

STUDENT PRESS LAW CENTER

REPORT

FALL 2016 VOL. XXXVII, NO. 3



TECHNICAL FOUL

HOW UNIVERSITY ATHLETIC DEPARTMENTS
RESTRICT STUDENT MEDIA

PAGE 4: THE HEROES WE NEED — MEET THE 2016 ACTIVE VOICE FELLOWS!

REPORT

FALL 2016, VOL. XXXVII, NO. 3

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

We've worked hard on the shiny new magazine design, including some tear-out infographics and notations for the tl;dr crowd. But we don't want our community to forget that this content, and more, is available online at www.splc.org/section/magazine, including:

- **If you can't beat 'em, sue 'em:** Some universities are taking aggressive legal action against their student news outlets
- **Reporting out of the mainstream:** Alternative, online student media are becoming more popular on college campuses, sometimes causing rifts with traditional student newspapers



A MESSAGE FROM EXECUTIVE DIRECTOR FRANK D. LoMONTE

Frank LoMonte

Universities increasingly digging in to fight public records requests

There's been a nasty culture change on America's college campuses, where the attitude toward openness in government has devolved into undisguised contempt.

Knight News, an independent student news website at the University of Central Florida, has been forced to sue UCF three times in the past three years for access to records and meetings. UCF has responded with a vicious campaign of harassment, including making repeated demands (so far, unsuccessfully) that the news organization pay the university's crushingly large legal bills – reversing the normal assumption that the requester, not the government agency, is entitled to recover attorneys' fees.

In September, the University of Kentucky sued its own student paper, the *Kentucky Kernel*, in a desperate attempt to conceal documents relating to the firing of a professor accused of sexual harassment. Facing criticism even from within his own board of trustees, the university's president, Eli Capilouto, doubled down by accusing the *Kernel* of sensationalist journalism, bringing a rare public rebuke from UK's journalism faculty.

The Kentucky and UCF cases are properly attracting public outrage and condemnation – but they're not isolated occurrences. They're symptomatic of colleges' growing assurance that they will pay no reputational price for secrecy, even when the secrecy flagrantly violates the law.

Students at Central Michigan University were told they can no longer have records identifying when

and where sexual assaults take place. Northern Kentucky University is in court seeking to entirely seal the records of an ongoing lawsuit – and gag its participants – in a case alleging that athletes received preferential treatment when accused of raping a classmate.

College trustees, too, have largely dropped the pretext that they care about – or feel bound by – the accountability requirements that apply to all other government agencies. Michigan State University is in court right now defending its illicit practice of rigging the votes of trustee meetings during closed-door “pre-meeting meetings” at which the real decisions get made. At Washington State University, trustees laughed in the faces of community members who expected to hear substantive deliberation on the finalists for WSU's vacant presidency; instead, trustees conducted the meeting by speaking in secret code, so as to technically comply with the

requirement of an open meeting while defying the law in substance.

All of these developments take place at a time of unprecedented national hand-wringing over an excess of “political correctness” on college campuses and how the purge of “offensive” speech imperils fundamental freedoms. The critics have a point – there have been terrible overreactions ruinous to the careers of fine educators over less-than-optimally-chosen words – but an excess of enthusiasm for social justice is not, by far, the greatest threat to freedom in our colleges. The greatest threat is administrators' single-minded fixation on “protecting the brand” over all else – even students' physical safety.

As this edition goes to press, the SPLC has just announced a joint effort with North Carolina's student-produced *Daily Tar Heel* and a half-dozen professional news organizations to pry loose records long illegally withheld by the University of North Carolina-Chapel Hill showing how often rapes are processed through the campus disciplinary system and with what result. We'll continue seeking such test cases – and asking our readers to help bring them forward – where we see the public's right to know in jeopardy. **-30-**

CONTRIBUTOR SPOTLIGHT

The SPLC would like to extend special thanks to the Robert R. McCormick Foundation and Edelman for hosting outreach training for our 2016 Active Voice Fellows in Chicago.

You can learn more about the Active Voice campaign – and the inaugural class of fellows – on the next page or by finding us on social media.



@ActiveSpeech



@useyouractivevoice



53% of young women in high school newsrooms report self-censoring in anticipation of administrative censorship.

Meanwhile, only **27%** of male students reported doing so.



Left to right: Stephanie Liebert, project coordinator – Sunshine Cho, UC San Diego – Darlene Aderoju, Howard University – Sindhu Ravuri, UC Berkeley – Sophie Gordon, Ball State University – Nashwa Bawab, UT Austin

“Find your voice. Own your voice. Don’t be afraid”

We are proud to announce our inaugural class of Active Voice Fellows. After an amazing response to our call for applicants, these five young women accepted the year-long challenge of enacting service projects to empower girls in high school newsrooms around the country.

In August, we flew the Fellows out to Chicago for a two-day crash course hosted by the Robert R. McCormick Foundation and the Edelman group. There, they heard from outreach professionals and legal experts on topics from starting and growing social movements to the rise of “civic data” initiatives designed to increase public awareness through open data.

Now, these First Amendment First Responders have returned to their home institutions to put their training to work, and you can follow their progress over the coming year online.


Learn more at TheActiveVoice.org



#TalkBack

Cruel Intentions

2.0



As students increasingly utilize social media to bully their peers, schools are having to navigate when and to what extent they punish instances of cyberbullying.

By Evelyn Andrews

Cyberbullying has come into the media spotlight many times in the past few years, from the constant torment of fellow students who have tragically taken their own lives to the often anonymous and vicious ridicule of celebrities.

Recently, this occurred when a Breitbart editor, Milo Yiannopoulos, posted insults about actress Leslie Jones on Twitter, after which followers of his account piled on with sharper personal attacks, many based around her race. The actress pushed back against the slurs by retweeting them and threatening to leave the site.

This prompted others, including celebrities and everyday users, to call for stronger action by Twitter. The harassment led to Twitter banning the journalist indefinitely, prompting a conversation on freedom of speech on the social media platform.

Occurrences of celebrities being harassed on social networking platforms do get media attention, but most of the conversation surrounds middle- and high-school students and they are often the subjects legislators have in mind when proposing legislation.

The last few years have seen the passage of bills criminalizing cyberbullying, bringing the total of states that have legislation to 13, according to a database by the Cyberbullying Research Center. An important consideration for legislators is the balance between protecting students and respecting their First Amendment rights.

Many times, legislators do this successfully, but there are still instances in which states take the law a step too far.

Justin Patchin helped found the Cyberbullying Research

Center in 2005 with his research partner, Dr. Sameer Hinduja. Both professors and authors, they intend the site to be a place to find facts on cyberbullying, including studies and resources for victims and educators.

Patchin said it can be difficult for states to adequately protect free speech rights, and laws are often challenged for being vague or overbroad.

One example is an Albany County, New York cyberbullying law, which was struck down by a state appeals court in 2014 for being overbroad, possibly criminalizing “a broad spectrum of speech outside the popular understanding of cyberbullying.”

The law defined the crime of cyberbullying as any electronic communication with “no legitimate private, personal or public purpose with the intent to harass, annoy, threaten, abuse, taunt, intimidate, torment, humiliate, or otherwise inflict significant emotional harm on another person.” The law also banned sending “hate mail.”

More recently, the North Carolina Supreme Court in June 2016 struck down a 2009 cyberbullying statute that made it a misdemeanor punishable by up to 120 days in jail to publish any “personal, private or sexual information” about a minor online with the intent to “intimidate or torment” the minor or the minor’s family. The justices found that the law was fatally flawed because it relied on vague terms (“intimidate,” “torment,” “personal,” “private”) that criminalized teasing, jokes and gossip, even without evidence that the speech reached or harmed its intended target.

A law is considered overbroad by courts when, while punishing unconstitutional speech, it also punishes or deters protected speech. Alternately, if an average person

can't determine what is made illegal by a law, that law is unconstitutionally vague.

Schools addressing cyberbullying concerns through policies can often be easier than legislators addressing it through laws. But laws still have their place, Patchin said, because schools are limited in the range of consequences they can impose.

State governments respond

Colorado is one state that recently passed cyberbullying legislation. Linda Newell, a Democratic state senator who cosponsored the legislation, said it was important for them to "hit the sweet spot" between protecting rights and protecting students.

The legislation initially hit rocky ground when it was opposed for being too vague and for the possibility it could be used to abridge students' First Amendment rights. The senators working on the bill, including Newell, requested a report from the Cyberbullying Subcommittee, which is a part of the state's Commission on Criminal and Juvenile Justice.

The subcommittee included representatives from the Lakewood Police Department, Douglas County Sheriff's Department, the American Civil Liberties Union, Metropolitan State University and a criminal defense attorney.

The subcommittee, of which Newell was also a member, provided a report on the problem of cyberbullying and how legislation could address some concerns. The report was based on existing laws, committee member expertise and research studies.

"We did not want to capture those who just made a stupid decision," Newell said, describing students who are not chronic, serious perpetrators of cyberbullying, which was also one of the ACLU's main concerns.

One way they accomplished this, Newell said, was to require proof of intent to harm, annoy, harass or alarm. They also added that the bill does not prohibit constitutionally protected speech.

One major problem with cyberbullying is that students cannot escape it when they leave campus; it follows them home through social media, the senator said. However, the ACLU argued that if students try to avoid speech on social media, they actually can, especially if it was a one-time offense.

Because the law cannot address every unwelcome online interaction, public attention has focused on the self-policing practices of social media platforms themselves. Unlike government agencies, social media companies as private corporations are unfettered by constitutional constraints, and can limit speech or ban speakers as they choose.

The attacks on Jones, for example, became part of the larger narrative about Twitter's policies on threats and harassment, which critics believe to be insufficient and inconsistently enforced.

One reason the reporting process is criticized is for requiring a link to the offending post, since often users delete the post before it can be reported. Also, when users are flooded with verbal attacks, it is a long process to report each individual user, critics say.

In addition, the interface for reporting users on most

REPORTING ON THE LAW

AFFIRMATIVE ACTION:

What you need to know to report on race in admissions

There's growing concern that minority students aren't getting access to educational opportunities that can open doors to career advancement. Out of 3,763 colleges and universities in the nationwide database of the College Board, only 1,946 (52 percent) report that 10 percent or more of their students are minorities. This indicates that nonwhite students are heavily clustering in a relatively few institutions.

To make campuses more diverse places reflective of the composition

of America, many colleges have incorporated race as a consideration in admissions decisions, giving preference to students of underrepresented races. Rejected white applicants have challenged racial preferences as a violation of federal civil-rights statutes ("reverse discrimination") and the Equal Protection Clause of the Fourteenth Amendment.

LEGAL BACKGROUND

When a government agency is accused of making decisions based on a forbidden consideration (such as race), the legal question boils down to whether (1) the practice

was necessary to achieve the government's purpose and (2) whether that purpose is important enough to justify deviating from established principles (i.e., that agencies normally can't make race-based decisions). That is how courts analyze challenges to race-conscious admission practices.

The Supreme Court has taken up the issue of race and college admissions several times over the past 40 years, struggling to find a consensus about when – if ever – it is allowable to consider an applicant's racial minority status as a "plus factor."

In *Regents of the University of*

social media sites is often described as cumbersome and ineffective, an issue for which Facebook is especially criticized.

Although they are reporting users for a different reason – selling firearms in violation of Facebook’s policies – activists have drawn publicity to the fact that the blocking process is needlessly complex and routinely changes.

Platforms do offer some features meant to be a respite from bullying, but they often have limitations. Twitter allows blocking or muting users. When users are blocked, neither party can see each other’s content and the blocked user is aware that they

are blocked. This sometimes leads to scorn or retaliation through an alternate account or on another site, which were the reasons Twitter cited when making an abortive attempt to change the way blocking works.

In December 2013, Twitter changed the process of blocking users to effectively muting them, before reversing the policy less than a day later in response to abundant criticism.

Under the change, a blocked user could still see and interact with the blocker’s posts; the blocking worked only one-way. However, critics of the change still wanted a way to completely hide posts from an unwanted user.

The block feature reverted back to its original function, preventing a blocked user from viewing the blocker’s Tweets or communicating with the blocker directly. Five months later, Twitter added the “mute” function in addition to blocking.

Most recently, Instagram announced a new feature, only available to high-profile users for now, that allows users to control comments on their own posts and disable comments on individual posts in an effort to curtail harassment and spam on the platform.

Although this is now only available to celebrities,

Instagram will later make it an option for all users, possibly signaling more features to fight harassment for the industry as a whole.

In a June 2016 column posted on Medium.com, media lawyer and SPLC board member Nabihah Syed and BuzzFeed Editor-

“Instead of banning social media completely, we need to do a better job at teaching kids appropriate ways to use them and the consequences when something is not appropriate,”

Steven Anderson, author and former teacher

in-Chief Ben Smith called for social networking sites to enact their own First Amendment-like free-speech policies so users can be assured that speech will not be deleted simply because, for instance, it mocks or ridicules a political figure.

About the process of blocking users or deactivating accounts in response to reader complaints, the authors observed: “Critically, people have no way of knowing

California v. Bakke (1978), the Supreme Court considered race and college admissions for the first time. The justices ruled 5-4 that setting aside a quota of seats for minority applicants to a medical school violated Title VI of the 1964 Civil Rights Act, which outlaws discrimination in federally funded programs. But the Court also ruled that race could be considered as one factor in admissions decisions. The justices’ votes were fragmented, with Justice Lewis Powell casting the decisive fifth vote in a separate opinion that identified diversity as a compelling governmental objective justifying preference for minority applicants.

In 2003, the Supreme Court took up affirmative action in the University

of Michigan’s undergraduate and law-school admissions policies, and reached a split result. In *Gratz v. Bollinger*, the justices voted 6-3 to strike down a “points system” that awarded a bonus to applicants from underrepresented minority groups, finding that it operated as the practical equivalent of an unlawful quota. But on the same day, the justices voted 5-4 in *Grutter v. Bollinger* to uphold the legality of a more narrowly tailored race-conscious admissions policy for Michigan’s law school. The majority in the *Grutter* case decided the issue left undecided in *Bakke*: Diversity is a compelling government interest that can justify considering an applicant’s race. But the Court said race cannot be permanently

built into the admissions system and must be phased out, suggesting 25 years as a target.

Eight states have statutes banning state colleges from considering race in admissions decisions: Arizona, California, Florida, Michigan, Nebraska, New Hampshire, Oklahoma and Washington. Michigan’s ban, amended into the state constitution after the *Grutter* ruling, was itself challenged as violating the Equal Protection Clause, but the Supreme Court upheld the ban in *Schuette v. Coalition to Defend Affirmative Action* (2014).

See the reporting cheat sheet on the next page.

COVERING RACE IN ADMISSIONS

THE NEWS ANGLE

A white applicant rejected from the University of Texas-Austin, Abigail Fisher, filed suit in 2008 arguing that the college's race-conscious admissions practices violated the Equal Protection Clause. UT has a hybrid admissions system under which the top graduates from Texas high schools are automatically accepted, and the remaining seats go through an individualized consideration process that can include race and ethnicity.

The case first arrived at the Supreme Court in 2013, which reached an inconclusive result sending the case back to a lower court. The ruling was interpreted at the time as setting a nearly impossible hurdle for college to justify affirmative action in admissions.

But on June 23, 2016, the Supreme Court (with a vacancy left by the death of Justice Antonin Scalia, and Justice Elena Kagan ineligible to vote because of a conflict) decided 4-3 that the UT-Austin admissions policy is constitutional. Justice Anthony Kennedy, whose swing to the liberal side made him the decisive vote, wrote the majority's opinion, saying: "Considerable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission." A dissenting justice, Samuel Alito, called the decision "affirmative action gone berserk."

In the aftermath of the Fisher case, colleges have more leeway to expressly incorporate race and ethnicity as factors in admission decisions, if they can show that the practice is necessary to achieve a diverse student body.

MAKING IT LOCAL

If you're at a public institution that must respond to requests for open records, ask to see any studies or reports about the use of race in your own institution's admissions policies, as well as any recent revisions in those policies. Statistics about the racial composition of the student body should be readily provided at any institution, public or private, and are also available from third-party sources including the U.S. Department of Education's Office of Civil Rights.

RESOURCES FOR REFERENCE

The authoritative Supreme Court commentary site, SCOTUSblog, posted a chronology of the *Fisher* case including links to more than 80 friend-of-the-court ("amicus") briefs filed by outside experts, most of them supporting the University of Texas' admissions system. These briefs are useful for locating expert individuals and organizations.

<http://www.scotusblog.com/case-files/cases/fisher-v-university-of-texas-at-austin-2/>

Harvard's Nieman Foundation curates academic research about race and college admissions that journalists may find helpful.

<http://journalistsresource.org/studies/society/race-society/affirmative-action-in-university-admissions-research-roundup>

The National Conference of State Legislatures tracks state statutes by topic, including statutes about college admission standards.

<http://www.ncsl.org/research/education/affirmative-action-state-action.aspx>

Academic experts on the law of college admissions include (in support of considering race as a factor)

- Prof. Sheryll Cashin at Georgetown University
- Prof. Eboni S. Nelson at the University of South Carolina
- Prof. Cedric Merlin Powell at the University of Louisville

(in opposition to considering race as a factor)

- Prof. Gail Heriot at the University of California-San Diego,
- Prof. Richard H. Sander at the University of California-Los Angeles
- Prof. R. Lawrence Purdy at the University of St. Thomas in Minnesota.

Advocacy organizations that have participated in past Supreme Court cases and may be sources for journalists include (in support of considering race as a factor) the NAACP Legal Defense Fund and the Racial Justice Project at New York Law School, and (in opposition to considering race as a factor) the Pacific Legal Foundation and the Claremont Institute's Center for Constitutional Jurisprudence.

how a platform's broadly stated community norms work in individual instances. Transparency requires that these 'cases' on which platforms rule should be made public in some form. Twitter, Facebook, and their peers should consider making, if not their decisions to ban users, their appeals process and the outcomes public."

Education is the answer

Author and former teacher Steven Anderson, who frequently blogs about technology in schools, believes cyberbullying was in many ways caused by adults, mainly by teaching students anonymity online was the best way to stay safe.

"We created a generation who were taught it was okay to lie about who they are," Anderson said. "We thought we were doing the right thing by protecting their privacy, but really now they think they can get away with anything through anonymity."

The way to reverse this and to have a generation that can properly utilize social media is by having social media lessons be part of the curriculum, Anderson said.

"Instead of banning social media completely, we need to do a better job at teaching kids appropriate ways to use them and the consequences when something is not appropriate," he said.

It can be appropriate to punish students for off-campus activity if they are using school-issued devices, he said. But he doesn't believe it to be appropriate to devote resources to monitoring students while they are at home, both for fear of exhausting school resources and for infringing on students' rights.

"I don't believe it is the responsibility of a school to discipline for speech done outside of school," he said.

Anderson believes it is easy to draft policies that are narrow enough to protect students from harassment while still allowing for free speech. However, legislators and schools tread treacherous grounds when they add punishments for off-campus expression.

"We need to be careful about reaching outside the schoolhouse," he said.

Anderson compared schools punishing students for off-campus behavior to two students getting in a fight during a community football game.

"Would the school be in charge of disciplining them? I think most people would say no," he said.

Justin Patchin, however, does think schools should be able to intervene in off-campus activity. Schools are rarely sued for violating students' rights when policing off-campus speech, he said. The main area from which problems arise is when students criticize administrators, often leading to the "administration [flying] off the handle" when punishing students.

Anderson said the public perception of cyberbullying

has been distorted by overblown media coverage focusing on a relative handful of cases.

"It gets sensationalized by major cases of cyberbullying, like instances where the victim commits suicide," he said.

Patchin concurred with that statement, saying it is possibly true but adding that it still affects 20 to 25 percent of students.

Walling off access

Schools' initial response to offensive online material has been to filter and block websites, at times excessively. While federal law requires schools that want to qualify for certain technology discounts to block websites "harmful to minors" on school computers, many have gone significantly further, making all social media inaccessible as well as filtering sites that contain forbidden terms.

School's over-reliance on "acceptable use policies" for technology has been criticized as educationally unsound. For instance, the Consortium for School Networking, a tech-industry group, called in a 2012 report for schools to move toward educationally based "responsible use" policies for the use of technology instead of punishment-based "acceptable use" policies.

Mina Yuan, a high school student at Wayzata High School in Plymouth, Minnesota, wrote an award-winning article on schools' authority to filter Internet access and students' right to access information.

While everyone she interviewed for the story agreed there was a moral obligation for the schools to protect to students from dangerous or offensive material, such as racial slurs or pornography, it becomes a problem when schools capture innocuous material in their filters.

"Where the line blurs a little more is when filters meant to block offensive material start blocking other content," Yuan said.

For example, she found in her reporting that students were unable to search for chicken recipes because of a block on the word "breast."

From her student perspective and knowledge from her reporting, striking a balance between protecting students while allowing them reasonable access to information can certainly be done, she said, but she doesn't think it will be easy. Her main takeaway from her reporting was that both students and administrators desire that perfect balance.

"Surprisingly, their ideal balances are quite similar," Yuan said.

However, both sides have different perspectives, so communication is an important factor, she said.

"Because each side has a different perspective, it is really important for students and administrators to properly communicate what they want to see happen," Yuan said. **-30-**

You're fired.

The sudden removal of two media advisers at Wayne State College has the Nebraska campus buzzing about why. The circumstances have fueled suspicions of retaliation.

By Kaelynn Knoernschild

On the morning of July 11, Max McElwain sat down at his computer and logged into his campus email. What he saw shocked him – he was being removed from his position as newspaper adviser at Wayne State College.

“It totally came out of the blue,” McElwain said.

Maureen Carrigg received her letter of dismissal in the mail June 17. Carrigg, a dedicated professor of 28 years at Wayne State, was being removed from her position as adviser to the campus TV station, KWSC-TV.

“The whole thing was a shock to me,” she said.

By the end of the summer, Wayne State had dismissed two media advisers for what McElwain calls “trivial” matters.

Forced to move on

McElwain, who advised the *Wayne Stater* staff for 14 years, received a memo June 29 from then-dean of arts and humanities, Steve Elliott. The memo stated a disciplinary meeting was to be held after McElwain allegedly approved a fraudulent payment arrangement between staff members, which he would not have had the authority to do.

McElwain claims Elliott approved the arrangement in March 2015 and brought the emails to the disciplinary hearing.

“Steve Elliott had 16 months to tell me (the arrangement) was a problem,” he said.

According to the email exchange, Elliott, who was named vice president for academic affairs in April, approved the arrangement March 23, 2015. After the meeting, McElwain didn't expect there to be significant ramifications.

“If they would have asked politely, I would have gladly stepped aside,” McElwain said.

After McElwain was notified of his dismissal, he was later told he would not be able to teach his news writing class because a colleague pointed out the class is affiliated

with the newspaper. Students' work from the class is often published in the *Wayne Stater*.

The faculty member who blew the whistle on McElwain will be teaching the class come fall.

Additionally, McElwain said for the first time in his career at Wayne State he received a check mark in the “needs improvement” portion of his annual review performed by Elliott. When he asked about the review, he was told a person in the college had a problem with him but the administration would not name the employee.

McElwain said he will continue to teach at Wayne State this school year but is planning on retiring next year.

Carrigg said she was removed from her position because the college noticed an incomplete grade on her graduate school transcript from 1988.

“I'd gone through the processes and whatever paperwork was there with my transcripts was accepted,” Carrigg said of her initial hiring and subsequent promotions. She said she received tenure in 1998.

Carrigg has not been offered a contract for this upcoming year and did not know about the incomplete until the college brought the issue to light at the end of the school year. However, her name and position as associate professor were included in the college's budget at the June 10 board of trustees meeting.

“If I wasn't qualified to teach, why was I allowed to teach for 28 years?” Carrigg said. “Why was I good enough for students up until my 28th year?”

In May, Carrigg said the human resources office asked for her graduate and undergraduate transcripts. She said she was notified of the incomplete and told she was not qualified to continue teaching. After she received her letter of dismissal, she requested a hearing with an advisory committee.

Carrigg said the university might have requested her records as part of the recurring accreditation process, but, according to the Higher Learning Commission, Wayne State College has been an accredited since 1917 and is

not up for reaffirmation of accreditation until 2024.

According to the agreement between The Nebraska State College Board of Trustees and the State College Education Association, Wayne State must appoint and designate an advisory committee within 10 days of the faculty member's request.

Carrigg continues to wait on the university to schedule a hearing date. A single mom, Carrigg has taken a laborious temporary job to provide for her family and said she is "terribly, terribly worried" about money. Because she doesn't have a contract, she has had to pay national and state union dues upfront to maintain her legal representation.

"On top of every other bill I have, I have to worry about this \$568 check for union dues," she said. "I'm kind of freaked out because I wasn't prepared for that."

The university has never disciplined her, but she said she is afraid of the administration. She doesn't have much faith in the hearing process and is mostly upset the college didn't offer her a path of corrective action once they became aware of the situation, she said.

"It hurts to be told you're not qualified to teach," Carrigg said. "To have my career end like this is a tough thing for me to swallow."

Carrigg has participated in faculty internship programs and used her own money to take editing classes to keep her skills and knowledge up to date.

She has also donated more than \$27,000 to the college

over the years, and is working to have a scholarship in her name for future students. While disappointed with the situation, she said she believes her removal is just business and not personal.

"Right now at Wayne there's a lot of rumors flying around that Max and I were removed because there were content concerns," Carrigg said.

She said her students produced some content regarding the highly publicized firing of former tenured psychology professor Karen Walker, but mentioned the TV station is mainly focused on sports. In the past, administrators had come to her with concerns related to content, but she said that hasn't happened in the last 10 years.

Carrigg said her main concern is her students, but she has been told she isn't officially allowed to address them.

"Our administration doesn't seem to handle things with the compassion they used to," Carrigg said.

Being 'cherry picked'

The day before McElwain was removed, the Academic Freedom Coalition of Nebraska awarded the campus paper the Intellectual Freedom Award for its reporting on tensions between the faculty senate and the Board of Trustees.

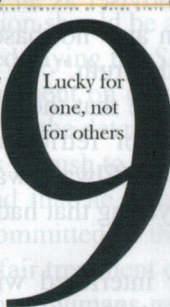
McElwain found out about the award via email and was elated. In light of his hearing, he said nothing better could have happened.

Frank Edler, AFCON newsletter editor, said the annual

The Wayne Stater

THE OFFICIAL STUDENT NEWSPAPER OF WAYNE STATE COLLEGE, SINCE 1921

In June, NSCS board raised tuition 9 percent at same meeting it gave chancellor 9 percent raise.



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WE KNOW IT'S TIME TO RAISE OUR OWN VOICES

DEARLY WEATHER WAS NOT ENOUGH TO KEEP SUPPORTERS FOR DR. KAREN WALKER AWAY

Dr. Karen Walker was not alone in her fight for academic freedom. A group of faculty members, including Dr. Michael Anderson, Dr. Charles Dunning, and Dr. Stan Carpenter, have been vocal in their support of Dr. Walker. They have organized protests, written letters, and spoken at public meetings. The group believes that Dr. Walker's removal is a violation of academic freedom and is a threat to the future of the college.

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Opinion

Persons familiar with the situation say employees are afraid to talk

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TO DO

BOOKSTORE



award was given to the newspaper for its “courage and reporting in journalism.”

“*The Wayne Stater* has consistently done an excellent job at really trying to get to the truth of things,” Edler said.

He said he doesn’t know if there is a connection between McElwain’s removal and the articles the newspaper published. However, Edler said the reporting revealed a lack of transparency and accountability at Wayne State.

Referencing the firing of Walker, who was subsequently escorted off campus by a security guard, Edler said the public had the right to know the reasons behind the university’s actions.

He said he doesn’t think firing a tenured professor and being unable to justify the action to taxpayers promotes transparency.

“What it amounts to is by not being transparent, you are not being accountable,” Edler said.

For his part, McElwain said the college used a payment policy issue to “cherry pick” him and remove him from the position at the request of higher administration because of the content the newspaper previously published.

The *Wayne Stater* has a reputation for being an “edgy, hard news and investigative” newspaper, and McElwain said he believes the newspaper made the right decision by choosing to investigate the administration. Earlier this year, he wrote a column published in the *Wayne Stater*, detailing the reporting process and what can be interpreted as an intimidating environment within the state college system.

“Do I fear for my job?” he wrote. “State college faculty have been fired for saying a lot less than I am here.”

Throughout 2015 and 2016, the *Wayne Stater* staff reported on stories critical of the college’s administration. In September 2015, the newspaper reported on a nine percent tuition hike that coincided with a nine percent raise for the Nebraska State College System chancellor, Stan Carpenter.

In October, Walker was escorted off campus by security. She worked at Wayne State for 18 years and after hearings last fall is no longer employed at the college. Wayne State never gave a comment on the situation because it was a “personnel matter.” The ordeal inspired student protests and a petition to the university administration to reinstate her.

The newspaper also revealed in 2015 that the lead consultant hired to assist with the Wayne State College

presidential search, Charles Bunting, had previously worked with Carpenter for 15 years. Carpenter was tasked with negotiating the contract for the lead consultant of the college’s presidential search process.

‘Angered beyond words’

Jay Collier, director of college relations at Wayne State, said the college doesn’t comment on personnel matters, citing the SCEA agreement.

“It’s not a lack of transparency,” Collier said. “Given (the policy) how are we supposed to address any of the concerns?”

According to the agreement, “public statements about the case by either the faculty member, the Advisory Committee members or college administrators should be avoided.” However, this clause refers only to the case in

.....
“Do I fear for my job? State college faculty have been fired for saying a lot less than I am here.”

.....
-Max McElwain, former *Wayne Stater* adviser

.....
relation to the advisory committee hearing, not the case as a whole. Furthermore, the policy doesn’t explicitly say the college is prohibited from speaking about personnel matters; it only says those comments regarding hearings where advisory committees are utilized “should be avoided.”

Collier said McElwain didn’t have a contract as adviser of the *Wayne Stater* and noted the professor of the workshop class associated with the newspaper serves as the faculty adviser.

He said the recent statements in the press depicting the removal of the newspaper adviser as an attempt to gain control over the publication are “not based in fact” and “could not be further from the truth.”

Collier said it is unfortunate that the timing of events is being viewed as an act of retribution against the newspaper and maintained McElwain was removed for “reasons independent of anything that had to do with the newspaper.”

“Wayne State has never interfered with the student press and never will,” he said. “It will continue to honor freedom of the press as it always has.”

Derek Pufahl, *Wayne Stater* editor-in-chief, said he was surprised when he found out about McElwain’s removal. He said he had no reason to think the former adviser would be removed over the summer.

After the *Stater* articles were published, however, Pufahl said there was a feeling among the newspaper staff that the administration did not like what was being reported about the university. The administration did not give feedback to the *Stater* after the newspaper’s investigations were published.

Although Pufahl said he doesn't think McElwain was removed as a direct result of the newspaper's content, the dismissal of two advisers in such a short time span is curious.

"It definitely raises questions," Pufahl said.

McElwain said the administration is looking for reasons to remove unwanted faculty and called his dismissal from the university a "retaliatory gesture."

"It's a witch hunt," he said. "They're getting rid of messy people."

Jason Zelenda, a Wayne State graduate and one of Carrigg's former students, emailed Collier July 29 to express his disappointment in the way a professor of 28 years had been treated.

Once he learned of her removal as adviser, Zelenda, who attended the college from 1998-2002, became skeptical of the college administration and its reasons for letting her go.

.....
"Wayne State has never interfered with the student press and never will."

-Jay Collier, directors of college relations

.....
"Everything sounded a little fishy to me once (I) started reading into it more and more," he said. "I just wanted to let them know I was unhappy with their decision."

In his email, Zelenda said he was "angered beyond words" after reading about Carrigg's removal and wrote the college's treatment of Carrigg was "unfair" and that the administration should be ashamed.

Collier replied saying the SCEA agreement "require(s) that we not comment on ongoing personnel issues" and that without all of the details, Zelenda's perception of the situation seems "a rush to judgment."

He mentioned that he is a former journalist and has always been committed to the truth, the freedom of the press and the "fair treatment of fellow human beings."

"But sometimes humans make mistakes and there are consequences for those actions," Collier wrote.

Zelenda, who works in marketing and public relations, studied mass communications at the college and said he spent a majority of his time under Carrigg's advisement because he worked for the TV station and had her as a professor. Carrigg prepared him for the real world and was extremely dedicated to her students, frequently sacrificing nights and weekends to work, he said.

"For someone who's been there for 28 years breaking their back to be shuffled that way is disrespectful," he said.

Future of the Stater

Collier said he talked with Pufahl before McElwain was removed to discuss the upcoming year and schedule a meeting between the newspaper staff and college administration for the fall.

"It was as innocent of a request as it could possibly be," Collier said.

Pufahl had approached Collier before McElwain was dismissed to talk about having better communication between the newspaper and the administration during the upcoming school year.

At the meeting, Collier said he hopes to inform students about "why (the administration's) hands are tied when it comes to personnel issues" and to become more familiar with the newspaper staff.

He said the administration has also proposed the idea for an advisory board to the *Wayne Stater*, which will be comprised of journalists and alumni to give students additional guidance when they are covering hard topics.

Pufahl and McElwain agreed an advisory board for the paper seems unnecessary, and McElwain said it would be another way for the college to monitor and control the newspaper.

Eddie Elfers, who served as the adviser to the *Wayne Stater* from 1992-1999, said the vice president for academic affairs asked him to take over as the newspaper adviser this fall. Elfers taught journalism at Wayne State for seven years and is now the director of teaching and learning technology.

Elfers said his advising style is more "hands-off" and that he doesn't plan to control the content students publish.

"It's not something I envisioned myself doing, but I wanted to make sure the students were protected," Elfers said.

McElwain and Carrigg have been advised not to share their stories with anyone. McElwain said he doesn't want his advising job back, but would only like to teach one more year. He feels as though he has been wronged, and said by staying silent he is adhering to the system that is responsible for his dismissal.

"I'm complying with a failing system when I don't say anything," he said.

Steve Elliott declined to comment for this story. -30-

We can #CureHazelwood in our lifetime.

On the next page, learn about the New Voices campaign to pass student press freedom laws in states across the country.

NEW VOICES

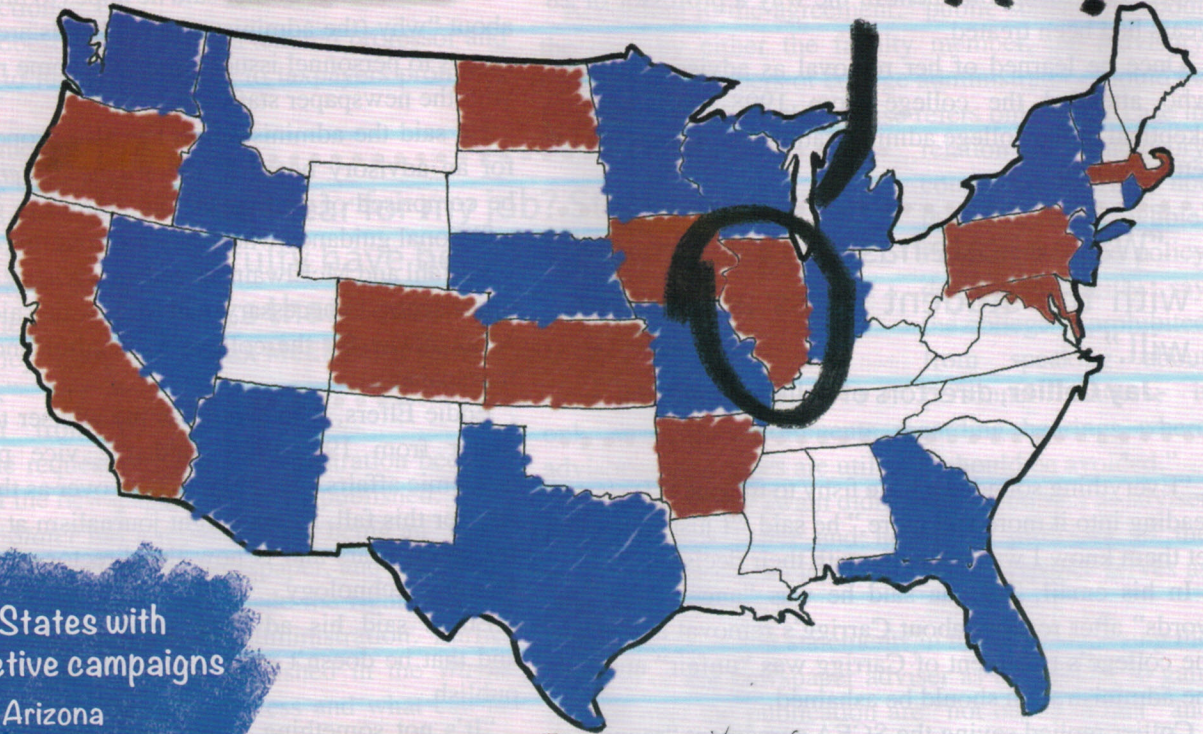
usa

Get involved at NewVoicesUS.com

Illinois Governor Bruce Rauner signed the Illinois New Voices Bill into law July 29, following unanimous support in the state House and Senate.

New Voices is securing free expression, one state at a time.

You did it!



States with active campaigns

Arizona
Georgia
Idaho
Indiana
Michigan
Minnesota
Missouri
Nebraska
Nevada
New Jersey
New York
Rhode Island
Texas
Vermont
Washington
Wisconsin

States with existing laws

Arkansas
California
Colorado
Illinois
Iowa
Kansas
Massachusetts
North Dakota
Oregon
Pennsylvania (regulation)

Win some, lose some:

While New Voices legislation passed in Maryland and Illinois, this year, bills in Rhode Island and New Jersey failed to gain traction. In a classic display of stick-to-itiveness, however, the New Jersey bill was refiled June 30.

This fall, we're welcoming four new states to the New Voices movement. Campaigns have been started in Arizona, Indiana, Nevada, and Vermont.

Put your state on the map!

If your state doesn't have a campaign, contact our team at: newvoicesus@gmail.com

Technical Foul

Access is a perennial issue for college media, and for sports reporters, that means battling powerful collegiate athletic programs. Recently, some college teams have begun cracking down on student journalists reporting over social media.

By Kaelynn Knoernschild

Sports reporters are increasingly being told what they can and cannot post on social media. Whether it be a ban on live tweeting or a blanket policy restricting reporters from posting about injuries, sports teams and organizations are increasingly trying to control who can say what.

For example, in August 2015 Virginia Tech sent out a Twitter policy to reporters prohibiting them from posting play-by-play updates on social media.

Faizan Hasnany, sports editor for the *Collegiate Times* at Virginia Tech, said reporters were allowed to tweet out big plays when they occurred. However, the official football and basketball accounts continued tweeting play-by-play, giving sole exclusivity to the university's social media accounts.

Although he said reporters at the student newspaper don't typically tweet play-by-play and that he doesn't perceive the policy as a direct obstacle to the newspaper's reporting process, Hasnany said he believes the restriction is technically censorship.

"But, I don't think (the policy) affects anybody really among Virginia Tech," he said.

Brian Moritz, a State University of New York at Oswego sports journalism professor, agrees. He said while he believes it is meaningless for reporters to tweet play-by-play, he also doesn't believe organizations should tell journalists what they are allowed to report.

"My problem is when an organization tries to tell media what you can and can't do," Moritz said. "That's getting close to censorship in my book."

Restrictive media policies aren't only an issue at the collegiate level; some even suggest professional sports teams are setting the precedent for such policies. Last summer, the Chicago Bears limited live training camp coverage, barring reporters from blogging or tweeting about "team strategy or injury specifics" and prohibiting TV stations and photographers from shooting video or photos during team drills.

In May, the Buffalo Bills issued a media policy banning reporters from tweeting or blogging about dropped passes or quarterback completions during practices.

Tyler Dunne, who covers the Bills for the *Buffalo News*, said he was flabbergasted by the policy.

"It was a joke, everyone saw it for the joke it was," Dunne said.

He said the organization quickly backtracked after criticism from journalists and sports fans. Dunne said most of the policy conditions were routine, excluding the restrictions on reporting happenings at practices and injuries, which he said qualified as censorship.

"Fans want to feel like they are right there at the practice," Dunne said. "In 2016, at a practice, that's reporting whether it's through Twitter, Snapchat or live-blogging."

Taking over the message

Moritz, who researches the practices of sports journalists, said teams and conferences don't have to rely on a journalist as "the middleman" to convey their message anymore.

"Technology has given teams, colleges and organizations a chance to take their message right to fans," Moritz said. "(Teams and organizations have) the desire and ability to control the narrative instead of having to rely on a reporter."

Historically, sports organizations and the media have had a symbiotic relationship, but Moritz said the relationship has changed. Because sports organizations are able to communicate to fans via websites and social media, similar to journalists, it gives those organizations the advantage. Teams not only have more control over their image, but also get to choose who is allowed exclusive access and who isn't.

Galen Clavio, sports media professor and director of the National Sports Journalism Center at Indiana University, said he believes there are uneven power structures in

sports media in which student journalists don't have the upper hand.

"Student journalists are always in a tough spot," he said.

According to Clavio, the industry is incredibly access-based, meaning journalists must work with sports information directors to gain access to players and coaches. Students are in a unique situation because the information directors are often providing valuable space in the press box to young journalists instead of professional reporters, he said. Athletic departments may have less patience with students who they feel are offering negative coverage of the team to their readership, he said.

Additionally, journalists are competing for exclusivity because fans gravitate to the provider that has the best or most select coverage. Clavio also noted that the need to maintain relations with a team that has control over a journalist's access may chill a reporter's willingness to ask difficult questions.

Moritz agreed and said self-censoring in hopes of maintaining a good relationship with sources isn't only an issue in sports journalism, but in journalism in general.

"When you have access now, you are going to want to guard it," Moritz said.

He said dealing with issues surrounding access to athletic teams tends to be more challenging for student journalists. Moritz said it can be good

experience for students to deal with adversarial athletic departments and information directors. However, he warns students might view all public-relations officials and sports information directors negatively as a result of the experience.

Controlling the 'middle man'

Professional and student journalists alike are learning to deal with limiting media policies and challenges when it comes to communicating with team officials.

In October 2013, a reporter for *O-State Illustrated*, a website associated with rivals.com, got his media credentials revoked by the Oklahoma State Athletic Department after he retweeted a photo of the university's Homecoming & Hoops basketball celebration set-up.

The athletic department demanded to know from whom Brendon Morris got the photo of the set-up, which the university was trying to keep secret. Morris eventually shared screenshots with the athletic department, revealing who posted the photo originally.

The department later offered to reinstate Morris's credentials on the grounds that he abstain from posting on his Twitter account during games and other sporting events. Morris resigned his position because he felt the restrictions were unfair, he told SPLC in 2013.





Other instances include the Ohio State Athletic Department barring reporters from live tweeting a press conference in 2012, and, more recently, UFC banning a reporter for life after he broke news about a professional wrestler finalizing a deal. UFC eventually lifted the lifetime ban after criticism related to the decision.

Dunne, who has also covered the Green Bay Packers, said his experience as a student reporter for *The Daily Orange* at Syracuse University helped him understand the relationship dynamic between sports information directors and reporters. His career as a student journalist helped prepare him professionally, he said.

He said students will find they are most likely going to butt heads with sports information directors and those who work in public relations at the collegiate and professional levels. Dunne said he remembers a meeting where administrators tried to talk him out of publishing a story because it would have reflected badly on the university.

“They might think they can bully students around and keep them from doing their jobs,” Dunne said. “You really learn at college to sharpen your elbows to get as much access as you can.”

Legal limitations

Kevin Goldberg, an attorney specializing in First Amendment and media law at Fletcher, Heald

& Hildreth, P.C., in Virginia, said restrictive media policies by corporate entities such as NFL teams don’t violate journalists’ First Amendment rights because a government entity is not involved. He said it has been difficult to find a court that will deem restrictions on coverage illegal.

Goldberg said sports journalists are dealing with restrictive media-credential terms that affect their copyright ownership, limit their distribution of video coverage, and restrict the frequency of updates on social media.

“There’s a number of effects,” Goldberg said.

He said the sometimes-constricting policies are an example of a “shifting balance” between those who provide the content and the belief that they no longer need the media.

However, Ted Kian, an Oklahoma State sports media professor, said universities still need and want to work with the press to cover smaller sports that might not get as much attention otherwise.

He said even though it can be difficult to navigate relationships with athletic departments as a student reporter, banning students from covering university sports is not typically a decision the information directors want to make.

“The last thing (sports information directors) want is a stain on their organization/team/coaches that they banned student reporters,” Kian said.

Sometimes, however, gaining access to

information and players in an industry estimated to be worth \$67.7 billion by next year may be more about profit than a team's image. For example, many of the policies, such as the one implemented at Virginia Tech, don't allow reporters to live stream events through Periscope, an app affiliated with the Twitter platform. The restriction could be a result of broadcasting deals teams and organizations, such as the NCAA, are benefiting from.

Clavio said it's likely some of the media policies are less about censorship and more about channeling audiences toward broadcast because that's where the advertisements are being sold.

From 2011 through 2012, 81 percent of the NCAA's revenue came from television and marketing rights fees, according to the NCAA. The organization also has a \$10.8 billion, 14-year agreement with CBS Sports and Turner Broadcasting.

Future of Sports Journalism

Dunne, who is assigned to the Bills this football season, said he thinks the more aggressive restrictions in the Bills' media policy will most likely be disregarded, and said he doesn't believe the policy will affect his reporting.

Dunne said he hopes restrictive policies are not the new normal and that the organization's public relations team just went too far. Sports teams owning their own networks, websites and having their own reporters might have been the impetus behind the organization's media policy, he said.

Dunne said there is nothing wrong with

organizations having their own media, but he also said the public doesn't benefit from one-sided reporting.

"I just think in any democratic society it's important for independent voices to be heard," Dunne said.

He said he believes there's enough room for independent journalists and reporters employed by sports teams to work together.

Clavio said although he believes the days of teams trying to restrict what the media is saying are mostly over, sports teams will continuously attempt to try to force journalists to abide by their rules when it comes to social media.

"I think there are going to be consistent attempts by sports organizations and leagues to force reporters to abide by arbitrary rules relating to social media until we have a re-evaluation about what social media are and how they fit within our overall media constellation," Clavio said.

Clavio also said he believes the relationship between sports teams and sports journalists is going to become increasingly distant. Sports information directors are communicating with the public just as much as they are with the media, Clavio said, setting the stage for more direct interaction with the public in the future.

"I think that sports teams will decide after a while that it's easier to communicate directly with fans than it will be to communicate indirectly with fans through the media," Clavio said. **-30-**

UNDER THE DOME

Illinois

On July 29, Governor Bruce Rauner signed into law the New Voices bill that unanimously passed the Illinois legislature in May. This makes Illinois the tenth state to pass a student free expression bill.

Rhode Island

A New Voices Bill drafted by high school student Yanine Castedo failed to survive the legislative session in Rhode Island. The bill

died in committee without a vote by the time the session ended. Castedo plans to revive the bill in 2017.

Delaware

The Delaware Senate introduced a bill June 15 that would require public institutions such as the University of Delaware and Delaware State University to practice greater transparency with regard to their Board of Trustees. Delaware and Pennsylvania are the only two states to provide exemptions for public universities adhering to public records and

open meetings laws.

New Jersey

The Garden State is taking a second crack at student press freedom. The first New Voices bill, put forward in December 2015, was referred to the education committee but no action was taken before the end of the legislative session. The latest iteration was introduced June 30 with new sponsorship and host of student and educator support.

Legal Analysis

Can school boards restrict public comment?

By Frank LoMonte

When Dean Paterakis stepped to the microphone to comment on restroom accommodations for transgender students, he was already a familiar antagonist to the Brevard County school board.

A former third-grade teacher, Paterakis had sued the district alleging wrongful termination in retaliation for blowing the whistle on grade-tampering by an administrator. On this occasion in May 2016, though, Paterakis was before the board as an upstart candidate challenging a two-term incumbent. And he gave the board an earful.

According to news reports,¹ Paterakis was told to step away from the microphone for “inappropriate” remarks and, when he refused, was removed from the meeting by sheriff’s deputies and jailed on two misdemeanor charges.

A school board member said Paterakis (who accused a teacher of showing a photo of his genitals to students during a class presentation) was in violation of a policy forbidding “talking about a teacher,” which is a “personnel matter and not allowed at Board meetings due to possible slander.”²

Though it’s a rarity when a school board speech escalates into an arrest, it’s increasingly commonplace for districts to impose restrictions on what members of the public may say during the open-microphone portion of board meetings. But such restrictions are doubtfully legal, and in a pair of recent interpretations – one in Illinois and one in Virginia – have been found unconstitutional.

What First Amendment rights do speakers have when they address school boards and other government meetings? This article will look at the growing consensus of legal authorities that citizens may freely criticize school practices – including named employees – during public meetings.

The First Amendment and government meetings

The ability to speak directly to a government board – a city council, a school board, college trustees – is perhaps the purest and most basic form of citizen participation. It may come as a surprise, then, that the Constitution is not understood to guarantee citizens a right to be heard before their elected officials make a decision; the Supreme Court said as much in a 1984 ruling involving labor negotiations in a community college district.³

Once an agency does agree to accept public comment, however, the commenting system cannot be operated in a discriminatory or viewpoint-restrictive way.

When a speaker seeks to use government-owned property as a platform for delivering a message, the degree of First Amendment protection depends on the nature of the property. Some property is recognized as being traditionally a “public forum” where speech can never be restricted on the basis of its message, such as a park or a sidewalk.

The Supreme Court set forth its “forum doctrine” in a case about access to mailboxes in a public school.⁴ In that case, a union wanted to place recruitment flyers in teachers’ inboxes, noting that the boxes were built specifically for communicative purposes. The Court, however, found that the boxes were not a “forum” open to general expressive use, but rather, were limited by their nature to communications about official school business by authorized users. Therefore, non-school organizations had no constitutional right to insist on using the mailboxes.

The podium at a governmental meeting is considered a “designated” public forum, meaning a piece of property that has been purposefully set aside for expressive use. Regardless of whether property is a forum by tradition or by designation, the government cannot pick-and-choose among viewpoints; once the property is opened for one opinion, it must be open on equal terms to all.

However, unlike a park or a sidewalk, when the government “designates” a location as a space where citizens can express themselves, the use of the space can be limited to speech consistent with the purpose of the space. While a city or county or school board cannot differentiate based on a speaker’s opinion, speakers can be limited to subjects relevant to that agency; for instance, a person who insisted on using the school board microphone for a speech about U.S. military strategy in Afghanistan could be silenced on the grounds that the speech is unrelated to the purpose of the school board meeting.⁵

Content based versus content neutral

Once a piece of property is declared to be a “forum,” any regulation on the content of a speaker’s message is presumed to be unconstitutional and is likely to be

struck down if it is challenged.⁶ Only if a judge finds that the restriction is absolutely necessary to achieve a compelling governmental purpose will the restriction be constitutional.

But even in a public forum, the government can always enforce reasonable regulations on the use of property that are “content neutral,” applying even-handedly to all speakers. For instance, a federal appeals court decided that a five-minute limit on speeches at a congressional hearing is a lawful, content-neutral restriction.⁷ A government body also may remove a speaker who causes a disturbance – shouting, refusing to leave after the expiration of a time limit – without violating the First Amendment.⁸

Judges sometimes have trouble making this distinction. Regulations that clearly seem targeted to the substance of a speaker’s message are, at times, mistakenly deemed to be “content neutral.”

For example, a federal judge decided that a City of Topeka regulation prohibiting “personal, rude or slanderous remarks” at city council meetings was a constitutionally valid, content-neutral regulation.⁹ But the rule should have been analyzed as content-based, since it targeted the speakers’ choice of words rather than their method of delivery.

Had the judge analyzed the rule properly, it would have been declared unconstitutional because of its excessive breadth. “Rude” and “personal” are not terms with any

accepted legal definition, and any potential speaker would be unable to anticipate what speech is and is not permitted, which is a red flag of unconstitutionality. (There is no indication that the ruling was appealed, but because it comes only from a district court, the decision is not binding on other courts.)

Restraints on commenting rarely succeed

When speakers who’ve been restrained from commenting at public meetings bring constitutional challenges, they’ve generally been successful. Judges have no difficulty recognizing that a government meeting is meant for the airing of complaints, even if that requires naming or criticizing a particular employee.

Examples include:

- A federal district court in California ordered a school board not to enforce a regulation against “charges or complaints against any employee of the District” during board meetings.¹⁰ The plaintiff, who was silenced – and ultimately removed from the room by sheriffs’ deputies – when addressing the board about why grievances against a principal and superintendent went unaddressed, argued that the rule violated her free-speech rights. The judge agreed, in a ruling that was primarily based on the California state constitution’s strong free-speech protections rather than on federal law. The judge found that protecting employees against speech defaming them or invading their privacy was not a compelling government interest overriding the public’s right to speak. (The judge also noted that the policy was not well-tailored to its purpose; for instance, a speaker could reveal intimate personal information about an employee without violating the policy, as long as the disclosure was not a “charge” or a “complaint.”)
- Another California district court struck down a school-district bylaw prohibiting “improper conduct or remarks” by public presenters.¹¹ The district defined “improper remarks” to mean “complaints against an individual employee.” A speaker who twice was silenced while trying to raise questions about the qualifications of the district school superintendent sued to invalidate the bylaw, and a judge found the restrictions unconstitutional: “Debate over public issues, including the qualifications and performance of public officials (such as a school superintendent), lies at the heart of the First Amendment. ... Central to these principles is the ability to question and challenge the fitness of the administrative leader of a school district, especially in a forum

TL;DR

- Some school boards have taken to limiting what can be said during the public comment portion of meetings, sometimes escalating to arrest.
- Defamation is frequently cited as the reason for such restrictions.
- The podium or microphone is an established public forum, and a governing body cannot restrict speech for opinion.
- However, they can restrict the discussion to relevant topics (so leave the Walking Dead spoilers outside).
- Restrictions on the content of speech in a public forum are assumed unconstitutional unless the government can prove it serves a “compelling government purpose.”
- It’s almost never all that compelling, tbh.

created specifically to foster discussion about a community's school system."¹²

- A Virginia Beach school board policy prohibiting "personal attacks" was struck down as an unconstitutional prior restraint on speech.¹³ The school district attempted to defend the restriction by saying it narrowly applied only to "personal" remarks (such as "the principal is a liar") and not to complaints about professional conduct (such as "the principal lied about spending the money"). But the judge found that the regulation still would inhibit speakers from voicing opinions about school officials, because the average person would not make such a distinction and would assume that any criticism mentioning an employee's name was forbidden.

In a 2010 case going against the majority view, a federal appeals court refused to strike down a Texas school district's restrictions that forbade speakers from using the microphone to air complaints about specific district employees.¹⁴

A three-judge panel of the federal Fifth Circuit analyzed the restriction as an extension of the school district's complaint-resolution process. Because the district had a complaint mechanism requiring grievances to first be presented to a lower-level district employee before the board would hear them, the judges regarded the restriction on speech as a legitimate method of enforcing compliance with the complaint procedure.

The ruling is a fairly narrow one, and it can be interpreted as applying only to speech that involves disputes with employees that are subject to a formal grievance procedure. That is different from saying that a board could constitutionally prohibit the mention of any names, which is a much broader restriction.

During 2016, two rulings – one in Illinois and one in Virginia – added to the growing consensus that the First Amendment protects the right to criticize the performance of school employees during board meetings.

Two regulations struck down

When the chairman of an Illinois school board shut off the microphone in the midst of a citizen activist's speech criticizing school personnel, Komaa Mnyofu responded with a federal lawsuit. Mnyofu alleged that his speech was cut short because of his unfavorable opinion, an act of unlawful viewpoint discrimination. He challenged the board's decision in U.S. district court as a violation of his First Amendment rights.

The district judge agreed that Mnyofu had a constitutionally protected right to use the public-comment period to criticize school employees – in fact, the judge

wrote, the right is "clearly established" by decades of federal precedent.¹⁵

In an unusual maneuver, the school district filed a "preemptive strike" lawsuit attempting to have Mnyofu banished from attending board meetings, arguing that his demeanor demonstrated a likelihood of future disruptive behavior. The judge threw out the case, finding that a government agency cannot preemptively ban a citizen from speaking at public meetings.¹⁶

In Virginia, meanwhile, the state's attorney general issued an interpretation instructing the Franklin City School board to stop enforcing a regulation banning "personal attacks against employees" and comments that "identify specific individuals" during the public portions of meetings.¹⁷

When evaluating a governmental restriction on speech, the first question is always whether the restriction is based on the content of the speaker's message; if so, then the regulation is presumed to be unconstitutional unless it is shown to be necessary to achieve a compelling government purpose.

Herring concluded that the rule was not based on content, because it prohibited all mentions of identifiable people (students as well as employees) and did not differentiate based on the speaker's message.¹⁸ Nevertheless, even a content-neutral regulation can be struck down as invalid if it is unreasonably broad or vague – and the Franklin school board's flunked the test.

Because the school board comment period is a "designated public forum" for the expression of public views, access to the forum can be closed or limited only if the speaker has reasonable alternative channels to be heard. The school board's lawyers argued that speakers could request to air personnel grievances in a closed-door "executive session," but Herring noted that there is no assurance the request will be granted: "I conclude that allowing discussion of individual school employees only during closed session does not meet the constitutional standard of 'leaving open ample channels of communication.'"¹⁹

Anticipating libel?

When a journalist questioned the validity of a Miami-Dade School Board policy that prohibits "individual grievances" and "personal attacks" during board meetings, the district's attorney claimed the policy was necessary to prevent members of the public from defaming school employees.²⁰

The argument that criticism of employees must be forbidden to prevent defamation fails on two legal grounds. First, not all critical speech is defamatory. Defamation requires proof of a false statement of fact.

Accurately describing wrongdoing by a school employee is a non-defamatory act of constitutionally protected speech. A restraint on referring to identifiable individuals fails the constitutional test of “overbreadth,” since it restrains far more speech than is necessary to accomplish its objective.²¹

Even if it’s reasonably anticipated that some speakers will abuse the comment period to make defamatory statements, the Supreme Court has made clear that speech cannot be restrained in anticipation that it will harm someone’s reputation.²² Rather, the proper remedy is to let the speech be heard and – if it causes harm – compensate any injured parties by way of a civil suit for money damages.

The Miami-Dade policy (which, while rare, is not unique) goes even further than prohibiting criticism of school employees and even prohibits mention of the names of individual school board members themselves (as well as any other proper name, even that of President Obama or the U.S. education secretary). While it’s arguably unfair for a speaker to be given a platform to berate a schoolteacher who’s not present at the meeting to defend herself, the school board members are present and have microphones of their own. Any policy extending beyond low-level school employees that insulates elected officials against criticism is undoubtedly unconstitutional.

As a reporter monitoring Miami-Dade school board meetings observed, policies against “mentioning” names are an invitation to abuse, since a speaker almost never will be silenced for commending an employee – indeed, reporter Rowan Moore Gerety witnessed several instances of speakers thanking people by name (including named school board members) without interruption.²³

Conclusion

It’s important for journalists who cover school boards – or student advocates who may find themselves speaking before school boards – to appreciate the strong First Amendment protection for citizen speech to government officials addressing matters of public concern. (Indeed, the First Amendment not only protects the freedom of speech, but also the freedom to petition government officials for the redress of grievances, and a restraint on speech to school boards jeopardizes both of these rights.)

An increasing number of school districts are buying cookie-cutter policies from vendors of uncertain reliability, who may or may not have written their policies in consultation with constitutional-law experts. When journalists discover that their school district is purchasing policies from an outside company rather than preparing them internally with the assistance of qualified

legal counsel, that’s a red flag that the policies may be shoddy and collapse if challenged in court.

Like any government agency, a school district acts only through the acts of its employees. Criticizing the way a school district is delivering educational services almost always requires commenting on the performance of employees.

The law recognizes that – especially when it comes to high-ranking officials – criticism of government practices occupies a specially protected status. The burden for a “public official” (such as a school board member or superintendent) to win a defamation suit is purposefully high, recognizing the need for speakers to feel confident they can safely express dissatisfaction with government services.²⁴

While restrictions on criticism of school employees may be rationalized on fairness grounds – protecting the reputations of people who aren’t present to defend themselves – school districts are notoriously image-conscious and it’s likely that at least some “no-criticism” rules are motivated by aversion to controversy. But when a member of the public takes to the microphone to complain about a school’s performance, it’s almost always because lower-volume options have been tried and failed. That a citizen feels compelled to resort to the podium to air a grievance should be recognized as suggesting a weakness in the school’s dispute-resolution process.

Attorney Frank LoMonte is Executive Director of the Student Press Law Center.

1. <http://www.floridatoday.com/story/news/education/2016/05/24/school-board-packed-lgbt-meeting/84814172/>
2. <http://m.washingtontimes.com/news/2016/may/25/dean-paterakis-florida-school-board-candidate-haul/>
3. *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271 (1984).
4. *Perry Ed. Ass’n. v. Perry Local Educators’ Ass’n.*, 460 U.S. 37 (1983).
5. For example, in *Jones v. Heyman*, 888 F. 2d 1328 (11th Cir. 1989), a federal appeals court said a speaker could be ejected from a public meeting after he refused repeated requests from the chairman to limit his remarks to the item on the agenda and responded with belligerent remarks interpreted as threatening.
6. “Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.” *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972).
7. *Wright v. Anthony*, 733 F. 2d 575 (8th Cir. 1984).
8. *Kirkland v. Luken*, 536 F. Supp. 2d 857 (S.D. Ohio 2008). See also *White v. City of Norwalk*, 900 F. 2d 1421 (9th Cir. 1990)

ON THE DOCKET

Krakauer loses case in Montana

After a favorable decision by the district court in Helena, Montana, ordering the University of Montana to turn over redacted disciplinary records concerning a U of M football player accused of rape, the Montana Supreme Court reversed in part and remanded the decision back to the lower court. At stake is whether the documents are protected by the Family Educational Rights and Privacy Act. The lower court ruled that the documents could be released in redacted form without violating FERPA, but the state's Supreme Court found that, because the requestor, Krakauer, knows the identity of the student the documents are about, redaction is insufficient to maintain privacy. The lower court has been ordered to conduct an in camera review of the records to determine which, if any, can be released.

University of Kentucky sues student paper

Last April, the *Kentucky Kernel* made a records request for investigation and disciplinary records related to sexual assault allegations against a professor at the University of Kentucky. The independent student newspaper revealed the professor, James Harwood, was allowed to resign with pay benefits through August. The university, however, refused to comply with the records request, claiming the investigative documents were protected as the work product of ongoing litigation and, later, were protected by FERPA. The *Kernel* appealed to Kentucky Attorney General Andy Beshear, who ordered the university to release the investigative records. As a result, UK filed a lawsuit against the *Kernel*, their only recourse to appeal the decision. Beshear has since joined the lawsuit in support of the *Kernel*, which has been raising money for its legal defense through GoFundMe. Meanwhile, the university continues to claim they're protecting the identity of the student victims.

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.

- (upholding an ordinance that prohibited speech during council meetings that "disrupts, disturbs or otherwise impedes the orderly conduct of the Council meeting.").
9. *Scroggins v. City of Topeka*, 2 F. Supp. 2d 1362 (D. Kan. 1998).
 10. *Baca v. Moreno Valley Unified Sch. Dist.*, 936 F. Supp. 719 (C.D. Calif. 1996).
 11. *Leventhal v. Vista Unified Sch. Dist.*, 973 F. Supp. 951 (S.D. Calif. 1997).
 12. *Id.* at 958.
 13. *Bach v. School Bd. of the City of Virginia Beach*, 139 F. Supp. 2d 738 (E.D. Va. 2001).
 14. *Fairchild v. Liberty Independent Sch. Dist.*, 597 F. 3d 747 (5th Cir. 2010).
 15. *Mnyofu v. Bd. of Educ. of Rich Twp. High Sch. Dist.*, 2016 LEXIS 45773, No. 15 C 8884 (N.D. Ill. April 5, 2016).
 16. Erin Gallagher, "Federal judge bars school district's effort to limit comments," *THE DAILY SOUTHTOWN* (May 16, 2016).
 17. Letter of Attorney General Mark R. Herring to the Hon. Richard L. ("Rick") Morris, April 15, 2016, available at http://ag.virginia.gov/files/Opinions/2016/15-020_Morris.pdf
 18. *This is probably erroneous; the proscription should have been treated as content-based because certain categories of message were deemed acceptable and certain were not, which is the definition of content discrimination.*
 19. *Herring, supra*, at *3.
 20. Rowan Moore Gerety, "Don't Say My Name Unless You're Saying Thank You," *WLRN.org*, July 24, 2016, available at <http://wlrn.org/post/don-t-say-my-name-unless-youre-saying-thank-you>.
 21. *See United States v. Stevens*, 130 S.Ct. 1577, 1587 (2010) (restriction on speech may be struck down "if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.") (internal quotes omitted).
 22. *See Near v. Minnesota*, 283 U.S. 697 (1931) (striking down state statute that enabled courts to issue injunctions prohibiting the publication of defamatory speech).
 23. *See Gerety, n. 20.*
 24. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 328 (1974) (explaining differing standards of proof for libel cases involving public figures).

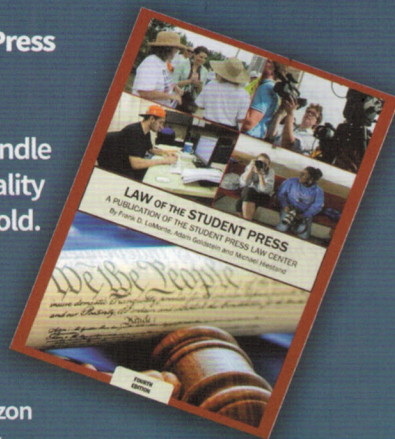
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