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Schoolhouse Rock: Lessons of Homosexual Tolerance in *Keeton v. Anderson-Wiley* from the Classroom to the Constitution

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I. INTRODUCTION

The public educational system is charged with more than the academic success of America's youth. Educators are responsible for "nurtur[ing] students' social and moral development by transmitting to them an official dogma of community values."[1] As *Keeton v. Anderson-Wiley*[2] demonstrates, community values are rapidly changing to acknowledge new constructions of homosexual identity and constitutional interests relative to historically marginalized attributes.[3] In *Keeton* the United States District Court for the Southern District of Georgia denied a

1. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 278 (1988) (Brennan, J., dissenting) (quoting Bd. of Educ. v. Pico, 457 U.S. 853, 864 (1982)) (internal quotation marks omitted).

2. 733 F. Supp. 2d 1368 (S.D. Ga. 2010).

3. *Compare id.* at 1381 (upholding college curriculum requiring counselors-in-training to set aside religious reservations to acknowledge clients' homosexual life choices), *with* Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (refusing to protect an individual's right to engage in same-sex sexual activity).

preliminary injunction to a student asserting various First Amendment[4] claims against her university for requiring her to complete remedial training for counseling gay, lesbian, bisexual, transgender, and queer/questioning (GLBTQ) clients.[5] The district court followed the Supreme Court of the United States's analysis of school-sponsored speech in *Hazelwood School District v. Kuhlmeier*.[6] But more significantly, the district court's straightforward acceptance of homosexuality remained a pervasive theme in *Keeton*.[7] As such, *Keeton* represents a growing culmination of homosexual rights, emphasizing the readiness of modern courts to both reflect and shape public opinion with a positive acknowledgement of the homosexual community. As momentum builds toward an evaluation of same-sex marriage by the Supreme Court,[8] such vital undercurrents of social construction will decidedly bear on the constitutional rights of homosexuals in the United States.

II. FACTUAL BACKGROUND

In the fall of 2009, Jennifer Keeton enrolled at Augusta State University (ASU) to pursue a master's degree in Counseling Education, hoping to become a school counselor.[9] In the context of various curricular activities, Jennifer continually voiced her condemnation of the homosexual "lifestyle" and her support of "conversion therapy" for GLBTQ clients based on her religious ideals.[10] Alarmed by Jennifer's desire to alter her future clients' sexual orientations, faculty members grew concerned about Jennifer's ability to separate her religious-based moral judgments from her professional role as a counselor. If Jennifer continued to refuse to set aside her viewpoint out of respect for a potential client's sexual identity, she would fail to meet the ASU

4. U.S. CONST. amend. I.

5. *Keeton*, 733 F. Supp. 2d at 1372-73, 1381.

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

7. *See* 733 F. Supp. 2d at 1375-81.

8. *See, e.g.*, Perry v. Schwarzenegger, 702 F. Supp. 2d 1132 (N.D. Cal. 2010) (addressing the constitutionality of a recent amendment to California's constitution denying marital recognition to same-sex couples); Gill v. Office of Personnel Management, 699 F. Supp. 2d 374, 376-77 (D. Mass. 2010) (internal quotation marks omitted) (challenging the constitutionality of the Defense of Marriage Act that defined "marriage" as "a legal union between one man and one woman as husband and wife" and "spouse" as "a person of the opposite sex who is a husband or wife").

9. Keeton v. Anderson-Wiley, 733 F. Supp. 2d 1368, 1371 (S.D. Ga. 2010).

10. *Id.* at 1371-72.

curricular requirements, which are based on American Counseling Association (ACA) standards.[11]

To address Jennifer's potential problems, the faculty created a Remediation Plan in accordance with program policy.[12] Remediation Plans are commonly used by faculty to assist students struggling with multicultural clients and to maintain university accreditation by complying with ACA ethical standards.[13] Under Jennifer's Remediation Plan, she was required to complete several assignments aimed at increasing her cross-cultural communication skills with members of the GLBTQ community, ranging from self-reflective writing to attendance at the Gay Pride Parade in Augusta, Georgia. The faculty assured Jennifer that she would not be required to change her religious beliefs to successfully complete the counseling program.[14] Jennifer expressed growing concern, however, that she would be required "to affirm the pro-[GL]BTQ orthodoxy"[15] in derogation of her First Amendment[16] freedom of speech.[17]

Hoping to avoid expulsion from ASU for failure to complete the curricular requirements under the Remediation Plan, Jennifer filed a verified complaint and sought a preliminary injunction based on alleged violations of her civil rights. Jennifer's limited brief for injunctive relief included the following First Amendment-based claims: viewpoint discrimination, compelled speech, restriction of free belief on personal choice, and retaliation.[18] Relying on *Hazelwood School District v. Kuhlmeier*[19] and a recent, nearly identical case from the United States

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11. *Id.*

12. *Id.* at 1372. All students could be subject to a Remediation Plan outlined in ASU's counseling program handbook:

> The student will receive a Remediation Plan from her or his advisor (which has been developed after a personal conference with the advisor and another faculty member(s)) outlining the faculty's concerns and stating that the student has been placed on remediation status. In addition, the Remediation Plan will delineate what conditions the student must meet to be removed from remediation status. The student will also be informed of the consequences of the failure to comply with the outlined conditions, including the possibility that the student will be dropped from the Program.

Id. at 1372 n.4.

13. *Id.* at 1371 n.1, 1375.

14. *Id.* at 1372-74.

15. *Id.* at 1379 (internal quotation marks omitted).

16. U.S. CONST. amend. I.

17. *Keeton*, 733 F. Supp. 2d at 1379.

18. *Id.* at 1374.

19. 484 U.S. 260 (1988).

District Court for the Eastern District of Michigan,[20] the Southern District of Georgia denied the preliminary injunction.[21] The district court threw out the case in light of ASU's right to impose reasonable academic standards in its curricular program despite Jennifer's religious apprehension.[22]

III. LEGAL BACKGROUND

A. *The Broken Moral Compass: Early Discrimination*

Although the court in *Keeton*[23] focused on the constitutional parameters of school-sponsored speech rather than delving into moral and political acceptance of homosexuality, this issue was at the heart of Jennifer's suit.[24] *Keeton* is a fresh voice in a long conversation about the traditional role of the teacher and counselor as the representative of social values. Courts have consistently given legal consideration to the social role of educators, asserting that "school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the school[] as a part of ordered society."[25] Given the vital role of maintaining the structure of "ordered society" through America's youth,[26] teachers and courts must answer the question: what is an ordered society? As the juxtaposition of *Keeton* and earlier cases suggest, society now includes acknowledgment of the historically marginalized homosexual community.[27]

Conversations about homosexuality were historically restricted in the classroom,[28] largely due to the traditional majoritarian view that homosexuality was wholly immoral.[29] This social construction abrogated any discussion about sexual orientation with students, forcing teachers and school officials to conceal their own self-identification as

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20. Ward v. Wilbanks, No. 09-CV-11237, 2010 WL 3026428 (E.D. Mich. July 26, 2010).
21. *Keeton*, 733 F. Supp. 2d at 1376, 1381.
22. *Id.* at 1379-81.
23. 733 F. Supp. 2d 1368 (S.D. Ga. 2010).
24. *See id.* at 1375.
25. Alder v. Bd. of Educ., 342 U.S. 485, 493 (1952).
26. *See id.*
27. *See, e.g., Keeton*, 733 F. Supp. 2d at 1379-80; Ward v. Wilbanks, No. 09-CV-11237, 2010 WL 3026428, at *18 (E.D. Mich. July 26, 2010).
28. *See, e.g.*, Jason R. Fulmer, *Dismissing the "Immoral" Teacher for Conduct Outside the Workplace–Do Current Laws Protect the Interests of Both School Authorities and Teachers?*, 31 J.L. & EDUC. 271, 274-75 (2002).
29. *See, e.g.*, John D'Emilio, *Making and Unmaking Minorities: The Tensions Between Gay Politics and History*, 14 N.Y.U. REV. L. & SOC. CHANGE 915 (1986).

homosexual.[30] This social standard was enshrined with a broader scope in *Bowers v. Hardwick*,[31] a case originating in Georgia, in which the Supreme Court held the fundamental right of privacy was restricted to *traditionally* held institutions including marriage, family, and procreative activity, exclusive of homosexual sodomy.[32] Although the Court in *Bowers* did not address other aspects of homosexual individuals' lives beyond the act of sodomy,[33] various courts had already established precedent attacking other aspects of homosexual self-identification and parenting.[34] These negative perceptions of homosexuality were analogously and strictly brought to bear on school officials and educators in their unique roles as the "exemplar[s]" of American values.[35]

Social objectives traditionally have required school officials to serve as models of American values while simultaneously fixing those virtues in the nation's youth.[36] Teachers have accordingly been held to a higher standard of conduct with accompanying scrutiny: "His habits, his speech, his good name, his cleanliness, the wisdom and propriety of his official utterances, his associations, . . . and the character for which he stands are [all] matters of major concern in a teacher's selection and retention."[37] Close examination of teachers has consequently extended well beyond the classroom walls into their private lives and public statements.[38] This scrutiny, coupled with a pervasive belief in homosexual immorality, resulted in various legislative attempts to remove any deviant influence of homosexual teachers[39] and also led to teacher

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30. *See* Fulmer, *supra* note 28, at 274-75.

31. 478 U.S. 186 (1986).

32. *Id.* at 190-91.

33. *See* High Tech Gays v. Def. Indus. Sec. Clearance Office, 668 F. Supp. 1361, 1370-71 (N.D. Cal. 1987).

34. *See, e.g.*, Gaylord v. Tacoma Sch. Dist. No. 10, 559 P.2d 1340, 1347 (Wash. 1977) (affirming the dismissal of a teacher for "immorality" as a publicly acknowledged homosexual); *In re* Jane B., 380 N.Y.S.2d 848, 860 (N.Y. Sup. Ct. 1976) (denying a mother's custody in the interest of her child when the mother's homosexuality created an "improper environment").

35. Fulmer, *supra* note 28, at 276 (internal quotation marks omitted).

36. *See, e.g.*, Bd. of Educ. v. Weiland, 179 Cal. App. 2d 808, 809-10, 813 (1960) (affirming the dismissal of a teacher who signed student names on attendance records when the students were absent).

37. *Id.* at 812 (quoting Goldsmith v. Bd. of Educ., 66 Cal. App. 157, 168 (1924)).

38. *See* Tingley v. Vaughn, 17 Ill. App. 347, 351 (1885) ("If suspicion of vice or immorality be once entertained against a teacher, his influence for good is gone. The parents become distrustful, the pupils contemptuous and the school discipline essential to success is at an end.").

39. For an overview of various homosexual civil rights ordinances that ultimately failed to receive legislative approval in Florida, California, and other states, see Anthony E. Varona, *Setting the Record Straight: The Effects of the Employment Non-Discrimination Act*

dismissals for known homosexual conduct.[40] Shockingly, judicial sanctions sometimes extended to individuals who merely asserted their homosexual identity or discussed sexual orientation with students and faculty members.[41]

At the height of anti-gay sentiment in the 1970s,[42] the Washington Supreme Court presented a shattering judgment in *Gaylord v. Tacoma School District No. 10*,[43] affirming the dismissal of a public school teacher solely on the basis of his homosexual identity.[44] James Gaylord, "a competent and intelligent teacher," was first brought to the attention of the school district following a conference with a student who sought help with "his homosexual problems."[45] Suspecting Gaylord was gay, the student reported this assumption to the school principal who later confronted Gaylord to confirm his homosexuality.[46] Gaylord was summarily discharged for violating the school district's policy prohibiting "immorality."[47]

The court analyzed several religious and medical definitions of homosexuality and immorality before broadly asserting that "[h]omosexuality is widely condemned as immoral and was so condemned as immoral during biblical times."[48] Content with this determination, the court considered the school's reasonableness in dismissing Gaylord based

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of 1997 on the First and Fourteenth Amendment Rights of Gay and Lesbian Public Schoolteachers, 6 COMMLAW CONSPECTUS 25, 30-31 (1998).

40. *See, e.g.*, Bd. of Educ. v. Calderon, 35 Cal. App. 3d 490, 492, 497 (1973) (affirming dismissal of teacher who was acquitted of a criminal charge for oral copulation with another man who was later, in a civil case, found to have committed the act); Sarac v. State Bd. of Educ., 249 Cal. App. 2d 58, 60, 63-64 (1967) (affirming revocation of school teacher's teaching credentials when teacher was convicted of disorderly conduct for having touched the private sexual parts of another man at a public beach).

41. *See, e.g.*, Boring v. Buncombe Cnty. Bd. of Educ., 136 F.3d 364, 366-67, 371 (4th Cir. 1998) (affirming teacher's disciplinary transfer after choosing a play containing controversial themes, including lesbianism, to be performed by her advanced acting class; Rowland v. Mad River Local Sch. Dist., 730 F.2d 444, 450 (6th Cir. 1984) ("[W]e have held it was not impermissible to discipline the plaintiff for making statements about her sexual preference."); Collins v. Faith Sch. Dist. #46-2, 574 N.W.2d 889, 891, 895 (S.D. 1998) (reinstating teacher's position after lower court affirmed dismissal because teacher replied to students' questions about homosexuality).

42. *See* Bob Moser, *Holy War: the Religious Crusade Against Gays Has Been Building for 30 Years*, INTELLIGENCE REP., Spring 2005, *available at* http://www.splcenter.org/intel/intelreport/article.jsp?aid=522 (examining pivotal moments in the gay rights movement).

43. 559 P.2d 1340 (Wash. 1977).

44. *Id.* at 1342, 1347.

45. *Id.* at 1345-46.

46. *Id.* at 1342.

47. *Id.* (internal quotation marks omitted).

48. *Id.* at 1345.

on Gaylord's fitness to teach in the wake of such a revelation.[49] Without identifying evidence that substantially disturbed Gaylord's capability as a teacher,[50] the court affirmed the trial court's finding that Gaylord's sexual orientation would have resulted "in confusion, suspicion, fear, expressed parental concern and pressure upon the administration from students, parents and fellow teachers, all of which would impair appellant's efficiency as a teacher and injure the school."[51] Thus, the court's decision took an uncompromising stance: educators charged with "impress[ing] on the minds of their pupils the principles of morality" could not affirm homosexuality, either explicitly or by example.[52] In contrast to this assertion, the dissent observed that general fear of homosexuality, without evidence of any physical act or intent, deprived Gaylord of his rights as an American citizen and as a human being.[53]

B. A New Path: Changing Perceptions of Homosexuality in the Professional Counseling Community

Scientists and medical professionals once affirmed negative social perceptions of homosexual individuals by deeming homosexuality an aberrant sexual choice or mental disorder.[54] Although a number of religious and social organizations still consider same-sex attraction a curable pathological behavior,[55] a multitude of scientific discoveries has suggested that homosexuality is a benign defining characteristic of human identity if not an immutable trait.[56] In 1998 and 1999 the governing body of the American Counseling Association (ACA) issued two resolutions opposing the portrayal of homosexual individuals as

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49. *Id.* at 1347.

50. *See id.* at 1346 (emphasis added) ("[Only] *one* student expressly objected to Gaylord teaching at the high school because of his homosexuality.").

51. *Id.*

52. *See id.* at 1342, 1347 (internal quotation marks omitted); *see also id.* at 1348 (Dolliver, J., dissenting).

53. *Id.* at 1348-49 (Dolliver, J., dissenting) ("An homosexual is after all a human being, and a citizen of the United States despite the fact that he finds his sex gratification in what most consider to be an unconventional manner.").

54. A. Dean Byrd, *Homosexuality: Innate and Immutable? What Science Can and Cannot Say*, 4 LIBERTY U. L. REV. 479, 479-80 (2010).

55. Joy S. Whitman et al., *Ethical Issues Related to Conversion or Reparative Therapy*, AM. COUNSELING ASS'N (May 22, 2006), http://www.counseling.org (follow "Search Our Site" hyperlink; then search "Joy Whitman").

56. Renee Culverhouse & Christine Lewis, *Homosexuality as a Suspect Class*, 34 S. TEX. L. REV. 205, 241-42 (1993).

mentally ill.[57] The ACA reproached professional counselors conducting reparative or conversion therapy in an attempt to "cure" homosexuals of a natural behavior.[58] Emphasizing the counselor's calling to "recognize historical and social prejudices," the ACA encouraged counselors to understand homosexual construction within a broad cultural context rather than to promote changes in sexual orientation.[59] The ACA noted the lack of medical or scientific evidence supporting conversion therapy, finding that clients are more often harmed than helped by this type of treatment.[60] As such, the ACA cautioned counselors that referrals to professionals practicing conversion therapy essentially violates the counselor's primary responsibility to avoid harming clients.[61] Finally, the ACA conclusively separated conversion therapy from professional counseling by deeming conversion therapy a religious-based practice and refusing to endorse professional counselors trained in this method.[62]

C. Curricular Control of Student Speech: Laying the Groundwork for Changing Values

Although students do not "shed their constitutional rights . . . at the schoolhouse gate,"[63] school officials may place reasonable restrictions on student expression to preserve the special purposes and characteristics of the educational system.[64] These special purposes include the school's aforementioned responsibility to provide academic knowledge and instill community values.[65] Accordingly, school officials and teachers retain the right to impose reasonable restrictions on speech produced by students in the context of school-sponsored activities.[66] For example, the Supreme Court has explicitly authorized teachers to curtail student expression bearing the school's imprimatur[67] as a

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57. Whitman, *supra* note 55.

58. *Id.*

59. *Id.* (internal quotation marks omitted); *see also* ACA CODE OF ETHICS E.5.c (2005), *available at* http://www.counseling.org/Resources/CodeOfEthics/TP/Home/CT2.aspx.

60. Whitman, *supra* note 55.

61. *Id.*; *see also* ACA CODE OF ETHICS A.1.a (2005), *available at* http://www.counseling.org/Resources/CodeOfEthics/TP/Home/CT2.aspx.

62. Whitman, *supra* note 55.

63. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

64. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (quoting *Tinker*, 393 U.S. at 506) (stating that the rights of students "must be 'applied in light of the special characteristics of the school environment'").

65. *See Weiland*, 179 Cal. App. 2d at 812.

66. *Hazelwood*, 484 U.S. at 271-73.

67. An imprimatur is a "general grant of approval." BLACK'S LAW DICTIONARY 825 (9th ed. 2009).

curricular activity.[68] Furthermore, other federal courts have extended this power beyond the scope of the traditional classroom setting.[69]

In *Hazelwood School District v. Kuhlmeier*,[70] the Supreme Court held that a high school principal was justified in removing two student-produced articles containing sensitive information from a school-sponsored newspaper to advance curriculum-based interests.[71] The articles were created for academic credit under the supervision of a journalism teacher who retained final authority over most aspects of the newspaper's publication.[72] The newspaper bore the school's name and was created with school resources.[73] Consequently, the Court held that the casual viewer could reasonably associate the speech directly with the school, making the content of the newspaper subject to legitimate pedagogical restrictions.[74] In this case, the principal removed two articles describing students' experiences with pregnancy and divorce.[75] According to the school board's policy, the students failed to meet course requirements dealing with the treatment of controversial issues and privacy based on "the legal, moral, and ethical restrictions imposed upon journalists."[76] The Court affirmed the principal's decision, holding that students' deviation from the professional standards of journalism incorporated in the academic curriculum provided a sufficient basis for legitimate pedagogical concerns.[77]

Although school officials are empowered to restrict "speech that is inconsistent with [the school's] basic educational mission,"[78] the Court has not clarified whether school officials may restrict student speech based on content alone in addition to limiting the manner in which the speech is expressed.[79] Accordingly, the United States Courts of Appeals

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68. *Hazelwood*, 484 U.S. at 271-73.

69. *See, e.g.*, Bannon v. Sch. Dist., 387 F.3d 1208, 1214 (11th Cir. 2004) (holding that a mural on a school wall is school-sponsored speech under *Hazelwood*); McCann v. Fort Zumwalt Sch. Dist., 50 F. Supp. 2d 918, 923 (E.D. Mo. 1999) (holding that a drug-related song performed by a school marching band is school-sponsored speech under *Hazelwood*).

70. 484 U.S. 260 (1988).

71. *Id.* at 275-76.

72. *Id.* at 268.

73. *Id.* at 262-63.

74. *See id.* at 271-72.

75. *Id.* at 263.

76. *Id.* at 268 (internal quotation marks omitted).

77. *Id.* at 276.

78. *Id.* at 266 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986)) (internal quotation marks omitted).

79. *See id.* at 271-72 (suggesting in dicta that a school may refuse to sponsor certain student speech but failing to explicitly address the issue of viewpoint neutrality).

have taken opposing approaches to this question.[80] Some courts have adhered to the long line of cases requiring viewpoint neutrality in non-educational social contexts;[81] other courts have granted greater power and deference to school officials based on their responsibility to instill community values in young citizens.[82] The latter approach highlights the tension placed on educators who are called to instill tolerance of differing viewpoints while simultaneously preferring certain perspectives to further educational interests.[83] Although the Southern District of Georgia adamantly ignored this tension, the conflict between competing social values actually formed the foundation of the decision in *Keeton*.[84]

D. New Expectations Emerging in Ward v. Wilbanks

Only a few years after the ACA's official statements regarding homosexuality, the Supreme Court dramatically overturned *Bowers v. Hardwick*[85] in *Lawrence v. Texas*[86] and acknowledged the right of free adults to engage in private, consensual sexual conduct.[87] Chief Justice Rehnquist and Justice Thomas joined Justice Scalia's opposition to this shift in the Court's analysis with a foreboding message of chaos and the destruction of American social order in favor of the "homosexual agenda."[88] Although the majority's holding in *Lawrence* has not "eliminat[ed] the moral opprobrium that has traditionally attached to homosexual conduct,"[89] tolerance of homosexual individuals is emerging in various social contexts.[90] The courts' own acknowledgment of

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80. *Compare* Peck v. Baldwinsville Cent. Sch. Dist., 426 F.3d 617, 632-33 (2d Cir. 2005) (requiring viewpoint neutrality), *with* Fleming v. Jefferson Cnty. Sch. Dist. R-1, 298 F.3d 918, 928 (10th Cir. 2002) (permitting viewpoint discrimination).

81. *See, e.g., Peck*, 426 F.3d at 632 n.9, 632-33; Searcey v. Harris, 888 F.2d 1314, 1325 (11th Cir. 1989) ("Without more explicit direction, we will continue to require school officials to make decisions relating to speech which are viewpoint neutral.").

82. *See, e.g., Fleming*, 298 F.3d at 928-29.

83. *Compare* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (remarking that inculcating tolerance of differing viewpoints is an essential task of American public schools), *with Fleming*, 298 F.3d at 928 (observing that a school may choose to sponsor student speech opposing drug use without being obligated to sponsor the opposite message).

84. *See* 733 F. Supp. 2d at 1371.

85. 478 U.S. 186 (1986).

86. 539 U.S. 558 (2003).

87. *Id.* at 578.

88. *See id.* at 591, 602 (Scalia, J., dissenting).

89. *Id.* at 602.

90. *See, e.g., In re* Marriage Cases, 183 P.3d 384, 428 (Cal. 2008) (finding that "gay individuals are fully capable of entering into the kind of loving and enduring committed relationships that may serve as the foundation of a family and of responsibly caring for and

homosexual orientation is especially evident in the context of the public school system.[91]

Ward v. Wilbanks,[92] which was decided one month before *Keeton*, is a factually similar case from the Eastern District of Michigan that defined acceptable academic performance of students training to be school counselors.[93] The plaintiff, a young orthodox Christian woman, claimed that the school's academic curriculum abridged various constitutional rights by requiring her to complete remedial training after refusing to counsel a homosexual client.[94] The plaintiff claimed that the school was discriminating against her on the basis of her religion, effectively demanding her to change her beliefs and affirm homosexual behaviors.[95] The district court individually examined the plaintiff's various sub-arguments under the First Amendment[96] and Fourteenth Amendment.[97] The district court's conclusion, however, produced one point: a student's freedom of speech and exercise of religion are not abridged when there is no evidence that the school sought to change the student's religious beliefs, all other students are held to the same standard of performance, and the school's curricular program "govern[ed] its counseling students in exactly the same way they will be governed when they are practicing counselors."[98] Because of the curricular program's practical application and derivation from ACA standards, the district court deemed the program to be "reasonably related to the legitimate pedagogical goal of maintaining a rigorous counseling program" to preempt violations of First Amendment freedoms.[99]

Considering the rational adoption of ACA standards by the university counseling program,[100] the district court emphasized the importance of the counselor's nondiscrimination on the basis of sexual orientation in the high school environment: "In a high school setting, a counselor can expect to be presented with all sorts of issues, including homosexuality. . . . A counselor who cannot keep their [sic] personal values out of the interaction [with students] has great potential to harm her

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raising children").

91. *See, e.g.*, *Ward*, 2010 WL 3026428, at *2, *5, *19.
92. No. 09-CV-11237, 2010 WL 3026428 (E.D. Mich. July 26, 2010).
93. *See id.*, at *1.
94. *Id.* at *1-2, *6.
95. *Id.* at *3, *17.
96. U.S. CONST. amend. I; *see Ward*, No. 09-CV-11237, 2010 WL 3026428, at *13-25.
97. U.S. CONST. amend. XIV; *see Ward*, 2010 WL 3026428, at *25-27.
98. *Ward*, 2010 WL 3026428, at *13, *18.
99. *Id.* at *26.
100. *Id.* at *14 (considering plaintiff's free speech claim under the *Hazelwood* analysis).

client."[101] The district court denied the plaintiff's request to refer homosexual clients to other counselors without religious reservations about homosexuality.[102] This decision ultimately restricted student-counselors' ability to avoid contact with the homosexual value system:

> [P]laintiff's request to refer clients based on their protected status (sexual orientation) was a clear and major violation of the ACA Code of Ethics as it also would have been if she had refused to counsel an assigned African American client on the basis that her values would not allow her to provide services to people of color.[103]

Instead of endorsing the plaintiff's desire to refer clients, the district court noted the importance of counselors reflecting on their own prejudices and assumptions about the homosexual community.[104] By summarily dismissing the plaintiff's religious reservations, the district court echoed the ACA's requirement of separation of a counselor's internal beliefs from the external, professional role of the counselor who must help clients "explore and clarify their beliefs and apply their values to solving their own problems."[105] Accordingly, the counseling student is called to evaluate her client's problems from the client's socially acceptable perspective; the counselor may not impose her own worldview on the client.[106] This construction of academic interests and corresponding student rights was followed in near identical fashion by the Southern District of Georgia in *Keeton*.[107]

IV. COURT'S RATIONALE IN *KEETON V. ANDERSON-WILEY*

Much like the plaintiff in *Ward v. Wilbanks*,[108] Jennifer Keeton's religious values conflicted with curricular requirements and led to several First Amendment-based claims.[109] Both plaintiffs' religious

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101. *Id.* at *16.

102. *Id.*

103. *Id.* at *18 (internal quotation marks omitted). *See generally* Randall Kennedy, *Marriage and the Struggle for Gay, Lesbian, and Black Liberation*, 2005 UTAH L. REV. 781 (discussing the similarities between African American and GLBTQ movements towards equal rights protection).

104. *See Ward*, 2010 WL 3026428, at *5.

105. *See id.* (internal quotation marks omitted).

106. *See id.*

107. *See* 733 F. Supp. 2d at 1376-77 (acknowledging the factual similarity of the cases and construction of argument).

108. No. 09-CV-11237, 2010 WL 3026428 (E.D. Mich. July 26, 2010).

109. *Compare* Keeton v. Anderson-Wiley, 733 F. Supp. 2d 1368, 1371 (S.D. Ga. 2010), *with Ward*, 2010 WL 3026428, at *1, *6.

reservations were met with the same judicial rebuttal: student speech must often yield to a college's educational mission.[110] Writing on behalf of the Southern District of Georgia, Judge Randal Hall emphatically refused to address the media and internet-driven furor surrounding Jennifer's conflict with ASU, stating that "this is not a case pitting Christianity against homosexuality. This case is only about the constitutionality of the actions taken by Defendants . . . within the context of Plaintiff's Counselor Education masters degree program at Augusta State University (ASU), and no more."[111] With this succinct pronouncement, the district court proceeded to determine whether Jennifer's circumstances merited a preliminary injunction.[112] Accordingly, the district court considered whether Jennifer could show a "substantial likelihood" of succeeding on her First Amendment claims against ASU.[113]

Before exploring Jennifer's individual claims, the district court set analytical parameters.[114] First, the district court acknowledged the Supreme Court's and Eleventh Circuit's broad deference to educators in matters of academic policy.[115] Second, the district court recognized *Ward* as a factually similar case applying the *Hazelwood School District v. Kuhlmeier*[116] school-sponsored speech analysis.[117] In this context, the district court noted that the controversial curricular program in *Ward* was *"reasonably related to legitimate pedagogical concerns"*[118] because the program conformed to ACA standards and applied to all enrolled students regardless of their specific religious preferences.[119] After clarifying this analytical approach and providing a cursory nod to First Amendment application to state actors through the Due Process Clause of the Fourteenth Amendment,[120] the district court addressed each claim presented by Jennifer.[121]

110. *Compare Keeton*, 733 F. Supp. at 1379, *with Ward*, 2010 WL 3026428, at *19.
111. *Keeton*, 733 F. Supp. 2d at 1371.
112. *Id.* at 1375-76.
113. *Id.* at 1375.
114. *See id.* at 1376-78.
115. *Id.* at 1376.
116. 484 U.S. 260 (1988).
117. *Keeton*, 733 F. Supp. 2d at 1376-77.
118. *Id.* at 1377 (quoting *Ward*, 2010 WL 3026428, at *16).
119. *Id.* at 1377, 1380.
120. U.S. CONST. amend. XIV.
121. *Keeton*, 733 F. Supp. 2d at 1377-81.

A. Viewpoint Discrimination

Addressing Jennifer's first claim, the district court's analysis focused on whether ASU reasonably restricted Jennifer's speech for legitimate pedagogical purposes.[122] The district court addressed the viewpoint discrimination claim by focusing on the school's intent, determining that "the government must abstain from regulating speech when the specific motivating ideology . . . of the speaker is the rationale for the restrictions."[123] The district court emphasized the freedom of university programs to craft student curricular responses by acknowledging that judicial restriction of academic choices should only occur when faculty decisions serve as a mere pretext for discrimination.[124]

The district court found no evidence to support the argument that the Remediation Plan was created due to faculty disapproval of Jennifer's religious beliefs in relation to homosexuality.[125] Rather, the district court distinguished between the intent to change an individual's internally held beliefs and the intent to change an individual's outward approach to professional counseling in accordance with ACA ethical standards.[126] The district court determined the Remediation Plan was designed to help Jennifer separate her preexisting religious ideology from her professional role as a counselor.[127] This was intended to train her to avoid imposing her particular viewpoint on future clients.[128] Furthermore, because the faculty's intent in designing the Remediation Plan was to maintain university accreditation by complying with the ACA and to produce counselors with the capability of counseling multicultural members of the populace, the district court found that ASU's program was reasonably related to legitimate pedagogical concerns and therefore merited protection.[129]

B. Compelled Speech

The district court briefly addressed Jennifer's claim that she was forced to affirm homosexual orthodoxy because the Remediation Plan

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122. *Id.* at 1378-79.

123. *Id.* at 1378 (quoting Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995)) (internal quotation marks omitted).

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 1378-79.

128. *Id.* at 1378.

129. *Id.* at 1379.

required her to submit monthly updates on her progress.[130] Instead, the district court emphasized the Remediation Plan's design to bring Jennifer's counseling skills in line with the ACA Code of Ethics,[131] observing that Jennifer's updates were intended to provide an opportunity for reflection on her own moral understanding and the impact that her personal beliefs could have on potential clients.[132] The district court did not question ACA standards, but supported the required acknowledgment of homosexual identity as a "reasonably related" curricular standard for counselors.[133]

C. *Free Exercise*

The district court similarly dismissed Jennifer's Free Exercise Clause claim and emphatically noted the implicit limits on a citizen's right to exercise religious beliefs, stating that "every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs."[134] The district court noted "[t]he prevailing constitutional standard" that permits incidental restriction of religious practice when a law–or in this case, a program–"is neutral and of general applicability."[135] Citing similar reasoning applied in *Ward*, the district court determined that Jennifer's Free Exercise right was not unconstitutionally infringed because all ASU counseling students were subject to sensitivity training under a Remediation Plan with no exemptions for particular religious beliefs or other characteristics.[136]

D. *First Amendment Retaliation*

In addressing Jennifer's final claim, the district court presented a three element test for retaliation. The plaintiff must first show "that [her] speech or act was constitutionally protected; second, that the defendant's retaliatory conduct adversely affected the protected speech; and third, that there is a causal connection between the retaliatory

130. *Id.*

131. ACA CODE OF ETHICS (2005).

132. *Keeton*, 733 F. Supp. 2d at 1379.

133. *Id.* at 1379-80 (quoting *Hazelwood*, 484 U.S. at 273) (internal quotation marks omitted).

134. *Id.* at 1380 (quoting United States v. Lee, 455 U.S. 252, 261 (1982)) (internal quotation marks omitted).

135. *Id.* (quoting First Vagabonds Church of God v. City of Orlando, 610 F.3d 1274, 1285 (11th Cir. 2010), *vacated by* 616 F.3d 1229 (11th Cir. 2010) (internal quotation marks omitted)).

136. *Id.* at 1380-81.

actions and the adverse effect on speech."[137] Proceeding without comparing of Jennifer's particular circumstances to any of the test's elements, the district court suggested that ASU's counseling program fell wholly outside the realm of retaliatory action.[138] Instead, the district court focused on the "academically legitimate" nature of the Remediation Plan in conjunction with the ACA Code of Ethics, again emphasizing the fact that Jennifer was never expressly required to change her personal religious standards.[139] The district court looked back to its earlier viewpoint discrimination analysis and the nonexistence of ulterior motives on the part of the faculty, ultimately concluding that Jennifer had simply failed to fulfill academic requirements.[140]

In light of the district court's assessment of First Amendment retaliation and Jennifer's other claims, the court held that Jennifer was unable to show a substantial likelihood of succeeding on the merits of her lawsuit and denied her motion for preliminary injunction.[141]

V. IMPLICATIONS

Social acceptance of homosexuality has dramatically changed over the past thirty years. Schools are no longer uncompromising environments where homosexual teachers are forced to hide their identity from the impressionable and presumptively heterosexual minds of children.[142] Cases like *Keeton*[143] and *Ward v. Wilbanks*[144] suggest that the reverse may be emerging by requiring morally-opposed school officials to acknowledge the homosexual identities of their students.[145] Although the court in *Keeton* and *Ward* produced holdings in the context of professional counseling programs,[146] these cases illustrate a broader understanding of the conversations that are now appropriate in school environments. Because school counselors have traditionally been included in the court's understanding of "exemplars" charged with exemplifying American social values and shaping the minds of the

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137. *Id.* at 1381 (alteration in original) (quoting Bennett v. Hendrix, 423 F.3d 1247, 1250 (11th Cir. 2005)).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *See, e.g.*, Boring v. Buncombe Cnty. Bd. of Educ., 136 F.3d 364, 366, 371 (4th Cir. 1998); Gaylord v. Tacoma Sch. Dist. No. 10, 559 P.2d 1340, 1347 (Wash. 1977).

143. 733 F. Supp. 2d 1368 (S.D. Ga. 2010).

144. No. 09-CV-11237, 2010 WL 3026428 (E.D. Mich. July 26, 2010).

145. *See Keeton*, 733 F. Supp. 2d 1368.

146. *Id.* at 1371; *Ward*, 2010 WL 3026428, at *1.

nation's youth,[147] any nondiscrimination requirements placed on these figures could become equally applicable to the average teacher who converses with students on a personal level. The willingness to discuss these issues with America's youth illustrates the accelerating normalization of homosexuality, superseding the historical belief that candid conversation would somehow "recruit[]" naïve students "into" homosexuality.[148] By requiring faculty and students with diametrically opposing worldviews to engage on a personal level, courts open the door to candid conversations about homosexuality in other parts of the community, beyond the counselor's office. In turn, the understanding produced from such conversations could produce the grassroots movement necessary to reach other aspects of the American existence as impressionable students become voting adults.

Teachers and school officials unwilling to participate in open discussions of homosexuality may find themselves increasingly separated from an emerging, new majoritarian value system. Jennifer Keeton's own experience suggests that individuals adamantly opposed to professional standards of counseling could be forced to seek ideological refuge with likeminded groups outside the public school system.[149] With courts' continued affirmation of ACA standards and other indications of homosexual normalization, religious groups may likewise feel compelled to seek alternate means of private education for themselves and their children. As courts continue to acknowledge historically marginalized populations, this protection may polarize some social communities, particularly in traditionalist regions of the country. This separation could tragically undermine the growing social acceptance that has developed in the South–and Georgia in particular–since the days of *Bowers v. Hardwick*.[150]

The Southern District of Georgia's interpretation of constitutional issues relating to homosexuality in *Keeton* could also have implications for other general areas of law. Although the district court attempted to diminish the tension between conflicting social values by focusing on professional requirements, the fact remains that these judicial construc-

147. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 278 (1988) (Brennan, J., dissenting) (quoting Bd. Of Educ. v. Pico, 457 U.S. 853, 864 (1982)).

148. *See* Varona, *supra* note 39, at 32-34 (considering the "Recruitment" and "Molestation" myths applied to homosexual teachers in public schools).

149. *See* Susan Mccord, *Student Suing Augusta State Works at Christian School*, AUGUSTA CHRON., Sept. 11, 2010, http://chronicle.augusta.com/news/education/2010-09-11/student-suing-augusta-state-works-christian-school-while-she-awaits.

150. 478 U.S. 186 (1986). *Bowers* and *Keeton* represent a major shift in judicial thought in Georgia. Both are Georgia cases, yet they demonstrate a complete change in opinion regarding homosexual identity in just twenty-four years.

tions favored equality between religion and homosexuality.[151] This conflict speaks directly to the continuing dispute between various courts regarding viewpoint discrimination in the context of the American school system.[152] Because of the social dynamics presented in this case and the public's uproar surrounding its result,[153] *Keeton* may prompt the Supreme Court to directly outline the parameters of content-based restrictions for schools in a subsequent case. The result of a Supreme Court ruling on viewpoint discrimination could dramatically affect both the constitutional rights of students and teachers' ability to instill vital social values. With its resolute affirmation of educational interests, the district court's decision in *Keeton* may ultimately restrict student speech in favor of other important social values.[154]

Additionally, the district court's statements stressing nondiscrimination point to the renewed movement for considering homosexuality as a suspect class, meriting stricter scrutiny from American courts.[155] In the past, courts have been unwilling to extend this designation based on the perception of homosexuality as a lifestyle choice or sexual preference rather than an immutable trait.[156] New scientific evidence, coupled with the district court's comparison of discrimination against African Americans to discrimination against homosexuals, could suggest a need to reevaluate the protection afforded to this traditionally marginalized group.

Whatever the result of Jennifer Keeton's counseling career, the underlying principles of her case and others like it will have a lasting

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151. *See Keeton*, 733 F. Supp. 2d at 1371, 1381.

152. *Compare* Peck v. Baldwinsville Cent. Sch. Dist., 426 F.3d 617, 632-33 (2d Cir. 2005) (requiring viewpoint neutrality), *with* Fleming v. Jefferson Cnty. Sch. Dist. R-1, 298 F.3d 918, 928-29 (10th Cir. 2002) (permitting viewpoint discrimination).

153. *See* Adam Folk, *Judge Grants Augusta State Stay in Keeton Case*, AUGUSTA CHRON., Nov. 1, 2010, http://chronicle.augusta.com/news/2010-11-01/judge-grants-augusta-state-stay-keeton-case (describing a Ku Klux Klan rally and opposing gay-straight alliance protest in response to Jennifer Keeton's case).

154. Although the Supreme Court initially provided broad protection for students in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), subsequent cases have increasingly limited student-speech in various contexts. *See, e.g.*, Morse v. Frederick, 551 U.S. 393, 410 (2007) (promotion of illegal substances); *Hazelwood*, 484 U.S. at 271-73 (school sponsored speech); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 686 (1986) (lewd, obscene speech).

155. Some states have already applied heightened scrutiny to statutes that distinguish on the basis of sexual orientation. *See, e.g.*, *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5, *as recognized in* Strauss v. Horton, 207 P.3d 48, 115 (Cal. 2009).

156. Courtney A. Powers, *Finding LGBTs a Suspect Class: Assessing the Political Power of LGBTs As a Basis for the Court's Application of Heightened Scrutiny*, 17 DUKE J. GENDER L. & POL'Y 385, 385 (2010).

impact on the construction of homosexual rights in the United States. *Keeton* provides insight to a number of changing social structures that have shaped this country, ranging from the classroom to the United States Constitution. This new awareness may initially cause conflict as *Keeton* and its kin continue to reflect and shape various public, judicial, and legislative conversations. But despite these contentions, the hope remains that Jennifer's story will help pave the way for a greater acceptance of those who have been historically marginalized, bringing America closer to the dream of indivisibility with liberty and justice for *all*.

BILLIE PRITCHARD

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