

AMERICAN BAR ASSOCIATION

SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE  
STANDING COMMITTEE ON PUBLIC EDUCATION  
SECTION OF STATE AND LOCAL GOVERNMENT LAW

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association urges all state, local, territorial, and tribal  
2 legislative bodies to enact statutes and school districts to adopt policies that:

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- 4 a) rigorously protect the ability of student journalists at the secondary and postsecondary
- 5 levels to make the independent editorial judgments necessary to meaningfully cover issues
- 6 of social and political importance without fear of retaliation or reprisal, provided that such
- 7 statutes should also allow for reasonable restrictions on the time, place, and manner of
- 8 student expression, and should neither authorize nor protect expression by students that is
- 9 defamatory or invasive of privacy, is obscene or otherwise unlawful, or is reasonably
- 10 anticipated to incite students to act unlawfully;
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- 12 b) safeguard advisors who supervise students participating in school-sponsored journalism
- 13 against punitive action for supporting their students in gathering and publishing news of
- 14 interest and concern to their communities;
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- 16 c) expressly declare that criticism of government policies or programs, or the discussion of
- 17 issues of social or political controversy, is protected speech in journalistic media,
- 18 regardless of the medium’s school affiliation or sponsorship; and
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- 20 d) ensure that student journalists have the right to exercise freedom of speech and of the press
- 21 in school-sponsored media.
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23 FURTHER RESOLVED, That the American Bar Association urges secondary and postsecondary  
24 educational institutions to offer students meaningful opportunities in school-sponsored journalism  
25 to enhance their civic learning and to promote all students’ media literacy.



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## REPORT

Schools and colleges are, in many ways, self-contained communities. As with any community, an editorially independent source of news is essential for an informed civic dialogue. There is a growing and well-founded sense of national urgency that young citizens are graduating from high school, and even college, ill-prepared for participation in civic life. Central to improving civic readiness is cultivating an appetite for verified information about issues of social and political importance. Preparing young people to have civil discussions about polarizing issues is central to the civic mission of America's public education system.

At a time of great national anxiety over the civic readiness of young Americans, about escalating hostility toward journalism and journalists, and about the inability of all users of social media to differentiate between fact and fabrication, it is timely and appropriate for states, territories, and tribes to take decisive action to fortify the quality of journalism education for the benefit of participants and consumers alike. Meaningful civic education requires that students feel safe and empowered to discuss issues of social and political concern in the responsible, accountable forum of journalistic media.

High-quality student journalism contributes to the civic health of the school and college community in many ways. It gives marginalized students opportunities for recognition; it sheds light on ways in which schools are performing unsatisfactorily and could be improved; and it builds healthy news readership habits that can carry over into adult life. With encouragement and guidance, students can and do produce journalistic work of remarkable sophistication. Recently, high-school journalists in Pittsburg, Kansas, achieved national acclaim for their investigative reporting that exposed résumé-padding by a newly hired principal, leading to her resignation and reforms in their district's hiring procedures.<sup>1</sup> College journalists at the University of Alabama were nominated for the Pulitzer Prize for their searing exposé of de facto segregation in college sororities.

Journalism thrives in communities like Pittsburg, Kansas, in no small part because of state statutes that enable students, not school administrators, to choose the content of journalistic publications. These state statutes are necessary because the U.S. Supreme Court significantly diminished students' protection against institutional censorship in its 1988 ruling, *Hazelwood School District v. Kuhlmeier*.<sup>2</sup>

Schools have essential safety responsibilities that require latitude to regulate speech in ways that would not be permissible outside the schoolhouse gate. Bullying and harassment are, and must remain, legally unprotected speech to which administrators can apply their best educational judgment. But when it comes to student journalism, it is possible to strike a sensible balance that protects journalistic speech with the schools' authority to respond to bullying and harassment. Indeed, the ability to be heard on issues of public concern is itself a matter of student safety. Students can and do use journalism to call public attention

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<sup>1</sup> Samantha Schmidt, *These high school journalists investigated a new principal's credentials. Days later, she resigned.* THE WASHINGTON POST, April 5, 2017.

<sup>2</sup> 484 U.S. 260 (1988).

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to safety hazards, when they are allowed to do so. Students at Pennsylvania’s Conestoga High School won national awards for spotlighting inadequacies in their district’s employee criminal background checks. At Maryland’s Rockville High School, students prompted the state to reassess its water-testing regime after they exposed elevated lead levels in school drinking fountains. The law must ensure that this type of whistleblowing speech is heard.

Before *Hazelwood*, speech in journalistic publications enjoyed substantial protection against censorship by school authorities under the standard set by the Supreme Court in *Tinker v. Des Moines Independent Community School District*.<sup>3</sup> In *Tinker*, the Supreme Court held that nothing short of a material and substantial disruption of school activities could justify content-based censorship of student expression. In its most quoted passage, Justice Abe Fortas’ majority opinion reaffirmed that “(I)t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>4</sup>

Nineteen years later, the *Hazelwood* Court carved out a less-protected tier of student speech when the vehicle conveying the message is provided by the school as a part of its educational offerings – in that case, a newspaper produced as an extension of a high-school journalism course. The *Hazelwood* majority, led by Justice Byron White, found that the students of Missouri’s Hazelwood East High School had minimal free-expression protection when publishing in a school-financed newspaper, because the newspaper had not been designated as a “forum” for the indiscriminate use of student speakers.<sup>5</sup>

Justice William Brennan, joined by Justices Harry Blackmun and Thurgood Marshall in dissent, decried the school’s censorship decision as an act of “unthinking contempt for individual rights” and lamented the Court’s retreat from *Tinker*:

Instead of teaching children to respect the diversity of ideas that is fundamental to the American system ... and that our Constitution is a living reality, not parchment preserved under glass, ... the Court today teaches youth to discount important principles of our government as mere platitudes. ... The young men and women of Hazelwood East expected a civics lesson, but not the one the Court teaches them today.<sup>6</sup>

In the 29 years since *Hazelwood* was decided, Justice Brennan’s admonition has proven prophetic. Attorney Christine Snyder, a former high-school journalism teacher, has written that state statutory protection for student journalists and journalism educators is urgently needed to restore the civic and educational benefits of consuming and creating news in schools:

As protection of free speech in schools has eroded over the last forty years through a series of court cases, censorship of student speech has increased, and

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<sup>3</sup> 393 U.S. 503, 511 (1969).

<sup>4</sup> *Id.* at 506.

<sup>5</sup> *Hazelwood*, 484 U.S. at 269-70.

<sup>6</sup> *Id.* at 290-91 (Brennan, J., dissenting) (internal quotes, brackets and citations eliminated).

student journalists, instead of valuing free speech, press, and expression, have been taught to shy away from controversy and to stifle differing views. Similarly, when teachers assigned to advise student journalists have acted in support of their students' rights, they have been punished, threatened, and terminated.<sup>7</sup>

Although the *Hazelwood* standard contemplates that a student could still contest censorship that lacks a legitimate educational justification, the standard is applied deferentially and successful student challenges are almost nonexistent.<sup>8</sup> In practical effect, the *Hazelwood* ruling has greatly diminished students' access to the courts even to attempt to vindicate their rights, because attorneys are rarely willing to take on the pro-bono representation of students knowing that the odds are so formidable. Even though the Student Press Law Center reports receiving hundreds of requests for assistance with censorship cases every year, a 2012 study found just one appellate-level court case since *Hazelwood* involving the censorship of a journalistic publication.<sup>9</sup> (The Second Circuit ruled against the journalists' challenge to the removal of a political cartoon questioning the efficacy of the school's sex-education curriculum.<sup>10</sup>) As Professor Sonja West has written: "Schools are essentially free to censor the student press even when the speech at issue is truthful, legally obtained, non-disruptive, and about matters of public concern."<sup>11</sup> Multiple commentators have arrived independently at the same description to characterize *Hazelwood*'s impact on the quality of the journalism education experience: "Devastating."<sup>12</sup> Nor has *Hazelwood*'s impact been limited to the "captive audience" K-12 educational setting. At least four federal circuits have stated that the *Hazelwood* level of institutional control constrains the rights of college students as well,<sup>13</sup> including one ruling – the Seventh Circuit's 2005 opinion in *Hosty v. Carter* – expressly applying *Hazelwood* to journalistic speech in a student-edited publication.<sup>14</sup>

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<sup>7</sup> Christine Snyder, *Reversing the Tide: Restoring First Amendment Ideals in America's Schools Through Legislative Protections for Journalism Students and Advisors*, 2014 B.Y.U. EDUC. & L.J. 71, 72 (2014).

<sup>8</sup> See Dan V. Kozlowski, *Hazelwood's Application in the Circuit Courts*, 3 U.B. J. OF MEDIA L. & ETHICS 1, 6 (2012) ("Circuit courts have broadly applied *Hazelwood* – both in terms of when it is applied and to whom – and expansively interpreted the 'legitimate pedagogical concerns' standard, generally granting wide discretion to school officials.").

<sup>9</sup> *Id.* at 12.

<sup>10</sup> *R.O. ex rel. Ochshorn v. Ithaca City Sch. Dist.*, 645 F. 3d 533 (2d Cir. 2011).

<sup>11</sup> See Sonja West, *Student Press Exceptionalism*, 2 EDUC. L. & POL'Y REV. 130, 132 (2015).

<sup>12</sup> Sara Prose, *Note: Dean v. Utica Community Schools: A Significant Victory for the Student Press Community and a Potential Guiding Force to the Reexamination of the Hazelwood Holding*, 87 U. DET. MERCY L. REV. 247, 247 (Winter 2010); Ryan D. Pittman, *Note: The College Student Media as House Organ: Reflections on an Off-Key Decision in Hosty v. Carter*, 44 HOUS. L. REV. 131, 156 (2007); Scott Andrew Felder, *Stop the Presses: Censorship and the High School Journalist*, 29 J.L. & Educ. 433, 454 (October 2000).

<sup>13</sup> See *Ward v. Polite*, 667 F. 3d 727 (6th Cir. 2012); *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005) (en banc); *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004); *Alabama Student Party v. Student Gov't Ass'n*, 867 F.2d 1344 (11th Cir. 1989).

<sup>14</sup> *Hosty*, 412 F.3d at 734. For a contrary view, see the Sixth Circuit's ruling in *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001) (en banc), holding that student-produced media at the college level operate as a public forum for student expression insulated from the *Hazelwood* level of school control. *Hosty* and *Kincaid* are the only appellate cases squarely confronting *Hazelwood* in the college newsroom setting, leaving uncertainty as to the level of protection that college journalists enjoy nationally.

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It is the consensus of every leading expert in journalism education that *Hazelwood* has fostered censorship for purposes of image control rather than education, and that *Hazelwood* has diminished the opportunity for students to make their voices heard on issues of social and political importance. As the Society of Professional Journalists stated in a resolution calling on states to renounce the *Hazelwood* level of control over student journalism:

[N]o legitimate pedagogical purpose or the public's right to know is served by censorship of student journalism on the grounds the reporting may be unflattering toward school programs or policies, that it candidly discusses sensitive social and political issues or that it voices opinions which challenge the majority views on matters of public concern because all of these are essential to critical thinking, collaboration and communication skills necessary for an informed public.<sup>15</sup>

Other leading organizations that train future journalists -- among them the Journalism Education Association, the Association for Education in Journalism and Mass Communication, the National Conference of Teachers of English and the American Society of News Editors – agree that the quality of journalism education is inhibited when educational institutions exercise total authority over what can be published. As the ASNE stated in its August 2016 resolution calling on states to enact comprehensive protection for student journalism, “a free and independent student media is an essential ingredient of a civically healthy campus community, conveying the skills, ethics and values that prepare young people for a lifetime of participatory citizenship.”<sup>16</sup>

Recently published research by University of Kansas journalism professors Genelle I. Belmas and Piotr B. Bobkowski documents that high-school journalists are prone to “self-censor” in anticipation of adverse reaction from school administrators, and that the toll of school censorship falls disproportionately on female students. In a survey of 461 high-school students attending journalism workshops in a southeastern state during the fall of 2015, 38 percent of students (41 percent of girls and 28 percent of boys) reported having been told that certain topics were categorically off-limits for discussion in student media, and 47 percent of students (53 percent of girls and 27 percent of boys) reported that they restrained themselves from pursuing an article because they anticipated a negative reaction from school authorities.<sup>17</sup> Among the responses that Bobkowski and Belmas received to a prompt inviting students to describe their censorship experiences, one student wrote: “We were told not to write about standardized tests that would make the school look bad.” Another volunteered: “We are asked to refrain from discussing any topic that would shed

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<sup>15</sup> Society of Professional Journalists, “Resolution No. 4: Student journalism censorship” (Aug. 26, 2013), available at <http://www.spj.org/res2013.asp#4>.

<sup>16</sup> American Society of News Editors, “Resolution in Support of Legal Protection for Student Journalists and Advisers” (Aug. 10, 2016).

<sup>17</sup> Genelle I. Belmas and Piotr B. Bobkowski, *Mixed Message Media: Girls' Voices and Civic Engagement in Student Journalism*, GIRLHOOD STUDIES 89 (March 2017).

negative light on our school even if it is honest and important.”<sup>18</sup> Other research has documented a similar erosion in the ability, or willingness, of student journalists to challenge the decisions of school authority figures since *Hazelwood* was decided.<sup>19</sup>

Excellent journalism educators have lost their jobs as punishment for speech by their students that calls attention to their schools’ shortcomings or provokes controversy by addressing sensitive social or political issues. A highly regarded Indiana teacher, Amy Sorrell, recently testified before her state’s House Education Committee that she was fired because she supported a student’s decision to publish an opinion column calling for tolerance toward gay and lesbian students.<sup>20</sup> A former journalism adviser at Chicago State University successfully sued his institution for reinstatement after being removed (along with the student editor) in retaliation for coverage of a controversy involving profligate spending of student activity fees.<sup>21</sup> More such instances at the college level are documented in a December 2016 white paper, “Threats to the Independence of Student Media,” issued by the American Association of University Professors and a consortium of free-expression organizations.<sup>22</sup> The report recommends strengthening state statutory protections to outlaw direct acts of censorship as well as indirect censorship by way of financial pressure on student media outlets or the removal of supportive faculty advisers.

The National Education Association, the nation’s largest teacher organization, marked the 20-year anniversary of the *Hazelwood* decision by enacting a resolution calling on schools to forswear censorship of student journalism:

The National Education Association believes that freedom of speech and press are fundamental principles in our democratic society granted by the First Amendment of the United States Constitution, and these freedoms provide all

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<sup>18</sup> *Id.* at 99.

<sup>19</sup> See Carol S. Lomicky, *Analysis of High School Newspaper Editorials Before and After Hazelwood School District v. Kuhlmeier: A Content Analysis Case Study*, 29 J.L. & EDUC. 464, 464-65 (2004) (concluding, after a study of 144 editions of one school’s newspaper covering a 16-year period, that students were significantly less likely to use the editorial page to express dissent with school policies after *Hazelwood* was decided). Tyler Buller’s research similarly finds that students in states without statutes protecting press freedom are far more likely than students in speech-protective states to publish editorials criticizing the disobedience of their peers – in other words, hewing to the school administration’s line rather than focusing their criticism on administrative policies. See Tyler Buller, *The State Response to Hazelwood v. Kuhlmeier*, 66 ME. L. REV. 89, 143-44 (2013).

<sup>20</sup> Alexa Chryssovergis, *Committee hears testimony on student press freedom protection bill*, THE INDIANA DAILY STUDENT (Feb. 14, 2017). For more information on the Sorrell case, see The Associated Press, “Teacher’s job on line over ‘tolerance’ column (April 23, 2007), available at [http://www.nbcnews.com/id/18268259/ns/us\\_news-education/t/teachers-job-line-over-tolerance-column/#.WP1qz1PytBw](http://www.nbcnews.com/id/18268259/ns/us_news-education/t/teachers-job-line-over-tolerance-column/#.WP1qz1PytBw). For more instances of retaliatory removals of journalism educators, see Tyler J. Buller, *Subtle Censorship: The Problem of Retaliation Against High School Journalism Advisers and Three Ways to Stop It*, 40 J.L. & EDUC. 609 (October 2011). See also Snyder, *supra* note 7, at 85 (“[M]any journalism teachers face the conflict between risking their jobs and speaking out against censorship. Administrators often exploit the precarious position of the journalism advisor as yet another way to control the content in student newspapers.”).

<sup>21</sup> *Moore v. Watson*, 838 F. Supp. 2d 735 (N.D. Ill. 2012).

<sup>22</sup> American Association of University Professors *et al.*, “Threats to the Independence of Student Media” (December 2016), available at [https://www.aaup.org/file/StudentMediaReport\\_0.pdf](https://www.aaup.org/file/StudentMediaReport_0.pdf).

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people, including students, with the right to engage in robust and uninhibited discussion of issues in student media.<sup>23</sup>

## **Substantive journalism in student media has demonstrable civic benefits**

The era of *Hazelwood* has coincided with a sharp diminution in news readership among all audiences, most especially the young. The Pew Research Center reports that only 16 percent of Americans ages 18 to 24 read a daily newspaper, down from 40 percent in 2000, and viewership of local news on television is declining sharply among Americans 29 and under.<sup>24</sup> While many factors are at play in the erosion of news consumption, making news uninteresting to young people at a time when they are forming lifelong viewing habits is self-evidently counterproductive.

Meaningful journalism education opportunities are especially crucial in today's society, for two primary reasons. First, it is now widely documented that young people are entering into adulthood inadequately prepared for informed civic participation, unable to differentiate between "fake" and "real" news they consume online.<sup>25</sup> Cultivating an appetite for well-researched, factual news is an essential function of the civic mission of the public school system. Censorship devalues journalism. When coverage is purposefully slanted to reflect only a favorable impression of school policies and events, it ceases to be news. As Judge Arthur Tarnow memorably wrote in *Dean v. Utica Community Schools*, a rare post-*Hazelwood* victory in which a student journalist successfully challenged school censorship:

A core value of being a journalist is to understand the role of the press in a free society. That role is to provide an independent source of information so that a citizen can make informed decisions. It is often the case that this core value of journalistic independence requires a journalist to question authority rather than side with authority. Thus, if the role of the press in a democratic society is to have any value, all journalists-including student journalists-must be allowed to publish viewpoints contrary to those of state authorities without intervention or censorship by the authorities themselves. Without protection, the freedoms of speech and press are meaningless and the press becomes a mere channel for official thought.<sup>26</sup>

Second, 73 percent of teens now have internet-enabled smartphones and 71 are active users of Facebook, the most popular social media platform.<sup>27</sup> It is no longer possible, as it was in Principal Robert Reynolds' day at Hazelwood East High School, to insulate teens from learning about "mature" subjects by withholding articles from newspapers. Because

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<sup>23</sup> National Education Association, Resolution B-56 (adopted 2008).

<sup>24</sup> See Amy Mitchell & Jesse Holcomb, "State of The News Media 2016," Pew Research Center (June 15, 2016), available at <http://www.journalism.org/2016/06/15/state-of-the-news-media-2016/>.

<sup>25</sup> Sue Shellenbarger, *Most Students Don't Know When News Is Fake, Stanford Study Finds*, THE WALL STREET JOURNAL, Nov. 21, 2016.

<sup>26</sup> 345 F.Supp.2d 799, 804 (E.D. Mich. 2004).

<sup>27</sup> "Teens, Social Media & Technology Overview 2015," Pew Research Center (April 9, 2015), available at <http://www.pewinternet.org/2015/04/09/teens-social-media-technology-2015/>.



“mature” discussions are unstoppably taking place online, schools can most effectively respond by equipping students with the skills, ethics and values to navigate the digital world safely: Verifying sources, correcting mistakes, entertaining opposing views, and considering the legal and ethical impact of one’s words on other people. Now that everyone can be a publisher, every student should graduate K-12 school having been trained in the skills, ethics and values of journalism. The McCormick Foundation, a leading philanthropic supporter of scholastic journalism, took note in a 2010 report of the healthful benefits that uncensored journalism can provide as an “antidote” to social-media incivility:

Students seek out the uncensored venue of social networking sites to criticize school policies and personnel because schools offer no meaningful alternative forum for them to be heard. Online ‘drive-by’ grievances can and should constructively be channeled into peer-moderated student media where discussion can occur civilly but without undue restraint.<sup>28</sup>

The public depends more today than ever before on students as primary gatherers and providers of news. Employment in professional newsrooms is in free-fall. U.S. Department of Labor statistics show that news publishing companies lost more than half of their workforce (from 412,000 jobs to 174,000) between 2001 and 2016.<sup>29</sup> The Pew Research Center found in a 2014 survey that 14 percent of all reporters covering America’s statehouses are students.<sup>30</sup> The Knight Foundation and other leading philanthropic funders of journalism have called on journalism schools to reconceive their mission as primary providers of information to underserved audiences just as medical schools operate teaching hospitals to meet the healthcare needs of their communities.<sup>31</sup> If student journalists are to assume responsibility as the primary newsgatherers for their communities, they must be assured of independence from viewpoint-based institutional control or reprisal, as nonstudent professionals are. Writing in *The Atlantic*, First Amendment lawyers Jonathan Peters and Frank LoMonte observed that today’s college journalists “are being asked to fulfill community needs for professional-caliber news without the assurances that keep professionals safe when fearless journalism provokes a backlash.”<sup>32</sup>

Coverage of schools and colleges has been particularly hard-hit by the decline in newsroom staffing. The Brookings Institution reported in 2009 that education accounted for just 1.4

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<sup>28</sup> The Robert R. McCormick Foundation, “Protocol for Free & Responsible Student Media” (2010), available at [http://www.issueab.org/resource/protocol\\_for\\_free\\_responsible\\_student\\_news\\_media](http://www.issueab.org/resource/protocol_for_free_responsible_student_news_media).

<sup>29</sup> U.S. Department of Labor, Bureau of Labor Statistics, “Newspaper publishers lose over half their employment from January 2001 to September 2016,” April 3, 2017, available at [https://www.bls.gov/opub/ted/2017/mobile/newspaper-publishers-lose-over-half-their-employment-from-january-2001-to-september-2016.htm?mc\\_cid=e73bf40429&mc\\_eid=e49f1168cb](https://www.bls.gov/opub/ted/2017/mobile/newspaper-publishers-lose-over-half-their-employment-from-january-2001-to-september-2016.htm?mc_cid=e73bf40429&mc_eid=e49f1168cb).

<sup>30</sup> Jodi Enda, Katerina Eva Matsu & Jan Lauren Boyles, “America’s Shifting Statehouse Press,” Pew Research Center (July 10, 2014), available at <http://www.journalism.org/2014/07/10/americas-shifting-statehouse-press/>.

<sup>31</sup> Eric Newton, “Journalism Funders Call For ‘Teaching Hospital’ Model of Education,” The Knight Foundation (Aug. 3, 2012), available at <https://www.knightfoundation.org/articles/journalism-funders-call-teaching-hospital-model-education>.

<sup>32</sup> Jonathan Peters & Frank LoMonte, *College Journalists Need Free Speech More Than Ever*, THE ATLANTIC (March 1, 2013).

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percent of the coverage provided by major television, print and online news outlets (and much of that 1.4 percent was disaster-driven rather than policy-focused).<sup>33</sup> The information safety net, particularly for those interested in the performance of schools and colleges, is more fragile than anytime in modern history. The Brookings report provided a partial solution: “Some school officials discourage student reporters from asking difficult questions or raising controversial issues. In fact, student journalism of this kind should be encouraged. Student newspapers often lead the media to important education stories.” Tyler J. Buller, a former Iowa school board member turned lawyer, has written that Americans are increasingly dependent on students to cover local education news:

Today, there are more high school student newspapers than there are commercial weekly and daily newspapers combined. If you look around the audience at your local school board meeting, it would not be surprising that the most common – and perhaps only – reporter you encounter is a student, writing for one of the nation’s 12,000 student publications. These student journalists fulfill a crucial function, as adults need candid, uncensored student journalism if they are to have any idea what is going on inside the schools they support.<sup>34</sup>

As Buller’s research documented, when given the freedom to pursue serious news stories, students have brought public attention to gang activity, hazing, wasteful contracts and other school maladies that might have gone unaddressed.<sup>35</sup>

## **Protective state laws can reinvigorate the journalism education experience**

The impact of *Hazelwood* can be mitigated by state, territorial, and tribal law. The *Hazelwood* standard represents a floor, not a ceiling, on the level of freedom that students can be granted, and a growing number of states are concluding that federal law inadequately protects journalists’ rights. Since the Court issued its ruling in February 1988, ten states have enacted statutes (referred to as “New Voices” statutes) giving students a state-guaranteed level of press freedom comparable to that recognized under federal law before *Hazelwood*. These protections are now on the books in Arkansas, California, Colorado, Illinois, Iowa, Kansas, Maryland, Massachusetts, North Dakota and Oregon.<sup>36</sup> Pennsylvania and the District of Columbia extend comparable protection by way of State

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<sup>33</sup> Darrell M. West, Grover J. Whitehurst & E.J. Dionne, Jr., “Invisible: 1.4 Percent Coverage for Education is Not Enough,” The Brookings Institution (December 2, 2009), *available at* [https://www.brookings.edu/wp-content/uploads/2016/06/1202\\_education\\_news\\_west.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/1202_education_news_west.pdf).

<sup>34</sup> Buller, *supra* note 17, at 89, 97 (internal quotes and citations omitted).

<sup>35</sup> *See id.* at 97-98 (enumerating examples of impactful journalism by high-school students). *See also* West, *supra* note 9 at 139 (citing substantive student coverage of elections, gun control, housing issues, the minimum wage and other current events).

<sup>36</sup> *See* Ark. C.A. § 6-18-1202 *et seq.*; Calif. Educ. Code § 48907 (K-12 schools); Calif. Educ. Code § 66301 (colleges); Calif. Educ. Code § 76120 (community colleges); Colo. Rev. Stat. § 22-1-120; 105 Ill. Comp. Stat. 80/1110 *et seq.* (K-12 schools); Ill. Comp. Stat. 13/5 *et seq.* (colleges); Iowa Code § 280.22; Kan. Stat. Ann. § 72-1504 *et seq.*; Md. Code Ann. § 7-121 (K-12 schools); Md. Code Ann. § 15-119 (colleges); Mass. Gen. Laws ch. 71, § 82; N.D. Cent. Code, § 15.1-19-25 (K-12 schools); N.D. Cent. Code, § 15-10-55 (colleges); Ore. Rev. Stat. § 336.477 (K-12 schools); Ore. Rev. Stat. § 351.649 (colleges).

Board of Education rule rather than by statute,<sup>37</sup> for a total of 12 jurisdictions in which the *Hazelwood* level of institutional control no longer governs. Four states – California, Kansas, Maryland and North Dakota – go further and explicitly protect faculty advisers against retaliatory personnel actions for defending the journalistic independence of their students.

The movement to moderate the impact of *Hazelwood* received renewed impetus in 2015 with the enactment of the John Wall New Voices of North Dakota Act, the first “New Voices” statute passed since Oregon’s in 2007. The New Voices Act passed with bipartisan sponsorship and without a negative vote on the House or Senate floors, invigorating a nationwide movement that takes its name – “New Voices” – from the North Dakota statute.<sup>38</sup> Illinois and Maryland followed North Dakota’s lead in 2016, and comparable bills have since been introduced in 11 other states. While the details of these statutes and proposals vary, the core objective of each is to restore to journalistic media the more robust level of freedom recognized by the Supreme Court in *Tinker*, which has stood for almost 50 years as the standard governing public schools’ regulation of student speech outside the curricular setting.

The *Tinker* standard strikes a commonsense balance between authority and autonomy, with the benefit of a well-developed body of interpretive caselaw. As Professor Sonja West has observed, it is counterintuitive that the one place in which students are assured of no legally protected freedom to voice political opinions is in the pages of a newspaper.<sup>39</sup> The movement to restore *Tinker* protection to student media has received broad editorial support from professional news organizations across the country, including endorsements in the *Seattle Times* and the *Bergen Record*, among many others.<sup>40</sup>

To be sure, safeguards are appropriate – particularly at the K-12 level where the audience is predominantly minors – to enable school authorities to respond appropriately if student publications become vehicles for defamation, bullying or other injurious behavior. The *Tinker* standard provides ample discretion to police harm-causing speech, just as it has allowed schools to respond outside the newsroom setting where it is reasonably foreseeable that student speech will provoke others to act disruptively.<sup>41</sup> Existing state statutes protecting the freedom of the student media do, and future statutes should continue to, provide K-12 schools with the *Tinker* level of authority needed to regulate the publication

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<sup>37</sup> See Pa. Code § 12.9; D.C. Mun. Regs. tit. 5-E, § 2401.

<sup>38</sup> Jonathan Peters, *How a new campaign is trying to strengthen the rights of student journalists*, COLUMBIA JOURNALISM REVIEW (Feb. 19, 2016).

<sup>39</sup> See West, *supra* note 9.

<sup>40</sup> Editorial, *Remove gag from student journalists*, THE SEATTLE TIMES (Feb. 5, 2017) (“the best education is rooted in critical thinking and forceful writing – the definition of good journalism.”); Editorial, *Free Student Press*, THE BERGEN RECORD (Aug 12, 2016) (“Being free to criticize school officials without the fear of censorship or retribution isn’t an unreasonable expectation for students in New Jersey. It’s called democracy.”).

<sup>41</sup> In an illustrative recent application, the Ninth Circuit U.S. Court of Appeals cited *Tinker* to permit a California school to enforce an edict banning American flag apparel on a day set aside to celebrate Latin-American heritage, because of documented instances in which students had used flags tauntingly in ways that inflamed racial tensions. *Dariano v. Morgan Hill Unified School Dist.*, 745 F. 3d 354 (9th Cir. 2014).

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of material that is genuinely injurious, as opposed to merely controversial or unflattering. (Importantly, these statutes have no effect on schools' authority over *non*-journalistic speech, including text messages or social media posts, none of which are subject to the *Hazelwood* standard.)

“New Voices” statutes have proven safe and effective. Contrary to initial concerns that granting students even a limited degree of press freedom would provoke costly and time-consuming legal disputes, research published in the University of Maine law review documents only six court cases over a combined history of more than 170 years' experience with “New Voices” statutes in which one of the statutes has been cited in a published judicial opinion.<sup>42</sup> Indeed, clarifying the boundaries of schools' authority and students' rights by way of a statutory checklist of well-defined categories of unprotected speech holds the promise of facilitating, rather than complicating, the resolution of censorship disputes. Nor is there any evidence that students in states with the benefit of statutory protection have abused that protection to publish harmful material. There are no known cases in which any K-12 school or district has ever been judicially ordered to pay damages to anyone injured by material published in student media.

New Voices statutes in no way affect the ability of schools to maintain order in the classroom, to restrict disruptive behavior such as walkouts or demonstrations, or to respond to cases of online bullying on social media. These statutes are, properly, limited to students' use of journalistic media (like the *Spectrum* newspaper at Hazelwood East High School) that is advised by faculty as an extension of school educational or extracurricular programming.

## **Enhancing Civic Literacy and Promoting Students' Media Literacy**

To achieve the American Bar Association's Goal IV (advancing the rule of law), lawyers and the legal profession should aid the public in understanding and respecting the legal system at home and throughout the world. Central to this is a public equipped with strong civic and media literacy skills. Such skills allow individuals to effectively participate in civic life by “knowing how to stay informed and understanding governmental process; exercising the rights and obligations for citizenship at local, state, national and global levels; and understanding the local and global implications of civic decisions[.]” High-quality civic learning in the K-12 environment goes beyond the social studies classroom. We should view civic learning as “not just as acquisition of factual information about the nation's founding principles and government structures but as how students experience and practice democracy in their daily lives.”<sup>43</sup> As the Partnership for 21<sup>st</sup> Century Learning noted, today's citizens must exhibit “a range of functional and critical thinking skills related to information, media and technology” that includes the ability to “understand and

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<sup>42</sup> See Tyler J. Buller, *The State Response to Hazelwood v. Kuhlmeier*, 66 ME. L. REV. 89, 116 (2013) (enumerating one case in Iowa, three in California and two in Massachusetts in which courts cited student press-freedom statutes). The dearth of California cases is especially noteworthy because California's press-freedom statute has been on the books since 1977, even predating the *Hazelwood* decision.

<sup>43</sup> Kei Kawashima-Ginsberg, *The Future of Civic Education*, National Association of State Boards of Education, [www.nasbe.org](http://www.nasbe.org), September 2016.

utilize media creation tools, characteristics and conventions.”<sup>i</sup> By supporting quality journalism education that fosters civic learning, the American Bar Association and the legal profession plays an integral role in shaping tomorrow’s civic leaders and protecting the rule of law.

Respectfully Submitted,

Kirke Kickingbird  
Chair, Section of Civil Rights and Social Justice

August 2017

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## GENERAL INFORMATION FORM

Submitting Entity: Section of Civil Rights and Social Justice

Submitted By: Kirke Kickingbird, Chair  
Section of Civil Rights and Social Justice

1. Summary of Resolution(s). The Resolution urges all state, territorial and tribal legislative bodies to enact statutes that:
  - (a) rigorously protect the ability of student journalists at the secondary and postsecondary levels to make the independent editorial judgments necessary to meaningfully cover issues of social and political importance without fear of retaliation or reprisal, provided that such statutes should also allow for reasonable restrictions on the time, place, and manner of student expression, and should neither authorize nor protect expression by students that is defamatory or invasive of privacy, is obscene or otherwise unlawful, or is reasonably anticipated to incite students to act unlawfully;
  - (b) safeguard the student media advisors who supervise students participating in school-sponsored journalism against punitive action for supporting their students in gathering and publishing news of interest and concern to their communities;
  - (c) expressly declare that criticism of government policies or programs, or the discussion of issues of social or political controversy, is protected speech in journalistic media, regardless of the medium's school affiliation or sponsorship;
  - (d) urge school districts to adopt written student freedom of expression policies in accordance with their jurisdiction's statutes; and
  - (e) ensure that student journalists have the right to exercise freedom of speech and of the press in school-sponsored media.

The Resolution also urges secondary and postsecondary educational institutions to offer students meaningful opportunities in school-sponsored journalism to enhance their civic learning and to promote all students' media literacy.

2. Approval by Submitting Entity. The Council of the Section of Civil Rights and Social Justice approved the Resolution during its Spring Meeting on Saturday, April 29, 2017.

The Standing Committee on Public Education approved co-sponsorship of the Resolution on April 22, 2017.

3. Has this or a similar resolution been submitted to the House or Board previously?  
No.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

The American Bar Association has longstanding policy on civic learning. In particular, the ABA has resolved to “[encourage] all lawyers to consider it part of their fundamental responsibility to ensure that all students experience high quality civic learning, including the study of law, government, and history” (10A-110, Standing Committee on Public Education) and to “[urge] policymakers at all levels of government to ensure that all students experience high quality civic learning.” (06A-102, Commission on Civic Education and the Separation of Powers)

To achieve the American Bar Association’s Goal IV (advancing the rule of law), lawyers and the legal profession should aid the public in understanding and respecting the legal system at home and throughout the world. Central to this is a public equipped with strong civic and media literacy skills. Such skills allow individuals to effectively participate in civic life by “knowing how to stay informed and understanding governmental process; exercising the rights and obligations for citizenship at local, state, national and global levels; and understanding the local and global implications of civic decisions[.]” High-quality civic learning in the K-12 environment goes beyond the social studies classroom. We should view civic learning as “not just as acquisition of factual information about the nation’s founding principles and government structures but as how students experience and practice democracy in their daily lives.” By supporting quality journalism education that fosters civic learning, the American Bar Association and the legal profession plays an integral role in shaping tomorrow’s civic leaders and protecting the rule of law.

5. If this is a late report, what urgency exists which requires action at this meeting of the House? N/A
6. Status of Legislation. (If applicable)

Since the Court issued its *Hazelwood* ruling in February 1988, ten states have enacted statutes (referred to as “New Voices” statutes) giving students a state-guaranteed level of press freedom comparable to that recognized under federal law before *Hazelwood*. These protections are now on the books in Arkansas, California, Colorado, Illinois, Iowa, Kansas, Maryland, Massachusetts, North Dakota and Oregon. Pennsylvania and the District of Columbia extend comparable protection by way of State Board of Education rule rather than by statute, (*See* Pa. Code § 12.9; D.C. Mun. Regs. tit. 5-E, § 2401), for a total of 12 jurisdictions in which the *Hazelwood* level of institutional control no longer governs. Four states – California, Kansas, Maryland and North Dakota – go further and explicitly protect faculty advisers against retaliatory personnel actions for defending the journalistic independence of their students.

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7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. We will work with relevant stakeholders within and outside of the American Bar Association and the Governmental Affairs Office to implement the policy.
8. Cost to the Association. (Both direct and indirect costs) Adoption of this proposed resolution would result in only minor indirect costs associated with Section staff time devoted to the policy subject matter as part of the staff members' overall substantive responsibilities.
9. Disclosure of Interest. (If applicable) There are no known conflicts of interest.
10. Referrals. The Report with Recommendation will be referred to the following entities (When will this be done?):

Section of State and Local Government Law  
Law Student Division  
Young Lawyers Division  
Forum on Communications Law  
Commission on the Lawyer's Role in Assuring Every Child's Right to a High-Quality Education  
Solo, Small Firm and General Practice Division  
Center of Children and the Law  
Government and Public Sector Lawyers Division

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

Steve Wermiel, Chair, First Amendment Committee, Section of Civil Rights and Social Justice  
Professor of Practice  
American University Washington College of Law  
4300 Nebraska Ave NW  
Washington, DC 20016  
Tel: 202-274-4263  
Email: swermiel@wcl.american.edu

Tanya Terrell Coleman, Director  
Section of Civil Rights and Social Justice  
1050 Connecticut Avenue NW  
Washington, DC 20036  
Tel: (202) 662-1030  
Email: Tanya.terrell@americanbar.org



12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

Estelle H. Rogers, CRSJ Section Delegate  
111 Marigold Ln  
Forestville, CA 95436-9321  
Tel.: (202) 337-3332 (Work)  
E-mail: [1estellerogers@gmail.com](mailto:1estellerogers@gmail.com)

Walter H. White, Jr., CRSJ Section Delegate  
McGuire Woods LLP  
11 Pilgrim Street  
London EC4V 6RN, United Kingdom  
Tel.: +44 (0)20 7632 1630  
Fax: +44 (0)20 7632 1638  
E-mail: [wwhite@mcguirewoods.com](mailto:wwhite@mcguirewoods.com)

2001 K Street N.W.  
Suite 400  
Washington, D.C. 20006-1040  
Tel.: 202/857.1707  
Fax: 202/828.2969  
(alternate address)

## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

That Resolution urges all state, territorial and tribal legislative bodies to enact statutes that rigorously protect the ability of student journalists at the secondary and postsecondary levels to make the independent editorial judgments necessary to meaningfully cover issues of social and political importance without fear of retaliation or reprisal, provided that such statutes should also allow for reasonable restrictions on the time, place, and manner of student expression, and should neither authorize nor protect expression by students that is defamatory or invasive of privacy, is obscene or otherwise unlawful, or is reasonably anticipated to incite students to act unlawfully; safeguard the student media advisors who supervise student journalists; declares that criticism of government policies or programs, or the discussion of issues of social or political controversy, is protected speech in journalistic media, regardless of the medium's school affiliation or sponsorship; urge school districts to adopt written student freedom of expression policies in accordance with their jurisdiction's statutes; and ensure that student journalists have the right to exercise freedom of speech and of the press in school-sponsored media. It also urges secondary and postsecondary educational institutions to offer students meaningful opportunities in school-sponsored journalism to enhance their civic learning and to promote all students' media literacy.

### 2. Summary of the Issue that the Resolution Addresses

The Resolution addresses the great national anxiety over the civic readiness of young Americans, about escalating hostility toward journalism and journalists, and about the inability of all users of social media to differentiate between fact and fabrication.

### 3. Please Explain How the Proposed Policy Position Will Address the Issue

Given the current national climate, it is timely and appropriate for states, territories, and tribes to take decisive action to fortify the quality of journalism education for the benefit of participants and consumers alike. Meaningful civic education requires that students feel safe and empowered to discuss issues of social and political concern in the responsible, accountable forum of journalistic media. This policy will allow the ABA to effectively advocate and educate on this issue.

### 4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

No minority views or opposition have been identified.

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