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Thirty Years of Hazelwood and Its Spread to Colleges and University Campuses

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Thirty Years of *Hazelwood* and Its Spread to Colleges and University Campuses

DAVID L. HUDSON, JR.*

I. INTRODUCTION: THE *HAZELWOOD* DECISION

Thirty years ago, the U.S. Supreme Court dramatically decreased the level of First Amendment protection for high school students in *Hazelwood School District. v. Kuhlmeier.*[1] The Court in *Hazelwood* created a new rule for so-called "school-sponsored" student speech, as opposed to student-initiated speech. This decision proved to be very deferential to school administrators and led to increased censorship across the country. The decision sparked an outcry that became

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

known as the anti-*Hazelwood* movement.[2] Numerous states passed laws that provided greater statutory protection for high school student journalists or other students than the limited constitutional protection the Supreme Court provided in *Hazelwood*.[3]

Sadly, the *Hazelwood* standard not only led to increased censorship of high school newspapers and other forms of school-sponsored student speech, but it also creeped outside of its original application in the K-12 environment and impacted First Amendment jurisprudence involving college and university campuses.[4] This metastasizing phenomenon has occurred in a variety of contexts, including college press censorship cases,[5] curricular choices of university professors,[6] professionalism standards,[7] online speech disputes,[8] and even professorial speech cases.[9]

The *Hazelwood* standard should be applied sparingly, if at all, at the college and university level. College and university students, nearly all of whom are legal adults, are learning in environments that are supposed to represent the marketplace of ideas. Universities are, as Erwin Chemerinsky and Howard Gillman explain, "spaces where all ideas can be expressed."[10]

Unfortunately, some ideas are not accepted at public college and university campuses. Students are often shielded from ideas deemed offensive by trigger warnings or safe spaces. They sometimes are protected from speech that might cause a "microaggression." Indeed, something different is happening at colleges and universities in recent years, as Greg Lukianoff and Jonathan Haidt expressed so vividly in

2. Elaina Koros, *A Catalyst for Reform: North Dakota's New Anti-Hazelwood Law Has Rebuilt a National Movement*, STUDENT PRESS L. CTR. (Aug. 24, 2015), http://www.splc.org/article/2015/08/a-catalyst-for-reform.

3. *Id.*

4. Vikram David Amar & Alan Brownstein, *A Close-up Modern Look at First Amendment Academic Freedom Rights of Public College Students and Faculty*, 101 MINN. L. REV. 1943, 1946 (2017) (noting that "Hazelwood has a reach that in fact has extended to college campuses.").

5. *See* Alan Browstein, *The Nonforum As A First Amendment Category: Bringing Order Out Of The Chaos Of Free Speech Cases Involving School-Sponsored Activities*, 42 U.C. DAVIS L. REV. 717, 749 (2009).

6. *Id.* at 761–62.

7. *See* Neal H. Hutchens, *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, 371 (2011).

8. *See* J.S. ex rel. Snyder v. Blue Mountain Sch. Dist., 593 F.3d 286, 290 (3d Cir. 2011) (en banc).

9. Demers v. Austin, 746 F.3d 402 (9th Cir. 2014); *see, e.g.*, Gorum v. Sessoms, 561 F.3d 179, 182–86 (3d Cir. 2009).

10. ERWIN CHEMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS 72 (2017).

their article "*The Coddling of the American Mind.*"[11] Part of this rising tide of censorship at college and university campuses can be attributed to the growing use of the *Hazelwood* standard in a variety of contexts. This Article first examines K-12 student speech law before *Hazelwood* and then discusses the *Hazelwood* decision. Next, the article focuses on the spread of *Hazelwood* and its deferential standard to the college and university level. This section examines cases from five different areas where the standard has been utilized with increasing frequency. Finally, the Article offers a few concluding thoughts on the *Hazelwood* standard and why it should be limited, if not interred.

A. Student (K-12) Speech Before *Hazelwood*

K-12 students possessed a greater degree of free speech rights under the First Amendment before the *Hazelwood* decision. While students possessed little to no free speech rights for the nineteenth century and a good portion of the twentieth century, the U.S. Supreme Court changed the equation in the seminal flag-salute decision *West Virginia Bd. of Educ. v. Barnette*, issued on Flag Day in 1943.[12]

Marie and Gathie Barnette attended Slip Hill Grade School near Charleston, West Virginia.[13] They and their father were Jehovah Witnesses and did not believe in saluting the flag, considering it a graven image.[14] They ended up facing expulsion for exercising their religious freedom. "Our teacher was very understanding," Marie Snodgrass (formerly Barnette) recalled in 2009.[15] "However, the principal was sterner. He wanted to know why we wouldn't do what the other kids were doing. He was a little less kind."[16]

The legal outcome looked bleak for the sisters, as the Supreme Court had upheld a flag salute law only a few years previously.[17] That decision had tragically contributed to a wave of violence perpetrated

11. Greg Lukianoff & Jonathan Haidt, *The Codding of the American Mind*, THE ATLANTIC (Sept. 2015), https://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/.

12. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 644 (1943).

13. David L. Hudson Jr., *Woman in Barnette Reflects on Flag Salute Case*, NEWSEUM INSTITUTE (Apr. 29, 2009), http://www.newseuminstitute.org/2009/04/29/woman-in-barnette-reflects-on-flag-salute-case/.

14. *Id.*

15. *Id.*

16. *Id.*

17. Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 600 (1940).

against Jehovah Witnesses across the country.[18] However, the Supreme Court was looking for a case to rectify its mistake, and found such a case in *Barnette*. The Court declared that public school officials violated the First Amendment by forcing students to salute the flag and recite the Pledge of Allegiance.[19] In celebrated language, Justice Robert Jackson wrote:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.[20]
>
> That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.[21]

The *Barnette* decision ensured that public school students possess some level of First Amendment free speech rights in the public schools. However, there was some confusion over whether the decision rested on the Free Exercise Clause or the Free Speech Clause. Furthermore, the Supreme Court did not establish a legal test to determine when student speech should be protected.[22]

In 1969, the Court finally articulated a test for student speech in a celebrated decision, *Tinker v. Des Moines Independent Community School District*[23] that has roots in the Civil Rights and anti-war movements. The case involved a group of students from Des Moines, Iowa, who sought ways to express their opposition to the Vietnam War, support Robert Kennedy's Christmas truce, and mourn those who had died in the conflict.[24] John Tinker, Mary Beth Tinker, Christopher

18. Garret Epps, *America's New Lesson in Tolerance*, THE ATLANTIC (Sept. 1, 2016), https://www.theatlantic.com/politics/archive/2016/09/americas-new-lesson-in-tolerance/498404/.

19. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

20. *Id.*

21. *Id.* at 637.

22. DAVID L. HUDSON, JR., LET THE STUDENTS SPEAK!: A HISTORY OF THE FIGHT FOR FREEDOM OF EXPRESSION IN AMERICAN SCHOOLS 45 (2011) ("The uncertainties of Barnette meant that school officials and students did not know the precise contours of First Amendment rights in schools.").

23. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969).

24. Davis L. Hudson, Jr., *On 30-Year Anniversary, Tinker Participants Look Back at Landmark Case*, NEWSEUM INST. (Feb. 24, 1999), http://www.newseuminstitute.org/1999/02/24/on-30-year-anniversary-tinker-participants-look-back-at-landmark-case/.

Eckhardt, and a few other students chose black armbands as their symbol of protest.[25]

School officials quickly learned of the impending protest and passed a no-armband rule.[26] Tellingly, school officials selectively targeted the black armbands, allowing students to wear other symbols, such as Iron Crosses and political campaign buttons.[27] Thus, school officials engaged in what is known in First Amendment doctrine as viewpoint discrimination. They selectively targeted a specific symbol associated with a specific viewpoint.[28]

After they were suspended from school, the Tinkers and Eckhardt sued in federal court.[29] They lost in the lower courts but took the fight all the way to the Supreme Court and achieved redemption before the High Court by a 7-2 vote.[30] The Court ruled that the students had a First Amendment right to wear black peace armbands to their school.[31] The Court proclaimed that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gates."[32] The Court also established a relatively speech-protective test in *Tinker* – that school officials can censor student speech only if the officials can reasonably forecast that the speech will cause a substantial disruption of school activities or invades the rights of others.[33]

The *Tinker* decision showed a remarkable degree of respect for student rights.[34] Much of the opinion reads like a paean to student expression and a denunciation of official school censorship.[35] The Court wrote that "schools are not enclaves of totalitarianism"[36] and "students may not be regarded as closed-circuit recipients of only that

25. *Id.*

26. *Tinker*, 393 U.S. at 504.

27. *Id.* at 510; *see also* HUDSON, *supra* note 22, at 59–60.

28. David L. Hudson, Jr., *School Officials Should Remember Lessons of Tinker,* NEWSEUM INSTITUTE (Nov. 23, 2009), http://www.newseuminstitute.org/2009/11/23/school-officials-should-remember-lessons-of-tinker/.

29. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 258 F. Supp. 971, 972 (S.D. Iowa 1966).

30. *Tinker*, 393 U.S. at 503, 514.

31. *Id.* at 513–14.

32. *Id.* at 506.

33. *Id.* at 508, 514.

34. Stuart L. Leviton, *Is Anyone Listening to Our Students? A Plea for Respect and Inclusion*, 21 FLA. ST. L. REV. 35, 41 (1993).

35. David L. Hudson, Jr., *Black Armbands, "Boobies" Bracelets and the Need to Protect Student Speech*, 81 UMKC L. REV. 595, 596 (2013); Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gate*, 48 DRAKE L. REV. 527, 527 (2000).

36. *Tinker*, 393 U.S. at 511.

which the State chooses to communicate."[37] The decision led to a litany of challenges to dress codes, hair regulations, censorship of student publications, and a variety of other challenges.[38]

B. The *Hazelwood* Decision

A more conservative Supreme Court created exceptions to the *Tinker* standard in the 1980s, beginning by carving out a new rule for student speech that was vulgar and lewd. A student named Matthew Fraser was suspended after delivering a speech nominating another student for elective office.[39] The problem for school officials was that his speech was laced with sexual references.[40] The Court explained in *Bethel Sch. Dist. v. Fraser* that students' free expression rights "must be balanced against society's countervailing interests in teaching students the boundaries of socially appropriate behavior."[41] The Court also explained that students, as minors, don't have the same constitutional rights as adults.[42]

That ruling set the stage for the Court's next foray into student speech and another carve-out to the *Tinker* standard. Students at Hazelwood East High School produced a newspaper called *The Spectrum* as part of their journalism class.[43] They had an advisor who generally supported their efforts.[44] However, that advisor left in the spring semester to take a job in the private industry.[45] A new advisor took over, one who was not as familiar with the process.[46] The students submitted copies of the articles for the spring edition to the new advisor.[47] Two of the articles dealt with teen pregnancy and the impact of divorce upon teens.[48]

The advisor showed the articles to the school principal, Robert Reynolds, who objected to the two articles.[49] Reynolds believed that

37. *Id.*
38. *See generally* HUDSON, *supra* note 22, at 69 (noting that the decision in *Tinker* brought forward a number of student-speech related issues).
39. Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 678 (1986).
40. *Id.* at 678–79.
41. *Id.* at 681.
42. *Id.* at 682.
43. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 262 (1988).
44. *See generally id.* at 263–64 (noting that the advisor made issue primarily with the identity of the individuals of the reported in the subjected articles).
45. *Id.* at 263.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*

the pregnancy article did not shield the identity of the pregnant student quoted.[50] He also felt that the article's references to sexual activity and birth control were unsuitable for some younger students.[51] The censorial justification for this article was dubious. The pregnant students had consented to interviews, gave their names, and were, of course, pregnant.[52] The journalism students had even changed the pregnant students' names in the actual article.[53]

Reynolds also objected to the divorce article, opining that the article did not afford the parent of a student quoted a chance to respond to comments the student made about the parent.[54] The article in question quoted a freshman student who said, "my dad wasn't spending enough time with my mom, my sister and I. He was always out of town on business or out late playing cards with the guys."[55]

"It wasn't the topic, and it wasn't the point of view," Reynolds said. "It was the invasion of privacy and lack of balanced view."[56] The copy of the article that Reynolds had read featured the real name of the student whose father was identified.[57] He thought the father should have a chance to respond to the article. However, the student editors already had replaced the student's name with a pseudonym.[58]

Reynolds ordered two pages deleted from the six-page paper.[59] Three female student editors – Cathy Kuhlmeier, Lee Ann Tippett West, and Leslie Smart – objected to the decision and filed suit in federal district court.[60]

The district court ruled in favor of school officials after a bench trial.[61] At trial, the students introduced evidence that, since 1976, the newspaper had covered a range of topics including articles on teenage

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50. *Id.*

51. *Id.*

52. Bari Sue Kenyon, *Drawing the Line on Student Rights: Censorship Has No Place in High School*, N.Y. TIMES (Feb. 21, 1988), http://www.nytimes.com/1988/02/21/nyregion/long-island-opinion-drawing-line-student-rights-censorship-has-no-place-high.html.

53. *Hazelwood*, 484 U.S. at 263.

54. *Id.*

55. *Id.*

56. Michael D. Sorkin & Tom Uhlenbrock, *Educators Elated; Not so Students*, ST. LOUIS POST-DISPATCH, Jan. 14, 1988, at 8A.

57. *Id.*

58. William H. Freivogel, *Supreme Court's Rulings Limit Rights of Students*, ST. LOUIS POST-DISPATCH, Jan. 17, 1988, at 8C.

59. *Id.*

60. David G. Savage, *Justice OK Censorship by Schools: Say Educators Can Control Content of Pupil Publications*, L.A. TIMES (Jan. 14, 1988), http://articles.latimes.com/1988-01-14/news/mn-36120_1_high-school-students.

61. Kuhlmeier v. Hazelwood Sch. Dist., 607 F. Supp. 1450, 1450 (E.D. Mo. 1985).

dating, the impact of television on kids, students' use of drugs and alcohol, race relations, teenage marriage, the death penalty, a desegregation case in St. Louis, teenage pregnancy, religious cults, the military draft, school busing, and student Fourth Amendment rights.[62]

While the student newspaper covered a range of topics, the district court viewed the newspaper more as a learning opportunity in a controlled environment rather than a public forum in which students could write topics freely without editorial control.[63] The court explained that "the *Spectrum* was an integral part of Hazelwood East's curriculum, as opposed to a public forum for free expression by students."[64] The district court added that "the most telling facts are the nature and extent of the Journalism II teacher's control and final authority with respect to almost every aspect of producing *Spectrum*, as well as the control or pre-publication review exercised by Hazelwood officials in the past."[65] The district court reasoned that school officials could censor a school-sponsored publication as long as the school had a "substantial and reasonable basis."[66]

The U.S. Court of Appeals for the Eighth Circuit reversed, finding that the *Spectrum* was not part of the school curriculum and instead was operated as a "conduit for student viewpoint."[67] The appeals court reasoned that school officials could not censor the student articles unless school officials could show that the articles would cause a substantial disruption of school activities or would invade the rights of others.[68]

The Eighth Circuit addressed whether the two articles in question invaded the rights of others.[69] It reasoned that student speech invades the rights of others only when such expression could expose the school to tort liability.[70] The appeals court found that there could be no tort action over the divorce article because the story did not use the quoted students' real names.[71] The only possible tort action available with the pregnancy article would have been invasion of privacy. However, this tort was not possible because the pregnant students freely

62. *Id.* at 1453.
63. *Id.* at 1465–66.
64. *Id.* at 1465.
65. *Id.* at 1465–66.
66. *Id.* at 1463 (quoting Frasca v. Andrews, 463 F. Supp. 1053, 1052 (E.D.N.Y. 1979)).
67. Kuhlmeier v. Hazelwood Sch. Dist., 795 F.2d 1368, 1372 (8th Cir. 1986).
68. *Id.* at 1374.
69. *Id.*
70. *Id.* at 1376.
71. *Id.*

consented to the interviews and the students did not even identify them by their real names.[72]

The Eighth Circuit also noted that the *Spectrum* was distributed not only to students and the school community, but to the public as well.[73] The appeals court concluded that the *Spectrum* was a public forum and there was no evidence that the articles could reasonably have caused a substantial disruption.[74] Thus, the students prevailed.

On further appeal, the Supreme Court reversed in a 5-3 decision.[75] Justice Byron White wrote the opinion for the majority.[76] White focused on whether the student newspaper was a public forum open to indiscriminate use by the public or whether it was a "supervised learning experience for journalism students."[77] He opined that the newspaper was created as part of journalism class and there was no intent on the part of school officials to relinquish control over its content.[78]

Kuhlmeier and the other plaintiffs argued that the Supreme Court should apply the *Tinker* "substantial disruption" standard.[79] Presumably, she would have prevailed easily under this standard, as there appeared to be no showing remotely close to a finding of disruption, much less a substantial disruption.

The school district advanced the curriculum argument, that it had greater control over this type of student speech because the newspaper was part of the curriculum.[80] "The real issue in this case is that the school paper produced as part of a class was a matter of the school curriculum," said attorney Robert P. Baine, who argued the case for the school district.[81] "Ultimately, the board of education determined curricular content. The school can require a student newspaper to be reflective of good journalism standards."[82]

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72. *Id.* at 1376.

73. *Id.* at 1372.

74. *Id.* at 1378.

75. There were only eight justices at the time, as Justice Anthony Kennedy was not appointed until Feb. 1988.

76. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 262 (1988).

77. *Id.* at 270.

78. *Id.*

79. *Id.* at 265.

80. *Id.* at 268.

81. David L. Hudson, Jr., *Cathy Cowan Reflects on Her High School Journalism Fight in Hazelwood case*, NEWSEUM INST. (Dec. 27, 2001), http://www.newseuminstitute.org/2001/12/27/cathy-cowan-reflects-on-her-high-school-journalism-fight-in-hazelwood-case/.

82. *Id.*

The majority framed the issue in a way that many lower courts have recited: "the question whether the First Amendment requires a school to tolerate particular student speech – the question that we addressed in *Tinker* – is different from the question whether the First Amendment requires a school district to promote particular student speech."[83] The majority referred to the student newspaper and other school-sponsored publications as school-sponsored speech.[84] Such speech, wrote Justice White, was speech that "students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."[85]

The Court created a new rule for school-sponsored student speech, as opposed to student-initiated speech under *Tinker*. Under this rule, school officials could censor school-sponsored student speech "so long as their actions are reasonably related to legitimate pedagogical concerns."[86] The Court's standard for school-sponsored speech was remarkably similar to a standard the Court had articulated one year earlier in a prison censorship case, *Turner v. Safley*.[87] The standard in the *Safley* case was that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[88] Thus, the Court seemingly substituted the word "pedagogical" for "penological."[89]

This "legitimate pedagogical concerns" standard was very broad. The majority provided numerous examples, including censoring student articles that were "ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences."[90] The Court also noted that school officials could prohibit school-sponsored student speech that advocated illegal drug or alcohol usage, irresponsible sex, or other inappropriate behavior.[91] The majority also determined that school officials could reasonably censor school-sponsored student speech that "associate[d] the

83. *Hazelwood*, 484 U.S. at 270–71.
84. *Id.* at 271.
85. *Id.*
86. *Id.* at 273.
87. Turner v. Safley, 482 U.S. 78, 87, 91 (1987).
88. *Id.* at 89.
89. DAVID L. HUDSON, JR., LET THE STUDENTS SPEAK: A HISTORY OF THE FIGHT FOR FREE EXPRESSION IN AMERICAN SCHOOLS 99 (Christopher Finan ed., 2011).
90. *Hazelwood*, 484 U.S. at 271.
91. *Id.* at 272.

school with any position other than neutrality on matters of political controversy."[92]

Applying this broad standard, the majority determined that Principal Reynolds acted reasonably in removing the two articles.[93] It found that his concerns about students identifying the pregnant student quoted were reasonable, as were his fears that the article was not "sufficiently sensitive to the privacy interests" of the pregnant students' boyfriends and family members.[94] The majority also determined that Principal Reynolds acted reasonably with regard to the divorce article, as the article contained very critical comments about the father of one of the students quoted in the story.[95] Reynolds believed that in the interest of "journalistic fairness" the parent should have had the opportunity to respond – a concern shared by the majority.[96] The majority concluded that Reynolds did not act unreasonably.[97]

Justice William Brennan – joined by Justices Thurgood Marshall and Harry Blackmun – wrote a fiery dissent. He criticized the majority's creation of a new category for school-sponsored student speech and instead would have evaluated the case under the familiar *Tinker* standard.[98] He accused the majority of sanctioning "blanket censorship authority."[99]

He noted that Principal Reynolds never consulted the students before censoring their articles.[100] He also warned that the majority's deferential standard would allow school officials the ability to "camouflage viewpoint discrimination as the 'mere' protection of students from sensitive topics."[101] Brennan accused Principal Reynolds of "brutal censorship"[102] and criticized the Court for teaching the wrong civics lesson.[103]

Administrators praised the Court's decision. "The authority of boards of education was being threatened if this case had been

92. *Id.*
93. *Id.* at 276.
94. *Id.* at 274.
95. *Id.* at 275.
96. *Id.*
97. *Id.* at 275–76.
98. *Id.* at 277 (Brennan, J., dissenting).
99. *Id.* at 280.
100. *Id.* at 285.
101. *Id.* at 288.
102. *Id.* at 289.
103. *Id.* at 277, 291.

lost,"[104] said Francis Hess, superintendent of the Hazelwood School District. "It's a victory for our authority to control our own curriculum."[105]

C. Anti-*Hazelwood* Movement

Criticism abounded of the Court's decision in *Hazelwood.* Journalism Professor Sherry Richiardi told the *St. Louis Post Dispatch*: "we've removed the First Amendment from our high schools. It will have an incredibly chilling effect."[106] The *Los Angeles Times* editorialized that the Supreme Court majority taught "censorship as a lesson."[107] *New York Times* reporter Fred M. Hechinger proved prescient when he wrote before oral argument in *Hazelwood* that the Court's decision "could have a lasting effect on student journalism and young people's views about freedom of the press and responsibility."[108] High school editor Kim Jenkins wrote that she was "enraged" by the Court's decision.[109] She said student journalists lost opportunities to learn and instead would be subject to the whims of school administrators.[110]

Some states responded with laws – called anti-*Hazelwood* laws – that provided greater statutory protection to student journalists or all students than the Supreme Court did in *Hazelwood.*[111] Most of the state laws required school officials to meet the *Tinker* standard of substantial disruption before censoring students. For example, Massachusetts' law provides:

> The right of students to freedom of expression in the public schools shall not be abridged, provided that such right shall not cause any disruption or disorder within the school. Freedom of expression shall include without limitation, the rights and responsibilities of students, collectively and individually, (a) to express their views

104. Sorkin & Uhlenbrock, *supra* note 56, at A1.
105. *Id.*
106. *Id.*
107. *Censorship as a Lesson*, L.A. TIMES (Jan. 16, 1988), http://articles.latimes.com/1988-01-16/local/me-9100_1_supreme-court.
108. Fred M. Hechinger, *Limits on Student Press*, N.Y. TIMES (Oct. 20, 1987), http://www.nytimes.com/1987/10/20/science/about-education-limits-on-student-press.html.
109. Kim Jenkins, *First Amendment: Is It Just for Adults?*, N.Y. TIMES (Jan. 31, 1988), http://www.nytimes.com/1988/01/31/nyregion/new-jersey-opinion-first-amendment-is-it-just-for-adults.html.
110. *Id.*
111. Mike Hiestand, *Understanding "Anti-Hazelwood" Laws,* NAT'L SCHOLASTIC PRESS ASS'N, http://studentpress.org/nspa/its-the-law-understanding-anti-hazelwood-laws/ (last visited Feb. 10, 2017).

> through speech and symbols, (b) to write, publish and disseminate their views, (c) to assemble peaceably on school property for the purpose of expressing their opinions. Any assembly planned by students during regularly scheduled school hours shall be held only at a time and place approved in advance by the school principal or his designee.[112]

Iowa – the state home to the famous *Tinker* case – adopted an anti-*Hazelwood* statute that went into effect July 1, 1989.[113] Its legislative sponsor, Sen. Richard Varn, said that "students can't learn about fundamental rights and freedoms unless they are allowed to use those rights."[114] Mark Goodman, the longtime director of the Student Press Law Center, said that anti-*Hazelwood* laws were necessary because "an increasing number of school officials are taking advantage of the Supreme Court's broad language [in *Hazelwood*] and censoring student viewpoints simply because they disagree with them."[115]

While the passage of anti-*Hazelwood* laws is a laudable effort, the reality is that those states represent a distinct minority. Most states do not have such a statute.[116] The climate at many high schools around the country is one where censorship prevails. Free speech expert Greg Lukianoff writes that "high school newspapers have been punished, censored, or shut down on a fairly regular basis" for such innocuous things such as articles on abstinence, tattoos, abortion, and gay marriage.[117] High school officials regularly censor articles "for reasons ranging from harmony, to patriotism, to convenience."[118] Law professor Catherine J. Ross similarly concludes that "Hazelwood almost always functions as the equivalent of a 'get out of jail free' card for administrators."[119]

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112. ADMINISTRATION OF THE GOVERNMENT, PUBLIC SECONDARY SCHOOLS; RIGHTS OF STUDENTS TO FREEDOM OF EXPRESSION; LIMITATIONS, Definitions, ch. 71 § 82 (2017).

113. Brian Schraum, *Iowa Supreme Court Lets Adviser's 'Anti-Hazelwood' Victory Stand*, STUDENT PRESS L. CTR. (Jan. 23, 2012), http://www.splc.org/blog/splc/2012/01/iowa-supreme-court-lets-advisers-anti-hazelwood-victory-stand.

114. Nat Hentoff, *In Iowa, Free Speech for Students*, WASH. POST, Aug. 28, 1989, at A13.

115. Fred M. Hechinger, *About Education: How free should high school student papers be?*, N.Y. TIMES, July 5, 1989, at B7.

116. *The First Amendment in Schools: Resource Guide: Student Publications*, NAT'L COAL AGAINST CENSORSHIP, http://ncac.org/resource/the-first-amendment-in-schools-resource-guide-student-publications (last visited Jan. 17, 2018).

117. GREG LUKIANOFF, UNLEARNING LIBERTY: CAMPUS CENSORSHIP AND THE END OF CAMPUS DEBATE 16–17 (2012).

118. *Id.* at 17.

119. CATHERINE J. ROSS, LESSONS IN CENSORSHIP: HOW SCHOOLS AND COURTS SUBVERT STUDENTS' FIRST AMENDMENT RIGHTS 52 (2015).

The *Hazelwood* standard is far too deferential to school officials. Even worse, some school officials "exploit the construct of school sponsorship to roll students' rights further back than the Supreme Court had envisioned."[120] For example, the *Hazelwood* standard has been used to justify censorship of student speech that clearly does not bear the imprimatur of the school.[121]

II. EXPANSION OF *HAZELWOOD* TO THE COLLEGE AND UNIVERSITY LEVEL

The Supreme Court in *Hazelwood* was not completely silent on whether its decision applied to school-sponsored speech on college and university campuses. In a footnote, the Court simply stated that it was not deciding that issue: "We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level."[122]

However, lower courts have not been reluctant to apply *Hazelwood* to limit school-sponsored expression on college and university campuses. These courts cite and rely on *Hazelwood* for the following points from the ill-fated decision:

> Universities have greater control over school-sponsored speech or speech that bears the imprimatur of the school;[123]
>
> Universities have greater control over student speech that occurs in the curriculum than purely student-initiated speech;[124]
>
> Universities can regulate school-sponsored speech if their justification is reasonably related to a legitimate pedagogical concern.[125]

The application of *Hazelwood* to college and university students is troubling. After all, the vast majority of college and university students are legal adults, at eighteen years of age or older. They have the right to vote via the Twenty-Sixth Amendment.[126] This amendment, as scholar Kelly Sarabryn writes, "ensured that students . . . had First

120. *Id.* at 96.
121. *Id.*
122. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).
123. *Id.* at 270–71.
124. *Id.* at 271.
125. *Id.* at 273.
126. *See* Kelly Sarabyn, *The Twenty-Sixth Amendment: Resolving the Federal Circuit Split Over College Students' First Amendment Rights*, 14 TEX. J. C.L. & C.R. 27, 29 (2008) (arguing that the Twenty-Sixth Amendment should lead to the abrogation of less than full First Amendment should end "the childhood abrogation of constitutional rights" for college and university students).

Amendment rights in the university forum and were therefore participants in, rather than recipients of, the marketplace of ideas."[127] Furthermore, "the pedagogical missions of public universities and public elementary and high schools are undeniably different."[128] Colleges and universities are the ideal marketplaces of ideas where First Amendment freedoms ideally should flourish.[129] Furthermore, the Supreme Court has declared that college and university campuses should have the full protections of the First Amendment, writing: "the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large."[130]

The First Amendment ideal does not match the reality of the situation. The reality is that college and university students face many threats to their free speech rights.[131]

A. College Press Censorship

It did not take long for college administrators to view the *Hazelwood* decision as a recipe for censoring student newspapers. Less than 24 hours after the *Hazelwood* decision, the California State University system began studying how the decision could be applied to college and university newspapers.[132] At California State Los Angeles, the independent publisher of the college newspaper was designated "laboratory supervisor."[133] The genesis of the change was not only the *Hazelwood* decision but a feeling among university officials that there was too much "negative news" coming from the student newspaper.[134]

The U.S. Court of Appeals for the Seventh Circuit sent a shockwave through the First Amendment community when it extended the *Hazelwood* standard to uphold the censorship of a college

127. *Id.* at 86.
128. McCauley v. Univ. of V.I., 618 F.3d 232, 243 (3d Cir. 2010).
129. *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).
130. Papish v. Bd. of Curators of Univ. of Mo., 410 U.S. 667, 671 (1973) ("The First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech."); *see also* Healy v. James, 408 U.S. 169, 180 (1972).
131. Robert Shibley, *Current Threats to Free Speech on Campus*, 14 First Amend. L. Rev. 239 (2016).
132. Joan Zyda, *Campus Censorship Made Easy: Cal State L.A. Adapts Missouri High School Ruling*, L.A. Times, Apr. 9, 1988, at A8.
133. *Id.*
134. *Id.*

newspaper in *Hosty v. Carter*.[135] Margaret Hosty, a student at Governors State University, wrote articles in the school newspaper, *The Innovator*, criticizing the Dean of the College of Arts and Science.[136] University officials accused the college newspaper staff of irresponsible journalism and defamation.[137]

Patricia Carter, the Dean of Student Affairs and Services, called the printers of the newspaper and told them not to print any more issues.[138] In essence, university officials shut down a college newspaper because they did not like its critical articles. Hosty and other staff members of the paper sued in federal court, alleging a violation of their First Amendment rights.[139]

The federal district court judge dismissed a few defendants outright or on qualified immunity grounds, but refused to deny the claims against others, including Carter.[140] The district court reasoned that the college newspaper was a public forum and that, as a state university newspaper, it was entitled to traditional free press protections.[141] The federal district court did not cite the *Hazelwood* decision in its opinion.

Carter moved for an interlocutory appeal on the denial of qualified immunity.[142] A three-judge panel of the Seventh Circuit affirmed.[143] The panel reasoned that *Hazelwood* was "inappropriate for a university setting."[144] Carter then petitioned for *en banc* review.[145]

The full panel of the Seventh Circuit reversed.[146] Writing for the majority, Judge Frank Easterbrook determined that "*Hazelwood* provides our starting point."[147] According to Easterbrook, *Hazelwood* supplied the proper framework by asking whether the newspaper was a public or nonpublic forum.[148] He also noted that other circuits had

135. Hosty v. Carter, 412 F.3d 731, 738 (7th Cir. 2005).
136. *Id.* at 732–33.
137. *Id.* at 733.
138. *Id.*
139. *Id.*
140. *Id.* at 738.
141. Hosty v. Governors State Univ., 174 F. Supp. 2d 782, 787 (N.D. Ill. 2001).
142. Hosty v. Carter, 325 F.3d 945, 947 (7th Cir. 2003).
143. *Id.* at 950.
144. *Id.* at 949.
145. *Id.* at 945.
146. Hosty v. Carter, 412 F.3d 731, 739 (7th Cir. 2005).
147. *Id.* at 734.
148. *Id.* at 735–36.

applied the *Hazelwood* standard when addressing curricular speech at the university level.[149]

The Seventh Circuit did not determine the public forum status of the *Innovator*, but noted that the law was not clearly established and granted Carter qualified immunity.[150] Legal commentators excoriated the decision as a devastating blow against college press freedom.[151]

The *Hosty* decision sparked an outcry among student free press advocates. It muddied the waters for college journalists.[152] Illinois soon passed the College Campus Press Act, which enhanced protections for college and university-level journalists.[153] To this day, the Student Press Law Center (SPLC) and others have battled against extending *Hazelwood* to college and university campuses.[154] The SPLC's "New Voices" campaign has led to rulings that have prohibited the application of the *Hazelwood* standard to college and university journalists, if not also high school journalists.[155]

As the SPLC and other free press advocates recognize, student journalists provide a key news outlet for the public; they often uncover corruption and do other vitally important work.[156] The American Bar Association recently recognized this reality, and its House of Delegates passed a resolution that calls for rigorous protections for student journalists at the secondary and post-secondary levels.[157]

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149. *Id.* at 735.

150. *Id.* at 739.

151. Chris Sanders, Comment, *Censorship 101: Anti-Hazelwood Laws and the Preservation of Free Speech at Colleges and Universities*, 58 ALA. L. REV. 159, 172 (2006) ("If Hazelwood arrives on college campuses, it is difficult to see a stopping point for the wreckage it could leave in its wake."); Samantha Harris, *FIRE Policy Statement on "Hosty v. Carter,"* FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Sept. 19, 2005), http://www.thefire.org/fire-policy-statement-on-hosty-v-carter/.

152. Jessica B. Lyons, Note, *Defining Freedom of the College Press After Hosty v. Carter*, 59 VAND. L. REV. 1771, 1786 (2006).

153. Meg McSherry Breslin, *Student-press freedom act OK'd*, CHICAGO TRIB. (June 8, 2007), http://articles.chicagotribune.com/2007-06-08/news/0706070826_1_student-journalists-college-journalists-student-paper; Luke Sheahan, *Illinois State Legislature Passes Student Press Bill*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (June 8, 2007), https://www.thefire.org/illinois-state-legislature-passes-student-press-bill/.

154. *See* Kaitlin DeWulf, *Maryland and Illinois Join Nationwide Anti-Censorship Movement by Filing New Voices Bills*, STUDENT PRESS L. CTR. (Feb. 11, 2016), http://www.splc.org/article/2016/02/maryland-and-illinois-new-voices-bills.

155. *Id.*

156. Tyler J. Buller, *The State Response to Hazelwood v. Kuhlmeier*, 66 ME L. REV. 91, 91–92 (2013) ("Student reporters uncover corruption, help hold government officials accountable to taxpayers and the public, and bring to light important issues that would otherwise go unreported.").

157. Adam Goldstein, *American Bar Association Calls for Protections for Student Media*, THE TORCH (Aug. 17, 2017), https://www.thefire.org/american-bar-association-calls-for-protections-for-student-media/.

B. Class Assignments and Curricular Speech

Many courts have applied the *Hazelwood* standard to class assignments or curricular speech.[158] The U.S. Court of Appeals for the Sixth Circuit applied *Hazelwood* in evaluating whether a university comported with the First Amendment when it expelled a graduate student for speaking out against counseling gay and lesbian patients.[159] Julia Ward, who had a 3.91 grade point average, ran afoul of officials in the counseling program at Eastern Michigan University because she asked her faculty supervisor to assign her to another patient when she was originally asked to counsel a gay client, citing her religious beliefs.[160]

The Sixth Circuit applied the *Hazelwood* standard, noting that the standard applies regardless of the age of the student.[161] "The key word is student," the panel wrote.[162] "*Hazelwood* respects the latitude educational institutions – at any level – must have to further legitimate curricular objectives."[163] The appeals court emphasized another reason why *Hazelwood* applies at all levels of schooling – that it matters whose speech it.[164] "The closer expression comes to school-sponsored speech, the less likely the First Amendment protects it."[165]

In Ward's case, the Sixth Circuit reinstated her claim, even after applying the deferential *Hazelwood* standard, because no professor ever told Ward that she could not refuse to see particular clients.[166] The appeals court noted that the university had on occasion allowed students some say over which clients they counseled.[167] The panel also wrote that a reasonable juror could find evidence of "religious-speech discrimination" from the way officials treated Ward.[168]

While the result in *Ward* was palatable, as there appeared to be evidence of bias against religious speech, the Sixth Circuit's extension

158. *See* Emily Gold Waldman, *University Imprimaturs on Student Speech: The Certification Cases*, 11 FIRST AMEND. L. REV. 382, 394 (2013) ("Although some have stopped short of saying that Hazelwood applies to all school-sponsored speech in the university setting, there is growing consensus that Hazelwood's 'reasonably related to legitimate pedagogical concerns' standard should at least apply to university students' curricular speech.").
159. Ward v. Polite, 667 F.3d 727, 729–32 (6th Cir. 2012).
160. *Id.* at 730.
161. *Id.* at 733.
162. *Id.*
163. *Id.*
164. *Id.* at 734.
165. Ward v. Polite, 667 F.3d 727, 734 (6th Cir. 2012).
166. *Id.* at 736.
167. *Id.*
168. *Id.* at 737.

of *Hazelwood* was troubling. As legal commentator Will Creeley cogently explains: "the Sixth Circuit's opinion in *Ward* . . . treat[s] legal precedent involving the rights of high school students and college students as though they were effectively interchangeable and of equal applicability in evaluating the merit of Ward's First Amendment claim."[169]

Even more recently, the U.S. Court of Appeals for the Tenth Circuit applied the *Hazelwood* logic to a University of New Mexico graduate student who was expelled from a class after making critical comments of the 1985 film *Desert Hearts* in a writing assignment.[170] The student had received A or A minus grades on her other papers but received no grade when she wrote in a paper that "lesbianism is a very death-like state as far as its inability to reproduce naturally" and that "the only signs of potency in the form of the male cock exist in the emasculated body" of a female character.[171]

The student was forced out of the class after the professor accused her of hate speech and said it was not in the student's best interest to return to class.[172] The student eventually sued in state court, but the defendants removed to federal court.[173] A federal district court granted summary judgment to the defendants on qualified immunity grounds.[174] On appeal, a two-judge panel of the Tenth Circuit unanimously affirmed.[175]

The Tenth Circuit relied extensively on *Hazelwood*, citing the deferential standard and numerous passages from the case.[176] The appeals court characterized the student's speech as school-sponsored, recited the deferential *Hazelwood* standard, and surmised that *Hazelwood* sanctioned viewpoint-based decisions about school-sponsored student speech.[177]

The appeals court reasoned that *Hazelwood* arguably applied with even more force at the college level, because "the need for aca-

169. Will Creeley, *Sixth Circuit Relies on High School Cases to Assess Graduate Student's Rights*, THE TORCH (Feb. 10, 2012), https://www.thefire.org/sixth-circuit-relies-on-high-school-cases-to-assess-graduate-students-rights/.

170. Pompeo v. Bd. of Regents of the Univ. of N.M., 852 F.3d 973, 977, 982 (10th Cir. 2017).

171. *Id.* at 978.

172. *Id.* at 979.

173. *Id.* at 981.

174. *Id.*

175. *Id.* at 973, 977. There were only two judges, because Judge Neil Gorsuch, who originally was on the panel, was elevated to the U.S. Supreme Court.

176. Pompeo v. Bd. of Regents of the Univ. of N.M., 852 F.3d 973, 977, 982 (10th Cir. 2017).

177. *Id.* at 982–83.

demic discipline and editorial rigor increases as a student's learning progresses."[178] The appeals court acknowledged that "certain forms of viewpoint discrimination are undoubtedly contrary to [the educational ideal]," but said its precedent did not prohibit educators from censoring student speech "based on viewpoints that they believe are offensive or inflammatory."[179] The student argued that she should not be punished because she offered a viewpoint contrary to the professor's or used words that university officials did not like.[180] The appeals court ended up deferring to university officials lest it "turn every classroom into a courtroom."[181]

In another case, a federal district court in Ohio rejected the First Amendment claim of a student in Ohio University's College of Education.[182] The school's credential review board removed the student after several professors complained the student did not get along well or work well with others and criticized youth literature as "trash" or "garbage."[183]

The federal district court relied on the *Hazelwood* case for two main points. First, it quoted *Hazelwood*'s language that "a school need not tolerate student speech that is inconsistent with its basic educational mission."[184] Second, and more importantly, the court applied the *Hazelwood* rational basis test to find that the college of education had a legitimate pedagogical reason to remove the student, because teachers must possess the ability to communicate with others and be respectful of students.[185]

Another variant of the class assignment line of cases arises when a student challenges a professor's regulation of her speech in a class assignment. A federal district court in Texas addressed a college student's First Amendment claim that her professor discriminated against her by refusing to allow her to speak about the topic of abortion for her public speaking assignment.[186] The federal district court relied extensively on *Hazelwood* and found that the professor had le-

178. *Id.* at 984 (quoting Brown v. Li, 308 F.3d 939, 951 (9th Cir. 2002)).
179. *Id.* at 986.
180. *See id.* at 977.
181. *Id.* at 989–90 (quoting Fleming v. Jefferson Cty. Sch. Dist. R-I, 298 F.3d 918, 928 (10th Cir. 2002)). The Fleming case involved high school speech.
182. Winkle v. Ruggieri, 2013 WL 230136, No. 2:12-CV-01079, at *1 (S.D. Ohio, Jan. 22, 2013).
183. *Id.* at *1.
184. *Id.* at *4 (quoting *Hazelwood*, 484 U.S. at 266).
185. *Id.* at *5.
186. O'Neal v. Falcon, 668 F. Supp. 2d 979, 981–82 (W.D. Tex. 2009).

gitimate pedagogical concerns with limiting students from speaking about the divisive topic of abortion, which may have distracted students.[187]

The student sued her political science professor at San Antonio College after he gave her a grade of B minus instead of an A.[188] She contended that he gave her the low grade because she wanted to speak on the topic of abortion.[189] The district court applied the *Hazelwood* standard without ever questioning whether the standard should apply to college and university students instead of high school students.[190]

At least one legal commentator has questioned whether courts should apply *Hazelwood* with unfailing obeisance to student classroom speech.[191] The commentator explains that *Hazelwood* was principally about giving school officials greater control over school-sponsored student speech, but that certain student classroom speech carries no concerns of being interpreted as school-sponsored.[192]

Graduate students' challenges to university denial of their thesis papers or similar curricular disputes also have raised the specter of the deferential *Hazelwood* standard. The U.S. Court of Appeals for the Ninth Circuit ruled that the *Hazelwood* standard allowed officials at the University of California, Santa Barbara to deny part of a student's thesis and not file his thesis in the school library.[193]

Christopher Brown, who was a graduate student in the Department of Material Science, wrote a thesis entitled "The Morphology of Calcium Carbonate: Factors Affecting Crystal Shape."[194] Brown's reviewing committee members all approved of his thesis.[195] However, Brown then inserted into his thesis a "Disacknowledgements" section that began: "I would like to offer special Fuck You's to the following

187. *Id.* at 986–87.
188. *Id.* at 981.
189. *See id.* at 982–83.
190. *Id.* at 985.
191. Adam Hoesing, *School Sponsorship and Hazelwood's Protection of Student Speech: Appropriate for all Curricuum Contexts?*, NEB. L. REV. (July 24, 2012), https://lawreview.unl.edu/white-paper-%E2%80%9Cschool-sponsorship%E2%80%9D-and-hazelwood%E2%80%99s-protection-student-speech-appropriate-all.
192. *Id.* ("Lower federal courts have routinely applied *Hazelwood's* scope of First Amendment protection when students select, discuss, or present a particular topic as part of curriculum that allows students to freely and sovereignly choose their substantive topic of desire. *Hazelwood's* adoption, however, is inappropriate in this context.").
193. Brown v. Li, 308 F.3d 939 (9th Cir. 2002).
194. *Id.* at 943.
195. *Id.*

degenerates for being an ever-present hindrance during my graduate career."[196]

Department officials would not approve of the "Disacknowledgments" section and would not file Brown's thesis with the library, though they did eventually give him his degree.[197] Brown pursued grievance remedies unsuccessfully and later filed suit in federal court.[198] A federal district court granted summary judgment to university officials.[199] On appeal, the Ninth Circuit affirmed by a 2-1 vote with three separate opinions.[200]

Judge Susan Graber wrote the main opinion.[201] She grappled at length with whether the *Hazelwood* standard applied at the college and university level.[202] Her opinion acknowledged that the Supreme Court had left the question open in *Hazelwood* and admitted it did not "know with certainty" that the Supreme Court would hold that *Hazelwood* controls such inquiries into a college student's curricular expression.[203] Judge Graber reasoned that *Hazelwood* did apply: "In view of a university's strong interest in setting the content of its curriculum and teaching that content, *Hazelwood* provides a workable standard for evaluating a university student's First Amendment claim stemming from curricular speech."[204]

The Ninth Circuit majority applied the deferential *Hazelwood* standard and found that university officials had a legitimate pedagogical concern with Brown's thesis — to teach him "the proper format for a scientific paper."[205] Brown claimed that he had a First Amendment right to draft an acknowledgements or "disacknowledgements" section from any viewpoint.[206] The Ninth Circuit majority disagreed, noting that *Hazelwood* establishes that university officials or professors "may require a student to write a paper from a particular viewpoint, even if it is a viewpoint with the student disagrees, so long as the requirement serves a legitimate pedagogical purpose."[207]

196. *Id.*
197. *Id.* at 954.
198. *Id.* at 945–46.
199. Brown v. Li, 308 F.3d 939, 945–946 (9th Cir. 2002).
200. *Id.* at 939, 941.
201. *Id.* at 941.
202. *See id.* at 949.
203. *Id.* at 951.
204. *Id.* at 952.
205. Brown v. Li, 308 F.3d 939, 952 (9th Cir. 2002).
206. *Id.* at 953.
207. *Id.* at 953.

In a concurring opinion, Judge Warren Ferguson saw no First Amendment problem at all.[208] He viewed Brown's act of inserting his disacknowledgements section as a form of cheating not protected by the First Amendment: "The plaintiff cannot cheat and then seek to evade accountability through the First Amendment."[209]

Judge Stephen Reinhardt dissented on the First Amendment issue.[210] He wrote that the *Hazelwood* standard is "wholly inappropriate" and "would seriously undermine the rights of all college and graduate students attending state institutions of higher learning."[211] He later wrote that he "vehemently disagree[d]" with the decision to import the *Hazelwood* standard into the university context.[212] Reinhardt explained that the *Hazelwood* decision limited high school students who were "young, emotionally immature, and more likely to be inappropriately influenced by school-sponsored speech on controversial topics."[213] Reinhardt also pointed out that college and university students, as adults, are given greater rights, such as the right to vote, join the military, purchase cigarettes, and marry.[214]

C. Professionalism Concerns

Several recent federal appellate courts have applied the *Hazelwood* standard to uphold college and university restrictions over students' alleged failure to adhere to professionalism standards.[215] Jennifer Keeton, a Masters student in counseling, ran afoul of officials at Augusta State University because she expressed her displeasure in class and in written assignments with the "gay and lesbian lifestyle."[216] Officials expressed concern that Keeton would not be able to serve as a good counselor to people from various backgrounds and required her to undergo a remediation plan.[217]

Keeton withdrew from the program and sued, alleging a violation of her free speech and free exercise rights under the First Amend-

208. *See id.* at 955 (Ferguson, J., concurring).
209. *Id.* at 956.
210. *See id.* at 956–57 (Reinhardt, J., dissenting).
211. Brown v. Li, 308 F.3d 939, 957 (9th Cir. 2002).
212. *Id.* at 960.
213. *Id.* at 961.
214. *Id.* at 961.
215. Susan Kruth, *Ninth Circuit Cites 'Professional Standards' in Allowing University to Punish Student Speech*, THE FIRE (Dec. 30, 2015), at https://www.thefire.org/ninth-circuit-cites-professional-standards-in-allowing-university-to-punish-student-speech/.
216. Keeton v. Anderson-Wiley, 664 F.3d 865, 873 (11th Cir. 2011).
217. *Id.* at 867.

ment.[218] A federal district court denied her injunctive relief, and the U.S. Court of Appeals for the Eleventh Circuit affirmed.[219]

The appeals court accepted the college officials' arguments that it could impose the remediation condition on Keeton, because she did not adhere to the American Counselors Association (ACA) Code of Ethics, which required counselors to respect all patients' dignity and show sensitivity.[220] The Eleventh Circuit relied heavily on *Hazelwood*, finding that the clinical practicum was a school-sponsored activity within the meaning of *Hazelwood*.[221] Furthermore, the course was part of the curriculum to which school officials are owed special deference.[222]

The appeals court then applied the *Hazelwood* standard, finding that the university "had a legitimate pedagogical concern in teaching its students to comply with the ACA Code of Ethics."[223] The remediation plan targeted these concerns by trying to ensure that Keeton would be able to counsel patients while still adhering to the ACA Code of Ethics.

This represents, as student press advocate Frank LoMonte has forcefully shown, "a breathtaking expansion of the *Hazelwood* doctrine."[224] The professionalism argument is dangerous from a First Amendment perspective. As free speech expert Mary-Rose Papandrea explains, "professionalism arguments have an elastic character and threaten to encompass virtually any decision a school might make."[225]

The Ninth Circuit has created a different standard for evaluating a university's action against a student for violating professionalism norms in *Oyama v. University of Hawaii*.[226] The Ninth Circuit determined that a university could withhold a student teaching application if the concerns were directly related to professionalism standards and were narrowly tailored.[227]

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218. *Id.* at 871.
219. *Id.* at 865.
220. *Id.* at 869, 880.
221. *Id.* at 875.
222. Keeton v. Anderson-Wiley, 664 F.3d 865, 875–876 (11th Cir. 2011).
223. *Id.* at 876.
224. Frank LoMonte, *"The Key Word is Student": Hazelwood Censorship Crashes the Ivy-Covered Gates*, 11 FIRST AMEND. L. REV. 305, 340 (2011).
225. Mary-Rose Papandrea, *The Free Speech Rights of University Students*, 101 MINN. L. REV. 1801, 1858 (2017).
226. Oyama v. Univ. of Hawaii, 813 F.3d 850, 875–76 (9th Cir. 2015).
227. *Id.* at 868.

Even though it formulated a different standard, the Ninth Circuit still found *Hazelwood* and student speech doctrine instructive in two ways. First, student speech law recognizes "an institutional rationale for a school's decision to regulate its student speech."[228] Second, and more significantly, *Hazelwood* establishes "a school's interest in managing how it "lend[s] its name or its 'imprimatur' to student expression."[229]

However, the Ninth Circuit refused to fully apply *Hazelwood* – as Judge Garber had done in *Brown v. Li* – because it "fails to account for the vital importance of academic freedom at public colleges and universities."[230] Furthermore, the Ninth Circuit in *Oyama* aptly noted that certification decisions by universities involve adults, not high school students.[231]

While the Ninth Circuit laudably did not apply the *Hazelwood* standard with full force, the decision still had an influence on the appeals court's deference to university officials and remains a "deeply regrettable result for students who think critically and wish to speak openly about professional rules and laws that affect their future professions — and for the generations of students who could benefit from these frank discussions."[232]

D. Online Speech

Some courts have used the *Hazelwood* standard to uphold college and university discipline of students for online speech. The U.S. Court of Appeals for the Eighth Circuit ruled that school officials at Central Lakes College could remove a student from its associated nursing degree program for inappropriate Facebook posts.[233]

Craig Keefe made several posts on Facebook that alarmed a classmate.[234] Some of these posts included the following statements:

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

228. *Id.* at 862.
229. *Id.* (quoting *Hazelwood*, 484 U.S. at 271–72).
230. Oyama v. Univ. of Hawaii, 813 F.3d 850, 863 (9th Cir. 2015).
231. *Id.* at 863.
232. *Kruth*, supra note 215.
233. Keefe v. Adams, 840 F.3d 523, 529 (8th Cir. 2016).
234. *Id.* at 526.

> Doesnt anyone know or have heard of mechanical pencils. Im going to take this electric pencil sharpener in this class and give someone a hemopneumothorax with it before to long. I might need some anger management.
>
> LMAO [a classmate], you keep reporting my post and get me banded. I don't really care. If thats the smartest thing you can come up with than I completely understand why your going to fail out of the RN program you stupid bitch. . . .And quite creeping on my page. Your not a friend of mine for a reason. If you don't like what I have to say than don't come and ask me, thats basically what creeping is isn't it. Stay off my page . . . .[235]

Keefe said that many of the posts were jokes, but college officials removed Keefe from the nursing program for not adhering to professionalism standards.[236] He was cited for "transgression of professional boundaries."[237]

Keefe contended that college officials violated his First Amendment free speech rights by removing him from the program for online speech created off-campus that was not related to any assignment or coursework.[238] Citing the *Hazelwood* decision, the Eighth Circuit explained that "college administrators and educators in a professional school have discretion to require compliance with recognized standards of the profession, both on and off campus, 'so long as their actions are reasonably related to legitimate pedagogical concerns.'"[239]

The Eighth Circuit reasoned that the college had a legitimate educational concern in ensuring that its nursing students comply with the Nurses Association Code of Ethics.[240] "As our sister circuits have recognized, a college or university may have an even stronger interest in the content of its curriculum and imposing academic discipline than did the high school at issue in Hazelwood."[241] The appeals court also noted that two of Keefe's classmates indicated they had problems with his posts and would have trouble sharing clinical space with Keefe.[242]

The *Keefe* decision is disturbing not only for allowing college administrators to rely on broad notions of professionalism but also be-

235. *Id.* at 526–27.
236. *Id.* at 527.
237. Keefe v. Adams, 840 F.3d 523, 527–28 (8th Cir. 2016).
238. *Id.* at 529.
239. *Id.* at 531 (citing *Hazelwood*, 484 U.S. at 273).
240. *Id.*
241. Keefe v. Adams, 840 F.3d 523, 531 (8th Cir. 2016).
242. *Id.* at 532.

cause it allows colleges and universities to punish students for speech they make anywhere at any time.[243] As the Cato Institute explained in an *amicus curiae* brief to the Supreme Court, "If he was speaking at the wrong place and time when he was at home after school, there will never be a proper place and time for him to speak."[244]

The *Keefe* decision also does not square with the Supreme Court's decision in *Papish v. Board of Curators of University of Missouri*.[245] In that decision, graduate student Barbara Papish was disciplined for distributing an independent newspaper on campus that depicted a police officer raping the Statute of Liberty and the Goddess of Justice.[246] Another article in the newspaper contained a headline "M----- F------ Acquitted."[247] The school attempted to expel Papish for "indecent conduct or speech."[248] The Supreme Court explained that "the mere dissemination of ideas - no matter how offensive to good taste - on a state university campus may not be shut off in the name alone of 'conventions of decency.'"[249] The Cato Institute explains that the Supreme Court's holding in Papish "must apply equally when speech is being shut off in the name of professionalism rather than of decency."[250]

Some commentators have called for a stronger standard than *Hazelwood*'s remarkably deferential "reasonably related to legitimate pedagogical standards" review. A pair of scholars have argued that "college officials must demonstrate a 'directly related' application to the pedagogical interest in order to limit student speech."[251]

E. Professorial Speech

Most courts apply a line of Supreme Court cases dealing with public employees when examining the free speech claims of college

243. *Id.* at 531.

244. Amicus Brief of Cato Institute, Electronic Frontier Foundation, National Coalition Against Censorship, and Student Press Law Center in Support of Petitioner, at p. 8, Keefe v. Adams, 840 F.3d 523, 527–28 (8th Cir. 2016) (No. 16-1035).

245. Papish v. Bd. of Curators of Univ. of Missouri, 410 U.S. 667, 670 (1973).

246. *Id.* at 667–68.

247. *Id.*

248. *Id.* at 668.

249. *Id.* at 670.

250. Amicus Brief, *supra* note 244, at 9.

251. Jeffrey C. Sun & Neal H. Hutchens, *College Students' Online Speech: Searching for the Appropriate Standards within First Amendment Case Principles*, 2014 CARDOZO L. REV. DE NOVO 129, 136 (2014).

and university faculty.[252] Under this rubric, the initial question is one posed by *Garcetti v. Ceballos*– was the public employee speaking as an employee pursuant to official job duties or was the instructor speaking more as a private citizen.[253] If the employee was speaking as a citizen, then courts ask whether the employee spoke on a matter of public concern or whether the speech was merely a private grievance.[254] If the speech touches on a matter of public concern, then the courts balance the employee's free speech rights against the employer's efficiency interests.[255]

However, some federal courts have applied the *Hazelwood* standard to limit speech by college and university professors. The U.S. Court of Appeals for the Eleventh Circuit used the *Hazelwood* standard in determining whether university officials violated the First Amendment rights of an education professor when they prevented him from interjecting his religious beliefs into the classroom.[256] The professor had argued that the university classroom was a public forum in which there were enhanced free speech rights.[257] The Eleventh Circuit rejected that assertion, quoting a long passage from *Hazelwood* stating that school facilities become a public forum only when school officials by policy or practice open the facilities up for indiscriminate use.[258] The appeals court concluded that Dr. Bishop's classroom was not a public forum for First Amendment purposes.[259]

The Eleventh Circuit then determined that the *Hazelwood* standard provided the appropriate framework for resolving Dr. Bishop's First Amendment claim.[260] The appeals court recognized that the case involved high school students, but "adopt[ed] the Court's reasoning [in *Hazelwood*] as suitable to our ends, even at the university level."[261]

252. These include Pickering v. Bd. of Educ., 391 U.S. 563 (1968); Connick v. Myers, 461 U.S. 138 (1983); Garcetti v. Ceballos, 547 U.S. 410 (2006).

253. *Garcetti*, 547 U.S. at 421; Two circuits – the 4th and the 9th – do not apply Garcetti in the university setting because of academic freedom concerns.

254. *Id.* at 421.

255. *Pickering*, 391 U.S. at 568 ("The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.").

256. Bishop v. Aronov, 926 F.2d 1066, 1071 (11th Cir. 1991).

257. *Id.*

258. *Id.* at 1071 (quoting *Hazelwood*, 484 U.S. at 267).

259. *Id.*

260. *Id.*

261. *Id.* at 1074.

While paying deference to the concept of academic freedom, the appeals court determined that the university's restrictions on Dr. Bishop's religious proselytizing during classroom hours were reasonable.[262] The appeals court determined that "the University's interests in the classroom conduct of its professors are sufficient, in the balance we have suggested, to warrant the reasonable restrictions it has imposed on Dr. Bishop."[263]

The U.S. Court of Appeals for the Tenth Circuit likewise used the *Hazelwood* standard to reject the First Amendment lawsuit of a junior college professor fired for allegedly making inappropriate comments in class.[264] Stuart R. Vanderhurst taught in the college's veterinary school program, including classes in clinical pathology, anaesthetic nursing, radiology, and veterinary medical nursing.[265] Vanderhurst allegedly made sexual references and other inappropriate comments in some of his classes.[266] For example, he referenced the presence of tampons in sewer plants when discussing animal parasites, referred to anal and oral sex in a lecture on the transmission of parasites, and used the terms "floaters" and "sinkers" to discuss feces.[267]

University officials ultimately terminated Vanderhurst for several reasons, including using offensive language and engaging in offensive conduct in class.[268] Vanderhurst pursued administrative remedies to no avail and then sued in state court.[269] The case was removed to federal district court and eventually proceeded to a jury.[270] The jury determined that college officials violated Vanderhurst's First Amendment rights and awarded more than $557, 000 in damages.[271]

The college officials moved for the district court to grant a Rule 50 motion granting a judgment notwithstanding the verdict.[272] The district court denied the motion.[273] On appeal, the Tenth Circuit affirmed in part because attorneys for the defendants waived the argument that there were legitimate pedagogical reasons for terminating

262. Bishop v. Aronov, 926 F.2d 1066, 1078 (11th Cir. 1991).
263. *Id.*
264. Vanderhurst v. Colorado Mountain Coll. Dist., 208 F.3d 908, 914 (10th Cir. 2000).
265. *Id.* at 911.
266. *Id.*
267. *Id.*
268. *Id.* at 912.
269. *Id.*
270. *Id.*
271. *Id.* at 918.
272. *Id.*
273. *Id.* at 915.

the professor.[274] However, the Tenth Circuit stated that the appropriate test to determine whether college officials violated the First Amendment was the *Hazelwood* test – whether the professor's termination was reasonably related to legitimate pedagogical concerns.[275]

Interestingly, attorneys on both sides agreed that the *Hazelwood* standard was the appropriate standard to use.[276] The Tenth Circuit assumed that the *Hazelwood* standard should apply, though it acknowledged that its use of the standard may not be definitive.[277] While the procedural nature of the decision may explain the Tenth Circuit's use of *Hazelwood*, such use of the standard by another appellate court creates damaging precedent.

III. CONCLUSION

Hazelwood was an unfortunate decision that deprived high school journalists of their First Amendment rights and sanctioned what Justice Brennan accurately called "brutal censorship."[278] It led to a wave of administrative censorship of high school student journalists and a lowering of free speech protection for virtually all K-12 students. The Court in *Hazelwood* created a legal standard that applied to not only school newspapers, but also to other forms of school-sponsored speech. The decision created a gaping exception to the more speech-protective standard the Court had articulated in *Tinker*. The decision should be overruled. If not overruled, more states need to pass anti-*Hazelwood* laws that limit its impact in particular states. These statutes have had a positive impact.[279]

Even worse, the *Hazelwood* standard has metastasized onto college and university campuses, impacting a wide variety of students and even professors in different capacities. The Supreme Court wrote more than seventy years ago: "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise, our civilization will stagnate and die."[280]

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274. *Id.*
275. *Id.* at 914.
276. *Id.* at 915.
277. *Id.*
278. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 289 (1988) (Brennan, J., dissenting).
279. Buller, *supra* note 156, at 93.
280. Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

College and university students are simply not similarly situated to high school students. Universities are adult forums where students are meant to be exposed to a variety of viewpoints.[281] The *Hazelwood* standard is inappropriate for college and university campuses, which are supposed to be bastions of learning and liberty for adults. *Hazelwood* was a decision based on the different mission of the high school setting and, in part, the age of high school students. It should have very limited application on college campuses.

281. Sarabyn, *supra* note 126, at 87.