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ABSTRACT

A study explored, through a review of the literature, specific problems that scholars have identified regarding free expression in student publications since "Hazelwood v. Kuhlmeier" (1988). It then analyzed the six state statutes which were passed to clarify the extent of school administrators' rights to censor student journalism and provide protection for student expression in Arkansas, California, Colorado, Iowa, Kansas, and Massachusetts to determine whether the statutes adequately address those problems. Findings revealed that many similarities exist among the statutes--all six make some mention of students' rights to free expression, specify some element or elements to be included in local policies, and identify certain types of unprotected speech; but none of the statutes addresses all of the student press law problems and recommendations identified by the Student Press Law Center and discussed in the literature review. Only one statute (Colorado) identifies student publications as public fora, but the other five use different language to suggest a similar status. All but one of the statutes require written policies for student publications, specifying such details as distribution of the publications and the policies, duties of student editors and journalism advisers, etc. None of the statutes protects specific categories of speech, but all prohibit certain types of unacceptable expression. In states without such statutes, student journalists are not likely to be able to change the situation without help from professional teacher and journalism organizations, lobbyists, community members, and parents. (Contains 90 notes.) (NKA)

PROTECTING STUDENT PRESS FREEDOMS: AN ANALYSIS OF STATUTORY PROTECTION FOR STUDENT PUBLICATIONS IN THE POST-*HAZELWOOD* YEARS

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"The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[1]

"[In Kuhlmeier,] the Court is using an atom bomb to swat a fly."[2]

In May 1997, a group of high school journalists at West Charlotte High School in Charlotte, North Carolina, learned a critical lesson about the value of free speech. They also learned the difficulty of identifying clear policies regarding the right of school officials to censor student press.[3] The students, mostly seniors, were disturbed by the overall decline in school quality they had witnessed under the school's new administration and by the number of faculty members who were planning to leave the school at the end of the year. Recognizing, although possibly underestimating, the potential power of the pen, they used the editorial page of the school paper to cite specific failings and to criticize the administration for refusing to discuss the issues.

The principal, who required prior review of all articles, attempted to stop publication of the editorial. However, his power to censor was unclear due to confusion resulting from the U.S. Supreme Court's decision in *Hazelwood v. Kuhlmeier.*[4] The *Hazelwood* decision generally gave school officials greater power to censor school publications than had previously been allowed by distinguishing between school-sponsored work and personal expression. But the school's paper

[1] Shelton v. Tucker, 364 U.S. 479, 487 (1960).
[2] J. Marc Abrams, S. Mark Goodman, William R. Mureiko, Comment: *End of an Era? The Decline of Student Press Rights in the Wake of Hazelwood School District v. Kuhlmeier*, 1988 DUKE L.J. 706, 726 (1988).
[3] Personal experience of author, who was newspaper adviser at the time. See also *The Charlotte Observer,* June 1997.
[4] Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988).

had established itself as a public forum for free expression in written policy and in practice, so technically *Hazelwood* did not apply.[5]

Ultimately, the editorial ran in the paper, accompanied by a rebuttal from the principal. *The Charlotte Observer* picked up the story for the next two weeks, from the controversy surrounding the school newspaper to the eventual displacement of all faculty and staff at the school by the superintendent.[6]

This incident served to illustrate the importance of student voices in the marketplace of ideas. But it also pointed to the need for clear legal rules regarding free expression in student publications. Although the *Tinker* and *Hazelwood* decisions are the leading precedents in student press law, the case law can be confusing for students and school officials. In 1988, when the *Hazelwood* Court expanded school administrators' ability to censor, it created a new standard beyond *Tinker*, which protected any expression that did not cause a disruption of the educational process.[7] However, the new ruling did not apply to publications that were designated public fora, referring those publications back to the *Tinker* standard.

In *Tinker et al. v. Des Moines Independent Community School District et al.*, the Supreme Court had declared: "It can hardly be argued that either students or teachers shed their

[5] The Supreme Court identified three types of fora in *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), at 45-46, and refined its analysis in *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985) at 799-811. The three types are traditional public fora, designated or limited public fora, and nonpublic fora. Restrictions in the first two types "must be narrowly drawn to serve compelling state interests." In the third type, the restrictions must only be "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." The *Hazelwood* decision only applies to nonpublic fora publications.

[6] Because of the intense controversy, the superintendent felt that drastic measures were necessary. He brought in a new principal who was allowed to hire his staff. Former teachers who wanted to remain at the school could reapply to interview with the new principal. Teachers and administrators with tenure were still guaranteed positions within the school system, even if they were not hired at West Charlotte.

[7] Tinker et al. v. Des Moines Independent Community School District et al., 393 U.S. 503 (1969); *Hazelwood*, 484 U.S. 260 (1988).

constitutional rights to freedom of speech or expression at the schoolhouse gate."[8] The Court went on to say that schools cannot abridge students' First Amendment rights unless the students' conduct "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."[9] This opinion encouraged student journalists and acknowledged the importance of schools in the marketplace of ideas.

Almost 20 years later, the Court appeared to lessen the power of the 1969 case with *Hazelwood School District et al. v. Kuhlmeier et al.*[10] In the majority opinion, Justice Byron White recognized the *Tinker* decision, but distinguished between tolerating symbolic speech and promoting written speech in a publication that is part of the school curriculum. "Educators are entitled to exercise greater control over this second form of student expression," said the Court, "to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school."[11]

In an effort to clarify the extent of school administrators' right to censor student journalism and provide greater protection for student expression, six states have passed student press freedom statutes: Arkansas,[12] California,[13] Colorado,[14] Iowa,[15] Kansas,[16] and

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[8] *Id.* at 506. In *Tinker*, the Court struck down a school's prohibition against students' wearing of black armbands to protest the Vietnam War.
[9] *Id.* at 513.
[10] 484 U.S. 260 (1988). In *Hazelwood*, former high school students who had been on the newspaper staff alleged that their rights had been violated when the principal censored two articles from an issue of the paper. The articles dealt with student experiences with teenage pregnancy and with the impact of parental divorce on students. The Court upheld the principal's actions.
[11] *Id.* at 271.
[12] Arkansas Student Publications Act, ARK. CODE ANN. §6-18-1201 *et seq.* (1995).
[13] Student Exercise of Freedom of Speech and Press, CAL. EDUC. CODE §48907 (1983).
[14] Rights of Free Expression for Public School Students, COLO. REV. STAT. §22-1-120 (1990).
[15] Student Exercise of Free Expression, IOWA CODE §280.22 (1989).
[16] Student Publications, KAN. STAT. ANN. §72-1506 (1992).

Massachusetts.[17] These statutes specify such issues as what types of speech are and are not protected, who retains control of content, and how the publications may be distributed.

The purpose of this research is first to explore specific problems that scholars have identified regarding free expression in student publications since *Hazelwood*. The paper will then analyze the six state statutes named above to determine whether the statutes adequately address those problems.

Literature Review

Journalism scholars and the Student Press Law Center (SPLC) have identified a long list of problems associated with regulation of student publications since *Hazelwood*.[18] Generally these issues can be grouped into three categories: the designation of student newspapers as public fora, the need for a clear written policy, and the specification of protected and prohibited speech. This review will discuss scholarly comment on these three categories of problems and on the potential for statutory regulation and protection of the student media.

Should student publications be designated public fora?

According to the SPLC, an important step toward fighting censorship after *Hazelwood* is to establish school publications as a forum for student expression by policy and by practice.[19] This defining issue is critical because *Hazelwood* specifically assigned greater power to educators over publications that are not designated as public fora.[20] Thus, "in cases in which the

[17] Right of Students to Freedom of Expression, MASS. ANN. LAWS ch. 7, §82 (1974, amended 1988).
[18] The Student Press Law Center, located in Arlington, Va., is a nonprofit organization dedicated to providing legal help and information to the student media and journalism educators. Since 1974, the SPLC has been the nation's only legal assistance agency devoted exclusively to educating high school and college journalists about the rights and responsibilities embodied in the First Amendment and supporting the student news media in their struggle to

public might perceive school sponsorship, *Tinker*'s standard [for censorship] of *material disruption* would be replaced by one of mere *reasonableness*."[21]

In *Hazelwood*, the Court specified that if a school has not established its publication as a public forum, then educators can exercise "editorial control over the style and content of student speech . . . as long as their actions are reasonably related to legitimate pedagogical concerns."[22] The Court also noted that educators do not need written policies in order to exercise such prepublication control.[23]

According to scholars, this reliance on public forum doctrine was a mistake by the Court, focusing "attention on the classification of the place rather than on the constitutional rights at stake."[24] Marc Abrams and Mark Goodman, both of the SPLC, and William Mureiko argued that the district court and the Supreme Court decided the question of public forum incorrectly.[25] *Spectrum*, the Hazelwood newspaper, was open to students not enrolled in the journalism class, covered issues of interest to the entire community, and raised part of its income through sales. But most importantly, the school and the school district had written policies establishing the paper as a forum for student expression. The Court ignored this evidence and "provided schools with an easy mechanism" for censorship.[26]

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cover important issues free from censorship. Although SPLC publications are not traditionally considered scholarly publications, the SPLC is the nationally recognized authority regarding matters of student press.

[19] Student Press Law Center (SPLC), *Fighting Censorship After Hazelwood: Eight Steps to Remember if It Happens to You*, *at* http://splc.org (1992).

[20] *Supra* note 5. *See also* William G. Buss, *School Newspapers, Public Forum, and the First Amendment*, 74 IOWA L. REV. 505 (1989).

[21] Rosemary C. Salomone, *Free Speech and School Governance in the Wake of Hazelwood*, 26 GA. L. REV. 253, 268 (1992).

[22] *Hazelwood*, 484 U.S. at 273.

[23] *Id.* at 291, note 7.

[24] Jeffrey D. Smith, Comment, *High School Newspapers and the Public Forum Doctrine: Hazelwood School District v. Kuhlmeier*, 74 VA. L. REV. 843, 856 (1988). *See also* Buss, *supra* note 19; Helene Byrks, Comment, *A Lesson in School Censorship: Hazelwood v. Kuhlmeier*, 55 BROOKLYN L. REV. 291 (1989); Sandra Ragland, *Chalk Talk: Rights or Wrongs? Student Newspapers and the First Amendment*, 27 J.L & EDUC. 165 (1998).

[25] Abrams, *supra* note 2, at 719-20.

[26] *Id.* at 721.

However, Abrams *et al* suggested that in light of other court decisions, schools' "attempts to convert a publication from forum to nonforum for the . . . purpose of gaining editorial control . . . would likewise be found unconstitutional."[27] They also argued that a school would not want such control as the institution would then be liable for any tortious material that appears in the publication.[28]

The potential loophole in the *Hazelwood* decision is that the Court was "permissive as regards control," according to journalism professor Robert Knight. "It permits schools to declare their newspapers as open forums – free to all expression – if they wish or to restrict quite severely what may be published."[29] Although no appellate court has held that a high school newspaper can be characterized as a traditional public forum, several circuits have ruled that a public high school publication constitutes a designated, or limited, public forum.[30] Thus, it is possible to declare a publication as a designated public forum and prevent a direct application of the *Hazelwood* ruling.

What elements should be specified in a written policy?

Scholars have argued that the Court made a second mistake in the *Hazelwood* decision when it ignored the written policies established by both the school and the school district. These policies "created a designated public forum for the expression of Journalism II students' opinions on a wide variety of subjects."[31] Jeffrey Smith argued that "even if the public forum doctrine could have been applied meaningfully in *Hazelwood*, school authorities had demonstrated by

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[27] *Id.* at 726.
[28] *Id.* at 727.
[29] Robert P. Knight, *High school journalism in the post-Hazelwood era*, JOURNALISM EDUCATOR, Summer 1988, at 43. *See also* Charles L. Klotzer, *There. (freedom of expression for high school newspaper)*, ST. LOUIS JOURNALISM REVIEW, Dec-Jan 1997, at 4.
[30] Smith, *supra* note 22, at 846.

both policy and practice that *Spectrum* was a limited public forum for expressive activity."[32] Thus, the Court should not have been able to declare the paper a nonpublic forum.

The SPLC advises schools to create a written policy protecting the right of student journalists to make their own content decisions. This policy should stipulate who controls the content of the publication, how the publication is distributed, and what types of speech are protected. It should include a statement prohibiting prior review and should protect the school from liability. The policy should be developed with journalism advisers and must be distributed to all students each school year.[33]

A national survey of high school principals and newspaper advisers conducted in 1985 revealed the necessity of such policies.[34] Nearly all principals (97 percent) and advisers (89 percent) agreed that newspaper advisers should review all copy before it is printed. More than two-thirds of the principals believed that administrators should have the right to prohibit publication of articles they think harmful, even though such articles might not be legally libelous, obscene, or disruptive. Sixty percent of principals agreed that it is more important for the school to function smoothly than for the student newspaper to be free from administrative censorship. One quarter of the principals did not believe that reading copy before publication is censorship.[35]

Abrams *et al* recommended that prior restraints, if they are to exist at all, should be "narrowly drawn" and specified in writing. All regulations must meet the following minimal requirements: 1) offer criteria and specific examples for students; 2) detail the criteria by which an administrator might reasonably predict "substantial disruption"; 3) define any key terms used;

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[31] *Id.* at 858.
[32] *Id.* at 857.
[33] SPLC, *supra* note 19.
[34] J. William Click & Lillian Lodge Kopenhaver, *Principals favor discipline more than a free press*, JOURNALISM EDUCATOR, 1988, at 49.
[35] *Id.*

4) be published in an official school publication circulated to students; 5) specify who approves material; 6) give students the right to a prompt hearing to defend the publication; and 7) limit administrators' decision-making time.[36]

What Types of Speech Are Protected and Prohibited?

The SPLC's *Model Guidelines for the Student Press* recommend that written policy protect the following types of speech: controversial topics, material related to sexual issues, occasional use of vulgar words, criticism regarding the school or school officials (in reference to their jobs), advocacy of illegal conduct that cannot be proven to cause "imminent unlawful action," material by non-students, endorsement of candidates for office, and commercial speech.[37] It also states that the following types of expression are not protected: material that is "obscene as to minors," libelous material, and material that will cause "a material and substantial disruption of school activities."[38] These guidelines refer publications back to the *Tinker* standard for censorship and avoid the "reasonableness" standard set by *Hazelwood*.[39]

Justice William Brennan, in his *Hazelwood* dissent, said that schools' control over the content of school-sponsored publications should be limited. However, he agreed with the majority opinion that an educator may constitutionally censor material that is "ungrammatical, poorly written, inadequately researched, biased or prejudiced."[40]

Through the results of their survey, Professors William Click and Lillian Kopenhaver were alarmed by the number of administrators who wanted to limit student speech beyond the

[36] Abrams, *supra* note 2, at 729.
[37] Student Press Law Center (SPLC), *Model Guidelines for the Student Press*, *at* http://splc.org.
[38] *Id.*
[39] Salomone, *supra* note 21.
[40] *Hazelwood*, 484 U.S. at 283.

boundaries suggested by the SPLC. At least 20 percent of principals said articles critical of the school board, local politicians, teachers, or administrators should never be published.[41]

Scholars have argued that there was no evidence in the *Hazelwood* case that the *Spectrum* articles would have caused a disruption or invaded students' privacy. Instead, the case involved "viewpoint suppression."[42] If education were truly suffering under the *Tinker* standard, then "common sense would indicate that high schools not imposing prior restraint would be in chaos," which is, of course, not true.[43]

What Is the Potential Role of State Legislation?

After identifying problems regarding the protection of student journalism, scholars have suggested that state legislation can play an important role in extending First Amendment rights to student publications. The SPLC offers model legislation on its Web site that contains many of the points set out in its model guidelines.[44] According to scholars, state statutes "will offer the best hope for the expansion of student press rights in the years ahead . . . Such legislative enactments would go a long way toward ameliorating the problems created by *Kuhlmeier* and the resulting loss of free speech in the pluralistic society of the American high school."[45]

Journalism professor Bruce Plopper proposed a synthesis model for passing state student press legislation after studying the efforts of several states, both successful and unsuccessful. Based on his research, he recommended that, in order to pass, legislation should "emphasize fairness and responsibility as an end goal for student journalists, while not excluding prior

[41] Click, *supra* note 34, at 49.
[42] Abrams, *supra* note 2 at 725. *See also* note 22.
[43] *Id.*
[44] *Available at* http://splc.org.
[45] Abrams, *supra* note 2.

review of student publications. It is also beneficial to minimize the role of editorial self-censorship by requiring written publications guidelines."[46]

Professors Mark Paxton and Tom Dickson conducted a national study of high school newspaper advisors to determine whether the amount of press freedom at public high schools differs in states with student press laws and states without such laws. The results showed that, regardless of the state in which they live, advisers were "remarkably similar in their attitudes about scholastic press freedom and the way they exercise what they see as their duty in overseeing the newspaper."[47] Advisers also appeared to agree about the amount of self-censorship and the amount of controversy in the newspaper. Principals in press law states seemed "more likely to leave the newspaper alone" than in non-press law states.[48] The authors of the study suggested that the similarities among advisers' self-reported actions should help to refute arguments that press laws "will open the door to objectionable newspaper contents."[49]

Although there is general agreement that state legislation is a step in the right direction toward establishing clear policies protecting student publications as public fora, scholars have not analyzed the existing six statutes to see how effectively they address the issues set forth in the literature. This paper will examine the statutes in light of those issues.

Research Questions and Methodology

This paper will address the following research questions:

1. Do existing student press freedom statutes address the public forum doctrine? If so, how?

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[46] Bruce L. Plopper, *A Synthesis Model for Passing State Student Press Legislation*, JOURNALISM & MASS COMMUNICATION EDUCATOR, Spring 1996, at 64.
[47] Mark Paxton and Tom Dickson, *State Free Expression Laws and Scholastic Press Censorship*, JOURNALISM & MASS COMMUNICATION EDUCATOR, Summer 2000, at 57.
[48] *Id.* at 57.
[49] *Id.* at 58.

2. Do existing student press freedom statutes require written policies? If so, how are they formed and what information is contained in those policies?
3. What types of speech are protected and prohibited by existing student press freedom statutes?

This paper will use traditional legal research methods, analyzing the Arkansas, California, Colorado, Iowa, Kansas, and Massachusetts statutes, the two reported cases involving the California statute, the two reported cases involving the Massachusetts statute, and a study regarding the implementation of the Arkansas statutes. No cases have been reported involving the other statutes.

Analysis of the Statutes

Many similarities exist among the statutes. All six make some mention of students' right to free expression, specify some element or elements to be included in local policies, and identify certain types of unprotected speech. None of the statutes addresses all of the student press law problems and recommendations identified by the SPLC and discussed in the literature review.

Are student publications designated as public fora?

Of the six statutes, only the Colorado law specifically deals with the public forum doctrine: "If a publication written substantially by students is made generally available throughout a public school, it shall be a public forum for students of such school."[50] None of the other statutes uses the public forum terminology. Instead they make general statements regarding rights of expression in school publications that could be interpreted by individual schools as a public forum designation.

[50] COLO. REV. STAT. §22-1-120 (1990).

The Iowa statute provides that "students of the public schools have the right to exercise freedom of speech, including the right of expression in official school publications."[51] The Arkansas, California, and Massachusetts statutes contain similar wording.[52] The Kansas statute presents a comparable guideline with the phrase "the liberty of the press in student publications shall be protected."[53] All statutes except for Kansas and Massachusetts specify that such freedoms include school-sponsored publications.

The fact that only Colorado designates its publications as public fora could be disturbing in light of the *Hazelwood* decision regarding non-public forum publications. However, the other statutes do lay the groundwork for protecting student expression, allowing individual school districts to label newspapers as public fora in their own written policies if they choose to do so. Unfortunately, without such designations, school publications will have no firm legal protection.

Are written policies required and what must they include?

Four of the six statutes require written policy for student publications, although they vary slightly on who is responsible for writing the policy and what must be detailed in the policy. Elements specified for publications policies include distribution of the publication and the policy, duties of student editors and advisers, school officials' right to exercise prior restraint, liability of the school for student expression, and definitions of key terms.

The Arkansas Student Publications Act requires each school board to create a "written student publications policy developed in conjunction with the student publication advisers and

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[51] IOWA CODE §280.22 (1989).
[52] ARK. CODE ANN. §6-19-1201 *et seq.* (1995); CAL EDUC. CODE §48907 (1983) gives "the right to exercise freedom of speech and of the press"; MASS. ANN. LAWS ch. 7, §82 (1974, amended 1988) states "the right of students to freedom of expression in the public schools of the commonwealth shall not be abridged."
[53] KAN. STAT. ANN. §72-1506 (1992).

the appropriate school administrators."[54] The California, Colorado, and Iowa statutes assign the job of writing student press policy to the governing board of each school district or the board of directors of a public school. Only the Kansas and Massachusetts statutes do not call for a written policy, although both statutes specify some information that could be included in such a policy.

Distribution of the publication is not directly addressed in most of the statutes. Arkansas stipulates that the policy "shall include reasonable provisions for the time, place, and manner of distributing student publications."[55] Kansas states that "school employees may regulate the number, length, frequency, distribution, and format of student publications."[56] The other states simply require that the policy "include reasonable provisions for the time, place, and manner of conducting free expression within the school district's jurisdiction," which presumably could include distribution of the publication.[57] A study of school policies created after passage of the Arkansas Student Publications Act showed that, "in terms of policy content, the most striking omission in many policies was a clear designation of distribution guidelines for student publications," suggesting that school officials were reserving control of distribution as "a viable means of censorship."[58]

Only Colorado and Iowa indicate that written policy must include dissemination of the policy itself. Publications codes at public schools in Colorado "shall be distributed, posted, or otherwise made available to all students and teachers" at the start of every school year.[59] School boards in Iowa must make the code available to parents and students. No other statutes mention providing copies of the policy to anyone.

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[54] §6-18-1202.
[55] §6-18-1202 (1995).
[56] §72-1506 (1992).
[57] COLO. REV. STAT. §22-1-120 (1990). *See also* CAL EDUC. CODE §48907 (1983) *and* IOWA CODE §280.22 (1989).
[58] Bruce L. Plopper & William D. Downs Jr., *Arkansas Student Publications Act: Implementation and Effects*, JOURNALISM & MASS COMMUNICATION EDUCATOR, Spring 1998, at 82.

Most of the statutes define the duties assigned to student editors and to journalism advisers. For example, the Iowa law requires that "student editors of official school publications shall assign and edit the news, editorial, and feature content of their publications."[60] Advisers are generally responsible for supervision of the production of publications and for "maintaining professional standards of English and journalism."[61] Colorado and Kansas advisers are also charged with "teaching and encouraging free and responsible expression of material."[62] The Kansas statute goes one step further by declaring that an adviser cannot be "terminated from employment, transferred, or relieved of duties . . . for refusal to abridge or infringe upon the right to freedom of expression conferred by this act."[63] The Arkansas study demonstrated its "most encouraging finding" in the fact that 40 percent of advisers reported policies placing control of student publications "in the hands of either students or advisers, or a mix of students, advisers, and principals."[64]

This element in the Massachusetts statute was discussed in 1992 when student yearbook editors at Lexington High School refused to print an ad that encouraged abstinence.[65] School officials, acting according to the student press statute, had "chosen to grant editorial autonomy to these high school students."[66] On appeal, the court said that students should not be considered "state actors" because decisions made by student editors are not attributable to the school. Therefore, the refusal of the ad was legal. After the Court of Appeals' unanimous ruling that

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[59] §22-1-120 (1990).
[60] §280.22 (1989). *See also* CAL EDUC. CODE §48907 (1983), COLO. REV. STAT. §22-1-120 (1990) *and* KAN. STAT. ANN. §72-1506 (1992).
[61] CAL EDUC. CODE §48907 (1983). *See also* COLO. REV. STAT. §22-1-120 (1990), IOWA CODE §280.22 (1989), *and* KAN. STAT. ANN. §72-1506 (1992).
[62] KAN. STAT. ANN. §72-1506 (1992). *See also* COLO. REV. STAT. §22-1-120 (1990).
[63] §72-1506 (1992).
[64] Plopper, *supra* note 57, at 83.
[65] Yeo v. Town of Lexington, 131 F. 3d 241 (1st Cir. 1997). The students refused the ad because it was against their policy to run advertising of a controversial nature.
[66] *Id.* at 249.

because student editors made all advertising decisions there was no First Amendment violation, the U.S. Supreme Court refused to hear the case.[67]

The same four states that define student and adviser roles also make policy statements regarding prior restraint. California, Colorado, and Iowa declare that prior restraint is not allowed, except in instances of unprotected speech (such as language that is obscene or libelous, which can be censored). The California code adds that "school officials shall have the burden of showing justification without undue delay prior to any limitation of student expression."[68] The Kansas statute maintains that "material shall not be suppressed solely because it involves political or controversial subject matter," but specifies that reviewing material to ensure "high standards of English and journalism" is not prior restraint.[69]

Liability is an issue covered by most of the statutes. Colorado, Iowa, Kansas, and Massachusetts all protect schools from liability for student expression by stating that "no expression made by students in the exercise of such rights shall be deemed to be an expression of school policy."[70]

Definitions of key terms are provided in four of the statutes. California and Iowa define "official school publications" as "material produced by students in the journalism, newspaper, yearbook, or writing classes and distributed to the student body either free or for a fee."[71] Colorado defines "publications adviser" as "a person whose duties include the supervision of school-sponsored student publications."[72] Massachusetts defines "student" as "any person attending a public secondary school in the commonwealth" and "school official" as "any

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[67] Yeo v. Town of Lexington, 524 U.S. 904 (1998).
[68] §48907 (1983).
[69] §72-1506 (1992).
[70] MASS. ANN. LAWS ch. 7, §82 (1974, amended 1988). *See also* COLO. REV. STAT. §22-1-120 (1990), IOWA CODE §280.22 (1989), *and* KAN. STAT. ANN. §72-1506 (1992).
[71] §48907 (1983) *and* §280.22 (1989).

member or employee of the local school committee."[73] These terms are significant for clarifying the application of these statutes. However, if the terms are defined too narrowly, they can exclude certain people and publications from protection.

One problem with legislation requiring schools to create written publications policies is that those policies may or may not actually be developed. One year after the Arkansas Student Publications Act was passed, a study of the implementation and effects of the Act found that nearly half of advisers were not aware that they should be involved in the creation of publications policy. Additionally, more than one-fourth of advisers were not aware that school districts were required to have a written policy, about ten percent said their schools had no written policy, and nearly 20 percent did not know if such policies existed.[74] In their report, Professors Bruce Plopper and William Downs suggested that "it is evident that on occasion, the letter of the law clearly has been violated."[75] Thus, it would appear that simply legislating that such a policy should exist does not necessarily result in the creation of an actual policy.

What types of speech are protected or unprotected?

None of the statutes details categories of speech that are protected in student publications, except in references to preventing prior restraint. For example, the Kansas statute specifies that "material shall not be suppressed solely because it involved political or controversial subject matter."[76] However, all six designate unprotected speech that is prohibited and subject to prior restraint by school officials, including anything that would "cause substantial disruption of the

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[72] §22-1-120 (1990).
[73] Ch. 7, §82 (1974, amended 1988).
[74] Plopper, *supra* note 57, at 82.
[75] *Id.* at 82.
[76] §72-1506 (1992).

orderly operation of the school."[77] All of the statutes, with the exception of Massachusetts, forbid expression that is obscene, libelous, or slanderous, as well as expression that "so incites students as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations."[78] Both Arkansas and Colorado prohibit expression that constitutes an invasion of privacy, and Colorado adds that expression that is defamatory or "is false as to any person who is not a public figure or involved in a matter of public concern" is also unauthorized.[79]

In their study, Plopper and Downs found that many Arkansas policies "did not contain required statutory language pertaining to content prohibited in student publications."[80] The authors found this omission unusual, as there is general agreement that libelous, obscene, or disruptive language would not be protected. They suggested this oversight could be due to the fact that school officials charged with creating policies did not take the law seriously.

Three cases have addressed language prohibited by the statutes. In 1984, David Leeb, the student editor of a California public school newspaper, brought suit against Principal James DeLong after DeLong prohibited distribution of the April Fool's Day spoof edition of the paper.[81] DeLong banned the paper because he felt it contained defamatory expression that would damage students' reputations and invade their privacy. Leeb claimed that the student press freedom statute violated the free press provision of the California Constitution. In deciding the case, the Court ultimately asked if "a statute which accords broad free press rights to public high

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[77] CAL EDUC. CODE §48907 (1983). *See also* ARK. CODE ANN. §6-19-1201 *et seq.* (1995). COLO. REV. STAT. §22-1-120 (1990), IOWA CODE §280.22 (1989), KAN. STAT. ANN. §72-1506 (1992), *and* MASS. ANN. LAWS ch. 7, §82 (1974, amended 1988). The language in this item is based on the *Tinker* decision.

[78] CAL EDUC. CODE §48907 (1983). *See also* ARK. CODE ANN. §6-19-1201 *et seq.* (1995). COLO. REV. STAT. §22-1-120 (1990), IOWA CODE §280.22 (1989), *and* KAN. STAT. ANN. §72-1506 (1992).

[79] §22-1-120 (1990). The language in this item is based on language in libel laws applicable to the professional media.

[80] Plopper. *Supra* note 57, at 82.

[81] David Leeb et al. v. James DeLong et al., 198 Cal. App. 3d 47 (1988).

school students is nonetheless repugnant to the Constitution of California because it also allows school officials a very limited right to censor official high school publications?"[82] The Court answered "no," and upheld the principal's decision, stating that "schools do have a legitimate pedagogical basis for fostering ethics in journalism" and can censor expression where "viable libel action could ensue."[83]

However, the Court did state that "defamatory material that is not actionable because it is privileged or deals with a public figure without malice may not be censored." A low grade on the assignment might be a more acceptable form of punishment than prior restraint in such cases.[84] The Court also acknowledged Leeb's complaint that the district's regulation contains no procedural guidelines for administrative review and advised the district to revise its policy accordingly. Although the case was decided against the student editor, the Court essentially upheld the California statute governing student publications.

In contrast, the state Court of Appeal in California found that the student press statute did not protect the use of profanity in a student-produced film.[85] During the 1991-1992 school year, four students at Valley High School wrote and produced a film in connection with a film arts class. The school principal and the district superintendent found the profanity in the film offensive and directed the class instructor to have the students remove the profanity and reference to sexual activity from the script. The Court of Appeal held that "school authorities

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[82] *Id.* at 53.
[83] *Id.* at 61.
[84] *Id.* at 62.
[85] Lillian Lopez et al. v. Tulare Joint Union High School District Board of Trustees et al., 34 Cal. App. 4th 1302 (1995). The film, intended to address the problems of teenage pregnancy, depicted the life of teenage parents and their baby. The students believed the profanity in the film made the characters more realistic and convincing.

may restrain such expression because it violates the 'professional standards of English and journalism' provision of section 48907."[86]

The Massachusetts statute was applied again in 1996 when Jeffrey and Jonathon Pyle, both former South Hadley High School students, sued the local school committee, claiming the committee's dress code that punished them for wearing t-shirts school officials considered offensive violated their statutory free expression right.[87] The Supreme Judicial Court of Massachusetts ruled in favor of the Pyles, arguing that the school could have punished the Pyles only if their actions caused a disruption at the school. "The statute is unambiguous and must be construed as written," said the Court in the majority opinion. "The language is mandatory . . . There is no room in the statute to construe an exception for arguably vulgar, lewd, or offensive language absent a showing of disruption within the school."[88]

Discussion and Conclusions

While none of the statutes meets the model standard set by the SPLC, all six address in some way the significant issues identified by scholars as problems in the student press. Only one statute identifies student publications as public fora, but the other five use different language to suggest a similar status. All but one of the statutes require written policies for student publications, specifying such details as distribution of the publications and the policies, duties of student editors and journalism advisers, officials' right to exercise prior restraint, the schools' liability for student expression, and definitions of key terms used in the statute. None of the statutes protects specific categories of speech, but all prohibit certain types of unacceptable expression. Courts in California and Massachusetts have upheld the constitutionality of their

[86] *Id.* at 1306.

student publication statutes. Because of the stated protection of controversial speech and the clear shield given to advisers, the Kansas statue may be the most useful for securing student press freedom.

If North Carolina had had a similar statute in 1997, the West Charlotte High School journalism students would likely have had a clearer understanding of their legal rights regarding the publication of stories about the administration. Also, the principal might have known what authority he was entitled to exercise over the content or distribution of the newspaper. Likewise, the adviser's job and tenure opportunities might not have been threatened.

But sadly, such legislation has an 83 percent failure rate in states where efforts have been made to pass student press legislation since 1988.[89] Without the help of professional teacher and journalism organizations, professors of journalism and mass communication, lobbyists, community members, and parents, student journalists are not likely to be able to change the current situation. These groups must work together to enact legislation that establishes student publications as designated public fora, requires written policies that prohibit prior review and give students editorial authority, protects advisers who refuse to abridge students' rights to free expression, and guards against censorship of controversial speech. Once such legislation is passed, it is imperative that those same groups of people generate publicity for the statutes and serve as watchdogs to be certain the statutes are enforced.

According to journalism professor Bruce Plopper, "the goal of student publications acts should be to strengthen high school journalism, for as several authors have shown, strong high

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[87] Jeffrey J. Pyle & another v. School committee of South Hadley & Others, 423 Mass. 283 (1996).
[88] *Id.* at 286.
[89] Plopper, *supra* note 45, at 61. States that have unsuccessfully attempted to pass student publications acts include Nebraska, Michigan, Alabama, Connecticut, Illinois, Arizona, and Oregon.

school journalism programs have far-reaching effects."[90] Student journalists learn valuable skills that will assist them throughout their education and beyond, regardless of their future career plans. Ultimately, some of these students will go on to be professional journalists, and media industries will benefit from students' early experiences. Student publications acts that effectively support scholastic media are not only helpful for students, they are vital for the development of future leaders and journalists.

[90] *Id.* at 66.

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