsibilities as legal adults."[135]

If the purpose (or "legitimate pedagogical concern") of the university is to protect its students' future career prospects, we must evaluate the *in loco parentis* doctrine. From the mid-1800s until the 1960s, universities were generally permitted to act "in the place of a parent" toward their students, which meant that a student's constitutional rights were "stopped at the college gates."[136] This came to an end around 1961, with the Fifth Circuit's decision in *Dixon v. Alabama State Board of Education*, where nine African American students were expelled from Alabama State College without notice or a hearing.[137] This was a due process case in which the students had been expelled for violating a state law that racially segregated lunch counters.[138] The court decided that an academic hearing was necessary "prior to expulsion from a state college or university."[139] Thus, disciplinary hearings as a result of a professional student's off-campus speech may face review under the court's procedural due process standard.[140]

The professional student's free speech rights do not end at the gates of the public university. Although professional students' off-campus speech deserves robust protection by the Court, universities and law enforcement officials' ability to discipline students based on unprotected speech should remain untouched, with those statements falling into traditional categories

134 Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

135 McCauley v. Univ. of the V.I., 618 F.3d 232, 246 (3d Cir. 2010).

136 Philip Lee, *The Curious Life of* In Loco Parentis *in American Universities*, 8 HIGHER EDUC. IN REV. 65, 67 (2011).

137 Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 154 (5th Cir. 1961).

138 *Id*. at 153.

139 *Id.* at 158.

140 *See* Keefe v. Adams, 840 F.3d 523, 534–35 (8th Cir. 2016).

such as fighting words[141] or true threats.[142] Harassment, for example, could be ripe for litigation in a public university setting,[143] and is a more fitting rubric for analysis in the case of *Keefe*.

Some argue that where there is no legitimate pedagogical concern, schools "may not stop speech, even in a nonpublic forum."[144] Many of the public school speech cases invoke the rationale that the university may restrict speech because it bears the imprimatur of the school itself via professional certification.[145] This may be justifiable in the context of curricular speech, as in *Oyama*'s student teaching program. In contrast, in the context of noncurricular speech, universities should not be granted vast deference—especially when off-campus speech is unrelated to the professional curriculum, is not undertaken as part of the student's role in providing services, and bears no imprimatur of the school itself. Statutory certification schemes, such as the regulation in *Tatro*, do not absolve the university of its responsibility to uphold the First Amendment as a state actor.

The role of the university is to educate, and the institution is a state actor bound to protect constitutional rights. This constitutional responsibility must outweigh the university's compelling interest in producing a commodity attractive for gainful employment. The "legitimate pedagogical concern" analysis must necessarily be narrowed to exclude the off-campus speech of mature students in professional programs who are not yet licensed professionals. The decision whether to certify a graduate student for entrance to a profession properly lies with the professional body, not with the university (as a state actor that is bound to uphold the Constitution).

For example, although requirements for admission to law practice vary by state, it's possible for U.S. law students to attain a professional degree (juris doctor, or JD), but nevertheless fail to pass a state's bar examination, or fail to pass a state's moral character requirement, thus attaining a law degree but failing to attain professional licensure.[146] For the purposes of sanctioning attorneys once they have been licensed, "the disciplinary body

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141 Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

142 *See e.g*, Elonis v. United States, 135 S. Ct. 2001 (2015); Virginia v. Black, 538 U.S. 343 (2003); R.A.V. v. St. Paul, 505 U.S. 377 (1992).

143 Ana Vieira Ayala, *Hate Speech is Free Speech but Free Speech is Not Absolute: A Look at the First Amendment and College Campuses*, 81 TEX. B.J. 330, 330–31 (2018).

144 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, 683 (2007).

145 *See* Emily Gold Waldman, *University Imprimaturs on Student Speech: The Certification Cases*, 11 FIRST AMEND. L. REV. 382 (2013).

146 *See Admission to the Bar in the United States*, WIKIPEDIA, https://en.wikipedia.org/wiki/Admission_to_practice_law#United_States (last visited Jan. 9, 2019).

bears the burden of proving falsity [of statements]."[147]

IV. CALVERT'S FOUR-PRONGED TEST AND UNFORESEEN OUTCOMES

First Amendment scholar and journalism professor Clay Calvert[148] proposed a test which seeks to resolve cases dealing with free speech and professional certification.[149] Under the four prongs of Calvert's suggested test, a court must ensure that a public university's enforcement of a professional standard does not violate a student's right to free speech by evaluating the standard for its (1) precision; (2) essentiality; (3) contextuality; and (4) proportionality.[150]

Calvert's Precision Principle, the first prong of his test, requires that the professional standard must be (1) codified by statute, or carry the imprimatur of a professional interest group, and (2) survive a facial challenge for vagueness.[151] This prong hinges on how vague the professional standard is, and what a court would subjectively consider vague.[152] A statute can survive a challenge for vagueness and still be too subjective. For example, recall that in *Keefe*, the student was removed from the nursing program for a lack of professionalism.[153] The court called the nursing program's professional standards "necessarily quite general, but they are widely recognized and followed."[154] It would not be a stretch to imagine a scenario where a court would move the line between "vague" and "general" based on the subjective perception of a university official who might disagree with a student's politically unpopular opinions.

Calvert's Precision Principle could push the *Keefe* finding into unconstitutional territory by virtue of the standards being too vague. Placing such a determination in the hands of the Court could allow a university to have unfettered reach into a student's speech off-campus. Regardless, the university, as a state actor, should not be in the position of enforcing a standard that is too vague and that infringes constitutional rights. In situations such as those involving a student's expression off-campus, as in *Keefe* and *Tatro*, the Court would do well to consider the student's "taste and style," as described in its decision in *Cohen v. California*: "[O]ne man's

147 Standing Comm. on Discipline of the U.S. Dist. Court v. Yagman, 55 F.3d 1430, 1438 (9th Cir. 1995) (citations omitted).

148 JD, PhD, https://www.jou.ufl.edu/staff/clay-calvert/ (last visited Sept. 25, 2019).

149 Calvert, *supra* note 9, at 648.

150 *Id.*

151 *Id.*

152 *See* Calvert, *supra* note 9, at 650.

153 Keefe v. Adams, 840 F.3d 523, 525 (8th Cir. 2016) (Keefe was removed from the nursing program "for behavior unbecoming of the profession and transgression of professional boundaries.").

154 *Id.* at 532.

vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual."[155]

Calvert's Essentiality Principle, the second prong of his four-pronged test, calls for the Court to require that compliance with the professional standard be essential to the student's "professional success following graduation."[156] This prong would place the Court in the position of deciding whether it would be necessary for a student to adhere to a professional standard in order to attain professional success post-graduation.[157] The Court would decide this by deferring to the university, which could impede the Court from adjudicating a constitutional matter. Furthermore, it raises the specter of student as commodity, which necessarily forces the Court to choose whether the university's role (or, legitimate pedagogical concern) is to educate students, or to produce students that are employable. Professional success could easily be defined so broadly as to restrict other constitutionally protected speech off-campus. The Court must scrutinize all professional licensing standards to ensure that students' right to free speech off-campus is not infringed.

Calvert's Contextuality Principle, the third of his four-prong test, requires that "[i]mposition of the professional standard . . . not place an undue burden on the free-speech rights of the student in nonprofessional contexts and nonacademic settings . . . ."[158] This principle should be further refined along the lines of cases that distinguish student speech on-campus and off-campus. For example, the test could make clear that while student speech in the curricular context can be restricted in line with the holdings in *Hazelwood* and *Oyama*, student speech that occurs in an off-campus forum and that bears no imprimatur of the school, such as with *Keefe* and *Tatro*, should not be restricted by the university. Other than speech that is not protected by the First Amendment, the Court should not place any burden on the free-speech rights of the student in nonprofessional contexts and nonacademic settings. Providing for a balancing test allows the university to reach too far into the off-campus context. Free speech "balancing tests" can be considered "free speech consequentialism," where harms to one interest must be weighed against another.[159] This balancing necessarily imparts a subjective determination on the part of the Court, "undermin[ing] strong free speech protections" and threatening the neutrality guarantee of

155 Cohen v. California, 403 U.S. 15, 25 (1971).
156 Calvert, *supra* note 9, at 651.
157 *Id.*
158 Calvert, *supra* note 9, at 648.
159 Erica Goldberg, *Free Speech Consequentialism*, 116 COLUM. L. REV. 687, 688 (2016).

the First Amendment.[160]

Calvert's Proportionality Principle, the final prong of his test, calls for a measured disciplinary response to students' violation of the professional standard. In order to pass constitutional muster, the university's sanction against a student must be "narrowly limited," or, if the student is expelled from the program, the student must have been a repeat offender who ignores warnings and "is unwilling or unable to uphold the standard."[161] It is unclear which cases or precedent suggest that this would be an adequate measure to educate the student. For example, Calvert begins by pointing to the fact that Amanda Tatro was permitted to continue in her mortuary program "with a failing grade in one laboratory course."[162] Calvert then points to evidentiary levels of proof and an examination of deference to the university for how a restriction on student speech might be constitutional.[163] The wide deference granted to the university in cases such as *Tatro* and *Keefe* show a strong trend toward deference to the university that could create wide opportunity for student speech to be curtailed, especially in situations where a university could argue that its legitimate pedagogical interest is in orthodoxy of ideas.

Calvert's test is an improvement over the current uncertain state of how courts evaluate these cases. However, although it is based off the three prongs set forth for curricular student speech in *Oyama*,[164] Calvert's four-pronged test fails to distinguish the fact that Oyama, unlike the students in *Tatro* and *Keefe*, sought certification for employment in a public institution (to teach in public schools).[165] It is understandably alarming for a candidate seeking to teach children to advocate for the legalization of child predation, as Oyama did in his coursework.[166] The Ninth Circuit in *Oyama* recognized that the public employee free speech doctrine addresses this concern[167] by allowing vast deference to the judgment of the government employer.[168]

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160 *Id.*

161 Calvert, *supra* note 9, at 648.

162 Calvert, *supra* note 9, at 655 n. 293 (citing Tatro v. Univ. of Minn., 816 N.W.2d 509, 524 (Minn. 2012)).

163 Calvert, *supra* note 9, at 655.

164 Oyama v. Univ. of Haw., 813 F.3d 850, 868–74 (9th Cir. 2015) (holding that a disciplinary decision must be based on well-established professional standards, must be narrowly tailored to further the school's educational mission, and must reflect reasonable professional judgment).

165 *See id.* at 860 ("Oyama's claim defies easy categorization because his position at the University combined the characteristics of both a student and a public employee.").

166 *Id.* at 856.

167 *Id.* at 865 ("[T]he University may constitutionally evaluate or restrict the candidate's speech to fulfill its responsibilities to the public and to achieve its institutional objectives.").

168 *Government Employees and First Amendment Overview*, FREEDOM FORUM INST. (Apr. 24, 2017), https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-speech-2/free-speech-and-government-employees-overview/.

Calvert suggests that if Oyama had advocated the same positions off campus, the court would not have allowed the university to restrict his statements.[169] Nevertheless, the *Oyama* court's deference to the "professional standard" could justify greater reach into a student's speech, regardless of its setting—an outcome not without its own potential downside.[170]

Professor Clay Calvert has suggested a workable test for professional certification cases involving student speech. However, it does not adequately account for the distinction between on-campus and off-campus speech. The Supreme Court in *Hazelwood* made clear that schools have a compelling interest in controlling student speech off-campus, provided it can be considered "curricular"—if it bears the imprimatur of the school.[171] Calvert's test would be more effective in preserving students' free speech rights if it declared their noncurricular speech off-campus generally off limits. Existing laws against harassment, true threats, and fighting words could adequately address many of these concerns without infringing on students' rights to free speech.[172]

V. CONCLUSION

As an educational institution, the university has an interest in teaching its students what the licensing body or professional standard will be upon graduation. The university may caution its students that they are at risk of not being able to obtain employment or certification. But expulsion (or discipline that results in failure from the program) for off-campus non-curricular speech infringes students' constitutional rights.

The university should be in the role of educator, notifying students that their off-campus conduct would not be acceptable under professional guidelines and could reduce their chances of attaining employment once they graduate.

The Supreme Court should clarify this area and urge universities to step

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169 Calvert, *supra* note 9, at 643–45.

170 *But see* Eugene Volokh, Opinion (*The Volokh Conspiracy*), *Okay to Dismiss Professional School Students for Expressing 'Views . . . Deemed Not in Alignment with Standards Set by' Government Authorities*, WASH. POST (Dec. 29, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/12/29/okay-to-dismiss-professional-school-students-for-expressing-views-deemed-not-in-alignment-with-standards-set-by-government-authorities/ ("[D]espite the Ninth Circuit's attempt to impose some limits on its 'professional standards' rationale, this sort of analysis is poison to academic freedom. . . . [T]he court's rationale could let universities suppress a vast range of student speech.").

171 Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988) (explaining that educators are entitled to control student expression that "members of the public might reasonably perceive to bear the imprimatur of the school").

172 Trego, *supra* note 14, at 119 ("[P]rofessional students should continue to be held to the same free speech exceptions as the public, including restrictions on true threats.").

out of the role of certification gatekeeper, keeping them properly in the role of education provider. This would afford students the opportunity to learn and be responsible for their own careers.