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## What You Sign Up For: Public University Restrictions on “Professional” Student Speech After *Tatro v. University of Minnesota*

William Bush

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# What You Sign Up For: Public University Restrictions on “Professional” Student Speech After *Tatro v. University of Minnesota*

William Bush\*

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\* Juris Doctor, Washington and Lee University School of Law 2014, Master of Fine Arts, University of Minnesota 2005, Bachelor of Arts in English Literature, Pennsylvania State University-Altoona 2001. This piece received the Louise A. Halper Award for best student Note. I am grateful to Professor Brian Murchison for his support and guidance during the writing process, Jeff Wieand, my predecessor Notes Editor, and various friends and colleagues who listened when I needed to talk. Special thanks go to Angelo Volpe, my longtime colleague at the University of Minnesota; without our many long conversations about academic freedom I would not know enough to believe what is written here.

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### I. Introduction

As anyone with experience on either side of the human resources desk can attest, our social media footprints are following us to work. Many employers now report checking applicants’ social media presence prior to hiring or even preliminary interviews, and popular-media advice on the recommended sanitization procedure is almost a daily feature of one news site or another.<sup>1</sup> Some advice columns even caution that “reblogging”—the common practice of referring others in one’s online network to content published elsewhere—can cause controversial material to be associated with a job applicant, with corresponding positive or negative effects.<sup>2</sup> Employees and job applicants are well advised to note that employer-side attorneys are advising their clients of ways to justify terminations based on social media activity that might embarrass the company.<sup>3</sup>

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1. See, e.g., Amy Levin-Epstein, *Job Interview? Prep Your Facebook, Twitter Profile*, CBS NEWS (Jan. 3, 2013), [http://www.cbsnews.com/8301-505125\\_162-57561846/job-interview-prep-your-facebook-twitter-profile/](http://www.cbsnews.com/8301-505125_162-57561846/job-interview-prep-your-facebook-twitter-profile/) (recommending detailed clean-up strategies, including leaving enough personal information to give an interesting personal impression).

2. See *id.* (“Just because you didn’t initially post it doesn’t mean it won’t be associated with your candidacy . . .”).

3. See, e.g., JONATHAN D. ROBBINS, *ADVISING E-BUSINESSES* Ch. 4, IX, § 4:69, *Disciplining or Terminating Employees for Online Activities* (2012) (characterizing social media websites as “a great way to obtain information about someone easily and at low cost,” acknowledging the “tempt[ation] to discipline an employee for her online remarks,” and offering general guidelines for crafting enforceable social media policies).

Increasingly, similar implications are affecting future professionals *before* they enter their chosen professions.<sup>4</sup> Several recent cases have seen colleges and universities sanctioning students for their online communications, particularly via the still-dominant social media site Facebook, when the students' postings were found to be incompatible with university rules. Notably, one particular, narrow group of students—those enrolled in undergraduate and graduate professional degree programs leading to government-regulated professions—have found themselves uniquely vulnerable to institutional discipline for their Facebook posts.<sup>5</sup> As this Note demonstrates, courts have found that such students can face legitimate academic consequences for posts that demonstrate an alleged<sup>6</sup> inability to abide by the associated profession's code of conduct, even when such state-sanctioned punishment would seem to offend the First Amendment.<sup>7</sup>

Many prominent commentators have endorsed this emerging standard of limited student free speech at public institutions of higher learning.<sup>8</sup>

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4. See Katherine C. Chretien, et al., *Online Posting of Unprofessional Content by Medical Students*, 302 JAMA 1309, 1309 (Sept. 23, 2009) (“Web 2.0 . . . risks broadcasting unprofessional content that can reflect poorly on individuals, affiliated institutions, and the medical profession.”).

5. See Scott Jaschik, *A Cadaver, Facebook, Free Speech*, INSIDE HIGHER ED (June 21, 2012), <http://www.insidehighered.com/news/2012/06/21/minnesota-supreme-court-upholds-punishment-student-over-facebook-posts> (acknowledging that Tatro II “deals with an issue relevant . . . to a range of health professions programs that expect students to adhere to certain standards of professionalism, even before they become professionals”).

6. I use the word “alleged” here because, as will be seen later, the courts have in the vast majority of cases chosen not to interrogate the appropriateness of student statements, but rather engage in a level of judicial review that leads them (in cases the universities win) to endorse as sufficient the *university's* judgment of the speech's appropriateness. Thus, the allegation is, for the most part, also the judgment.

7. See *infra* Part III.B (summarizing and discussing professional school case law).

8. See, e.g., Neal H. Hutchens, Commentary, *A Delicate Balance: Faculty Authority to Incorporate Professionalism Standards into the Curriculum Versus College and University Students' First Amendment Rights*, 270 ED. LAW. REPORTER 371, 371 (2011) (arguing that incorporation of professional standards was appropriate in several recent cases); Emily Gold Waldman, *University Imprimaturs on Student Speech: The Certification Cases*, 11 FIRST AMEND. L. REV. 382, (2013) (arguing that schools can legitimately police student speech in professional degree programs because those programs “certify” graduates as fit to serve in their professions); Jeffrey C. Sun, Neal H. Hutchens, & James D. Breslin, *A (Virtual) Land of Confusion with College Students' Online Speech: Introducing the Curricular Nexus Test*, 16 U. PA. J. CONST. L. 49 (2013) (suggesting a test allowing universities to regulate off-campus, extracurricular student speech that reasonably relates to legitimate pedagogical concerns). *But see* Andrew R. Kloster, *Speech Codes Slipping Past the Schoolhouse Gate: Current Issues in Students' Rights*, 81 UMKC L. REV. 617 (2013) (describing professional standards cases as “permitting universities to use third-party

Prior to 2011, most of the notable cases had involved school counseling students who had refused to counsel non-heterosexual students in violation of their avowed religious beliefs. However, the recently decided *Tatro v. University of Minnesota*<sup>9</sup> (hereinafter *Tatro II*<sup>10</sup>) saw this new jurisprudence extended to a mortuary science student who made off-color jokes on her Facebook page about her laboratory cadaver.<sup>11</sup>

The *Tatro* cases represent a potentially dangerous overreach of public, educational institutional control over student speech. While the speech at issue, in the professional student context, presents a reasonably nuanced question as to constitutional protection, the persuasive authority that might emerge from *Tatro II* threatens to leave too many other close questions on the wrong side of the jurisprudential line. Sadly, Tatro's untimely death<sup>12</sup>

regulation of student speech to do an end-run around settled First Amendment doctrine”).

9. *Tatro v. Univ. of Minn.*, 816 N.W.2d 509, 521 (Minn. 2012) [hereinafter *Tatro II*] (holding that a professional student's First Amendment free speech rights were not violated by a public university's sanction for violation of conduct code based on established professional conduct).

10. In this Note, “*Tatro I*” will be used to refer to *Tatro v. Univ. of Minn.*, 800 N.W.2d 811 (Minn. App. 2011) [hereinafter *Tatro I*], the Minnesota Court of Appeals case that upheld the university's disciplinary sanctions under familiar secondary-school standards, discussed *infra* at Part III.A. Discussion of both *Tatro* cases is necessary both because of the differing analytical frameworks between the two courts and because their account of the factual record differs somewhat. See *infra* note 106 (discussing relevant factual disparity between *Tatro I* and *II*).

11. See *id.* at 512–13 (summarizing content of Tatro's Facebook posts).

12. See, e.g., Alyssa Creamer, *Amanda Tatro Found Dead: University of Minnesota Graduate Who Sued School for Punishment Over Facebook Posts*, THE HUFFINGTON POST (July 13, 2012), [http://www.huffingtonpost.com/2012/06/28/amanda-tatro-found-dead-u\\_n\\_1635461.html](http://www.huffingtonpost.com/2012/06/28/amanda-tatro-found-dead-u_n_1635461.html) (reporting Tatro's death and collecting other news reports of her case). Tatro, who was only 31 years old, was found dead in her home by her husband. *Id.* Several news accounts indicate that Tatro did not have an easy life. *Id.* She apparently suffered from a nervous system disorder related to a traumatic brain injury, though it is unclear whether this was related to her death. *Id.* A former husband had sought a restraining order against her in 2007, alleging that she was “very unstable” and had been hospitalized for a drug overdose. See Emily Gurnon, *Amanda Tatro, Who Challenged University of Minnesota's Facebook Punishment, Had Turbulent Life*, PIONEER PRESS, June 27, 2012, [http://www.twincities.com/localnews/ci\\_20954862/amanda-tatro-who-challenged-university-minnesotas-facebook-comments](http://www.twincities.com/localnews/ci_20954862/amanda-tatro-who-challenged-university-minnesotas-facebook-comments). The former husband also alleged that Tatro had undergone weapons training. *Id.* The restraining order was refused, on the grounds that Tatro's alleged conduct was merely “annoying” behavior that appeared to be part of a bad breakup . . . .” *Id.* It may be worth wondering whether Tatro's Facebook behavior was interpreted by her classmates in the context of what may have been a vaguely understood reputation; at any rate, the posts, though initially investigated as potential threats, were determined by police to be harmless. See *infra* note 16 (discussing police investigation of Tatro's Facebook posts).

several days after her loss in the Minnesota Supreme Court likely the issue in her own uniquely illustrative case.<sup>13</sup> This Note will argue that this watershed case gives too much “cover” to educational institutions that want to protect their public image, and further suggests that even this concern is better served by a hands-off approach when it comes to student social media activity that does not rise to the level of a potential physical threat. Part II will describe the complicated factual circumstances of *Tatro II* as well as the previous (and notably different) adjudication of the same facts in the Minnesota Court of Appeals. Part III will summarize the legal framework that has guided student speech cases in various relevant contexts—on- and off-campus, secondary and post-secondary, online and off. Part IV will analyze and apply several existing theories of educational speech to the professional student context presented in the *Tatro* cases, and Part V will explore the potential ramifications of these cases on emerging free speech problems. Finally, Part VI will offer two approaches to regulating off-campus, online speech by professional students—one couched in terms of “best practices” that might help a university avoid both bad publicity and expensive litigation, as well as a legal framework that discourages “unprofessional” speech that might be likened to false speech under recent U.S. Supreme Court jurisprudence.

## *II. Background: Tatro I and II*

The details and procedural history of the *Tatro* case are somewhat convoluted, in no small part because the case originated within a public university. While an advanced undergraduate student in the Mortuary Sciences program, and, importantly, enrolled in a human anatomy laboratory course at the University of Minnesota, Amanda Tatro made the following posts to her Facebook wall:<sup>14</sup>

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13. Because the sanctions against Tatro were relatively slight, her grievance might not be seen as one capable of repetition, yet evading review. One commenter has suggested, however, that free speech claims might be seen as “belonging” to society (as opposed to the individual litigants) if they “raise issues that are important to the living.” Kirsten Rabe Smolensky, *Rights of the Dead*, 37 HOFSTRA L. REV. 763, 783 (2009).

14. At the time of Tatro’s posts, Facebook users almost universally drafted their “wall” posts as third-person sentences about themselves, to complement Facebook’s interface convention that caused all posts to be immediately preceded by the user’s full name. In recent years this convention has fallen away.

- **Amanda Beth Tatro** 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 ... [November 12, 2009]
- **Amanda Beth Tatro** 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. [December 6, 2009]
- **Amanda Beth Tatro** Who knew embalming lab was so cathartic! I still want to stab a certain someone in the throat with a trocar though. Hmm ... perhaps I will spend the evening updating my "Death List # 5" and making friends with the crematory guy. I do know the code ... [December 7, 2009]
- **Amanda Beth Tatro** Realized with great sadness that my best friend, Bernie, will no longer be with me as of Friday next week. I wish to accompany him to the retort. Now where will I go or who will I hang with when I need to gather my sanity? Bye, bye Bernie. Lock of hair in my pocket. [Undated.]<sup>15</sup>

The University police investigated these posts, but eventually determined that Tatro did not pose a threat to the university community.<sup>16</sup>

Tatro was sanctioned by the university's Campus Committee for Student Behavior in response to her Facebook posts, which Tatro described as "satirical commentary and violent fantasy about her school experience."<sup>17</sup> Finding that Tatro had "violated the Student Conduct Code and academic program rules governing the privilege of access to human cadavers," the Committee issued Tatro a failing grade for her anatomy course.<sup>18</sup> Additionally, the Committee ordered Tatro "to enroll in a clinical ethics course; write a letter to mortuary-science department faculty addressing the issue of respect within the department and profession; and complete a psychiatric evaluation."<sup>19</sup> The specific "academic program rules" Tatro violated were a prohibition against "blogging" about her anatomy lab experience<sup>20</sup> and treating human remains with inadequate

15. *Tatro II*, 816 N.W.2d 509, 512–13 (Minn. 2012).

16. *Id.* at 513. When interviewed by campus police, Tatro stated that the potentially threatening content of the posts were references to favorite movies—for instance, "Death List # 5" was a reference to the two-part Quentin Tarantino film *Kill Bill*. *Id.*

17. *Id.* at 511 (quoting court filing by petitioner Tatro).

18. *Id.*

19. *Tatro I*, 800 N.W.2d 811, 815 (Minn. App. 2011).

20. *See id.* at 818 (referring to anatomy lab course rule that "[b]logging about the anatomy lab or the cadaver dissection is not allowable").

respect.<sup>21</sup> In *Tatro I*,<sup>22</sup> the Minnesota Court of Appeals upheld the sanctions on the theory that Tatro's actions "'materially and substantially disrupt[ed]' the work and discipline of the university," particularly the university's anatomy bequest program, through which living donors pledge their bodies for the training of future mortuary science and medical students.<sup>23</sup>

While the Minnesota Supreme Court upheld the sanctions on Tatro, it dispensed with the lower court's reasoning, holding instead that "a university does not violate the free speech rights of a student enrolled in a professional program when the university imposes sanctions for Facebook posts that violate academic program rules that are narrowly tailored and directly related to established professional conduct standards."<sup>24</sup> This rule, the court stated, would "limit the potential for a university to create overbroad restrictions that would impermissibly reach into a university student's personal life outside of and unrelated to the [student's professional degree] program."<sup>25</sup>

Looking forward, the value of the *Tatro* case is its contribution to a discussion not of the university's interest in maintaining an environment that is physically safe or otherwise free of disruption, but rather of a three-sided relationship between universities, the professions, and the students trained *for* those professions *by* universities.<sup>26</sup>

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21. *See id.* (referencing the following anatomy lab course rules that "[h]uman material should always be handled with the greatest respect[,] [t]he body should be appropriately draped whenever possible[.]" and "[c]onversational language . . . outside the laboratory should be respectful and discreet"). The Minnesota Court of Appeals accepted Tatro's argument that because the rule referred specifically to draping the body, the rule "only applie[d] to the physical handling of the cadaver," and thus she had not violated this part of the rules. *Id.*

22. *Id.* at 822 (holding that mortuary science student's Facebook posts violated conduct restrictions of laboratory course and constituted a substantial disruption of curricular activities, justifying academic sanctions).

23. *See id.* at 821 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969)). *Tinker* and its progeny are discussed in detail *infra* Part III.A. For a thorough analysis of *Tatro I*, including a persuasive argument that the *Tinker* standard should not apply to college students, see Meggen Lindsay, Note, *Tinker Goes to College: Why High School Free Speech Standards Should Not Apply to Post-Secondary Students—Tatro v. University of Minnesota*, 38 WM. MITCHELL L. REV. 1470 (2012).

24. *Tatro II*, 816 N.W.2d 509, 521 (Minn. 2012).

25. *Id.*

26. Of course, First Amendment analysis is only called for in *Tatro* and the other cases under discussion in this Note because the students and programs in question are housed in public universities. Just as obviously, however, many professional students get their training at private universities, where Constitutional rights apply with less, if any, force.



III. *The Existing First Amendment Legal Framework for Electronic, Off-Campus Student Speech*

It is important to note that the Supreme Court has applied the same analytical frameworks used in secondary school cases to the college and university context.<sup>27</sup> Thus, an analysis of the secondary school cases is important, even though the challenged behavior of a high school student may seem comically immature by comparison with the concerns of a university, and the interests served by compulsory education of minors is significantly different than that served by elective education of adults.<sup>28</sup>

A. *School Speech Cases*

As the Supreme Court first famously stated in *Tinker v. Des Moines Independent Community School District*,<sup>29</sup> teachers and students alike do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>30</sup> While *Tinker* laid a strong baseline for student free speech in public schools, the Court emphasized that students’ free speech rights are cabined by the legitimate interests of schools.<sup>31</sup> The Court held that speech that did not “substantially interfere with the work of the school or impinge upon the rights of other students” was not subject to legitimate school restriction.<sup>32</sup> In describing a high school’s decision to forbid the wearing of black armbands in protest of the Vietnam War, the Court noted that “an urgent wish to avoid the controversy which might result from the [students’] expression” was an insufficiently compelling interest to justify the restriction on First Amendment speech rights.<sup>33</sup>

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27. See *infra* note 69 and accompanying text (describing rationale for applying secondary school case law in the college setting).

28. See *infra* Part III.A for a more thorough discussion of this issue.

29. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969) (holding that on-campus student speech that materially disrupted the school environment was not subject to First Amendment protection).

30. *Id.* at 506.

31. See *id.* at 513 (explaining that students’ free speech rights did not prohibit a school’s “reasonable regulation of speech-connected activities in carefully restricted circumstances”).

32. *Id.* at 509.

33. *Id.* at 510.

The Court has departed from this speech-friendly stance in later cases. In *Bethel School District No. 403 v. Fraser*,<sup>34</sup> a student who delivered a nominating speech on behalf of a fellow student seeking a class office. In his speech, he “referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor” was permissibly sanctioned by the high school.<sup>35</sup> *Fraser* is interesting for its departure from *Tinker* as to speech the Court declared “offensively lewd and indecent . . . unrelated to any political viewpoint . . . [that] undermine[d] the school’s basic educational mission.”<sup>36</sup> The Court was also at pains to point out that the speech was less protected because it was made on school grounds by a child.<sup>37</sup> Subsequent cases further develop the importance of both the location of the interdicted speech and the maturity of the speaker. The more mature the student, the more such speech is likely to be protected. Conversely, the more closely connected to an educational mission, and the less politically grounded the expression, the less likely constitutional protections will be triggered.<sup>38</sup>

The power of school officials to sanction less offensive speech under the color of curriculum and school sponsorship was further developed in *Hazelwood School District v. Kuhlheimer*,<sup>39</sup> where school officials cut two pages of articles from a student newspaper.<sup>40</sup> The articles in question were substantially less arguably “offensive” than the material found objectionable in *Fraser*—one described the experiences of students who had dealt with teenage pregnancy, the other the effect on a student of her

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34. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986) (holding that student’s lewd, sexually graphic on-campus speech was not protected by the First Amendment).

35. *Id.* at 677–78 (1986).

36. *Id.* at 687.

37. *See id.* at 682 (“It does not follow . . . that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school.”).

38. *See Morse v. Frederick*, 551 U.S. 393, 402–03 (2007) (dismissing the dissent’s argument that the offending Bong HiTs 4 Jesus banner was part of a “political debate over the criminalization of marijuana”).

39. 484 U.S. 260, 273 (1988) (holding that “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored activities so long as their actions are reasonably related to legitimate pedagogical concerns”).

40. *See id.* at 262 (detailing school principal’s decision to remove the articles from the student publication).

parents' divorce.<sup>41</sup> Critical to distinguishing the situation from that in *Tinker* was the fact that the student newspaper's readers might mistakenly attribute the articles' content to the school, and not their authors alone. The Court stated that the articles "might reasonably [be] perceive[d] to bear the imprimatur of the school" and therefore could "fairly be characterized as part of the school curriculum."<sup>42</sup> Furthermore, because the newspaper was produced exclusively by members of a particular journalism class, for which student-editors received a grade, the Court recognized that "[e]ducators are entitled to exercise greater control" over such curricular speech "to assure that participants learn whatever lessons the activity is designed to teach . . . so long as their actions are reasonably related to legitimate pedagogical concerns."<sup>43</sup> The importance of the paper's place in the journalism curriculum (i.e., as a graded exercise) is inseparable, in *Hazelwood*, from the fact that the school published—and thus could be seen to endorse—its contents. Future cases, especially professionalism cases, make the distinction important.

Off-campus speech is subject to less regulation.<sup>44</sup> A federal district court recently summarized the current state of constitutional regulation of off-campus speech this way: "[S]tatements are protected under the First Amendment and not punishable by school authorities unless they are true threats or are reasonably calculated to reach the school environment and are so egregious as to pose a serious safety risk or other substantial disruption in that environment."<sup>45</sup> This standard has the additional benefit of alignment with the common sense notion that outside of school, whatever rights students *do* "shed . . . at the schoolhouse gate," they may pick up on their way home.<sup>46</sup>

Notably, however, what constitutes the geographical and metaphysical boundaries of the school grounds for the purposes of institutional control over student speech is no simple matter of walls and fences. In *Morse v. Frederick*,<sup>47</sup> the U.S. Supreme Court held that a group of students who

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41. *See id.* at 263 (describing the content of the articles removed from the paper).

42. *Id.* at 271.

43. *Id.* at 271–73.

44. *See Morse v. Frederick*, 551 U.S. 393, 405 (2007) ("Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected.").

45. *See R.S. v. Minnewaska Area Sch. Dist. No. 2149*, 894 F. Supp. 2d 1128, 1140 (D. Minn. 2012) (summarizing the current state of governing law).

46. *Tinker*, 503 U.S. at 506.

47. *Morse*, 551 U.S. at 396 (2007) (holding that a high school principal did not violate

displayed a banner reading “BONG HiTS 4 JESUS” along the Olympic Torch Relay Route were subject to the kinds of restrictions on their speech that would apply if they were *inside* the school or attending a school-sponsored activity.<sup>48</sup> The offending students—one of whom was so late for school that at the time of the relay he was just arriving for the day—were across the street from the school, and thus not even physically on school property.<sup>49</sup> Interestingly, the Court also dispensed with any idea that a banner censored by school authorities because it could be construed to promote the use of illegal controlled substances should be analyzed as political speech (and thus potentially deserving of greater protection), characterizing it instead in terms of Frederick’s desire to get on TV with his friends.<sup>50</sup>

Unlike primary and secondary public schools, colleges and universities do not exercise “custodial and tutelary” care over their students, such as to “permit[] a degree of supervision and control that could not be exercised over free adults.”<sup>51</sup> Thus, while *Tinker* and its progeny have been used in analyzing higher education speech cases, such cases are rare.<sup>52</sup>

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a student’s First Amendment speech rights by confiscating a banner bearing the phrase “Bong HiTs 4 Jesus” on the basis that the message promoted illegal drug use).

48. *Id.* at 397.

49. *Morse v. Frederick*, 551 U.S. 393, 405 (2007) (describing the physical location of respondent Joseph Frederick, who was “late to school that day” and “joined his friends” (all but one of whom were [school classmates] across the street from the school to watch the event)).

50. *See id.* at 402–03 (stating that while Frederick’s motive for displaying the banner—to get on television—did not mitigate its content, the pro-drug message, his lack of political motivation stripped it of any First Amendment protection as a contribution to public debate). The Court, per Chief Justice Roberts, writing for a six-justice majority, spared with Justice Stevens in dissent over this point. Justice Stevens questioned the Court’s readiness to endorse the principal’s determination that the banner promoted drug use, and called the message “nonsense.” *Id.* at 444 (Stevens, J., dissenting). Nonetheless, he expressed concern in the event the banner *did* express that view. Speculating “whether the fear of disapproval by those in the majority is silencing opponents of the war on drugs,” Justice Stevens wrote “[s]urely our national experience with alcohol [prohibition] should make us wary of dampening speech suggesting—however inarticulately—that it would be better to tax and regulate marijuana than to persevere in a futile effort to ban its use entirely.” *Id.* at 448 (Stevens, J., dissenting).

51. *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995).

52. *See Tatro I*, 800 N.W. 2d 811, 821–22 (Minn. Ct. App. 2011) (finding that Tatro’s Facebook posts “materially and substantially disrupt[ed] the work and discipline of the university” using the *Tinker* standard).

*B. Professional School Cases*

The two leading cases in the realm of professional students' First Amendment rights arise in school counseling programs. They depart from the prior discussion inasmuch as they represent hybrid claims in which students asserted religious beliefs, communicated through expressive conduct, that were found to interfere with the conduct code of their chosen profession. In *Keeton v. Anderson-Wiley*,<sup>53</sup> Jennifer Keeton, a student enrolled in a graduate-level counseling program at Augusta State University, made statements reflecting disapproval (based on her religious beliefs) of members of the lesbian, gay, bisexual, and transgendered (LGBTQ) population as well as her belief that non-heterosexuals suffered from a mental illness that could (and should) be treated.<sup>54</sup> Keeton's professors believed these statements indicated that she would not be able to practice in the school's clinical program (or beyond) according to the professional standards of the American Counseling Association (ACA), compliance with which was a requirement of the counseling program.<sup>55</sup> Believing that she could not effectively complete the remediation plan her professors prescribed before allowing her to work with student clients in the university's clinical program, Keeton withdrew from the program and sued.<sup>56</sup> While school officials informed Keeton that she "was not being asked to alter her personal religious beliefs," they did stress that failure to

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53. *Keeton v. Anderson-Wiley*, 664 F.3d 865 (11th Cir. 2011) (holding that a university's dismissal of a school counseling student who indicated that she would not affirm the sexual identity of non-heterosexual students, as well as the non-marital sexual activity of unmarried students, did not violate First Amendment speech protections).

54. *See id.* at 868 ("[Keeton] expressed to professors in class and fellow classmates in and out of class that she believed that the LGBTQ population suffers from identity confusion, and that she intended to attempt to convert students from being homosexual to heterosexual.").

55. *See id.* at 869 (quoting relevant code provisions: "Counselors respect the dignity of clients . . . [and] do not condone or engage in discrimination based on . . . gender identity, sexual orientation, marital status/partnership . . . or any basis proscribed by law.").

56. *See id.* at 870–71 (describing a remediation plan and Keeton's reaction to it). The plan set out by Keeton's professors would have required her to read peer-reviewed scholarly articles on "improving counseling effectiveness for the LGBTQ population . . . familiarize herself with [a LGBTQ counseling association's] Competencies for Counseling Gay and Transgender Clients" as well as attend LGBTQ community events and relevant counseling seminars, all with the intent of increasing Keeton's exposure to, and presumably tolerance for, members of the LGBTQ population she might someday encounter in her counseling practice. *Id.* at 870.

complete the remediation plan would result in her dismissal from the counseling program.<sup>57</sup>

Since Keeton's statements were not a publication or an address, the Eleventh Circuit viewed the counseling program itself as the "forum" for First Amendment purposes.<sup>58</sup> Because the court deemed the counseling program a non-public forum, the court analyzed the restriction on Keeton's speech—the remediation plan—for reasonableness and content-neutrality.<sup>59</sup> The court applied *Hazelwood* in two ways, finding, first, that the clinical program was a "school-sponsored expressive activit[y]," as those who receive counseling in the program and members of the general public "might reasonably perceive [it] to bear the imprimatur of the school."<sup>60</sup> Second, both the clinical program and the remediation plan were "part of the school curriculum . . . supervised by faculty members and designed to impart particular knowledge or skills to [Keeton]."<sup>61</sup> Thus, the school's sanction of Keeton's expressions of disapproval of LGBTQ individuals could be characterized as an "unwillingness to abide by [the university's] curriculum."<sup>62</sup>

Julea Ward, a graduate counseling student at Eastern Michigan University, voiced similar, if less aggressive, concerns about counseling gay clients.<sup>63</sup> Whereas Keeton had expressed an intention to practice conversion therapy, Ward consistently expressed only disapproval of homosexuality, as well as extramarital sex and some other heterosexual conduct.<sup>64</sup> And whereas Keeton was not allowed to enter her program's

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57. *Id.* at 871.

58. *See Keeton v. Anderson-Wiley*, 664 F.3d 865, 871 (11th Cir. 2011) ("We . . . find that ASU's counseling program constitutes a nonpublic forum.").

59. *See id.* at 872 ("[As a nonpublic forum], school officials 'may impose restrictions on speech that are reasonable and viewpoint neutral' . . . Accordingly, we must ask two questions . . . (1) whether the remediation plan was a reasonable restriction on her speech; and (2) whether the remediation plan was viewpoint neutral.").

60. *Id.* at 875 (quoting *Hazelwood*, 484 U.S. 260, 271).

61. *Id.* (quoting *Hazelwood*, 484 U.S. 260, 271).

62. *Id.* at 878. The degree to which the court relied on the ACA standards themselves is unclear. The court analyzed the sanctions, finding them to be reasonable in light of the ACA standards, but did not address the ACA standards themselves.

63. *See Ward v. Polite*, 667 F.3d 727, 729 (6th Cir. 2012) ("In three years with the program, Julea Ward frequently expressed a conviction that her faith (Christianity) prevented her from affirming a client's same-sex relationships as well as certain heterosexual conduct, such as extra-marital relationships.").

64. *See id.* at 729–30 (summarizing Ward's religious convictions).

clinical program without completing a remediation plan, Ward was already practicing in a supervised clinic and had counseled two student-clients before her beliefs allegedly came into conflict with her professional conduct.<sup>65</sup> Rather than expressing her disapproval in front of any student whose sexuality troubled her, Ward contacted her professor and supervisor with a request to refer her third client, who was gay, to another counselor.<sup>66</sup> At the behest of two of her professors, Ward participated in an “informal meeting . . . designed ‘to assist [Ward] in finding ways to improve [her] performance or to explore the option of . . . voluntarily leaving the program.’”<sup>67</sup> Ward agreed with her professors that “the development of a remediation plan would not be possible,” and after a formal review, was forced to leave the program.<sup>68</sup> Unlike Keeton, who had merely expressed views that suggested she could not follow ACA guidelines in the future, Ward was informed by her professors that she had already failed to follow them.<sup>69</sup>

In its analysis of Ward’s free speech claim, the court made several novel observations about the university free-speech environment in light of *Hazelwood*. First of all, *Hazelwood*—a high school case—was applicable at the college level.<sup>70</sup> Second, the increased maturity of college students did not necessarily *decrease* the extent to which their speech could be validly restricted—rather, the voluntary nature of higher education gave prospective students the opportunity “to learn what a curriculum requires before applying to the school and before matriculating there.”<sup>71</sup>

*Tatro* sits somewhat uneasily alongside the professional cases. Whereas Ward and Keeton made their feelings known to their instructors

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65. *See id.* at 731 (noting that Ward was enrolled in the clinical program and had counseled two students before the incident for which she was disciplined).

66. *See id.* (detailing Ward’s actions upon realizing, from a review of his file prior to their first meeting, that her next client would be a gay student who sought counseling related to his intimate relationships).

67. *Id.*

68. *Id.*

69. *Ward v. Polite*, 667 F.3d 727, 729 (6th Cir. 2012) (describing communication by a professor that Ward had violated two sections of the ACA code of ethics by “imposing values that are inconsistent with counseling goals” and “engag[ing] in discrimination based on . . . sexual orientation”) (substitutions in original).

70. *See id.* at 734 (“[F]or the same reason [the *Hazelwood*] test works for students who have not yet entered high school . . . it works for students who have graduated from high school. The key word is student.”).

71. *Id.*

directly—Ward even going so far as to issue what might be fairly termed a warning—Tatro’s supposed inability to perform according to professional standards was determined indirectly, through report of her Facebook posts to others.<sup>72</sup> Additionally, Keeton and Ward were—or were set to—practice their professions with clients through a clinical training exercise.<sup>73</sup> Tatro, by contrast, was merely involved in a laboratory course using an anonymous donor,<sup>74</sup> arguably an environment with little, if any, impact on the population served by practicing morticians. Lastly, the counseling cases both involve religious convictions, whereas Tatro’s Facebook posts (and corresponding attitudes toward her profession) were secular. The speech claims of Ward and Keeton, though, are no stronger for their invocation of another First Amendment right, for, as the Tenth Circuit has indicated, “the religious nature of [a speech claim] is not determinative . . . [t]he Supreme Court has never held that religious speech is entitled to more protection than non-religious speech.”<sup>75</sup>

In *Ward*, the university initially won its motion for summary judgment in the district court. Reversing, the Sixth Circuit highlighted a conflict between the program’s ACA-based ethical requirements and its actions toward Ward:

[t]he key problem with the university’s position is not the adoption of this anti-discrimination policy, the existence of the practicum class or even the values-affirming message the school wants students to understand and practice. It is that the school does not have a no-referral policy for practicum students and adheres to an ethics code that permits values-based referrals in general.<sup>76</sup>

As in *Tatro*, the counseling program required clinical students to abide by the relevant professional standards, in this case those of the American

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72. See *Tatro I*, 800 N.W.2d 811, 814 (Minn. App. 2011) (noting that Tatro contacted the media after she was told by University Police not to come to campus pending further investigation, but before the office of student conduct submitted its formal complaint against her).

73. See *Ward*, 667 F.3d at 730 (describing actual client-contact aspect of clinical program); see also *Keeton v. Anderson-Wiley*, 664 F.3d 865, 869 (same).

74. See *Tatro II*, 816 N.W.2d 509, 512 (Minn. 2012) (describing laboratory course as relying on donated human cadavers under the same program as that supplying medical and dental schools, as opposed to performing volunteer funerary duties).

75. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1292 n. 13 (10th Cir. 2004) (citing *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995)).

76. *Ward v. Polite*, 667 F.3d 727, 730 (6th Cir. 2012).



Counseling Association (ACA).<sup>77</sup> However, unlike the Minnesota Supreme Court, the Sixth Circuit was willing to engage (or at least order the district court to engage) in a careful reading of the relevant conduct code provision rather than deferring to the university's supposedly academic determination. The court stated that it was possible for a jury to decide that, by requesting that her client be referred to another counselor, she had in fact *prevented* her own potential discrimination against that client, thus *upholding* the relevant ACA standard.<sup>78</sup>

Curiously, the Sixth Circuit noted that “the university setting [does not] invariably mean that educators have less discretion over their curriculum and class-oriented speech” than high school teachers.<sup>79</sup> Because they are not compelled to enroll and can presumably make themselves aware of curricular requirements—even speech-related ones—“[w]hen a university lays out a program’s curriculum or class requirements for all to see, it is the rare day when a student can exercise a First Amendment veto over them.”<sup>80</sup> This view has been criticized by scholars who argue that university students, because of their maturity, should be entitled to more, not less, freedom of expression.<sup>81</sup>

One common theme in the professional standards cases is the courts’ adoption of the secondary-school doctrine permitting greater speech restrictions where student speech “might reasonably perceive[d] to bear the imprimatur of the school.”<sup>82</sup> In *Keeton*, for example, the court determined

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77. *See id.* at 731 (“The counseling program’s student handbook incorporates the ACA code of ethics and tells students, including practicum students, to follow it.”).

78. *See id.* at 735 (analyzing language in the ACA code of ethics that “Counselors [1] are aware of their own values, attitudes, beliefs, and behaviors and [2] avoid imposing values that are inconsistent with counseling goals”). Interestingly enough, not only were Ward’s orthodox Christian views—and the fact that they precluded her from counseling gay clients—known to her instructors, *see id.*, she had previously written a paper anticipating situations identical to the one that resulted in her expulsion. *See Ward v. Wilbanks*, No. 09-CV-11237, 2010 WL 3026428, at 1 (E.D. Mich. July 26, 2010) (“[Ward] wrote ‘[i]n situations were [sic] the value differences between a counselor and client are not amenable, ‘standard practice’ requires that the counselor refer his/her client to someone capable of meeting their needs.’”). Even more interestingly, Ward received “a perfect score” on the paper. *Id.*

79. *Ward*, 667 F.3d at 734.

80. *Id.*

81. *See, e.g.,* Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 879 (2008) (referring to college campuses as marketplaces of ideas and arguing that restrictions on college student speech are “less likely to be marketplace enhancing” than those on younger students).

82. *Hazelwood School Dist. v. Kuhlheimer*, 484 U.S. 260, 271 (1988).

that members of the public—and, more importantly, clients taking advantage of the student counseling clinical services—could reasonably attribute the speech of a student counselor to the university sponsoring the program.<sup>83</sup> In the *Tatro* cases, the University of Minnesota was clearly concerned that her expressions would affect the cadaver donation program, an outcome only possible if her allegedly disrespectful demeanor were attributed to her training program, and thus, the university.<sup>84</sup>

### C. Social Media Cases

Ordinarily, posts to social networking sites like Facebook would seem to be fairly clear examples of non-school sponsored or “off-campus” speech, and in fact, several cases have recognized broad protections for such posts.<sup>85</sup> Furthermore, electronic speech that originates off-campus cannot be “brought” onto campus through the actions of another party.<sup>86</sup>

Two recent Third Circuit cases grappled with students who made intentionally offensive social media profiles of secondary-school principals using images drawn from official school websites.<sup>87</sup> In both cases,

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83. See *Keeton v. Anderson-Wiley*, 664 F.3d 865, 875 (applying *Hazelwood* to clinical counseling student’s refusal to counsel gay clients).

84. See *Tatro II*, 816 N.W. 2d 509, 513 (Minn. 2012) (“[T]he Anatomy Bequest Program received letters and calls from donor families and the general public who expressed concerns about Tatro’s lack of professionalism, poor judgment, and immaturity. Others questioned the University about the steps it would take to prevent something like this from happening in the future.”).

85. See *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205 (3d Cir. 2011) (holding that student who created “lewd and offensive” Facebook profile purporting to be school principal’s, using a picture from the school’s website but his own computer, was beyond the reach of the school’s power to discipline); see also *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011) (holding, similarly, that a middle school student’s fake MySpace profile of a principal using “adult language and sexually explicit content” was protected off-campus speech in spite of school’s policy against student use of such language).

86. See *Blue Mountain Sch. Dist.*, 650 F.3d at 933 (declining to hold that off-campus activities could be deemed to have occurred on school grounds when printouts of the offending page were brought to school by a student, on the principal’s orders).

87. For reasons not wholly relevant here, the fake social media profile cases call to mind the recent phenomenon of fake celebrity or public official Twitter profiles. Some of these profiles are incredibly popular and are even coming to be recognized as a kind of art. See, e.g., Sarah Fitzmaurice, *Who to Follow on Twitter? Not the Real Stars . . . The Fake Profiles are Far Funnier*, THE DAILY MAIL [UK], Feb. 17, 2011, available at <http://www.dailymail.co.uk/tvshowbiz/article-1358008/Who-follow-Twitter-Not-real-stars--fake-profiles-far-funnier.html> (praising fake profiles purporting to represent, among others, the Queen of England, and encouraging readers to follow the fake profiles instead of the real

however, the students used their own computer equipment and did not construct the profiles at school.<sup>88</sup> The court refused to adopt “a rule that allows school officials to punish any speech by a student that takes place anywhere, at any time, as long as it is about the school or a school official, is brought to the attention of a school official, and is deemed ‘offensive.’”<sup>89</sup>

Professional education presents a scenario in which traditionally non-academic conduct can plausibly be treated as if it were curricular, because such programs arguably must provide an education in professional conduct.<sup>90</sup> If one of the objectives of public education is to “inculcate fundamental values necessary to the maintenance of a democratic political system,” then a parallel, perhaps even more practical objective of professional education is a similar inculcation of fundamental values necessary to the maintenance of that profession.<sup>91</sup> Counselors must be inclusive and affirming. Lawyers must protect their clients’ secrets. Morticians must be respectful of the dead. Professional schools will quite naturally seek to keep a tight rein on student conduct, since the public—and scholars—may attribute bad professional behavior to the quality of education provided in the professional schools.<sup>92</sup>

One interesting thread that appears in the relevant cases is the degree to which students had advance notice that their expressions violated a conduct standard. In *Fraser*, for example, the student who gave a sexually indecent speech in a school-sponsored forum had been advised by two of his teachers that the content—which they reviewed in advance—would be

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88. See *Blue Mountain Sch. Dist.*, 650 F.3d at 920 (noting that the student made the offending fake profile at home); see also *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 216 (3d Cir. 2011) (“[W]e do not think that the First Amendment can tolerate the School District stretching its authority into Justin’s grandmother’s home and reaching Justin while he is sitting at her computer after school . . .”).

89. *Id.*

90. See Nicola A. Boothe-Perry, *Enforcement of Law Schools’ Non-Academic Honor Codes: A Necessary Step Towards Professionalism?*, 89 NEB. L. REV. 634, 636 (2011) (arguing that law schools present a singular opportunity for inculcating future lawyers with “meaningful training in professionalism”).

91. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S.675, 681(1986) (quoting *Ambach v. Norwick*, 441 U.S. 68, 76–77 (1979)) (substitutions in original).

92. See Nicola A. Boothe-Perry, *supra* note 90, at 652 (“Judging by the number of reported complaints of unprofessional behavior and the general demise of the reputation of the profession [of law], it is apparent that the cursory treatment of professionalism in the historical law school tenure is deficient.”).

“inappropriate” and “might have ‘severe consequences.’”<sup>93</sup> The *Ward* court’s warning that university students could make themselves aware of curricular requirements prior to enrolling in particular programs seems to echo this idea.<sup>94</sup> While it is certainly true of certain aspects of the professions that an applicant needs to be aware of what he or she is signing up for—medical, mortuary, and law students alike may be expected to put aside a certain level of squeamishness about blood and other bodily fluids—extending the curriculum’s control over outputs as well as inputs may give universities too much power.

*D. Reconciling Academic Freedom with Academic Speech Restrictions:  
“Institutional Free Speech”*

One scholar, Joseph Blocher, has argued that institutions that tend to increase the free flow of information—those that enhance the marketplace of ideas—should be granted judicial deference only inasmuch as those institutions do, in fact, improve that marketplace.<sup>95</sup> Professor Blocher’s work is a modification of economic theories that make the same claim about financial and material goods markets and the institutions which tend to increase economic efficiency and decrease transaction costs.<sup>96</sup> While this “New Institutional First Amendment” explains and justifies all of the Supreme Court’s recent rulings on middle- and high-school restrictions on speech,<sup>97</sup> Professor Blocher argues that colleges and universities “contribution to the efficiency of the marketplace of ideas . . . does not require or justify extensive internal speech regulations.”<sup>98</sup>

Blocher likens educational institutions to commercial institutions by observing that “[u]niversities lower information search costs by making

93. *Fraser*, 478 U.S. at 678.

94. *See Ward v. Polite*, 667 F.3d 727, 734 (6th Cir. 2012) (noting voluntariness of university coursework and availability of information to potential students).

95. *See Blocher, supra* note 81 at 880 (“Universities are thus entitled to institutional deference when it comes to speech regulations that improve, not limit, the free flow of information and ideas.”).

96. *See id.* at 838–47 (describing “new institutional economics” theory recognizing role of “institutions that regularize interactions and lower transaction costs,” justifying lessened government regulation).

97. *See id.* at 872–76 (analyzing *Fraser*, *Hazelwood*, and *Morse* in terms of new institutional first amendment theory and concluding that recent decisions “demonstrate[d] an increasing institutional awareness”).

98. *Id.* at 879.

ideas and information widely available and more easily accessible . . . [and] lower search and measurement costs for students and faculty by equipping them with better analytic tools with which to evaluate new ideas.”<sup>99</sup> Like repeat commercial players, then, universities have a vested interest in abiding by the norms established through consistent institutional practice—the norms of the ideological market.<sup>100</sup>

While purporting to deny universities the sort of power to regulate speech that may be more appropriate in high schools, Professor Blocher’s theory still grants extensive institutional deference to universities, and perhaps more troubling, the power to determine what will fall within that deference.<sup>101</sup> It is far from clear whether Facebook posts like Tatro’s, or religious positions like Ward’s, would be included within the realm of market-enhancing expressions that could be seen as contributing to the intellectual discourse of mortuary science. Even identifying the relevant inquiry may be difficult—is the appropriateness of the applicable professional guidelines themselves an open intellectual question? What about whether a particular statement falls inside or outside those guidelines’ boundaries? Blocher identifies the possibility of institutional abuse and asks: “What happens when otherwise ‘good’ institutions apply their internal rules in a way that does not advance the marketplace of ideas? Does an educational institution—which would otherwise be entitled to great deference from courts—still get deference when it limits speech for reasons unrelated to the marketplace of ideas?”<sup>102</sup>

For Blocher, the answer is no, but only because individual universities who break with traditional speech-promoting norms are not representative of the “institutions” to which they belong when they do so.<sup>103</sup> To determine whether an educational organization, such as an individual university, had misapplied the relevant institutional norms, courts would have to conduct a harder look than is typical in academic cases—a task Blocher feels is within

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99. *Id.* at 857.

100. *See id.* (describing universities’ incentives to abide by the standards set by the community of higher education institutions).

101. *See id.* at 856 (noting that the comparison to economic institutions is apt because market efficiencies are what determine the institutional norms established by these market players).

102. *Id.* at 860.

103. *See id.* (identifying the difference between “institutions,” like academia, and “organizations” like, e.g., Duke University).

the competence of the court.<sup>104</sup> The Sixth Circuit's remand in *Ward* may indicate that at least some judges are willing to undertake such a case-by-case analysis in the case of professional codes applied to students.

Another potential area of conflict can arise between ideological institutions within a single entity. A university is not an ideological monolith, but is arguably composed of several (ideological) market-shaping institutions. As Professor Blocher points out, a university's students, faculty, and administration may have different interests to protect in any clash over speech.<sup>105</sup> "Disaggregat[ing] the institution" of academia, however, reveals even more composite institutions than Blocher identifies.<sup>106</sup> As the recent Penn State sex-abuse scandal revealed in horrific fashion, collegiate athletics are an institutional force so powerful that they can overcome many of the larger and ostensibly dominant ideological institutions represented by an individual university.<sup>107</sup>

Not only may different organizational parts of a university have different ideological interests, different academic units<sup>108</sup> may assume differing relationships from one another to the ideological institutions they represent. Professional schools may have a different role to play in the marketplace of ideas than the traditional academic departments. Whereas the academic departments can be more exclusively devoted to the production of knowledge itself, professional schools are obligated by their mission to produce qualified employees, not only to individual sectors of the economy but often to specific positions *within* those sectors (law schools, for example, train only lawyers and not paralegals). A professional

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104. *See id.* at 862.

Determining whether an organization is misapplying its institutional norms would, of course, require courts to investigate the content and application of those norms. But that would be no more difficult . . . than their responsibility to investigate . . . whether a particular limitation on speech amounts to viewpoint discrimination.

105. *See id.* at 878 ("[W]ho exactly is it that 'challenges conventional wisdom,' . . . ?").

106. *Id.*

107. *See* FREEH SPORKIN & SULLIVAN, LLP, REPORT OF THE SPECIAL INVESTIGATIVE COUNSEL REGARDING THE ACTIONS OF THE PENNSYLVANIA STATE UNIVERSITY RELATED TO THE CHILD SEXUAL ABUSE COMMITTED BY GERALD A. SANDUSKY, 14 (July 12, 2012), available at <http://www.nytimes.com/interactive/2012/07/12/sports/ncaafootball/13pennstate-document.html> (finding that the University's President acted in concert with the Athletic Director and Head Football Coach to conceal repeated instances of sexual abuse from the Board of Trustees).

108. In this context, it is interesting to recall that the different academic units are often known as "colleges"—"College of Liberal Arts", "College of Engineering," etc.

school, then, has obligations not only to inculcate its students with the professional and behavioral norms of the profession it serves, but also to (reasonably) guarantee the professional suitability of its graduates—it must produce graduates who are fit to serve. In sensitive professions, this fitness could include minimal or nonexistent controversiality, which could in theory extend to a student’s social media presence. A more conservative assessment of the traditional sphere of academic matters, however, might exclude social media expressions from a college’s realm of academic authority—or at least limit the university’s role to education, rather than enforcement.

Emily Gold Waldman expresses a contrary view, arguing that professional academic programs perform a “certifying” function by “signing off on their students’ fitness to enter the profession in question.”<sup>109</sup> Thus, schools can plausibly argue that the *Hazelwood* standard should apply, not because their *speech* bears the school’s “imprimatur,” but rather because the graduates *themselves* bear it.<sup>110</sup> Dovetailing with the idea of universities as First Amendment actors, Professor Waldman even suggests that the policing of its future graduates’ speech can be seen as the university’s protected speech act.<sup>111</sup> Such control is appropriate, Waldman argues, as long as the university or program can “articulate the nature of their concern and explain why it was indeed legitimate in light of professional standards and expectations.”<sup>112</sup>

There are two potential problems with this theory. The first is that it barely places any burden on a degree-granting entity. All degree programs arguably place some kind of university-imprimatur of fitness on their graduates, in the sense that they “certify” that a student has obtained a threshold amount of subject-matter knowledge. Likewise, their grade point averages “certify” a particular level of competence in that subject matter—even in the age of grade inflation. In today’s job market, it would not be hard for any university program to claim employability as a legitimate pedagogical concern.

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109. Waldman, *supra* note 8, at 383.

110. *Id.* at 405.

111. *See id.* at 405–06 (noting that “by facilitating professional students’ entry into the field . . . the university is engaging in its own sort of speech” and describing the granting of a degree as an implicit statement that the graduate is “fit to enter the profession”).

112. *Id.* at 407.

The second problem is that other entities are ultimately responsible for a professional's fitness. Governmentally-sanctioned agencies are frequently responsible for licensing professionals—in the case of a law school graduate, for example, numerous barriers—the bar exam, character and fitness review, even the Multistate Professional Responsibility test—stand between earning a juris doctorate and becoming a lawyer. Furthermore, assigning responsibility for a professional's fitness to his or her alma mater could allow individual employers to lean too heavily on institutional “certification.”

*E. Are Facebook Posts “Private” or “Public” Speech?*

The *Tatro* court emphasized the public nature of Facebook posts, noting that her privacy settings allowed her posts to be read by “Friends” and “Friends of Friends.”<sup>113</sup> This setting allows posts to be disseminated not only to people the user actively admits to her network, but also to people those users admit to their networks.<sup>114</sup> The court characterized this level of security as the functional equivalent of “blogging” (which was expressly forbidden on the laboratory course's syllabus).<sup>115</sup> While a potentially large group of people, however, this setting is in fact finite, and could be argued to fall short of general publication.

Determining whether Facebook posts are public or private is critical in determining whether a student, like, *Tatro*, whose posts may violate speech restrictions have acted unprofessionally. According to the Minnesota Supreme Court, *Tatro*'s posts were public: “[T]he University is not sanctioning *Tatro* for a private conversation, but for Facebook posts that could be viewed by thousands of Facebook users and for sharing the Facebook posts with the news media.”<sup>116</sup> Because of the inconsistency between the lower court's and the Supreme Court's decisions, it is not possible to know just how widely *Tatro*'s Facebook network was—whether the posts were visible to hundreds or thousands of visitors.<sup>117</sup> Further

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113. *Tatro II*, 816 N.W.2d 509, 512 (Minn. 2012).

114. See *Choose Who You Share With*, FACEBOOK, <https://www.facebook.com/help/459934584025324/> (under “Your Audience Options,” select “What audiences can I choose from when I share?”) (last visited Jan. 10, 2012) (defining various privacy levels for Facebook posts).

115. *Tatro II*, 816 N.W.2d at 512.

116. *Id.* at 523.

117. Compare *Tatro II*, 816 N.W.2d at 523 (stating that sanctions were based on



complicating the situation is the issue of Tatro's sharing of her posts with media outlets, and the fact that this additional and exponentially wider dissemination of her alleged unprofessional attitudes occurred only *after* the university sanctioned her.<sup>118</sup>

Commenters that have studied social media forms have pointed to the multiplicity of uses to which Facebook users put their online expressions. One scholar refers to the "endemic" narcissism of many Facebook users, whose primary goals are to become famous—or infamous—within their ever-widening social circles.<sup>119</sup> Another identifies internet-facilitated speech as "the core of how [young people] understand communication with each other."<sup>120</sup> The latter understanding ironically suggests that the frequency of users' Friends' status updates, combined with the frequency with which all users check in with (and, by extension, mentally dismiss) what their Facebook friends post, actually robs individual posts of their noteworthiness.<sup>121</sup> In other words, Facebook statuses are so public—or rather, so many of them are so equally public—that they lose their function as potentially disruptive public statements.<sup>122</sup> Thus, it is highly unlikely that any one Facebook post, no matter how scathing or offensive, could be "sufficiently noteworthy that the student body would react to it in a manner that could be disruptive to the school campus."<sup>123</sup>

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"Facebook posts that could be viewed by thousands of Facebook users") with *Tatro I*, 800 N.W.2d 811, 814 (Minn. App. 2011) ("Tatro's Facebook settings allowed her 'friends' and 'friends of friends' to view these postings; Tatro acknowledges that this group includes hundreds of people.").

118. See *Tatro II*, 816 N.W.2d at 513 ("Tatro, believing that she had been suspended, attempted to bring attention to her punishment by reporting the incident to, and sharing her Facebook posts with, the news media.").

119. Patricia Sánchez Abril, *Recasting Privacy Torts in a Spaceless World*, 21 HARV. J. L. & TECH 1, 16 (2007).

120. Bryan Starrett, *Tinker's Facebook Profile: A New Test for Protecting Student Cyber Speech*, 14 VA. J.L. & TECH. 212, 225 (2009).

121. See *id.* at 233 (describing the second prong of a new two part test to apply the *Tinker* framework to various forms of internet speech).

122. See *id.* (describing the effect of new Facebook posts by individual users on members of their online networks).

123. *Id.*

*F. Speech Restriction in Governmentally-Licensed Professions and Public Employees*

As a somewhat corollary matter for the purposes of this Note, there have been cases where the Supreme Court has addressed the idea that the state's licensure of a professional entails a licensee to speak in a professional capacity. In this sense, the "speech" regulated by the licensure scheme is typically the communication between the licensee professional and his or her client-customer.<sup>124</sup> The most prominent and easily understood examples are lawyers, whose written and spoken speech acts constitute legal advice subject to regulation when the listener is a client,<sup>125</sup> and physicians, whose written and spoken speech acts can constitute medical advice when the listener is a patient.<sup>126</sup> The Supreme Court has addressed this form of speech regulation in two prominent cases, both involving speech prohibited by statute because it involved solicitation for services.<sup>127</sup> While these cases apparently address only whether the state can regulate who can offer professional services through speech acts that create a professional relationship (and which are thus not pure speech, but rather "speech incidental to conduct"),<sup>128</sup> the analysis that leads to the Court's conclusions is illuminating for the light it sheds on the legitimate government interests that give rise to the speech restrictions within the professions.<sup>129</sup>

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124. See Robert Kry, *The "Watchman for Truth": Professional Licensing and the First Amendment*, 23 SEATTLE U. L. REV. 885, 910–11 (2000) (deriving from *Lowe v. SEC*, 472 U.S. 181 (1985), a case involving unlicensed investment advisors, that advice must be both "person to person" and "characteristic dependent," in the sense that it responds to a specific client's needs, to fall within the government's ability to regulate it through licensing).

125. See *id.* at 893–95 (noting both expressive and non-expressive quality of lawyers' advice to, and action on behalf of, clients).

126. See *id.* at 894 ("When a doctor writes a prescription for a patient, she is doing more than simply recommending a remedy. The prescription has legal significance because it authorizes a pharmacist to deliver a[n otherwise illegal] prescription medication to the patient . . .").

127. See *Thomas v. Collins*, 323 U.S. 516, 544 (1945) (Jackson, J., concurring) (noting that "the state may . . . determine . . . who makes a business or a livelihood of soliciting funds or memberships for unions"); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 449 (1978) (holding that a state may sanction lawyers for the in-person solicitation of clients).

128. Kry, *supra* note 124, at 891.

129. See *id.* at 890 (arguing that by requiring licensing of professionals before they can enter certain types of speech-dependent relationships, states enact a kind of "prior restraint" on this kind of speech). Kry's argument is weakened in light of his own analysis that these speech acts do more than communicate information, but in fact create legal relationships, see

It is unclear whether a state should sanction a licensed professional for giving bad advice—such situations typically give rise to the private right of action (malpractice) by the client against the licensee.<sup>130</sup> State lawyer sanctions, for example, are more common for failure to abide by standards of conduct incident to the substance of the lawyer-client relationship (such as failure to maintain proper records or improper disclosure of confidential information). Malpractice is a private tort; ineffective assistance of counsel is a legal remedy. Courts are split as to whether a lawyer’s expressive out-of-court statements violate civility rules.<sup>131</sup>

Viewing professional students as quasi-employees by virtue of their courses of study would afford them even less Constitutional protection than even students typically enjoy. Public employees may have their speech rights limited substantially by their government employers.<sup>132</sup> Traditionally, the Court has authorized a balancing test “between the interests of the [employee], as a citizen . . . and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”<sup>133</sup> Notably, however, the Constitutionally-protected interests of such employees extend only to speech “on matters of public concern.”<sup>134</sup> Private speech that involves “only matters of personal interest,” by contrast, receives no special First Amendment protection

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*infra* note 125 and accompanying text. The general idea of profession-licensing tends to suggest only a gate-keeping, rather than a case-by-case censoring, function of the appropriate restrictions.

130. *See id.* at 906 (suggesting that *Lowe v. SEC*, 472 U.S. 181 (1985), a case involving unlicensed investment advisors, “can be read to suggest that government regulation of professional speech is permissible only when the communication occurs in the context of a fiduciary relationship”).

131. *See* *Justices of the App. Div., 1st Dept. v. Erdmann*, 33 N.Y. 2d 559, 559–60 (reversing disciplinary action against an attorney for “isolated instances of . . . vulgar and insulting words” in reference to a judge, published in a magazine article”), *State Bar v. Semaan*, 508 S.W. 2d 429, 431–32 (Tex. App. 1974) (affirming lower court finding that letter to the editor calling trial judge “a midget among giants” in reference to other, allegedly wiser judges was not misconduct); *but see* *Ky. Bar Ass’n v. Heleringer*, 602 S.W. 2d 165, 168 (Ky. 1980) (“We are not alone in our opinion that by coming to the bar an attorney incurs the ethical obligation not to bring the bench and bar into disrepute by unfounded public criticism.”).

132. *See* *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (“[I]t cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.”).

133. *Id.*

134. *Id.*

beyond that existing between an employee and a private employer.<sup>135</sup> Thus, while a teacher may *not* be disciplined for writing a letter to the local newspaper criticizing the school board's handling of fund-raising proposals,<sup>136</sup> a district attorney *may* be fired for circulating a questionnaire to coworkers about a supervisor's office policies.<sup>137</sup>

One employee speech case is particularly noteworthy for its potential relevance to students like Tatro. In *U.S. v. National Treasury Employees Union*,<sup>138</sup> the Court struck down a ban on honoraria for public employees' literary products that fell outside the scope of their official duties.<sup>139</sup> The Court protected the employee's right to receive compensation for their work on the grounds that it fell "within the protected category of citizen comment on matters of public concern rather than employee comment on matters related to personal status in the workplace."<sup>140</sup> Critical to the Court's analysis were that the statutory prohibition on payment imposed a substantial burden on the employees' expressive activity<sup>141</sup> and the fact that the activities described "were addressed to a public audience, were made outside the workplace, and involved content largely unrelated to their government employment."<sup>142</sup> While Justice Stevens referred in his majority opinion to notable federal employee-authors Nathaniel Hawthorne, Walt

135. *Connick v. Myers*, 461 U.S. 138, 147 (1983).

136. *See Pickering*, 391 U.S. at 574 (requiring "proof of false statements knowingly or recklessly made" before a public school teacher may be dismissed when public statements regard "issues of public importance").

137. *See Connick*, 461 U.S. at 154 (holding that state district attorney's office did not violate the First Amendment rights of employee who circulated a questionnaire "most accurately characterized as an employee grievance concerning internal office policy").

138. *U.S. v. Nat'l Treasury Employees Union*, 513 U.S. 454 (1995) (holding that provision in Ethics and Government Act that prohibited federal employees from receiving payment for giving speeches or writing articles violated employees' First Amendment rights).

139. *See id.* at 461–62 (describing some of the employees jobs and literary products). Some examples cited by the court included, e.g., "a lawyer for the Nuclear Regulatory Commission who . . . published articles on Russian history . . . [a] mail handler [who] had given lectures on the Quaker religion . . . [and a] microbiologist at the Food and Drug Administration [who] had earned almost \$3,000 per year writing articles and making radio and television appearances reviewing dance performances." *Id.*

140. *Id.* at 466.

141. *See id.* at 469 ("Publishers compensate authors because compensation provides a significant incentive toward more expression. By denying respondents that incentive, the honoraria ban induces them to curtail their expression if they wish to continue working for the Government.") (internal footnotes omitted).

142. *Id.* at 466.

Whitman, and Herman Melville,<sup>143</sup> none of the identified plaintiffs who challenged the statute were poets or novelists.

These cases draw distinctions between the kinds of expressive activity that may bring a public employer's powers closer to those of a private employer; just because the government or its proxy can fire an employee for certain speech does not mean that the employee is subject to civil liability for that speech.<sup>144</sup> Public employees do not enjoy First Amendment rights that private employees do not, only a relationship with their employer that is influenced by Constitutional rights. In that sense, the situation is somewhat analogous to the distinction between private and public-school students.

An argument could be made that because the state is training professional students at public universities to serve in publicly regulated professions, similar standards should apply.<sup>145</sup> Assuming that Tatro's comments about her cadaver specimen do not constitute expressions on matters of public concern, then, the university, acting as a quasi-employer, would be justified in disciplining her. This interpretation is strengthened if the posts are determined to be related to her "employment" in the sense that they would not have come into being but for her university-facilitated presence in the anatomy lab.<sup>146</sup> Important differences between professional

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143. See *id.* at 464 ("Respondents have yet to make comparable contributions to American culture [to those of Whitman, Hawthorne, and Melville], but they share with these great artists important characteristics that are relevant to the issue we confront."). Justice Stevens did not identify whether the common issues encompassed the equivalence of creative and scholarly work for the purposes of determining what constitutes matters of public concern. One might wonder whether subject matter is a relevant factor—whether, for example, an employee who could *not* be disciplined for writing a novel about the dark heart of the human soul *could* be fired for starring in pornographic films. The latter case may soon find its way into the federal courts. See Wendy Leung, *Oxnard Teacher, Fired for Performing in Porn Films, Appeals to Court to Get her Job Back*, VENTURA COUNTY STAR, Feb. 22, 2013, available at [www.vcstar.com/news2013/feb/22/oxnard-teacher-fired-for-performing-in-porn-to/](http://www.vcstar.com/news2013/feb/22/oxnard-teacher-fired-for-performing-in-porn-to/) (describing pending California state-court appeal of public middle school teacher dismissed for taking pornographic film roles during eight months prior to employment).

144. See *Connick v. Myers*, 461 U.S. 138, 147 ("We in no sense suggest that [employee] speech on private matters falls into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the State can prohibit and punish such expression by all persons in its jurisdiction.").

145. See Waldman, *supra* note 8, at 414–18 (analyzing in greater detail, and ultimately rejecting, the "public employee analogy" of professional students).

146. See *Garcetti v. Ceballos*, 547 U.S. 410, 411 (2006) ("Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise

students at public universities and professional public employees must alter this analysis, however.

On the one hand, professional students—especially those not involved in direct client contact through a clinical education program—are not true employees.<sup>147</sup> Nor are they yet licensed professionals in their field, fully subject to licensing requirements. On the other, even non-clinically-engaged professional students are arguably in the process of being initiated into publicly-licensed professions by means, in these cases, of government entities. Without the public university's approval, in the form of a passing grade, these students cannot enter their chosen professions in the first place.<sup>148</sup> As Tatro's avowed difficulties in finding employment<sup>149</sup> subsequent to her dispute with the University illustrate, professional programs can more closely resemble a pipeline with few honorable exits than a branching path that can only open opportunities as the student progresses chronologically through the course of study. The control a public university exercises over its professional students' future licensure would seem to necessitate either *more* control over student speech and behavior (emphasizing the government's role in protecting its citizens from unqualified professionals), or *less* control (emphasizing the student's relatively vulnerable role as an as-yet uneducated aspirant who has placed so much control over her future livelihood in a government institution's hands). In any event, the courts in *Ward*, *Keeton*, and *Tatro* have not applied professional or public-employee doctrines to the case of professional student cases, relying instead on the deference traditionally afforded universities in prescribing curriculum.

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of employer control over *what the employer itself has commissioned or created.*") (emphasis added).

147. Several cases illuminate an importantly different situation: when a student's clinical placement is outside the school. In these cases, courts have applied the employer-employee rules and upheld sanctions that resulted from a clinical student being "fired" from his or her outside "employer." See Waldman, *supra* note 8, at 398–401 (discussing various cases).

148. See, *supra* notes 109–112 and accompanying text.

149. See Kaitlin Walker & Katherine Lymn, *From Facebook to Court: U Defends Discipline*, MINN. DAILY, Feb. 13, 2012, available at <http://www.mndaily.com/2012/02/13/facebook-court-u-defends-discipline> (stating Tatro's belief that she has "had trouble getting jobs and internships since the case began").

#### IV. *Tatro* and the Professional Student Cases

##### A. The Emergence of “Established Professional Standards” in University Conduct Cases

While the specific facts in *Tatro* may be idiosyncratic, the case arises in the broader context of public universities’ struggle to determine how, if at all, online student speech may be constrained by conduct codes. It is particularly noteworthy that the Minnesota Supreme Court abandoned the lower appeals court’s analysis along the *Tinker* line of substantial disruption cases, and instead crafted a new standard related to established professional conduct codes.

The new test may have been a departure in the procedural posture of *Tatro*, but similar tests had been applied in other cases.<sup>150</sup> Commentator Neal H. Hutchens has used the *Ward* and *Keeton* cases to illustrate the rise of this trend in allowing expanded restriction of student speech according to professional-conduct code-related speech, arguing that such standards are constitutionally appropriate. As Hutchens points out, the district courts granted summary judgment in these cases on the grounds that “[t]he judiciary’s review of academic decisions is limited.”<sup>151</sup>

Limited judicial review of “academic” decisions—as distinguished from behavioral “disciplinary” decisions—stems from the so-called “academic freedom” protections of universities.<sup>152</sup> Somewhat ironically, “academic freedom” so characterized is based on the university’s right to define its curriculum—a right seen as necessary by the courts and derived from the first amendment itself.<sup>153</sup> The University of Minnesota, in reacting to *Tatro*’s conduct through giving her a failing grade, was able to

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150. See Neal H. Hutchens, Comment, *A Delicate Balance: Faculty Authority to Incorporate Professionalism Standards into the Curriculum Versus College and University Students’ First Amendment Rights*, 270 ED. LAW REP. 371, (2011) (summarizing cases in which courts upheld speech restrictions based on professional conduct standards for professional students).

151. *Ward v. Wilbanks*, No. 09-CV-11237, 2010 WL 3026428, at 15 (E.D. Mich. July 26, 2010).

152. See Jack E. Byrom, Note, *To Love and Die in Dixon: An Argument for Stricter Judicial Review in Cases of Academic Misconduct*, 31 REV. LITIG. 147 (2012) (providing background of academic/disciplinary distinction).

153. See *Brown v. Li*, 308 F.3d 939, 950 (9th Cir. 2002) (stating that a university “has discretion to engage in its own expressive activity of prescribing its curriculum”).

characterize its actions as “academic” rather than “disciplinary”—and gain the protection of a much more deferential judicial posture.<sup>154</sup>

The professional standards cases problematize this dual standard.<sup>155</sup> In courses of study aimed at training students for regulated professions—including programs in counseling, law, and mortuary science—students must be taught the relevant standards of professional conduct. When these students move beyond the classroom and into clinical training, their adherence to the professional standards can, arguably, be legitimately imported into the curriculum; that is to say, a student’s ability to adhere to the rules of her profession not only protects her clients, but also demonstrates her mastery of her program’s course content.

Such a characterization, however, places an important burden on university faculty and administrators not to blur the line between curriculum and discipline. Cases like *Ward* and *Keeton*—where students’ alleged speech-related misconduct occurs, or threatens to occur, in the context of contact with an actual client and is directly related to their professional activities—are, arguably, less “close,” in the jurisprudential sense, than cases like *Tatro*, where the “speech” occurs in a classroom setting and the student is engaged in an educational activity insulated from the public (such as a laboratory). Of course, the preceding analysis assumes that a situation like *Tatro*’s involves in-class conduct at all, ignoring the fact that the Facebook posts were not actually made from the lab. For *Tatro*, the appropriateness of a Facebook post depended on her status as a student—her posts fell within the ambit of the mortuary science curriculum because *Tatro* was enrolled in it. Setting such wide boundaries for what a student can be graded on (and failed for) forces students constantly to second-guess their actions on and off-campus, to wonder where and how—and why, in particular instances—their performance is being evaluated. As the professional speech cases discussed above point out, such behavioral requirements are not even universally understood to apply to professionals after they are licensed.

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154. See *Tatro II*, 816 N.W. 2d 509, 522 (“Although ‘a university’s interest in academic freedom’ does not ‘immunize the university altogether from First Amendment challenges,’ courts have concluded that a university ‘has discretion to engage in its own expressive activity of prescribing its curriculum’ and that it is appropriate to ‘defer[] to the university’s expertise in defining academic standards and teaching students to meet them.’”) (quoting *Brown v. Li*, 308 F.3d 939, 950, 952 (9th Cir. 2002)).

155. See *Byrom*, *supra* note 152, at 151 (suggesting that universities have disguised disciplinary decisions as “academic” in order to avoid higher due process requirements).



### B. Problems Specific to Tatro II

#### 1. Tatro II Is Not Consistent with the Emerging “Established Professional Standards” Jurisprudence

Because it represents the furthest extent to which a court has stretched a public university’s ability to punish a student for his or her speech, it is not surprising that commentators and scholars have begun to cite it as part of the jurisprudential trend that includes *Ward* and *Keeton*.<sup>156</sup> Nonetheless, *Tatro* is not a natural extension of the doctrine that appears to be developing in these cases.

The students in both *Ward* and *Keeton* were sanctioned for expressions that demonstrated an inability to abide by the ethical norms of their profession as such—they said, openly, in conversations with their professors and in classroom environments, that they could not counsel LGBTQ clients.<sup>157</sup> The expressions were about the student’s inability to comply with the curriculum, and were addressed to faculty members and other students in a curricular setting. *Tatro*, by contrast, posted comments on Facebook that, while arguably unprofessional, were also in a sense *non*-professional, in the sense that they did not take place in the context of her academic program. To the extent that they were *about* her laboratory work, *Tatro*’s posts were expressions of her personal experiences and feelings about that work. *Tatro* expressed no feelings about the disposition of

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156. See, e.g., 19 AM. JUR. 2D. *Proof of Facts* § 5.5 (1979) (citing *Tatro II* for the proposition that “allow[ing] student to continue in program while assigning her a failing grade . . . was not arbitrary or a pretext for punishing student’s First Amendment rights. . . .”). Perhaps even more troubling are references to *Tatro II* in the employment law context. See RICHARD A. ROSS, 5A MINN. PRAC., METHODS OF PRACTICE § 4.50.10(B) (4th ed.) (“While not an employment law case, *Tatro [III]* is indicative of claims a public employer may face if they choose to discipline an employee for statements made on Facebook.”); see also Eric Goldman, *From Eric’s Blog*, 17 No. 7 CYBERSPACE LAWYER 17 (2012) (citing *Tatro II* to illustrate “problems with online discussions by people in the healthcare industry literally from cradle . . . to grave”); but see 16A AM. JUR. 2D *Constitutional Law* § 489 (citing *Tatro II* for the proposition that “[a] university cannot use a code of ethics as a pretext for punishing a student’s protected speech”—presumably relying on the Minnesota Supreme Court’s decision that applying the code of ethics was justified by *Tatro*’s status as a professional student) (emphasis added).

157. See *Keeton v. Anderson-Wiley*, 664 F.3d 865, 873 (11th Cir. 2011) (describing memo from administrators detailing various “interactions with [Keeton] during classes, papers written . . . for classes, and behaviors toward and comments to fellow students in . . . classes”); see also *Ward v. Polite*, 667 F.3d 727, 731 (describing various communications between *Ward* and her faculty supervisor on the subject of her clinical work).

human remains, her willingness to practice her trade within the bounds of professional guidelines, or details that could identify the donor of the specimen upon which she worked.

## 2. *The Disposition of Tatro II Is Inconsistent with its Holding*

Noting that the universe of “legitimate pedagogical concerns” was so broad as to capture “values like ‘discipline, courtesy, and respect for authority,’” the *Tatro II* court explicitly rejected the pedagogical rational basis standard of *Hazelwood* and its progeny as a test for assessing college student Facebook posts.<sup>158</sup> The court did not explicate in great detail the reasons it found such values inappropriate to the facts or context in *Tatro*. Arguably, however, the value protected by the professional conduct standard at issue was similar in scope and character to those values the court saw as too broad in *Hazelwood*. The court concluded that “dignity and respect for the human cadaver constitutes an established professional conduct standard for mortuary science professionals”<sup>159</sup> and that *Tatro*’s Facebook posts were a violation of that standard. In another case involving the posting to a student’s Facebook page of material deemed objectionable under a professional conduct standard, a Kansas District Court remarked that “students in publicly supported schools [should] not be held to vague standards that are interpreted in arbitrary and unpredictable ways that ultimately hinge on the personal interpretations, feelings, and personal morals of those who are imposing them.”<sup>160</sup> While it may be obvious that Facebook posts comparing a cadaver to the title character of *Weekend at Bernie’s* are disrespectful, the issue of whether or not “disrespect” is a validly quantifiable pedagogical benchmark seems equally subject to unpredictable interpretation.

Furthermore, while the court saw fit to point out that *Tatro* was well aware of the restrictions that her participation in the course would place on her online social media posts, it also stated in a footnote that this reasoning should not be taken to mean that a student can “contract out” of First Amendment Protections:

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158. *Tatro II*, 816 N.W.2d at 518 (quoting *Polling v. Murphy*, 872 F.2d 757, 762 (6th Cir. 1989)).

159. *Tatro II*, 816 N.W.2d 509, 522 (Minn. 2012).

160. *Byrnes v. Johnson Cnty. Cmty. Coll.*, No. 10 2690, 2011 WL 166715 (Jan. 19, 2011).

[o]ur analysis of Tatro’s free speech argument does not depend on Tatro’s agreement to restrict her speech as a condition of participating in the laboratory courses. We concur with Tatro that a university cannot impose a course requirement that forces a student to agree to otherwise invalid restrictions on her free speech.<sup>161</sup>

The exact meaning of the distinction is not made explicit, but it would seem to follow that “academic program rules, narrowly tailored and directly related to established professional conduct standards” would have applied to Tatro whether she agreed to them or not.<sup>162</sup>

### 3. Tatro’s Posts Problematize the Distinctions of Earlier Cases

Rather than statements of religious or political conviction, Tatro’s offending Facebook posts were personal, if arguably off-color. In past cases, however, the Supreme Court has indicated that speech falling into some category of artistic expression need not be political in order to gain First Amendment protection—indeed, it need not even make sense.<sup>163</sup>

The court agreed that the university was free to hold Tatro to “academic program rules requiring the respectful treatment of human cadavers.”<sup>164</sup> Such rules did not violate Tatro’s First Amendment rights because they were “directly related to established professional conduct standards”<sup>165</sup> and “narrowly tailored” inasmuch as they only sanctioned public comment.<sup>166</sup> Interestingly, the fact that Tatro publicized her own Facebook posts to the media only after she believed herself to have been suspended from the university—during the police investigation—was a factor in the court’s assessment of how widely the posts had been disseminated.<sup>167</sup>

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161. *Tatro II*, 816 N.W. 2d at 521, n.6.

162. *Id.* at 521.

163. *See* *Hurley v. Irish-American Gay, Lesbian, Bisexual Group of Boston*, 515 U.S. 557, 569 (1995) (“[A] narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a ‘particularized message,’ . . . would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll.”) (internal citation omitted).

164. *Id.* at 523.

165. *Tatro II*, 816 N.W. 2d 509, 521–22 (Minn. 2012) (comparing class conduct requirements to statutory provisions governing the conduct of mortuary professionals).

166. *Id.* at 523.

167. *Id.* (describing sanctions as narrowly tailored as applied).

*V. Potential Ramifications of Tatro II in College Free Speech  
Jurisprudence*

*A. Universities Can Capture Too Much Student Behavior as “Curricular”*

Part of the problem in academic discipline cases is that a university’s ability to assign grades to students is characterized, at least in part, as a First Amendment freedom.<sup>168</sup> University professors cannot be constrained by legislatures as to what they may or may not teach, which has created a sphere of protection for their curricular decisions about what students must read, and how they may appropriately respond. The doctrine has expanded to conclude that professors may even require students to engage in specific speech acts that contradict their own beliefs.<sup>169</sup> More broadly, universities are presumed to have a First Amendment right to determine the content of its curriculum.<sup>170</sup> Interpolating this right to individual programs or departments is not an unreasonable extension of the academic freedom doctrine.

It is unclear whether college students’ adult status and independence grants them more or less speech protection than secondary students. Colleges are arguably less obviously invested in the moral training of their students than high schools are, and college students are more likely to be able to benefit from a marketplace of ideas that includes crude and unprofessional expressions. However, the theory that college students voluntarily join their educational communities—and thus have a degree of notice of behavioral standards to which they will be expected to adhere—has appeared in the professional standards cases. This is certainly in keeping with the notion that in joining a particular profession—even a governmentally-regulated one—citizens can sacrifice certain rights.<sup>171</sup>

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168. See *Tatro II*, 816 N.W. 2d at 522 (citing *Brown v. Li*, 308 F.3d 939, 950 (9th Cir. 2002) for the proposition that a university “has discretion to engage in its own expressive activity of prescribing its curriculum”).

169. See *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1291–92 (10th Cir. 2004) (“Requiring an acting student, in the context of a classroom exercise, to speak the words of a script as written is no different than requiring that a law or history student argue a position with which he disagrees.”).

170. See *Ward v. Polite*, 667 F.3d 727, 730 (6th Cir. 2012) (“Curriculum choices are a form of school speech, giving schools considerable flexibility in designing courses and policies and in enforcing them so long as they amount to reasonable means of furthering legitimate educational ends.”).

171. See *supra* Part III.F (describing professional licensing and effect on speech rights).

One thing seems certain: the restrictions placed on Tatro's speech by the mortuary science lab's rules would likely not survive the Supreme Court's usual First Amendment scrutiny. The fact that "[t]he anatomy lab rules allowed 'respectful but discreet [c]onversational language of cadaver dissection outside laboratory' but prohibited 'blogging'"<sup>172</sup> may be taken as a content restriction in time, place, and manner clothing—even in private conversations or conversations occurring within the lab itself, the governmental "rule" would seem always to prohibit comments that are not "respectful." Such a statement, "made at any time, in any place, to any person" would seemingly have difficulty surviving the strict Constitutional scrutiny called for outside the unique Constitutional setting of schools.<sup>173</sup>

Due to this confusion, the better rule would be to treat college student speech as though it were adult speech. Students who attended private institutions would be afforded the same kind of notice of their lessened speech rights that they have of limited due process and religious freedoms.<sup>174</sup>

#### *B. Institutional Processes May Create an Imperfect Record for Appellate Review*

In all three of the professional standards cases, judicial review occurred only after students exhausted internal university grievance procedures.<sup>175</sup> This has the potential to create two problems—the internal processes may create an uncertain record for appellate review, and universities may serve first as arbiters of the student's dispute and later as the opposing party when the case is litigated in court.

Several differences are apparent in the factual summaries of the two available *Tatro* decisions. In the Minnesota Court of Appeals, the number

172. *Tatro II*, 816 N.W. 2d 509, 512 (Minn. 2012).

173. *See* U.S. v. Alvarez, 132 S. Ct. 1537, 2547 (2012) (emphasizing the all-encompassing nature of the speech prohibited in the Stolen Valor Act for the purposes of defining its prohibitions as content-based restrictions triggering strict judicial scrutiny).

174. *See generally* Michael Stokes Paulsen, Lecture, *Freedom of Speech at a Private Religious University*, 2 U. ST. THOMAS J. L. & PUB. POL'Y 104 (2008) (outlining differences in First Amendment rights of public and private universities).

175. *See Tatro II*, 816 N.W.2d 509, 511 (Minn. 2012) (describing initial review of the sanctions by the Campus Committee on Student Behavior and affirmation by university provost); *Ward*, 667 F.3d at 731 (describing formal review committee composition and process); *Keeton*, 664 F.3d at 869–70 (describing formulation of student's "remediation plan").

of people to have access to Tatro's Facebook page is said to be "hundreds" of people.<sup>176</sup> The Minnesota Supreme Court sets the approximate number at "thousands."<sup>177</sup> The Supreme Court opinion also makes no mention of the full measure of sanctions leveled by the university and upheld by the provost. While the appeals court's opinion makes reference to a required ethics course, a letter of apology, and a "complete psychiatric evaluation,"<sup>178</sup> the Supreme Court only reviews the seriousness of a "failing grade."<sup>179</sup> If "the seriousness of the consequences" is an important factor when assessing a university's potential suppression of a student's First Amendment expression rights, then the significant difference between these two sets of sanctions would seem to be relevant to that analysis.<sup>180</sup>

Finally, when initial determinations made against students are subject to review by the courts, university officials may not be fair arbiters of students' rights. As long as a free speech dispute can be captured by the court's deferential curricular decisions jurisprudence, faculty and administrators will know that their sanctions are likely to be upheld by the courts. While this may be appropriate in the grade challenge context, when the student behavior under review is related to traditional academic issues like plagiarism, cheating, or a challenge to an assignment grade, it seems considerably less appropriate when it comes to off-campus electronic speech that does not affect the student's completion of course requirements.

## *VI. What Course Should Universities Steer on "Unprofessional" Student Speech?*

### *A. A Best Practices Approach*

Professionally inappropriate speech acts by students enrolled in professional degree programs poses a unique challenge for public colleges and universities. While professors who view themselves as their students

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176. See *Tatro I*, 800 N.W.2d 811, 815 (Minn. App. 2001) ("Tatro acknowledges that [the group of people with access to her Facebook posts] includes hundreds of people.").

177. *Tatro II*, 816 N.W. 2d at 523.

178. *Tatro I*, 800 N.W. 2d at 815.

179. See *Tatro II*, 816 N.W. 2d at 524 ("... Tatro was not expelled or even suspended from the Mortuary Science Program. The University allowed Tatro to continue in the ... program with a failing grade in one laboratory course.").

180. *Id.* (citing *Doninger v. Niehoff*, 527 F.3d 41, 52–53 (2d Cir. 2008)).

mentors (and administrators who see themselves as guardians of the institution's reputation among members of the fields its professional schools train) may instinctively want to shape and correct such lapses, higher education institutions are ultimately best suited by an amoral approach to student speech acts even when those acts arguably (or even clearly) cross the professional line.

Higher education institutions—even private colleges and universities—are beholden to a reputation for openness to controversial and sometimes blatantly inappropriate conduct. While the judicial definition of “academic freedom” may be limited to the university's sovereign power to determine what its curriculum means, popular opinion and American folkway extend this definition to mean “professors can say what they want and not get fired.”<sup>181</sup> Students at universities may have the right to feel the same way, both as citizens and members of an academic community; often, in fact, they are encouraged to feel this way.<sup>182</sup> Increasingly (and unfortunately), however, they do not—a recent study found that almost forty percent of Minnesota college and university students do not feel as though they have the right to speak their minds about controversial subjects on campus.<sup>183</sup>

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181. See Lawrence White, *Fifty Years of Academic Freedom*, 36 J. C. & U. L. 791, 820 (“[Professors who] invoke academic freedom by virtue of their status . . . collide . . . with one of the fundamental precepts of constitutional law: that constitutional rights are not profession-specific and membership in a particular profession does not bestow constitutional privileges unavailable to citizens at large.”).

182. See AM. COUNCIL OF TRUSTEES & ALUMNI, AT A CROSSROADS: PUBLIC HIGHER EDUCATION IN MINNESOTA 12, (2010), available at [http://www.goacta.org/images/download/at\\_a\\_crossroads.pdf](http://www.goacta.org/images/download/at_a_crossroads.pdf) (citing University of Minnesota Student Conduct Code definition of “Academic Freedom” as “the freedom to discuss all relevant matters in the classroom . . . and to speak or write without institutional discipline or restraint on matters of public concern as well as on matters related to professional duties . . .”). The current version of the document cited by the American Council of Trustees & Alumni report has apparently been updated to remove explicit references to academic freedom, and instead states that “[t]he University seeks an environment . . . that is protective of free inquiry. . . .” UNIV. OF MINN. BD. OF REGENTS, STUDENT CONDUCT CODE § I(b), amended Oct. 11, 2012, available at [http://www1.umn.edu/regents/policies/academic/Student\\_Conduct\\_Code.pdf](http://www1.umn.edu/regents/policies/academic/Student_Conduct_Code.pdf). Interestingly, the document also contains the proviso that “[t]he University supports and is guided by state and federal law while also setting its own standards of conduct for its academic community.” *Id.* at § I(d).

183. See *id.* at 16 (reporting that 39.1% of Minnesota college and university students agreed with the statement “On my campus, there are certain topics or viewpoints that are off-limits.”).

As the *Tatro* case demonstrates, public colleges and universities have little to gain, beyond proof of their own power, from media-fueled street fights with students over tasteless Facebook posts, which create the impression of a David-versus-Goliath dynamic even when the institutional position rests on firm legal ground.<sup>184</sup> In addition to the risk that it might lose the legal battle—even when that risk is low—institutions must face potential public opposition from student groups<sup>185</sup> and members of their own faculty,<sup>186</sup> whose statements to the media on the subject will undoubtedly be protected on First Amendment grounds. Once the matter hits the press, any statements made in defense of a disciplined student will be protected as speech on matters of public concern—which, if nothing else, muddies the rhetorical waters as to the appropriateness of the original student speech.

Another problematic aspect of the student-institutional social media relationship evidenced in *Tatro II* is the lack of a clear social media policy addressing hybrid forms such as Facebook. Amanda's class syllabus forbade "blogging" about cadavers, but made no specific mention of Facebook or other personal social media sites—the only reference to Facebook occurred during the class's orientation session.<sup>187</sup> While the distinction was unimportant to the Minnesota Supreme Court, it is incredibly important in the professions, where individuals can (and, according to most experts giving good advice, should) manage their social

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184. See, e.g., William Creeley, *In Troubling Ruling, Minnesota Court of Appeals Upholds Punishment of Student for Facebook Posts*, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, July 12, 2011, available at <http://thefire.org/article/13368.html> (illustrating negative national attention *Tatro I* drew to the University of Minnesota from a public interest group).

185. See Editorial, *Free Speech Comes First*, MINN. DAILY, Feb. 15, 2012, available at <http://www.mndaily.com/2012/02/15/free-speech-comes-first> (expressing the editorial board's concern that financial motivations might influence the University's motivation for punishing student speech, and asking "[w]hat will happen the next time a student criticizes an aspect of University research or wasteful administration that . . . reduces a donor's willingness to give?").

186. See Kaitlin Walker & Katherine Lymn, *From Facebook to Court: U Defends Discipline*, MINN. DAILY, Feb. 13, 2012, available at <http://www.mndaily.com/2012/02/13/facebook-court-u-defends-discipline> (relaying University of Minnesota media law professor Jane Kirtley's concern that the then-current student conduct code may violate the First Amendment).

187. See *Tatro II*, 816 N.W. 2d 509, 512 (Minn. 2012) ("The instructor for the anatomy lab course testified that 'blogging' was intended to be a broad term and that she explained to the students during orientation that blogging included Facebook and Twitter.").



media presence in such a way as to allow for a vibrant, stress-relieving private life that does not present the potential for public professional embarrassment. By some accounts, “gallows humor” is not only prevalent in mortuary schools, but is recognized by practitioners as a healthy way to deal with the pressures of the traditionally somber profession.

Discussion on the proper role of universities in shaping their students’ use of social media abounds. Often, and unsurprisingly, the focus of such “best practices” pieces is the increasing problem of cyber-bullying.<sup>188</sup> Unfortunately, too many of these strategies focus on keeping students from doing things that might embarrass their educational patrons.<sup>189</sup> If students should be aware that their social media posts may put them at odds with policies in their academic programs, they need clear notice of these policies.<sup>190</sup>

Simply put, colleges and universities—especially, but not only, public ones—have no proper business managing the private interactions between their students and the larger world via non-school-sponsored social media applications. Attempts to do so obscure the institution’s role—at best making them out to be enforcers of a moral agenda and at worst Orwellian oppressors of student speech. Often as not, public outcry over a student’s sanction is what brings these incidents into the public sphere in the first place—not the student’s initial conduct. When this happens, the appropriateness of the student’s original act (or speech act) becomes obscured by the appropriateness of the institution’s response—making the institution lose, with at least some constituencies, even when it wins, time after time, in the courts. And unlike the courts, which can be forced into unpopular decisions by precedent (such as the precedent to give deference

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188. See, e.g., Sara Jane Shanahan & Jessica Gray Kelly, Commentary, *How to Protect Your Students from Cyberbullying*, CHRONICLE OF HIGHER ED., Mar. 25, 2012, available at <http://chronicle.com/article/How-to-Protect-Your-Students/131306/> (suggesting incorporation of social media policies intended to “send an unequivocal message that they will identify and hold accountable students who seek to intimidate others . . . through digital communications” akin to those covering “academic dishonesty”).

189. See, e.g., Reynol Junco, *The Need for Student Social Media Policies*, EDUCAUSE REVIEW, Jan/Feb 2011 60–61, available at <http://net.educause.edu/ir/library/pdf/ERM1118.pdf> (encouraging policymakers to incorporate student conduct and hate speech codes into clearly-articulated social media policies).

190. See AM. COUNCIL OF TRUSTEES & ALUMNI, *supra* note 182, at 16 (reporting that only 4.9% of Minnesota students disagreed with the statement “Students feel free to state their social or political views through social media, such as Facebook or Myspace, without getting in trouble on my campus.”).

to academic administrative disciplinary boards), colleges and universities are free to make their own policy about student social media speech—including the best policy, to leave it alone.

*B. Extending Alvarez: A “Stolen Professionalism” Approach*

In 2012, the Supreme Court decided *U.S. v. Alvarez*,<sup>191</sup> invalidating the “Stolen Valor” law that made false claims to have earned certain military decorations a federal crime.<sup>192</sup> The respondent was a member of a Claremont, California municipal office who claimed, in numerous public meetings, to have been wounded several times in combat and been awarded the nation’s highest military honor, the Medal of Honor.<sup>193</sup> The Court determined that the statute’s broad reach—to encompass “a false statement made at any time, in any place, to any person[,]” regardless of the speaker’s intent—and lack of any other condition precedent made the law a content-based restriction on speech, and thus subject to strict judicial scrutiny.<sup>194</sup> Moreover, there was no “long (if heretofore unrecognized) tradition of proscription” of false statements on no other basis than their falsity.<sup>195</sup> In striking down the statute, the Court, per Justice Kennedy, spoke in strong terms about the need to protect speech that was not only offensive, but also unambiguously false:

Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage [i.e., to cause a cognizable harm to another], it would give government a broad censorial power unprecedented in this Court’s cases or in our constitutional tradition. The mere potential for the exercise of that power casts a chill, a chill the First amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom.<sup>196</sup>

The Court’s language in search of a compelling governmental interest is, given the vastly different context, surprisingly instructive of the

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191. *U.S. v. Alvarez*, 132 S. Ct. 2537 (2012) (holding that the Stolen Valor Act’s prohibition of false claims to military honors was an unconstitutional content-based restriction on free speech).

192. *See id.* at 2543 (describing the substance of the Stolen Valor Act).

193. *See id.* at 2542 (relaying facts of the case below).

194. *Id.* at 2547.

195. *Id.*

196. *Id.* at 2547–48.

professional student speech conundrum. “Public recognition of valor and noble sacrifice by men and women in uniform” the Court wrote, “reinforces the pride and national resolve that the military relies upon to fulfill its mission.”<sup>197</sup> Arguably, a very similar concern animates the public’s interest in maintaining the reputation of members of the licensed professions. If a false statement is analogous to a statement that brings potential shame to one’s own profession (or, as in *Alvarez*, a statement that brings shame to a profession one does *not* belong to), then the blanket prohibition of such statements may be entitled to similar constitutional protection.

Even if, for some reason, unprofessional statements are not analogous to false ones, imagining statements satisfying both criteria, and that nonetheless fit within the Court’s *Alvarez* analytic framework, is not difficult. What if Tatro had made the following statement, online or off: “All mortuary science students at the University of Minnesota are members of a Satanic cult”? Or, “Some mortuary science students at the University of Minnesota use their donated cadavers to perform Satanic rituals”? The first of these statements is likely both defamatory and false; the second clearly implicates the professional conduct standard—treating the dead with respect—that Tatro was found to have violated. Surely it is more damaging, if believed, to the reputation of the mortuary profession than an oblique reference to a limp late-eighties comedy. Yet, because the statements are false, they do not indicate actual violation of the code except *as* pure speech. And the Supreme Court’s analysis in *Alvarez* suggests that, as such, they would be protected but for some professional licensure exception to the First Amendment.

*Alvarez* provides one other potentially useful analytic tool for use in school speech cases: an expressed judicial preference for “counterspeech” that will achieve substantially the same goal as prohibition.<sup>198</sup> “The remedy for speech that is false is speech that is true. . . . The response to the unreasoned is the rational; to the unformed, the enlightened; to the straightout lie, the simple truth.”<sup>199</sup> Speech out of character with the codified standards of the speaker’s profession—as long as that speech does not harm the interests of another<sup>200</sup>—would seem to fit within the Court’s

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197. *Id.* at 2548.

198. *Id.* at 2549.

199. *Id.* at 2550.

200. Arguably, some professional conduct standards establish speech restrictions that safeguard not the profession, but the physical and financial interests of others, such as fiduciaries. See, e.g., MODEL R. OF PROF’L CONDUCT R. 1.6 (1983) (prohibiting lawyers

analysis. As to Tatro, it would be hard to argue that a statement to the media about the inappropriateness of her remarks would have corrected whatever damage her remarks inflicted on the University's reputation, given the vast degree of community respect enjoyed by the latter. And, before any media correction would have been necessary—Tatro only revealed her Facebook posts to the press *after* she was disciplined by the University—the mortuary science program would likely have been able to show students why the posts were inappropriate by means of a dialogic seminar of some kind. At the university, Justice Brandeis can be taken literally: “If there be time to expose through discussion the falsehood and fallacies, *to avert the evil by the processes of education*, the remedy to be applied is more speech, not enforced silence.”<sup>201</sup> Surely universities, by definition the most sophisticated institutions of learning around and the intellectual home of our greatest and most persuasive minds, should be the last to pass up an opportunity to teach.

### VII. Conclusion

If, as Justice Holmes said, “the best test of truth is the power of the thought to get itself accepted in the competition of the market,”<sup>202</sup> then the best test of the attitudes of our professionals towards their clients, alive or dead, may be the power of those attitudes to withstand public scrutiny. The fact that a student can be punished for expressing an unprofessional attitude does not necessarily guarantee the eradication of that thought—especially if punishment creates a sense of persecution in the offender, as is often the case.<sup>203</sup> If anything, Amanda Tatro's vindication in the press and cause celeb status on education rights blogs teaches us this lesson. That a student is a professional student (as opposed to what, we might ask—an

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from disclosing confidential information); R. 1.13(g) (requiring lawyers to inform corporate officers of institutional clients that they represent the institution and not necessarily its officers); R. 4.1 (prohibiting a lawyer from making false statements of material fact or law to a third party in the course of representation of a client).

201. *Whitney v. California*, 274 U.S. 357, 377 (1972).

202. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

203. See Deborah Selby & Sharon Murphy, *Graded or Degraded: Perceptions of Letter-Grading for Mainstreamed Learning-Disabled Students*, 16 B.C. J. OF SPECIAL ED. 92–104 (1992) (collecting research across all student levels and showing that students who receive failing grades often withdraw from the learning process or justify grades as meaningless).

“academic” or even “real” student) would seem to offer a distinction unworthy of a new exception to First Amendment protections. That distinction appears to be hardening, however. Professors and students—the core constituency of the “academy” as we understand it—should be aware of what they be signing up for, and what they may be signing away.