On the road with the Tinker Tour:

Mary Beth Tinker’s mission: Standing up for students’ rights

INSIDE: JOURNALISTS TRYING TO USE DRONES FACE LENGTHY, COMPLICATED APPROVAL PROCESS
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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Journalism: Love it or leave it

“There is one matter on which is it permitted, I think, to be an absolutist in the newsroom,” the media critic Jay Rosen has written. That, he explains, is the First Amendment. It is the “article of faith” on which journalism — what New York Times veteran Robert H. Phelps described in his memoir as “the secular substitute for religion” — is founded.

Plenty of journalists are wise, good-hearted people who accept with great seriousness their obligation to safeguard the First Amendment rights entrusted to each generation by the last. One of the all-time finest, longtime Times and McClatchy newsman Reggie Stuart, has just completed a distinguished term as chairman of the Student Press Law Center’s board of directors.

The Society of Professional Journalists threw the full weight of its 9,000-strong nationwide membership behind the sanctity of press freedom in an August 2013 resolution that calls on schools and colleges to forswear reliance on the Supreme Court’s Hazelwood standard to censor student journalism for purposes of image control: “[I]t is well-documented the Hazelwood censorship clause impedes an educator’s ability to adequately instruct and train students in professional journalistic values and practices, including the right to question authority and investigate performances of governance.”

Journalism pros at The Philadelphia Inquirer have given invaluable encouragement to student editors at Pennsylvania’s Neshaminy High School, who are defending their right to refrain from using the offensive word “Redskins” in covering school athletic teams. Reminding Principal Robert McGee that his authority extends only to speech disrupting the educational process, Inquirer editors wrote, “Free engagement in journalism is educational.”

Regrettably, each year a few lost journalistic souls, uninformed about the law and ignorant of history, accelerate the demise of their profession by disrespecting the only group of Americans who still look up to them — the young people whose readership they desperately need and whose free labor they gladly accept.

The current “president” of the Journalists Against the First Amendment Club is Los Angeles Times editorial columnist Michael McGough. Uncritically parroting the legal disinformation dished out by school lobbyists, McGough told the gutsy Neshaminy High editors in his Nov. 19 column that they should be thankful for the valuable “lesson” their “publisher” — the principal — is teaching them about who’s boss.

Let’s put the stake in this one for all time. Nothing about being a principal of a high school is in any way analogous to being the publisher of a newspaper. “Publisher” is a term of legal significance that identifies an individual with complete editorial discretion. A publisher can use the editorial page to launch personal political crusades and to advocate for the election or defeat of his chosen candidates. A principal who used the student newspaper in that way would be both violating the law and subject to termination (particularly in Pennsylvania, where a state code — which McGough’s errant column miscalculates — gives student editors the final say in all but the most extreme cases).

If principals are newspaper publishers, they’re the most unethical publishers in America. If the publisher of the Times is quoted in a news story about a dispute in which he is involved, he is ethically bound to refrain from altering the story or ordering that it be shaded to favor his side. Principals adhere to no such boundaries, regularly removing stories they find unflattering. Is ethical blindness part of the “lesson” that McGough and the Times hope their future employees will graduate having learned?

Thousands of newspapers have been published for decades free from prior administrative review, safely and without incident. There is not a single documented case in the nation’s history — not one — in which a school has been forced to pay damages for anything published by student journalists. Nor is there any evidence that principals can be trusted to limit their censorship decisions to material presenting a legal risk; no such risk exists in a disagreement over the name of a team mascot.

McGough’s club is a sad and lonely one, but not as lonely as it should be. In New Jersey, an editor from The Hunterdon Democrat undermined students’ anti-censorship efforts by telling the school board that “editing” in the principal’s office was no different from editing by a professionally trained journalist. In Washington, The Seattle Times has crusaded against student press freedom with such “get-off-my-lawn” vehemence that its editors have almost single-handedly torpedoed legislative efforts at reform.

When professional journalists fail to stand up for the rights of student journalists, it feels to students like a betrayal — like those who themselves suffered censorship have forgotten the disempowering feeling of being distrusted. The word of journalism professionals gives cover to those who censor to deny the public truthful information about their failing schools. When journalists side with censors, that is the side they are taking — the side of lies over truth, the side of less information over more.

The last word on this subject should go to a journalist far more accomplished and respectable than McGough, Paul Steiger of the investigative website ProPublica. Accepting the Burton Benjamin Memorial award from the Committee to Protect Journalists on Nov. 26, Steiger told his colleagues: “We can’t rest. We need to stand up in stout opposition whenever the First Amendment is challenged at home. We need to speak out, even more vigorously than before, when journalists are abused around the world.”

An attack on a student journalist is an attack on all journalists. When your moral compass deserts you so badly that you find yourself sympathizing with censors over journalists, it’s time to set down the pen and walk away.
The family of a high school senior found dead inside a rolled-up gym mat last January asked to see video surveillance footage from the school gym where his body was found. Kendrick Johnson’s family believes the video may show evidence that his death was not an accident, as the Lowndes County Sheriff’s Office has determined. The Lowndes County School system attorney, Warren Turner, said the district cannot release the recordings because they are protected by FERPA.

**SPLC Attorney Advocate Adam Goldstein:** Let’s just get the law out of the way so we can truly ponder the magnitude of maladjusted selfishness that invoking FERPA in this instance requires. FERPA rights generally terminate at death. However, when the rights involve a minor—and Kendrick Johnson was 17—the rights belonged, and still belong, to his parents. You might also recall that FERPA is a right of access statute as well, ensuring that parents (or eligible students) can obtain copies of their own records. That’s true even when other students might be identified in the record, if those students relevant to the incident.

So in short, the school district is violating the FERPA rights of Johnson’s parents by refusing to hand over the video and citing FERPA as a basis for why it’s violating FERPA.

**We rate this: Three Arne Duncans**

In October, a performance of “The Laramie Project” at the University of Mississippi was interrupted by members of the audience who yelled gay slurs throughout the play, which is about the murder of a gay student at the University of Wyoming. The school held a mandatory “dialogue session” for attendees, but told *The Daily Mississippian* that attending the meeting or interviewing anyone who attended would violate FERPA.

**Goldstein:** No. Just, no. FERPA is about education records. Education records are defined as those records maintained by the institution that are directly related to a student. Here, there are no records yet. When those records would be created, they would be in the possession of students. Furthermore, FERPA regulates the activities of school employees and agents. Nothing a non-employee student can do on his or her own can violate anyone’s FERPA rights, ever.

**We rate this: Three Arne Duncans**

Believing that women and older workers are discriminated against in hiring, the graduate student union at the University of California requested statistical data from the university. The students asked to see “the salary, total earnings, appointment and classification for employees hired in different departments,” according to *The Daily Bruin*. The university has denied the records request because providing such information would violate FERPA, the Family Educational Rights and Privacy Act, a spokeswoman told the paper.

**Goldstein:** The information as requested is purely anonymous statistical data, so this isn’t even identifiable information. But even if the information wasn’t purely statistical, let’s all have a look at the list of things that aren’t considered protected: “records relating to an individual who is employed by an educational agency or institution, that: (A) Are made and maintained in the normal course of business; (B) Relate exclusively to the individual in that individual’s capacity as an employee; and (C) Are not available for use for any other purpose.”

So the question is, are records of salaries, earnings, appointment and classification of employees made in the ordinary course of business and related exclusively to employment status? Presumably, the school isn’t intending to grade people on their age and race?

So even if there are identifiable employees in this data, it shouldn’t be protected by FERPA anyway.

**We rate this: Three Arne Duncans**

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**FERPA Fact**

FERPA Fact is an SPLC project to fact check the use of FERPA — the Family Educational Rights and Privacy Act — when denying access to public records. Sometimes, the records are legitimately protected by FERPA. Sometimes the records are protected by other privacy laws. And sometimes, schools just don’t want to release the records.
Exclusivity contracts limit student journalists’ live sports coverage

As more high school athletic associations enter into agreements granting third parties exclusive broadcasting rights, journalists are figuring out how to deal with the restrictions.

BY SAMANTHA VICENT

When Hannah Daly went to cover her school’s competition in the California Interscholastic Federation’s Southern Section boys’ 2013 water polo championships, she expected the process would be similar to that of regular-season games. Mira Costa High School, where Daly is a sports producer for the school’s Mustang Morning News broadcast, was one of California’s top-ranked water polo teams, and students were interested to follow the team’s progress throughout the postseason.

However, when she called CIF officials a few days before the championship to request a credential, Daly received an unwelcome surprise: She wouldn’t be able to show Mira Costa’s championship game live, like the Morning News does usually.

“They also said I can only shoot highlights — six highlights, two minutes apiece,” Daly said. This was because CIF had a contract with Fox Sports West granting it exclusive rights to live broadcasts, she said.

Such contracts are common in several states, to the frustration of student and professional journalists. After a 2011 ruling by the Seventh U.S. Circuit Court of Appeals stated Wisconsin’s Interscholastic Athletic Association had a legal right to sign contracts for exclusive live broadcast and webcast coverage of high school sports games, other state athletic associations followed suit.

School policies increasingly impose broadcast restrictions — such as limiting live broadcasts, liveblogging and post-game coverage — as a condition of receiving credentials. Journalists say the policies are convoluted and hinder them from fully doing their jobs.

For high school students, the ability to broadcast playoff games live over the air and online allows them to get a sense of the fast-paced, high-pressure world of sports reporting, advisers said. In states with restrictions, the limits are “crushing,” said Adam Dawkins, who advises student reporters at Regis Jesuit High School in Aurora, Colo.

RJ Live, Regis Jesuit’s broadcast journalism club, produces live online streams of regular season games, but PlayOn! Sports has exclusive rights from the Colorado High School Athletic Association to show postseason games. CHSAA’s new bylaws, passed this year, state anyone wanting to broadcast a high school game online or on TV must obtain permission from the association first — live or otherwise.

The contract between CHSAA and PlayOn! prioritizes profits for the organizations at the expense of complete reporting, Dawkins said.

RJ Live uses PlayOn! Sports’ equipment to broadcast live — but viewers have to subscribe and pay a fee to PlayOn! to watch, he said. But because the subscription fees are more expensive than postseason game tickets, viewership of RJ Live’s broadcast is low, said Joe Quigley, one of RJ Live’s sports reporters.

“From a student’s standpoint, we would like to have playoff games for broadcast be free to our viewers,” Quigley said. “We would like it if our own broadcast that we self-ran remained free for our viewers.”

Both the Alabama High School Athletic Association and the Florida High School Athletic Association have similar bans on livestreaming and control credentialing for championship games.

AHSSA does not allow news organizations to livestream any postseason events, and those who want to broadcast full games with a delay must pay the AHSSA broadcast fees, said Ron Ingram, AHSSA’s communications director.

In Alabama, high school sports journalists are barred from providing play-by-play analysis in real time but can provide updates online each quarter, Ingram said.

“We provide a play-by-play anyway, if anyone wants to see the live play-by-play right on our website.” Ingram
said. “We try to discourage liveblogging like that because it makes it harder for them to be a good reporter.”

Some state athletic associations have drawn fire for their policies. In September, the New Mexico Activities Association updated its policies governing coverage of scholastic sports, which the state’s press association argued are unfairly strict.

Included in those new directives are bans from broadcasting two consecutive plays during a postgame show and a requirement that all credentialled media either be a limited liability company or registered to conduct business in New Mexico — restrictions that essentially disqualify high school media. The NMAA has the right to deny a credential “for any reason whatsoever,” according to the policy. Kevin Goldberg, an attorney for the American Society of News Editors, said the most restrictive new rule is one forbidding radio commentators from discussing coaching styles or referee calls.

State athletic associations should place a higher priority on credentialling high school and other student journalists, as education remains one of the primary goals of high school sports, Goldberg said. Student reporters are performing legitimate journalism and should be treated as such, he said.

“A lot of negotiations done with credentials are with the state press associations,” Goldberg said. “I would just hope that as (associations) do things ... they’re incorporating students into the process. Every sport is something that’s part of the educational process ... and it’s always been clear to me that student reporters are not given enough consideration in any of these situations.”

Quigley said while he has had a good working relationship with Colorado’s athletic association, he wishes officials would ask school journalism programs for their input when deciding on their reporting policies. Daly echoed that, said she wished officials had been more proactive about notifying student journalists of the policies.

“It’s (CHSAA) supposed to be promoting sports and activities and things like that among our other schools so kids can succeed,” Quigley said. “By putting limits on broadcasting, it’s limiting our ability to flourish in a high-pressure playoff situation, since it’s not live anymore.”

Michael Hernandez, the Mustang Morning News adviser, agreed, saying that while he doesn’t believe state associations are intentionally limiting student journalists’ broadcast and webcast capabilities, they simply don’t pay enough attention to their needs. High school journalists deserve to give their peers the experience of live sports coverage, he said.

“It (a playoff game) is a student event ... and therefore the students should all have affordable access to it,” Hernandez said. “One of those ways is having the media be able to cover it. The media allows people who can’t go to have access to that.”
College presidential searches are increasingly cloaked in secrecy until final decisions are made. Such is the case at Appalachian State University, where the current search is closed. In a front-page editorial, the staff of The Appalachian asked the school to reconsider. Editor-in-chief Michael Bragg explained the decision in an email Q&A with Casey McDermott.

McDermott: Why did you want to call attention to this issue of closed presidential searches?
Bragg: There weren’t a lot of people talking about this issue on campus, including us for a little while. I thought about the idea of an editorial to bring this issue to the attention of the university, and we all decided as an editorial board to move forward.

McDermott: What did you hope to accomplish by running this editorial?
Bragg: We really wanted to shine a light on the issue for the public to see and for them to see why we think the closed search is not beneficial to the university. We felt that if we made our argument strong enough and really out there that it could generate support for more openness, or at least more conversation about the manner of the search.

McDermott: What gave you the idea to run it on the front page?
Bragg: I had seen college newspapers run front page editorials, and I always wanted to do one if we had a strong enough opinion or subject worth displaying on page one. After some consideration, we decided this issue was important enough and that our position was equally as strong and compelling.

McDermott: How do you plan to address this issue moving forward?
Bragg: We will continue contacting the spokesperson of the committee for updates as regularly as possible, but we’ll continue to read over North Carolina’s laws regarding open records and open meetings to see what our options and rights are as the press and as citizens of the state, since this is a state-funded university.

McDermott: Do you think you’ll consider more nontraditional editorial formats for big issues in the future?
Bragg: If there is an issue that is as important and calls for this kind of format, then yes. However, we don’t want to be known as a newspaper that pushes editorials over news content too often. We’ll just have to know when the timing is right.

McDermott: What feedback have you received?
Bragg: Almost all of the feedback has been positive and supportive. The reaction from campus so far has not been as strong or numerous as I had initially hoped for, but it’s still there and I’m grateful for that. We’ve also had support and feedback through our social media accounts from people and organizations not from Boone or North Carolina.

McDermott: You cited SPLC’s reporting on the trend in closed executive searches — in what ways do you think other college students could speak up about the issue?
Bragg: I think they should start with understanding the issue at their school and then comparing that to similar cases, much like we did. By doing that, we saw how these searches could play out based on other scenarios at other schools. I think looking into the open records and open meetings laws in your state can help reinforce your stance – or sadly weaken it in some cases, but that should not deter them from speaking against closed searches.

But overall, I think college students need to make their voices heard. Sure, we’ll only be at the university for four years, but we have a stake in these institutions, and we deserve to know what’s going on in the search for its next leader. And if we don’t speak up for ourselves, let’s say something for the benefit of the faculty, staff, surrounding community and alumni.
At the start of the 2013 school year, students at Hoover High School in California’s Glendale Unified School District were surprised to discover their school district had been paying GeoListening, a social media monitoring company, to keep tabs on their online activity for more than a year without their knowledge.

GeoListening isn’t the only company being paid to keep track of students’ online activity, however. Increasingly, schools and districts are turning to third parties for help monitoring students’ public social media posts. Monitoring, administrators say, can help schools intervene when students post about issues like self-harm, suicide and bullying.

The practice though, has cyberbullying researchers and First Amendment experts around the country concerned, saying such services, while well-intentioned, could bring about unnecessary and unconstitutional restrictions on students’ freedom of speech. Experts also say because these companies are only a few years old, it’s too soon to tell whether monitoring students’ online activity has effectively resolved or prevented instances of cyberbullying or violence.

Furthermore, constant monitoring, even when students are out of school, could stand in direct contradiction to state statutes, and two states — Illinois and Michigan — already have laws on the books prohibiting school districts from tracking the online behavior of K-12 students.

Bullying concerns spark monitoring

When Glendale’s program became public, the school district cited concerns about student safety.

“We think it’s been working very well,” Superintendent Richard Sheehan told The Los Angeles Times. (Sheehan declined to comment for this story, instead referring reporters to the Times story.) “It’s designed around student safety and making sure kids are protected.”

Chris Frydrych, GeoListening’s founder, said school districts don’t have adequate staff or time to properly identify issues on the Internet, which impair’s their ability to prevent conflicts between students, he said.

His company sends a daily report to schools flagging potentially harmful or controversial posts. That helps administrators “triage” posts, Frydrych said.

Bruce Canal, a retired Indiana State Police officer, said he created Social Net Watcher, a GeoListening-like company, in 2010 after realizing the dangers involved with teenagers’ use of social media. The company maintains a database with “hundreds” of phrases and key words, which relate to such topics as bullying, suicide and violence, he said.

Social Net Watcher works with two dozen schools in five states — Florida, Indiana, New York, Ohio and Tennessee. Both Canal and Frydrych cited an increase in bullying, particularly cyberbullying, as reason their clients chose to monitor students’ social media use.

Canal described a recent suicide at an Indiana high school, where a female student killed herself following repeated incidents of online bullying by her classmates. Her story is only one of many that could have been prevented with active social media monitoring at school, Canal said.

“If teachers had advance knowledge of these situations, none of them would have happened,” he said. “In all these events, if they would have had our program, districts would have had advanced intelligence of this and could have probably saved some lives.”

Cyberbullying was what prompted Missouri’s Columbia Public Schools system to begin monitoring student posts, spokeswoman Michelle Baumstark said. Several years ago, the district hired Illinois-based Meltwater, which like Social Net Watcher searches postings for different keywords ranging from discussions about schools and administrators
to offensive language and signs of bullying.

“We use that in conjunction with working on our cybercrimes unit with the sheriff’s department,” Baumstark said. “We also rely on our students to report things. We really focus on the power of the bystander and we try to educate people because we can’t be there all the time.”

Columbia Public Schools has used Meltwater’s services for three years, and Baumstark said she receives an email three times per day with links to stories, posts and other online mentions matching the district’s selected keywords.

The school system has had only two severe instances of cyberbullying since contracting with Meltwater, but both of those required notifying law enforcement, Baumstark said.

Monitoring is most prevalent at “one-to-one” schools that provide a computer or tablet computer to each student, principals at those schools say. Many schools require students to sign an acceptable use policy before getting a device and opt to install tracking software that allows administrators to monitor online activity by students.

Most schools’ monitoring looks for more than just instances of bullying, however. Often schools have extensive lists of keywords and websites they track. Some, like the Columbia school system, also look for posts that reflect poorly on the district. Baumstark said it’s “extremely important” to know at all times what staff and students are saying online, as they are a reflection of the district.

Administrators at Garrett High School in Indiana use a tracking service called Lightspeed, which looks for about 1,000 red flag words students have used while logged into school-issued devices, said school principal Matt Smith. However, the school does not actively monitor students’ social media accounts, he said.

“We don’t track Twitter or Facebook,” he said. “(Lightspeed) is a suspicious search filter that flags searches or posts for health issues like pregnancy ... we’ve actually been able to help some young ladies.”

Like Baumstark, Smith receives an email each morning with information about students’ suspicious searches on school computers the day before. Discipline is uncommon, but students can be held accountable for posts made off-campus with the computers, he said.

“If (suspicious activity) is on the school’s device, it doesn’t matter,” Smith said. “Lightspeed works on the computer even when it’s off-campus.”

In Massachusetts, Burlington Public Schools Superintendent Patrick Larkin said the district uses software installed on school-issued electronics to see what students are doing both on and off-campus.

Larkin said the district monitors the use of school-related hashtags as well as checks students’ Internet use when they log in and out of their school-issued electronics. Burlington hasn’t had major issues with cyberbullying or inappropriate

DIY: DOES YOUR SCHOOL MONITOR STUDENTS’ POSTS?

Want to know whether your school monitors students’ social media posts, and what they’re looking for? You can use public records to find out more information. Ask to see:

1. Tech services budgets. If you look at your school or school district’s budget, you can see if they are paying an outside company to monitor students, or if they pay staff to monitor. You can also see if the school has made purchases for monitoring software.

2. List of filtered words. Request the list of words that get flagged when they are used in students’ posts.

3. Emails. Ask for the number of emails in the discipline officer’s inbox that match key terms like “Facebook,” “Twitter,” or Tumblr.

Internet use, he said.

“We’re not overly invasive about how we monitor the kids,” Larkin said. “As expected, we have 1,000 high school kids that every now and then will try to get to a (prohibited) site, like pornography.”

On- or off-campus violations of the district’s acceptable use policy can lead to sanctions for students, Larkin said. Rather than disciplining students, though, administrators usually talk to students about their Internet habits and explain what is inappropriate, he said.

“I’ve seen some tweets on weekends where kids are watching sports events and using profanity because, for example, the Patriots are playing poorly,” he said. “But I tell them if I’m a college admissions person and I Google your name and Twitter, that’s what I would see.”

Baumstark said her district handles disciplinary situations similarly. The district tries to respect students’ First Amendment rights, she said, but noted that certain profane posts can be flagged “if there is an intent to hurt or harm” within them. A student’s location when they post does not exempt them from responsibility for their statements, she said.

“There is a difference between using your voice and bullying someone, and our definitions and policies are very specific,” Baumstark said. “We take threats very seriously. We expect our students to be responsible and good citizens, whether you’re on our campus or not.”

Monitoring concerns

While schools are right to be concerned about cyberbullying, some argue it’s unnecessary for districts to go as far as signing contracts with third-party monitoring companies, as many students and teachers have historically self-reported problems they’ve seen online. Justin Patchin, co-director of the Cyberbullying Research Center, said the issues
“We expect our students to be responsible and good citizens, whether you’re on our campus or not.”

MICHELLE BAUMSTARK, COLUMBIA PUBLIC SCHOOL SYSTEM SPOKESWOMAN

In 2011, the 3rd U.S. Circuit Court of Appeals ruled that public school students cannot be punished for off-campus speech that fails to cause substantial disruption to on-campus activities. In the cases — Layshock v. Hermitage School District and J.S. v. Blue Mountain School District — two students sued after they were suspended for creating fake MySpace profiles mocking their respective principals.

However, the Third Circuit declined to decide whether the Tinker standard applied in the case, with Chief Judge Theodore McKee writing in his opinion that the court “need not now define the precise parameters of when the arm of authority can reach beyond the schoolhouse gate.”

Still, school discipline for online posts should be administrators’ last resort, Scheer said. Students in K-12 schools are still learning proper social media etiquette, and administrators should remember that when deciding how to handle inappropriate activity, he said.

“We’re not talking about fully-formed adults,” he said. “We’re talking about kids in middle school or high school. There’s a difference between observing and intervening in a hopefully helpful way, versus on the other hand seeing something they don’t like and taking adverse action against the student. Certainly in the First Amendment context, we’re worried about adverse action that would censor students.”

Canal and Frydrych both said they feel the public misunderstands their business models and refute claims of being secretive. Neither of their companies can see students’ private social media posts, they said, and both maintain they have no intention of taking away or reducing students’ rights.

“People want to throw GeoListening into the NSA realm, but we look at things only in the public domain,” Frydrych said. “We don’t have anything to do with free speech. It’s the school’s interpretation of what we report that is going to apply what the student says not only up against the Constitution, but what is in their student code of conduct. The issue we’ve helped raise to the public is if students sign a code of conduct that says ‘You will respect everyone in the school community,’ you’re giving up a little bit of your free speech aren’t you?”

Canal said schools need to continuously keep up and adapt to students’ methods of communication, and social media monitoring is the most efficient way for schools to do so.

“Everybody’s getting data,” he said. “They (kids) understand this. So we know that in a matter of years there will be a lot more schools on the program because it (social media) is just the way kids communicate nowadays.”

The public nature of social media could cause unintended ramifications for students if not used correctly, which makes monitoring both educational and necessary, Frydrych said.

“We feel like students deserve the right to understand the consequences,” he said. “We’re trying to create thinking before posting, but that’s not intended to limit free speech. We’re just saying, ‘Be careful.’”

with social media monitoring lie more with administrators’ responses to their findings than with the data collection itself, as long as that collection looks only at public activity.

“The most important thing is how parents or schools work together to respond to the information that’s been gathered,” he said. “The question really becomes ‘How does the school respond?’ Some schools have gotten in trouble with responding too harshly, and others have gotten in trouble for not doing anything.”

Legally, the rules aren’t clear about schools’ limits in tracking students’ online activity. The issue of whether schools can punish students for off-campus speech is also somewhat ambiguous.

When schools handle reports of off-campus bullying, however, Peter Scheer, executive director of the First Amendment Center, says schools should be careful. Districts should only step in if there is a substantial disruption to a student’s ability to attend school, Scheer said, and Patchin said administrators should follow the standards set in court decisions such as in 1969’s Tinker v. Des Moines Independent Community School District case when doing so.

“That’s (Tinker) pretty clear,” Patchin said. “Whatever is being said online or off, if it results in a substantial disruption on campus, then it’s fair game in terms of an educational sanction.”

But the courts have disagreed about whether the Tinker standard should apply to speech on social media made off-campus, said Frank LoMonte, Student Press Law Center executive director. Tinker addressed speech made in-person during school hours only, and students have proper reason to believe Tinker does not provide them enough protection for online, off-campus posts, he said.

“That’s much, much different from speech that a viewer has to seek out on Facebook or Twitter,” LoMonte said. “If something bothers you on Facebook, you can just click away. So there has to be a higher degree of protection when you’re speaking as a citizen on your own time than when you’re speaking in the confines of a school.”
2013 Newspaper Thefts

Newspaper theft is a form of censorship — and an effective one at that. In the last year, student newspapers have reported a total of 12 thefts.

NEWSPAPER THEFTS BY STATE

THEFTS BY SUBJECT

“I think it’s funny that by attempting to censor this story, these two guys actually brought more attention to the story … than it might have ever received otherwise.”

— Ryan Jones, then-Tulane Hullabaloo editor, after two Kappa Sigma fraternity pledges were found to have stolen approximately 2,000 copies of a newspaper featuring an article about a drug bust at the fraternity.

STOLEN COPIES

16,340

LARGEST THEFT

5,000

NUMBER OF COPIES OF THE EAGLE AT AMERICAN UNIVERSITY STOLEN AFTER THE PAPER REPORTED ON A HAZING INVESTIGATION INVOLVING A FRATERNITY.

MOST THEFTS, BY MONTH

4

REPORTED THEFTS IN NOVEMBER.

MORE INFO

FOR A MAP OF ALL THEFTS REPORTED SINCE 2000, AS WELL AS RESOURCES FOR PREVENTING AND DEALING WITH THEFTS, VISIT: http://www.splc.org/knowyourrights/theftmap.asp
In light of recent censorship, national group takes a second look at HBCUs

After two high-profile incidents where student journalists alleged censorship last year, the National Association of Black Journalists has convened a panel to look into concerns.

BY SAMANTHA VICENT

Last January, the editor-in-chief at Florida A&M University’s Famanu was ousted from his position, forced to reapply and then denied the job. Then, in October, editors at The Gramblinite at Louisiana’s Grambling State University found themselves in a similar situation, when two students were suspended from the paper, a decision that was quickly reversed after the situation gained national attention.

The two incidents garnered national attention and turned the spotlight on the often overlooked journalism programs and student publications at historically black colleges and universities, or HBCUs. While the incidents aren’t directly connected, they follow a pattern that’s been seen at other historically black colleges and universities, or HBCUs, says Errin Haines Whack, the National Association of Black Journalists’ vice president for print publications.

“It’s been different schools and it’s come from different places,” she said. “It’s frequent enough that it happens and you think ‘Here we go again.’”

Advisers and professionals who work with student newspapers at HBCUs say many, but not all, of the challenges their student journalists face are similar to those faced at predominantly white institutions. But some of the challenges are unique to HBCUs, they say.

Like most publications nationally, HBCUs across the nation have been hit hard financially. At HBCUs, financial problems have been exacerbated by declining enrollment that has further limited the amount of student fee money available for campus publications.

And moreso than their peers at predominantly white institutions, student journalists at HBCUs must contend with a history of journalism that has not always portrayed African-Americans fairly. That history can make some administrators and students apprehensive of and even hostile toward student media.

Budget concerns force greater dependence on schools

A look into HBCU journalism programs by NABJ in 2004 concluded the programs were significantly underfunded. Ten years later, those problems, particularly involving finances and censorship, haven’t gone away but rather have become more prevalent, Haines Whack said.

Christina Downs, a former editor-in-chief of The Hilltop at Howard University, said her paper has faced significant financial shortages. During the 2012-13 school year, her staff wasn’t paid until February of the spring semester due to budget shortages, and the paper stopped publishing its print edition temporarily because of the funding issue. Downs, a former Student Press Law Center intern, graduated from Howard in 2013.

“It was difficult to even hire people because I knew this had been a problem in the past,” Downs said.

She praised administrators for helping the paper raise money to print once she brought the issue to their attention but said she thought the problem shouldn’t have occurred.

“I don’t think it was a matter of people wanting to stop the press,” Downs said. “I think we just weren’t on the priority list in terms of funding.”

Darren Martin, the editor-in-chief of The Maroon Tiger at Morehouse College in Georgia, said enrollment issues are responsible for his newspaper’s financial issues. The paper is funded partially by a student activities fee, meaning that the university’s enrollment decreases have a direct impact on the newspaper’s budget.

“It creates a very, very stressful atmosphere for these HBCU newspapers,” Martin said. “It makes the organization as a whole kind of slow down.”

Financial issues were closely tied to controversy at FAMU. The paper’s publication schedule was suspended and then-editor Karl Etters was removed shortly after...
FAMU was sued for libel over a story that inaccurately named a student who the paper said had been suspended in connection with the hazing death of FAMU drum major, Robert Champion.

Valerie White, an assistant professor at the school who was director of the school’s journalism division at the time of the editors’ removal, defended journalism Dean Ann Kimbrough’s decision to suspend publication pending training for Famuan staff.

“We were trying to honor what the plaintiffs were requesting within the bounds of protecting the students’ First Amendment rights,” said White, who was tapped to advise the paper last summer. “We wanted to show them we do give students training, and (the libel suit) was what the catalyst was.”

A bad outcome in the libel suit, which is still proceeding, could cripple the student newspaper, she said. The paper’s funding from student government has been decreasing over the past few years. Last year The Famuan had to cut reporters’ pay, White said.

White dismissed the budgetary concerns at her school’s newspaper as any different from those facing most student journalism programs. She said the pay cuts aren’t detracting from her students’ goal to re-establish the paper as an example of exemplary student media.

“In old-school journalism, we didn’t get paid,” she said. “We did it because we liked it. If students said they wouldn’t work there unless they get paid, they don’t like journalism enough.”

Bruce Depyssler, who advises The Campus Echo at North Carolina Central University, agreed the budget problem isn’t unique among HBCU student newspapers but said it hits them particularly hard and has forced many to depend more on the university. The increased involvement of university officials in the newspaper — and student newspapers’ reliance on their schools’ continued financial support — can lead to problems like the situation at FAMU, he said.

After being replaced, Etters, now a reporter at The Tallahassee Democrat, told the SPLC he thought administrators’ decisions had more to do with a clash in ideas than finances, saying that he believed he didn’t fit in with FAMU administrators’ vision for the paper.

Depyssler said financial independence is one of the key differences between student newspapers at HBCUs and those at the nation’s largest institutions. He encouraged students at HBCUs to find ways to increase their independence.

“It seems (large university papers) kind of anticipated that there could be this contentious relationship between the administration and students and advisers,” Depyssler said. “So that’s something you have to look at.”

ON THE DOCKET

VIRGINIA — A state ban on alcohol advertisements in college newspapers is unconstitutional and violates the First Amendment rights of student journalists at Virginia Tech and the University of Virginia, the Fourth Circuit U.S. Court of Appeals said in September. Virginia argued it had a “substantial interest” in limiting underage drinking, but the papers said the ban was overly broad.

LOUISIANA — A district judge ordered Lousiana State University’s Board of Supervisors to pay attorneys fees and damages to two newspapers that sued seeking access to public records. The newspapers sought records related to the school’s most recent presidential search, which resulted in the hiring of F. King Alexander. The decision awarding attorneys fees came after the judge found the school in contempt for failing to turn the records over. LSU is appealing that ruling.

OKLAHOMA — An Oklahoma student journalist’s public records lawsuit has been moved to federal courts at the request of the University of Oklahoma. Joey Stipek sued the school in May after his request for parking tickets records was denied. The school says the records are protected by a federal education privacy law, the Family Educational Rights and Privacy Act, which is why the case should be heard in federal, not state court. Stipek is appealing the move.

WISCONSIN — A University of Wisconsin-Milwaukee student has sued the university, alleging it failed to comply with the state’s public records laws. Taylor Scott requested copies of emails sent to and from a student employee who investigated Scott in a misconduct case. The school said it could not provide the emails because they were private under FERPA.

UTAH — The Society of Professional Journalists’ Utah chapter filed an amicus brief with the state’s Court of Appeals seeking to prevent what it says is a wrongful expansion of FERPA privacy. The case at hand involves a parent’s request for copies of surveillance video to see whether the footage showed his son in a fight with another student.
Relationships key to preventing censorship

In nearly all of the cases where students at HBCUs have alleged censorship, the issue has arisen following the publication of controversial stories—a common motivating factor not just at HBCUs.

But students and administrators at HBCUs can be more sensitive to negative coverage because of the way African-Americans historically have been portrayed in the media, which is often “unfair,” Depyssler said.

“African-Americans have gotten a raw deal from the press,” he said at the time. “There’s a sense of we don’t want our own press to be doing the same thing to us.”

*The Campus Echo* hasn’t faced censorship from North Carolina Central brass since the 1970s, but in recent years, several newspaper thefts have occurred following the publication of controversial stories, Depyssler said.

The first happened in October 2010 after the paper ran an unflattering piece about the firing of the business school’s dean. In that case, the paper’s racks were moved to obscure areas of campus, making it harder for students to find copies. The second theft took place after a front-page story, published a month later, detailed altercations between a sociology professor and two students. The professor had a small clique of student supporters, who staff believe took about 300 papers off the racks when the negative piece was published.

In the most recent case, a student reporter wrote a first-person piece in 2011 about a high school band director who had inappropriate sexual relationships with her and her friend before starting college. While the band director wasn’t named, he was easily identifiable after reading the story, which led to a police investigation and ultimately a conviction and prison sentence for the director.

“It turns out that the other girl was a student here,” Depyssler said. “She was still with him and she got her crowd to pull papers.”

What distinguishes those incidents from the sequence of events at FAMU, however, is how the university handled them, Depyssler said. *The Campus Echo* has been “lucky” to have university administrators’ support, he said.

“The university sent out a campuswide email saying, “We’re a free press and we don’t do that,’” Depyssler said. “The administration backed us up all the way.”

A lack of administrative support can lead to conflict between student editors and the university, as was the case at Grambling State several times over the past 10 years and, in the early 2000s, at Hampton University in Virginia.

The Hampton controversy began in October 2003, when Talia Buford, then-editor-in-chief of *The Hampton Script*, defied the president’s order that the *Script* to publish an administrative memo on the front page, which addressed a story in the paper about the university cafeteria’s health code violations. Buford printed it on page 3 but still included the article about the violations on the cover, which prompted administrators to confiscate the *Script*’s entire press run before students could distribute it.

The most recent *The Gramblinite* controversy pitted students against their adviser and the school’s office of communications over the newspaper’s coverage of the football team’s strike. Grambling State student journalists David Lankster and Kimberly Monroe were suspended for what adviser Wanda Peters said was a violation of the newspaper’s code of ethics.

In Lankster’s case, he was reporting on unsafe conditions for Grambling State’s football team, and to illustrate the story he tweeted photographs of the football team’s locker room, which showed mold and mildew as well as holes in the ceilings and floor mats. Peters told Lankster, *The Gramblinite*’s online editor, the tweets were “opinion-based,” and she told the SPLC at the time she chose to suspend him.
after he engaged in a heated Twitter debate with Grambling State spokesman Will Sutton, who questioned the paper’s use of anonymous sources in some of its coverage.

Monroe, the paper’s opinion editor, was suspended for her role organizing a rally in support of the football team’s protest, Peters said. Peters did not respond to multiple requests for comment for this story.

Lankster defended his and Monroe’s methods of covering the protests, saying he would likely report it the same way if given the opportunity.

“I just like being in the know,” he said. “I had a positive trustworthy relationship with the football team and with the people I was working with, and they were telling me how they were feeling.”

And there have been other censorship concerns at Grambling State concerning “negative” stories about the university. Six years ago, Provost Robert Dixon suspended publication for a month, citing an improper interpretation of the 2005 Seventh U.S. Circuit Court of Appeals decision in Hosty v. Carter. (Louisiana, where Grambling State is located, is in the Fifth Circuit, where Hosty’s ruling does not apply.)

Dixon was displeased with several stories in the paper that he said reflected negatively on the university, and he only allowed the paper to republish after deciding Peters must review all content before it went to press. The policy remained in effect until the recent controversy, Lankster said. Now, Peters will no longer perform prior review of the paper.

Hampton University assistant journalism professor Wayne Dawkins said that the state of the Script has improved since 2003 and that student journalists at the school have worked hard to both repair relationships with administrators but cover news aggressively.

In 2009, two Hampton students were wounded during a shooting by a former student on campus. The shooter was also injured, and the Script published a story after the incident, which said students were concerned about how to protect themselves. Dawkins said student reporters covered the incident well despite some administrative pushback.

“That’s out there in the public,” he said. “It would be very difficult for someone to say ‘Do not cover that because that makes us look bad.’ Difficult things happen on campus, but we’ve gotta look at the merits. Can the story be told? Can it be told in a balanced, fair, complete way?”

Dawkins said he routinely has many of the Script’s reporters in his classes, and he uses the prior controversies of the paper to impress upon them the importance of balanced reporting.

“I counsel them to look at this campus as not just the students but an entire community of students, faculty, support staff and friends of the university,” he said. “There will be a time where you’re at cross-purposes with the administration. They may not outright say ‘I don’t want you to run that,’ but there will be discomfort.”

Good relationships with administrators and advisers has been key to preserving student editorial independence at The Maroon Tiger, Martin said.

In October, the paper published its take on ESPN The Magazine’s Body Issue. The Maroon Tiger issue showed 30 students from Morehouse, Spelman College and Clark Atlanta University, who all posed nude and shared their accounts of fighting addiction, mental illnesses and abuse.

Martin said he and the editorial staff planned the issue for months, and Morehouse College administrators were always helpful throughout.

“I think The Maroon Tiger has always had some type of respect and trust within the administration that has allowed us to do what we wanted to and report what we wanted to report without a fear of censorship,” he said.

“But this semester we have a new administration, and it was a little scary. When there was anything that happened in the newspaper that administration might not have agreed with, we sat down with them. They may disagree but they said they would never censor us.”

Martin also spoke highly of the paper’s adviser, Ron Thomas, who also directs Morehouse’s Journalism and Sports program. He acknowledged that his relationship with Thomas was different than many of his editorial counterparts at other schools.

“He’s given us so much journalistic freedom and autonomy and we trust him, so if he says something shouldn’t run we listen,” he said. “He comes to some of the meetings and/or copy editing sessions, and we talk about the issues of objective reporting.”

The Grambling State debate went public about a week before The Maroon Tiger was set to publish its body issue, which concerned Martin at first. But he said Morehouse has done well as protecting student expression in the paper and elsewhere on campus.

“My fear was going through the process, what if they change their mind (on publication) because of this?” Martin said. “It could get national attention and be bad just like Grambling, but it wasn’t.”

As a result of the most recent Grambling State controversy, Haines Whack said the NABJ is working on convening a student media council, which will “further examine the relationship between student journalists and administrators, explore how to increase independence and improve the state of student media and continue to raise awareness on those issues.”

“Bringing these two sides to the table — administrators and student media — so they can talk about what their issues are and what the challenges are ... will be helpful for everybody,” she said.
On the road, a free speech icon gives inspiration to new generation

For 10 weeks last fall, Mary Beth Tinker and Mike Hiestand traveled the country in an RV, talking with students about free speech. They found an audience of teens “hungry for support and encouragement.”

BY SARA TIRRITO

When John and Mary Beth Tinker won their case before the Supreme Court in 1969, when the justices announced that students do, in fact, have rights, it was a turning point for all students, and especially for student journalists: The declaration that students have the right to wear black armbands to school in protest of the Vietnam War set a precedent that student expression cannot be arbitrarily censored.

“They neither interrupted school activities nor sought to intrude in the school affairs or the lives of others,” Associate Justice Abe Fortas wrote in the Court’s majority opinion. “They caused discussion outside of the classrooms, but no interference with work and no disorder. In the circumstances, our Constitution does not permit officials of the State to deny their form of expression.”

Though they lost in the lower courts, the Supreme Court sided with the students on February 24, 1969. The Tinker house celebrated that night with ice cream and soda pop.

“That was a big thrill, man — ice cream and soda,” Mary Beth Tinker said. “Didn’t get that every day.”

Last fall, she and First Amendment attorney Mike Hiestand took the celebration of that win to a new level.

Hiestand says he got the idea for the tour in his hot tub and later proposed the idea to Tinker. The time felt right to reach out to the younger generations, he said.

“[Mary Beth and I] felt that this is a particular time in history that just feels different. It seems like there are just so many issues, so many problems, so many things coming to a head that we’ve decided that we can’t ignore anymore,” Hiestand said. “We need everybody’s voice when it comes to bringing about that change, but young people especially.”

That’s because young people are uniquely motivated, Hiestand said.

“Their brains are manufactured for change. They’re creative, they’re imaginative, they’re geared toward taking action,” Hiestand said. “It’s young people that throughout history have always been the ones to effect change, so I think our message to folks, to the young people we talked to, was, we need you.”

From the response Tinker and Hiestand have gotten, it’s clear students are “really, really hungry for support and
encouragement,” LoMonte said. 

“[Students have] been told so many times that they have no rights and to keep their opinions to themselves that it’s a life-changing experience for an adult to come into their school and support their outspoken engagement,” he said. “For many of these kids, hearing from Mary Beth is the first time that anyone has told them that their opinions have value.”

At Denman Junior High School in McComb, Mississippi, Tinker and Hiestand were slated to talk with one eighth grade class. When other students found out about the lecture, they started a petition so that they could attend the lecture as well. The school’s principal granted their request, announcing his decision over the loudspeaker.

“That was great,” Tinker said. “They used their First Amendment rights to come and hear us.”

And that was just one inspiring instance along the tour route, Tinker said. In Queens, New York, a student presented Tinker with a hand-drawn mural depicting youth speaking out. At the Phoenix Military Academy in Chicago, Ill., the uniformed students “all recited from memory, with the greatest enthusiasm and excitement, the First Amendment,” she said. And in cities all over the east, students shared topic after topic that they wanted to speak out and write about.

“That was really one of the most heartening things about the trip, was to see so many young people that are embracing journalism and excited about it and not discouraged by all the issues,” Tinker said. “They really have a commitment to maintaining an independent media.”

In an email, Tinker said that she was also inspired by the journalism advisers she and Hiestand met throughout the tour “who go above and beyond to keep journalism free and democracy alive,” and was encouraged by many administrators they met as well.

While he was impressed with the students he met along the tour, Hiestand said he wishes there were even more student journalists to tackle today’s problems.

“There are those young journalists out there that just blow you away, but I wish there were more of them because I think we need more of them,” Hiestand said. “I think the problems are so big we need another generation like we had after Watergate, where they saw what journalism could do.”

**Back to Des Moines**

The welcome in Iowa illustrated a lesson Mary Beth Tinker said she tries to impress upon youth.

“[There are] so many people that we hold up now and we admire, but at the time they were despised or ostracized, like we were ostracized by a lot of people,” Mary Beth Tinker said. While their case was proceeding, the Tinkers were the target of angry letters and even death threats, she said.

“It happened slowly over the years, where the feeling about our situation changed.”

Though she said she still hears from people “who really despise what we did,” the Des Moines Public Schools celebrate the Tinkers’ actions. When the tour stopped at Warren G. Harding Middle School, the siblings were honored with a locker dedication, which DMPS Superintendent Thomas Ahart said he hopes will send “a message that Des Moines has changed as a result of that and continues to honor the lessons learned from that case.”

Dan Johnston, the American Civil Liberties Union attorney who argued the Tinkers’ case, said the district quickly showed support for the ruling, inviting him to give a commencement address to a DMPS high school just one year later.

“School officials really have pretty much embraced it,” Johnston said. “The schools that tried to expel [Mary Beth] 40 years ago welcomed her as sort of an alumni-celebrity.”

John Tinker said he’s noticed big changes in the district over the years as well. While he remembers his fellow students referring to North High School as “the fascist high school,” during his time there, he says it has “changed completely.” The district brought the Tinkers back for an anniversary celebration in the 1990’s and took obvious pride in them then, just as they did this year, he said.

“There’s a lot that’s hopeful in that, in the welcome that we received,” he said.

Ahart said it was “not at all” difficult deciding whether to invite the Tinker Tour to visit DMPS.

“It’s pretty rare, I think, that you get an opportunity to expose students to living history, if you will,” Ahart said. “The Tinkers are legendary in the education world and First Amendment law world. ... The ability to expose our students to that was a really unique experience.”

Ahart said he hopes the visit reinforced the idea that students “can be a force for change in the community and they have a responsibility to be a force for change.”

“The Tinkers really were courageous and brave and if our students want to have a similar impact on whatever issue...
ON THE ROAD

Mary Beth Tinker and Mike Hiestand traveled across the country for 10 weeks last fall, talking with students and teachers about the First Amendment and the importance of student free speech.
Meriden, Conn.: Tinker talks with students from Wilcox High School after her speech.

New Albany, Ind.: Tinker signs armbands for students at Indiana University Southeast.

New York, NY: Tinker talks with Cardozo High School students at one of the tour’s first stops.

Philadelphia, PA: Student reporters from Conestoga High School interview Tinker.

Boston, Mass.: Hazelwood plaintiff Cathy Kuhlmeier Frey, Hiestand and Tinker

Photo credits: Mike Hiestand, except Boston (Frank LoMonte) and Philadelphia (Sara Gregory).
they think we need some movement on, they're just as capable," Ahart said he told the students.

The Tinker Tour also made a stop at the U.S. Courthouse in St. Louis, where they spoke to students from University City High School — the school from which Mary Beth Tinker graduated in 1970.

UCHS sophomore and student journalist Christine Politte said she was surprised to find out that Tinker was a UCHS alumna, and was empowered by that fact.

“It makes me think anyone can make history,” Politte said.

First Amendment rockstar

Mary Beth Tinker remains humble about her role in history, noting that for years people have had to fight injustices and indignities. Still, she’s a First Amendment celebrity to journalism lovers, and throughout the tour, she was surrounded by gaggles of students and teachers who wanted to speak with her, or who wanted her autograph or photo.

Mary-Ann Kendall, a junior at Cardozo High School in New York, said Tinker’s story gave her “a push to speak up.”

“I was grateful to finally meet the one who was fighting for peace for the Vietnam War as a kid,” Kendall said. “That really was amazing. And one thing that caught my attention was she wasn’t a bad kid, she was a good kid. A smart, intelligent young lady who just wanted peace for her country.”

About two weeks after the Tinker Tour’s visit, students at Cardozo protested budget cuts that were going to result in the cancellation of some classes. Kendall said her participation was inspired by the tour, and though their protest didn’t change the situation, she was glad to have stood up for what she believed.

Claire Chell, an eighth grader in Des Moines, said she was also inspired by the Tinkers’ story and is now on the lookout for ways to help or change her community.

“Hearing that story made me feel a lot more independent and that I can do whatever I put my mind to,” Chell said.

Mary Beth Tinker said she was raised to use her gifts, experiences and circumstances for positive change, and that that’s what she is trying to do today.

“At some point, I decided if I can use that experience as an example for kids, or myself as a role model for speaking up about the things that you care about and trying to have your voice heard, then that’s what I should do,” she said.

“I try to make the most of that role in such a way that will help kids use their voices effectively and for a better world. Not for more hate, not for more division. A better world of more understanding and good will and equality.”

Though the Tinker Tour is on a break at present, Mary Beth Tinker is still speaking at schools until the West Coast phase of the tour begins in March.

While only the first phase is done, LoMonte said the tour has already been successful.

“There’s no question that the Tinker Tour has opened the eyes of a lot of young people to what’s possible,” LoMonte said, “and if it’s done that, then it’s a success.”

Dave Scott, who coordinates a civics education program for the Northport-East Northport Schools District in New York, said he is grateful to Hiestand and Mary Beth Tinker for “going directly to kids and telling that story and really inspiring them to learn about their rights and responsibilities” and he hopes the tour will have an affect on national education policy.

“My prayer is that this really does facilitate some awareness from the people that are making educational policy right now, that revitalizing civic education in this country must become a priority,” Scott said.

Seeing the effect that the Tinker Tour had on the eighth graders in his district, and hearing from parents who said their students came home talking about what they learned makes Scott optimistic about the tour and its mission.

“I could imagine that thousands of those conversations happened over dinner tables across the U.S.,” Scott said. “It’s going to take a lot, but you just gotta do it one kid at a time. Ideally, we’d have Mike and Mary Beth out on the road every day.”
Students reporting on U.S.-Mexico border issues face special challenges

Reporters frequently encounter cultural, safety and language barriers when reporting on immigration, but those obstacles don’t stop them from sharing the stories of people on both sides of the border.

BY SAMANTHA SUNNE

When she started writing for The Vista at the University of San Diego, Leeza Earl hadn’t expected cultural or linguistic barriers to come between her and her sources. She hadn’t expected a 20-foot-tall wall to come between them, either.

Earl found herself juggling all three last fall, while writing about a public park on the extreme southwestern corner of the United States. The park, smack dab in the unpopulated space between San Diego and Tijuana, serves as a meeting place for families scattered between the cities or even farther inland.

After visiting the park with a class, Earl realized it was something she wanted to write about. She thought more of her San Diego classmates needed to know about this space, one that few visited.

“You got to see both sides of the story,” she said. “The border is pretty much our backyard.”

Countless schools in California, Arizona, New Mexico, Texas and northern Mexico thrive with binational student bodies, which means binational student reporters as well. These border-adjacent student journalists face challenges some say are unique to their craft. Language, culture, prejudice and bureaucracy can all play a part.

“Students really have to have more understanding of the region,” said Celeste Gonzalez de Bustamante, who teaches “Reporting in the U.S.-Mexico Borderlands” at the University of Arizona’s School of Journalism.

And, much as Bustamante hates to admit it, there’s the safety issue.

“You don’t have to cross into Mexico to get into a sticky situation as a reporter,” Bustamante said. “(But) I would rate safety as a top concern.”

In 2011, the International Press Institute rated Mexico the deadliest country in the world for journalists. Ciudad Juarez, just across the border from El Paso, Texas, has been considered one of the world’s most dangerous cities for years.

“In this context of violence, it’s been really hard to attract students to this career,” Pablo Hernandez Batista said. (Batista was interviewed in Spanish.)

Batista teaches in Juarez’s first journalism school, the Licenciatura en Periodismo at the Universidad Autonoma de Ciudad Juarez. It was founded less than three years ago.

“It’s a very young school,” Batista said, “and it’s still too early to be able to define the most concrete advancements.”

Nevertheless, there are still students who are dedicated to the cause, he said. Some of his students publish stories in Borderzine, an El Paso-based online magazine that features reporting by Latino student journalists.

Zita Arocha, a professor at the University of Texas at El Paso, co-founded the magazine in 2008 as a multilingual, multimedia news site. She said the site’s audience has grown from a few hundred readers to tens of thousands each month.

Batista said he sees Borderzine as a platform for his students to publish work more openly and creatively.

“The advantage that Borderzine offers is the liberty to propose your own subjects to report on,” he said.


Batista said he tries to encourage students to “not just give voice (to these subjects) but also promote analysis and dialogue in the public debate.”

Borderzine came into being around the same time the U.S. State Department started warning Americans not to travel to Mexico. Arocha said her staff and students have faced substantial bureaucracy due to this travel warning. UTEP instituted a policy barring students and professors from traveling to Mexico on university business.

“Ironically enough, about 10 percent of our students
actually live in Juarez,” Arocha said. “We’ve really had to work hard to get around that obstacle.”

For one of Borderzine’s biggest projects, Mexodus, she said students had to do a lot of phone and Skype interviews, and commission photographs from Mexico-based photographers. One student traveled across the border independently because the school wouldn’t give permission.

Mexodus, an exhaustive reporting project that chronicled the mass exodus of citizens and businesses from Juarez, won an Online Journalism Award last year.

Bustamante said that the State Department’s travel warning created hurdles for her students, as well as colleagues in other universities.

“We at the school of journalism wanted to take a proactive approach,” she said. They started “border safety workshops” for student reporters in 2009. The workshops proved popular enough to draw students from other disciplines like sociology and anthropology.

Bustamante also co-founded the Border Journalism Network, a community that serves as a platform for communication and publication for student and professional journalists. Arizona students publish stories, which cover topics like deportation and Border Patrol killings, on the BJN website.

Mexican-American students are also leading efforts to create journalism that reflects themselves. Arturo Sierra, an editor at San Diego State University’s The Daily Aztec, started a Spanish section of the student newspaper last year.

The Aztec’s five Spanish reporters do original reporting and writing in Spanish, and not just about border or immigration issues. Sierra said two of his favorite projects from that section were about an undocumented student raising money for her own tuition and a film by the only Latina student in a film festival.

The section is the first Spanish-language content in the century-old paper, even though roughly a quarter of SDSU’s student body is Latino, Sierra said.

“You hear Spanish just walking on campus,” he said. “I figured there was that demand.”

Both Sierra and Earl said their campuses’ proximity to the border has deeply influenced daily life at each of their schools.

“We’re all just border kids,” said Sierra, who himself grew up in Tijuana.

These close ties are an advantage that students might have over professional journalists in the area, Arocha said. Many students at his school have families with mixed citizenship and relatives who still live across the border.

“When you live the story … it gives you much more context” to write it, Arocha said. “Most of our students here are bilingual … The ability to really write, and report in many cases, in Spanish is a huge plus.”

Bustamante said another advantage students might have is a view of the border that is less cluttered with pre-formed ideas from the media or the news.

“I think (students) have an advantage in that maybe they don’t have so many preconceived notions of what the border is,” she said. Generationally, they “can look at it through different eyes.”

Students on the Mexican side face some of the same burdens, though, too, Batista said. Ciudad Juarez especially suffers from a lack of media outlets and open jobs. The jobs that are available usually have low salaries.

“A city like Juarez doesn’t have as many media outlets as as other important cities in Mexico normally have,” he said. As Borderzine’s Mexodus reported, many businesses and people have fled the city to escape crime and corruption.

But reporters, even student ones, Batista said, have a responsibility to influence the agendas of society and the government, and thereby “improve the conditions and quality of life for the inhabitants of Juarez.”

“Therefore, the responsibility that they have is enormous,” he said.
Dylan Bouscher says he was trying to photograph a crime scene. The cop says he was treading on a crime scene. Bouscher says he was in a public space. The cop says he refused to leave.

And so another case plays out: a journalist says he was doing journalism, a cop says he was breaking the law. Except this case isn’t in court, it’s in Florida Atlantic University’s Office of Student Conduct, and Bouscher doesn’t have the benefit of systemic protections for criminal defendants.

In the end, he accepted some of the charges because he felt the school would pursue criminal charges if he did not. “It seemed like a gamble,” said Bouscher, who is editor-in-chief of FAU’s student newspaper, the University Press.

In the last few years, nearly a dozen student journalists have faced student conduct charges as retaliation or threats for what professionals would simply call journalism. Students and advisers have largely been successful in getting these charges thrown out, but fighting such charges can be a drain on time and resources. Threats of punishment can also intimidate student journalists, making them less likely to pursue controversial stories in the future.

It doesn’t always take a controversial story to put administrators on edge. College Media Association President David Swartzlander said he once had to defend a student reporter who was charged with harassing swans by taking pictures of them.

“And he actually got written up on student conduct charges for that,” Swartzlander said. “I just kind of sat there and listened to the evidence.”

As he’d suspected, administrators didn’t have much of a case, Swartzlander said. They dropped all the charges except a technicality. But Swartzlander said the experience showed him how students can be cowed by the conduct process.

“We’re talking about 18- to 22-year-old people,” Swartzlander said. “In some cases they’re still pretty naïve... They can be easily intimidated by a judicial proceeding on campus.”

Michael Koretzky, the University Press’ volunteer adviser, said Bouscher’s hearing in September was all too typical of an administration that has a history of intimidating student journalists.

“I don’t think this case was really about Dylan,” Koretzky said. “I think it was a message to other students... ‘Don’t mess with us.’”

Karla Bowsher, who was editor-in-chief of the University Press in 2010 and 2011, said the same administrators threatened her with misconduct charges as a way to influence the University Press.

“They know better than to outright censor, but they can do it by intimidation,” Bowsher said. “They’re just smart enough to not outright say things.”

Koretzky calls this tactic “censoring without censoring.” Bowsher said she and Koretzky were able to avert these tactics by “calling their bluff on everything.”

“I did what any journalist should do,” Bowsher said. She waited. She checked her facts. And she was right: the administration backed off.

But the threats themselves, can create a chilling effect on journalists, said Robert Shibley, the Foundation for Individual Rights in Education’s senior vice president.

This “chilling effect” means students “will at be less likely to exercise their constitutional rights because they know they won’t get a fair hearing,” he said.

“If (schools) are using threats of punishment in order to affect press coverage, that’s a serious problem, and it ought not to be happening,” Shibley said.

Free speech advocates like Shibley say the student conduct system lacks due process, a cornerstone of the real-world justice system. Absent those safeguards, threats and
intimidation against journalists and other students are much more likely to proliferate, FIRE says.

College students “run a significant risk of being found responsible for a minor or, indeed, serious offense even if (they) are innocent” in a student disciplinary proceeding, FIRE wrote in its guide to due process on campus.

Accused students do have some constitutional rights to due process, but not many. According to the Supreme Court’s 1961 decision in Dixon v. Alabama, schools must inform them of their charges and give them an opportunity to defend themselves. But that only applies to students facing suspension or expulsion, and only at public universities. (Private schools aren’t beholden to that ruling, but many promise their students similar rights in the conduct process.)

FIRE advises accused students arm themselves with knowledge of the school conduct code and their rights in its disciplinary system. The group says it also helps to know legal terminology, which raises the specter of a lawsuit before the officials’ eyes.

“Many students find that it is most effective to suggest subtly, before any suit, the possibility of legal action,” FIRE’s due process guide instructs. “Informally tell the administrators responsible for your case that you believe the university’s disciplinary procedures to be unlawful and explain why (using legal language).”

In his experience, Koretzky said, raising the issue of legal action has caused officials to back down. “Intimidating students is one thing, pissing off litigious media attorneys is quite another,” he wrote in a blog post.

Another potential pitfall for students in the disciplinary system, Shibley pointed out, was the lower standard of evidence. To be found guilty of a crime in a court of law, a jury must believe the prosecutor “beyond a reasonable doubt,” meaning they must be almost 100 percent sure of the defendant’s guilt, Shibley said.

Almost every universities today uses the “preponderance of evidence” standard, meaning the decision-maker must be 51 percent sure in order to find the student responsible. Shibley likened this system to a coin toss.

One reason protections are scarce in student conduct processes is that the potential punishments are much less. After all, a university can’t send you to prison. The worst it can do is expel you. But these are still potentially life-altering consequences, Shibley said.

University discipline offices have moved firmly away from more judicial-like proceedings to more educative-like ones. To reflect this change, in 2009 the Association for Student Judicial Affairs changed its name to the Association for Student Conduct Administration.

Its president-elect, Matt Gregory, said the group felt its original name didn’t accurately capture the disciplinary job.

“The term ‘judicial’ tends to communicate a legal construct, and that isn’t what we wanted campus processes to mirror,” Gregory said.

“Legalistic or formal models tend to create adversarial environments, foster confusion between criminal law and campus conduct, and hinder educational opportunities,” one 2011 study at Kansas State University found.

Gregory suggested campus news teams should hold training sessions on the school’s conduct code, as well as local laws such as trespassing.

“I think it’s important for student journalists to be aware of various state laws or university policies,” he said.

Trespassing was the charge used against The Cavalier Daily’s editor-in-chief and one of its reporters in 2011. James Madison University in Virginia charged them with trespassing, disorderly conduct and non-compliance with an official request for walking around a dorm and asking questions.

Their understanding of the First Amendment allowed the students to get almost all of their charges dropped.

Josh Wolf wasn’t so lucky. In 2010, the University of California-Berkeley student was hit with five alleged conduct violations for filming a student protest on campus. He was found responsible for three, and the vice-chancellor for student affairs later rejected his request for an appeal.

Another California student, Neil O’Brien, was found guilty of harassment in 2011 for videotaping school officials while asking them aggressive questions. He sued California State University at Fresno for violating his First Amendment rights; a district judge granted the school’s motion to dismiss the case in May, which O’Brien is appealing.

O’Brien isn’t a journalist, but the outcome of his case could have implications for student journalists who often are in the position of seeking interviews with reluctant sources themselves, which is why the Student Press Law Center and FIRE filed an amicus brief in October in support of O’Brien.

“We can’t have college disciplinary bodies passing judgment on whether a journalist’s interviewing style is polite enough,” SPLC Executive Director Frank LoMonte said. “Just the fear of being brought up on bogus charges — with the possible risk of being suspended from college — will be enough to intimidate journalists from doing their best work.”

Shibley said the secrecy of the university disciplinary process can be a detriment to accused students as well. Law and society have dictated that criminal courts remain open to public scrutiny as a check on their power, but most student disciplinary procedures are conducted behind closed doors.

“It does definitely introduce the disadvantage that if students are being railroaded or treated unfairly, there’s no one around to expose that,” Shibley said.

Sometimes that secrecy itself has produced more charges. In 2011, the University of Virginia’s student conduct board charged The Cavalier Daily with violating its “rules of confidentiality” by issuing a public apology for plagiarism.
by a staff member. The case was dismissed because the board did not have jurisdiction over “the exercise of journalistic and editorial functions by student groups.”

Harassment is among the more common disciplinary charges student journalists face, typically following complaints from readers or the unhappy subject of a story.

In one case, Cassie Negley, editor-in-chief of The Stylus at the State University of New York at Brockport, was brought up on harassment charges in fall of 2012 for writing aggressive stories about student government.

“[The conduct officer] told me to keep it quiet and tell no one,” Negley said. Instead, she immediately told her staff and adviser. A week later, she said, the administrator called her into the office to tell her the charges had been dropped.

“But she made me sit there and read through all these letters” from angry student government members, Negley said. “She was trying to sit me down and read me the riot act.”

Editors at The Calumet at Muscatine Community College in Iowa found themselves confronting investigators last fall after the paper published a story raising concerns after the Student Senate president was named “Student of the Month” for the second time in a contest where her uncle served as judge.

In The Calumet’s case, an investigator with the school’s Equal Employment Office tried to question reporters but wouldn’t tell them what they were accused of, editors say. As of press time, the school has clarified only that the adviser, and not the students, are under investigation.

And for the past two years, April Fool’s Day editions have prompted disciplinary action against newspaper editors.

Editors at the University of Missouri came within throwing distance of misconduct charges in 2012 for an April Fool’s issue that renamed the paper The Carpeteater, which many found offensive. The Maneater’s top editors received letters asking them to attend “pre-disciplinary” meetings with the Office of Student Conduct, but the school later stated it would not pursue any charges.

“Even highly offensive speech is constitutionally protected against disciplinary sanction,” LoMonte wrote in a letter to the university at the time.

In 2013, The Sun Star, the student newspaper at the University of Alaska at Fairbanks, faced two investigations for similar charges after its April Fool’s edition. The issue included an article announcing the construction of a “building in the shape of a vagina,” a satire on the proliferation of “penis-shaped” buildings.

A professor accused the paper of sexual harassment, prompting the schools’ Diversity and Equal Opportunity to investigate. The officer ruled in favor of the newspaper, noting that the article was “constitutionally protected,” but the professor appealed. The second review has not been completed.

Lee Bird, an Oklahoma State University student affairs officer who consults on First Amendment issues, said it’s not always the conduct office’s fault if it receives and investigates a complaint, as was the case in The Sun Star investigation. After all, these offices don’t go out and “drum up business,” she said.

“I think I’d work on trying to get people together to talk about perceptions and what’s going on” rather than initiate disciplinary action, Bird said.

Gregory, with the student conduct association, said disciplinarians should be careful not to confuse regulating students’ behavior with censoring their speech. He suggested both sides institute policies and procedures that encourage a collaborative partnership.

“A student journalist, just like any member of a student organization, or any person who is enrolled for classes and is a student, behaviorally speaking, could be held accountable,” Gregory said.

Many universities have disciplinary procedures and policies that afford students rights beyond those guaranteed by the Supreme Court. But once a school makes that promise, it needs to keep it or be liable for lawsuits, said John Lowery, a consultant with the National Center for Higher Education Risk Management.

“The more specific an institution is, the more it locks itself into a set response,” he said. “The more likely they are to encounter a case that their system doesn’t accommodate well.”

Shibley, with FIRE, said private universities have to follow this rule as well, because keeping promises is a matter of contract law, and not due process. Three colleges are currently fighting “breach of contract” lawsuits filed by students who say their disciplinary procedures were unfair.

“We’ve seen case after case … where universities don’t follow their own rules,” he said. “Due process means getting a fair deal and the deal that you are promised by the school.”

Bouscher, the FAU student accused of disobeying a police order in September, said he didn’t think taking reports, investigating complaints, deciding responsibility and issuing sanctions should all be carried out by the same official.

“I don’t think that power should belong to one person,” Bouscher said.

Even though he doesn’t think he did anything wrong, Bouscher said he accepted some charges in order to protect the paper from future interference from the conduct office. He said the discipline officer even asked for the name of another reporter who was with him that day.

“It seemed like they did plan on bringing her up on charges,” he said. He refused to give up the reporter’s name, and the officer dropped the issue.

Bowsher said her time at FAU made her more careful and thoughtful in her responses to threats from public officials, but also inspired her.

“They gave me another reason to do watchdog journalism, to hold them accountable to what they were saying,” she said.
FROM THE STUDENT PRESS LAW CENTER:

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When technology advances, journalism isn’t far behind. Unfortunately, the law usually is far behind.

Four universities — Ball State University, the University of Illinois, the University of Missouri-Columbia and the University of Nebraska-Lincoln — have joined the drone journalism movement and begun long, complicated procedures to get authorization. Once they have that, their drone reporting will be limited, but it will be legal.

A fifth, Syracuse University in New York, has no way to get authorization because it’s a private school. That loophole is just one example of the many legal pitfalls threatening student journalists who navigate the Federal Aviation Administration’s rules for unmanned aircraft systems.

Even a high school is getting in on the tech trend. At Palo Alto High School in California, The Paly Voice’s drone reporting was prompted by adviser Paul Kandell’s stroll through an airport.

“I stopped in a Brookstone shop and I saw a flying remote-controlled drone” for $300, Kandell said. “And it just occurred to me that that was within our budget.”

Kandell’s purchase typifies the drone journalism inductee: the cheapness and availability of drones has resulted in a “rapid global proliferation” over the last few years, according to a 2013 Reuters study.

Sports, agriculture, the environment and even the arts are all viable options for drone reporting, enthusiasts say. Matt Waite, who founded Nebraska’s Drone Journalism Lab, started experimenting in 2011 when Congress was considering updates to drone regulations.

“It was very clear that there was a future where this was going to be possible,” Waite said.

Student journalists have already published videos of parched fields, controlled burns, sports facilities and more. Kandell said The Paly Voice even took a peek into a 150-foot-tall tower that no one had entered for years. They didn’t find anything interesting, he said, but it shows how many ways drones can see what “nobody’s ever seen before.”

“It’s just a matter of getting creative,” he said.

Kandell’s team published a video in September of a gigantic flag being unfurled during a football game. That footage was most likely shot from over 400 feet above ground, Kandell said, meaning it technically violated FAA regulations.

But unlike other drone enthusiasts, The Paly Voice has never heard from the FAA. Instead, Kandell said, they’re just using common sense: staying away from crowds and airspace heights where it might interfere with air traffic.

“We’re pretty darn careful with it,” he said.

Missouri and Nebraska haven’t been so lucky. Both schools got letters from the FAA in August threatening “legal enforcement action” if they didn’t cease their drone activities.

“Based on your university website, you are currently operating a [drone] without proper authorization,” the letter to Missouri stated. “The options available are 1) to cease operations, or 2) to make application for the proper authorization so that the FAA can be assured of the safety of your operation.”

FAA rules categorize drones as either public, civil or hobbyist aircraft, and the teams at Missouri and Nebraska originally thought they qualified as “hobbyists.” But because they are public universities, the two schools’ drones are considered “public aircraft” — and that means they must apply for Certificates of Authorization, or COAs.

“We did follow rules that we believed applied to us,” said Scott Pham, who runs the Missouri Drone Journalism Program in conjunction with local NPR station KBIA. Hobbyists don’t need a permit but are required to fly under

Drone journalists find themselves flying in cloudy legal space

The Federal Aviation Administration has been cracking down on unregulated drone usage, but many journalists aren’t letting that stop them. It could be years though, before some are allowed to fly legally.

BY SAMANTHA SUNNE

WINTER 2014 • REPORT 27
400 feet, within the light of sight of the operator, and away from crowded areas and airports.

Only those who fly unmanned aircraft “solely for recreational purposes” qualify as hobbyists, FAA spokesperson Les Dorr said.

Programs at private schools like Syracuse are stuck — they don’t qualify as public or civil aircraft, but they’re not hobbyists, either.

Dan Pacheco, who heads journalism innovation at Syracuse’s Newhouse School of Public Communications, said that “legal murkiness” has limited students.

“We’re definitely hamstrung by current regulations,” Pacheco said.

Syracuse student Jamison Getman has been flying drones with a friend under the hobbyist guidelines, but he said students at the law school have been advising him to be careful because his work is technically part of an independent study project.

“We’ve really been walking on eggshells,” Getman said. “We’ve really been limited about what we’ve been technically allowed to shoot.”

Projects like Getman’s might not be allowed under hobbyist guidelines. Waite said the FAA has an extremely broad definition of compensation, which includes grades, class credit, wages and even bylines.

“For students, it is a really murky place because the FAA allows hobbyists to fly,” Waite said. “But if you are in any way affiliated with your university, you are not a hobbyist.”

For now, university drone journalism programs are moving forward with their COA applications. So far, the process hasn’t been going well for each university, and none are even close to being done. Brant Houston, who started the Illinois project, said in October that his team had been working on their application for more than a year.

“We’re further down the road than a lot of people in terms of this application, but it is slow and it’s very detailed,” Houston said. “We’re not flying until we have certification.”

Before schools can apply for a COA, they need proof from their state attorney general that their university is indeed a public entity. This one preliminary hurdle has been surprisingly difficult for all of the schools applying currently.

“We’ve almost completed what you might think of as the pre-process to application,” Pham said in Missouri. “It has taken well over a month to get to where are we now.”

Doctoral student Acton Gorton is spearheading the Illinois team’s COA effort. He said the number of questions on the application, and the level of detail they require, is “daunting.”

“It’s been a long process,” he said. “They ask you for every possible thing ... that you could imagine, and then some.”

For instance, Gorton said, he had to list the device’s projected ascent rate, cruising altitude, and locations where it might run into other flight paths. He even had to get a medical exam to make sure he would stay healthy at multiple altitudes, even though he’s staying on the ground. Gorton is Illinois’ designated “observer” — someone who takes over from the licensed pilot if the pilot is incapacitated.

“They treat a little hobby drone the same as they would a predator (drone) or a Boeing 747,” he said.

Problems like the ones Gorton encountered are part of the reason Congress mandated an update to drone regulations last year. The FAA Modernization and Reform Act of 2012 ordered the FAA to incorporate drones into the national airspace by the end of 2015, although some reports suggest the FAA is already falling behind.

“It is always the case that the law lags a bit behind technology,” said Nabhia Syed, a media lawyer who co-founded DroneU.org, which explores “social, political and legal implications of drone technology.” (Syed also serves on the Student Press Law Center’s board of directors.) The
hobbyist guidelines that Getman is using date back to 1981.

A couple years ago, though, the FAA started cracking down on civilians flying drones. Hobbyists who received payment for photos, for example, started receiving cease and desist letters. The Daily, a now-defunct news service run by News Corp., received such a letter in 2011 for publishing footage of massive flooding in Alabama and North Dakota.

Gorton said these threats were the main reason his team at Illinois decided to wait for authorization before they even launch their first drone into the air.

“(The FAA agent) was giving me examples of people they were cracking down on,” he said. “I kinda knew at that point that I better take this stuff pretty seriously.”

Pham temporarily stopped using drones in Missouri when he got his letter. But he said even the COA itself would be “a huge detriment to the journalism we can do.” The worst part, he said, was that applicants have to declare a single contiguous airspace to fly in.

“Once we fill out that COA, we have locked ourselves into a box of literal airspace that we cannot fly out of,” Pham said.

Plus, the wait time for another COA axes any hopes journalists might have of breaking news outside that box, Pham said. An August blog post by the Drone Journalism Lab called the COA requirements “antithetical to journalism.”

In addition to the FAA regulations, the proliferation of drones has prompted many groups to consider the impact on people’s privacy. Almost every state is looking at enacting its own drone legislation, and four already have laws in place, according to a 2013 report by the Reporters Committee for Freedom of the Press.

G.S. Hans, a researcher with the Center for Democracy and Technology, said a lot of this wariness comes from the media’s depiction of drones as militarized killing machines.

“There’s obviously a lot of concern about the weaponization of drones,” he said. Half a dozen bills making their way through Congress aim to restrict the use of drones for harm or data collection in U.S. airspace.

Drone enthusiasts are trying to overcome this stigma and show that drones can be used responsibly in ways that benefit society.

Waite and his team are sharing their COA application online to help fill the “information vacuum” that has contributed to fears of drones, he said.

“I get that people are not unreasonably uncomfortable about the idea of flying robots with cameras,” Waite said. “So the more I can do to demystify these, the better.”

Airborne journalism itself is nothing new. Reporters have drifted above Civil War battles in hot air balloons,
caught rides on Air Force One and surveyed traffic from helicopters. But unlike those aircraft, drones are operated by journalists themselves. This opens up a lot of legal risks like liability and licensing, the Reuters study found.

“Most media lawyers have been blissfully unaware of the field of aviation law: it has not impinged on their clients’ activities,” the study said. “But ... this field of regulation will become a new area of expertise.”

The Electronic Frontier Foundation sued the FAA last year for records of COA recipients, citing privacy concerns. The American Civil Liberties Union published recommendations in 2011 for keeping drone privacy infringements in check.

“All the pieces appear to be lining up for the eventual introduction of routine aerial surveillance in American life,” the report threatened. “The prospect of cheap, small, portable flying video surveillance machines threatens to eliminate the privacy Americans have traditionally enjoyed in their movements and activities.”

The Constitution does not list privacy as an explicit right. But in its 1964 ruling in Griswold v. Connecticut, the Supreme Court decided there is a “zone of privacy created by several fundamental constitutional guarantees.”

Hans, with the Center for Technology and Democracy, said this “right to privacy” has been attacked over the years for being overly broad and vague. “This is a somewhat controversial area,” he said.

On the other hand, Syed said a person’s “reasonable expectation of privacy” would come into play in a court case involving the government use of drones. And in this day and age, people’s expectation of privacy isn’t what it used to be.

The Congressional Research Service released a report last April on whether drones could step into the “unreasonable searches and seizures” territory outlawed by the Fourth Amendment.

“As technology advances, the contours of what is reasonable under the Fourth Amendment may adjust as people’s expectations of privacy evolve,” the report states.

Then again, privacy restrictions might run afoul of reporters’ First Amendment rights to record in public places. The National Press Photographers Association unsuccessfully tried to stop a Texas bill from becoming law last year because it criminalized some drone photography. (The Texas law does include an exemption for professors and students at public institutions.)

Privacy and safety are the biggest concerns, but journalists face any number of potential legal pitfalls. Flying over private property, for instance, might constitute aerial trespass or warrant a nuisance complaint. On the other hand, if the FAA refuses permission based on content reasons, that could constitute prior restraint.

“There’s substantial legal questions out there that drones bring up,” Waite said.

The Missouri class that kickstarted that school’s drone experimentation was not continued this fall, and Pham said he doesn’t expect to have a COA in hand for the spring semester. Ball State instructor Tim Pollard said the same goes for his school, where students will train with simulators and indoor flights in the meantime.

Though many colleges are experimenting with drones, only a handful are using them for journalism. Drone U, the website Syed co-founded, found dozens of college programs experimenting with drone technology.

She said a lot of programs are waiting to see where the laws and regulations settle before they jump into what she called “an uncertain landscape.”

“No one wants to get in trouble, everyone wants to experiment,” Syed said. “A lot of folks are just waiting to see how this shakes out.”

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**SO YOUR NEWSROOM WANTS A DRONE ...**

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<tr>
<th>If you’re a student who receives no compensation from your journalism program (for example, class credit):</th>
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<tr>
<td><strong>GO</strong></td>
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<tr>
<td>Congrats! You are a hobbyist. As long as your drone activity stays below 400 ft. and is away from airports and crowded places, you should be fine.</td>
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<td><strong>WAIT</strong></td>
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<tr>
<td>You need a COA, or certificate of authorization, from the Federal Aviation Administration. The process will most likely take more than a year, so get started.</td>
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<th>If you receive some compensation and are at a private school or university:</th>
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<tr>
<td><strong>STOP</strong></td>
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<tr>
<td>Sorry. Right now this isn’t an option, at least legally. Wait until 2015, when the FAA might begin allowing commercial drones in the air. Until then, experiment with drones indoors.</td>
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Legal Analysis

What public forum doctrine means for your student publication

Recent court rulings have devalued “limited public forum” protection for student journalists, but there are still ways to shield yourself from censorship.

BY FRANK D. LoMONTE

When student journalists at New York’s Ithaca High School clashed with their principal over the right to publish an editorial cartoon mocking their school’s unrealistic sex-education courses, they believed the law was on their side.

Because their newspaper, The Tattler, had operated essentially free from administrative censorship for 100 years, and was acknowledged in written school policy as a “forum” for student expression, students were convinced they had the benefit of the highest possible First Amendment protection.

Their confidence was misplaced.

A federal appeals court sided with their principal, ruling that the editorial cartoon — which used scribbled stick-figure couples in exaggerated sexual poses to mock the effectiveness of Ithaca High’s sex-education curriculum — could lawfully be censored.¹

The constitutional protection that Robert Ochshorn and his fellow editors believed they enjoyed at The Tattler proved to be an illusion. Regardless of the official recognition of The Tattler as a “forum,” three judges with the Second Circuit U.S. Court of Appeals gave school administrators as much control over the newspaper as if no “forum” existed at all.

Since the U.S. Supreme Court’s Hazelwood ruling² drew a road map for obtaining heightened First Amendment recognition in student media, hundreds of student publications have attempted to follow it, invoking the incantation “public forum.” Recent legal developments, however, have cast grave doubt on the value and durability of designating a publication — or any piece of government property — as a “forum.” Because it is uncertain whether a “forum” policy offers reliable protection, those seeking to insulate their publications against censorship may be better served by choosing clearer, more explicit policies removing the need for difficult constitutional interpretations.

This article will examine what it means (or doesn’t) for a publication to be deemed a “forum,” and — in light of recent court rulings that appear to undermine the value of forum status — will suggest more reliable ways to protect student editorial independence.

Birth of the “public forum”

The First Amendment speaks in absolute terms — “Congress shall make no law…” — when it comes to government’s ability to regulate speech. In practice, however, restrictions on speech can and do persist despite constitutional challenges.

Whether a person can express himself freely on his own property is a different question from whether a person is entitled to use government property as a platform for speech. When the government is acting as a “landlord” to manage the use of its own property, the First Amendment allows greater leeway to regulate what is said — even if the very same speech would be legally protected on private property.

To determine the level of the government’s authority over speech on government property, the Supreme Court developed a framework known as the “forum doctrine.” The forum doctrine helps courts resolve difficult cases in which the rights of a speaker to convey a particular message might bump up against the government’s interests in managing public property — for example, the government’s interest in making sure that speech does not interfere with other citizens’ use of the property for its intended purpose.

The forum concept recognizes that not all government property can be equally open for individual speakers’ expressive use. The same political rally that might be perfectly at home in a county park would be out of place in the reading room of the county library. Even though both are publicly owned facilities, the park is recognized as a “traditional public forum” — a place amenable to wide-open expressive use — while the inside of the library is not.

Once property is identified as a “public forum,” any limitation on a speaker’s message will be extremely hard to defend. If a speaker is banned from speaking, or is punished after-the-fact for his message, the speaker will have a strong argument that the government violated his constitutional rights. The burden to justify restricting a speaker’s message in a public forum is so high that the government regulator will almost always lose.
This is where it gets complicated. In a 1983 ruling involving the use of teacher mailboxes in an Indiana school district, the Supreme Court recognized that government property sometimes is “designated” for communicative use by members of the public. When that happens, the government has created a public forum — which means regulators cannot play favorites and entertain only the speech they agree with.3

The Supreme Court has not specified exactly what is necessary for property to become a designated forum, but it has given judges two factors to consider in deciding whether a forum has been created:

- The “policy and practice” of the agency that operates the property.
- The “nature of the property and its compatibility with expressive activity.”4

A forum can be either a physical space (like a bulletin board) or can be a “metaphysical” space (like the student activity fee system or student election system at a college).5

Once a forum is designated for expressive use, speech within that forum gets the same extra-strength legal protection as speech in a park or in another “traditional” public forum. That means any restriction on the content of a speaker’s message will be presumed to be unconstitutional, and will be struck down unless the restriction is absolutely necessary to further an essential government priority.

And this is where it gets even more complicated. Government property sometimes is understood as falling within one of three categories — traditional public forum, designated public forum, or non-forum — but in recent years, a fourth category has arisen: The “limited” public forum.

Courts in different parts of the country are, in the words of one author, “strikingly divided” over what it means for property to be a limited public forum.6

Some judges simply use “limited” as almost interchangeable with “designated” public forum, with the same high level of protection against government censorship. But other judges believe it is not really a forum at all, and that speakers in a “limited” forum get no greater protection than those using “non-forum” property.7 The Supreme Court has sent unclear signals, leaving the law in disarray.8

Justice Anthony Kennedy’s majority opinion in the 1995 Rosenberger case — a case generally beneficial to student rights — appears to be the source of much of lower courts’ confusion over what it means to be a limited public forum.

In discussing the student fee system at the University of Virginia, which the Court appeared to regard as a limited public forum, Kennedy wrote: “The State may not exclude speech where its distinction is not ‘reasonable in light of the purpose served by the forum,’ nor may it discriminate against speech on the basis of its viewpoint.” That statement accurately describes the level of First Amendment protection that applies to a non-public forum.

Kennedy did not, however, claim to be overruling Supreme Court precedent saying that speech gets much more protection in a limited public forum than in a non-public forum. It is probably best to understand his confusing statement as saying that, on any government property, whether it is a forum or not, regulations must be reasonable and viewpoint-neutral.9

The public forum goes to school

The property of a school, including student publications created as part of school-sponsored activities, is not a traditional public forum. Therefore, student media can attain forum status only by designation.

The Supreme Court first applied the “forum” concept to student speech in the case Hazelwood School District v. Kuhlmeier, in analyzing the First Amendment claims of student journalists whose principal censored their newspaper:

“[S]chool facilities may be deemed to be public forums only if school authorities have by policy or by practice opened those facilities for indiscriminate use by the general public ... or by some segment of the public, such as student organizations. ... If the facilities have instead been reserved for other intended purposes, communicative or otherwise, then no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community.”10

The Court found that the school had not opened up the student newspaper, Spectrum, for “indiscriminate use” and had operated it primarily as “a supervised learning experience for journalism students.”11 Consequently, no public forum had been created. (Though the newspaper had published a “policy statement” declaring the paper to be student-run, the justices were more persuaded by the school’s actual practice of involving the adviser and principal in editorial decisions.) Because the Spectrum was not a forum, the principal was free to censor it for any basis “reasonably related to legitimate pedagogical concerns.”12

Although student journalists lost their censorship case in Hazelwood, the majority opinion can be seen as a road map toward greater editorial independence. If a school allows “indiscriminate” use of the newspaper — “by policy or by practice,” meaning that a written policy may not be necessary if the school’s actual practice is to refrain from censoring — then a forum exists, and speech within the forum is entitled to heightened constitutional protection.

Hazelwood opened a gate that editor Katy Dean drove through in her 2004 censorship case, Dean v. Utica.13

In the Dean case, a federal district judge found that a Michigan high school maintained its student newspaper, Arrow, as a limited public forum. The judge looked to a checklist of “intent factors” to decide whether the paper
was operated as a forum, but was most influenced by the evidence that, for 25 uninterrupted years, no administrator had exercised prior review. Therefore, the paper was entitled to the benefit of public forum status.

(The judge then went on to say that, even if Hazelwood did apply, the school’s decision to remove an accurate article about a lawsuit against the school was solely motivated by image control and was unreasonable.)

In an earlier case involving a college yearbook, the federal Sixth Circuit likewise concluded that a student publication was a limited public forum in which the college had minimal ability to control content.

The court in Kincaid v. Gibson decided that Kentucky State University violated the First Amendment rights of student editors in refusing to distribute a yearbook, The Thorobred, because administrators subjectively disliked the students’ choice of themes, colors and photos.

The judges rejected Kentucky State’s contention that, to be a forum, a publication must be thrown open to “indiscriminate” public use. It was enough, said the court, that KSU had a policy and practice of giving the student editors “exclusive control” over the yearbook.

Because The Thorobred was a limited public forum, the judge ruled, any restriction on the students’ choice of editorial content was unlawful unless “narrowly drawn to effectuate a compelling state interest.” This is a significantly higher burden than a college would have to satisfy if the property was a non-forum.

But in the Ithaca High School case, the Second Circuit U.S. Court of Appeal took a more expansive view of school censorship authority in a limited public forum.

The Ochshorn case was not primarily about the “forum” nature of the newspaper at all. The decisive issue was the Second Circuit’s view that the Tattler editorial cartoon qualified as “lewd” speech. The Supreme Court recognized in Bethel Area School District v. Fraser that “lewd” speech to an audience of K-12 students is unprotected by the First Amendment.

Secondarily, the Ochshorn court went on to address whether the forum status of the Tattler limited the school’s censorship authority. The judges concluded that the Tattler could not be a true “public forum” because history showed that the principal and adviser “exercised a substantial degree of control over the paper’s creation and content.” The paper was therefore no more than a “limited” public forum, and – in the view of the Second Circuit – was subject to the Hazelwood level of school control.

The Ochshorn judges almost certainly got it wrong. If a school has the authority to regulate speech in any reasonable manner in a limited public forum, then a limited public forum is meaningless. Even in a non-forum — government property that is not open to the public for speech at all, such as a prison or a military base — the First Amendment requires that regulations be reasonable. A limited public forum ought to require something more.

Judge Tarnow certainly thought so in the Dean case. As he explained, “The Hazelwood standard is inapplicable where a school-sponsored publication is a limited public forum.”

Even though it is erroneous, Ochshorn is now the law; the Supreme Court declined to review it, so the case is final.

Although the Second Circuit sets precedent only for the states of New York, Vermont and Connecticut, student media cases so rarely go to court that the Ochshorn case may prove to be influential even beyond the circuit. At the very least, it highlights the risk of relying on forum status to provide a meaningful check on school censorship authority.

### The designated forum: How durable?

Even if a publication succeeds in attaining “public forum” designation, it’s possible that a school or district can revoke that status more-or-less at will.

Any action by the government intended to punish or deter lawful speech can violate the First Amendment. The Supreme Court has said that even canceling a government employee’s scheduled birthday party might qualify as unlawful retaliation if meant to inhibit free expression.

Changing the status of a student publication logically should qualify as illegal retaliation — if a cause-and-effect can be shown between removing the forum designation and something that student journalists published (or tried to publish). A successful challenge would require a judge to scrutinize the school’s motive for the change.

However, at least some court interpretations indicate that government agencies can freely close formerly public forums for any reason at all — even if motivated by a particular speaker’s message. If that is the case, then a school bent on censoring a newspaper, yearbook or magazine might simply “un-designate” the publication as a forum first.

Federal courts have struggled with the question of when regulators can stop operating property as a public forum. The struggle is most apparent in the wavering of the federal Ninth Circuit, covering nine western states.

In a 2000 case involving a portion of a national forest in Idaho that was closed to environmental protesters, the
Ninth Circuit scrutinized the government’s closure decision to make sure that it was neutral as to the protesters’ message and that it was narrowly tailored to restrict no more speech than necessary.24 In other words, the judges believed that a decision to close a formerly open designated forum could be a constitutional violation if the closure had an ulterior motive.

But more recently, the court has retreated from that view. In a case brought by antiantiwar and poverty-rights organizations challenging a city’s restrictions on protests, the Ninth Circuit declined to consider First Amendment claims based on a city policy of selectively allowing certain types of banner displays on public streets.25

While the judges agreed that the streets had been designated as a public forum when the city agreed to let community organizations post banners, they decided that the groups no longer had a First Amendment claim because the city had repealed the banner policy and no longer allowed anyone to put up protest signs — closing the formerly public forum. The judges did not consider whether the closing itself might have violated the First Amendment, simply saying that a city may close a designated forum “whenever it wants.”26

A handful of federal district courts have ruled that a speaker who shows that the forum was yanked out from under him to prevent him from speaking has a valid constitutional claim. In one notable example, the Ku Klux Klan was allowed to pursue a First Amendment claim after the city of Kansas City decided to discontinue a public-access cable TV channel rather than continue airing the Klan’s racially offensive broadcasts. “A state may only eliminate a designated public forum if it does so in a manner consistent with the First Amendment,” a federal district judge ruled.27

Neither the Supreme Court nor the federal courts of appeal, however, have explicitly recognized a claim for “retaliatory forum closure,” and at least a few appellate courts have decided that no such claim exists.

The most recent court to confront this issue was the Richmond, Va.-based Fourth Circuit U.S. Court of Appeal. It arose in the context of Confederate flag banners that a local Sons of Confederate Veterans chapter wanted to display on city flagpoles throughout Lexington, Va.28

The city had made the flagpoles available to other groups, but after receiving the request from SCV, the city changed its policy, fearing the banners would be seen as racially inflammatory. The SCV claimed that the change — closing a formerly “designated” public forum — violated the First Amendment. But the appeals court disagreed.

A three-judge panel decided in July 2013 that no First Amendment violation occurred, because the city was free to stop offering a designated forum at any time and for any reason. The First Amendment, Judge Robert Bruce King wrote, does not require the government to act with “clean hands.” “[I]t appears that the City experimented with private speakers displaying flags on the City’s standards, and that effort turned out to be troublesome. It was entitled... to alter that policy,” Judge King wrote.29

Consequently, in the view of the Fourth Circuit, a government agency can freely take away the forum status from a piece of public property even if the change is intended to silence a specific speaker or a specific message.

Since the Supreme Court has said that even a relatively minor slight can be unlawful retaliation if meant to inhibit the exercise of free-speech rights, the decision to declare a piece of public property entirely off-limits for expression certainly seems to qualify. Why courts have hesitated to recognize a retaliation claim in such situations is somewhat mystifying.

It may be because the closure affects all potential speakers so that the deprivation is not sufficiently personalized to any one speaker. Or it may be deference to the spending priorities of government policymakers, whose discretion might be compromised if forced to maintain property they can no longer afford.

Whatever the reason, it’s possible that forum status can lawfully be revoked at any time and for any reason — even a retaliatory or content-motivated reason. It’s therefore risky for a student publication to rely on a “public forum” policy to provide enduring legal protection.

**Freedom beyond the forum**

If simply labeling a publication a “public forum” does not guarantee safety from censorship, what does?

State laws limiting the censorship discretion of school officials are on the books in seven states (and in an eighth, Illinois, at the college level only), and three jurisdictions — Pennsylvania, Washington and the District of Columbia — have given students enhanced press freedom through Board of Education rules.30 In each instance, the permissible grounds for censorship are spelled out in some detail.

Iowa’s Student Free Expression Law, enacted in 1989 — the year after *Hazelwood* — is an especially clearly worded example that can serve as a model. It lists five categories of prohibited speech in student media — obscenity, libel, or material that encourages students to break the law, violate school rules, or substantially disrupt school operations — and then concludes: “There shall be no prior restraint of material prepared for official school publications except when the material violates this section.”31

A school-district regulation (or, lacking that, a building-level policy at the school) that tracks the wording of Iowa’s law can avoid dispute over the meaning of “designated public forum.” By laying out the exclusive grounds for a school or college to override the decision of student editors, such a policy minimizes uncertainty and conflict.

When a federal appeals court surprisingly extended
the Hazelwood level of censorship authority to college publications in 2005,13 dozens of colleges across the country reacted by enacting “public forum” policies to blunt the impact of the decision. The best of these policies went further than simply reciting “public forum” and specified that students may publish the lawful editorial content of their choosing.

The University of Arizona’s “Governing Statement” for student media provides one excellent example.14 The Statement provides in part:

“The student press at the University of Arizona is free of censorship and advance approval of content. Student editors, managers and news directors must be free to develop their own editorial policies, content, programming and news coverage. An independent and active press — print, online and broadcast — is a basic right in a free and democratic society and is valuable in promoting the development of students as socially responsible persons. … Students alone are responsible for the content, character and design of their publications, and students alone are responsible for their broadcast programming, consistent with FCC regulations.”

An unequivocal statement of student editorial control, ideally one enacted by vote of the governing body of the school or college, is the student media’s best assurance of safety from censorship if a disagreement arises.

Conclusion

While attaining status as a public forum is a symbolically meaningful gesture, it is uncertain how much weight a court will put on forum status. Making sense of the distinction between a “limited” and “designated” public forum has been confusing even for Supreme Court justices. It asks too much to expect a high-school principal to be a more proficient constitutional scholar than a Supreme Court justice.

In light of the damaging ruling in the Ochshorn case, in no event should a student-media policy use the phrase “limited” public forum. Rather, where possible, student media should be referred to as a “designated” public forum. But it probably is unsafe to stop there.

While it’s fine to retain the phrase “public forum” for whatever First Amendment benefit it may provide, an ideal student-media policy will go further and will precisely define the limits of school censorship authority in a way that everyone can understand.

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Endnotes

1. R.O. v. Ithaca City Sch. Dist., 645 F.3d 533 (2d Cir. 2011).
4. Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 802 (1985). The Court in Cornelius indicated that simply refraining from exercising censorship authority alone probably is not enough to create a public forum, rather, there must be some evidence of an intent to open up the property for expressive use. See id.
5. See Rosenberger v. Rector and Visitors of Univ. of Virginia, 515 U.S. 819 (1995) (using forum analysis on student fee system); Alabama Student Party v. Student Gov’t Ass’n, 867 F.2d 1344 (11th Cir. 1989) (applying forum analysis to university’s student government campaign finance system).
7. See id. at 332-34. In his article, Prof. Ha described the federal Second and Fourth circuits as most reliably finding heightened speech protections in limited public forums — but his article came before the Second Circuit Ochshorn ruling. Other circuits, notably the First and Ninth, appear to take the view that speech in a “limited” forum may be regulated to the same extent as if no forum existed at all.
8. See id. at 326-27.
9. Even more unhelpfully, Justice Thomas’ 2001 majority opinion in Good News Club v. Milford Central School parroted the misleading passage from Rosenberger, reinforcing the impression that the government may freely regulate speech in a limited public forum to the same extent as in a non-forum. 533 U.S. 98, 106-07 (2001).
10. Hazelwood, 484 U.S. at 267 (internal quotes and citations omitted).
11. Id. at 270.
12. Id. at 273.
14. Id. at 807-09.
15. Id. at 814.
16. 236 F.3d 342 (6th Cir. 2011) (en banc).
17. Id. at 353.
18. Id. at 354.
20. Id. at 539. The judges also noted that the school provided funding and office space to the newspaper, that the school paid the adviser’s salary, that the newspaper bore the school’s name and insignia, and that at least one parent believed the paper to be the official voice of the school because she filed a complaint over editorial content with the district, not the editors. Id. at 541.
24. United States v. Griefen, 200 F.3d 1256 (9th Cir. 2000).
25. Santa Monica Food Not Bombs v. Santa Monica, 450 F. 3d 1022 (9th Cir. 2006).
26. Id. at 1032.
29. Id. at 232.
30. These statutes and regulations are available online at http://www.splc.org/nowyouurights/law_library.asp.
31. Iowa Code Sec. 280.22.
32. See Hosty v. Carter, 412 F.3d 731, 734 (7th Cir .2005 (en banc) (calling Hazelwood the “starting point” for analyzing the First Amendment rights of college as well as K-12 journalists).
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