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# Student Newspapers at Public Colleges and Universities: Lessons from the United States

TERRY L HAPNEY AND CHARLES J RUSSO\*

## Introduction

An on-campus activity of enduring interest in the United States<sup>1</sup> that is present elsewhere in the English-speaking world,<sup>2</sup> but that has yet to yield reported litigation or academic writing in Great Britain,<sup>3</sup> concerns free speech issues associated with student newspapers in higher education. Student newspapers have long occupied a significant role in their dual functions of informing

members of their campus communities and as preparation grounds for future journalists.<sup>4</sup>

Against this background, the remainder of this article is divided into three major sections. The first part examines the nature of student newspapers and related issues while the second examines key litigation involving these publications in public institutions; these parts of the article focus on state-funded institutions in the United States insofar as the protections afforded by the First Amendment with regard to freedom of speech and expression are inapplicable in non-public, or private, institutions where most rights are contractual in nature. The final portion of the article offers suggestions particularly for readers who work in and with tertiary institutions involving student journalists. The article rounds out with a brief conclusion.

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<sup>1</sup> The first student newspaper in American higher education, *The Dartmouth* was created at Dartmouth College in 1799. According to its website, *The Dartmouth* is 'an independent, nonprofit corporation chartered in the state of New Hampshire. All editorial and business decisions are made by the students without any interference from the College': <http://thedartmouth.com/about>. By the late 1800s, student newspapers made such an impact that college journalism was labeled as a particularly American institution. For apparently the earliest book on the topic, see JF McClure, *History of American College Journalism* (McClure, 1883).

<sup>2</sup> Student newspapers are popular, for example, in Australia. See, eg *On Dit: University of Adelaide Student Newspaper*, <http://www.sensational-adelaide.com/forum/viewtopic.php?f=4&t=1560>; *Farrago*, founded at Melbourne University in 1925, <http://union.unimelb.edu.au/farrago>. See also Australia's *Student Media Directory*, <http://studentmedia.com.au/for> comprehensive information about student newspapers in Australia.

<sup>3</sup> For a discussion of related issues involving speech codes rather than student newspapers, see GR Evans, 'Campus speech codes required by the Education (No 2) Act 1986: a satisfactory basis for addressing today's needs,' (2010) Ed Law 95.

## Nature of Student Newspapers

### *The First Amendment*

According to the relevant part of the First Amendment to the United States Constitution, 'Congress shall make no law . . . abridging the freedom of speech or of the press ...'<sup>5</sup> It is by

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<sup>4</sup> In 1869, under the direction of the former Confederate General, Robert E Lee, President of Washington College, now Washington & Lee University, in Lexington, Virginia, introduced the forerunner of professional preparation for journalists. In 1878, the University of Missouri at Columbia offered journalism classes; the University of Pennsylvania's Wharton School of Business followed suit in 1893. Robert W Desmond, *Professional Training of Journalists* (UNESCO, 1949); Albert A Sutton, *Education for journalism in the United States from its beginning to 1940* (Northwestern University, 1945).

<sup>5</sup> US Const amend I. Although a discussion of its application is beyond the scope of this paper, freedom of expression in Great Britain is covered by Art 10 of the European Convention for the Protection of Human Rights

design that freedom of speech is among the first of the rights enumerated in the Bill of Rights. Free speech is perhaps the most cherished right enjoyed by Americans. Thomas Jefferson's words ring as true today as when he penned them in 1786: 'Our liberty depends on the freedom of the press, and that cannot be limited without being lost.'<sup>6</sup>

Jefferson summed up his opinion of the press-government relationship: 'Were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate to prefer the latter.'<sup>7</sup> Under the First Amendment Americans have news media outlets that are largely unfettered from governmental interference: '[t]here is nothing more important to the journalism business than freedom of the press – the right guaranteed us by the writers of the Constitution at this country's founding.'<sup>8</sup>

As a measure of its historical significance in the United States, other than the press no private organisation 'is specifically mentioned in the Bill of Rights. This places the press and its problems in a special file.'<sup>9</sup> The same 'special file' could apply to the approximately 1,600 college and university student newspapers in the United States,<sup>10</sup> all of which seek the same freedom of press and expression rights as shared by their professional counterparts. Even so, student press involves an inherent tension as campus journalists yearn to act as watchdogs reporting on people, events, and programs at their schools free from administrative control but may lose some of their independence because they depend on institutional funding to operate.

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and Fundamental Freedoms 1950 which was brought into domestic law the Human Rights Act 1998.

<sup>6</sup> Harold L Ickes, *Freedom of the Press Today A Clinical Examination by 28 Specialists* (The Vanguard Press, 1941), at p 65.

<sup>7</sup> *Ibid* at pp 103–104.

<sup>8</sup> Stephen J Humes, *How to Run a Student Newspaper* (Humes Communications, 1989), at p 102.

<sup>9</sup> Ickes, *op cit* n 6, at p 3.

<sup>10</sup> *Ibid*.

### *Conflicts Between Administrators and Student Journalists*

As noted, student newspapers play an important role as they report news, publish the opinions and discussions of members of campus communities, and may print advertisements of interest to students, faculty members, and others on their campuses.<sup>11</sup> Budding journalists can improve their skills if they can enjoy the freedom needed to work as independent professionals but controversies arise when officials who do not approve of their reporting attempt to limit student expression.<sup>12</sup>

The litigation reveals administrators in higher education are of utmost importance in the success and freedom of student newspapers on the campuses of American public institutions of higher learning. In most instances conflicts arise when administrators limit student expression directly by attempting to impose controls such as demanding prior review or more subtly by limiting funding for publications, issues that are discussed in more detail below. In addition, when student papers are stolen, administrators can step in to punish perpetrators.<sup>13</sup>

Disputes arise over censorship when campus officials treat faculty advisors as vehicles by which to restrain what student journalists can publish or to order them to delete materials deemed unacceptable.<sup>14</sup> While campus administrators lack the authority as publishers of professional newspapers who can control, or censor, the content of the publications they manage,<sup>15</sup> nothing prevents

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<sup>11</sup> JW Click, *Governing College Student Publications* (National Council of College Publications Advisers, 1980).

<sup>12</sup> Louis E Ingelhart, *Student Publications: Legalities, Governance, and Operation* (Iowa State University Press, 1993).

<sup>13</sup> John K Wilson, 'Censoring the Student Press' 2005, [http://www.ilaup.org/news/illinoisacademe/2004\\_fall/censoring\\_the\\_student\\_press.doc](http://www.ilaup.org/news/illinoisacademe/2004_fall/censoring_the_student_press.doc).

<sup>14</sup> See *Antonelli v Hammond*, 308 F Supp 1329, 1332 (D Mass 1970) (enjoining the president of a public college from creating a faculty advisory committee to evaluate what could be published in the student newspaper as whether it was 'responsible freedom of press' or obscene).

<sup>15</sup> *Bazaar v Fortune*, 476 F 2d 570 (5th Cir 1973), cert denied, 416 US 995 (1974) (establishing guidelines

them from imprinting disclaimers on publications to ensure that readers understand that they do not endorse or agree with the contents.<sup>16</sup>

Courts have forbidden officials from limiting the content of student newspapers on campuses whether, for example, publishing material deemed objectionable<sup>17</sup> or controversial<sup>18</sup> or denying funding for content they view as offensive,<sup>19</sup> generally agreeing that 'college students may speak, write, and publish freely.'<sup>20</sup> To this end, the judiciary has sought to allow student newspapers to function in climates of editorial independence wherein campus journalists, in a manner similar to editors of privately-owned newspapers, are free to operate as they see fit.<sup>21</sup> Still, as documented throughout, attempts by administrators to control student media continue to generate litigation.

### *Role of Student Newspapers*

The role of the student press is fourfold.<sup>22</sup> First, it chronicles life on campuses by informing readers about events ranging from national, international, and local news to student protests, athletic events, and the like. Secondly, the press provides a forum in which students, faculty members, administrators, staff members, and others can debate issues of concern. Thirdly, it acts as a watchdog to uncover problems on campus such as crime and cafeteria health code violations. Fourth, student media are a training ground for a new generation of journalists.

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regarding limits on a campus literary magazine, declaring that even when institutions provide funding, faculty advising, and facilities, officials may not censor content). For a definition of censor, see *Black's Law Dictionary* (8th edn, 2006), at p 92: 'To officially inspect . . . and delete material considered offensive.'

<sup>16</sup> *Ibid*, Bazaar.

<sup>17</sup> *Mississippi Gay Alliance v Goudelock*, 536 F 2d 1073 (5th Cir 1976).

<sup>18</sup> *Trujillo v Love*, 322 F Supp 1266 (D Colo 1971).

<sup>19</sup> *Stanley v Magrath*, 719 F 2d 279 (8th Cir 1983).

<sup>20</sup> *Milliner v Turner*, 436 So 2d 1300 (La Ct App 1983).

<sup>21</sup> See, eg *Sinn v Daily Nebraskan*, 829 F 2d 662 (8th Cir 1987).

<sup>22</sup> Rachele Kanigel, *The Student Newspaper Survival Guide* (Blackwell Publishing, 2006).

News sources, often institutional administrators, sometimes rebel at the intrusion of student journalists. This, in turn, causes tension mainly based on a lack of understanding of the nature of student newspapers as journalistic enterprises. Journalism is defined as gathering information from sources, many of whom are reluctant to disclose what they know; prioritising information after interviews, based on readers' right to know; composing stories; and reporting stories effectively.<sup>23</sup> The key to well-functioning student newspapers is the First Amendment because it can facilitate operations in open climates; of course, some papers operate in the opposite environment.

Many individuals on campuses, including some administrators and journalists who do not always act responsibly in handling their freedom,<sup>24</sup> apparently do not fully understand the role of student newspapers or the tenets of freedom of the press. While colleges and universities are institutions of higher learning, when occasional scandals occur such as questionable research, the misuse of state funding, and the hiring of sexual predators,<sup>25</sup> the only organisations on campuses that may be able to investigate and report on such matters are student newspapers. At these times, though, tensions arise, often leading to litigation, between administrators who seek to limit freedom of the press and students who wish to exercise their responsibility as a free press. The next major section of this article examines examples of the sometimes adversarial relationship between administrators and student journalists that have led to litigation.

The tension between institutional officials and student journalists arises in part because administrators are different from owners of commercial presses insofar as they neither operate campus newspapers for profits nor as sources of revenue and ordinarily focus on goals other than those of the newspapers. Additionally,

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<sup>23</sup> Melvin Mencher, *The Student Newspaper* (American Council on Education, 1970).

<sup>24</sup> 'Responding to an April Fools' Newspaper Issue' *Student Affairs Leader* 3/15/2006, Vol 34 Issue 6, at pp 5-6.

<sup>25</sup> Kanigel, op cit n 22.

administrators are governmental wardens, a status which brings the traditional adversarial nature of the relationship between government and the press into question.

Throughout the 1950s and 1960s, freedom of press for American student newspapers was not a priority. Administrators, as governmental representatives on public campuses, were viewed as owners who used their authority to discipline and regulate school environments to justify censorship. Moreover, around 1955, a professional newspaper editor viewed administrators as publishers with final say on all aspects of student newspapers on public campuses.<sup>26</sup> In the late 1960s, amid massive social change in the United States, Great Britain, and the world, American college journalists and their legal counsel began arguing that the judiciary should apply the First Amendment to protect their newspapers from administrative intervention. Since then the courts generally agreed that First Amendment rights of student publications on public campuses are as strong as those of other journalists because administrators are representatives of the state who must abide by the First Amendment.

### *Governance Models*

Most student newspapers fit into one of two broad categories as either laboratory or extracurricular publications. Laboratory papers are primarily teaching tools for publishing stories from in-class writing assignments in which faculty and staff members influence, both directly and indirectly, the content of campus newspapers. In extracurricular papers, which are outside of academic programs, students are responsible for content. This classification is further subdivided into four models: authoritarian, independence, student activity, and advisor.<sup>27</sup> At one end of the spectrum, in the authoritarian model, campus officials act as 'publisher-owners,' retaining censorship authority. Although still present on some campuses, this

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<sup>26</sup> John D Reed, 'Toward a Theory of the First Amendment for the College Press' (PhD diss, Southern Illinois University at Carbondale, 1985).

<sup>27</sup> Ibid.

model has largely 'been discredited . . . by the college press cases.'<sup>28</sup> In the independence model, at the other end of the spectrum, newspaper organisations are incorporated apart from their schools as students and/or professionals control editorial content and business activities.

The student activity model provides student journalists with decision-making authority as staff writers and editors report to their student government associations or publications boards.<sup>29</sup> Under the advisor model, universities own the publications, but officials delegate publishing rights to advisors who provide advice to student editors and writers but do not use prior review.

### **Litigation**

#### *Nature of the Forum*

A preliminary matter in reviewing key litigation involving student newspapers is the kind of fora that they create, whether in printed, hard copy versions, or in virtual online and electronic formats. If anything, the online versions of newspapers provide more independence for student journalists insofar as third-party organisations can serve as hosts of content at no cost, thereby placing the issue of delaying funding, discussed in more detail below, should campus officials wish to engage in some form of prior review out of the reach of administrators. Even so, to date, in First Amendment speech cases the Supreme Court has identified three different types of fora,<sup>30</sup> none of which has involved electronic formats.

Under the first category, governmental power to regulate expression is most restricted in traditional public fora such as parks, streets, and sidewalks. The government may 'exclude a speaker from a traditional public forum' only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that

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<sup>28</sup> Ibid, at p 11.

<sup>29</sup> Louis E Ingelhart, *Student Publications: Legalties, Governance, and Operation* (Iowa State University Press, 1993).

<sup>30</sup> For discussions of forum analysis, see *Perry Educ Ass'n v Perry Local Educators' Ass'n*, 460 US 37 (1983); *Hazelwood Sch Dist v Kuhlmeier*, 484 US 260 (1988).

interest.<sup>31</sup> Narrowly tailored content-neutral regulations as to time, place, and manner of expression can be enforced, but only if the governmental interest is significant and alternative channels of communication are available.

The same standard used in public fora applies to 'limited' or 'designated public fora,' public property that the state opened for public use as places for expressive activity.<sup>32</sup> The government can create such fora either by express policies or by significant practice. In limited public fora, First Amendment protections provided to traditional public fora apply, but only to entities of a character similar to those the government admits to the fora. The government is not indefinitely bound to retain the open nature of limited fora for college and university newspapers.

A non-public forum, the third category of public property, such as a classroom, 'is not by tradition or designation a forum for public communication.'<sup>33</sup> As such, non-public fora are subject to less rigorous scrutiny than open or designated public fora. In these settings, the government can enforce regulations to reserve fora for their intended purposes, communicative or otherwise, but they 'must be "reasonable in light of the purpose served by the forum".'<sup>34</sup>

### Early Cases

Perhaps it is not surprising that student free speech in higher education followed on the heels of the Supreme Court's landmark decision in *Tinker v Des Moines Independent Community School District*.<sup>35</sup>

In *Tinker*, the court ruled that educators could not limit non-disruptive student speech in the form of black armbands protesting American activity in Vietnam,<sup>36</sup> opening the door for the application of the First Amendment in other educational settings whether elementary, secondary, or higher education.

*Healy v James*<sup>37</sup> illustrates how administrators cannot infringe on the First Amendment rights of students in higher education by denying recognition to groups based on the possibility that their members would engage in disruptive behaviour and violence. After a college president refused to grant official recognition to a student group based on such a fear, the Supreme Court explained that by not recognising the group administrators engaged in prior restraint to stifle the group's First Amendment rights. Pointing out that classrooms and campuses constitute marketplaces of ideas, not unlike student newspapers, the court concluded that the First Amendment protections apply the same on campuses as in larger communities.

A year later, *Papish v Board of Curators of the University of Missouri*,<sup>38</sup> the only Supreme Court case on the student press, examined whether university officials could expel a graduate student for distributing a newspaper on campus because they disapproved of a political cartoon on its pages. Interestingly, the newspaper had been sold on campus for more than 4 years with approval from university officials before the issue with the offensive material appeared. The Supreme Court in *Papish*, in a brief unsigned opinion, held that officials had to reinstate the student and restore her academic credit. The court thought that university

<sup>31</sup> *Arkansas Educ Television Comm'n v Forbes*, 523 US 666, 677 (1998) (quoting *Cornelius v NAACP Legal Def & Educ Fund*, 473 US 788, 800 (1985)).

<sup>32</sup> *Arkansas Educ Television Comm'n v Forbes*, *ibid*.

<sup>33</sup> *Perry Educ Ass'n v Perry Local Educators' Ass'n*, 460 US 37, 46 (1983)

<sup>34</sup> See, eg *Good News Club v Milford Cent Sch*, 533 US 98, 106–107(2001), quoting *Cornelius v NAACP Legal Defense and Educ Fund*, 473 US 788, 806 (1985); *Rosenberger v Rector and Visitors of Univ of Va*, 515 US 819 (1995).

<sup>35</sup> 393 US 503 (1969). For a case from higher education involving a protest against American activity in Vietnam, see *Lee v Board of Regents of State Colleges*, 441 F 2d

1257 (7th Cir 1969) (affirming that university officials in Wisconsin could not prevent student editors from publishing an advertisement against the war because doing so would have violated the First Amendment).

<sup>36</sup> For two cases pre-dating *Healy*, see *Channing Club v Texas Tech Univ*, 317 F Supp 688, 689 (DC Tex 1970) (refusing to enjoin distribution of a campus newspaper on the basis that students 'have a constitutionally guaranteed right of freedom of expression which is protected against state infringements.')

<sup>37</sup> 408 US 169 (1972).

<sup>38</sup> 411 US 960 (1973).

officials could not dismiss the student for violating an institutional bylaw because the newspaper she distributed did not contain obscenities and that the propagation of ideas on a state university campus, regardless of their offensiveness, was protected First Amendment speech because it was not obscene. The court was convinced that officials violated the First Amendment in expelling the student because of the content of the newspaper rather than the time, place, or manner of its distribution on campus.

Additional litigation reveals that university officials have limited authority in attempting to discipline student journalists for not following their directives. Among the cases in which student journalists prevailed were disputes over whether a newspaper's use of grammar, spelling, and expression of language was unacceptable,<sup>39</sup> publishing a letter that was critical of the university's president,<sup>40</sup> attempting to expel students for printing news stories and editorials criticising state legislators and governors,<sup>41</sup> and endorsing a candidate for student government.<sup>42</sup> These later cases can also typically fit under the two broad headings of prior restraint-review and issues associated with funding for groups that may disagree from accepted campus orthodoxies.

### *Prior Restraint-Review*

Courts decided many cases in favour of students who challenged prior restraint or review by administrators. Among the other cases resolved in favor of student journalists were those preventing administrators from placing unreasonable restrictions on distributions of papers regardless of whether they were produced on or off of

campuses,<sup>43</sup> limiting advertisements solicited for publications,<sup>44</sup> preventing newspapers from reporting about campus crimes.<sup>45</sup>

Since *Hosty v Carter*<sup>46</sup> the only appellate case partially resolved in favor of a university administrator who sought to limit student expression, it is reviewed in greater detail. Acting in response to an article critical of a campus dean, the dean of students notified officials at the company that printed the campus newspaper that they should not print any issues that she had not reviewed and approved in advance even though it was a subsidised publication akin to what was described earlier as an extracurricular activity.

In response, the student journalists sued the dean and others alleging that she engaged in prior review in violation of the First Amendment. A federal trial court in Illinois rejected the dean's motion for qualified immunity because the paper was subsidised by activities fees and was published by an independent group of students, not as part of a class.<sup>47</sup> The trial court expressly refused to apply *Hazelwood School District v Kuhlmeier*<sup>48</sup> wherein the Supreme Court allowed educational officials to remove stories they deemed unacceptable in a high

<sup>39</sup> *Schiff v Williams*, 519 F 2d 257 (5th Cir 1975).

<sup>40</sup> *Thonen v Jenkins*, 517 F 2d 3 (4th Cir 1975).

<sup>41</sup> *Dickey v Alabama State Bd of Educ*, 273 F Supp 613 (MD Ala 1967).

<sup>42</sup> *Husain v Springer*, 494 F 3d 108 (2d Cir 2002) (deciding that officials at a public college had no First Amendment duty to ensure that the positions expressed by the student newspaper funded primarily through activity fees reflected a balance of viewpoints).

<sup>43</sup> *New Times v Arizona Bd of Regents*, 519 P 2d 169 (Ariz 1974) (invalidating a regulation obligating a publisher to fill out an application to receive permission to circulate its material on campus on the ground that it exceeded reasonable time, place, and manner restrictions permitted by the First Amendment); *Hays County Guardian v Supple*, 969 F 2d 111 (5th Cir 1992) (finding that regulations prohibiting the distribution of a newspaper on campus were unconstitutional because the university was a designated public forum for free student speech)

<sup>44</sup> *Lueth v St Clair County Community College*, 732 F Supp 1410 (ED Mich 1990); *Leeds v Meltz*, 85 F 3d 51 (2d Cir 1996); *Doe v New York Univ*, 786 NY S 2d 892 (NY Sup Ct 2004).

<sup>45</sup> *Doe*, *ibid*.

<sup>46</sup> *Hosty v Carter*, 412 F 3d 731 (7th Cir 2006), *cert denied*, 546 US 1169 (2006). For a review of *Hosty*, see Kerry Brian Melear, 'The First Amendment and Freedom of Press on the Public University Campus: An Analysis of *Hosty v Carter*' (2007) 216 *Educ L Rep* 293.

<sup>47</sup> *Hosty v Governors State Univ*, 174 F Supp 2d 782 (ND Ill 2001).

<sup>48</sup> 484 US 260 (1988). For a discussion of *Hazelwood* in higher education, see Louis M Benedict, 'The First

school paper that was part of a journalism class and for which students received academic credit.<sup>49</sup> The justices reasoned that ‘educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.’<sup>50</sup>

On appeal, the Seventh Circuit reversed in favour of the dean using the framework of *Hazelwood*, stating it applies to subsidised campus newspapers. The court observed that the newspaper operated as a designated or limited-purpose public forum beyond the control of institutional officials, conceding that expression in this type of forum is not subject to censorship when its sponsor deems speech unacceptable. While the court invalidated the dean’s action, it added that she was protected by qualified immunity absent evidence that she knew that her behaviour was unlawful. Accordingly, the court granted the dean’s motion for qualified immunity because the law in this area was unsettled and difficult to apply. Following *Hosty*, Illinois essentially abrogated its holding by enacting a statute providing student journalists at public colleges and universities with protection from administrative prior review or censorship.<sup>51</sup>

### Funding

Sometimes university administrators or student government groups try to influence campus newspapers through funding, arguing that providing subsidies affords them such control. In other cases,

administrators allocate funding to student government associations (SGA) that subsequently provide funding to student groups on public university campuses, including student newspapers. Some SGAs view their funding decision making as licenses to serve as publishers. Typically, funding does not permit administrators or SGAs to govern student newspapers or to limit their support for groups with which they disagree. This section focuses primarily on two Supreme Court cases that established the parameters for funding. These cases concern funding for groups that may differ from prevailing campus orthodoxies and individuals who wish to avoid paying fees to help underwrite publications and/or positions with which they disagree.

In *Rosenberger v Rector and Visitors of the University of Virginia*,<sup>52</sup> a student organisation that gained Contracted Independent Organisation status, meaning that although they operate on campus with funds from extracurricular student activities fees they are independent of the university and that its officials are not responsible for their actions, published a newspaper to promote its activities. However, when a committee of the university’s student council refused to pay a printer to cover costs for the publication, the students filed suit. The Supreme Court found that the student council engaged in viewpoint discrimination<sup>53</sup> because once university officials created a forum for free speech, others, such as the Christian newspaper, could not be denied access due to religion. In deciding that the action discriminated ‘on the basis of religious editorial viewpoints, not religion itself,’<sup>54</sup> the court determined that the students were

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Amendment and College Student Newspapers: Applying *Hazelwood* to Colleges and Universities’ (2007) 33 J College & Univ Law 245.

<sup>49</sup> In dicta, in footnote 7, the *Hazelwood* court wrote ‘A number of lower federal courts have similarly recognised that educators’ decisions with regard to the content of school-sponsored newspapers, dramatic productions, and other expressive activities are entitled to substantial deference . . . We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level.’ *Ibid.*, at p 273 (internal citations omitted).

<sup>50</sup> *Ibid.*

<sup>51</sup> 110 ILCS 13/10 (2007).

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<sup>52</sup> 515 US 819 (1995).

<sup>53</sup> For another case prohibiting viewpoint discrimination, see *Kincaid v Gibson*, 236 F 3d 342 (6th Cir 2001) (positing that university officials engaged in viewpoint discrimination by confiscating yearbooks insofar as they apparently disagreed with its theme).

<sup>54</sup> *Ibid.* at 819. For a similar dispute reaching a like result, see *Gay & Lesbian Students Ass’n v Gohn*, 850 F 2d 361 (8th Cir 1988) (although involving student group rather than a publication, affirming that a university had to provide funding without regard to content of the ideas expressed by organisational members). But see *Mississippi*



entitled to funding to cover printing costs since this is covered by the First Amendment.<sup>55</sup>

In *Board of Regents of the University of Wisconsin System v Southworth*,<sup>56</sup> the Supreme Court rejected the argument that university mandates for fees to fund media that conflicted with students' ideologies violated the First Amendment.<sup>57</sup> The court ruled that the fees were acceptable because they had the singular purpose of facilitating freedom of ideas exchanged on the campus. This, the court remarked, is a central part of a public university's mission, so long as the fees are available to all student groups with all beliefs. The justices unanimously agreed that the fee system was acceptable because the university did not award funding to student groups based on their views.<sup>58</sup> The court rejected an optional refund system as unworkable because it would have further restricted the flow of free ideas on campuses.

### *Emerging Issues*

Access to student records via open records requests to view information about campus crime and the theft of newspapers present novel, emerging issues. Two cases from Ohio on access rights by student press reached different outcomes, leaving the status of the law unsettled.

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*Gay Alliance v Goudelock*, 536 F 2d 1073 (5th Cir 1976) (deciding that insofar as student editors were not state actors, they could refuse to print advertisements highlighting a group's library of homosexual literature).

<sup>55</sup> Ralph D Mawdsley and Charles J Russo, 'Religion in Public Education: *Rosenberger* Fuels an Ongoing Debate' (1995) 103 Educ L Rep 13.

<sup>56</sup> 529 US 217 (2000).

<sup>57</sup> For an earlier case reaching the same outcome, see *Hays County Guardian v Supple*, 969 F 2d 111 (5th Cir 1992) (stating that the use student fees to subsidise a campus newspaper does not violate First Amendment rights because it fulfils the university's educational goals, providing journalism experience to its students along with being a forum for public discussion).

<sup>58</sup> R Craig Wood and Alvin J Schilling, 'The Legal Dilemma Created by Mandatory Student Activity Fees: The Supreme Court Offers a Resolution in *Wisconsin v Southworth*' (2000) 147 Educ L Rep 413.

The Supreme Court of Ohio ultimately granted the editors of a student newspaper at a public university access to records of proceedings before its student disciplinary board so that it could track student crime trends on campus.<sup>59</sup> The students did not request names, identification numbers, or other data that provided identity clues about victims. University officials complied with the requests but deleted the identity, sex, ages, dates, times, and locations of the incidents along with internal memoranda and other written statements. The court granted the students' request to access the deleted materials because insofar as the information was not academic in nature, the records were not exempt from release under the Federal Family Education Rights and Privacy Act (FERPA).<sup>60</sup>

Conversely, in a second case involving students from the same university in Ohio, among others, the Sixth Circuit reached the opposite result.<sup>61</sup> The appellate panel affirmed that insofar as student disciplinary records fail to qualify as educational records within the contemplation of FERPA, a trial court did not abuse its discretion in denying discovery to a student newspaper. The appellate court added that there is no First Amendment right of access to student disciplinary records detailing criminal activities and punishment.

### *Stolen Papers*

In response to increasing activity in this regard, lawmakers in California,<sup>62</sup> Colorado,<sup>63</sup> and Maryland<sup>64</sup> enacted statutes making campus

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<sup>59</sup> *Miami Student v Miami Univ*, 680 NE 2d 956 (1997), *cert denied*, 522 US 1022 (1997).

<sup>60</sup> 20 USCA § 1232g (detailing access rights to student records).

<sup>61</sup> *United States v Miami Univ*, 294 F 3d 797 (6th Cir 2002). But see *Red & Black Publishing Co v Board of Regents*, 427 SE 2d 257 (Ga 1993) (affirming that records of a student organisation court, including disciplinary proceedings, were subject to inspection under the state's open records act since they were not educational records under FERPA).

<sup>62</sup> Cal Penal Code § 490.7 (2007).

<sup>63</sup> Colo Rev Stat § 18-4-419 (2004).

<sup>64</sup> Md Criminal Code § 7-106 (2002).

newspaper theft illegal. Existing theft laws in other states apply to the prohibition of stealing free newspapers.<sup>65</sup> While the limited litigation in this area has not gone past trial courts,<sup>66</sup> news stories illustrate that problems exist with regard to stolen student newspapers in the United States.<sup>67</sup>

## Discussion

At a time when freedom of the press is increasingly contentious around the world, student newspapers remain an integral part of campus life in the United States even though they do not occupy such a role in many other nations. Since the student press can play a crucial role in promoting free speech, these newspapers are likely to remain controversial in open democratic societies within which not all agree.

In the United States, at least, many of the legal difficulties between institutional officials and student press can likely be resolved before resorting to litigation, saving administrators, faculty advisors, and student journalists a great deal of effort if they understand what is acceptable relating to campus newspapers. In this spirit, the suggestions discussed below are offered to encourage readers to treat American litigation as persuasive precedent, a kind of lesson, because even if one disagrees with the judicial opinions highlighted herein and principles derived therefrom, they offer food for thought. Consequently, readers can accept ideas which may work for them while rejecting concepts which may be inapplicable insofar as not all nations share the American tradition of free speech. The challenge, of course, is discovering a way to strike a balance

between the rights of journalists and those who may disagree with what they read.

Efforts to achieve a balance between campus press and institutional officials are often frustrated because many administrators and student journalists fail to understand the boundaries of acceptable free speech. This section, then, suggests guidelines drawn from the cases to establish acceptable limits for student press. Even in conceding that student newspapers remain almost uniquely American, the following discussion offers food for thought for readers who are interested in free speech on campuses. These ideas may be especially pertinent in England and Wales since 'the requirement that each institution should maintain its own internal code for the protection of freedom of speech and keep it up to date . . . [is] not adequate to meet more recent needs.'<sup>68</sup>

### *Prior Restraint-Review*

Administrators should be careful not to infringe on the free speech rights of students in higher education by denying official recognition to groups, even those other than newspapers. Insofar as classrooms and campuses constitute a marketplace of ideas<sup>69</sup> in which even unpopular ideas<sup>70</sup> have a right to be expressed, free speech protections should apply in higher education just as in society

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<sup>65</sup> See 'Law of the Student Press,' *Student Press Law Center* (Student Press Law Center, 2008).

<sup>66</sup> See, eg *Coming Up v San Francisco*, 857 F Supp 711 (ND Calif 1994) (asserting that a police chief violated federal civil rights law when he confiscated mass quantities of a 'free' newspaper, awarding financial damages to the publisher for economic losses and emotional distress).

<sup>67</sup> See, eg Emily Salmon, 'Shawnee State Newspapers Taken from Racks,' *The Portsmouth (OH) Daily Times*, Feb 23, 2006 at p 1; 'SPLC Legal Brief: Student Press Freedom at Public Colleges,' *Student Press Law Center*, 2009, <http://www.splc.org/legalresearch.asp?id=9>.

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<sup>68</sup> Evans, *op cit* n 3 at p 95.

<sup>69</sup> See *Rosenberger v Rector and Visitors of the Univ of Va*, 515 US 819, 831 (1995) (applying viewpoint neutrality in holding that a policy permitting university officials to authorize payments to print the publications of student organisations applied to a Christian journal since its speech was protected by the First Amendment): The dissent's assertion that no viewpoint discrimination occurs because the Guidelines discriminate against an entire class of viewpoints reflects an insupportable assumption that all debate is bipolar and that antireligious speech is the only response to religious speech. Our understanding of the complex and multifaceted nature of public discourse has not embraced such a contrived description of the marketplace of ideas. If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one. It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint. The dissent's declaration

writ large.<sup>71</sup> In a closely related matter, institutional officials cannot restrict content in student newspapers that operate as designated or limited-purpose public fora even if administrators disagree with their content.<sup>72</sup>

At the same time, higher education officials should not impose regulations on off-campus publications that differ from those for on-campus student newspapers if the former are to be distributed on campuses<sup>73</sup> or the types of advertisements that editors choose to print in their publications.<sup>74</sup> Moreover, officials cannot engage in prior restraint by dictating what student journalists publish or reprimanding editors because they disagree with what they publish in campus newspapers,<sup>75</sup> even if stories criticise legislators and governors and they cannot expel students as insubordinate if they do so.<sup>76</sup> Such, officials must afford student editors on public campuses the right to exercise editorial control and judgment when selecting content for their newspapers.<sup>77</sup>

On the other hand, although officials are forbidden from obstructing student press and preventing its distribution, they may place or stamp 'This is not an official publication of the University' on the covers of student publications as disclaimers to ensure that readers understand that they are not controlled by the institutions.<sup>78</sup> Additionally, graduate students cannot be disciplined for

distributing what campus officials deem obscene<sup>79</sup> or dismiss editors or staff writers because they believe that papers exhibit low levels of editorial responsibility.<sup>80</sup> Put another way, once institutions create student newspapers as fora for student expression, they cannot change the way the campus press functions.<sup>81</sup>

### *Funding*

Funding issues arise when student newspapers seek to publish ideas that are unpopular on campuses or individuals are unwilling to allow their mandatory fees to subsidise publications espousing points of view with which they disagree. The Supreme Court has ruled that individuals must still pay student fees since they are intended to facilitate the free exchange of ideas, a concept that is integral to the mission of higher education.<sup>82</sup> Similarly, while colleges and universities may not be obligated to support student organisations, once they provide funding for some groups, they cannot engage in viewpoint discrimination regardless of whether organisational ideas involve religion<sup>83</sup> sexual orientation.<sup>84</sup> Neither can officials reduce funding of student newspapers when board members and administrators object to editorial content.<sup>85</sup>

### *Emerging Issues*

The law related to public records is in a state of flux since the highest courts of Ohio<sup>86</sup> and Georgia<sup>87</sup> treated student disciplinary files as subject to disclosure but the Sixth Circuit, in a

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that debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways.

<sup>70</sup> See, eg Erwin Chemerinsky, 'Unpleasant Speech on Campus, Even Hate Speech, is a First Amendment Issue' (2009) 17 Wm & Mary Bill Rts J 765.

<sup>71</sup> *Healy v James*, see above n 37.

<sup>72</sup> *Hosty v Carter*, see above nn 45 et seq.

<sup>73</sup> *Hays County Guardian v Supple*, see above nn 43, 47.

<sup>74</sup> *Lueth v St Clair County Community College*, see above n 44.

<sup>75</sup> *Thonen v Jenkins*, see above n 40.

<sup>76</sup> *Dickey v Alabama State Bd of Educ*, see above n 41.

<sup>77</sup> *Mississippi Gay Alliance v Goudelock*, see above nn 17, 56.

<sup>78</sup> For a case where this was done, see *Bazaar v Fortune*, see above nn 15–16.

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<sup>79</sup> *Papish v Board of Curators of the Univ of Mo*, see above n 38.

<sup>80</sup> *Schiff v Williams*, see above n 39.

<sup>81</sup> *Trujillo v Love*, see above n 18.

<sup>82</sup> *Board of Regents of the Univ of Wis Sys v Southworth*, see above n 56.

<sup>83</sup> *Rosenberger v Rector & Visitors of Univ of Va*, see above n 52, 69.

<sup>84</sup> *Gay & Lesbian Students Ass'n v Cohn*, see above n 54.

<sup>85</sup> *Stanley v Magrath*, see above n 19.

<sup>86</sup> *Miami Student v Miami Univ*, see above n 59.

<sup>87</sup> *Red & Black Publishing Co v Board of Regents*, see above n 61.

second case from Ohio,<sup>88</sup> disagreed. As such, educational officials should check appropriate statutes and/or develop institutional policies to safeguard student privacy. Turning to newspaper thefts, it almost goes without saying that officials should apply existing civil and/or criminal laws while developing institutional policies to ensure the free flow of ideas via student press on campuses.

## Conclusion

In sum, legal issues pertaining to campus newspapers are likely to continue to emerge as publications are increasingly available in on-line formats. Moreover, if the response of the American judiciary to the proliferation of expression via electronic media in the context of K-12 education<sup>89</sup> is to serve as an example, then it is clear that the legal rules applicable to higher education are far from settled since the law is having difficulty keeping pace with developments in technology.<sup>90</sup>

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<sup>88</sup> *United States v Miami Univ*, *ibid*.

<sup>89</sup> Elementary (primary) and secondary education.

<sup>90</sup> For a discussion of conflicting judicial responses to electronic media such as Facebook, see Allan G Osborne and Charles J Russo 'Can Students be Disciplined for

Certainly, the way that the interplay involving the rights of student journalists and their newspapers, whether in hard copy or electronic versions, is an issue that bears watching in coming years.

Aware of the unsettled state of the law, especially with regard to electronic versions of newspapers, higher education officials and their lawyers should develop proactive policies and review them annually, typically between academic years, to help to avoid litigation. It is wise to avoid reviewing policies during or shortly after controversies end since placing 'cooling off periods' between conflicts and thoughtful review affords better perspectives than if parties are in the middle of disputes. Allowing for some time to pass in the midst of controversies can allow individuals to take the longer view in searching for solutions. The authors hope that the ideas and suggestions expressed herein can enable interested parties to diffuse potentially contentious situations by helping nascent journalists to understand the acceptable parameters of a free student press, regardless of where it exists.

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Off-campus Cyberspeech: The Reach of the First Amendment in the Age of Technology' (2012) *Brigham Young University Educ and LJ*, 331.