

**TRUMP**  
MAKE AMERICA GREAT AGAIN

STUDENT PRESS LAW CENTER  
**REPORT**  
WINTER 2017 VOL. XXXVIII, NO. 1

trumped-up

Army  
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**THE DISTRICT**

The  
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Vice President  
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IT'S NEVER  
TOO LATE  
DO THE  
RIGHT THING  
EVAN MCMULLIN  
FOR PRESIDENT 2016

**STAMP OF APPROVAL**  
The battle over political editorials:  
Can student journalists run afoul of the IRS?  
P. 5

**Feel The Bern**  
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Mike Pence  
family Bible  
vice pre  
Republican

**FOR PRESIDENT 2016**  
**VOTE DEEZ NUTS**  
**NO HILLARY OR TRUMP**

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designer  
first couple  
Trump  
brand.

**Greater Good Not The Lesser Evil!**  
VOTE GREEN PARTY  
**2016.com**

Supreme Court  
Thomas,

# REPORT

Winter 2017, VOL. XXXVIII, NO. 1

The Student Press Law Center *Report* (ISSN 0160-3825), published three times each year by the SPLC, summarizes current cases and controversies involving the rights of the student press. The *Report* is researched, written and produced by journalism interns and SPLC staff.

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## FIND MORE ONLINE

Don't forget that this content, and more, is available online at [www.splc.org/section/magazine](http://www.splc.org/section/magazine), including:

- **Missing:** A review of newspaper theft and vandalism at colleges across the country.
- **The right stuff:** Arguments over the use of drones span military applications, commercial uses, and the casual hobbyist, but recent FAA guidance has cleared the air for student journalists.



A MESSAGE FROM EXECUTIVE DIRECTOR FRANK

Frank Goldstein

## In the post-fact era, scholastic journalism can strengthen civics

Even among people satisfied with its outcome, the November 2016 election left America with a collective national urge to take a shower and scrub off the ooze of the most dispiriting campaign in modern history. How did our political process produce such distasteful and polarizing candidates, and how are we unable to have civil, fact-based conversations that produce solutions and not insult memes?

In the election's aftermath, "media literacy" (or its cousin, "news literacy" – each term has its devotees) gained sudden urgency. Though with little consensus on what it means or how to effectively teach it.

In a widely circulated post-election column for Medium, Harvard media scholar Danah Boyd provocatively challenged popular wisdom by asking, "Did media literacy backfire?" People are already amply skeptical of media, Boyd observes, and teaching them to read news with distrust only deepens the paranoia of those disposed to follow their own prejudices over the consensus of experts.

"We need to enable people to hear different perspectives and make sense of a very complicated – and in many ways, overwhelming – information landscape. We cannot fall back on standard educational approaches because the societal context has shifted," Boyd writes. "We need to get creative and build the social infrastructure necessary for people to meaningfully and substantively engage across existing structural lines."

In a post on Quartz that nodded to Boyd's message, if not quite her

delivery, NYU's Ben Moskowitz called for a "reinvention" of high school civics that, while incorporating technology, doesn't rely on algorithmic crutches to make our news judgments for us:

"[W]hat's needed is a new model for high-school civics; one that integrates American history and government, critical thinking, media literacy, and digital literacy. The goal of such education should not be merely to instill understanding of our online civic landscape, but how to navigate and participate in it in constructive and meaningful ways: Not what to think, but how to think.

Author and Slate columnist Dana Goldstein came closest to the mark, recognizing the irreplaceable educational value of creating media as part of a well-rounded civic education:

"[E]ffective media literacy empowers students to consume and create good content, not just critique the bad stuff. In other words, skepticism toward sources is good, but a blanket cynicism is counterproductive to the civic ends that media literacy theorists hope to achieve: a more informed and engaged public."

There is no need to invent a curriculum that teaches young people to "consume and create good content." The "new civics" is, and always has been, journalism. Well-supported journalism education, in which young people learn to actually value news as opposed to merely distrusting it, is the most promising antidote to the epidemic of socially shared "fake news" that exaggerates our differences and replaces dialogue with demonization.

This edition of the SPLC Report focuses on issues that emerged during the 2016 election cycle affecting the student media. It's the start of an ongoing conversation that we hope to continue with our audience about ways that journalism can be a force for healing and reconciliation in American civic life, instead of an amplifier for name-calling. -30-

### DUST OFF THOSE RESUMES...

We're currently accepting applications for 2017-18 Active Voice Fellows. Learn more at [theactivevoice.org](http://theactivevoice.org)

### AND FOLLOW ALONG...

Our 2016-17 Active Voice Fellows have been incredibly busy. With upcoming events in Austin, Seattle, San Francisco and the big show in Florida – it's hard to keep up.

We've featured these tenacious young women, in their own words, on the next page.

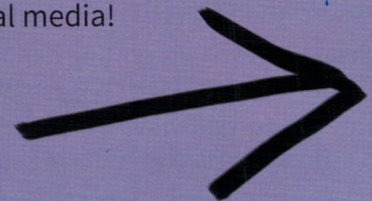
Don't forget to catch them on social media!



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# TALK BACK. ALL DAY. EVERY DAY.



**SHINE CHO - UC SAN DIEGO**

I learned that citing Wikipedia in a paper was equal to committing academic suicide, but never what constitutes news credibility in the form of primary sources, amount of detail, or objective language.

My hope is that next time, the media will focus less on stories that generate profit, but on the actual facts, policies and issues. Without trust in our media to report fair, unbiased, and non-sensationalized stories, I fear that ignorance will "Trump" intelligence as the election of 2016 demonstrated.



**DARLENE ADEROJU - HOWARD UNIVERSITY**

While I do not know how, I know that we as women will prevail. History tells us so, as do my instincts. So, 2017, here we women come; hear us talk back and watch us continue to change the political, social and economic landscape.



**SINDHU RAVURI - UC BERKELEY**

For my project I wanted to find a solution to the problem I see at so many media outlets: not enough women. But how can you inspire a generation of young girls who are constantly being silenced? My answer is to show them how to use their voice - literally.



**NASHWA BAWAB - UT AUSTIN**

There are a number of schools that are doing things right,  
But let's get the nation to be united in this fight  
Remember Tinker v Des Moines and the gains that were seen  
Let's cure Hazelwood in 2017!



**SOPHIE GORDON - BALL STATE UNIVERSITY**

You can catch our Active Voice fellows in action out in the field throughout the spring semester.

Sindhu Ravuri will show off her website about girls and STEM education at the Association Collegiate Press convention, March 3-4 in San Francisco.

Nashwa Bawab is presenting her pilot program about podcasting skill-building at the SXSWedu convention, March 9 in Austin.

Sophie Gordon will have a listening session for girls attending the JEA-NSPA spring high school journalism convention, April 7 in Seattle.

And, last but not least, you can watch the whole crew at the FIU Kopenhaver Center's 2017 Conference - **Women in Communication: Breaking the Barriers** - on April 20!



**#TalkBack**

Apply for the 2017-18 Active Voice Fellowship at [theactivevoice.org](http://theactivevoice.org)



# STAMP OF APPROVAL

Editorial endorsements are a staple of the newspaper industry, and many student publications try their hand at crafting a reasoned argument for one candidate over another. This raises a question for independent, nonprofit student media. Do they risk running afoul of tax laws forbidding political advocacy?

By Mary Tyler March

**W**hile the 2016 presidential election prompted new ethical dilemmas for the fourth estate, some student media organizations found themselves grappling with the question of whether candidate endorsements were within their rights to publish.

Following an unprecedentedly abnormal election cycle, newspapers across the country – from student newspapers at private colleges and universities, to independent, nonprofit student publications – were prompted to publish their own opinions about the candidate they deemed most qualified to take the reins from the outgoing Obama administration.

But for some college newspapers, editors worried their status as nonprofit organizations could have jeopardized their ability to publish an endorsement without facing financial repercussions.

Syracuse University's student newspaper, *The Daily Orange*, has been independent of the university since 1971 and completely financially independent since 1991.

Though *The Daily Orange* has historically endorsed presidential candidates, including an endorsement for President Barack Obama in 2012, Editor-in-Chief Justin Mattingly said the paper decided to opt out of endorsements this year because of a looming tax audit expected in the next few months.

*The Orange*, Mattingly said, had its general manager leave in March and, due to an article in the paper's bylaws, an audit was required with the hiring of their new general manager.

"We reviewed 501(c)(3) standards from the IRS, specifically the rules regarding political activity," Mattingly said. "After reviewing that, along with the Nieman Journalism Lab's guide for nonprofit newsrooms, we decided that it would be in the best interest of *The*

*D.O.* not to endorse a presidential candidate this election cycle. It was more of a 'play it safe' decision."

## Don't Mess With the IRS

**A**ccording to a 2013 report by the nonprofit Council on Foundations, nonprofit institutions cannot endorse candidates – if a nonprofit does, it risks loss of its tax-exempt status and excise taxes against the company and its managers.

But, according to a 1997 IRS opinion letter issued to Northwestern University's *The Daily Northwestern*, the publication and dissemination of editorial statements are classified as acts and expressions of opinion by students that occur in the course of academic-related functions of their institutions.

In the ruling, the IRS cited its own revised rule from 1972 in determining that an organization would be exempt under tax code provisions, provided the newspaper was operated exclusively for students' educational purposes, had no substantial part in attempting to influence legislation and did not participate in any political campaign on behalf of any candidate for public office.

For organizations in which the university furnishes physical facilities and faculty advisers in connection with the newspaper's operation, the IRS wrote, the students' expressions of political views published in the newspaper would not be regarded as acts of the university. Instead, the opinions expressed on an editorial page make it clear the views expressed are those of the students and not of their institution – views that are within the rights of nonprofit student media to publish.

"Student newspapers of the type involved have long been an established feature of university operation and have long been accepted as not only an integral part of the

university life of students and faculty but also an extension of the formal instructional process itself,” the law states. “The expression of editorial opinion on political and legislative matters in the manner described is likewise a commonly accepted feature of legitimate journalism, and would accordingly appear to be an accepted feature of legitimate student newspapers.”

While Mattingly said *The Orange’s* editorial board members were interested in writing an endorsement, they made the decision not to endorse following a discussion about the paper’s nonprofit standards. But, Mattingly said, editors felt that the paper’s readers needed an explanation behind the non-endorsement.

“I’m a former news editor at the paper and a staunch advocate for transparency,” he said. “We wanted to let our readers know that we wouldn’t be endorsing a candidate in an effort to be as transparent as possible.”

On the other side of the issue, West Virginia University’s newspaper, *The Daily Athenaeum*, published an endorsement this year in support of Democrat Hillary Clinton.

Caitlin Coyne, the *Athenaeum’s* editor in chief, said the paper has a history of publishing endorsements for the mid-term and general elections. Like *The Orange*, the *Athenaeum’s* last presidential endorsement was for Obama in 2012.

In this year’s particularly contentious political climate, Coyne said she opened up the idea of endorsements to student editors a few weeks prior to the election. Editors were given the choice of participating in the discussion or

opting out of endorsements. But, Coyne said, the decision that would be published would stand for all members of the editorial board – even if they were not involved in the process.

Of the 12 editorial board members, Coyne said nine showed up – the others, she said, weren’t interested in politics or participating in the debate.

“At the time, we initiated a conversation and planned on doing endorsements throughout the state because West Virginia is a weird state politically,” she said. “Local politics tend to be what we really stress, like the governor’s race, because a lot of our issues don’t relate very clearly to the rest of the nation.”

After a nearly four-hour meeting, Coyne said the board only managed to get through its presidential endorsement, leaving no time for local politics – something for which she wished the staff had been given more time.

Coyne said the meeting was ideologically split between staunch Democrats, non-Donald Trump conservatives and one pro-Trump member. In the meeting, editors narrowed down a list of the issues most important to the WVU and surrounding Morgantown communities before going through the pros and cons of the two major-party candidates.

In the end, the board found overwhelmingly in favor of endorsing Clinton on all counts.

Despite hailing from a deeply “red” state, the university and Morgantown exist as a liberal pocket in the state’s political fabric. And responses to the *Athenaeum’s* endorsement, Coyne said, reflected the area’s geography.

## What would you write about, if there were no limits?

It takes an inventive teacher to come up with that prompt – and a brave teacher to read and publicize the responses. Students at Nebraska’s Omaha North High School are fortunate to have both in Hillary Aerts DeVoss.

DeVoss only had to ask her students, and the pent-up frustrations came pouring out, filling sheet after sheet of butcher paper: “I want to write about suicide/mental health, rape culture, the arbitrary nature of school & beauty standards, taboos within certain ethnic cultures & religions, simply views that don’t seem shared across the board.” And keep in mind, this is a school with a skilled, supportive adviser who encourages her students to think big. Imagine how many rolls of paper might be filled in a more typical classroom.

Common to all of the responses was students’ desire to use media to voice the concerns of marginalized people who don’t fit traditional “popular-kid” standards. That’s student journalism at its best, and it’s revealing that the stories that could make the most difference in creating a positive school culture are also the ones students feel

most discouraged from sharing.

This is the hidden toll of censorship, the lost critical thinking and creativity that results from a school climate where students know their administrators don’t trust them and the courts won’t rescue them. It’s the most compelling argument for reinforcing the tattered safety net that, since the Supreme Court’s ruinous 1988 *Hazelwood* decision, has emboldened unsupportive schools to “dumb down” the discussion of social issues that young people care about.

If you’re a student or a teacher in one of the 40 states that lacks statutory protection for student journalists’ independence, please consider replicating this ingenious thought experiment. You might be dismayed – or inspired – by what you learn. DeVoss has laid out a how-to roadmap on the blog of the New Voices campaign at [www.newvoicesus.com](http://www.newvoicesus.com). We’d be excited to use the New Voices website to share your findings – because awareness of the pernicious impact of censorship is the first step toward curing it.

“We got a good mix of responses – we got some messages that were disparaging, but we also got lots of support,” she said. “We had one really long Twitter message from an alum that said it was well-written and smart, but he didn’t fundamentally agree with it, and that’s exactly what we wanted.”

## High School Students Weigh In

While dozens of other universities chose to endorse a presidential candidate, a number of the nation’s high schools also chose to broach the topic.

Newspaper staff at Colorado Springs’ Palmer Ridge High School expected a response to their endorsement of Clinton, but none perhaps as significant as those they received post-publication.

Evan Ochsner, a Palmer Ridge senior and co-editor-in-chief, told the *Denver Post*, “Some of the stuff we’ve seen on Facebook is quite disgusting. There were a lot of personal attacks that seemed out of bounds. It almost borders on bullying.”

According to a report by the *Post*, angry parents and community members emailed the school and used social media to say the editorial was unfit for a student publication, that Donald Trump should have been allotted equal space and that the paper’s staff should have been suspended. Commenters even went so far as to call the paper’s adviser a “communist” and a “socialist,” accusing him of indoctrinating students and calling for his removal from the position.

The *Post* also reported that, due to the volume of complaints, both the adviser and the school’s principal sent an email to parents explaining that the political views communicated by the editorial were an endorsement made by a nine-member editorial board and were not reflective of any position held by the school or district.

In the wake of the endorsement’s widespread controversy, pro-Trump graffiti was spray painted on the side of an El Paso County high school the following weekend. “We support Trump” and “Trump for presidet (sic)” were painted in red, white and blue, according to the *Post*.

While officials aren’t sure whether the perpetrator or perpetrators were students or adults – or even whether the incident is directly related to the editorial – the act sent a clear message to the student journalists about their opinion.

Throughout the dispute surrounding the newspaper’s endorsement, some parents also questioned whether the editorial overstepped its legal bounds.

Though high schools weren’t addressed in the IRS interpretations about college media, under Colorado’s 1990 Student Freedom of Expression Law, the speech

of students in journalistic media is not controlled by the school or attributable to school authorities.

Just as students are allowed to craft an editorial, their dissenters are allowed to participate in the free exchange by writing a letter to the editor of the publication.

As the Colorado controversy was playing out, a New York high school newspaper similarly garnered attention when it broke tradition by publishing its first ever presidential endorsement.

Outside New York City in the Clintons’ Chappaqua suburb, Horace Greeley High School’s student newspaper, the *Greeley Tribune*, endorsed its hometown candidate. The choice didn’t cause any particular controversy because Clinton was a local favorite. But it’s less clear in New York than in Colorado that the editors could have insisted on a right to publish endorsements had their administrators objected.

Because of a nearly 30-year legal precedent set forth in *Hazelwood School District v. Kuhlmeier*, student newspapers at public schools that have not been established as forums for student expression are subject to diminished First Amendment protection. In essence, as long as these papers rely on school resources, they remain subject to censorship by faculty and staff.

It is relatively uncommon, but not unheard-of, for school district publications policies to explicitly prohibit candidate endorsements. Those prohibitions have never been challenged in court, however, and it’s not clear how they’d fare, given that political speech is afforded heightened protection under the First Amendment.

On the same day *The Daily Athenaeum* published its presidential endorsement, the paper also published a column highlighting the importance of student newspaper endorsements.

In the column, Alex Weidman notes that college newspapers are given the advantage of being able to inform their peers about issues important to them through their own shared perspective as students.

“This endorsement from *The DA* puts the University, and by extension all of you, in a much larger conversation,” Weidman wrote. “Morgantown and our University has lately been a liberal island in a red state. Our endorsement is actually a dissent for much of the state; we’re not just another voice in an echo chamber.”

More importantly, Weidman wrote, the value of a student newspaper is that the students comprising the paper’s staff come from a place and group that shares the same concerns, ideas, worries and hopes as the readers.

“When students are trying to research which candidate they want to support, who better to look to first than the newspaper produced by their peers?” -30-

## COVERING IMMIGRATION

### THE NEWS ANGLE

Immigration has been a hot issue on college campuses, with ongoing debates over whether undocumented students can qualify for in-state tuition or financial aid. The Trump administration's aggressive stance on policing U.S. borders, including a much-protested January 27 order banning visitors from seven targeted countries accused of harboring terrorists, has turned up that hot issue to the boiling point.

### MAKING IT LOCAL

- *How do universities handle refugees and undocumented?*

Policies regarding undocumented immigrants and college attendance vary widely between states. According to the National Conference of State Legislatures, 18 states allow undocumented immigrants to pay in-state tuition at public universities. Some states even let undocumented students apply for state-based financial aid. Alabama and South Carolina don't allow undocumented immigrants to attend public colleges at all. As immigration continues to heat up as a public debate, it's worth following legislation in your state regarding undocumented immigrants and higher education.

- *"Sanctuary campuses"*

The "sanctuary" movement dates back to the 1970s in Los Angeles, and has come to mean a city (or more recently, a campus) where law enforcement officers are directed not to inquire about the legal status of a person detained for a non-immigration-related offense or to turn over arrestees to federal immigration authorities for removal from the country. At times it is also interpreted more broadly to include not allowing immigration officers onto the campus without a warrant, and providing other support services to those in the country without authorization. (Note that under the Supreme Court's 1972 ruling in *Plyler v. Doe*, a public K-12 school must take all comers regardless of citizenship status, but there is no comparable constitutional duty for colleges.) Many colleges have publicly claimed they're forbidden by the federal privacy law (the Family Educational Rights and Privacy Act) from sharing information about students' citizenship status with anyone, even federal law enforcement. That's probably a faithful reading of FERPA, which was drafted specifically to protect students from police agencies "fishing" into their records for damaging information.

### CONCERNS

Journalists often ask the Student Press Law Center whether interviewees can expose themselves to deportation by admitting in a news story that they're undocumented. While federal enforcement priorities can always change, there is no history of federal authorities rounding up news sources based on statements made to the media about their citizenship status, and in fact news organizations have been carrying such stories harmlessly for many years.

### GETTING IT STRAIGHT

- *Who are the people? "Immigrant," "Refugee," "Green Card holder"*

**Immigration** is the process of moving from one country to another with the intent of settling down permanently or semi-permanently.

The federal Department of Homeland Security defines **immigrant** as a noncitizen admitted to the United States as a "lawful permanent resident." But in common usage, "immigrant" also includes those who've entered the country without going through the lawful admittance process or who've overstayed their legal basis for admittance. Technically it is incorrect to use "immigrant" to refer to an international student who has applied for nonimmigrant status, as that status doesn't indicate an intent to establish permanent residency.

A **permanent resident alien** is the strictest definition of "immigrant," anyone who has been cleared to live and work in the U.S. permanently, but still face some restrictions. A permanent resident alien can't run for elected office, and some jobs at the federal level may require citizenship. This is commonly known as having a green card.

A **refugee** is defined as anyone "who is unable or unwilling to return to that country because of persecution or a well-founded fear of persecution." Examples of refugees include Jews fleeing Nazi Germany, Southeast Asian opponents of North Vietnam who came after the Vietnam War, and, currently, Syrians escaping the chaos of the Syrian Civil War.

**Asylum** is the process by which a person can show up at a point of entry to the United States and seek refuge by establishing a risk of persecution based on gender, religion, political affiliation or another protected characteristic.

Students outside of the U.S. who want to come to college here need to apply for a **student visa**. These are commonly referred to as F-1 visas, which require full-time enrollment in an accredited educational institution and strictly limit how much the holder can work for pay, especially off campus.

*These definitions are sourced from the [Department of Homeland Security's glossary](#).*

### RESOURCES & REFERENCES

A number of U.S. law schools offer immigration-law clinics through which law students provide free help to those with legal problems. Their faculty can be sources of expertise for news stories, including:

[American University](#)

[The University of Arizona](#)

[The University of Texas-Austin](#)

[The University of Virginia](#)

[Yale Law School](#)

The [Georgetown University law library](#) also maintains a well-organized repository of immigration-law resources and links.





# Alternative Definitions

The conflict between privacy and transparency is no more apparent than in the tensions between university interpretations of FERPA and their obligations to honor Title IX protections. Some universities have been caught stretching the limits of FERPA beyond recognition.

By Mary Tyler March

When the Family Educational Rights and Privacy Act was introduced in 1974, even its author did not foresee the ways in which the law's interpretations would diverge from its original intent.

Better known as FERPA, the act was created by former New York Senator James Buckley to protect the privacy of student education records in schools that receive federal funding from the Department of Education.

While the law has, in some cases, acted as a defense to protect student education and financial records from prying eyes, in countless others the law has been used as a means of protecting school administrations from releasing records that could reflect poorly on their reputations.

This year alone, one student newspaper is fighting a lawsuit filed by its own university in a nearly year-long battle over what the paper argues are public records. The university claims the records are protected under FERPA. At the same time, other journalists and student newspapers are taking their universities to task in their own quest to obtain similar records.

## Storms Over Kentucky

The *Kentucky Kernel*, the University of Kentucky's independent student newspaper, has found itself in a legal battle with university administration over the newspaper's access to records surrounding the sexual misconduct of a former associate professor.

The months-long struggle began when then editor-in-chief Will Wright requested documents that detailed an investigation into multiple complaints of sexual misconduct toward students by then-associate professor James Harwood. The university gave the *Kernel* Harwood's settlement documents, but did not provide them with the full investigation or mention that the accusations included sexual battery and verbal harassment.

After the university declined to release the full records, citing privacy concerns, the paper appealed to Attorney General Andy Beshear's office for an opinion.

The subsequent opinion found fault with the university, which had refused to release the documents to the attorney general's office for review. Beshear ruled that the university must release the records – with names and identifiers redacted – prompting UK President Eli Capilouto to send a campuswide email threatening to sue the *Kernel* – a threat he later made good on.

In his email, Capilouto cited the confidentiality and privacy of the victims as the reason for withholding the documents, despite the *Kernel's* policy of not publishing victims' names and the attorney general's provision that stated no names or identifiers were to be included in the records' release. Capilouto called the investigation "preliminary," and therefore not open to public record laws. But Beshear's opinion affirmed that the records were not protected under any existing exemptions to the state's open records law.

During that time, the *Kernel* came into possession of a 122-page investigation document, with the victims' names and identifiers redacted, from an anonymous source related to the case. The documents contained new details, including a number of accusations against Harwood for sexual harassment and assault from multiple complainants.

University officials would not confirm the authenticity of the documents acquired by the *Kernel*, but the newspaper reported that the report was signed by the university's deputy Title IX coordinator, Martha Alexander.

Though the records had been disclosed, UK proceeded with the lawsuit anyway, arguing it was necessary to challenge Beshear's interpretation and protect future students against the unwanted disclosure of their records.

UK's lawsuit claims that Beshear erred in ordering

disclosure of the records about the university's investigation, in part, because they are protected from disclosure as "education records" under the federal Family Educational Rights and Privacy Act.

In a statement issued with the lawsuit, Jay Blanton, UK's executive director of Public Relations and Marketing, said, "Our argument is not with *The Kentucky Kernel*. Respectfully, it is with an opinion from the Office of Attorney General that, if allowed to stand, would force the university to turn over private information about victim survivors to anyone, including the media, other students, employers, and strangers."

But the *Kernel*, which had been in contact with the victims' spokesperson since March, reported that the victims wanted the documents to be made public, as long as their names and identifiers had been redacted. And, under FERPA, personally identifiable information from an eligible student's education records can be made available to a third party, provided that student has given written consent.

Capilouto argued that confidentiality was necessary to encourage victims to come forward and report. But, in line with the policy of most news organizations, the *Kernel* does not identify victims of sexual assault without their permission.

In January, a state-court judge ruled with the university and overturned Beshear's order to disclose. The court accepted the university's claim that FERPA applies even to records kept in employee personnel files if they refer to students, and that the records could not be culled or excerpted to protect student identities.

In an interview before that ruling, Marjorie Kirk, the paper's editor-in-chief, said she hoped that the university would be able to see the *Kernel*'s perspective and understand that the documents are public and should be

public for accountability reasons.

"I think we both have the same goals – we both want what's best for our students," she said. "Our approaches are different probably because of underlying interests. We have ethical interests, definitely, and want the public to know we can be public watchdogs."

## Laissez Faire FERPA

One problem FERPA critics frequently cite is the openness to interpretation schools are given to determine what qualifies as a student record.

Carolyn Carlson, a professor of communication and the assistant director of journalism and emerging media at Kennesaw State University, was involved with getting FERPA amended in the 1990s to exclude records of sex offenders and those found to have committed violent crimes on campus.

"Nobody ever does release those records, but they can and they can't claim FERPA covers them," she said. "A lot depends on whether your state law requires those records to be released if they're not FERPA-related. You rarely see those kinds of records but it's not required by FERPA that they keep those records secret."

In North Carolina, state law requires that any government records not explicitly exempt under state or federal law belong to the public and must be released. Meanwhile, the state's flagship university has once again come under fire for its refusal to release such records.

The University of North Carolina's independent student newspaper, *The Daily Tar Heel*, along with other prominent North Carolina media outlets, sued the university in late November for the release of public records relating to any cases in which someone was found responsible for sexual assault.

Like Kentucky, the university claims it is protecting

## UNDER THE DOME

### Indiana

The Indiana New Voices Act was introduced on Jan. 3 by Representative Ed Clere, himself a former student journalist with a daughter currently active in scholastic journalism. Indiana's bill was assigned to the education committee and on Feb. 16, the committee voted unanimously to advance the bill. It passed the House floor 88-4 on Feb. 21.

### Missouri

The Show-Me State is showing their journalistic roots with the Cronkite New Voices Act. This year's bill is taking a second shot at victory after stalling in the Senate last year. Sponsored by Rep. Kevin Corlew, the bill has had one hearing before the Elementary and Secondary Education Committee. They voted it on to the House Rules Committee. No hearing is yet scheduled.

### Washington

The New Voices of Washington bill was introduced by Senator Joe Fain alongside numerous cosponsors. It was assigned to the Early Learning & K-12 Education Committee and underwent a hearing Jan. 19. Since then, the Seattle Times endorsed the legislation in an op-ed. The bill passed the committee Feb. 16.

### Vermont

The New Voices of Vermont bill, filed on Jan. 12, is Sen. Jeanette White's

the identities of sexual assault victims – but, like the *Kernel* and countless other newsrooms across the country, *The Daily Tar Heel's* policy states that the paper will never publish the names of sexual assault victims without their consent.

While FERPA requires colleges to uphold the privacy of most education records, the law also states that the outcomes of disciplinary cases involving crimes of violence or sex crimes – those requested by *The Daily Tar Heel* – are not confidential.

In a column written by Jane Wester, the *Tar Heel's* editor in chief, Wester called the release of these records a public service and criticized the university's broadness in describing the outcomes of sexual assault cases.

"In the report, the University said getting more specific would risk identifying people," she wrote. "We say getting more specific is essential. I badly want to know how many people my school has found responsible for sexual assault and what consequences those people are getting."

A later column published by Wester highlighted the importance of transparency to campus safety – an issue many critics have argued that FERPA citations undermine

"We take survivors' privacy seriously. We take sexual assault seriously. I want UNC to handle these cases as well as possible, and I want transparency so the *DTH* can make sure they do that," she wrote. "The threat and reality of sexual assault should not be so routine. It isn't extreme to ask for basic safety."

While universities may not cite FERPA for records pertaining to those convicted of a sex crime or crime of violence, Carlson said there are exceptions to the rule.

In one of its more recent interpretations of FERPA, the Department of Education issued a ruling that restricts

"targeted requests." If schools believe that a request is "targeted" to a particular student, then the records can be withheld even without the student's name, since the requester already knows whose records they are.

That wasn't the issue in Kentucky, where the newspaper agreed to accept records with identifying information removed, and the attorney general ordered those records released with the identities of claimants withheld.

"FERPA was initially there to protect grades and financial info – to protect students from having people look at that information and that's laudable. But over the years, administrations have started using that to hide just about every piece of paper they have with the students' names on it and it's gotten worse and worse," Carlson said.

One problem with FERPA, Carlson noted, is that the law doesn't have a viable enforcement mechanism. With FERPA, schools found to have violated the law's protections lose their federal funding – regardless of the degree to which they're found in violation.

"There are no gradations in enforcement, it's either you lose your funding or you don't lose your funding, and that's stupid," she said. "Part of the problem is that administrations are completely overreacting because there's no incentive not to overreact."

And while many institutions do have legitimate concerns about losing federal funds, many others don't want to admit violent crimes – especially sexual offences – occur on their campuses for fear of bad publicity, Carlson said.

"[Schools] will bend over backwards to make sure that that kind of information doesn't get out, no matter how you ask for it," she said. "Some will be backed into a corner and will have to give out aggregate information,

third attempt to introduce student press freedom legislation. The campaign has since seen a flurry of hearings, a successful vote out of committee, and a "yea" vote from the full Senate. It has now moved in to the House for consideration.

## Arizona

Senator Kimberly Yee's fight for student press rights started, for her, in high school. The former student journalist witnessed censorship in her own school – and testified in

favor of an anti-Hazelwood bill in Arizona 25 years ago. Feb. 13, her new Voices bill passed the state Senate unanimously.

## North Dakota

Not one to settle, the progenitors of the New Voices movement are seeking to level up their protections this year. The new legislation is aiming to excuse schools from liability for their student's journalism and to provide protections for journalism advisers

who could face retaliation. The bill passed the Senate committee unanimously before being approved by the full Senate on Jan. 27.

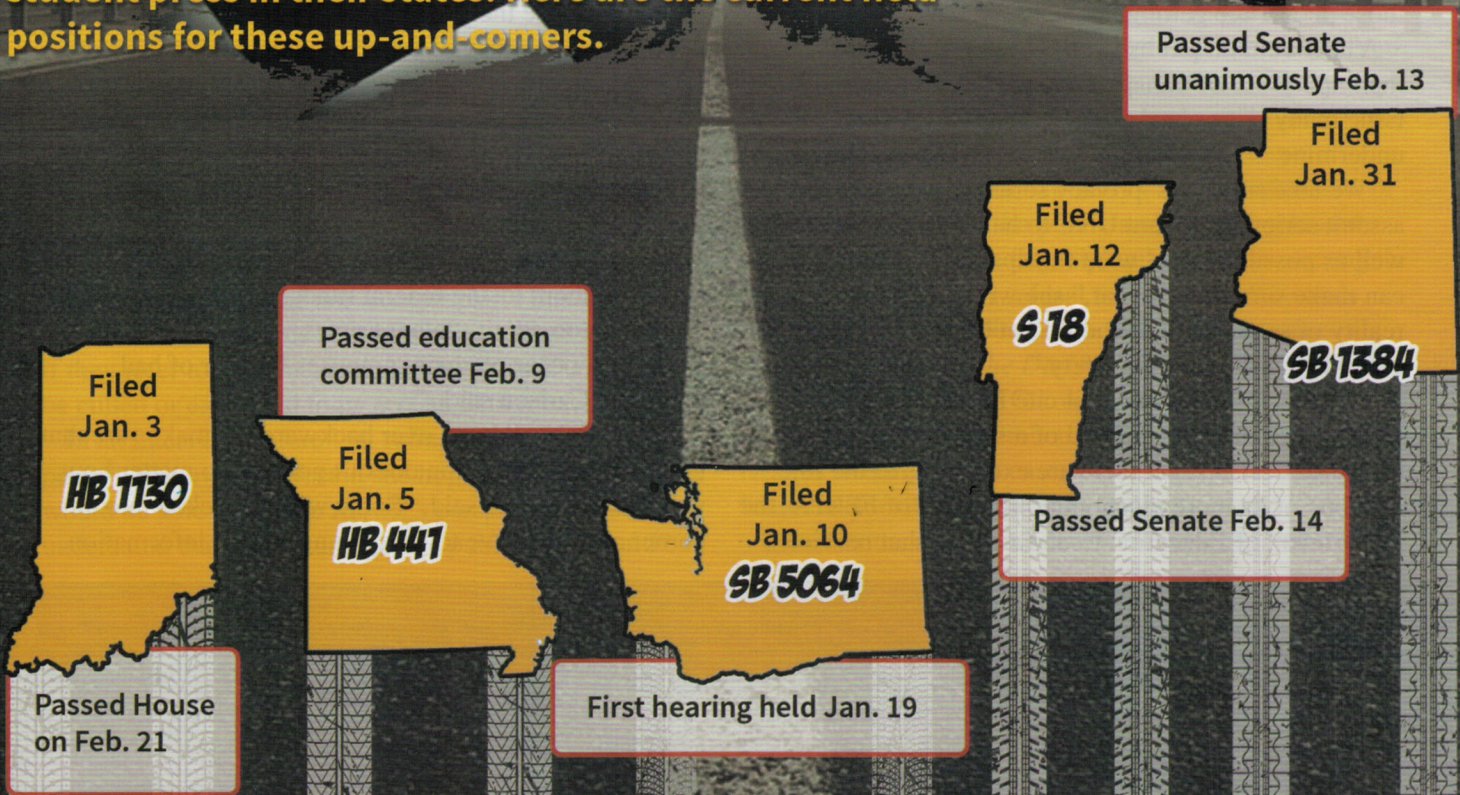
## New Jersey & Michigan

New Jersey and Michigan both have active bills, filed in 2016. No hearings are currently scheduled, but supporters continue to host meetups. You can get involved through [newvoicesus.org](http://newvoicesus.org) or find the campaigns on Facebook and Twitter.

# NEW ★ VOICES usa

## The race is on!

While bills in New Jersey and Michigan continue, a fresh field of contenders have joined the race. At the start of 2017, five states filed bills to ensure free expression for the student press in their states. Here are the current field positions for these up-and-comers.



While you cheer on these bills (and engage in the inevitable smack-talk), why not join the race? Visit [newvoicesus.org](http://newvoicesus.org) to learn more about starting a campaign in your state!

Mile-by-mile, we will #CureHazelwood!

but numerous cases have punished schools for misinterpreting the definition of sexual assaults in order to underreport that number of assaults on campus.”

Many schools, Carlson said, will do their best to say there aren't any instances of sexual assault or say there are very few instances, when many on campus know that around 25 percent of the women at their institution will be the victim of such crimes.

“Students know this happens a lot and people are being treated for it at counseling centers, for the trauma of rape, yet the school may have reported no rapes,” she said. “These statistics are a joke. The point is that nobody is finding out what they need to know about the amount of crime on campus, particularly this kind of crime.”

### Watchdogs Biting Back

In a stinging editorial published in September, the *Kernel* wrote that UK's practices would not have come under public scrutiny had the victims' spokesperson not alerted the *Kernel* to the investigation.

“They showed that at UK, people who have been charged with violations hold too much power,” the *Kernel* wrote. “The university gives the accused privacy in matters the public has a right to know.”

Institutions, instead, need to be more discerning when it comes to education records, Carlson said. Just because a record has a student's name on it, does not mean it qualifies as an education record under FERPA.

“We can't indict all institutions of higher education for mishandling these kinds of cases, but there are some who are just doing their best to keep it silent and others who are doing a very good job of making sure that when a crime is committed on campus, that it is properly reported,” she said.

While traditional news organizations continue to see their funding slashed, student journalists are using their unique positions to fill the gaps in investigative coverage surrounding their universities. Those organizations, especially media independent of the university, are increasingly seeking out records pertaining to violent crimes, and, in turn, are growing more willing to demand information of their universities.

The high-stakes case has drawn a dividing line between UK administration and faculty, but also serves as a litmus test for similar ongoing open records cases in the state.

On its own campus, 15 UK faculty members wrote and hand-delivered a letter to Capilouto objecting to his “insulting treatment” of the *Kernel* and calling upon him to drop the lawsuit. Other supporters of the *Kernel* say UK's stance could pose a public threat to the campus

community by granting anonymity to sexual predators.

Despite university investigators having uncovered enough evidence to take disciplinary action against Harwood, the professor tendered his resignation in February under a provision in his university employment agreement. Harwood remained salaried with benefits until his departure in August and his case never reached a hearing.

Because his resignation ended the employee disciplinary process, the victims who filed complaints against Harwood are not able to appeal the decision, and the investigation will not be disclosed in any future job applications.

During a September board of trustees meeting, another critic of the university, UK trustee and former editor of Louisville's *Courier-Journal*, David Hawpe, alluded to similarities between the university's case and that of the Catholic Church, which was found to have covered up sexual offenses by priests while allowing them to move between parishes.

As it stands at UK and many other public universities, faculty accused of sexual misconduct have the choice of settling with the institution, resigning and moving on, or completing a formal disciplinary process. These employment provisions mirror federal Title IX guidelines and, at UK, allow faculty the assurance of privacy and ability to move from university to university, undetected, in what the *Kernel's* editorial board called “a system built for the accused, not for the victims.”



“These statistics are a joke. The point is that nobody is finding out what they need to know about the amount of crime on campus, particularly this kind of crime.”

-Carolyn Carlson, Kennesaw State University



The university has argued that the release of such documents has made – and could continue to make – victims of sexual violence afraid to come forward for fear of seeing their cases become public. Capilouto suggested that the decline the university saw in reported campus sexual offense cases this year could be attributed to the *Kernel's* reporting of the Harwood case.

Additionally, despite encouraging the *Kernel's* news coverage in the beginning, two of the victims reportedly detailed in the UK investigation are now seeking to join the university in its lawsuit against the paper.

While a number of Kentucky faculty and even its

trustees have voiced concerns about the university's stance on the issue, another Kentucky university is using the case as a guide to determine whether or not to provide its own student newspaper with sexual misconduct records.

According to a report by the newspaper, the *Western Kentucky Herald*, Andrea Anderson, assistant general counsel and Title IX coordinator, wrote "WKU is aware of the ongoing litigation between the *Kentucky Kernel* and the University of Kentucky... Should the matter resolve with the court ordering production of UK's Title IX investigative files, WKU will supplement this response."

Subsequently, WKU got its answer in the Jan. 23 decision against the *Kernel*. For the time being, case law in Kentucky supports WKU's decision to withhold its records. Regardless, Beshear proceeded to issue his decision in the *Herald's* appeal after the court overturned his UK opinion.

Once again, the AG ruled for the release of records, and WKU vows to appeal – a move that will, again, require a university to sue the requesting journalists.

## An Epidemic of FERPA Fear

In the fight for disclosure, professional journalists often fare no better than their student counterparts. During 2016, in a case mirroring UK and UNC's, a state court struck down a request for open records at one Montana university on FERPA grounds.

In September, Montana's high court rejected the public release of disciplinary records related to a former University of Montana quarterback who had been accused of rape, holding that the records of college students are entitled to strict privacy protection.

The case involved a request by "Into the Wild" author Jon Krakauer, whose latest book chronicles the handling of sexual-assault complaints at the university. Krakauer had filed a request in 2014 seeking the records of Montana quarterback Jordan Johnson for his 2015 book, "Missoula: Rape and the Justice System in a College Town," which focused on Johnson's case and the issue of campus sexual assault in a broader context.

Johnson was brought up on disciplinary charges after a fellow student accused him of sexual assault, but, for unexplained reasons, the state's higher education commissioner overturned a campus disciplinary board's decision to expel Johnson, who was later acquitted in a criminal trial.

Citing FERPA, the state denied Krakauer's request to review the commissioner's files, leading him to file suit under the Montana open records act. The district court

ruled in the author's favor, demanding the university release any records involving a football player accused of raping a woman in 2012 – with redactions to student names and identifiers.

Under Montana's constitution, records requesters have a right to access public documents except when "the demand of individual privacy clearly exceeds the merits of public disclosure."

The exemption in FERPA for records of sexual-assault cases applies only where there is a finding of guilt. Because that finding was eventually overturned, the state of Montana argued, the FERPA exception didn't apply, and Krakauer was not entitled to the documents.

The Montana Supreme Court accepted the state's rationale, despite a supporting brief from the Student Press Law Center and other national open-government organizations arguing that FERPA was never intended as a shield for high-ranking officials' handling of serious crimes.

The Montana decision limits the public's ability to find out how colleges and universities handle the appeals of sexual assault cases, despite a previous district court ruling that deemed the records releasable under Montana's right to know law. The court's decision also deals a direct blow to those seeking to ensure transparency and accountability on college campuses by way of elevating the importance of FERPA in the eyes of school administrators.

Frank LoMonte, executive director of the Student Press Law Center, called the law a "disastrously broken statute," stating that higher education has too long abused FERPA as a "get out of accountability free card" for secretive colleges.

Litigation is ongoing for both the University of North Carolina and the University of Kentucky, but both cases will result in what could be watershed moments for open records in their respective states. For now, FERPA remains a statute designed for the protection of students' privacy, but one for whom its benefits will remain unclear until Congress clarifies the facets often left to universities' interpretations.

In a 2009 interview with the *Columbus Dispatch* as part of its in-depth examination of FERPA abuse, "Secrecy 101," the primary sponsor of FERPA, former U.S. Sen. James Buckley, said the law is being misapplied in instances where disclosure would be harmless and invade no privacy interests.

"The law needs to be revamped," Buckley told the newspaper. "Institutions are putting their own meaning into the law." -30-

# TRUMP

MAKE AMERICA GREAT AGAIN!



Begun and held at the City of New-York, on  
Wednesday the Fourth of March, one thousand seven hundred and eighty nine

THE Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent an abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institution,

RESOLVED by the Senate and House of Representatives of the United States of America, in Congress assembled, two thirds of both concurring, that the following Articles be proposed to the Legislatures of the several States, as amendments to the Constitution of the United States, all or any of which Articles, when ratified by three said Legislatures, to be valid to all intents and purposes, as part of the said Constitution; viz<sup>to</sup>

ARTICLES in addition to, and Amendment of the Constitution of the United States of America, proposed by Congress, and ratified by the several States, pursuant to the fifth Article of the original Constitution.

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to the fourth... A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

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ATTEST,

~~James M. Smith, Secretary~~  
~~James M. Smith, Secretary~~

# Sad!

Student media questions itself in the age of bitter partisanship, and educators strive to tackle the problems head-on while increasing media literacy and defending the place of journalism in the public discourse.

By Lev Facher

Hours after Donald Trump was elected America's 45th president, the *Washington Post* ran a column titled: "A call to action for journalists covering Donald Trump."

The author, *Post* media columnist and former *New York Times* public editor Margaret Sullivan, pulled no punches in describing the bleak implications Trump's campaign rhetoric held for the political journalism traditions. Many are so deeply ingrained in the trade that most journalists have come to view them as rules. Sullivan's final paragraph: "If January 2017 isn't going to herald disaster for press rights – and the citizens served by a free and independent press – we're going to need some help. We're going to need some heroes."

The help, say many high-school journalism educators around the country, has to start early. Since his election, Trump has made a point of repeatedly attacking outlets like CNN and *The New York Times* on Twitter. In a move unprecedented in the modern political era, the president-elect did not hold a press conference until six weeks following his election – and when he did, it devolved into a shouting match in which he called CNN "fake news." It is the new normal in journalism, and those who teach journalism don't know what to do.

Many who teach journalism to high-schoolers feel the truisms they've been feeding students for decades no longer apply. The idea of journalism as a noble profession, and one integral to the success of the American democratic system, is no longer a given.



A search for "media" by @realDonaldTrump on Twitter yields hundreds of results.

"When we were in Indianapolis for the National High School Journalism Convention, there was also a marching band convention going on in the same hotel," said Michael Hernandez, a journalism and media instructor at Mira Costa High School in Manhattan Beach, California.

"One of my students went down to the pool when he had some free time, and another family asked if they were there for the marching band convention. He said no, the journalism convention. And they asked him: 'You're a good journalist, right? Like Fox News – not one of those lying CNN-type reporters, right?'" In the era of Trump, the stories are hardly isolated. Jamie Miller, who teaches journalism at DuPont Manual High School in Louisville, Kentucky, says parents will sometimes balk at the prospect of enrolling their child in the journalism and communications track, one of the magnet school's five curriculum options.

"There were many times when we were talking to parents whose kids were interested in our program, only for them to say something like, 'Wow, I don't know. Journalism's pretty terrible. Why would I want my child to pursue that as a career?'"

Most of the time, Miller and his wife Liz Palmer – also a journalism teacher at DuPont Manual – assume the parents aren't interested in "a lengthy disquisition of the merits of journalism" and its role in the American political system.

Instead, they simply assure parents that journalism and communication skills will be useful to their child throughout their life, even in the likely event they don't pursue journalism as a career.

Many educators said it isn't accurate to lay all of the responsibility for the increasingly media-hostile environment in the United States at Trump's feet. Politicians calling out certain media organizations for what they perceive as unfair coverage is nothing new. Trump managed to break new ground, somehow, both in the generality and the specificity of his media-bashing. On multiple occasions during his campaign, Trump called out NBC's Katy Tur for what he saw as unfair coverage, exhorting thousands of people at a campaign rally to turn to the press area and boo Tur directly. At other rallies, Trump crowds chanted "CNN sucks," and booing the traveling press corps as it entered become a ritual at Trump rallies throughout the final months of the campaign.

"All politicians have a beef with one news organization," Miller said. "But Trump was speaking out against journalism as a whole."

For Miller and Palmer, enough was enough. During



# News

a costume day at a school spirit week, the pair dressed up in orange jumpsuits, pretending to be journalists a then-hypothetical President Trump punished for their reporting. The costumes, complete with official-looking documents explaining the “detention of journalists committing seditious libel,” were a glimpse into a future that nobody expected to become reality.

“At the time, Clinton was up by double digits,” Miller said. “It seemed at that point that Trump wasn’t going to win. But the Trump presidency posed a unique threat to journalism.”

## Post-Fact Student Journalism

The idea of a fully post-fact society is just as troubling to many educators as the idea of the president-elect taking his rhetoric to its logical conclusion and pursuing punishments for journalists he personally dislikes.

One side effect of the heightened media scrutiny has been an increased spotlight on media literacy.

A recent Stanford University study made waves in the weeks following the election by showing that 82% of middle-school students couldn’t distinguish between “sponsored content” and original reporting on news websites. The study also showed that a slightly smaller majority lacked the ability to identify a readily apparent bias, like a banking executive writing an article about why young people need a better understanding of financial tools.

Another troubling development is the rise of fake news sites, which have harbored fabricated stories and full-

blown conspiracy theories and were shown to have seen more engagement than real news stories on Facebook.

If anything, the spate of post-fact partisanship has emboldened some journalism educators to dig in their heels and more aggressively teach some of the principles they had previously seen as givens.

“I think it’s empowered and emboldened a lot of journalism teachers to realize the importance of what we’re teaching,” said Mark Newton, the president of the Journalism Education Association. “I get the vibe out there that we’re going to teach First Amendment topics a lot more aggressively. There’s a renewed sense of purpose.”

Some of the concepts have been made easier to reinforce by Trump’s actions and rhetoric. A November 2016 tweet from Trump asserted that those who burn the American flag should face either a year’s jail time or lose their citizenship – punishment that has been deemed in violation of a citizen’s First Amendment rights by the U.S. Supreme Court.

The task extends far beyond simply teaching students their constitutionally guaranteed rights as journalists. There’s an entire field of civics, reading comprehension and media competency that is ignored in many schools and has little curricular consistency in many of the schools that do teach it.

“Media literacy is the new literacy,” Newton said. “I’ve been saying that journalism is the 21st-century English.”

Getting standardized instruction for “21st-century English” is an impossibly long way off, Newton said, because incorporating journalism into core educational

requirements would require both political will at the statehouse and buy-in from local districts.

## New School

A more attainable goal is simply getting capable and thoughtful journalism instructors in classrooms around the country.

“When you get a qualified teacher who understands these things, awesome things happen,” Newton said. “The role of JEA is to get an awesome journalism teacher in every school in the country. When that happens, you’re able to start to address fake news stories. We’re going to address media literacy. We know that, OK, we’re at the heart of this. These kids are going to be making important decisions.”

Despite the turmoil surrounding the journalism industry in the wake of Trump’s election, some educators have seen silver linings in their classrooms. At one high school a short drive south of Seattle, students on both sides of the political spectrum have gone above and beyond to emphasize fairness.

“My editor will not allow anything published that doesn’t have both sides, even in a column,” said Thomas Custodio-Kaup, a journalism instructor at Auburn High School in Washington. “She’s adamant that we always have both sides of every issue.”

One surprise was the emergence of several Trump supporters in Custodio-Kaup’s classroom – a demographically unlikely occurrence among teenagers at a diverse high school in a left-leaning metro area in the heart of a blue state. The election emboldened four of the 20 or so students on the school newspaper’s staff to acknowledge their support for their candidate, which created a somewhat divided newsroom but forced student reporters from both sides to cling more tightly to the journalistic principles Custodio-Kaup teaches.

“We’re doing an article (about the election results),” Custodio-Kaup said. “One of the boys reporting the story is strongly a Trump supporter and did a great job of interviewing kids from both sides.”

As for the anti-media rhetoric of their favored candidate, Custodio-Kaup said his student reporters are less likely to take Trump literally, which he attributed more to a generational tendency to separate media reports and public statements from students’ perceptions of real-life impacts.

The student’s bipartisan support for sticking to their journalistic guns extends from the classroom to the state capitol in Olympia. State senator Joe Fain, a Republican representing parts of Auburn, visited Custodio-Kaup’s classroom in fall 2015 before co-sponsoring New Voices

legislation in 2016 to guarantee full First Amendment protections for student journalists in the state. The bill didn’t advance out of committee in the 2016 legislative session but was re-filed for 2017.

New Voices legislation endeavors to confer upon student journalists some degree of the editorial independence – and subsequent responsibility – enjoyed by professionals. Students can make bold and innovative steps toward effective, meaningful coverage in their schools, but it often takes an educator to stress the values of making voices heard, creating an open forum for expressing opinions and steadfastly reporting facts. It’s easier said than done.

Newton stressed the importance of collaboration as journalism educators strive to ensure a renewed enthusiasm for the profession and its importance moving forward.

Much of the issue, Newton said, stems from a lack of consistency across schools. Journalism courses are sometimes offered as an elective, most history courses touch on the topic only in passing and the quality and presence of student publications at high schools varies widely.

Many educators described journalism as a relatively do-it-yourself field in terms of building a curriculum. The Common Core standards, adopted by 46 states (but disfavored by the incoming Trump administration and by many conservatives now in power in Congress and the states), make little mention of media consumption. The words “journalism” or “newspaper” don’t appear in the official description of the standards’ English and language arts expectations.

Without any kind of federal or even state-level means of ensuring consistent journalism and media consumption education, it’s up to organizations like the JEA and teachers around the country to frame the conversation.

Miller said the media climate that defined the 2016 election even spurred interest in finally creating a Kentucky journalism educators organization — a project many had long expressed interest in but that had never come to fruition.

“A lot of teachers are saying ‘well, what role can we play in saying despite whoever was elected, that the next person gets elected on the merits of truth, not post-truth?’” Newton said. “We want to make sure that going forward, we’re all dealing with the same set of facts, not whether or not we like the media. We make people aware of the alternative in which we don’t have a robust media, which is much, much much worse.” -30-

## Legal Analysis

# Modern-day Tinkers: Student political speech and the First Amendment

By Mariana Viera

When 15-year-old Mariah Havard got to school on “picture day,” she did not expect her T-shirt to be a source of controversy.<sup>[1]</sup> Havard wore a “Black Lives Matter” shirt that day, and was subsequently sent to the vice principal’s office.

The vice principal of Buckeye Union High School in Buckeye, Arizona, told Havard that her T-shirt was disruptive; Havard was handed a plain white T-shirt and told to change.<sup>[2]</sup> Prior to changing, Havard snapped a photo of herself in her “Black Lives Matter” shirt and posted it on Facebook.<sup>[3]</sup> Her story garnered national attention, sparking conversations not just about racism in American society but also about the ability of students to express their political views on school grounds.

From the *Barnette*<sup>[4]</sup> children in the 1940s to the *Tinker*<sup>[5]</sup> siblings in the 1960s, schools are no strangers to student political speech. Political speech off-campus is almost always guaranteed to be protected under the First Amendment; indeed, the Supreme Court has said that speech addressing matters of public concern receives a specially heightened degree of protection.

While students’ free speech rights are limited on school grounds, those rights do not cease to exist once the student enters the school building. Decades have passed since the days of the Court’s *Barnette* and *Tinker* rulings, but students continue to share their political views—including, in recent months, concern over police use of force that has resulted in loss of life and in criminal charges against officers from Minnesota to Maryland.

Student concern over violent encounters between police and civilians has boiled over into free-speech controversies over apparel and over the practice of kneeling during the national anthem, a symbolic gesture popularized by San Francisco 49ers quarterback Colin Kaepernick. These contemporary factual situations have yet to make their way into the courts, but previous cases are enlightening when studying courts’ attitude toward student political speech.

## Armbands and T-shirts

High school girls are no strangers to strict dress codes; however, high school dress codes typically aim at

covering girls’ bodies, not their political views. In her post about her school’s decision to make her change her shirt, Havard wrote that she wore her “Black Lives Matter” shirt as a political statement. She also wrote that she was told to change because she had gotten into an argument with another student over its message.<sup>[6]</sup>

In *Tinker v. Des Moines Independent School District*, two siblings decided to wear black armbands to school in protest of the Vietnam War.<sup>[7]</sup> The school implemented a policy prohibiting students from wearing armbands; any student who did not comply would be suspended. Though Havard was not directly threatened with suspension like the *Tinkers*, the two situations have obvious parallels: Restricting student political speech through dress codes. The Supreme Court held in *Tinker* that student speech can be restricted only when it would cause a substantial or material disruption to the educational environment. (The *Tinker* standard was modified in *Bethel School District, No. 403 v. Fraser* where the Supreme Court ruled that schools can restrict “offensively lewd and indecent speech,”<sup>[8]</sup> but individual political speech retains its high degree of constitutional protection.)

More recently, cases involving student political speech through clothing have involved Confederate flag T-shirts, Breast Cancer Awareness Month wristbands, and T-shirts criticizing President Bush. The case law varies.

In cases involving the Confederate flag, the courts tend to uphold school bans on Confederate flag T-shirts, especially where there is a demonstrated history of racially motivated disruptions where the Confederate flag has provoked problems.<sup>[9]</sup> However, cases involving the Breast Cancer Awareness Month bracelets<sup>[10]</sup> and T-shirts criticizing President Bush<sup>[11]</sup> lean toward defending students’ right to express their political and social views through their clothing, even using language that is regarded as impolite or uncivil.

Whether a “Black Lives Matter” shirt is or is not protected speech will be a fact-specific matter of context.

On one hand, the shirts are an expression of students’ views on important social and political statements, much like the Breast Cancer Awareness Month bracelets, the *Tinker* armbands, and the T-shirts criticizing President



Mariah Havard

August 23, 2016 · 🌐

i woke up this very morning knowing that it's picture day for my school we all know as Buckeye Union High School - BUHSD #201. I get dressed and put on my BLM shirt and I walk out the door and join the other students on the bus. I walk into school and search for somewhere to sit until I reach a bench in front of the office. A security guard then asks me to follow him into the office and as I do so he then tells me to sit down in front of the principals office. I sit and wait for the principal and when he finally walks up and tells me to go see Ms. Whitman our vice principal. I walk into her office and I sit and listen on how she tells me that my shirt is creating a disruption in the learning of education, she then tells me that I am not allowed to wear the shirt that means a great deal to me and my African American friends. She then walks out of the office and hands me a white shirt that's meaningless and non political and has nothing to do for what I'm standing for. I heard her loud and clear but I do plan to continue wearing my shirt. The reason why I apparently can't wear this shirt is because on Friday, August 19th I got into a argument with a young caucasian boy who said "black lives don't matter" and "that shirt is meaningless" #blacklivesmatter

add on: while wearing the shirt I have been verbally attacked MANY times, I never meant to imply because black lives matter others don't! On top of that while attending buckeye i've seen a young lady who wore a confederate flag shirt that clearly supports racism, the creator of the confederate flag in his own words said, "As a people we are fighting to maintain the heaven-ordained supremacy of the white man over the inferior or colored race". People are so quick to say all lives matter when I say black lives matter, your aim movement is just derailing blm trying to imply that police brutality in poc communities are an illusion! At this point I'm starting to believe theirs a problem with the word black? it must be since they don't teach us about black people in school or tell me that me standing for my people against police brutality is "disruptive in a learning environment".



Photo and note from Mariah Havard's Facebook. Used with permission of Roxanne Havard.

Bush. On the other hand, in a school with a recent history of racial disturbances could argue (analogous to the Confederate flag cases) that a "Black Lives Matter" shirt risks inciting arguments that could boil over into violence.

The *Tinker* standard provides that any restraint on speech must be grounded in fact and not speculative, and that a "substantial disruption" means something beyond just a strongly worded political opinion that offends some listeners. But at the same time, the courts have been willing to accept without much second-guessing the forecast of schools that even symbols as seemingly harmless as the American flag will be "substantially-disruptive" where racial or ethnic tensions are involved.<sup>[12]</sup>

## Expressive clothing: judgment calls

Students have clashed with their schools for decades over the right to wear clothing that expresses an opinion on a contested social or political issue. How those cases get resolved by the courts often comes down to a legal question that is simple to state but challenging to apply: Is the speech simply controversial (in which case it is protected) or is it actually likely to incite a violent reaction (in which case it is unprotected).

For example, schools have been smacked down by the courts when trying to suppress the discussion of homosexuality because administrators find the speech morally objectionable or believe that others in the community might object.

In Florida, a student won a federal court order enjoining a school from enforcing a broad ban on clothing expressing support for gay students, including pink triangles, rainbow flags and a list of banned slogans (among them, "I Support My Gay Friends").<sup>[13]</sup> More recently in California, a student achieved a favorable settlement in a First Amendment suit alleging her rights were violated when the school forced her to change out of a T-shirt stating, "Nobody Knows I'm a Lesbian."<sup>[14]</sup>

This is a door that swings both ways, as the courts have also been protective of the right to wear apparel stating opposition to homosexuality as well.<sup>[15]</sup>

However, where speech appears likely to pour fuel on the smoldering embers of racial or ethnic tension, courts are much less protective and more likely to defer to school judgment calls. Most illustratively, the federal Ninth Circuit decided in its 2014 *Dariano* ruling that a school could forbid students from wearing American flag apparel on a day designated for celebrating Latin-American pride, because of evidence that a student had previously used an American flag shirt to taunt a Latino

classmate to the brink of violence.<sup>[16]</sup>

The danger of using the potential for violent backlash as a standard for when a student may address a controversial issue involving race is that opponents can use threats to shut down speakers they disagree with (the so-called “heckler’s veto”). Schools must be wary, especially where speech is asserting the concerns of an outnumbered minority, of giving critics the ability to silence speech challenging to their views.

## Following Kaepernick’s lead

The Supreme Court’s 1943 decision in *West Virginia State Board of Education v. Barnette* has very real implications for student speech today. The Court in *Barnette* held that the children of Jehovah’s Witnesses were not required to stand and salute the flag and recite the Pledge of Allegiance, finding that there is a First Amendment right not to speak.<sup>[17]</sup>

While students still occasionally choose not to participate in the Pledge of Allegiance, the more current trend is using the national anthem at school athletic events as a vehicle to express dissent with American policies. Inspired by the NFL’s Kaepernick<sup>[18]</sup>, students—be they on the field or in the stands—are taking the knee or staying seated when the national anthem is played at school sporting events.<sup>[19]</sup>

The response from school administrators has varied. Some schools are proud of their students for being engaged in important political and social issues, while others have equivocated and attempted to channel the protest into a less divisive form.<sup>[20]</sup> Other schools have more forcefully said that students who do not stand up for the anthem during sporting events will be asked to leave.<sup>[21]</sup>

In *Morse v. Frederick*<sup>[22]</sup>, the Supreme Court found that speech at school-sponsored events is subject to the substantial disruption standard set forth in *Tinker*. The Court in *Tinker* found students do not “shed their constitutional rights... at the schoolhouse gate,” but that school administrators may limit student speech if it will cause a material or substantial disruption.

So far, the justification that schools have cited in attempting to compel students to take part in the national anthem has focused on instilling a sense of unity and patriotism, or avoiding a political statement that might offend onlookers. Ultimately, these concerns mirror the arguments that were presented—and failed—in *Barnette*. Just as the First Amendment protects the ability to, peacefully and quietly, take a seat during the Pledge of Allegiance, it will likely protect the right to sit out the national anthem as well; indeed, the disruption argument may be even weaker during an athletic event than during

## TL;DR

- “Speech” can take the form of attire – from T-shirts bearing the confederate flag to social justice campaigns like “Black Lives Matter” and the breast cancer awareness slogan “I (Heart) Boobies.”
- Traditionally, political speech has been recognized as a particularly crucial part of public discourse and thus enjoyed a heightened level of protection.
- This includes political speech for students, as long as it doesn’t represent a “substantial disruption” to the school day.
- Schools generally have a high bar to meet in proving that a shirt, arm band, bracelet or other accessory constitutes a substantial disruption.
- However, with regard to some difficult and controversial topics, courts have shown a willingness to defer to the judgment of the schools.
- We’ll say it louder for the cheap seats:  
**Students do not waive their rights to free speech at the schoolhouse gate.**

an in-class activity, since some members of the audience in a stadium will undoubtedly be finding their seats, managing small children, or otherwise not concentrating on the anthem. In that setting, it will be difficult for a school to prove that the silent act of taking a knee “disrupted” a school event.

The one factor that clouds a student’s ability to use an athletic event for expressive purposes is the argument that a student participant stands on different footing from a student spectator, and has forfeited some freedom in exchange for wearing the school’s uniform and taking part in a team event. This argument is legally questionable – citizens generally cannot be forced to surrender their rights in exchange for receiving government benefits or privileges – but it has received some support in the school context.

For instance, a federal court in Texas – in a widely condemned ruling – found that a cheerleader had no legally protected right to silently sit out a cheering routine honoring the student she’d accused of raping her, because as a member of the cheering squad, she was a “mouthpiece” for school-required messages.<sup>[23]</sup>

Following that logic, a school might argue that an athlete, too, functions as a “mouthpiece” when standing on the sidelines in uniform as part of a team event.

## Political statements in 140 characters or less

The Supreme Court has stayed silent on what standard should be used when students post speech on social media that may have an effect on the educational environment.<sup>[24]</sup> Though lower courts have adjudicated cases of student social media use, a majority of the cases deal with threat speech, which clearly is not constitutionally protected even in the non-student adult realm.<sup>[25]</sup> As a result, school administrators have little guidance when dealing with situations where students’ social media posts ignite conversations at school.

Jodeci Williams, Claire Skivington, and Toni Trail, students at Tomball High School in Tomball, Texas, were reportedly threatened with in-school suspension after they shared a photo on social media of Williams raising her fist as a commentary on a group of girls in the background whose T-shirts spelled out “Trump.”<sup>[26]</sup> The school received complaints from the parents of the girls in the background of the picture demanding that the post be taken down. Williams and her friends were told to delete the post or be subject to in-school suspension.

The situation at Tomball High School did not involve threat speech, so it is more analogous to cases in which courts have protected students’ right to engage in sharp political commentary on social media. For example, courts have protected students’ rights to criticize teachers and school administrators, even in harsh and uncivil ways. But two factors make the Tomball situation more complex and difficult to resolve – first, that the criticism involves other students and not government officials, and second, that the photo was taken on campus during school hours as opposed to off-campus on purely personal time.

These types of scenarios – divisive political statements that pit students against other students – are perhaps the most challenging for the legal system to resolve, and as with many other student-speech situations, will depend on the intensity of the reaction and how volatile the climate in the school is.

## Conclusion

When it comes to student political speech, the law has not changed much since the *Tinker* decision in 1969. Students’ right to stay seated during the national anthem should generally be protected by the Supreme Court’s decisions in both *Barnette* and *Tinker*, saying that students have First Amendment rights on school grounds

and that the right to free speech includes the right not to speak. Students wearing “Black Lives Matter” T-shirts to school may present a closer call, but their speech generally should be protected as well, because the shirts express a message about a contemporary issue that is nondisruptive on its face (not calling on students to break the law or attacking other students’ characteristics). The *Tinker* standard is a purposefully flexible one that has proven adaptable to decades of political concerns, and its protection should be elastic enough to accommodate today’s generation of social protest.

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## ON THE DOCKET

### Pennsylvania student faces expulsion

Early in December, a student at the Upper Perkiomen High School in Pennsylvania found himself in deep trouble over a mashup video he posted to YouTube. The compilation mixed a school violence public service ad titled "Evan," which was produced by Sandy Hook Promise, with the Foster the People song, Pumped Up Kicks – which is about children fleeing a school shooting. After a night of panic, the school opted to close for a day, and suspended the student who posted the video once his identity was discovered. Then, however, the school district moved to expel him, and his parents filed suit. In January, a federal judge for the Eastern District of Pennsylvania denied the family's motion to stay the school's actions, effectively allowing the expulsion process to move forward.

### Keefe seeks Supreme Court review

The former Minnesota nursing student who was removed from his associate program for registered nursing over social media posts he made lost his appeal in the 8th Circuit U.S. Court of Appeals. Craig Keefe was attending Central Lakes College when, in the fall of 2012, one of his classmates approached their professor with a report of threatening Facebook posts made by Keefe. The student provided copies of the posts, one where he mused there was "not enough whiskey to control that anger," over a change in a group project. The university expelled him from the program, citing a failure to adhere to "professional" standards per the student handbook. The appellate court ruled in favor of the college, upholding their argument that Keefe was removed for what could be considered an academic violation. One judge dissented, arguing the speech was personal, not assigned and therefore not subject to academic review, and took place off campus. Keefe filed a petition to the Supreme Court on Feb. 23.

### UCF ordered to turn over SG records

In one of three open records and open meetings lawsuits filed against the University of Central Florida by the independent news site Knight News, the 9th Judicial Circuit Court of Florida ordered the university to release budget records pertaining to the Student Government Association. Knight News requested access to the Activities & Services Fee Database, but the university first withheld the information then released a redacted version, citing FERPA. Their claim rests on the fact that the budget records include payments to student government members. The university is arguing these payments constitute private student information. Prior to this ruling, the university had filed a motion to recoup its litigation costs from the independent newspaper. In response to the 9th Circuit's order, UCF filed an appeal August 22.

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