

January 2013

The State Response to Hazelwood v. Kuhlmeier

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Recommended Citation

Tyler J. Buller, *The State Response to Hazelwood v. Kuhlmeier*, 66 Me. L. Rev. 89 (2013).

Available at: <https://digitalcommons.mainerlaw.maine.edu/mlr/vol66/iss1/4>

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THE STATE RESPONSE TO *HAZELWOOD V. KUHLMIEIER*

Tyler J. Buller

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THE STATE RESPONSE TO *HAZELWOOD V. KUHLMEIER*

Tyler J. Buller*

I. INTRODUCTION

It's hard to predict what an average member of the public thinks when he or she hears the words "student newspaper." To students, their newspaper might be a creative outlet, a way to share and develop opinions, or a resume-booster for college applications.¹ To many principals, superintendents, and school board members, student newspapers are little more than an annoyance, just another student club, or perhaps even the rallying point for a group of unruly students intent on second-guessing school officials' decisions.² And, to far too many adults and community members, the image that comes to mind is an amateurish publication, filled with fluff news and pun-ridden innuendos.³

This Article goes beyond that public perception and demonstrates that student journalists across the country are doing work that matters. Student reporters uncover corruption,⁴ help hold government officials accountable to taxpayers and

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1. See Lynn Schofield Clark & Rachel Monserrate, *High School Journalism and the Making of Young Citizens*, 12 JOURNALISM: THEORY, PRACTICE, & CRITICISM 417, 420-23 (2011) (reporting that students find "personal fulfillment" through journalism by expressing themselves through their writing, "taking a stand about something [they] believe in," and improving their skillset in preparation for a future career).

2. See Michael Murray, *I Didn't Always Think Well of the Student Press*, 65 SCH. ADM'R, Mar. 2008, available at <http://www.splc.org/pdf/aasafreepressarticle2.pdf>; M. Chester Nolte, *The Student Press and the Ways You Can Control It*, AM. SCH. BD. J., Mar. 1978, at 35, 35 ("Before you get crushed, mashed and vilified by your student newspaper, here are a few pointers . . ."); see also *infra* note 323 and accompanying text (discussing administrators' desire for control over many aspects of student publications); *infra* note 15 and accompanying text (discussing numerous examples of censorship by administrators); David L. Martinson & Lillian Lodge Kopenhaver, *How School Superintendents View Student Press Rights*, 65 CLEARING HOUSE 159, 164 (1992).

3. See Frank LoMonte, *A Primer on Student Press Rights and Responsibilities*, LEARNING NETWORK BLOG, N.Y. TIMES (Aug. 22, 2011, 2:28 PM), <http://learning.blogs.nytimes.com/2011/08/22/student-journalism-a-guide-to-rights-and-responsibilities> ("Say the words 'high school journalism' to a person on the street, and the reflexive word-association will probably be some variation of 'amateurish.'")

4. See *infra* notes 37-38 and accompanying text.

the public,⁵ and bring to light important issues that would otherwise go unreported.⁶ They allow students to develop academically, professionally, and socially.⁷ And they give a voice to developing citizens who are often disenfranchised from voting, holding elected office, or otherwise participating in politics and government.⁸

Across the country, there are two very different standards for what student journalists are free to write about and when school officials can punish them. Because of developments in federal constitutional law and related state statutes, the protections afforded student journalists vary from state to state.⁹ One group of students (those in what I refer to as “*Tinker* states”) has the same level of protection afforded to Mary Beth Tinker more than forty years ago, when she wore a black armband to school in protest of the war in Vietnam.¹⁰ These *Tinker*-state newspapers can only be censored if they publish unprotected speech (like libel or obscenity) or school officials reasonably forecast the publication will cause a material and substantial disruption.¹¹ The other group (in what I refer to as “*Hazelwood* states”) has far less protection, and their student publications can be censored any time school officials’ actions are “reasonably related to legitimate pedagogical concerns.”¹² This Article explores the differences between the two groups of student newspapers by drawing on litigation concerning states’ so-called anti-*Hazelwood* statutes and conducting an original study comparing the editorials of *Tinker*-state student newspapers and their *Hazelwood*-state counterparts.

In Part II, I build a foundation for why the student press matters and why student journalists’ freedom of speech deserves our attention. There is strong evidence that student journalism improves academic achievement, serves a watchdog function over taxpayer-funded public schools, and inculcates values crucial to being an engaged citizen—like an appreciation for free speech and government transparency. These benefits, I argue, are worth fighting for through measures like anti-*Hazelwood* statutes, because today’s students will become tomorrow’s engaged citizens and voters, entrusted with safeguarding our democracy.

Next, in Part III, I sketch the broad contours of student-press law under the federal First Amendment. The First Amendment’s protection of student speech was at its peak following 1969’s *Tinker v. Des Moines*, when the Court famously held that students do not shed their rights at the schoolhouse gate.¹³ But nineteen years later, the Court removed most student newspapers from the protection of *Tinker* and gave schools a license to censor student publications.¹⁴ Seeing the threat

5. See *infra* notes 39-40 and accompanying text.

6. See *infra* notes 45-50 and accompanying text.

7. See *infra* Part II.B.

8. See *infra* Part II.C.

9. In addition to state-by-state variations in student-press law, individual school districts can also provide increased free-speech protections for students. This Article, however, focuses on statewide efforts to combat censorship through either state statutes or state agencies’ administrative regulations. See *infra* Part IV.

10. See generally *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

11. See *id.* at 506-14.

12. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

13. *Tinker*, 393 U.S. at 506.

14. See *infra* Part III.B.

Hazelwood posed to student journalism, state legislators quickly responded with statutes designed to blunt the effect of *Hazelwood* and protect the student press.

As I discuss in Part IV, seven states have adopted anti-*Hazelwood* statutes that provide greater protection to student journalists than the federal First Amendment. Two states' administrative codes also arguably provide similar levels of protection, though their impact is less certain. Unfortunately, these statutes and regulations are often flawed or incomplete. As I discuss in Part V, anti-*Hazelwood* statutes are only litigated in the rarest of circumstances and these statutes are each plagued by substantive problems, such as the frequent mootness of students' claims, difficulties in maintaining standing to sue, and the potential for school officials to justify censorship premised on murky and poorly defined grounds.

Against this backdrop, one might wonder: is the state response to *Hazelwood* working? The original empirical study discussed in Part VI provides at least a partial answer to that question. While the existing research on the effect of anti-*Hazelwood* statutes is mixed, few of these studies looked solely at the content of student newspapers, and no study—until this one—has made an inter-group comparison between newspaper content in *Tinker* and *Hazelwood* states. Following a specific methodology, I acquired nearly 1,800 editorials from randomly selected high school newspapers and coded those editorials based on their content. After analysis using tests of statistical significance, the results indicate that *Tinker*-state newspapers have significantly more editorial content than *Hazelwood*-state newspapers and proportionally more critical editorials, editorials on controversial topics, and editorials criticizing school officials and policies. Meanwhile, states with administrative codes are more similar to *Hazelwood* states than *Tinker* states, with a significantly lower number of critical and controversial editorials and a significantly higher number of editorials that take school officials' sides and criticize fellow students.

I conclude by placing these results in a broader context. In short, the data demonstrate that anti-*Hazelwood* statutes are, at least in large part, fulfilling their purpose. The increased criticism of school officials and larger number of controversial editorials in *Tinker* states both indicate the student press is better able to fulfill its watchdog function, develop today's students into tomorrow's engaged citizens, and promote the free flow of student ideas when protected from administrative censorship. Based on these findings, I suggest pursuing anti-*Hazelwood* statutes in more states is a worthwhile goal, though perhaps little would be accomplished from pursuing administrative regulations. Finally, I draw out additional areas where more research and additional data will improve our understanding of the student press and the interplay between state statutes, constitutional freedoms, and scholastic journalism.

II. WHY THE STUDENT PRESS MATTERS

Although one might hope that this Part would be unnecessary, school officials' repeated attempts to squelch the student press suggest that someone must make the

case for a robust and free student press.¹⁵ As discussed below, three broad rationales undergird any discussion for why we should care about scholastic journalism. While not exhaustive (by any means), these three rationales drive the discussion about why the student press has value and is worthy of our attention and protection.¹⁶ First, student journalism correlates strongly with students' academic success. Second, student journalists serve an important watchdog function over one of the largest taxpayer-funded entities in the country: our nation's public school system. And third, high school students are the future of the First Amendment and student journalism helps ensure today's students treasure free speech and will continue to do so as adult citizens.

A. Student Journalism Benefits Students Academically

The academic rationale for student journalism is very straightforward: students engaged in student journalism "earn higher grade point averages, score better on the ACT college entrance examination and demonstrate better writing and grammar skills in college" than peers who do not participate in journalism activities.¹⁷ Scholastic journalism also goes beyond the number-driven side of student achievement, developing sound cross-disciplinary skills in how to manage a staff, work well with others, communicate effectively, and stand by your beliefs.¹⁸

15. For hundreds of instances where school administrators have attempted to silence student speech, see the Student Press Law Center (SPLC)'s archived "News Flashes," available at http://www.splc.org/news/newsflash_archives.asp (last visited Sept. 6, 2013).

16. See *ASJMC Statement on the Value of Scholastic Media*, ASS'N OF SCHS. OF JOURNALISM & MASS COMM'N, http://www.asjmc.org/resources/scholastic/scholastic_media.php (last visited Sept. 6, 2013).

17. See *Scholastic Journalism: The Road to Success: ACT/NAAF Study 2008*, NEWSPAPER ASS'N OF AM. FOUND. (2008), available at http://www.splc.org/jideas/images/NAA_summary_v1.pdf. Among the many scholars that have made contributions to the study of scholastic journalism's effect on academic achievement, Jack Dvorak's work, dating back nearly 20 years, is the seminal authority. See generally JACK DVORAK, LARRY LAIN, & TOM DICKSON, *JOURNALISM KIDS DO BETTER: WHAT RESEARCH TELLS US ABOUT HIGH SCHOOL JOURNALISM* (1994), available at <http://eric.ed.gov/PDFS/ED366995.pdf>. Later studies conducted by Dvorak also showed that the effect of scholastic journalism on academic achievement was particularly profound for struggling minority students. See Jack Dvorak & Candace Perkins Bowen, *Minority Journalism Kids Do Better Academically* (unpublished manuscript), available at <http://lime.weeg.uiowa.edu/~quill-sc/images/MinorityJStudents.pdf>.

18. No one has made the case for student journalism more powerfully than its champions at the Student Press Law Center. As SPLC Executive Director Frank LoMonte has explained:

Name something that an employer – any employer – wants in a young employee. Analytical thinking? Clear writing? Sensitivity to deadlines? This should be starting to sound familiar – because it's the package of skills that journalism conveys uniquely well through hands-on experience. Leadership? Check. Teamwork? Check. It's one of very few school activities that accurately simulates a work environment – because it is a work environment. . . . The values imparted by working in a newsroom are the values that every educator wants every young citizen of the Internet to learn, practice and live.

Frank LoMonte, *The Case for High School Journalism*, LEARNING NETWORK BLOG, N.Y. TIMES (Aug. 23, 2011, 1:06 PM), <http://learning.blogs.nytimes.com/2011/08/23/student-journalism-the-value-of-school-newspapers>. See also JOURNALISM EDUC ASS'N, *HIGH SCHOOL JOURNALISM CONFRONTS CRITICAL DEADLINE: A REPORT BY THE JOURNALISM EDUCATION ASSOCIATION COMMITTEE ON THE ROLE OF JOURNALISM IN SECONDARY EDUCATION* 16-17, 43-45 (1987), available at

Students benefit from developing these skills whether they choose to pursue careers in journalism, or not.¹⁹ If we can all agree that better grades, improved writing, and the ability to work as part of a team are goals of the public school system—and I have no doubt we can—then student journalism done right embodies quality education.

But the benefit to students' education ripples beyond the direct benefits that flow to student journalists themselves. The student readers of these publications benefit as well, from being exposed to new ideas,²⁰ developing lifelong habits as news consumers,²¹ and dialoguing about their education. Student journalists themselves report fulfilling an important information-providing role for fellow students, on topics as diverse as the school's extracurricular activities, teenage driving, the struggles of gay students, gang-related violence, and the wars in Iraq and Afghanistan.²² Even school principals agree that giving students the opportunity to discuss these topics can be beneficial to the entire school community.²³

The student press is in a unique position to “enable students in a public high school to receive the information they need to make their own choices about such issues and concerns.”²⁴ While these issues can range from the serious to the entertaining, there is no question that student publications offer an opportunity for students to debate ideas and share information in a way that virtually no other medium can.

B. The Student Press Serves a Watchdog Function for School Officials

The public has a vested interest in the public schools—how they're being run, what our children are learning, and how our tax dollars are being spent. Local school officials make decisions that range from the purchase and sale of real estate, to the hiring and firing of countless employees, to what languages will be taught and how prepared our students will be for the workforce or higher education. Some

<http://www.eric.ed.gov/PDFS/ED292081.pdf> (discussing skills taught by student publications and collecting quotes from students about skills gained through scholastic journalism).

19. See JOURNALISM EDUC. ASS'N, *supra* note 18, at 43-45. Of course, many former high school student journalists do go into careers in journalism and reap these benefits, as well as a professional leg-up due to their student-press experience. *Id.* at 57-61.

20. See Clark & Monserrate, *supra* note 1, at 428 (“[P]ublishing a high school newspaper can . . . spark discussions of politics that extend beyond the classroom—particularly politics as they are more broadly understood to include working out multiple competing interests within the context of a diverse society.”).

21. See NEWSPAPER ASS'N OF AM. FOUND., GIVE THEM THE KEYS: PROMOTING ADOLESCENT LITERACY THROUGH NEWSPAPERS (2011), available at http://www.naaafoundation.org/docs/Foundation/NIE-Week-2012_Give-Them-The-Keys.pdf.

22. Clark & Monserrate, *supra* note 1, at 421-23.

23. Harry Proudfoot & Alan Weintraub, *The Voice of Freedom*, PRINCIPAL LEADERSHIP 5-8 (Mar. 2001), available at <http://www.splc.org/pdf/principalarticle.pdf> (“With stories [on topics like teenage drinking or sex], the [newspaper] forces school staff members to take steps toward improving students' lives [and serves as] an avenue for open and clear communications about where students are coming from. More than once, items in the paper have made both teachers and administrators rethink decisions that have been made.”).

24. J. Marc Abrams & S. Mark Goodman, *End of an Era? The Decline of Student Press Rights in the Wake of Hazelwood School District v. Kuhlmeier*, 1988 DUKE L.J. 706, 723 (1988).

would even say that local school boards are where much of the nation's most important governing takes place.²⁵

American taxpayers' financial investment in the public schools is massive. In the aggregate, states and local school districts spend more than \$600 billion dollars on K-12 education annually—the equivalent of nearly 16 percent of the total federal budget²⁶ or nearly 5.5 percent of the nation's Gross Domestic Product (GDP).²⁷ Among these dollars, more than 90 percent come from state and local sources: from local property taxes, fees, and proportionally dispersed statewide levies.²⁸ If for no other reason than to see where its tax dollars are going, the public has a tremendous interest in the management of public schools and the actions of school officials.

Yet despite the importance of public schools—for educating our children, as a massive expenditure of government resources, and as a vehicle for safeguarding our values—few adults pay close attention to the work of local school leaders. Although exact data is hard to come by, most estimates place turnout in local school board elections at between 20 and 30 percent of eligible voters,²⁹ and some states have even reported that average turnout has dropped well below 10 percent.³⁰

While voters' apathy toward local matters is nothing new, the digital revolution and changes in the news-media landscape have helped put school governance and the acts of school officials even further out of the public's mind. Across the country, traditional print media continues to suffer financially, cutting back on coverage and downsizing newsrooms.³¹ In many cases, reporters from local television stations and newspapers that historically covered school events and served as watchdogs over school officials have disappeared or been reassigned.³²

25. No less an authority than fictional President Josiah Bartlet has made this observation, decrying apathy in local elections because “[a]ll [bad candidates] have to do is, bit by little bit, get themselves on the Boards of Education and city councils. ‘Cause that’s where all the governing that really matters to anybody really happens.” *The West Wing: The Midterms* (Warner Bros. Television 2000).

26. The United States budget for fiscal year 2012 is approximately \$3.796 trillion dollars. See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, FISCAL YEAR 2012 BUDGET OF THE U.S. GOVERNMENT (2012), available at <http://www.gpo.gov/fdsys/pkg/BUDGET-2012-BUD/pdf/BUDGET-2012-BUD.pdf>.

27. *Public Spending on Education, Total (% of GDP)*, WORLD BANK, <http://data.worldbank.org/indicator/SE.XPD.TOTL.GD.ZS> (last visited Sept. 5, 2013). The most recent figure at press time—for 2010—is 5.6% of GDP. *Id.*

28. See U. S. CENSUS BUREAU, G09-ASPEF, PUBLIC EDUCATION FINANCES: 2009 (2011), available at <http://www2.census.gov/govs/school/09f33pub.pdf>.

29. See Christopher R. Berry & Jacob E. Gersen, *The Timing of Elections*, 77 U. CHI. L. REV. 37, 63 (2010) (reporting median turnout for California school board elections was 22 percent).

30. Lisa Bartusek, *School Board Elections: Voter Turnout Needs Your Help*, IOWA ASS'N. OF SCH. BDS., <http://www.ia-sb.org/assets/0f2b4365682d4ae6b538dea1e949b90b.pdf> (last visited Sept. 3, 2013) (reporting average turnout near 6 percent).

31. See, e.g., James O'Shea, *Journalism of Value = Context for Communities*, NIEMAN REPS. (2011), <http://www.nieman.harvard.edu/reports/article/102630/Journalism-of-Value--Context-for-Communities.aspx> (last visited Sept. 3, 2013).

32. Cf. STEVEN WALDMAN ET AL., FED. COMM'NS COMM'N, THE INFORMATION NEEDS OF COMMUNITIES: THE CHANGING MEDIA LANDSCAPE IN A BROADBAND AGE 5 (July 2011), available at http://transition.fcc.gov/osp/inc-report/The_Information_Needs_of_Communities.pdf (“[W]e now face a shortage of local, professional, accountability reporting. This is likely to lead to the kinds of problems that are, not surprisingly, associated with a lack of accountability—more government waste, more local

One estimate suggests that just 1.4 percent of total mainstream media coverage is devoted to education.³³

Fortunately, one group remains interested in what is happening in our public schools: the students themselves. Today, there are more high school student newspapers than there are commercial weekly and daily newspapers combined.³⁴ If you look around the audience at your local school board meeting, it would not be surprising that the most common—and perhaps only—reporter you encounter is a student, writing for one of the nation’s 12,000 student publications.³⁵ These student journalists fulfill a crucial function, as “[a]dults need candid, uncensored student journalism if they are to have any idea what is going on inside the schools they support.”³⁶

Many students have ably fulfilled this role, sounding the alarm on misdeeds by school officials or exposing facts about the school environment that would otherwise go ignored. An investigative story published in *MavLife*, the La Costa Canyon High School newspaper, revealed irregularities with student-activity-fee spending that ultimately led to additional administrative oversight and new regulations to safeguard student monies.³⁷ Student reporters in a Dallas suburb conducted a similar investigation into a school vendor’s contract for gang-related intervention programs, eventually “uncover[ing] years of false claims, unfulfilled contracts and unsubstantiated statistics.”³⁸ Student reporters in Larkspur, California turned their attention to the local police and investigated reports of police officers stopping teens without probable cause; the trove of data students uncovered eventually prompted a grand jury investigation into teens’ treatment by law enforcement.³⁹ And a 2010 story in the Foothill, California *Dragon Press* revealed that a convicted sex offender was employed by both a contractor that repaired

corruption, less effective schools, and other serious community problems. The independent watchdog function that the Founding Fathers envisioned for journalism—going so far as to call it crucial to a healthy democracy—is in some cases at risk at the local level.”).

33. DARRELL M. WEST ET AL., INVISIBLE: 1.4 PERCENT COVERAGE FOR EDUCATION NEWS IS NOT ENOUGH, BROOKINGS INST. 1 (Dec. 2, 2009), available at http://www.brookings.edu/~media/research/files/reports/2009/12/02%20education%20news%20west/1202_education_news_west.pdf.

34. M. GOODMAN ET AL., CTR. FOR SCHOLASTIC JOURNALISM, THE 2011 SCHOLASTIC JOURNALISM CENSUS: STUDENT MEDIA PRESENCE REMAINS STRONG IN AMERICAN PUBLIC HIGH SCHOOLS 4 (2011), available at http://www.csj kent.org/images/stories/csj_census_2011.pdf.

35. *Id.*

36. LoMonte, *supra* note 18.

37. See Brenna Lyles, *The Money Game of La Costa Canyon*, MAVLIFE NEWS, May 2011, at 12-16, available at http://fissuu.com/lccnews/docs/may_issue. See also Editorial, *Financial Oversight Needed*, MAVLIFE NEWS, May 2011, at 2. In 2012, the newspaper’s work earned the Student Journalist Impact Award from the staff from the Journalism Education Association. See *Investigative Reports on Activity Funds Earn Top Prize in Annual JEA Student Impact Award Competition*, JOURNALISM EDUC. ASS’N (Mar. 20, 2012), <http://jea.org/impactaward2012>.

38. Press Release, *Newseum, Student Press Law Center & National Scholastic Press Association Announce Winners of 2005 Courage in Student Journalism Awards*, STUDENT PRESS LAW CTR. (Nov. 4, 2005), <http://www.splc.org/news/newsflash.asp?id=1118>.

39. See Ben Breuner & Michael Weinstein, *Targeting Teens: Marin Teens Face High Arrest Rates*, REDWOOD BARK (Nov. 5, 2010) (on file with author); Editorial, *Age Discrimination Violates Teen Rights*, REDWOOD BARK (Nov. 5, 2010) (on file with author). See also *Investigation Feature on Teen Profiling Earns Top Prize in Annual Student Impact Award Competition*, JOURNALISM EDUC. ASS’N (Dec. 13, 2011), <http://jea.org/teen-profiling/> (discussing award received by student reporters).

school printers and a school fundraising company, and had apparently been on campus many times.⁴⁰

Students are also able to give perspective on the ground floor of public education by virtue of their unparalleled access to sources and in-school information.⁴¹ For more than a century, student journalism has provided a window into the public schools that would not have been possible otherwise.⁴² Often it is only through the work of these student journalists that community members and school officials become aware of problems that face young people or trends among the study body.⁴³ Sometimes, school officials even take this information to heart and make improvements that benefit students' education.⁴⁴

High school reporters for the *Paly Voice* student newspaper and *The Viking* student magazine in Palo Alto, California opened a school community's eyes to widespread violent and sexually motivated hazing rituals among the school's athletic teams.⁴⁵ One of the more gruesome accounts reported by the students involved members of the football team forcing an underclassman to eat a cake covered in upperclassmen's pubic hair.⁴⁶ A local CBS affiliate and the local daily newspaper quickly picked up the story, prompting reactions from school board members, administrators, and faculty.⁴⁷

Student journalists writing for the *Rampage* in Rockville, Maryland wrote a detailed exposé about local gang activity that had been ignored by mainstream

40. Anaika Miller, *Sex Offender Tries Connecting with Local High School*, DRAGON PRESS (Nov. 8, 2010), <http://foothilldragonpress.org/sex-offender-tries-connecting-with-local-campus-through-new-online-fundraiser>; see also *2011 NSPA Story of the Year Winners*, NAT'L SCHOLASTIC PRESS ASS'N, <http://www.studentpress.org/nspa/winners/story11.html> (last visited Sep. 3, 2013) (discussing award received by author).

41. Josie Foehrenbach Brown, *Inside Voices: Protecting the Student-Critic in Public Schools*, 62 AM. U. L. REV. 253, 312 (2012) ("Students are an underutilized source of 'critical local knowledge,' and their aired concerns and grievances offer data about both a school's climate and practices.") (citation omitted).

42. Since at least 1847, student journalists have been drawing attention to the deteriorating condition of public schools and the necessity of public funding to fulfill the promise of their education. See WILLIAM J. REESE, *THE ORIGINS OF THE AMERICAN HIGH SCHOOL* 86 (1999). Even in the 19th Century, student newspapers strove to cover controversial topics, such as underage drinking. *Id.* at 173.

43. For readers interested in precisely what students were writing about at the turn of the 19th Century, *The Lowell*, a national-award-winning high school newspaper in San Francisco, California, provides a fascinating archive of its back issues, dating to 1898. See *Digital Archives*, THE LOWELL, <http://www.thelowell.org/archive> (last visited Sep. 3, 2013). Of particular note, readers with their own high school newspaper experience might be reassured to find that, more than a century ago, student journalists were confronted with a student body lacking school spirit, a handful of slacking student reporters, and a tension between whether to report the news, publish more literary pieces, or allow students to use the newspaper as a "means for venting their spite." *Editorials*, 1 THE LOWELL, Jan. 1898, at 15, available at <http://www.thelowell.org/archivepdfs/01.1898%20thru%2004.1898.pdf>.

44. See generally Sheldon H. Nahmod, *Beyond Tinker: The High School as an Educational Public Forum*, 5 HARV. C.R.-C.L. L. REV. 278, 281-88 (1970) (arguing school officials may benefit from student criticism of educational policy, school rules, and school personnel).

45. Peter Johnson, *Hazing*, THE VIKING (Dec. 10, 2007), available at <http://www.vikingsportsmag.com/features/2007/12/10/hazing>.

46. See *id.*

47. See Arden Pennell, *District, Paly Vow Changes After Hazing Article*, PALO ALTO ONLINE (Dec. 13, 2007), http://www.paloaltoonline.com/news/show_story.php?id=6625; see also *Hazing Revisited*, THE VIKING 20 (Feb. 2008), available at <http://issuu.com/thevikingmag/docs/volume1issue3>.

media due to fears of retaliation.⁴⁸ The student reporters relied on student-sources not available to their adult counterparts, as well as information from government officials, and worked tirelessly for months.⁴⁹ After publication, the students earned praise from local police, who documented a decrease in gang-related violence and attributed it to the students' reporting.⁵⁰

These are just a few examples of the intrepid reporting that can flourish when the student press is freed and allowed to write about important issues—even when their reporting casts school officials in a negative light or makes people uncomfortable. Stories like those outlined above allow students to provide a window into the ground floor of public education and hold the men and women running our schools—teachers, administrators, and school board members—accountable.

C. Students Are the Future of the First Amendment

The third, most far-reaching reason to care about the student press is that public high school students are truly the future of the First Amendment.⁵¹ The survival of free speech depends not just on our Constitution as interpreted by today's judges, but also on whether we succeed at passing our constitutional values on to the next generation.⁵² By many measures, we are failing.

Over the last decade, survey results have consistently shown that between one-quarter and one-half of high school students believe the First Amendment “goes too far in the rights it guarantees.”⁵³ More than a third of students graduate high school without any classroom instruction on the First Amendment and more than three-quarters graduate without any training in journalism or related skills.⁵⁴ In 2011, just 12 percent of students believed flag-burning should be constitutionally protected and nearly 60 percent thought the government should be able to require newspapers and websites to obtain government approval before posting stories.⁵⁵ And since 2004, an average of 38.5 percent of respondents self-reported taking the First Amendment “for granted.”⁵⁶ Though already troubling, this data may paint an

48. The February 22, 2008 edition of the *Rampage* includes pieces by Ben Austin, Amanda Gonzales, Ben Bloom, Tom Chalmers, and Mandy Dols on this topic. See 40 RAMPAGE, Feb. 22, 2008, available at <http://www.splc.org/pdf/RAMPAGE.pdf>.

49. Alberto D. Morales, *Rockville High School Students, Principal, Adviser Win Courage in Journalism Award for Gang Coverage*, STUDENT PRESS LAW CTR. (Nov. 12, 2008), <http://www.splc.org/news/newsflash.asp?id=1833>.

50. *Id.*

51. See generally KENNETH DAUTRICH, *FUTURE OF THE FIRST AMENDMENT: 2011 SURVEY OF HIGH SCHOOL STUDENTS AND TEACHERS* (2011), available at http://www.knightfoundation.org/media/uploads/publication_pdfs/Future-of-the-First-Amendment-full-cx2.pdf [hereinafter “FOFA 2011”].

52. See Michael Rebell, *Tinker, Hazelwood and the Remedial Role of the Courts in Education Litigation*, 69 ST. JOHN'S L. REV. 539, 539 (1995) (“Traditionally and historically, a prime mission of schools, especially in the United States, has been to inculcate values. This was just accepted, almost without comment or discussion, throughout American history.”) (footnote omitted).

53. FOFA 2011, *supra* note 51, at 12.

54. *Id.* at 15.

55. *Id.* at 29.

56. *Id.* at 30.

overly rosy picture in light of demographic trends, as recent scholarship has unearthed wide race- and wealth-based gaps in youths' civic knowledge.⁵⁷

Student journalism is not an instant panacea to these depressing statistics. But it is a starting point. Time and time again, we have seen that "[l]earning about the First Amendment from a textbook isn't enough."⁵⁸ Students need to engage with the First Amendment in activities, classes, and their daily lives. Survey data shows that students who easily imagine the First Amendment applying to them—to their ability to express unpopular opinions or to listen to music with offensive lyrics—support protection for those activities.⁵⁹ On the other hand, when faced with activities removed their daily lives—like flag-burning or professional newspaper publication—students' support plummets.⁶⁰ One way to bridge this divide is to involve more students in First Amendment activities. For example, students who receive instruction in scholastic journalism through coursework or writing for a student publication are between seven and eight percent more likely than students who have not received First Amendment instruction to support First Amendment protections for musicians, unpopular viewpoints, and professional publications.⁶¹ In other words, by exposing students to First Amendment values, student journalism substantially increases the likelihood those students will come to cherish and respect First Amendment values.

Ensuring today's students remain stalwart guardians of the First Amendment is particularly crucial in light of declining support for free speech among the adult public. Since 1997, the First Amendment Center has surveyed American adults for its annual State of the First Amendment (SOFA) report.⁶² These numbers have changed over time and remain in flux today, sometimes shifting in response to major events. For example, support for the First Amendment—and civil liberties more generally—plummeted after the terrorist attacks of September 11, 2001.⁶³ For the first and only time in the survey's history, nearly half—49 percent—of Americans reported they believed the First Amendment goes too far,⁶⁴ and 40 percent of respondents went on to say that "newspapers should not be allowed to freely criticize the U.S. military about its strategy and performance."⁶⁵

57. See Meira Levinson, *Solving the Civic Achievement Gap in De Facto Segregated Schools*, PHIL. & PUB. POL'Y Q., Winter/Spring 2005, at 2-10, available at http://ippg.gmu.edu/QQ/Vol25_1-2.pdf.

58. Charles C. Haynes, *How Free Should Student Newspapers Be?*, FIRST AMENDMENT CTR. (Oct. 8, 2003), <http://www.firstamendmentcenter.org/how-free-should-student-newspapers-be>.

59. Between 2004 and 2011, an average of 83% of students supported First Amendment protection for expression of unpopular ideas, and an average of 68% supported musicians' use of offensive lyrics. See FOFA 2011, *supra* note 51, at 13, 16.

60. Between 2004 and 2011, an average of just 54.5% of students supported First Amendment protection from prior restraint for newspapers, and an average of just 15% supported First Amendment protection for flag-burning. *Id.* at 13.

61. *Id.* at 16.

62. See generally *State of the First Amendment Survey Reports*, FIRST AMENDMENT CTR., <http://www.firstamendmentcenter.org/sofa> (last visited Sept., 6 2013) (listing publications regarding SOFA surveys dating back to 1997).

63. FIRST AMENDMENT CTR., STATE OF THE FIRST AMENDMENT 2002, at 11 (2002), <http://www.firstamendmentcenter.org/madison/wp-content/uploads/2011/03/sofa2002report.pdf> [hereinafter "SOFA 2002"].

64. *Id.* at 2.

65. *Id.*

These numbers have largely rebounded in intervening years,⁶⁶ but the state of the First Amendment remains grim. Twenty-seven percent of Americans cannot name a single right enshrined in the First Amendment.⁶⁷ Only 13 percent name “freedom of the press” as one of those rights.⁶⁸ And 18 percent of respondents still believe the First Amendment goes too far.⁶⁹ These numbers should give pause to all Americans who hold the First Amendment dear, as we depend at least as much on public support for free speech as we do on courts, lawyers, and judges.⁷⁰ Improving civic literacy among today’s high school students is one important avenue to stemming this tide and ensuring the First Amendment remains relevant.

Allowing students to live the First Amendment, rather than merely reading abstract First Amendment texts or listening to lectures, also helps ensure the next generation of students will take their dedication to free speech with them when they walk out the schoolhouse gate. Increasingly, though, the actions of school officials leave students with the opposite lesson.⁷¹ Students faced with administrative oppression, rampant censorship, and instructions to only report “good” news take with them life-long beliefs that the First Amendment is little more than words on a page, occasionally paid lip-service when convenient for government officials. This point can be made no better than it was by David Martinson and Lillian Lodge Kopenhaver in 1992:

Teachers can talk all day about the need to take an active role in preserving democracy in America. They can even require that students memorize the entire U.S. Constitution. If, however, students see that teachers and administrators do not respect the most basic of the rights contained in that Constitution, all the rhetoric and all those exercises in rote memorization will constitute further evidence of the

66. See *id.* and accompanying text.

67. See FIRST AMENDMENT CTR., STATE OF THE FIRST AMENDMENT 2012, at 1 (2012), [hereinafter “SOFA 2012”], available at <http://www.firstamendmentcenter.org/madison/wp-content/uploads/2012/07/SOFA-2012.pdf>.

68. *Id.*

69. *Id.* at 2.

70. No one has put it better than Judge Learned Hand, who noted in a 1944 speech:

I often wonder whether we do not rest our hopes too much upon constitutions, upon laws, and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it

Judge Learned Hand, *The “Spirit of Liberty” Speech*, I AM AN AMERICAN DAY (1944), in *Spirit of Liberty Speech*, PROVIDENCE FORUM, <http://www.providenceforum.org/spiritoflibertyspeech> (last visited Sept. 6, 2013).

71. As Justice Brennan wrote in his *Hazelwood* dissent:

Instead of teaching children to respect the diversity of ideas that is fundamental to the American system, and that our Constitution is a living reality, not parchment preserved under glass, the Court today teaches youth to discount important principles of our government as mere platitudes. The young men and women of Hazelwood East expected a civics lesson, but not the one the Court teaches them today.

Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 290-91 (1988) (Brennan, J., dissenting) (internal quotations, citations, alterations omitted).

There is also empirical evidence that student journalism breeds these democratic values; for example, it should come as no surprise that “[s]tudents who participate in a school newspaper activity have more positive views of the First Amendment” Mark Hugo Lopez et al., *Schools, Education Policy, and the Future of the First Amendment*, 26 POL. COMM. 84, 93 (2009).

hypocrisy that young people too often see as characteristic of much of the “adult world.”⁷²

Unfortunately, few concerns related to students’ First Amendment education are limited to just one civic concept. Fault lines run throughout American civics knowledge, raising serious questions about the health and durability of our democracy.⁷³ Young people’s voting rate has gradually declined over the last half-century.⁷⁴ Americans aged 18–24, out of all surveyed groups, report the lowest rates of volunteerism with nonprofits, government agencies, and civic organizations.⁷⁵ And, on the most recent national standardized test, roughly three-quarters of American students failed to achieve a “proficient” score in “civic knowledge.”⁷⁶ If public education is truly the “the very foundation of good citizenship,”⁷⁷ the future of our citizenry rests on shoddy construction.

But we should not despair just yet. A free student press is one of the most promising vehicles for repairing the abysmal state of students’ civic knowledge. As retired Justice Sandra Day O’Connor has often said in recent years, “knowledge about our government is not handed down through the gene pool.”⁷⁸ We have to teach our civic values to the next generation—and scholastic journalism allows students to learn these values in a hands-on, empowering environment. Writing for student publications “affords young people a sense of a collective and shared public culture” that is crucial to revitalizing civic participation,⁷⁹ allows students to improve and take ownership of their own education, and helps develop civic literacy by giving students a means to hold government officials accountable for their actions. In short, student journalism holds tremendous promise: for students, for the state of civics knowledge, and for the vitality of our democracy. Unfortunately, as discussed in the following sections, today’s student press is

72. Martinson & Kopenhaver, *supra* note 2, at 63.

73. See generally RICHARD J. COLEY & ANDREW M. SUM, *FAULT LINES IN OUR DEMOCRACY: CIVIC KNOWLEDGE, VOTING BEHAVIOR, AND CIVIC ENGAGEMENT IN THE UNITED STATES* (2012) [hereinafter “FAULT LINES REPORT”], available at <http://www.ets.org/s/research/19386>.

74. U.S. CENSUS BUREAU, *REPORTED VOTING AND REGISTRATION BY RACE, HISPANIC ORIGIN, SEX, AND AGE GROUPS: NOVEMBER 1964 TO 2012*, at tbl. A-1, <http://www.census.gov/hhes/www/socdemo/voting/publications/historical/index.html> (last visited Sept., 6, 2013).

Voter turnout among 18–24 year-olds in the 2008 General Election was the highest since 1972. *Id.* It is unclear whether this might reflect a reversal of the trend or may be more a reflection of that year’s candidates. In any event, turnout in 2010’s congressional races was in line with previous turnout rates of roughly 20 to 30% among 18–29 year-olds. See CTR. FOR INFO. & RESEARCH ON CIVIC LEARNING & ENGAGEMENT, *THE YOUTH VOTE IN 2010: FINAL ESTIMATES BASED ON CENSUS DATA 1* (2010).

75. *FAULT LINES REPORT*, *supra* note 73, at 22.

76. NAT’L. CTR. FOR EDU. STATISTICS, NCEES 2011-466, *CIVICS 2010: NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS AT GRADES 4, 8, AND 12*, at 2 (2011), available at <http://nces.ed.gov/nationsreportcard/pdf/main2010/2011466.pdf>; see CAMPAIGN FOR THE CIVIC MISSION OF SCHS., *GUARDIAN OF DEMOCRACY: THE CIVIC MISSION OF SCHOOLS 14* (Jonathan Gould ed., 2011) [hereinafter “GUARDIAN OF DEMOCRACY REPORT”].

77. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954); *accord Plyler v. Doe*, 457 U.S. 202 (1982); *Ambach v. Norwick*, 441 U.S. 68 (1979); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

78. ‘*Sandra Day O’Connor Civic Learning Act of 2013*’ *Introduced*, CAMPAIGN FOR THE CIVIC MISSION OF SCHS. (May 1, 2013), <http://www.civicmissionofschools.org/news/2013-05-sandra-day-oconnor-civic-learning-act-of-2013-introd>.

79. Clark & Monserrate, *supra* note 1, at 418.

endangered and faces an uphill battle in the courts when students fight to secure freedom from censorship.

III. THE STATE OF STUDENT-PRESS LAW

Over the last century, the path of minor students' constitutional rights has taken a number of turns, for better and for worse. Although there are only a handful of cases concerning student speech from the turn of the 20th Century, virtually all "these early efforts to win the right of free speech [for students] were failures."⁸⁰ Courts sanctioned everything from the paddling of students who criticized teachers in off-handed, off-campus remarks⁸¹ to the suspension of students who criticized school officials in the local newspaper⁸²—all in the name of *in loco parentis*.⁸³

Eventually, students' free-expression rights arrived on the Supreme Court's doorstep in a series of cases that dealt with students' refusal to recite the Pledge of Allegiance with their classmates. First, in *Minersville v. Gobitis*, the Court held in 1940 that students could be disciplined—and even expelled—for refusing to recite the Pledge.⁸⁴ But just three years later, the Court reversed course in *West Virginia v. Barnette*, holding that the First Amendment included protection from compelled speech, allowing public school students to refuse to say the Pledge or other affirmations they might disagree with.⁸⁵ *Barnette* was the first explicit recognition of public school students' rights to free expression and would prove valuable precedent when the Court's landmark student-speech case was handed down twenty-six years later.⁸⁶

A. *Tinker*: Students Do Not "Shed Their Rights at the Schoolhouse Gate"

The Supreme Court's first significant treatment of student-speech rights came from relatively straightforward facts out of the public schools in Des Moines, Iowa. Three teenage students in the Des Moines Independent School District—Mary Beth Tinker, her brother John Tinker, and their friend Christopher Eckhardt—planned to wear black armbands to school in protest of the war in Vietnam.⁸⁷ Upon hearing of the Tinkers' plans, Des Moines school officials met and "adopted a policy that any student wearing an armband to school would be asked to remove it, and if he refused he would be suspended until he returned without the armband."⁸⁸ Between

80. STUDENT PRESS LAW CTR., LAW OF THE STUDENT PRESS 23 (3d ed. 2008).

81. *Id.* (discussing *Lander v. Seaver*, 32 Vt. 114 (1859)).

82. *Id.* (discussing *Slate v. Dist. Bd. of Sch. Dist. No. 1*, 116 N.W. 232 (Wis. 1908) and *Tanton v. McKenney*, 197 N.W. 510 (Mich. 1924)).

83. "*In loco parentis*" refers to the legal concept for "[s]upervision of a young adult by an administrative body such as a university." BLACK'S LAW DICTIONARY 858 (9th ed. 2009).

84. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940), *overruled by* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

85. *Barnette*, 319 U.S. at 642.

86. See STUDENT PRESS LAW CENTER., *supra* note 80, at 23-24.

87. Scott A. Moss, *The Story of Tinker v. Des Moines to Morse v. Frederick: Similar Stories of Different Student Speech with Different Results*, in FIRST AMENDMENT STORIES 402, 403 (Richard W. Garnett & Andrew Koppelman eds., 2012).

88. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969).

December 16th and 17th of 1965, all three students wore armbands to school,⁸⁹ were suspended by their building principals,⁹⁰ and did not return until after their planned protest had run its course.⁹¹ The students soon filed a section-1983 action in federal court, claiming their First Amendment rights had been violated.

The United States District Court for the Southern District of Iowa dismissed their claim after an evidentiary hearing, finding that the schools' authority to punish students for what they say "should not be limited to those instances where there is a material or substantial interference with school discipline."⁹² The district court's decision was affirmed in a three-sentence per curiam opinion by an equally divided en banc panel of the Eighth Circuit Court of Appeals.⁹³

The Supreme Court granted certiorari and reversed, famously noting that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."⁹⁴ The holding of the case—often now referred to as the "*Tinker* standard"—permits censorship of student-speech in three circumstances: first, speech that materially and substantially disrupts school operations; second, speech reasonably forecast by school officials to cause such a disruption or infringement on the rights of another; or third, speech that actually invades the rights of another.⁹⁵ The Court found that the school district had failed to meet its burden on any of the three circumstances, holding that student-speech that results in "some discussion outside of the classrooms, but no interference with work and no disorder," could not be proscribed by school officials.⁹⁶

Since *Tinker* was handed down in 1969, it has remained good law, and has yet to be overturned. But *Tinker*'s powerful declaration of students' freedoms has been weakened, eroded, and often relegated to the sidelines.⁹⁷ First, in 1986's *Bethel v.*

89. Christopher Eckhardt and Mary Beth Tinker wore their armbands on December 16, 1965. Brief for the Petitioner, *Tinker*, 393 U.S. 503 (1969), 1968 WL 94383, at **4-6. John Tinker, believing school officials should have an opportunity to respond to the students' claim that the policy banning armbands was unconstitutional, did not wear his armband until December 17, after the president of the Des Moines school board refused to convene an emergency school-board meeting to hear the students' grievance. *Id.* at *6.

90. *Id.* at **15-16.

91. In support of then-Senator Robert F. Kennedy's proposed "Christmas-day truce," the students had planned to wear the armbands from roughly mid-December until after New Year's Day. *See id.* at **2-3.

92. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 258 F. Supp. 971, 973 (S.D. Iowa 1966).

93. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 383 F.2d 988, 988 (8th Cir. 1967).

94. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

95. *Id.* at 513-14.

96. *Id.* at 514. Of note, there was evidence that John Tinker's armband had caused students to make "unfriendly remarks to [him] about the arm band," but neither party seriously contended that these comments were disruptive. Brief for the Petitioner, *Tinker*, 393 U.S. 503 (1969), 1968 WL 94383, at *8.; accord Brief for the Respondents *Tinker*, 393 U.S. 503 (1969), 1968 WL 94384, at **5-6. (noting that several of John's friends made fun of him during gym class, in the locker room, and at lunch; but none of the comments were threatening or otherwise disruptive). Counsel for the Tinker children conceded at oral argument that there was some lunchroom conversation about Mary Beth's armband, as well. *See* Transcript of Oral Argument, *Tinker*, 393 U.S. 503 (1969) ("[T]here was by the way some conversation between [Mary Beth] and other students in the lunch room about why she was wearing the armband and whether or not she should be wearing it.").

97. *See* Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of Tinker?*, 48 DRAKE L. REV. 527, 529 (2000) ("[I]t is hardly surprising that at least

Fraser, the Court established an exception to *Tinker* that permitted a school to punish a student for an “offensively lewd and indecent [student council nomination] speech” given to a captive audience.⁹⁸ A similar exception was crafted in *Morse v. Frederick* in 2007 for speech that is “reasonably viewed as promoting illegal drug use.”⁹⁹ But both of these exceptions are narrow.¹⁰⁰ In light of both *Fraser* and *Frederick*, *Tinker* remains the default rule, excepting narrow classifications of lewd or drug-promoting speech. As discussed below, though, *Hazelwood* dramatically shifted the legal landscape for student newspapers, imposing a new—more school-official-friendly—default standard.¹⁰¹

B. Hazelwood: A Retreat from *Tinker* and a License to Censor

In the spring of 1983, Cathy Kuhlmeier, layout editor of *The Spectrum* student newspaper, oversaw production of a four-page newspaper that included articles about student pregnancies and how parental divorce affected students.¹⁰² Immediately before distribution of the issue, and without informing Kuhlmeier or the other student editors, the Hazelwood East High principal cut two articles out of the newspaper.¹⁰³ Kuhlmeier and two other student editors filed suit in federal court for the Eastern District of Missouri alleging that the school district had violated their First Amendment rights.¹⁰⁴

The district court rejected the students’ claim, finding that *The Spectrum* was not a public forum, but instead “an integral part of Hazelwood East’s curriculum.”¹⁰⁵ In support of that finding, the court noted that students received a grade and academic credit for their work on the paper, that the curriculum guide described the class as a “laboratory situation,” and that the journalism adviser had

one federal court of appeals has concluded that subsequent Supreme Court cases cast doubt on whether *Tinker* remains viable and whether students retain free speech rights. There simply are hardly any Supreme Court cases in the past thirty years protecting students’ constitutional rights.” (citation omitted); Mark Yudoff, *Tinker Tailored: Good Faith, Civility, and Student Expression*, 69 ST. JOHN’S L. REV. 365, 366 (1995) (“Although [later Supreme] Courts have not specifically overruled *Tinker*, *Tinker*’s progeny have greatly altered the holding set forth by the Warren Court.”); James M. Henderson, Sr., *The Public Forum Doctrine in Schools*, 69 ST. JOHN’S L. REV. 529, 536 (1995) (arguing that *Tinker* has fallen into disuse, particularly in the context of students’ rights to communicate religious speech).

98. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986).

99. *Morse v. Frederick*, 551 U.S. 393, 403 (2007).

100. See Tyler J. Buller, *Subtle Censorship: The Problem of Retaliation Against High School Journalism Advisers and Three Ways to Stop It*, 40 J. L. & EDUC. 609, 627-28 (2011); see also Clay Calvert, *Mixed Messages, Muddled Meanings, Drunk Dicks, and Boobies Bracelets: Sexually Suggestive Student Speech and the Need to Overrule or Radically Refashion Fraser*, 90 DENV. U. L. REV. 131, 143 (2012) (describing *Fraser* and *Morse* are “meanings-based” inquiries, compared to *Tinker*’s “effects-based” inquiry).

101. See Scott Andrew Felder, *Stop the Presses: Censorship and the High School Journalist*, 29 J. L. & EDUC. 433, 439-41 (2000); Alexander Wohl, *The Hazelwood Hazard: Litigating and Legislating in the State Domain When Federal Avenues Are Closed*, 5 ST. THOMAS L. REV. 1, 3-4 (1992).

102. Moss, *supra* note 87, at 414-15.

103. *Id.* at 414-15; *Kuhlmeier v. Hazelwood Sch. Dist.*, 607 F. Supp. 1450, 1459 (E.D. Mo. 1985).

104. *Kuhlmeier*, 607 F. Supp. 1450.

105. *Id.* at 1465.

historically maintained control over many aspects of production.¹⁰⁶

The students appealed to the Eighth Circuit Court of Appeals, which reversed, holding that *The Spectrum* was “a public forum because it was intended to be and operated as a conduit for student viewpoint[s].”¹⁰⁷ The Eighth Circuit justified its conclusion on the basis that “students chose the staff members, determined the articles to be written and printed, and determined the content of those articles” and that the newspaper and school district’s policies (regardless of occasional practices to the contrary) supported strong student control over the editorial process.¹⁰⁸

The school district then appealed to the Supreme Court, which reversed, holding that *The Spectrum* was not a public forum and that censorship would be permitted “so long as [school officials’] actions are reasonably related to legitimate pedagogical concerns.”¹⁰⁹ The Supreme Court’s finding regarding *The Spectrum*’s forum status largely discounted school board policies that granted broad freedoms to students, instead relying on the authority possessed by the journalism adviser—for example, that he had “selected the editors of the newspaper, scheduled publication dates, decided the number of pages for each issue, assigned story ideas to class members, advised students on the development of their stories, reviewed the use of quotations, edited stories, selected and edited the letters to the editor, and dealt with the printing company.”¹¹⁰ Based on the subject matter of the articles slated for publication, the Court reasoned, the school could have reasonably concluded that students had failed to master “those portions of the Journalism II curriculum that pertained to the treatment of controversial issues and personal attacks, the need to protect the privacy of individuals . . . and the legal, moral, and ethical restrictions imposed upon journalists within the school community.”¹¹¹ Because *Hazelwood* is so deferential to school officials—essentially a rational basis review, rather than *Tinker*’s more searching scrutiny¹¹²—these vague justifications were found to be “reasonably related to legitimate pedagogical concerns” and sufficient to justify censorship.¹¹³

The Court’s decision in *Hazelwood* was widely seen as a victory for school administrators seeking more control over student publications and as a devastating blow to the student press.¹¹⁴ Surveys have established that, post-*Hazelwood*,

106. *Id.* at 1465-66. It is worth noting that the adviser for the issue of *The Spectrum* that led to litigation was essentially a substitute, hired to finish out the remainder of the school year because his predecessor had left the district. *Id.* at 1458.

107. *Kuhlmeier v. Hazelwood Sch. Dist.*, 795 F.2d 1368, 1372 (8th Cir. 1986).

108. *Id.* at 1372-74. There is some disagreement between the Eighth Circuit’s description of the factual circumstances regarding production of *The Spectrum* and the district court’s description. Neither the Eighth Circuit nor the Supreme Court explicitly acknowledged these inconsistencies.

109. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

110. *Id.* at 268.

111. *Id.* at 276 (internal quotation omitted).

112. See Chemerinsky, *supra* note 97, at 538.

113. *Hazelwood*, 484 U.S. at 273.

114. Felder, *supra* note 101, at 451. Examples of predictions that *Hazelwood* would be the end of quality high school journalism abound. See, e.g., Jeffrey D. Smith, Comment, *High School Newspapers and the Public Forum Doctrine: Hazelwood School District v. Kuhlmeier*, 74 VA. L. REV. 843, 860-61 (1988) (“Educators, armed with the broad discretion afforded to them by *Hazelwood*, may limit school newspapers to mundane matters and cause students to ignore important, though controversial, issues.”); Wohl, *supra* note 101, at 9 (“The impact of the *Hazelwood* decision has been, as its critics feared, to

ensorship of high school newspapers is widespread.¹¹⁵ Among the more telling survey results, 33 percent of principals and 20 percent of advisers believe “articles in which quoted sources criticize the school board should never appear in the student newspaper,”¹¹⁶ 63 percent of principals believe advisers should prevent publication of articles that “may embarrass the school’s administration,”¹¹⁷ and 40 percent of student editors report not covering important stories out of fear they would not be allowed to print them.¹¹⁸ Surveys immediately following *Hazelwood* also showed school officials were aware of the new tool placed in their arsenal, as 18.9 percent of Missouri principals planned to “look more closely at student publications” following the decision,¹¹⁹ and more than 94 percent of Texas high school principals expressed agreement with the increase in control afforded by *Hazelwood*.¹²⁰ In the same vein, a survey conducted one year after *Hazelwood* revealed that 23 percent of advisers believed their students were less likely to report on controversial news and 17 percent believed their students would be less likely to criticize school officials than they had been a year earlier.¹²¹ Another 12 percent of advisers surveyed in the same study reported that prior review¹²² had

cause a significant increase in the number of incidents of high school censorship and, in general ‘a blight on the world of scholastic journalism.’”) (internal citation omitted); David L. Martinson, *The Front Line: Hazelwood: The End of the “Hidden Curriculum” Charade?*, 75 HIGH SCH. J. 131, 131 (1992) (“January 13, 1988 [the date *Hazelwood* was decided]. That is a day — in some minds at least — that will almost rival December 7, 1941, as a ‘day that will live in infamy.’”); Abrams & Goodman, *supra* note 24, at 728 (“[*Hazelwood*] appears to be a tsunami that has wiped out all that existed before”); *Hazelwood: Experts React to Decision Against Freedom for Student Journalists*, STUDENT PRESS LAW. CTR. REP., Spring 1988, at 3 (“[*Hazelwood*] will create cafeteria journalism. Students will choose only the most innocuous subjects to write about and won’t challenge or discuss topics that are important to them . . .”).

115. See, e.g., *High School Students, Teachers Report Student Media Censorship*, STUDENT PRESS. LAW CTR., <http://www.splc.org/news/newsflash.asp?id=2505> (last visited Sept. 20, 2013) (more than 40% of surveyed students and advisers reported censorship by administration); Lillian Lodge Kopenhaver & J. William Click, *High School Newspapers Still Censored Thirty Years After Tinker*, 78 JOURN. & MASS. COMM. Q. 321, 327 (2001) (three-quarters of surveyed advisers and principals reporting newspaper is censored); Thomas W. Dickson, *Self-Censorship and Freedom of the Public High School Press*, JOURNALISM EDUCATOR, Autumn 1994, at 56, 61 (more than a third of advisers and student editors report censorship of editorials based on subject-matter); J. William Click & Lillian Laodge Kopenhaver, *Principals Favor More Discipline Than a Free Press*, JOURNALISM EDUCATOR, Summer 1988, at 48, 48 (more than two-thirds of principals believe harmful stories should be censored, “even though these articles may not be libelous, obscene or disruptive”).

Kopenhaver & Click, *supra* note 115, at 328 (emphasis added).

117. *Id.*

118. Dickson, *supra* note 115, at 61; *accord NSPA/JEA 2012 Student Survey – Analysis Results*, STUDENT PRESS LAW CTR., http://www.splc.org/pdf/JEA_NSPA_survey.docx (last visited Sept. 20, 2013) (reporting 39% of students opting against publication of certain stories because they believed school officials would censor them).

119. Thomas W. Dickson, *Attitudes of High School Principals About Press Freedom After Hazelwood*, JOURNALISM Q., Spring 1989, at 169, 169-73.

120. Roger Bennett et al., *Expectations of Change in the High School Press After Hazelwood: A Survey of Texas High School Principals, Newspaper Advisers, and Newspaper Editors*, 4 SW. MASS COMM’N J. 64, 65 (1988).

121. Jim Patten, *High School Confidential: The Alarming Aftermath of the Hazelwood Decision*, COLUM. JOURNALISM REV., Sept.-Oct. 1990, at 9, 10.

122. “Prior review” is a term of art in the context of student journalism. According to the Journalism Education Association, prior review occurs “when anyone not on the publication/media staff requires

been implemented at their schools after *Hazelwood* when it had not been the school's policy or practice before the decision.¹²³

In spite of alleged limits on the reach of *Hazelwood*, the decision has operated as a broad license to censor.¹²⁴ While the opinion's language suggests it would only apply to non-public forum student newspapers,¹²⁵ it is not clear that any student newspapers would qualify as a public forum under the Court's analysis. At least one commentator has determined that "[n]o case after *Hazelwood* seems to have found that a student newspaper constitutes a public forum."¹²⁶ Given that the Supreme Court rejected the students' argument that the *Hazelwood Spectrum* was an open forum—despite protective school board policies¹²⁷ and strong student control over the editorial process¹²⁸—it is difficult to imagine exactly what set of circumstances would amount to a public forum.

Although it is difficult to quantify exactly how much *Hazelwood* has spurred censorship of high school newspapers, data from the Student Press Law Center (SPLC)—the nation's only organization dedicated solely to the rights of student journalists¹²⁹—suggests a fairly dramatic shift in the years following the decision. One of the SPLC's primary functions is its student press hotline, where attorneys and staff members take calls from student journalists regarding claims of

that he or she be allowed to read, view or approve student material before distribution, airing or publication. See *Definition of Prior Review*, JOURNALISM EDUC. ASS'N, <http://jea.org/home/about-jea/statements> (last visited Sept. 20, 2013).

123. Patten, *supra* note 121, at 10.

124. David Schimmel, *Censorship of School-Sponsored Publications: An Analysis of Hazelwood v. Kuhlmeier*, 45 EDUC. L. REP. 941, 947 (1988) (“[E]ven a narrow reading of *Hazelwood* gives administrators almost unlimited discretion to censor school-sponsored publications and plays . . .”). For a visual sample of censorship justified by *Hazelwood*, see Victor Xu, *45words Student Partners*, 25 *Years of Red Tape*, ISSUU, http://issuu.com/45words/docs/hazelwood_anniversary (last visited Sept. 20, 2013).

125. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 281 (1988) (Brennan, J., dissenting) (“The Court today casts no doubt on *Tinker*'s vitality. Instead it erects a taxonomy of school censorship, concluding that *Tinker* applies to one category and not another.”) (discussing majority's distinction between forum-statuses).

126. Felder, *supra* note 101, at 441-42. My own review of subsequent case law has not revealed a district court concluding a high school newspaper was a public forum, either. However, at least one district court has held that certain school newspapers may be limited public forums and fall outside the reach of *Hazelwood*. See *Dean v. Utica Community Schs.*, 345 F.Supp.2d 799 (E.D. Mich. 2004) (finding school district violated students' First Amendment rights when censoring story about allegedly toxic fumes emanating from school bus facility).

127. The district court received evidence concerning several Hazelwood School District board policies. *Kuhlmeier v. Hazelwood Sch. Dist.*, 607 F. Supp. 1450, 1455 (E.D. Mo. 1985). Board Policy 348.51 provided: “School sponsored student publications will not restrict free expression or diverse viewpoints within the rules of responsible journalism. School sponsored publications are developed within the adopted curriculum and its educational implications and regular classroom activities.” *Id.* at 1455. Similarly, Board Policy 348.5 provided: “Students are entitled to express in writing their personal opinions. The distribution of such material on school property may not interfere with or disrupt the educational process. Such written expressions must be signed by the authors.” *Id.* at 1455.

128. *Kuhlmeier v. Hazelwood Sch. Dist.*, 795 F.2d 1368, 1372 (8th Cir. 1986) *rev'd*, 484 U.S. 260 (1988) (“The students chose the staff members, determined the articles to be written and printed, and determined the content of those articles.”).

129. See *generally About Us*, STUDENT PRESS LAW CTR., <http://www.splc.org/aboutus/mission.asp> (last accessed Sept. 13, 2013).

ensorship.¹³⁰ In 1988, the year before *Hazelwood* was decided, the SPLC received just 548 calls. That number had more than doubled—to 1,600—in 1999¹³¹ and the SPLC received roughly 1,900 calls per year in 2010 and 2011.¹³² The views of several major journalism education groups back up the claim that *Hazelwood's* impact has been far-reaching and long lasting. Twenty-five years after the decision, these organizations passed resolutions explicitly condemning *Hazelwood* and how it has affected the student media.¹³³ While far from dispositive on *Hazelwood's* impact, there is little doubt that *Hazelwood* has played at least some part in the massive increase in calls reporting censorship of student publications.

IV. THE STATE RESPONSE TO HAZELWOOD

The movement to counter *Hazelwood's* threat to student journalism began immediately following the decision, in the spring of 1988.¹³⁴ Within four months, at least six states had proposed bills to combat *Hazelwood's* new standard for censorship of the scholastic press.¹³⁵ Bills have been introduced in dozens of states since, but few of these efforts have run the full legislative gauntlet and been signed into law. One writer estimates that 83 percent of attempts to enact a student-press law have failed, either during the legislative process or following gubernatorial veto.¹³⁶

At the state level,¹³⁷ student-press protections have been included in both statutes and administrative regulations. As discussed below, seven states have enacted legislation that restores at least some of *Tinker's* protections to student

130. See *Contact Us*, STUDENT PRESS LAW CTR., http://www.splc.org/legalassistance/legal_request.asp (last accessed Sept. 13, 2013). Over the past few years, the SPLC has also started taking online-only requests. These online-only requests are aggregated and counted in the same way as calls. See *id.*

131. Mark Goodman, *Freedom of the Press Stops at the Schoolhouse Gate: The Consequences of Student Press Censorship Could Be Devastating*, YOUTH JOURNALISM, NIEMAN REPS., Spring 2001, at 47-49.

132. E-mail from Frank LoMonte, Exec. Dir. for the Student Press Law Ctr., to Author (May 6, 2012) (on file with author).

133. *AEJMC Resolution: 25th Anniversary of Hazelwood v. Kuhlmeier*, ASS'N FOR EDUC. IN JOURNALISM & MASS COMM'N (Apr. 2, 2013), <http://www.aejmc.org/home/2013/04/resolution-one-2013/>; *Board Approves Resolution Regarding Censorship*, JOURNALISM EDUC. ASS'N (Apr. 16, 2013), <http://jea.org/blog/2013/04/16/board-to-vote-on-resolution-regarding-censorship>; *Quill and Scroll Joins Groups in Opposing High School Censorship*, JEASPRC BLOG (May 24, 2013), <http://jeasprc.org/quill-and-scroll-joins-in-opposing-high-school-censorship> (reproducing Quill & Scroll's resolution).

134. *Legislation Reversing Hazelwood's Effect Being Considered in Several State Houses*, STUDENT PRESS LAW CTR. REP., Spring 1988, at 5-6, <http://issuu.com/splc/docs/v9n2-spring88>.

135. *Id.* Another state had joined the race to combat *Hazelwood* by the Fall of 1988. See *Seven States Scramble to Overcome Hazelwood*, STUDENT PRESS L. CTR. REP. Fall 1988, at 5-6, <http://issuu.com/splc/docs/v9n3-fall88>.

136. Bruce L. Plopper, *A Synthesis Model for Passing State Student Press Legislation*, JOURNALISM & MASS COMM'N EDUCATOR, Spring 1996, at 61, 61.

137. This Article does not address local school districts' anti-*Hazelwood* or general pro-student-press regulations and board policies. There is no known national database of such regulations, but the Student Press Law Center does publish a model school board policy that imposes the *Tinker* standard, consistent with language appearing in the anti-*Hazelwood* statutes. See generally *Student Press Law Center Model Guidelines for High School Student Media*, STUDENT PRESS LAW CTR., <http://www.splc.org/knowyourrights/legalresearch.asp?id=6> (last accessed Sept. 14, 2013).

journalists. Two more states have adopted somewhat nebulous administrative regulations that—at least arguably—provide similar protection.

A. Seven States Have Adopted Anti-Hazelwood Statutes that Restore the Protections of Tinker to Student Publications.

Following *Hazelwood*, seven states adopted new statutes—or modified laws already on the books—to explicitly reject the degradation of students’ free-speech rights. As discussed below, six of the seven statutes generally follow the structure of the first student-press law in California. The other state, Massachusetts, has a substantially different statute that provides less specificity and has been interpreted somewhat differently.

1. The California Model (Six States)

To understand the California model of student-press statutes, it is important to first understand the history of the California Student Free Expression Law. The original California statute pre-dates *Hazelwood* and was adopted in 1971, just two years after *Tinker*.¹³⁸ From the outset, California courts have held that the statute embodied at least the protections afforded students by *Tinker*, if not more.¹³⁹ The statute’s current form was adopted in 1976 as Education Code 48907,¹⁴⁰ though it would be more than a decade before that statute saw litigation in a reported case.¹⁴¹ Finally, just two weeks after *Hazelwood* was decided by the Supreme Court, the California Court of Appeals held that Section 48907 provided broader protection than the federal First Amendment and that “[t]he broad power to censor expression in school sponsored publications for pedagogical purposes recognized in [*Hazelwood*] is not available to this state’s educators.”¹⁴² The California State Department of Education adopted a similar position a few months later, in March of 1988.¹⁴³

In its current form, the California statute reads:

(a) Pupils of the public schools, including charter schools, shall have the right to exercise freedom of speech and of the press including, but not limited to, the use of bulletin boards, the distribution of printed materials or petitions, the wearing of buttons, badges, and other insignia, and the right of expression in official publications, whether or not the publications or other means of expression are

138. Christopher J. Palermo, *Only the News That's Fit to Print: Student Expressive Rights in Public School Communications Media After Hazelwood v. Kuhlmeier*, 11 HASTINGS COMM’N & ENT. L.J. 35, 38 (1988).

139. See *Bright v. Los Angeles Unified Sch. Dist.*, 556 P.2d 1090, 1098 (Cal. 1976).

140. Palermo, *supra* note 138, at 37-38; CAL. EDUC. CODE § 48907 (West 2013). As discussed below, the California statute was amended in 2008 to include an adviser-protection provision. See Part V.B *infra*.

141. Palermo, *supra* note 138, at 38.

142. *Leeb v. Delong*, 243 Cal. Rptr. 494, 497-98 (Cal. Ct. App. 1988) (“If [*Hazelwood*] were specifically applicable in California, little more would have to be said. But it is not. Section 48907 of the Education Code and California decisional authority clearly confer editorial control of official student publications on the student editors alone, with very limited exceptions.” (internal footnote omitted)).

143. News Release, Cal. Dep’t of Educ., Honig Clarifies Status of Students’ “Freedom of the Press” (Mar. 18, 1988), available at <http://www.splc.org/pdf/caldoeadvisory.pdf>.

supported financially by the school or by use of school facilities, except that expression shall be prohibited which is obscene, libelous, or slanderous. Also prohibited shall be material that so incites pupils as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school.

(b) The governing board or body of each school district or charter school and each county board of education shall adopt rules and regulations in the form of a written publications code, which shall include reasonable provisions for the time, place, and manner of conducting such activities within its respective jurisdiction.

(c) Pupil editors of official school publications shall be responsible for assigning and editing the news, editorial, and feature content of their publications subject to the limitations of this section. However, it shall be the responsibility of a journalism adviser or advisers of pupil publications within each school to supervise the production of the pupil staff, to maintain professional standards of English and journalism, and to maintain the provisions of this section.

(d) There shall be no prior restraint of material prepared for official school publications except insofar as it violates this section. School officials shall have the burden of showing justification without undue delay prior to a limitation of pupil expression under this section.

(e) “Official school publications” refers to material produced by pupils in the journalism, newspaper, yearbook, or writing classes and distributed to the student body either free or for a fee.

(f) This section does not prohibit or prevent the governing board or body of a school district or charter school from adopting otherwise valid rules and regulations relating to oral communication by pupils upon the premises of each school.

(g) An employee shall not be dismissed, suspended, disciplined, reassigned, transferred, or otherwise retaliated against solely for acting to protect a pupil engaged in the conduct authorized under this section, or refusing to infringe upon conduct that is protected by this section, the First Amendment to the United States Constitution, or Section 2 of Article I of the California Constitution.¹⁴⁴

Portions of this statute have been incorporated into every other enacted anti-*Hazelwood* statute, with the exception of Massachusetts.¹⁴⁵ Each of the statutes modeled on California’s—Arkansas, Colorado, Iowa, Kansas, and Oregon—includes two components. First, each includes a positive statement declaring students’ statutory free-speech rights.¹⁴⁶ Next, the statutes detail an explicit list of

144. CAL. EDUC. CODE § 48907 (West 2013).

145. Wohl, *supra* note 101, at 20 (1992).

146. CAL. EDUC. CODE § 48907 (“Pupils of the public schools, including charter schools, shall have the right to exercise freedom of speech and of the press . . .”); IOWA CODE ANN. § 280.22 (West 2013) (“Except as limited by this section, students of the public schools have the right to exercise freedom of speech, including the right of expression in official school publications.”); COLO. REV. STAT. ANN. § 22-1-120 (West 2013) (“[S]tudents of the public schools shall have the right to exercise freedom of speech and of the press, and no expression contained in a student publication, whether or not such publication is school-sponsored, shall be subject to prior restraint except for [speech exempted by statute.]”); KAN. STAT. ANN. § 72-1506 (West 2012) (“The liberty of the press in student publications shall be protected.”); ARK. CODE ANN. § 6-18-1203 (2012) (“Student publications policies shall recognize that students may exercise their right of expression. . . . This right includes expression in school-sponsored publications, whether such publications are supported financially by the school or by

materials that may be censored or restrained: those that are obscene,¹⁴⁷ libelous, slanderous, incite others to lawless action or to violate lawful school rules,¹⁴⁸ or are reasonably forecast to cause a material and substantial disruption to the orderly operation of the school.¹⁴⁹ Two statutes—Arkansas and Oregon—also permit censorship of publications that cause an unwarranted invasion of another’s privacy,¹⁵⁰ and Colorado permits censorship of gang-related speech.¹⁵¹ All of the California-model statutes, with the exception of Arkansas, also require that advisers ensure publications are consistent with standards of journalism and English,¹⁵² and half fully immunize school officials from liability when they act pursuant to statute.¹⁵³

use of school facilities, or are produced in conjunction with a class, except as provided [by statute.]”); OR. REV. STAT. ANN. § 336.477 (West 2013) (“[S]tudent journalists have the right to exercise freedom of speech and of the press in school-sponsored media, whether or not the media are supported financially by the school or by use of school facilities or are produced in conjunction with a high school class.”).

The Colorado statute’s provision is somewhat anomalous, in that the federal courts have found that the general pronouncement of student-speech rights at the beginning of the statute is essentially surplusage and that the remainder of the statute applies only to student “publications.” See *Corder v. Lewis Palmer Sch. Dist. No. 38*, 568 F. Supp. 2d 1237, 1248 (D. Colo. 2008) (“Were this provision intended to encompass all kinds of speech, including oral speech, the statute need only reference ‘expression’ and the inclusion of ‘publication’ would be surplusage”), *aff’d*, 566 F.3d 1219 (10th Cir. 2009). Notably neither the district court nor the Tenth Circuit certified any questions of law to the Colorado state courts on how their state student-press statute should have been interpreted.

147. As discussed in Part V.E below, whether the statutes regulate materials that are profane or obscene as to minors is an open question.

148. As discussed in Part V.F below, there is ambiguity as to the statutes’ use of “encourage” versus “incite.”

149. See *supra* note 146 and accompanying text (quoting statutes).

150. ARK. CODE ANN. § 6–18-1204(3) (2012) (“[T]he following types of publications by students are not authorized... publications that constitute an unwarranted invasion of privacy, as defined by state law.”); OR. REV. STAT. § 336.477(4)(b) (2011) (“Nothing in this section may be interpreted to authorize expression by students that . . . constitutes an unwarranted invasion of privacy.”). There are no reported cases interpreting the invasion-of-privacy provisions of either statute.

151. COLO. REV. STAT. ANN. § 22-1-120(8) (West 2013) (“Nothing in this section shall be construed to limit the promulgation or enforcement of lawful school regulations designed to control gangs.”).

152. IOWA CODE ANN. § 280.22 (West 2013) (“Journalism advisers of students producing official school publications shall supervise the production of the student staff, to maintain professional standards of English and journalism, and to comply with this section.”); KAN. STAT. ANN. § 72-1506 (West 2012) (“Review of material prepared for student publications and encouragement of the expression of such material in a manner that is consistent with high standards of English and journalism [does not violate the statute.]”); COLO. REV. STAT. ANN. § 22-1-120 (West 2013) (“This section shall not prevent the advisor from encouraging expression which is consistent with high standards of English and journalism.”); CAL. EDUC. CODE § 48907 (West 2013) (“[I]t shall be the responsibility of a journalism adviser or advisers of pupil publications within each school to supervise the production of the pupil staff, to maintain professional standards of English and journalism, and to maintain the provisions of this section.”); OR. REV. STAT. ANN. § 336.477 (West 2013) (“This subsection does not prevent a student media adviser from teaching professional standards of English and journalism to the student journalists.”).

Arguably, Colorado’s provision may require something slightly different than the other states. See *Understanding Student Free-Expression Laws*, STUDENT PRESS LAW CTR., Fall 2007, at 30, available at http://www.splc.org/news/report_detail.asp?id=1351&edition=43 (discussing adviser’s role in making writing assignments).

153. The Iowa statute has the most detailed provision, providing that:

Courts in California, Colorado, and Iowa have all recognized that these statutes codify the *Tinker* standard in response to *Hazelwood* and require material and substantial disruption to justify censorship of student speech.¹⁵⁴ Commentators also widely agree that the statutes serve as an explicit rejection of *Hazelwood* in favor of some form of the *Tinker* standard.¹⁵⁵

2. The Massachusetts Model (One State)

Unlike the long-standing mandatory California statute, Massachusetts' student-press law was originally enacted as a local-option statute long before the

Any expression made by students in the exercise of free speech, including student expression in official school publications, shall not be deemed to be an expression of school policy, and the public school district and school employees or officials shall not be liable in any civil or criminal action for any student expression made or published by students, unless the school employees or officials have interfered with or altered the content of the student speech or expression, and then only to the extent of the interference or alteration of the speech or expression.

IOWA CODE ANN. § 280.22(6) (West 2013). The Kansas statute includes nearly identical language, *see* KAN. STAT. ANN. § 72-1506(e) (West 2012), while the Colorado statute is similar in all respects except providing for officials' liability to the extent they alter materials. *See* COLO. REV. STAT. ANN. § 22-1-120(7) (West 2013).

The Arkansas, Oregon, and California statutes do not include comparable provisions. *See generally* ARK. CODE ANN. § 6-18-1201–1204 (West 2013); OR. REV. STAT. ANN. § 336.477 (West 2013); CAL. EDUC. CODE § 48907 (West 2013). However, even absent such a provision, it is likely that liability would follow control, which the statute places squarely in students' hands.

154. *Lopez v. Tulare Joint Union High Sch. Dist.*, 40 Cal. Rptr. 2d 762, 771 (Cal. Ct. App. 1995) (“The only reasonable interpretation of Senator Rodda’s comments is that section 10611 constitutes a statutory embodiment of the *Tinker* and related First Amendment cases at that time.”); *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1236 (10th Cir. 2009) (“It appears [the Colorado statute] was passed by the Colorado legislature in the wake of *Hazelwood* and the concern regarding its impact on student newspapers.”); *Lange v. Diercks*, No. 11–0191, 2011 WL 5515152, at *9 (Iowa Ct. App. 2011) (“When the United States Supreme Court identified a constitutional distinction between “educators’ ability to silence a student’s personal expression” (like that in *Tinker*) and “educators’ authority over school-sponsored publications” (like that in *Hazelwood*), our legislature stepped in to pass section 280.22, supplementing Iowa students’ right to free expression within the schoolhouse gates.” (internal citations omitted)).

155. LAW OF THE STUDENT PRESS, *supra* note 80, at 53 (“These [anti-*Hazelwood*] statutes have different wording, but each provides students in those states with greater protections than they have under the First Amendment as defined by the Supreme Court in *Hazelwood*, and each uses *Tinker*’s ‘substantial disruption’ standard as the primary limitation on student free press rights.”); Evan Mayor, Note, *The “Bong Hits” Case and Viewpoint Discrimination: A State Law Answer to Protecting Unpopular Student Viewpoints*, 77 GEO. WASH. L. REV. 799, 818 (2009) (“In the years after *Hazelwood*, numerous states passed legislation limiting the case’s scope. . . . [S]tudents attempting to bring lawsuits in state[s] with these statutes] do not have to worry about the *Hazelwood* standard.”); Richard Bradley Ng, Note, *A House Divided: How Judicial Inaction and a Circuit Split Forfeited the First Amendment Rights of Student Journalists at America’s Universities*, 35 HASTINGS CONST. L.Q. 345, 363 (2008) (“[S]tates that passed ‘anti-*Hazelwood*’ legislation expanded the free speech protection for student journalists under state law, giving student journalists a state court forum to litigate infringements upon their right to free speech.”); Chris Sanders, Comment, *Censorship 101: Anti-*Hazelwood* Laws and the Preservation of Free Speech at Colleges and Universities*, 58 ALA. L. REV. 159, 168 (2006) (“Growing concerns that *Hazelwood* left students’ press freedoms too vulnerable led a handful of states . . . to pass so-called anti-*Hazelwood* statutes, affording students greater free speech protections under their state laws than they received under *Hazelwood*.”).

Hazelwood case began working its way through the courts.¹⁵⁶ It includes a positive statement of statutory rights—“[t]he right of students to freedom of expression in the public schools of the commonwealth shall not be abridged”—with only one permitted justification for censorship: speech that causes “any disruption or disorder within the school.”¹⁵⁷ Following *Hazelwood*, legislators acted to make the statute mandatory, rather than optional, but made no other substantive changes.¹⁵⁸

The Massachusetts statute has been given fairly detailed treatment by the Massachusetts courts. In *Pyle v. South Hadley*, the United States First Circuit Court of Appeals certified a question to the Supreme Judicial Court (SJC) of Massachusetts concerning the statute.¹⁵⁹ In answering the certified question, the SJC held that the statute codified *Tinker*, did not incorporate subsequent Supreme Court case law such as *Bethel v. Fraser*,¹⁶⁰ and did not contain an exception for proscribing any category of lawful speech that is not disruptive.¹⁶¹ Essentially, the SJC found that the Massachusetts statute fixed students’ free-speech rights permanently in 1969, at the height of the First Amendment’s protection for public high school students.

B. Two States—Washington and Pennsylvania—Have Administrative Codes that May Provide Greater Protection from Censorship than Hazelwood and Federal Law

In addition to state legislatures’ statutory responses, two states—Washington and Pennsylvania—have promulgated administrative rules that at least arguably provide students with greater free-speech protection than current First Amendment case law.

Washington’s administrative code sets forth a series of student rights that parallels the federal Bill of Rights,¹⁶² including that “[a]ll students possess the constitutional right to freedom of speech and press . . . subject to reasonable limitations upon the time, place, and manner of exercising such right.”¹⁶³ This provision is entirely untested in the courts, though the Student Press Law Center has taken the position that the code section “may provide students attending Washington public high schools with added protection against administrative

156. See Wohl, *supra* note 101, at 22 (discussing MASS. GEN. L. ANN. ch. 71 § 82 (West 1988)).

157. MASS. GEN. L. ANN. ch. 71 § 82 (West 1988).

158. Wohl, *supra* note 101, at 22.

159. The question certified read: “Do high school students in public schools have the freedom under [the Massachusetts statute] to engage in non-school-sponsored expression that may reasonably be considered vulgar, but causes no disruption or disorder?” *Pyle v. Sch. Comm. of S. Hadley*, 667 N.E.2d 869, 871 (Mass. 1996).

160. See *supra* Part III.A (discussing *Bethel v. Fraser*, 478 U.S. 675 (1986), and *Morse v. Frederick*, 551 U.S. 393 (2007)).

161. *Pyle v. Sch. Comm. of S. Hadley*, 667 N.E.2d at 871-72.

162. The administrative code section includes language that loosely mirrors the federal First, Fourth, Fifth and Fourteenth Amendments, and also guarantees a right to be free from “unlawful inference in [students’] pursuit of an education.” Compare WASH. ADMIN. CODE § 392-400-215 (2012) with U.S. CONST. amend. I, IV, V & XIV.

163. WASH. ADMIN. CODE § 392-400-215 (2012).

“censorship.”¹⁶⁴ Such a position likely reflects an interpretation of the code section that would have those rules codify student-speech rights as they existed when that section was enacted in 1977 and thus imposes the *Tinker* standard. But another possible interpretation might be that this code section was written to reflect the evolution of “the constitutional right to freedom of speech and press,” which would impose the *Hazelwood* standard, as well as restrictions present in *Bethel v. Fraser* (concerning lewd and indecent speech)¹⁶⁵ and *Morse v. Frederick* (concerning speech that advocates illegal drug use)¹⁶⁶ in modern litigation.

The Pennsylvania administrative code more clearly codifies the *Tinker* standard, permitting students the right to free speech “unless the expression materially and substantially interferes with the educational process, threatens serious harm to the school or community, encourages unlawful activity or interferes with another individual’s rights.”¹⁶⁷ The code section also imposes on students “the responsibility to obey laws governing libel and obscenity and to be aware of the full meaning of their expression”¹⁶⁸ and “the responsibility to be aware of the feelings and opinions of others and to give others a fair opportunity to express their views.”¹⁶⁹ Like the Washington code section, the Pennsylvania administrative code sections pertaining to student speech have not been litigated¹⁷⁰ or widely discussed.¹⁷¹ The Student Press Law Center, however, has taken the position that the regulations “should provide student journalists attending Pennsylvania public high schools with added protection against administrative censorship.”¹⁷² It is

164. *Washington Administrative Code: Student Rights*, STUDENT PRESS LAW CTR. (Aug. 1, 1977), http://www.splc.org/knowyourrights/law_library.asp?id=12 (emphasis added).

165. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986) (upholding discipline of student after giving student-council nomination speech rife with sexual innuendo).

166. *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (upholding discipline of student for unfurling “Bong Hits 4 Jesus” banner at school-sponsored event).

167. 22 PA. CODE § 12.9(b) (2012).

168. *Id.* § 12.9(c)(1).

169. *Id.* § 12.9(c)(2).

170. The Third Circuit has referenced this administrative-code section twice in passing, both times without analysis. First, in the *Blue Mountain* case, the court simply mentioned the statute as guiding school regulations before ultimately upholding discipline of a student for speech reasonably forecast to cause a material and substantial disruption under *Tinker*. See *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 593 F.3d 286, 306 (3d Cir. 2010), *aff’d in part, rev’d in part en banc*, *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011). Similarly, the code section was referenced without analysis in a footnote in *Walker v. Leonard*, concerning a student’s right to circulate a petition during school hours. See *Walker-Serrano ex rel. Walker v. Leonard*, 325 F.3d 412, 415 n.2 (3d Cir. 2003).

171. There was, however, a brief public discussion of the protection afforded by the Pennsylvania administrative regulation in 2002, when state board of education members proposed to give school officials broader power to control the student press. See generally Rhea Borja, *Pa. Board Mulls Tighter Reins on Student Press*, EDUCATION WEEK, Jan. 16, 2002, at 5. Although the proposed changes were not adopted, the suggestion that school officials wanted to bring the state “more in line with court rulings bolstering school administrators’ authority over student newspapers” suggests that the statute does in fact codify *Tinker* and serve an anti-*Hazelwood* function. See *id.* (internal quotation marks omitted).

172. *Pennsylvania Administrative Code: Student Rights and Responsibilities*, STUDENT PRESS LAW CTR. (Dec. 3, 2005), http://www.splc.org/knowyourrights/law_library.asp?id=11.

At least one unpublished thesis (by a Master of Arts in Journalism candidate) has taken the position that the Pennsylvania code incorporates portions of both *Tinker* and *Hazelwood* because it provides for administrative review of student newspapers. See Jill Marano Strainic, *High School Publications Demonstrate Higher Quality When Students Control Content* (Dec. 2007) (unpublished

unclear what case law or principles of construction might guide an understanding of this code section.

V. PROBLEMS WITH ANTI-*HAZELWOOD* STATUTES

These statutes share not only a common genesis as a response to *Hazelwood*, but also a number of substantive flaws and weaknesses that potentially limit their effectiveness and ability to safeguard students' rights. These discrete problems include difficulties in enforcement, vulnerabilities to indirect censorship, mootness of claims, and murky language concerning standards of journalism, profanity, and incitement—all of which are discussed below.

In addition to the narrow issues that individually plague a handful of statutes, each of these statutes also shares a common concern: as a group, anti-*Hazelwood* statutes have seen little—and in some cases, no—litigation. Iowa's statute has only been substantively litigated in one case,¹⁷³ while the California¹⁷⁴ and Massachusetts¹⁷⁵ statutes have each been litigated in just a handful of cases. The Arkansas, Kansas, and Oregon statutes have yet to be relied on in a single lawsuit, while the Colorado statute has seen only marginal treatment in a federal graduation-speech case.¹⁷⁶ The scarcity of case law likely shapes the practical effectiveness of these statutes, as both students and administrators often lack clear guidance from the courts about the construction and application of student-press laws. Yet, even in the handful of states where these statutes have been addressed in-depth by the courts, significant flaws and concerns have been exposed. As discussed below, these weaknesses may raise serious questions as to whether the statutes can fulfill their intended purpose of safeguarding students' rights.

A. Enforcement: Nearly All Statutes Lack Independent Enforcement Mechanisms and School Districts Often Ignore Statutory Requirements to Adopt Consistent Guidelines

Without a mechanism for effective enforcement, student-press laws remain but words on a page, doing little to ensure that students are actually free from administrative censorship. Of the seven statutes and two administrative-code

M.A. thesis, Kent State Univ.), available at <http://www.jeapressrights.org/2008documents/2008ResponsibleJ/2008point4communication/2007-StrainicPaper.pdf> (“The Pennsylvania Code (2005) speaks to both the *Tinker* and *Hazelwood* decisions While it allows the wearing of armbands and buttons consistent with the *Tinker* case, it also states that schools will follow the precedent set in *Hazelwood*, outlining procedure for prior review, distribution, and editorial control of school-sponsored publications.”) This conclusion is incorrect as a matter of law. The Pennsylvania code section, 22 PA. CODE § 12.9(g)(2), only permits censorship of “obscene or libelous material and edit other material that would cause a substantial disruption or interference with school activities.” This is an embodiment of *Tinker*, rather than *Hazelwood*'s “pedagogical concerns” standard. See *supra* Part III.

173. See generally *Lange v. Diercks*, No. 11–0191, 2011 WL 5515152 (Iowa Ct. App. 2011).

174. See, e.g., *Leeb v. Delong*, 243 Cal. Rptr. 494 (Cal. Ct. App. 1988); *Lopez v. Tulare Joint Union High Sch. Dist.*, 40 Cal. Rptr. 2d 762 (Cal. Ct. App. 1995); *Smith v. Novato Unified Sch. Dist.*, 59 Cal. Rptr. 3d 508 (Cal. Ct. App. 2007).

175. See, e.g., *Pyle v. Sch. Comm. of S. Hadley*, 667 N.E.2d 869 (Mass. 1996); *Westfield High Sch. L. I. F. E. Club v. City of Westfield*, 249 F. Supp. 2d 98 (D. Mass. 2003).

176. See *Corder v. Lewis Palmer Sch. Dist.* No. 38, 566 F.3d 1219, 1235-36 (10th Cir. 2009) (finding the Colorado statute applied only to student publications, rather than all student speech).

provisions, just one—Oregon’s statute—provides a penalty for violations.¹⁷⁷ As a result, students are forced to rely on a state’s general declaratory-judgment statute or seek injunctive relief, rather than bringing a self-contained cause of action that arises solely out of a student-press statute. This adds additional uncertainty to the litigation calculus by complicating the pleading stage and adding another consideration for students weighing whether to bring a claim.¹⁷⁸

Unlike many other civil-rights claims, the state-law rights conferred by student-press statutes are not easily vindicated in the federal courts. Section 1983 of the United States Code—the most common statutory cause-of-action to vindicate civil-rights claims—only permits actions to remedy deprivations of rights under federal law or the federal constitution.¹⁷⁹ This means that, if school officials violate a student’s statutory free-speech rights, but not federal law (as would be the case when administrators censor pursuant to *Hazelwood* in a state with an anti-*Hazelwood* statute), students cannot obtain federal relief¹⁸⁰ and must instead turn to often-underutilized state civil-rights statutes.¹⁸¹ And even then, students may be severely limited in the relief they can seek.¹⁸²

While six of the seven statutes lack a mechanism for judicial enforcement, five of these statutes (Kansas being the exception) provide a mechanism for local, school-level enforcement by requiring school boards to adopt guidelines consistent with the statutes’ requirements.¹⁸³ Because school board policies “carr[y] the force

177. Compare CAL. EDUC. CODE § 48907 (West 2013); IOWA CODE ANN. § 280.22 (West 2013); COLO. REV. STAT. ANN. § 22-1-120 (West 2013); KAN. STAT. ANN. § 72-1506 (West 2013); ARK. CODE ANN. § 6-18-1203 (West 2013); MASS. GEN. LAWS ANN. ch. 71 § 82 (West 2013) with OR. REV. STAT. ANN. § 336.477 (West 2013); see also Palermo, *supra* note 138, at 69 (published before Oregon adopted its anti-*Hazelwood* statute).

178. See Buller, *supra* note 100, at 647 (“Both the Iowa and Colorado statutes lack any explicit independent-enforcement . . . This effectively leaves aggrieved students in the dark, unsure of exactly where to turn for vindication of their rights.”) (footnote omitted).

179. Title 42 section 1893 of the United States Code (commonly referred to as “section 1983”) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (2006).

180. See *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 370-71 (9th Cir. 1996) (citing *Hallstrom v. City of Garden City*, 991 F.2d 1473, 1482 n.22 (9th Cir. 1993), and *Brown v. Nutsch*, 619 F.2d 758, 764 (8th Cir.1980)). In *Lovell*, the Ninth Circuit reversed a magistrate’s award of damages and attorneys’ fees under section 1983 for a school district’s violation of a student’s rights under the California anti-*Hazelwood* statute. 90 F.3d 367 at 373.

181. See *Understanding Student Free-Expression Laws*, *supra* note 152, at 30.

182. See *Land v. Los Angeles Unified Sch. Dist.*, 2007 WL 1413227, at *8 (Cal. Ct. App. May 15, 2007) (finding plaintiff forfeited issue of private enforcement due to failure to cite authority).

183. See generally *supra* note 146 and accompanying text. It is unclear why Kansas’ statute does not include a similar provision. See KAN. STAT. ANN. §§ 72.1504–1506 (West 2013). Neither the House nor

of law for public employees, students, or visitors on school property,”¹⁸⁴ students can appeal to school officials and elected school board members for enforcement. Unfortunately, there is significant evidence that school districts have, in practice, utterly failed to comply with statutory requirements and some have even adopted policies that directly conflict with student-press statutes.¹⁸⁵ Although there is limited evidence as to whether schools’ noncompliance with statutes is willful or ignorant, at least one study suggests that, among administrator-preparation programs, not even school-law instructors (most of whom have graduate-level degrees) are aware of anti-*Hazelwood* statutes.¹⁸⁶ Based on these factors, it is hardly surprising that isolated incidents of censorship continue to crop up in states with anti-*Hazelwood* statutes.¹⁸⁷

In sum, the anti-*Hazelwood* statutes are difficult to enforce through litigation and compliance is left largely to the whims of individual boards of education and school administrators. This raises serious questions about whether statutory commands to abstain from censoring student publications have any bite for administrators intent on silencing the student press.

B. Indirect Censorship: Anti-Hazelwood Statutes Largely Target Direct Censorship and Provide Students Limited Protection from Indirect Censorship

Censorship takes many forms. It can be overt, like when a principal cuts pages out of a newspaper, or it can be indirect, such as when a principal retaliates against a journalism adviser or a school board cuts funding for a publication. By their plain

the Senate Journals for Kansas SB 62 (1991)—the bill that eventually became the Kansas anti-*Hazelwood* statute—reveal any discussion related to school boards’ adoption of guidelines.

184. Edwin C. Darden, *Policy, the Law, and You*, AM. SCH. BD. J. 54, 54 (2008).

185. See Jeri Christine Okamoto, *Prior Restraint and the Public High School Student Press: The Validity of Administrative Censorship of Student Newspapers Under the Federal and California Constitutions*, 20 LOY. L.A. L. REV. 1055, 1103 (1987); Bruce L. Plopper & William D. Downs, Jr., *Arkansas Student Publications Act: Implementation and Effects*, JOURNALISM & MASS COMM’N EDUCATOR, Spring 1998, at 74, 78-81 (reporting that as many as 29% of Arkansas school districts have either failed to promulgate policies as required by statute or the school adviser was unaware of the existence of a policy; and, among districts that did promulgate policies, 51% unlawfully granted final control of student publications to school officials).

186. Brian Schraum, *Trained to Censor? A Student of Student Expression Issues in Missouri Principal Preparation Programs* 42 (July 2010) (unpublished M.A. thesis, Univ. of Missouri-Columbia), available at <https://mospace.umsystem.edu/xmlui/bitstream/handle/10355/9265/research.pdf?sequence=3>. Schraum’s study also includes other qualitative information about administrator-preparation courses, including a discussion of their syllabi and how they approach the decisions in *Tinker*, *Hazelwood*, and other important First Amendment cases. See *id.* at 39-47. Of particular interest, Schraum notes that the take-away message regarding students’ rights from most of these administrator-preparation programs is: “Principals have total control over school newspapers. See *Hazelwood v. Kuhlmeier*.” *Id.* at 51.

187. Although anecdotal reports of censorship in *Tinker* states have been reported, it is virtually impossible to assess their cause or prevalence. See, e.g., Steve Marcantonio, *Colorado Student Shares His Experience Confronting and Overcoming Censorship*, STUDENT PRESS LAW CTR. BLOG (Jan. 10, 2013) <http://www.splc.org/wordpress/?p=4605>; Nicole Ocran, *Student Newspaper Containing Critical Article Confiscated at Iowa High School*, STUDENT PRESS LAW CTR. NEWSFLASH (Feb. 10, 2010) <http://www.splc.org/news/newsflash.asp?id=2026>; *Principal Violates Kansas Press Law; Superintendent Won’t Punish Censor*, STUDENT PRESS L. CTR. REP., Spring 1996, at 10, available at <http://issuu.com/splc/docs/v17n2-spring96>.

language, most anti-*Hazelwood* statutes are focused only on direct censorship, and are not easily adapted to combat subtler, more insidious attempts to silence students.

One of the most widely discussed examples of indirect censorship is retaliation against journalism advisers. Across the country, school officials—unable to censor students directly—apply pressure to the students’ journalism adviser through reprimands, threats of transfer or discipline, or even termination.¹⁸⁸ Yet the vast majority of student-press statutes are silent on adviser-retaliation. Only California and Arkansas’ statutes contain explicit adviser-protection provisions¹⁸⁹ (though the Iowa courts have found at least some implicit protection against adviser-retaliation emanates from the state’s statute).¹⁹⁰ I have addressed the problems associated with vindicating advisers’ rights elsewhere,¹⁹¹ but suffice to say, school administrators’ ability to reach around student-press statutes by punishing advisers instead of students is a massive statutory gap with significant consequences for students and advisers. And, as with all other forms of censorship, adviser-retaliation chills student speech and undermines the First Amendment’s guarantees.¹⁹²

But retaliation against advisers is not the only form of indirect censorship students face.¹⁹³ Particularly at the college level, tales abound of university administrations and student governments attempting to control the student press through budget cuts and funding restrictions.¹⁹⁴ These concerns may be just as prevalent at the high school level—perhaps even more so, given the complex machinations of public school funding at the local level. It would not be surprising

188. See generally Buller, *supra* note 100, at 617-18 (discussing common forms of adviser-retaliation).

189. *Id.* at 643-44 (discussing KAN. STAT. ANN. § 72-1506(d) (West 2013); CAL. EDUC. CODE. § 48907(g) (West 2013)).

190. See *Lange v. Diercks*, No. 11-0191, 2011 WL 5515152 (Iowa Ct. App. 2011).

191. See generally Buller, *supra* note 100.

192. *Id.* at 619 (“No matter the source, censorship chills student speech, teaching students that fully exploring their freedom of expression will result in consequences to them or their teachers.”).

193. According to student-press advocate Frank LoMonte, newer, more subtle forms of censorship “involve[] pressure indirectly applied: changes to the governance structure of the student newspaper, reassignment (or outright firing) of the faculty adviser, or crippling cuts to the publication budget. These tactics may be subtler than leaning over the student editor’s shoulder and pressing the delete key, but they are no less effective.” Frank D. LoMonte, *Student Journalism Confronts A New Generation of Legal Challenges*, 35 HUMAN RIGHTS, no. 3, 2008, available at http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol35_2008/human_rights_summer2008/hr_summer08_lomonte.html (last visited Sep. 27, 2013).

194. *Student Governments Use Money to Control Student Newspapers*, 17 STUDENT PRESS L. CTR. REP., no. 3, Spring 1996, at 31, available at <http://issuu.com/splc/docs/v17n2-spring96> (last visited Sep. 27, 2013); *Fighting Over the Purse Strings: Student Senate Attempts to Control Finances of Newspaper*, 17 STUDENT PRESS L. CTR. REP., Winter 1995-96, at 23, available at <http://issuu.com/splc/docs/v17n1-winter95> (last visited Sep. 27, 2013); *Queens Paper Survives Struggle for Student Government Funding*, 13 STUDENT PRESS L. CTR. REP., no. 3, Fall 1992, at 35, available at <http://issuu.com/splc/docs/v13n3-fall92> (last visited Sep. 27, 2013); see also *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973) (retaliation against university publication by withholding publication funding). Censorship at a public college, as with a public high school, implicates the First Amendment when public monies or other resources fund publications.

The Journalism Education Association has also documented use of school budgets as a form of indirect censorship affecting student newspapers, although numerical data regarding the frequency of these problems is not available. See JOURNALISM EDUCATION ASS’N, *supra* note 18, at 8-9.

if many attempts to de-fund student newspapers go unreported due to public (and news media) apathy toward local government or because they are buried in the pre-text of budget cuts warranted by an economic slowdown.

This inability to combat indirect censorship is a substantial weakness for most of the anti-*Hazelwood* statutes. Indirect censorship—like adviser-retaliation and budget cuts—is just as effective at silencing student-speech as taking scissors to a newspaper article, yet these statutes do little to protect students' rights from administrators with the creativity or ambition to circumvent existing statutory safeguards.

C. Mootness: Most Statutes Do Not Prevent Students' Claims from Becoming Moot After Graduation

Anti-*Hazelwood* statutes also lose much of their punch when, in the rare case where students can rally the resources needed to litigate a claim,¹⁹⁵ lawsuits are dismissed as moot because students lack standing. The procedural barrier of standing has been particularly difficult for students who graduate as their cases wind their way through the federal courts.¹⁹⁶ In one notable case, the Supreme Court of the United States even *sua sponte* declared students' First Amendment claims moot when the Court learned at oral argument that the student-plaintiffs had graduated; the mootness issue in that case had not been briefed by the students or the school district, or raised in the courts below.¹⁹⁷ Although state statutory claims are not necessarily bound by the requirement of Article III standing,¹⁹⁸ state courts are similarly unlikely to reach the merits of claims for relief that have become moot or where no injunctive relief is possible.¹⁹⁹

195. Brief for Student Press Law Center et al. as Amici Curiae Supporting Respondents, *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (No. 86-836), 1987 WL 864179, at n.9 (“Only the handful of students with the necessary financial resources, peer and parent support and sheer courage end up fighting unconstitutional censorship in court.”); accord Jonathan Peters, *Student Journalists v. School Administrators: A More Structured Way To Resolve Disputes 4* (2011) (unpublished manuscript), available at http://works.bepress.com/jonathan_peters/4 (last visited Sep. 27, 2013) (“Students, unless they solicit the help of an organization like the SPLC, just do not have the resources to drag school officials before a judge.”).

196. See, e.g., *Lane v. Simon*, 495 F.3d 1182 (10th Cir. 2007) (finding college students lacked standing to pursue federal claim after graduation); *Sapp v. Renfroe*, 511 F.2d 172, 175-76 (5th Cir. 1975) (finding graduation mooted challenge to school ROTC guidelines even under “capable of repetition, yet evading review” doctrine); *Jones v. Indiana High Sch. Athletic Ass’n, Inc.*, 16 F.3d 785, 788-89 (7th Cir. 1994) (finding challenge to high school athletic-eligibility requirement was moot following plaintiff’s graduation); *Harper v. Poway Unified Sch. Dist.*, 318 F. App’x 540, 541 (9th Cir. 2009) (holding federal cause of action asserting state-law rights was also mooted by graduation of plaintiffs).

197. *Bd. of Sch. Comm’rs. of Indianapolis v. Jacobs*, 420 U.S. 128, 129 (1975) (“At oral argument, we were informed by counsel for petitioners that all of the named plaintiffs in the action had graduated . . . it seems clear that a case or controversy no longer exists between the named plaintiffs and the petitioners . . .”).

198. *Contra Lane v. Simon*, 495 F.3d 1182 (10th Cir. 2007) (finding college students lacked standing to pursue federal claim after graduation); see generally *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (on Article III standing).

199. See, e.g., *Barcik v. Kubiacyk*, 873 P.2d 456 (Or. App. 1994) (holding plaintiff student journalists lacked standing on appeal because they had graduated before the district court entered a judgment in their favor), *aff’d in part*, 895 P.2d 765 (Or. 1995) (en banc) (holding plaintiff student

As plaintiffs, student journalists are unique: the entire staff of a given student publication is guaranteed to turn over every four years due to routine graduation.²⁰⁰ The window shrinks even further if one assumes that newspaper leadership positions (such as a student editorial board) are likely upper-classmen, and the editor-in-chief is very likely to be a graduating senior. Under these circumstances, the window of time in which a student's statutory free-speech claim survives is months at the longest, or as short as weeks when a principal censors a newspaper's senior- or graduation-edition. It is effectively impossible for students to litigate their claims in such a narrow timeframe.

Student-press attorneys have suggested that students may be able to game state or federal standing requirements by substituting current editors as named plaintiffs, suing for damages, filing a class-action suit, or alleging that censorship has caused actual harm to the parties.²⁰¹ But it is unclear whether many, or any, of these tips have practical value for high school students. Every student-editor is unique and it would not be surprising to find that some editors are uninterested in pursuing censorship claims on behalf of their predecessors—especially when school officials replace the students complaining of censorship with peers more in line with administrators' views.²⁰² Students are also unlikely to seek monetary damages, given the limited financial assets of student publications and students' goal of injunctive relief: often an order to prevent censorship and allow distribution of a student publication.²⁰³ While some advocates remain optimistic, it is unclear whether any of these strategies will actually increase students' access to the courts under these statutes.

One state, however, has addressed this weakness head-on. California amended its student-press laws in 2008 to explicitly confer standing on aggrieved student journalists even after they have graduated.²⁰⁴ Although this provision has yet to be tested in the courts, its straightforward language suggests that it may effectively combat the problem of standing.

journalists lacked standing with the exception of a student who had disciplinary notices placed in his record); *but see* *Leeb v. Delong*, 198 Cal. App. 3d 47, 51-52 (Cal. Ct. App. 1988) (holding otherwise because the “constitutional issue raised is of continuing public interest and likely to recur in circumstances where, as here, there is insufficient time to afford full appellate review.”).

200. *See* Buller, *supra* note 100, at 630.

201. *See* Robert Corn-Revere, Rory Eastburg & Micah Ratner, *Keeping Your Case Alive After Graduation*, 30 STUDENT PRESS L. CTR. REP., no. 1, Winter 2008-2009, at 35, available at http://www.splc.org/news/report_detail.asp?id=1478&edition=48 (last visited Sep. 27, 2013). The authors also suggest that an incorporated college newspaper may be able to join the suit as an entity, but this avenue is likely not available to most high school newspapers. *See id.*

202. *See* Kent A. Hansen, Note, *Obscenity, Profanity, and the High School Press*, 15 WILLAMETTE L. REV. 507, 526-27 (1978-79) (suggesting “manipulation of the staff structure of a school publication by administrators and faculty advisers to ensure that editorial positions are filled with students who will not embarrass or challenge administrative policies.”).

203. *See* Corn-Revere et al., *supra* note 201, at 35.

204. This section, enacted in 2008, provides:

A pupil who is enrolled in a school at the time that the school has made or enforced a rule in violation of subdivision (a) may commence a civil action to obtain appropriate injunctive and declaratory relief as determined by the court. Upon motion, a court may award attorney's fees to a prevailing plaintiff in a civil action pursuant to this section.

CAL. EDUC. CODE § 48950(b) (West 2012).

D. Murky Justifications for Censorship: Several Statutes Permit Censorship of Publications that Do Not Meet “Standards of Professional Journalism”

Five of the seven states that have enacted anti-*Hazelwood* statutes give school officials the power to regulate student publications based on a vague and ill-defined justification: to ensure student speech is consistent with “professional” or “high” “standards of English and journalism”²⁰⁵ These provisions raise practical problems of proof—exactly who determines “professional standards of English and journalism?”—and offer an easy cover for administrators who seek to silence otherwise protected speech.

The most glaring problem with including a standards-based justification for censorship is that courts are not equipped to determine exactly what “professional standards of English and journalism” are. A lack of institutional experience at least partially explains why every court to address these provisions has done so only in passing. In both the California and Iowa cases, appellate courts have skirted the issue of journalism standards by relying on rules of error preservation²⁰⁶—rules that themselves are designed to ensure judges have an adequate record on which to base their decisions. It is not difficult to imagine a scenario in which parties put on a “battle of the experts” to establish what the standards of English and journalism require and whether a given publication complies with those standards. The product of any attempt at judicial fact-finding is unpredictable at best, given the somewhat amorphous nature of “standards” in journalism education.²⁰⁷ But, even in a

205. IOWA CODE ANN. § 280.22 (West 2013); KAN. STAT. ANN. § 72-1506 (West 2012); COLO. REV. STAT. ANN. § 22-1-120 (West 2013); CAL. EDUC. CODE § 48907 (West 2013); OR. REV. STAT. ANN. § 336 (West 2013).

206. As explained by Judge Linda Gemello, writing for the California Court of Appeals:

We note that [*Leeb*] did not take into account the language in section 48907 authorizing journalism advisers “to maintain professional standards of English and journalism.” Under that language, educators may well be able to exercise some of the control over student speech in school newspapers permitted under [*Hazelwood*]. The issue was not raised by the parties and we need not decide how the authority conferred to schools under the “professional standards” language in section 48907 differs from the authority recognized in [*Hazelwood*].

Smith v. Novato Unified Sch. Dist., 150 Cal. App. 4th 1439, 1453, 59 Cal. Rptr. 3d 508, 517 (Cal. Ct. App. 2007) (internal citations omitted). Judge Mary Tabor, writing for the Iowa Court of Appeals, came to a similar conclusion by drawing on the reasoning of Judge Gemello’s opinion:

Although Diercks and the District mentioned section 280.22(5) [concerning professional standards] in the district court, they did not explain how these publications failed to meet the standards of journalism and English. On appeal, they cite *Smith v. Novato Unified School District*, for the proposition that a similar statutory provision in the California code “may well enable educators to exercise some of the control over school speech in student newspapers under [*Hazelwood*].” But the California court did not decide the “professional standards” issue because the parties did not raise it. We similarly conclude this record does not properly present the issue for our review.

Lange v. Diercks, No. 01-0191, 2011 WL 5515152, at *11 (Iowa Ct. App. 2011).

207. For an example of state standards related to student publications see generally IND. DEP’T. OF EDUC., OFFICE OF CURRICULUM AND INSTRUCTION, STUDENT PUBLICATIONS STANDARDS, (2008), available at <http://www.doe.in.gov/sites/default/files/curriculum/studentpublicationsstandards1.pdf>. Unfortunately, many states’ academic standards fail to detail specific standards for journalism education. For example, in states that have adopted “common core” standards, journalism is not even mentioned among English Language Arts standards, even though journalism courses can be used to

hypothetical state with unimaginably detailed standards of journalism, the standards provisions likely remain unworkable. Statutes designed to protect student journalists cannot reasonably be construed in a manner that would allow otherwise protected student speech to be censored because a journalism adviser did not teach enough lessons about em-dashes, apostrophes, or semi-colons.

To give school officials the benefit of the doubt—that is, to assume they are more concerned with providing for students’ academic growth than silencing speech critical of administrators or school policy—it may make sense to allow school officials to censor speech that does not meet certain minimum thresholds of English and journalistic standards. It makes sense to let schools require student reporters learn the fundamentals of grammar, spelling, and how to report factually accurate information. And it makes sense that schools want to instill basic values of journalism ethics in student journalists. Unfortunately, if even a fraction of reported cases of censorship are accurate, school officials are much more likely to create a situation where “all a principal . . . has to do to kill a story or editorial he or she doesn’t like is to label it ‘poorly written’ or ‘inconsistent with the shared values of civilized social order’”²⁰⁸

The *Lange* case from Iowa provides a strong cautionary tale of the dangers that arise when a school official—or even a district court judge—is placed in the position of determining whether student journalism meets appropriate standards of English.²⁰⁹ In *Lange*, the student newspaper at issue was an April Fool’s parody-edition of the Waukon Senior High School newspaper, *The Tribe-une*.²¹⁰ By any measurement, this edition of *The Tribe-une* was not a pinnacle of journalistic excellence. Among its many satirical and parody stories, it included a digitally created photo of an infant smoking a cigarette, a fictional story about a methamphetamine lab found in a biology classroom, and a story quoting students about their (presumably exaggerated) aspirations of becoming exotic dancers.²¹¹

During depositions, the school district’s superintendent indicated that he justified censorship of the newspaper in part based on his opposition to the “parody, satire type of reporting, editorializing, whatever” that the students had

meet core-standards requirements. See generally COLO. HIGH SCH. PRESS ASS’N JOURNALISM IS THE NEW ENGLISH (Feb. 2011), available at <http://www.chspaonline.org/wp-content/uploads/2010/08/Journalism-is-the-new-English.pdf> (discussing COMMON CORE STATE STANDARDS INITIATIVE, ENGLISH LANGUAGE ARTS STANDARDS, available at <http://www.corestandards.org/ELA-Literacy> (last visited Sept. 18, 2013)).

208. Mike Hiestand, *Washington Student Free Press Law FAQ*, NAT’L SCHOLASTIC PRESS ASS’N NEWS & NOTES BLOG (Feb. 1, 2007), http://www.asjmc.org/resources/scholastic/scholastic_media.php. Precisely this kind of justification was in play when *The Statesman*, an award-winning high school newspaper in Illinois, faced numerous acts of censorship in 2009 and 2010. See *Muzzling Students*, CHICAGO TRIBUNE, Nov. 26, 2009, http://articles.chicagotribune.com/2009-11-26/news/0911250926_1_student-journalists-administrators-story. School officials ultimately defended their censorship by criticizing the students’ use of anonymous sources and claimed that it was not appropriate to report on illegal activity, such as underage drinking. *Id.* A *Statesman* package concerning teens “hooking-up” was similarly criticized by school officials for being “irresponsible, unbalanced and lacking in news value,” despite the *Chicago Tribune*’s praise for the coverage. *Id.*

209. *Lange v. Diercks*, No. 11-0191, 2011 WL 5515152 (Iowa Ct. App. 2011).

210. *Lange*, 2011 WL 5515152, at **1-2.

211. *Id.* at **2-3, 9.

engaged in.²¹² Not in so many words, the school district advanced the claim that parody—at least of the type practiced by the Waukon Senior High students—did not meet professional standards of journalism or English. Yet the letters of reprimand issued to the newspaper’s adviser do not mention disagreement over style or journalistic standards, but rather highlight the school’s belief that the material was “inappropriate, “had a negative impact on the [school district],” and “offended” members of the community.²¹³ It would be naïve to assume that *Lange v. Diercks* was an anomaly, and that other school officials would not seek to suppress otherwise lawful student speech based on perceived deficiencies in “journalism standards.”

Against this backdrop, the best understanding of the statutes’ standards-of-journalism component is likely that a school should only be authorized to require students writing for an official student publication to correct gross problems of

212. Deposition of Dave Herold, *Lange*, 2011 WL 5515152, app. at 103 (on file with author). In the interest of providing the full context of Superintendent Herold’s remarks, the questions surrounding that statement (asked by Lange’s trial attorney) read:

Q. Okay. Would you point out to me, starting at page 1 there, which articles are objectionable to you?

[HEROLD]. First, the first article that is the most objectionable to me in regard to the articles there are a few that are more than others. I don’t care for the totality of the - and I don’t agree with the parody, satire type of reporting, editorializing, whatever.

Q. So you just object to that style.

A. Yes.

Q. Okay.

Id. at 102-03.

213. The Allamakee School District issued two letters of reprimand to adviser Ben Lange, both of which were eventually expunged by court order. *See Lange*, 2011 WL 551515, at *12. The first letter, dated August 8, 2008, read:

This document records an incident that had a negative impact on the [school district]. The incident happened in April of the 2007-2008 school year and involves the April 2, 2008, “April Fools” edition of the Waukon Senior High School Bribe-une (Tribe-une) and the high school journalism class. Numerous inappropriate text, comments and articles were created, edited, and printed in this edition. A previous discussion of appropriateness concerning the Tribe-une newspaper was discussed at an earlier with Mr. Lange.

A multitude of people from within our school district and a neighboring school district of Eastern Allamakee were offended by this edition. Administration and the school board felt that issue was inappropriate and done with poor judgment casting a dark shadow on our school district.

Both Mr. Lange and his journalism class were reprimanded and held accountable for their actions. Articles for the rest of the school year were previewed by the high school administration, an apology was printed in the next Tribe-une issue, no future April Fools edition will be written, and new criteria for the Tribe-une will be instated during the 2008-2009 year.

Lange, 2011 WL 5515152, app. at 16 (on file with author). A second reprimand, in October of 2009, made similar comments and purported to suspend Lange for two days because “People (both staff and non-staff) within our school district are offended by this edition. Administration feels that the issue was inappropriate and done with poor judgment once again having a negative effect and undermining our school district’s goals.” *Id.* at 19.

grammar, spelling, or inadequate research.²¹⁴ Essentially, these provisions should operate to ensure journalism advisers are able to do their job: to provide students advice on sound principles of journalism, English, and writing, without requiring students to accept every suggested comma or line-edit to escape censorship.²¹⁵ Much like a coach provides student-athletes advice on how to play—without running onto the field and ripping the football from a player’s hands—these statutes should give students the breathing room they need to learn and grow with the advice, support and assistance of teacher-advisers.²¹⁶ Until courts come to this conclusion, however, students in states with “standards” provisions should be vigilant against school officials’ attempts to abuse statutes and use backdoor-censorship to squelch controversial or unpopular stories.

E. Profanity and Other Less-than-Obscene Speech: Whether School Officials May Regulate Speech that is Merely Profane or Obscene-as-to-Minors is an Open, Unresolved Question

Courts have yet to conclusively settle whether profanity in official student publications can be regulated pursuant to anti-*Hazelwood* statutes’ prohibition of obscenity. The case that has come closest to resolving the issue—*Lopez*—ignored a district court’s finding that four-letter words were obscene within the meaning of California’s student-press statute, instead affirming censorship of a video²¹⁷ on the basis that the profanity did not meet professional standards of English and journalism.²¹⁸ The *Lopez* court’s holding likely does not extend to statutes other than California’s, however, given the appellate court’s reliance on two pieces of the statute’s legislative history: (1) testimony by educators sponsoring the bill who believed the statute permitted regulation of profanity;²¹⁹ and (2) the legislative defeat of a prior version of the California bill “after a senator charged that the bill would open the door for students to proliferate four-letter words in their newspapers.”²²⁰ Absent similar history with other states’ statutes, it is unclear whether the reasoning of *Lopez* reaches beyond the borders of California.

214. See *Smith v. Novato Unified Sch. Dist.*, 59 Cal. Rptr. 3d 508, 521 (Cal. Ct. App. 2007) (“[The California statute] likely authorizes journalism advisers to restrict the publication of student writings that are ungrammatical, poorly written, or inadequately researched.”).

215. *Id.* at 522. (“[The statute] permits schools to engage with student journalists regarding the linguistic and journalistic merits of their work . . .”).

216. See, e.g., *Q&A, in ADVISER AND STAFF 54*, 20-21 (Gary Lundgren, ed., 2004), available at [http://er.bhusd.edlioschool.com/ourpages/auto/2011/11/14/54353681/Adviser%20and%20Staff%20\(Fall%202004\).pdf](http://er.bhusd.edlioschool.com/ourpages/auto/2011/11/14/54353681/Adviser%20and%20Staff%20(Fall%202004).pdf) (quoting Colorado-based high school adviser Jack Kennedy); *September 2010 Podcast: Tyler Buller, Former School Board Member in Johnston, Iowa, and Leslie Shipp, Newspaper Adviser at Johnston High School, Discuss Local Policies that Can Help Protect Student Press Rights*, STUDENT PRESS LAW CTR. (Sept. 2010), <http://www.splc.org/podcasts/Sept10podcast.mp3>, at 13:00 (Iowa newspaper adviser Leslie Shipp makes the analogy between advising and coaching in a podcast).

217. The court split on whether the video qualified as an official school publication or a curricular component more akin to a homework assignment. *Lopez v. Tulare Joint Union High Sch. Dist.*, 40 Cal. Rptr. 2d 762, 779-90 (Cal. Ct. App. 1995) (Ardaiz, P.J., concurring).

218. See *id.* at 776-78.

219. See *id.* at 776.

220. Jeri Christine Okamoto, *Prior Restraint and the Public High School Student Press: The Validity of Administrative Censorship of Student Newspapers Under the Federal and California Constitutions*, 20 LOY. L.A. L. REV. 1055, 1097 n.206 (1987).

Should courts read these proscriptions on obscenity in light of federal law—and at least one commentator has decried such an approach²²¹—the issue of profanity may be guided by *Bethel v. Fraser*, which permits schools to regulate speech that is “offensively lewd and indecent” and presented to a captive audience of students.²²² Or, applying *Tinker*-era precedent, courts may find school officials cannot regulate profanity unless it rises close to the level of obscenity.²²³ Recent Supreme Court developments may also signal a movement away from imposing special rules on the First Amendment rights of minors. In 2011, the Court decided *Brown v. EMA* and invalidated a California statute that restricted the ability of minors to purchase video games based on the games’ violent content.²²⁴ In evaluating the Court’s case law regarding minors and obscenity, Justice Scalia (for the majority) found the reach of those cases to extend only to speech with a sexual component.²²⁵ In light of *Brown*, it would appear that profane speech may yet be protected, so long as it is not of a sexual nature.²²⁶

This area of law remains unsettled and the take-away lesson for student journalists is to think carefully about the use of profanity and four-letter words in student publications. While many courts would likely find profanity to be protected speech, that outcome is not a certainty. And, perhaps more importantly, unless profanity is necessary or crucial to the reporting of a story, its use may give the impression that student journalists are going for shock value, rather than truth-telling.

F. “Incitement” versus “Encouragement”: The Reach of Statutes for Speech Concerning Unlawful Activity is Unsettled

All six California-model statutes, with some variation in precise language, provide for censorship of student speech that may cause students to commit unlawful acts, violate school rules, or be disruptive. Among the statutes, there are at least four different standards used to determine when speech that might result in unlawful acts might be censored. The Arkansas statute requires speech to “incite” unlawful acts before censorship is permitted.²²⁷ In contrast, the Iowa and Kansas

221. Palermo, *supra* note 138, at 58-59. Palermo notes that a student could wear Cohen’s jacket (“Fuck the Draft”) without repercussions in an anti-*Hazelwood*-statute state, so long as the jacket was not submitted as part of a curricular endeavor (like a sewing class). *See generally* *Cohen v. California*, 403 U.S. 15 (1970); *contra* *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986) (citing *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1057 (2d Cir. 1979) (“[T]he First Amendment gives a high school student the classroom right to wear *Tinker*’s armband, but not Cohen’s jacket.”)).

222. *Bethel Sch. Dist. No. 403*, 478 U.S. at 685 (“We hold that petitioner School District acted entirely within its permissible authority in imposing sanctions upon [a student] in response to his offensively lewd and indecent speech.”).

223. *See* Hansen, *supra* note 202, at 516-19 (collecting cases and arguing profanity cannot be regulated consistent with *Tinker*).

224. *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2732-34 (2011).

225. *See id.* at 2735 (discussing *Ginsberg v. New York*, 390 U.S. 629 (1968)).

226. It does not require a font of creativity to imagine a litany of four-letter or otherwise “profane” words devoid of sexual implications.

227. ARK. CODE ANN. § 6-18-1204(4) (West 2013) (permitting regulation of “Publications that so incite students as to create: (A) A clear and present danger of the commission of unlawful acts on school

statutes permit regulation of speech that merely encourages unlawful acts,²²⁸ while the California, Colorado, and Oregon statutes require a “clear and present danger” of unlawful acts or “substantial disruption.”²²⁹ The plain language of the Massachusetts statute requires that an actual disruption take place before censorship is permitted.²³⁰

The Arkansas courts have not had an opportunity to construe the meaning of that state’s incitement requirement. However, the California statute also requires that speech “incite” disruption—albeit in the context of inciting a clear and present danger. If the California courts are any indication, the use of “incite” in a student-press statute is unambiguous, and will be guided by its plain meaning.²³¹ To incite is “to instigate, persuade, or move another to commit a crime”—in other words, speech directed at achieving a particular unlawful result.²³²

The Iowa and Kansas statutes’ proscription of materials that “encourage” students to commit unlawful acts is potentially broader. However, the only case to construe either provision has interpreted “encourage” comparably to the California courts’ treatment of “incite.” The Iowa Court of Appeals—noting that the legislative history of Iowa’s student-press statute intended to broaden, rather than restrict, student speech—narrowly interpreted “encourage” to find that the statute only regulated speech if the students “actually advocate[ed] their peers take some action.”²³³ This narrow interpretation may have been fueled by school officials’ inability to detail how the parody edition of the student newspaper at issue encouraged unlawful acts. At various points, the school district in *Lange v. Diercks* claimed a digitally created photo of an infant with a cigarette encouraged illegal activity,²³⁴ that the name “KeySux High School” (referring to a neighboring school district) violated the statute by “putting kids at odds with each other and their

premises; (B) The violation of lawful school regulations; or (C) The material and substantial disruption of the orderly operation of the school.”).

228. IOWA CODE ANN. § 280.22(2)(c) (West 2013) (permitting regulation of “Materials which encourage students to do any of the following: (1) Commit unlawful acts; (2) Violate lawful school regulations; (3) Cause the material and substantial disruption of the orderly operation of the school.”); KAN. STAT. ANN. § 72-1506(c) (West 2013) (“Publication or other expression that . . . commands, requests, induces, encourages, commends or promotes conduct that is defined by law as a crime . . . is not protected by this act.”).

229. COLO. REV. STAT. ANN. § 22-1-120(3)(d) (West 2013); OR. REV. STAT. ANN. § 336.477(4) (West 2013); CAL. EDUC. CODE § 48907(a) (2013).

230. MASS. GEN. LAWS ANN. ch. 71, § 82 (West 2013) (students’ exercise of right to freedom of expression “shall not cause any disruption or disorder within the school.”).

231. *See, e.g.*, *Smith v. Novato Unified Sch. Dist.*, 59 Cal. Rptr. 3d 508, 519 (Cal. Ct. App. 2007). The *Smith* court also noted that, “The [California] Legislature’s choice of the verb ‘to incite’ likely resulted from the frequent use of ‘incite’ and ‘incitement’ in the United States Supreme Court’s ‘fighting words’ cases.” *Id.* at 520 n.6 (citations omitted). As a result, Supreme Court case law concerning incitement—such as *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)—may provide guidance when construing these statutory provisions.

232. *Smith v. Novato Unified Sch. Dist.*, 59 Cal. Rptr. 3d 508, 519 (Cal. Ct. App. 2007) (citing BLACK’S LAW DICTIONARY 762 (6th ed. 1990)).

233. *Lange v. Diercks*, No. 11-0191, 2011 WL 5515152, at **7-8 (Iowa Ct. App. 2011).

234. Deposition of David Herold, *Lange*, 2011 WL 5515152, app. at 122-24; Deposition of Daniel Diercks, *Lange*, 2011 WL 5515152 app. at 209-210.

friends,”²³⁵ that a student’s statement that he “wanted to meet Jay Z²³⁶ because he is a gangster” encouraged illegal activity,²³⁷ that re-naming the student newspaper (normally *The Tribe-une*) the “*Bribe-une*” encouraged bribery,²³⁸ and that a student’s quote that he would “like to go to a Chippendale’s tryout [after graduation]” encouraged unlawful acts.²³⁹ Against these far-fetched justifications for censorship, it is not surprising that the Iowa Court of Appeals would narrowly construe the word “encourage” to avoid abuse by school administrators seeking to post-hoc legitimize otherwise impermissible censorship of student speech.²⁴⁰

235. Deposition of David Herold, *Lange*, 2011 WL 5515152, app. at 113; Deposition of Daniel Diercks, *Lange*, 2011 WL 5515152, app. at 177-78.

236. Shawn Corey Carter, better known as “Jay Z,” is a Grammy-winning American rap artist with a CD entitled “American Gangster.” See generally *Jay-Z: The Fresh Air Interview*, NAT’L PUB. RADIO (Nov. 16, 2010), <http://www.npr.org/templates/transcript/transcript.php?storyId=131334322>.

237. The context of the district’s position concerning the student wanting to meet Jay Z is worth repeating in full here:

Q. Is there anything else, I guess, besides this picture, because what I hear you telling me – you correct me if I’m wrong – which you believe encourages the students to commit an illegal act?

[DAVID HEROLD]. There is a picture two-thirds down to the bottom of the page in regard to a student who is – “If you could meet any famous person, who would it be and why?” And that student says, “Jay Z because he is a gangster.”

Q. Okay. So a student quoted as wanting to meet someone, does that, in your opinion, encourage students to commit an illegal act?

A. It means to me he would like to meet him because he’d like to be like him.

Q. Well, let’s separate something here. You’ll agree that’s a quote from [a student]; correct?

A. Yes.

Q. That the paper printed a quote.

A. Yes.

Q. Do you see the printing of a quote by someone as concurrence by the paper with the content of that quote?

A. I see the paper has a responsibility.

Q. I would, too. But my question was, do you see the printing of a quote of an individual the paper [interviews] as the paper itself condoning or encouraging what is contained in that quote?

A. It depends on the instance. In this instance, my answer would be yes.

Q. So once you again, you think quote is the publication intending to encourage criminal activity.

A. I think that this newspaper printed those that they wanted to print to do that, yes.

Deposition of David Herold, *Lange*, 2011 WL 5515152, app. at 125-127; see also Deposition of Daniel Diercks, *Lange*, 2011 WL 5515152, app. at 210-211.

238. Deposition of Daniel Diercks, *Lange*, 2011 WL 5515152, app. at 178-79.

239. Deposition of Daniel Diercks, *Lange*, 2011 WL 5515152, app. at 192-94. In deposition, the principal admitted, in response to a question, that “publication of the word ‘Chippendale’s’ in [his] opinion encourage[d] students to come into the school and take off their clothes.” *Id.* at 194.

As Judge Tabor helpfully informed readers of her opinion in a footnote, “The Chippendales are a ‘cast of exotic male dancers’ who provide ‘Broadway-show like performances across the United States and around the world.’” *Lange v. Diercks*, No. 11-0191, 2011 WL 5515152, at *9 n.6 (Iowa Ct. App. 2011) (citing *Chippendales USA, Inc.*, 90 U.S.P.Q.2d 1535 (T.T.A.B. 2009)).

240. The school district’s motivation for punishing *Lange*, the journalism adviser, is well established by the two letters of reprimand that were placed in *Lange*’s personnel file. See *supra* note 213 and accompanying text (discussing reprimands for “inappropriate” newspaper that was produced “in poor judgment”).

Interestingly, the California, Colorado, Oregon, and Massachusetts statutes appear to place an even higher burden on school officials to justify censorship than *Tinker* would require. *Tinker* only requires school officials demonstrate a reasonable forecast of material and substantial disruption; school officials need not wait until such a disruption is imminent or actually occurring.²⁴¹ While a reasonable forecast is not justified by “undifferentiated fear or apprehension of disturbance” or a “mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint,”²⁴² courts are likely to defer to an administrator’s forecast so long as it is buttressed by some factual inquiry from which reasonable minds could predict a material and substantial disruption.²⁴³ In contrast, the Colorado, California and Oregon statutes²⁴⁴ would impose the “clear and present danger”²⁴⁵ standard, which requires that the speech be a proximate cause of an imminent harm.²⁴⁶ This is a much higher hurdle and would likely require stronger evidence of causation between speech and a forecasted disruption than *Tinker*. The Massachusetts statute may even go a step further and eliminate any potential for prior restraint by school officials, instead requiring they wait for

241. LAW OF THE STUDENT PRESS, *supra* note 80, at 25 (“[S]chool officials need not wait until a disruption actually occurs before they can limit student expression.”); *see also* Lowery v. Euverard, 497 F.3d 584, 591-92 (6th Cir. 2007) (“*Tinker* does not require school officials to wait until the horse has left the barn before closing the door. Nor does *Tinker* require certainty that disruption will occur.” (internal citations and quotations omitted)).

242. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508-09 (1969).

243. *See, e.g.*, *Butts v. Dallas Indep. Sch. Dist.*, 436 F.2d 728, 732 (5th Cir. 1971) (“As to the existence of [disruptive] circumstances, [school officials] are the judges, and if within the range where reasonable minds may differ, their decisions will govern. But there must be some inquiry, and establishment of substantial fact, to buttress the determination.”); *Defoe ex rel. Defoe v. Spiva*, 625 F.3d 324, 336 (6th Cir. 2010) (forecast of disruption reasonable when supported “by the racial violence, tension, and threats occurring in [the school district,] as well as the fact that the Confederate flag is a ‘controversial racial and political symbol.’”), *cert. denied*, 132 S. Ct. 399 (2011); *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001) (“Forecasting disruption is unmistakably difficult to do. *Tinker* does not require certainty that disruption will occur, but rather the existence of facts which might reasonably lead school officials to forecast substantial disruption.” (internal citations and quotations omitted)).

244. COLO. REV. STAT. ANN. § 22-1-120(3)(d) (West 2013) (permitting regulation of speech “that creates a clear and present danger of the commission of unlawful acts, the violation of lawful school regulations, or the material and substantial disruption of the orderly operation of the school or that violates the rights of others to privacy or that threatens violence to property or persons.”); OR. REV. STAT. ANN. § 336.477(4) (West 2013) (permitting regulation of speech that “So incites students as to create a clear and present danger of: (A) The commission of unlawful acts on or off school premises; (B) The violation of school policies; or (C) The material and substantial disruption of the orderly operation of the school . . .”); CAL. EDUC. CODE § 48907(a) (West 2013) (“Also prohibited shall be material that so incites pupils as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school.”).

245. The “clear and present danger” analysis originates in an opinion by Justice Holmes in *Schenck v. United States*, 249 U.S. 47, 52 (1919) (affirming convictions of leaflet-distributors inducing persons to refuse to cooperate with the draft during wartime).

246. *E.g.*, *United States v. Alvarez*, 617 F.3d 1198, 1215 (9th Cir. 2010) (“*Schenck*’s [clear-and-present danger analysis] require[s] that any restricted speech be uttered under circumstances likely to be the proximate cause of an imminent harm within the scope of Congress’ legitimate reach.”) *cert. granted*, 132 S. Ct. 457 (2011).

student speech to actually cause disruption or disorder within the school.²⁴⁷

The significant differences in the burden placed on school officials by the varied statutory language highlights the impact of these statutes' scant litigation track record. Cautious administrators—particularly in Oregon, Massachusetts, and Colorado—might think twice about censoring speech that could have been regulated under *Tinker*, as a reasonable forecast may be insufficient to justify censorship under state law. Similarly, school officials considering prior review of materials that incite unlawful action in Iowa and California may be given more latitude than their counterparts in other states, but risk further developments narrowing the statutes' scope if justifications for censorship stretch school officials' credibility with the courts.

VI. ARE THE STATE RESPONSES WORKING?

Against the landscape of deficiencies, weaknesses, and flaws discussed above, it might be fair to wonder: why bother having anti-*Hazelwood* statutes at all, if they are so plagued by problems? This Part aims to answer that question, first by surveying existing studies on the effects of anti-*Hazelwood* statutes, and then by presenting the methodology, findings, and implications of an original study evaluating the content of student newspapers from across the country.

For purposes of the following discussion and study, this Part divides the nation's states into three categories based on the status of students' free-press rights: *Tinker* states (where some form of the *Tinker* standard is imposed by a state statute), *Hazelwood* states (for states without a student-press statute or comparable administrative-code sections), and code-states (states with an administrative code that arguably provides enhanced student-press rights).

A. Existing Studies

Existing research concerning the differences in student journalism between *Hazelwood* and *Tinker* states has largely focused on survey data. A 2000 survey conducted by Mark Paxton and Tom Dickson investigated differences in attitudes among advisers in *Tinker* versus *Hazelwood* states and revealed mixed results.²⁴⁸ The survey found that advisers in *Tinker* states were less likely to believe high school students were too immature to be responsible journalists and less likely to believe the adviser (rather than students) should be responsible for decisions about

247. MASS. GEN. LAWS ANN. ch. 71, § 82 (West 2013) (“The right of students to freedom of expression in the public schools of the commonwealth shall not be abridged, provided that such right shall not *cause* any disruption or disorder within the school.” (emphasis added)).

One federal court has indicated that a reasonable construction of the Massachusetts statute would permit restriction of disruptive speech prospectively, as in *Tinker*. See generally *Westfield High Sch. L.I.F.E. Club v. City of Westfield*, 249 F. Supp. 2d 98, 111 (D. Mass. 2003). However, no Massachusetts state court has explicitly addressed the question as of yet. See *id.* at 110-12.

248. See Mark Paxton & Tom Dickson, *State Free Expression Laws and Scholastic Press Censorship*, JOURNALISM & MASS COMM’N EDUCATOR, Summer 2000, at 50. As the authors note, one limitation of their study was the small number of *Tinker* states at the time of publication. *Id.* at 58. In 2007, Oregon enacted its student-press statute, bringing the total number of *Tinker* states to seven. See OR. REV. STAT. Ann. § 336.477 (West 2013).

content.²⁴⁹ On the other hand, there was no statistically significant difference in advisers' attitudes about whether they should review copy, correct misspellings, or allow administrators to censor stories that resulted in negative publicity for the school district.²⁵⁰ As described by the authors, the overall findings of the survey "suggest that advisors in states with scholastic freedom of press laws and those in states without such laws are remarkably similar"²⁵¹ According to that study, one of the only major differences between the two groups was that principals in *Hazelwood* states were significantly more likely to have read the contents of a student publication before it went to press and more likely to have censored or demanded a re-write of a student-written editorial.²⁵² Consistent with that finding, another study found that advisers believe students are somewhat more willing to self-censor their publications in *Hazelwood* states.²⁵³

Two studies have explored the effects of student-press laws by testing the impact of changing student-press standards on a single population over time. The first study, by Professor Carol Lomicky, was published in 2000 and focused on editorials published in an anonymous Midwestern high school's student newspaper during the eight years before and after the *Hazelwood* decision.²⁵⁴ Lomicky found significant differences in the types of editorials published before and after *Hazelwood*.²⁵⁵ The number of critical editorials decreased from 40 to 12, while the number of editorials appealing to causes and written for entertainment increased significantly.²⁵⁶ The topics discussed also shifted from a criticism of school policies and personnel decisions to "safer issues," like crowded hallways, homecoming activities, and student parking.²⁵⁷ The second study, by high school journalism adviser Jennifer Garner and college journalism professor Bruce Plopper, was published in 2010 and investigated a stratified sample of Arkansas public high schools' student newspapers published before and after enactment of Arkansas's Student Publications Act.²⁵⁸ The Garner and Plopper study found no significant

249. Paxton & Dickson, *supra* note 248, at 55.

250. *Id.* at 55. This is consistent with the results of an unpublished study conducted in 2004, which found that student-press laws correlate with a change in principals' practices, but not a change in advisers' practices. See Vaughn G. Rhudy, *A Study of the Relationship Between State Student Free Expression Laws and the Perceived Scholastic Journalism Practices in Public High Schools in the United States*, at 64-72 (2004) (unpublished Ed.D. dissertation, West Virginia Univ.) (on file with author), available at http://wvusolar.wvu.edu:8881/exlibris/dtl/d3_1/apache_media/L2V4bGlicmlzL2R0bC9kM18xL2FwYWNoZV9tZWRRpYS82OTI5.pdf.

251. Paxton & Dickson, *supra* note 249, at 57.

252. *Id.* at 56.

253. Vincent F. Filak, Scott Reinardy & Adam Maksl, *Expanding and Validating Applications of the Willingness to Self-Censor Scale: Self-Censorship and Media Advisers' Comfort Level with Controversial Topics*, 86 JOURNALISM & MASS COMMUN. 368, 377-79 (2009). It is worth noting that, in Filak, Reinardy, and Maksl's study, the authors found that nearly a third of advisers misidentified whether their state had a student-press statute. *Id.* at 382 n. 37. For example, of the 44 California advisers surveyed, 11 reported they believed their state did not have a student-press law. *Id.*

254. Carol S. Lomicky, *Analysis of High School Newspaper Editorials Before and After Hazelwood School District v. Kuhlmeier: A Content Analysis Case Study*, 29 J. L. & EDUC. 463, 474-75 (2000).

255. *Id.* at 469.

256. *Id.* at 469-71.

257. *Id.* at 470-72.

258. Jennifer R. Garner & Bruce Plopper, *The Effects of a Student Press Law on the Content of Student Newspapers* 10-11 (Aug. 2009) (unpublished research paper) (on file with author). Garner and

change in the number of controversial²⁵⁹ editorials or news/feature stories published after implementation of the Arkansas anti-*Hazelwood* statute.²⁶⁰ What differences the study did reveal were hypothesized to be due to school size (urban versus rural) and the level of training and experience for the schools' journalism advisers.²⁶¹ A related study by Plopper provides some context for these findings, noting that "student-press laws may not have much effect on student-press censorship" given the proliferation of censorship in *Tinker* states,²⁶² the lack of adviser-awareness about anti-*Hazelwood* statutes,²⁶³ and many districts' failure to comply with requirements of the Arkansas Student Publications Act.²⁶⁴

In the aggregate, the data from these surveys is mixed. In terms of newspaper content, the Lomicky study (finding editorial content at a single high school changed after *Hazelwood*) seems at odds with the Garner and Plopper study (finding little difference in controversial coverage before and after enactment of a student-press statute). Similarly, the survey data revealing little difference among attitudes of advisers and student-editors after *Hazelwood* seems at odds with reported differences in the attitudes of principals and other school officials. As many writers in this area have noted, more data is needed to better gauge whether anti-*Hazelwood* statutes are having the intended effect of allowing student journalism to flourish in the absence of censorship by school officials.²⁶⁵ To that end, the study described in the following subsections was designed to provide additional data concerning differences between student newspapers in *Tinker* and *Hazelwood* states.

B. Methodology

In order to create a dataset that offered insight into whether anti-*Hazelwood* statutes materially affect the content of student newspapers, I designed a study involving a content analysis of student newspapers from *Tinker* states, *Hazelwood* states, and states with speech protections in an administrative code. Content analysis is "a research method that uses a set of procedures to make inferences

Plopper's investigation covered September 1989 through May 1994, and September 1996 through May 2001. *Id.* at 11.

259. The Garner and Plopper study identified "controversial" pieces as those that covered drugs/alcohol, sex or sex-related issues, violence, criticism of personnel, criticism of policies, and other. *Id.* at 11.

260. *Id.* at 13.

261. *Id.* at 13-15.

262. Bruce L. Plopper & William D. Downs, Jr., *Arkansas Student Publications Act: Implementation and Effects*, JOURNALISM & MASS COMM'N EDUCATOR, Spring 1998, at 74, 75 (detailing censorship incidents in Massachusetts, Iowa, California and Colorado).

263. *Id.* at 78 (reporting 26% of advisers were unaware of Student Publications Act).

264. *Id.* at 79, 80. Plopper & Downs found that 29% of schools either did not have an official student publications policy as required by statute or the adviser was unaware of such a policy. *Id.* at 79. The survey also revealed that, among schools with official student publications policies, roughly half were controlled by school officials, contrary to the Student Publications Act granting that authority to students. *Id.* at 81; *see also* ARK. CODE ANN. §§ 6-18-1201-1204 (West 1995).

265. *See, e.g.*, Paxton & Dickson, *supra* note 248, at 58; Lomicky, *supra* note 254, at 474; Dickson, *supra* note 119, at 173 (all discussing the need for more data).

from text.”²⁶⁶ The inferences drawn from text can be about a variety of topics, such as the author of the message, the intended audience, or the message’s content.²⁶⁷ Here, the selected items were editorials published in public high school student newspapers between 2008 and 2011 and the inferences drawn concerned the content of the editorials.

To determine the universe from which my sample of student newspapers would be drawn, I used the database of student media maintained by *My High School Journalism*, an initiative of the American Society of Newspaper Editors.²⁶⁸ In March of 2012, the database included roughly 3,800 student newspapers from across the world: 2,722 in *Hazelwood* states, 837 in *Tinker* states, and 228 in code-states.²⁶⁹ I then used a random-number generator to create a list of 25 newspapers in each of the three categories.²⁷⁰ Private schools were manually removed and replaced with a randomly selected public school. Public charter schools were not excluded, as they are generally subject to constitutional restrictions on state action.²⁷¹

I chose to rely on internet-available newspapers rather than solely print copies due to logistical issues in acquiring print-editions of student newspapers²⁷² and the belief that internet-available newspapers would be more accessible for readers of this study. Admittedly, there could be some selection bias resulting from use of internet-available newspapers.²⁷³ It would not be surprising if smaller, less sophisticated student newspapers were less likely to have an online presence. However, because whatever bias was introduced by relying on internet-available newspapers applies with equal force to all three samples, it is unlikely to have had a disparate impact among the *Tinker*-, *Hazelwood*-, and code-state samples.

After determining the sample of newspapers, I used a standardized method to obtain items for analysis. First, I searched the link that accompanied the database entry on the *My High School Journalism* website. Next, I conducted a Google

266. ROBERT PHILIP WEBER, BASIC CONTENT ANALYSIS 9 (2d ed. 1990) (providing a concise and introductory account of content analysis for a reader with limited scientific or statistical background).

267. *Id.*

268. See generally *About HSJ*, HSJ.ORG, http://www.hsj.org/About_HSJ/index.cfm?menu_id=3 (last accessed Sept 26, 2013). The site provides “[f]ree online hosting and a content management system for youth-generated news, connected to more than 4,000 student news outlets.” *Id.*

269. See *HS/Teen News Organizations*, HSJ.ORG, http://www.hsj.org/modules/school_news_organizations/index.cfm (last visited Sept. 25, 2013).

270. The random-number generator used for this study was the integer-set creator at <http://www.random.org>. See generally *Random Integer Generator*, RANDOM.ORG, <http://www.random.org/integers/> (last visited Sept. 26, 2013). Original printouts from the generator, as used for this study, are on file with the author.

271. See generally Jason Lance Wren, *Charter Schools: Public or Private? An Application of the Fourteenth Amendment’s State Action Doctrine to These Innovative Schools*, 19 REV. LITIG. 135, 136 (2000).

272. Many student newspapers print only a few hundred copies of each issue and only distribute locally. Unlike with major daily newspapers, it is uncommon—if not virtually unheard of—to find publicly accessible microfilm of student newspapers.

273. One recent study suggests that only roughly one-quarter of student newspapers have an online component. See Goodman et al., *supra* note 34, at 3.

search²⁷⁴ using the student newspaper's name, the name of the high school, and the city and state of publication.²⁷⁵ Finally, I conducted a search on *Issuu*, a digital publishing website that includes PDF copies of many high school and college student newspapers, using the same terms as the Google search.²⁷⁶

Items included for analysis—which I refer to as “editorials”—included any items that appeared on editorial or opinion pages, were marked as editorials or opinions, or clearly appeared to be editorial or opinion pieces.²⁷⁷ Sports columns, editorial mastheads²⁷⁸ feature columns, commercial reviews,²⁷⁹ editorial cartoons,²⁸⁰ letters to the editor, and advice columns were all excluded from the final analysis. Guest pieces by non-students were excluded, while guest pieces by students were included.

All items were published during 2008, 2009, 2010, or 2011. The selected timeframe spans four years to include the full range of an election cycle (on the assumption that elections and campaigns may affect editorial content) and reflected the most recent four full calendar years (on the assumption that more newspapers have published online in recent years). The study did not draw boundaries for the timeframe at academic years due to inter-state variation in school start-dates and varying publication cycles (whether monthly, bi-weekly, or at some other frequency).

Before collecting the data, I designed a rubric for categorizing editorials.²⁸¹ I

274. It is possible that some bias inherent in the Google search algorithm might have affected the search results. See *Algorithms Rank Relevant Results Higher*, GOOGLE, <http://www.google.com/competition/howgooglesearchworks.html> (last visited Sept. 26, 2013). However, given the proprietary nature of Google's algorithm, it is unclear what if any impact this may have had on the study.

275. For example, for the *Bear Buzz* (the first newspaper in the *Tinker* sample), the search terms used were: “Mount Shasta” AND “California” AND “Bear Buzz” AND “Mount Shasta High School.” See *infra* App. A.

276. “Issuu is the leading digital publishing platform delivering exceptional reading experiences of magazines, catalogs, and newspapers.” *About Issuu*, ISSUU, <http://issuu.com/about> (last visited Sept. 26, 2013).

277. Some student newspapers did not caption pages by topic, such as by including “news,” “feature,” or “opinion” at the top of the page. For newspapers without these cues to categorization, any pieces that appeared to be opinion pieces—such as by taking a position on an issue or reflecting on events using personal pronouns (“I think” or “it’s my opinion that”)—were included. I erred on the side of inclusion.

278. A *masthead* is “a box or section printed in each issue of a newspaper or magazine, giving the publishers, owners, and editors, the location of offices, subscription rates, etc.” WEBSTER’S NEW WORLD COLLEGE DICTIONARY 833 (3d ed. 1996).

279. Such reviews often focus on movies, restaurants, books, video games, or other forms of entertainment. Many, but not all, publications separately laid out pages for reviews and other opinions.

280. Unlike other excluded items, many editorial cartoons do indeed take a position on controversial topics and have occasionally been censored by school officials. See, e.g., Brian Schraum, *Appeals Court: N.Y. School Can Censor Cartoon in ‘Forum’ and Independent Newspapers*, STUDENT PRESS LAW CTR. (May 18, 2011), <http://www.splc.org/news/newsflash.asp?id=2222>. For purposes of this study, however, it would have been nearly impossible to categorize cartoons in the same way as text. Cartoons often include subtle, multi-faceted messages rather than a single overriding tone, are more likely to be ambiguous in meaning, and—particularly for student newspapers—can be difficult to understand without context and familiarity with school events.

281. See *infra* App. B.

placed each editorial in one of seven categories,²⁸² as follows:

- Editorials of praise (indicating approval of another person or group's conduct or behavior);
- Editorials of criticism (indicating disapproval);
- Entertainment editorials (pieces that did not take a position on any particular issue or topic, but were written to entertain or motivate readers);
- Informational editorials (pieces that did not take positions, but provided information to students about a topic or issue);
- Cause-appealing editorials (calls-to-action for students to support an issue or engage in some conduct);
- Debate editorials (which provided equal space to discuss the pros/cons of a particular issue or topic or included brief statements by a number of students); and
- Other (all other editorials, such as reflective pieces that discuss personal experiences without an overriding theme).

The editorials of praise and editorials of criticism were both subcategorized based on the focus of the praise or criticism. These editorials were coded depending on whether the praise/criticism targeted the school (including curriculum, facilities, school rules, and school officials), state and local government (including city, county, and state), the national government, or international entities.

Entertainment editorials were subcategorized into seasonal editorials (such as Christmas or Valentine's Day-themed pieces, or pieces about prom and graduation), humorous editorials (such as satirical or joke pieces), and other editorials.

Debate editorials were subcategorized into man-on-the-street editorials (a collection of quotes from students or staff responding to a particular question), pro/con editorials (where one student took a position favoring an issue and another student took a position against it), and other debate editorials.

Independent of the categorization for type of editorial, each item was also coded for whether it discussed a controversial topic. Five categories of controversial topics were included in the analysis as follows:

- Drugs/Substance Abuse (relating to illegal drugs, tobacco, or alcohol);²⁸³
- Race (relating to topics such as illegal immigration and race-related stereotypes or discrimination);
- Religion (relating to students' religion as well as the role of religion in public schools);
- Sex (including homosexuality, birth control, teenage sex and pregnancy, abortion, and sex education); and
- Crime/Violence (including gang-related activities, vandalism, capital punishment, and in-school fights and violence).

The list of topics coded as "controversial" is a synthesis of topics deemed

282. The categories used in this study are a modified version of the categorization relied on in Lomicky's case study. *See generally* Lomicky, *supra* note 254.

283. Tobacco and alcohol are grouped with illegal drugs (like marijuana) because use and possession of tobacco and alcohol are illegal for the vast majority of high school students.

controversial in other studies,²⁸⁴ the topics principals have described as likely to result in censorship,²⁸⁵ topics litigated in censorship cases,²⁸⁶ and topics that are commonly associated with censorship reported to the Student Press Law Center.²⁸⁷ Pieces that covered more than one controversial topic were coded based on which topic dominated the piece (such as by comprising a higher word-count or using more forceful language). Pieces that addressed the legalization of illegal substances were categorized for drugs/substance abuse, rather than crime/violence.

Before beginning the coding process, I formed five tentative hypotheses that would support anti-*Hazelwood* statutes having an effect on the content of student newspapers:

1. *Tinker*-state newspapers would include proportionally more critical editorials than *Hazelwood*-state newspapers.
2. Among the critical editorials, *Tinker* newspapers would have a greater proportion of editorials criticizing school administrators than *Hazelwood* newspapers.
3. *Tinker* newspapers would publish more editorials on controversial topics than *Hazelwood* newspapers.

284. See, e.g., Filak, Reinardy & Maksel, *supra* note 253, at 374 (rating willingness to self-censor articles about sex, substance use/abuse, and misdeeds); Garner & Plopper, *supra* note 259, at 11 (coding stories about drugs/alcohol, sex or sex-related issues, violence, criticism of personnel, criticism of policies, and other as “controversial”).

285. Dickson, *supra* note 119, at 171 (reporting that 60.8% of principals might suppress pieces about sex; 56.8% for pieces about drugs; 41.9% for pieces about student pregnancy).

286. See, e.g., *Morse v. Frederick*, 551 U.S. 393, 393 (2007) (“Bong Hits 4 Jesus” poster); *Smith v. Novato Unified Sch. Dist.*, 59 Cal. Rptr. 3d 508, 512 (Cal. Ct. App. 2007) (editorial concerning race and illegal immigration); *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1296 (7th Cir. 1993) (distribution of *Issues & Answers*, a religious student newspaper); *Kuhlmeier v. Hazelwood Sch. Dist.*, 607 F. Supp. 1450, 1457 (E.D. Mo. 1985) (teen pregnancy and divorce); *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981 (9th Cir. 2001) (poem depicting violence and criminal activity).

287. See generally A.J. Bauer, *Editorials Under Attack*, STUDENT PRESS L. CTR. REP., Fall 2006, at 4 (discussing censorship of numerous editorial topics, including “Migrant worker day,” gay rights, sexually transmitted diseases, and Gay-Straight Alliances); see, e.g., *Under the Influence*, STUDENT PRESS L. CTR. REP., Fall 1979, at 30-31, available at <http://issuu.com/splc/docs/v2n3fall79> (feature stories exposing student drug-use); Kathleen Fitzgerald, *SMOKE THIS: School Pulls Papers, Objecting to Article on Hookah Health Effects*, STUDENT PRESS L. CTR. REP., Spring 2008, at 15 (feature article on smoking hookah); K.C. Jones, *Censored KKK Story Distributed on Campus*, STUDENT PRESS L. CTR. REP., Winter 1980-1981, at 7, available at <http://issuu.com/splc/docs/v4n1-winter80> (stories on racism and local Ku Klux Klan activities); *High School Censorship in Brief: Florida*, STUDENT PRESS L. CTR. REP., Winter 2006-2007, at 30 (article on differences in test scores between students of different races); *Distribution of Christian Paper Brings Courts Battles*, STUDENT PRESS L. CTR. REP., Fall 1988, at 26-27, available at <http://issuu.com/splc/docs/v9n3-fall88> (religious-themed student newspapers); *High School Censorship In Brief: School Ends Prior Review of Paper, but Staffers Still Worried*, STUDENT PRESS L. CTR. REP., Winter 2007-2008, at 17 (coverage of classroom assignment that allegedly involved Christian teachings); *Censored Editorial Printed After Dispute*, STUDENT PRESS L. CTR. REP., Spring 1984, at 5, available at <http://issuu.com/splc/docs/v5n2-spring84> (editorials concerning homophobia); Clay Gaynor, *Students Win Fight over Censorship of Sex Article*, STUDENT PRESS L. CTR. REP., Winter 2005-2006, at 10 (article on national trends for teen sexuality); *Principal Censors Shooting from High School Yearbook*, STUDENT PRESS L. CTR. REP., Fall 1986, at 23, available at <http://issuu.com/splc/docs/v7n3-fall86> (yearbook spread about crime committed near campus); *High School Censorship In Brief: Nevada*, STUDENT PRESS L. CTR. REP., Spring 2007, at 14 (student leaflet concerning ease of manufacturing explosives).

4. *Tinker* newspapers would publish a proportionally smaller number of informational and entertainment editorials than *Hazelwood* states.
5. *Tinker* states would publish a proportionally larger number of cause-appelling editorials.

I also hypothesized that the code-state sample's content would be more similar to the *Hazelwood* sample, on the theory that administrative regulations provide a less publicly known, less positive, and ultimately less effective grant of rights than a state statute.²⁸⁸

A table of the newspapers included in each sample and the number of items acquired from each newspaper is included at Appendix A. Using the rubric included at Appendix B, I manually coded and reviewed each item. To the extent possible, the identity of the student newspaper was obscured during the review process²⁸⁹ and editorials from each group were mixed. While it is always possible that subconscious researcher bias may have crept into the coding process, these measures mitigated that possibility. After coding each item, I input the results into a Microsoft Excel document. Following minor data cleanup (typo-correction, ensuring each item was only coded into one category, etc.), I exported pivot tables for each sample. These tables are reproduced in Appendix C and form the basis of the results section below.

I then took the compiled data (in substantially the same form as it appears in Appendix C) and prepared to run statistical tests to determine what differences between the samples, if any, were statistically significant. Because all three samples were independent, drawn from simple random sampling, and consisted of more than ten items, a test of the difference of proportions was used. To run the relevant calculations, I used R, a popular open-source statistical calculation environment.²⁹⁰ I tested for whether proportions between each of the samples were significant at the 0.05 level—in other words, whether the differences were significantly different with 95 percent confidence. The results of the statistical tests are included in Appendix C and discussed below.

C. Results

On balance, the data confirms that anti-*Hazelwood* statutes have had a statistically significant effect on the content of student-newspaper editorials. The data support (with 95 percent confidence) my hypotheses about editorials of criticism, editorials criticizing school officials in particular, and editorials on controversial topics, but refuted my two hypotheses about entertainment and cause-appelling editorials. In other words, the anti-*Hazelwood* statutes appear to be

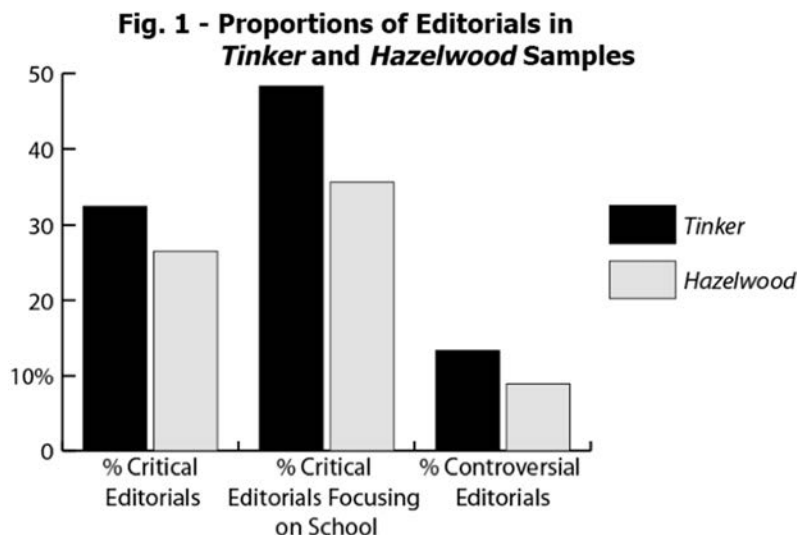
288. See *supra* Part IV.B.

289. In some cases, although the school and newspaper name were removed from the items reviewed, the location of the newspaper was apparent from editorial coverage, such as when pieces focused on state legislatures or governors.

290. "R is a free software environment for statistical computing and graphics. It compiles and runs on a wide variety of UNIX platforms, Windows and MacOS." See *The R Project for Statistical Computing*, R-PROJECT.ORG, <http://www.r-project.org> (last visited Sept. 27, 2013). It is widely used by scientists, corporations, and others, and compares favorably to commercial statistical software. Ashlee Vance, *Data Analysts Captivated by R's Power*, N.Y. TIMES, Jan. 6, 2009, <http://www.nytimes.com/2009/01/07/technology/business-computing/07program.html>.

effective in permitting students to write editorials on controversial topics and be critical of school officials, but have little effect on the likelihood of students to write informational, entertainment, or cause-appealing editorials.

1. Student newspapers in Tinker states publish proportionally more editorials of criticism, editorials specifically criticizing school officials and the school environment, and editorials on controversial topics than their counterparts in Hazelwood states.



As depicted in Figure 1 above, three of my five hypotheses regarding the effectiveness of anti-*Hazelwood* statutes were ultimately supported by the data to a degree of statistical significance. First, the *Tinker* newspapers had a significantly greater proportion of critical editorials: 32.41% (329 items), compared to 26.51% (149 items) for *Hazelwood* newspapers.²⁹¹ Second, the *Tinker*-state newspapers were significantly more likely to focus that criticism on school officials than *Hazelwood* newspapers, with nearly half (48.33%, 159 items) of the critical *Tinker* editorials focusing on the school, compared to roughly one third (35.57%, 53 items) in the *Hazelwood* sample.²⁹² Third and finally, *Tinker*-state newspapers covered controversial topics significantly more often—13.30% of editorials (135 items) for *Tinker* newspapers, compared to just 8.90% of editorials (50 items) for *Hazelwood* newspapers.²⁹³

Qualitatively, the editorials of criticism focused on the school revealed students taking a stance on a wide variety of issues. Students criticized aspects of

291. See *infra* App. C. All percentages reported in the body of the text, as well as in Appendix C, are rounded to the nearest one-hundredth. Values used in calculations in R were not rounded and were instead the raw value of the number of coded editorials divided by the total number of editorials for each sample.

292. See *infra* App. C.

293. See *infra* App. C.

the school experience that ranged from school disciplinary rules,²⁹⁴ to curriculum,²⁹⁵ to the parking situation,²⁹⁶ to perceived deficiencies in standardized testing,²⁹⁷ to the dress code.²⁹⁸

In the *Tinker* sample, sex-related topics were the most frequent controversial subject, at 28.15% of all controversial editorials.²⁹⁹ The remainder was divided about equally among editorials concerning drugs/substance abuse, race, religion, and crime/violence.³⁰⁰ Sex-related editorials also featured prominently in *Hazelwood* newspapers, comprising 42% of the controversial-editorial sample.³⁰¹ In both samples, these editorials covered topics that ranged from same-sex marriage,³⁰² to abortion,³⁰³ to discussion of sex education and the risks of sexually transmitted diseases.³⁰⁴

294. Riley Galbraith, *James Odegard, One Crime, Double Time*, THE TORCH (John F. Kennedy High School; Cedar Rapids, Iowa), Apr. 20, 2011, at 3, available at http://issuu.com/kennedytorch/docs/8-torch_29apr2011 (criticizing good-conduct policy violations having a disparate impact on students involved in academic and athletic extracurricular activities); Sylvie Ramirez, *New Drug Policy is Not Comprehensive*, THE FALCON (Crescenta Valley High School; La Crescenta, Cal.), Oct. 14, 2009, available at <http://my.hsj.org/299503>.

295. *Changing Graduation Requirements Confusing*, RAMPAGE (Southeast Polk High School; Runnels, Iowa), Mar. 12, 2008, at 2, available at <http://www.se-polk.k12.ia.us/district/publications/rampage/200803.pdf>; Jenina Reyes, *KEEP OUR ELECTIVES!!!*, THE ORACLE (Cesar Chavez High School; Stockton, Cal.), Feb. 3, 2011, available at <http://my.hsj.org/409598>.

296. Opinion/Editorial, Sarah Fitzgerald, *More Parking Spots for Students!*, PANTHERBOOK (Franklin High School; Franklin, Mass.), Nov. 16, 2011, available at <http://pantherbook.org/oped/2011/11/16/more-parking-spots-for-students>.

297. Claire Kaufman, *Standardization*, LACES UNTIED (Los Angeles Center for Enriched Studies; Los Angeles, Cal.), Apr. 7, 2010, available at <http://my.hsj.org/351001>; Trevor Greenan, *Junior API Scores Not Up to Par*, THE SANTA ROSAN (Santa Rosa High School; Santa Rosa, Cal.), Nov. 1, 2011, available at <http://www.santarosan.com/article/2011/11/junior-api-scores-not-par>.

298. Katie McGinnis, *Code Creates Crass Controversy*, THE SAGA (Pleasant Valley High; Chico, Cal.), Oct. 28, 2011, at 5, available at <http://my.hsj.org/Portals/2/schools/219/editions/dcbcbdef-c24d-4d46-a1b3-64c15a7cb107-Issue%202.pdf>; Samantha Herrera, *Dress Code at GFHS*, THE GRIZZLE GAZETTE (Godinez Fundamental High School; Santa Ana, Cal) Oct. 21, 2011, at 3, available at http://www.sausd.k12.ca.us/cms/lib5/CA01000471/Centricity/Domain/878/volume3_issue1b.pdf.

299. See *infra* App. C.

300. The remaining controversial items were divided as follows: drugs/substance abuse (17.78%), race (20.00%), religion (15.56%), and crime/violence (18.52%). See *infra* App. C.

301. See *infra* App. C. Interestingly, while the difference between controversial editorials on sex-related topics between *Hazelwood* and *Tinker* newspapers was not statistically significant at the .05 level (95% confidence), it was statistically significant at 0.10 (90% confidence). See *infra* App. C. No easy explanation for this difference emerged from the data.

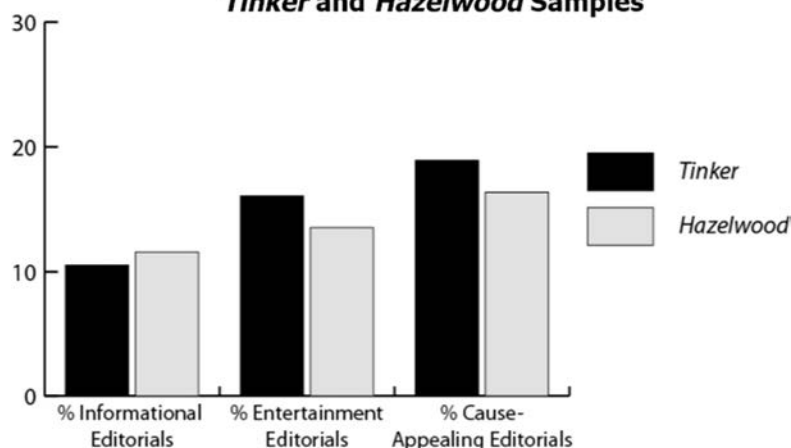
302. See Danielle Martin, Op-Ed., *Gay Marriage: An Inside Perspective*, CRIMSON CHRONICLE (Paso Robles High School; Paso Robles, Cal.), Dec. 18, 2008, at 6, available at http://issuu.com/crimsonchronicle/docs/december_08; Danielle Pham & Geoff Devaux, *Showdown: Should America Legalize Gay Marriage?*, THE PATRIOT (Shawnee Mission South High School; Overland Park, Kan.), Dec. 2008, at 8, available at <http://my.hsj.org/249134>.

303. See, e.g., Talisha Lee, Editorial, *Abortions...Outlaw Them!*, THE ORACLE (Cesar Chavez High School; Stockton, Cal.), Jan. 28, 2011, available at <http://my.hsj.org/408630>; Hallie Frost, Editorial, *Government Aborts Funding for Planned Parenthood*, THE CLARION (Cleveland High School; Portland, Or.), Mar. 15, 2011, at 5, available at http://my.hsj.org/Portals/2/schools/556/editions/43a38367-2702-4336-b0f9-39623a895ce7-Clarion_Issue07_12pages.pdf.

304. Torch Staff, Editorial, *Need for Parental Input in Sexual Education, Without Being Gross*, THE TORCH (John F. Kennedy High School; Cedar Rapids, Iowa), Feb. 26, 2010, at 6, available at http://issuu.com/kennedytorch/docs/vol_43_6_26_feb_10; Olivia Bell, *Students Need Knowledge to*

2. *Tinker- and Hazelwood -state newspapers include remarkably similar proportions of informational, entertainment, and cause-appealing editorials.*

Fig. 2 - Proportions of Editorials in *Tinker* and *Hazelwood* Samples



The fourth hypothesis—that *Tinker*-state newspapers would have comparably fewer entertainment and informational editorials—was not supported. As depicted in Figure 2, the data show that both samples contain very similar proportions of entertainment, informational and cause-appealing editorials.³⁰⁵ Differences among these proportions between the *Hazelwood* and *Tinker* samples were not statistically significant.

For editorials coded as entertainment, both samples included roughly half seasonal editorials³⁰⁶ and one-third motivational editorials,³⁰⁷ with the remainder comprising humorous and other editorials.³⁰⁸ For both samples, seasonal editorials were largely concerned with holidays,³⁰⁹ homecoming/prom,³¹⁰ and other recurring

Prevent STIs and Pregnancy, KING'S PAGE (Rufus King International High School; Milwaukee, Wis.), Dec. 14, 2009, <http://my.hsij.org/319702>.

305. A combined 26.60% of the *Tinker* sample consisted of entertainment editorials (16.06%) and informational editorials (10.54%). The corresponding value for the *Hazelwood* sample is 24.92% for entertainment editorials (13.35%) and informational editorials (11.57%). See *infra* App. C.

306. Seasonal editorials comprised 50.31% of the *Tinker* entertainment-editorial sample and 54.67% for *Hazelwood* states. See *infra* App. C.

307. Motivational editorials comprised 35.58% of the *Tinker* entertainment editorial sample and 38.67% of the corresponding portion of the *Hazelwood* sample. See *infra* App. C.

308. The remaining 6.67% of the *Hazelwood* sample entertainment-editorials were humorous, while the remaining *Tinker* entertainment-editorials were split between 7.36% humorous editorials and 6.75% other entertainment-editorials. See *supra* App. C.

309. See, e.g., Taylor Foote, Editorial, *Merry Chrismahaunakwanza*, TIGER TALES (Joliet West High School; Joliet, Ill.), Dec. 3, 2010, available at <http://www.jthstigertales.org/views/2010/12/03/marry-chrismahaunakwanza/>; Joey Pedroza, Editorial, *Existence + Valentine's Day = *Sigh**, THE GRIZZLY GAZETTE (Hector G. Godinez High School; Santa Ana, Cal.), Feb. 14, 2011, at 6, available at http://www.sausd.us/cms/lib5/CA01000471/Centricity/Domain.878/Newspaper/Issue_3.pdf; Staff Editorial, *Don't Make Carbon-Copy New Year's Resolutions*, THE CHRONICLE (William Mason High

yearly events. The motivational editorials typically encouraged other students, such as by urging them to study hard³¹¹ or to put more effort into standardized tests,³¹² while humorous editorials covered wide-ranging topics, from mocking the *Twilight* book and film series,³¹³ to jokes about sophomores' inability to park their cars,³¹⁴ to satirical pieces lampooning the Tea Party.³¹⁵ The uncategorized entertainment-editorials reflected an eclectic collection of writing, from tips on how to survive a zombie attack³¹⁶ to an obituary for an eraser.³¹⁷

Both the *Tinker* and *Hazelwood* newspapers also included approximately the same percentage of informational editorials, comprising 10.54% of the *Tinker* sample and 11.57% of the *Hazelwood* sample.³¹⁸ These editorials did not take a position on any particular issue, but instead provided readers with information,

School; Mason, Ohio), Jan. 15, 2010, at 6; Michael Hoefler, Editorial, *Hating on Halloween*, THE TORCH (John F. Kennedy High School; Cedar Rapids, Iowa), Oct. 22, 2010, at 7, available at <http://issuu.com/kennedytorch/docs/2-torch22oct2010>.

310. See, e.g., Imran Ahmed, Editorial, *The Stress of Prom*, THE TALON (East Lake High School; Tarpon Springs, Fla.), Apr. 29, 2011, available at <http://www.elhstalon.net/student-life/2011/04/29/the-stress-of-prom/>; Mike Hoefler, Editorial, *Help for Homecoming: Top Ten Ways to Ask that Special Somebody*, THE TORCH (John F. Kennedy High School; Cedar Rapids, Iowa), Sept. 24, 2010, at 10, available at http://issuu.com/kennedytorch/docs/1-torch_24sep2010.

311. See, e.g., Editorial, *Fast Forward: Your Transcript is You*, THE RAMPAGE (Southeast Polk High School; Runnels, Iowa), Aug. 24, 2011, at 2, available at <http://sep.southeastpolk.org/district/publications/rampage/2011-08.pdf> ("High school is our last chance to show what we're made of and what we're capable of doing . . . We must try our best and challenge ourselves to create the future we want."); Jocelyn Jensen, Editorial, *As Senioritis Plagues Loy Norrix: Make a Plan to Stay on Track*, KNIGHT LIFE (Loy Norrix High School; Kalamazoo, Michigan), Apr. 2011, at 4, available at <http://issuu.com/tpankop/docs/51.4.11>.

312. See, e.g., Shane Goodall, Editorial, *Shane's Guide to ITEDs*, THE TORCH (John F. Kennedy High School; Cedar Rapids, Iowa), Apr. 1, 2011, at 3, available at http://issuu.com/kennedytorch/docs/7-torch_1apr2011.

313. See Taylor Halliburton, Editorial, *"Twilight" Banned?*, THE BLUFFER (Poplar Bluff Senior High School; Poplar Bluff, Mo.), May 6, 2008.

314. See Mark Leiffert, Op-Ed., *Death by Sophomore*, RAMPAGE (Southeast Polk High School; Runnels, Iowa), Apr. 23, 2008, at 3, available at <http://sep.southeastpolk.org/district/publications/rampage/200804.pdf> ("One thing is certain: If you drive a car and park in the Southeast Polk parking lot, you will get in an accident and you will die.") This editorial, of course, parodies an oft-quoted line from hit film MEAN GIRLS (Paramount Pictures 2004) ("At your age, you're going to have a lot of urges. You're going to want to take off your clothes and touch each other. But if you do touch each other, you will get chlamydia . . . and die.")

315. Andrea Nemecek, Editorial, *The Politics of the Tea Party*, THE TORCH (John F. Kennedy High School; Cedar Rapids, Iowa), Apr. 16, 2010, at 8, available at <http://issuu.com/kennedytorch/docs/aprilissue> ("I've decided to leave the political party that has fought for the middle class in a thoughtful, civilized manner for a party that is fighting for a vague idea in a violent, angry, illogical manner. If you still doubt the Tea Party, ask yourself: 'How's that hopey, changey thing working for you?'").

316. Anna Romero, Editorial, *During A Zombie Attack, Please Follow Me*, THOMAS JEFFERSON JOURNAL (Thomas Jefferson High School; Denver, Colo.), Nov. 18, 2010, available at <http://www.tjjournal.com/2010/11/18/during-a-zombie-attack-please-follow-me> ("It's not likely you're going to have to use this guide any time soon (as the soonest predicted zombie apocalypse is in 2012), but it's always best to err on the safe side and keep a baseball bat nearby.")

317. Sabrina Neria, Op-Ed., *Billie the Purple Eraser*, THE SAGA (Pleasant Valley High School; Chico, Cal.), Nov. 3, 2008, at 5.

318. See *infra* App. C.

such as detailing the dangers of caffeine,³¹⁹ summarizing election results with little or no commentary,³²⁰ or explaining why gasoline prices were increasing.³²¹

The fifth hypothesis—that the *Tinker*-state newspapers would include proportionally more cause-appealing editorials—was not supported by the data either. The two samples contained very similar proportions of cause-appealing editorials, at 18.92% of editorials in the *Tinker* sample and 16.37% of editorials in the *Hazelwood* newspapers.³²² For both samples, the causes addressed by students ranged from serious issues—like global warming,³²³ cyberbullying,³²⁴ and abortion³²⁵—to more whimsical topics—like urging students to wear deodorant,³²⁶ the merits of “hating on” Justin Bieber,³²⁷ and the perceived appeal of dating “bad boys.”³²⁸

For all three groups—entertainment, informational, and cause-appealing editorials—the differences between *Tinker* and *Hazelwood* samples were less than three percent. This variation is minor, is not statistically significant,³²⁹ and lends limited support to the fourth and fifth hypotheses concerning the effect of anti-*Hazelwood* statutes.

319. Scott Olinger, Editorial, *Caffeine: The Drug of a Generation*, THE PATRIOT (Shawnee Mission South High School; Shawnee Mission, Kan.), Sept. 2008, at 9.

320. Adelina LaMorticella, Editorial, *Gubernatorial Results*, THE CLARION (Cleveland High School; Portland, Or.), Nov. 16, 2010, at 4.

321. Jackson Wallace, Editorial, *An Explanation of Rising Gas Prices*, THE ZONE (Central High School; Keller, Tex.), May 31, 2011, at 3, available at http://issuu.com/nataliebrown/docs/may_zone.

322. See *infra* App. C.

323. Alexis Nichols, Editorial, *Global Warming—Is it Just a Scam?*, SILVERTIP (Mission Hills High School; San Marcos, Cal.), Feb. 10, 2010.

324. Troy Swodzinski, Op-Ed., *Cyber Bullying Increasing Among Teens*, KNIGHT LIFE (Loy Norrix High School, Kalamazoo, Mich.), Oct. 2010, <http://klnewspaper.files.wordpress.com/2010/10/opweb.pdf>.

325. Lee, *supra* note 303.

326. Chase Eaton, Editorial, *DeodorANT*, THE TALON (Tumwater High School; Tumwater, Wash.), Oct. 8, 2011, at 8 (“Please. I am begging you. Do not make a habit of forgetting your deodorant. . . . The next time you smell a bit of stank, make sure you aren’t the one smelling rank.”).

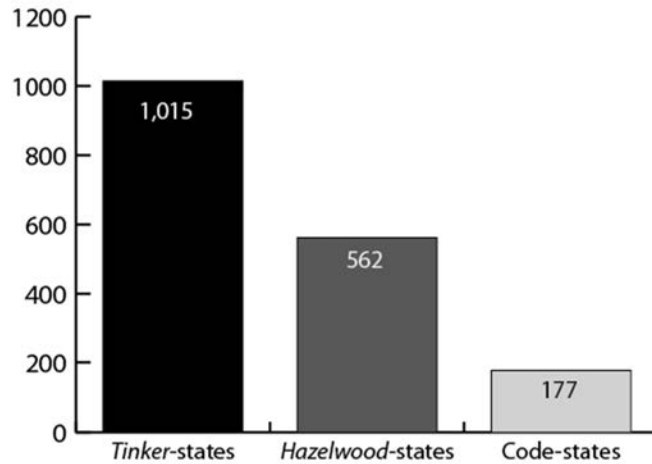
327. Asmaa Elkeurti, *Haters Add Fuel to JB’s Fire*, THE TORCH, Feb. 25, 2011, at 3.

328. Julia Halpin, *Dating the Bad Boy: Relationship Happiness Stems from Picking the Right Guy*, THE CHRONICLE, Mar. 11, 2011 (on file with author).

329. The differences among entertainment, informational, and cause-appealing editorials between the *Hazelwood* and *Tinker* samples is not statistically significant at either a 90 percent or 95 percent confidence interval.

3. Student newspapers in Tinker states include significantly more editorial content than student newspapers in Hazelwood states.

Fig. 3 – Quantity of Editorials in Tinker-, Hazelwood-, and Code-state samples



One unanticipated result, as depicted in Figure 3, was that *Tinker*-state newspapers included significantly more editorial content than *Hazelwood*-state papers. The *Tinker* sample ultimately consisted of 1,015 editorials from twenty-two different newspapers, while the *Hazelwood* sample consisted of 562 editorials from twenty papers.³³⁰ The distributions are also highly dissimilar. The *Tinker* sample averaged 46.14 items per newspaper with an online presence, with a median of 27 items, and a standard deviation of 50.71.³³¹ The *Hazelwood* sample averaged 28.1 items per newspaper with an online presence, with a median of 18, and a standard deviation of 28.39.³³² Put descriptively, this means that newspapers from *Tinker* states contained nearly twice as many items per newspaper than those from *Hazelwood* states, and *Hazelwood*-state newspapers were less variable (more consistent) than *Tinker*-state newspapers.

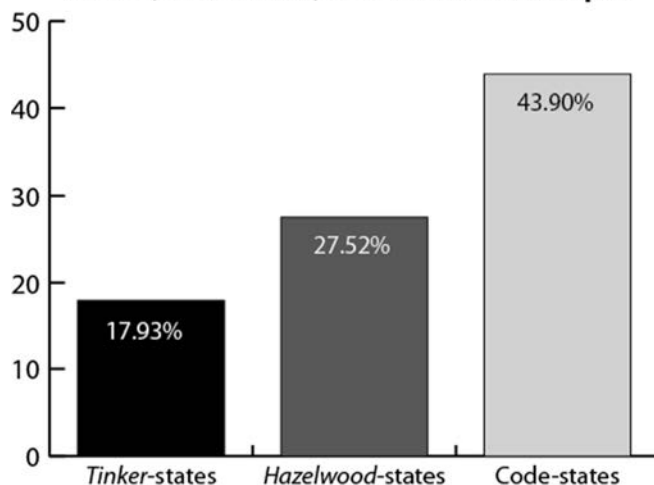
330. See *infra* App. A.

331. See *infra* App. A. Descriptive statistics were calculated solely based on the number of newspapers that contained at least one item. In other words, newspapers with no online presence or zero editorials were not included.

332. See *supra* note 331 and accompanying text for information concerning statistics.

4. Hazelwood newspapers and code-state newspapers have significantly more editorials that focus criticism on writers' peers than Tinker newspapers.

Fig. 4 – Proportion of Peer-Criticism Editorials in Tinker-, Hazelwood-, and Code-State Samples



A second unanticipated result, as depicted in Figure 4 above, came from a statistical analysis of the proportion of editorials of criticism that focused on students' peers. This was the only comparison, throughout all of the calculations in this study, where there was a statistically significant difference among all three groups. As depicted in Figure 4 above, *Tinker* newspapers had a significantly lower number of peer-criticism editorials³³³ than *Hazelwood* newspapers³³⁴ and code-state newspapers,³³⁵ and the difference between *Hazelwood* and code-state newspapers was also statistically significant—all with 95 percent confidence. Many of these editorials take the “side” of school administrators with students reprimanding their peers for activities like loitering in the halls,³³⁶ relying on Sparknotes³³⁷ instead of doing their English homework,³³⁸ or for engaging in public displays of affection in the

333. In the *Tinker* sample, there were 59 editorials criticizing students' peers, which comprised 17.93% of critical editorials. See *infra* App. C.

334. In the *Hazelwood* sample, there were 41 editorials criticizing students' peers, which comprised 27.52% of critical editorials. See *infra* App. C.

335. In the code-state sample, there were 18 editorials criticizing students' peers, which comprised 43.90% of critical editorials. See *infra* App. C.

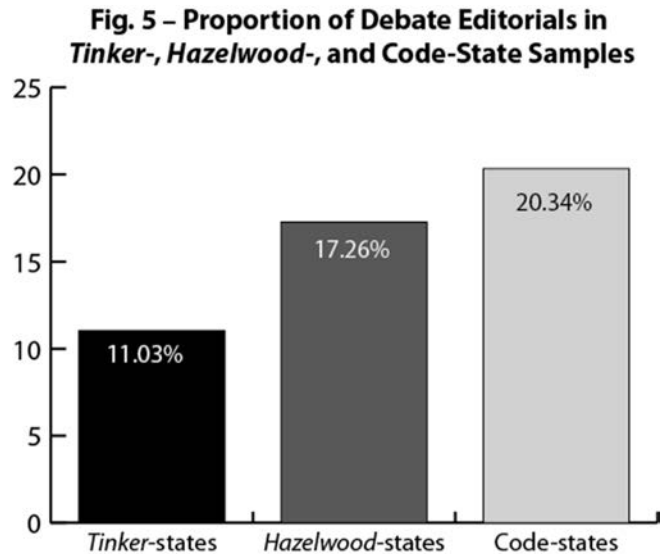
336. Cer Bolton, *Students Should Stop Loitering in the Halls*, KNIGHT LIFE 7, Feb. 2010, available at <http://issuu.com/tpankop/docs/binder2>.

337. Sparknotes, should any reader be unfamiliar, is an online source of information about literature and academic textbooks that many students rely on in completing (or instead of completing) their assigned coursework. See *generally About Sparknotes*, SPARKNOTES, <http://www.sparknotes.com/about> (last visited Oct. 3, 2013).

338. Chris Altonji, *Sparknotes to Be Used as Aid, Not Ultimate Source*, THE ORACLE, Dec. 16, 2011, available at <http://theoracle.glenbrook225.org/opinions/2011/12/16/sparknotes-to-be-used-as-aid-not-ultimate-source>.

hallways.³³⁹

5. The *Tinker* newspapers include significantly fewer debate editorials than either the *Hazelwood* newspapers or code-state newspapers.



Another unanticipated—but statistically significant—result concerned the debate editorials. As depicted in Figure 5 above, the *Tinker* newspapers included 112 debate editorials, which made up just 11.03% of the total *Tinker* sample,³⁴⁰ while the *Hazelwood* sample included 97 debate editorials, or 17.26% of the total *Hazelwood* sample. This difference is significant with a 95 percent confidence interval. Similarly, the code-state sample included a significantly greater proportion of debate editorials (36 editorials, or 20.34% of the code-state sample) than the *Tinker* sample, though this number is not significantly different from the *Hazelwood* sample.

These debate editorials all involved two or more students taking opposing sides (or multiple different viewpoints) on a given issue. In other words, the students presented two or more competing arguments regarding an issue, without the newspaper staff taking a position. For example, many student newspapers include “man-on-the-street” packages that involve a newspaper staffer asking a series of persons³⁴¹ a question, like whether they support a major sports franchise

339. Taylor Foote, *PDA: How much is too much?*, TIGER TALES, Dec. 3, 2010, available at <http://www.jthstigtale.org/views/2010/12/03/pda-how-much-is-too-much/>.

340. See *infra* App. C.

341. Generally the persons interviewed were students, but sometimes faculty or other school staff were also included. See, e.g., *Street Talk: PDA*, THE CRIMSON CHRONICLE, Nov. 2011, at 11, available at <http://issuu.com/crimsonchronicle/docs/nov2011> (collecting quotes from two teachers and two students; juxtaposing a teacher’s observation of a student “motor boating” his girlfriend in the hallway with students calling the public displays of affection “awkward”); *Knights Speak: Should Talking on the*

moving to the state,³⁴² if they favor a tax on soda to fund healthcare initiatives,³⁴³ or their ideal gift for the Twelfth Day of Christmas.³⁴⁴ Similarly, other pieces are structured as “pro vs. con” packages, where two students take opposing viewpoints, such as arguing for and against same-sex marriage³⁴⁵ or debating abstinence versus safe sex.³⁴⁶ The common theme among these editorials is that, instead of the editorial staff taking a stance on a particular issue (*e.g.*, in favor of same-sex marriage), the staff presents both sides in an attempt at impartiality.

6. *Code-state newspaper editorials are more similar to Hazelwood newspapers than Tinker newspapers.*

Qualitatively, the code-state and *Hazelwood*-state newspapers were largely similar. Both contained proportionately fewer editorials of criticism focusing on the school than *Tinker*-state newspapers,³⁴⁷ and proportionately more editorials focusing criticism on students’ peers.³⁴⁸ Both also contained significantly fewer editorials on controversial topics than *Tinker*-state newspapers.³⁴⁹ In fact, the only editorial-type subgroup where there is a statistically significant difference between the *Hazelwood* newspapers and those from code-states is for editorials coded as “other.”

In terms of editorial quantity, the code-state sample is also much more similar to the *Hazelwood* newspapers than the *Tinker* sample.³⁵⁰ The code-state sample yielded items from just fourteen of the twenty-five randomly selected newspapers, for a total of 177 editorials.³⁵¹ This is much closer to the 562 editorials in the *Hazelwood* sample than the 1,015 editorials collected from *Tinker* newspapers.³⁵² The distribution of code-state editorials among newspapers with an online presence is also consistently low, with a mean of 12.64 editorials per newspaper, a mean of

Phone While Driving Be Illegal?, KNIGHT LIFE, Apr. 2011, at 4, available at <http://issuu.com/tpankop/docs/51.4.11> (comparing views of a school resource officer and two students).

342. *Class System: Should Kansas Become Home to an NHL or NBA Franchise?*, THE PATRIOT, Nov. 17, 2008, available at <http://my.hsj.org/232780> (respondents were one student from each grade at the high school).

343. *Would You Pay a “Soda” Tax to Fund Health Care Reform?*, THE SAGA, Nov. 16, 2009, (respondents were one student from each grade).

344. *The Last Bark: On the 12th Day of Christmas, What Would You Want Your True Love to Give You?*, THE CARTHAGINIAN 8, Dec. 17, 2010, available at http://issuu.com/jquick/docs/december_issue (respondents included one student from each grade and two faculty members).

345. Pham & Devaux, *supra* note 302.

346. Cristina Bryant & DeChelle Jones, *Point/Counterpoint*, KNIGHT LIFE 5, Apr. 2011, available at <http://issuu.com/tpankop/docs/51.4.11>.

347. In the *Tinker* sample, 48.33% of critical editorials targeted the school; 35.57% for the *Hazelwood* sample; and 26.83% for the code-state sample. *See infra* App. C.

348. Only 17.93% of *Tinker* critical-editorials focused on peers, compared to 27.52% for *Hazelwood* newspapers and 43.9% for code-state newspapers. *See infra* App. C.

349. Among the *Tinker* sample, 13.3% of editorials were controversial, while only 8.9% of the *Hazelwood* sample and 6.78% of the code-state sample covered controversial topics. *See infra* App. C.

350. *See* Fig. 3

351. *See infra* App. A.

352. *Id.*

7.5, and a standard deviation of 12.07.³⁵³

D. Discussion

Amidst the ocean of numbers and qualitative examples discussed above, a consistent narrative emerges concerning anti-*Hazelwood* statutes: they make a difference in the editorial content of student newspapers. The increased number of critical and controversial editorials in *Tinker* states suggests that these students are subject to less censorship and can operate more independently of school officials' interference. Similarly, the unanticipated finding that *Tinker* newspapers were less likely to criticize their peers and more likely to take a position on an issue—rather than passively presenting both sides—supports anti-*Hazelwood* statutes' effectiveness at freeing the student press. Unfortunately, the same cannot be said of code-states, where it appears the presence of a pro-student-press administrative-code section has little or no impact on students' editorials. Yet, even in states where students do not have the protections of an anti-*Hazelwood* statute, this study is proof positive that a great many students continue to work toward producing quality journalism, in spite of laws that heavily favor school officials. This study has established a solid foundation for further research into the efficacy of anti-*Hazelwood* statutes and, as discussed below, more data will help us to understand this area of the law even better.

1. The significantly greater number of total editorials published in Tinker states, and the corresponding greater proportions of controversial editorials and editorials criticizing school officials, all support anti-Hazelwood statutes having a positive effect on student journalism.

If we accept a few key assumptions—that better, more free student journalism results in more critical editorials and covers more controversial issues—the inescapable conclusion from this study is that anti-*Hazelwood* statutes are effective at improving student journalism, despite the statutes' flaws and limitations.

The most direct beneficiary of the statutes, of course, appears to be students.³⁵⁴ In the aggregate, *Tinker* newspapers published nearly twice as many editorials as *Hazelwood* newspapers.³⁵⁵ This means, putting aside any values-judgment about the content of their editorials, *Tinker*-state student journalists were expressing themselves more often and were more frequently engaged in public discourse. For many students, scholastic journalism provides one of few outlets for intellectual stimulation, the debate of ideas, and the mass transmission of information to their

353. See *infra* App. A. See *supra* note 331 and accompanying text for a discussion of the methodology for calculating these descriptive statistics.

354. At least one student newspaper raised exactly this point on the twenty-fifth anniversary of *Hazelwood*. See, e.g., *Editorial: Hazelwood Decision Remains Unfair and Unconstitutional*, THE PALY VOICE, (Palto Alto High School; Palo Alto, Cal.) Jan. 13, 2013, available at palyvoice.com/2013/01/13/editorial-hazelwood-decision-remains-unfair-and-unconstitutional (“The students at Palo Alto High School are lucky enough to benefit from this [anti-*Hazelwood*] legislation and do not feel the implications of the *Hazelwood* decision.”).

355. In sum, *Tinker* newspapers published 1,015 editorials, while *Hazelwood* newspapers published just 562. See *infra* App. C.

peers during the school day.³⁵⁶ These publications provide a valuable outlet for students to explore their political and social identities, to obtain information uniquely relevant to their daily lives (like frank discussion of birth control or underage drinking),³⁵⁷ and dialogue with their peers. This ultimately helps achieve a core goal of the public education system: to train young people to become independent thinkers, contributing members of society, and informed citizens.³⁵⁸

Looking beyond the sheer quantity of editorials in *Tinker* states, the data also reveal *Tinker* newspapers were significantly more likely to write editorials critical of school administration or on controversial topics than their *Hazelwood*- or code-state counterparts. While students certainly benefit from the ability to criticize and improve aspects of their education, school districts also reap benefits from this student feedback. The increase in editorials focusing on the school environment is a valuable indicator that a less-restricted student press helps foster a dialogue between school officials and students that allows both to take ownership in the educational enterprise—hopefully with the goal of improving public education. In some cases, student criticism may even provide valuable feedback to administrators who are considering changes in policy or curriculum—after all, who better to report the school board’s impact on students than students themselves? In a society that embraces democratic values, one can only hope that these benefits outweigh administrators’ desire to suppress unpopular viewpoints or the voices that are most critical of school personnel and policies.

Society at large also benefits from a free student press—particularly stakeholders of the public school system who are not present in the schools with any consistent frequency. A free student press can ably fulfill its watchdog function through editorials critical of school spending, curriculum, and school officials’ actions.³⁵⁹ For many voters and taxpayers, including young adults without children or retirees whose children graduated long ago, one of the only windows into the local high school is through student publications and occasional commercial media coverage. The significant number of editorials criticizing school officials indicates that students are providing valuable feedback on the education process to stakeholders throughout the school community.

The publication of more editorials on controversial topics also shows that anti-*Hazelwood* statutes are working, as these are the kind of topics often censored when students lack protection. It is difficult to draw any conclusions from the subject matter of students’ controversial editorials, as these often mirror national

356. Undoubtedly there are other spaces in which teens might congregate (like social media networks or even a local mall), but none where the debate is so open, with so many voices (from a wide array of peers and faculty) as the public schools.

357. It would not be surprising, for example, to find that many students obtained a more direct, practical education concerning contraceptives from a spread in the student newspaper than in a sex education class. Similarly, students might be far more likely to make cautious choices about underage alcohol use if the student newspaper widely reports on the sometimes-fatal consequences of binge drinking.

358. *E.g.* Wohl, *supra* note 101, at 7-8 (“A central goal of a public school is to train young minds to be contributing, thinking members of society. It is simply wrong to believe that by restraining student speech and thought, it will either make that thought or speech disappear, or will have any generally beneficial effects.”); *see also supra* Part II.C (“Students are the Future of the First Amendment”).

359. *See supra* Part II.B (“Student Journalism Serves a Watchdog Function for School Officials”).

trends,³⁶⁰ but students' editorials on policies like "Don't Ask, Don't Tell," the election of the nation's first African-American president, and the efficacy of high school sex-education programs suggest that students are engaged in the same national discourse as many of their adult counterparts and these voices should be valued.

The demonstrable effectiveness of the statutes, despite their limitations, may also suggest that the statutes have a cultural effect. In other words, the statutes' mere existence may affect norms and make administrators more tolerant of a free student press, despite statutes rarely leading to lawsuits and students occasionally not succeeding in the courts.³⁶¹ Although it is difficult to place a value on our cultural beliefs, demonstrating to our developing citizens that government is tolerant of dissenting speech, and that democratic society relishes debate, is a worthwhile endeavor.

2. Two unanticipated findings—that Tinker states have a significantly smaller proportion of peer-criticism editorials and debate editorials—also support anti-Hazelwood statutes having a positive effect on the content of student newspapers.

The first unanticipated finding, that *Tinker* newspapers have a significantly smaller number of peer-criticism editorials, supports the overall hypothesis that anti-*Hazelwood* statutes have had a significant effect on editorial content. It would make sense that, in a *Hazelwood* or code-state, where students are less protected from censorship, they would be more likely to take the side of administrators and criticize their peers instead of school officials. This is consistent with the content of many of these editorials, as students take their fellow students to task for violating school rules or for academic laziness.³⁶² Similarly, it would make sense that, in a district where students are more protected from censorship, they would be more likely to take the "side" of students and take administrators to task for their shortcomings.³⁶³ However, the even greater number of peer-criticism editorials in the code-state sample (compared to both the *Hazelwood* and *Tinker* samples) is somewhat puzzling. As discussed above, the code-state sample largely falls somewhere between the *Tinker* and *Hazelwood* newspapers—though there are far more statistically significant differences between the *Tinker* and code-state samples than between the *Hazelwood* and code-state samples. Yet here the code-state newspapers show a much greater proportion of peer-criticism than the *Hazelwood* newspapers. Further research should look carefully at this finding to determine not only whether it can be replicated, but also what meaning it should be ascribed.

The statistically significant difference in the number of debate editorials

360. Lomicky, *supra* note 254, at 473 ("Subjects about which students select to . . . frequently relate to the shifting currents of news."); Garner & Plopper, *supra* note 258, at 16 ("[Differences in editorial coverage] may have been driven by what the national press was reporting rather than by greater press freedom.").

361. One key reason why un-litigated statutes may be successful at creating pro-journalism norms is that many school officials likely perceive the prospect of being hauled into district court and accused of "violating students' rights" a public-relations disaster for the school district.

362. See *supra* notes 336, 338-339 (discussing peer-criticism editorials).

363. See *supra* Part VI.D.1 (discussing higher proportion of school-criticism editorials in *Tinker* newspapers).

between samples also supports my hypothesis regarding anti-*Hazelwood* statutes' effectiveness, albeit in a more indirect way. The significantly greater proportion of debate editorials in *Hazelwood* newspapers suggests that students in *Hazelwood* states may have been less likely to stick their necks out or stake out a position on an issue, instead choosing to present both sides of an argument without passing judgment on either. Particularly when the debate editorials concern controversial topics (like same-sex marriage or legalizing marijuana), it would make sense that students feel safer if they offer both sides of an argument, rather than making a claim that might ruffle feathers or risk censorship from administrators. As with the peer-criticism editorials discussed above, there does not appear to be any easy explanation for why code-states have an even greater proportion of debate editorials than both the *Hazelwood* and *Tinker* samples.

3. *Administrative codes providing student-press rights appear to be largely ineffective.*

The data revealed by this study for Washington and Pennsylvania—the two states with administrative codes offering free-speech protections—is somewhat surprising. Looking at the five hypotheses intended to measure the effectiveness of anti-*Hazelwood* statutes, the code-state data indicates that students produce arguably lower-quality journalism than their counterparts in states where *Hazelwood* governs. Code-state newspapers include fewer editorials of criticism, fewer critical editorials focused on school officials, and cover fewer controversial topics than the *Hazelwood*-state newspapers; they also include significantly fewer of these items than the *Tinker*-state papers.³⁶⁴ Given the limited sample size for code-state newspapers, it may be unwise to generalize and say that all code-state student publications bear fewer indicia of quality scholastic journalism. But, at the very least, these findings suggest that having student-speech protections embodied deep within an administrative code is less effective than placing those protections in a state statute.

4. *Hazelwood-state newspapers still have value and are not devoid of worthwhile content.*

The data revealed here should also give pause to commentators who predicted gloomily that *Hazelwood* “could lead to the death of worthwhile student journalism.”³⁶⁵ Although *Tinker*-state editorials appear to reflect “better” student journalism in the sense that they are more likely to criticize school officials and cover controversial topics, it would be a mistake to dismiss the student journalism published in *Hazelwood* states as valueless. For every *Hazelwood*-state paper that publishes puff pieces about “promblems”³⁶⁶ and trick-or-treating³⁶⁷ there is another

364. See *infra* Apps. A, B. Code-states also include substantially fewer editorials overall. See App. A.

365. Felder, *supra* note 101, at 451; see *supra* note 114 and accompanying text.

366. Julia Ceraolo, *The Real “Promblem,”* THE TALON (East Lake High School; Tarpon Springs, Fla.), May 25, 2011, available at <http://www.elhstalton.net/opinions/2011/05/25/the-real-promblem/> (concerning music at prom).

that critiques Hollywood's fascination with teen pregnancy³⁶⁸ and debates the pros and cons of underage-curfew ordinances.³⁶⁹ Admittedly, many of the more controversial pieces published in *Hazelwood*-state newspapers may only be printed due to the hands-off approach taken by individual administrators or a tolerant school board.³⁷⁰ And it's entirely possible that, with a change in administrative personnel or following a school board election, these papers may face pressure to editorialize on less controversial topics or print more positive pieces.³⁷¹ But the data provided here show that the student press lives on, even in the shadow of *Hazelwood*.

5. Numerous avenues for additional research into the effectiveness of anti-Hazelwood statutes remain and are necessary for a more complete understanding of how the statutes affect student journalism.

Although this study provides valuable data that furthers our understanding of

367. *Trick-or-Treating: An Ageless Tradition*, MADISON RAMPAGE (Madison Comprehensive High School; Mansfield, Ohio), Nov. 1, 2011, <http://www.madisonrampage.com/opinion/2011/11/01/trickortreatinganagelesstradition>.

368. Aleesha Hargraves, *Does Hollywood Endorse Teen Pregnancy?* THE BLUFFER (Poplar Bluff Senior High School; Poplar Bluff, Mo.), Apr. 28, 2008, at 2, available at <http://my.hsj.org/Portals/2/schools/88/editions/Issue11.pdf>.

369. Anthony Lindahl, *Curfews Do Not Keep Kids Out of Trouble*, KNIGHT LIFE (Loy Norrix High School; Kalamazoo, Mich.), Apr. 2010, at 5, available at <http://issuu.com/tpankop/docs/50.4> (open viewer, scroll to page five); Jevonte Hughes, *Curfew Keeps Kids Out of Trouble*, KNIGHT LIFE (Loy Norrix High School; Kalamazoo, Mich.), Apr. 2010, at 5, available at <http://issuu.com/tpankop/docs/50.4>.

370. For example, following a spat over distribution of an April Fool's Day issue of the Parkway West High *Pathfinder* student newspaper, the principal remarked, "Students and journalists will continue to do this paper without prior review . . . Just because *Hazelwood* gave the right of prior review doesn't mean we should take it." See Felder, *supra* note 101, at 453 (citing and discussing articles published in *Pathfinder*).

371. Unfortunately, the coda to the *Pathfinder* story, see *supra* note 369 and accompanying text, belies the danger in relying on benevolent administrators. Parkway High officials eventually replaced the *Pathfinder*'s adviser and revised district policy in an attempt to more directly influence the newspaper. *Id.* at 457-58.

On balance, the literature supports the proposition that most school administrators—particularly when not reined in by statute or case law—will be hostile to the student press. As one commentator has put it, "The risk that school authorities will be tempted to use any censorship powers they possess to suppress pointed or disrespectful criticism is a near certainty." Leon Letwin, *Administrative Censorship of the Independent Student Press: Demise of the Double Standard?* 28 S. C. L. REV. 565, 583 (1977). Surveys have revealed that a significant majority of school superintendents and principals strongly disagree with "freeing" the student press and permitting unrestrained coverage of controversial stories or stories that do not cast the school in a positive light. See Martinson & Kopenhaver, *supra* note 72, at 131, 160-62; but see Kathleen Kling, *Freeing the Student Press for Their Good and Ours*, THE SCHOOL ADMINISTRATOR, Apr. 2002, available at <http://splc.org/pdf/aasafreepressarticle.pdf> (championing the student press).

Most school board members appear similarly disinclined to support the student press. See generally M. Chester Nolte, *supra* note 2, at 35 (suggesting school board members "look for the chinks between the bricks in the wall of the First Amendment"); but see Tyler Buller, *Stirring the Pot: Policies That Give Your Student Journalists the Freedom to Learn Benefit the Students and the District, Too*, AM. SCH. BD. J., June 2010, at 25, 26 available at www.splc.org/pdf/StirringthePot_Buller.pdf (championing pro-student-press school board policies).

how anti-*Hazelwood* statutes affect student newspapers, it would be a mistake to think that these statutes are the only variable affecting the content of students' editorials. For example, one metric that this study could not account for was self-censorship by students. There is little doubt that, in editorial board meetings of at least some of the seventy-five sampled newspapers, students opted against running an editorial because they feared they, their adviser, or other members of the newspaper staff would be retaliated against for what they wrote. There is even one explicit example of self-censorship from the *Hazelwood*-state sample. William Mason High School's *The Chronicle* included a front-page "letter from the editor" explaining to readers that they had opted to self-censor and refrain from reporting about the indictment of a high school teacher who had been accused of having sex with multiple William Mason students.³⁷² The students explicitly noted that the decision to censor was their own, rather than an edict from school officials.³⁷³ A body of research that explores whether students' decisions to self-censor are based on journalistic ethics, fear of reprisals from school officials, or some other factor would provide a basis for evaluating whether self-censorship should be seen as a negative, positive, or neutral aspect of student journalism.

Another factor that the study did not—and practicably could not—control for was the presence of local board policies that granted student-press freedoms or particular administrators that allowed students free reign with publications. It would not be surprising to find that content in most *Tinker*-state newspapers is approximately similar to the content of a *Hazelwood*-state newspaper in a district with strong student-press board policies and a supportive principal. For example, *The Globe* student newspaper at Clayton High School in Clayton, Missouri, is a consistent winner of numerous national student journalism awards³⁷⁴—yet Missouri is a *Hazelwood* state. One possible mediating factor that has allowed *The Globe* to flourish is that its district has effectively imposed its own anti-*Hazelwood* measure by opening *The Globe* as a public forum and allowing student editors to make all content decisions.³⁷⁵ It seems beyond doubt that some other school districts, despite a lack of state anti-*Hazelwood* measures, have also created an oasis from

372. Carlie Sack, *From the Editor: The Chronicle's Stance on the Schuler Indictment*, THE CHRONICLE (William Mason High School; Mason, Ohio), Feb. 11, 2011, at 1, available at <http://masoncomets.org/features/CometMedia/chronicle/8.5>. The indicted teacher was ultimately convicted on sixteen counts of sexual battery for sleeping with multiple current and former students. Kevin Dolvak, *Ohio Gym Teacher Jailed for Sex with Students*, ABC NEWS (Oct. 28, 2011), <http://abcnews.go.com/US/ohio-gym-teacher-jailed-sex-students/story?id=14831933>.

373. Sack, *supra* note 372 ("Please note that Mason High School administration did not prevent *The Chronicle* from covering these events.").

374. See *2011 NSPA Winners*, NAT'L SCHOLASTIC PRESS ASS'N, <http://www.studentpress.org/nspa/winners/npm11.html> (last accessed Apr. 20, 2012).

375. In relevant part, *The Globe's* 2012-2013 masthead provides: "The Globe student newspaper exists primarily to inform, entertain, persuade and represent the student voice at CHS to the best of its ability. It serves as a public forum for the Clayton community. All content decisions are made by the student editors." See *Masthead*, THE GLOBE (Clayton High School; Clayton, Mo.), Mar. 16, 2011, at 22, available at http://www.clayton.k12.mo.us/cms/lib/MO01000419/Centricity/Domain/136/March_2011Globe.pdf. The students themselves attribute their freedom in large part to school district policies that protect them from censorship. See Editorial, *Walking a Fine Line*, THE GLOBE (Clayton High School; Clayton, Mo. Mar. 2013, at 38, available at <http://issuu.com/chsglobe/docs/marchissue>.

widespread censorship and allowed a free student press in their schools.³⁷⁶

Finally, a valuable piece of scholarship that would supplement—and either reinforce or raise questions regarding—this study is research that is based on a larger sample size and includes both online and print-only student newspapers. Although the resources needed to complete such a study are substantial (likely the assistance of several paid research assistants, significant postage, and a tremendous amount of time), providing another data-set would firmly establish the reliability of this study’s findings and better settle the question of whether anti-*Hazelwood* statutes are accomplishing their goals.

VII. CONCLUSION

Hopefully, this study is the beginning of a conversation, rather than the end. The editorials analyzed here put a face on today’s student newspapers, highlighting how student journalism is a watchdog for the public schools and a training ground for tomorrow’s citizens. But, in spite of evidence that student journalism is tied to academic success and serves civic, cultural, and democratic goals, student journalists continue to face opposition from many adults—both in-school and out. These data supply ammunition to those who champion a strong student press in the struggle against those who would rather silence student voices and pretend there is no controversy, no corruption, and no misbehavior in our public high schools.

Few can dispute that, “if students are to learn the lessons of democracy, such as the importance of exercising the right to freedom of speech, they must live in an environment that fosters the free exchange of ideas.”³⁷⁷ There is no better environment to train tomorrow’s citizens than a public high school with a vibrant and free student press. For the many reasons discussed in this Article—from declining public support for First Amendment principles to the inability of commercial media to hold local school officials accountable—it is more important now than ever to ensure students learn these lessons of democracy as they exit the schoolhouse gate and enter adulthood. Continued support for a free student press, such as by adopting anti-*Hazelwood* statutes, will ensure students have every opportunity to learn these lessons and safeguard the future of the First Amendment.

In light of this study, advocates should feel reassured that efforts to bolster the student press and guard against government censorship have real-world consequences that manifest in the content of student newspapers. The data also show we should remain vigilant against attempts to silence student journalists, because a free student press has far-reaching positive consequences that reverberate through the public schools and beyond. Legislators, student-press advocates, and students should continue to pursue a return to the protections of *Tinker*, be it

376. E.g., Editorial, *Hazelwood: A Bleak Anniversary*, THE KIRKWOOD CALL (Kirkwood, Mo.), Feb. 8, 2013, http://www.thekirkwoodcall.com/_stories_/opinion/staff-editorials/2013/02/08/hazelwood-a-bleak-anniversary/ (discussing a supportive administration in a school just a few miles from Hazelwood, Missouri); THE FEATHERDUSTER (Westlake High School; Austin, TX), Colophon, Nov 6, 2012, at 3, available at <http://issuu.com/fdonline/docs/moneyissue> (“Content decisions rest in the hands of staff, despite the Supreme Court’s ruling in the case of *Hazelwood v. Kuhlmeier*.”).

377. David L. Hudson, Jr., THE SILENCING OF STUDENT VOICES 6 (2003), available at http://www.firstamendmentcenter.org/madison/wp-content/uploads/2011/03/Silencing.intro_.pdf.

through the courts, state legislatures, or local school boards.³⁷⁸ With the support of legislators, school officials, and the public, student journalism will continue to thrive and grow, and we will all reap the benefits.

378. Cf. Buller, *supra* note 100 (comparing routes available to ending indirect censorship).

APPENDIX A

TINKER-STATE NEWSPAPERS

Newspaper	High School Name	Location	# of editorials
The Bear Buzz	Mount Shasta High School	Mount Shasta, CA	0
The Torch	Kennedy High School	Cedar Rapids, IA	97
The Blueprint	Swampscott High School	Swampscott, MA	6
The Oracle	Cesar Chavez High School	Stockton, CA	102
The Patriot	Shawnee Mission South High School	Overland Park, KS	41
Grizzle Gazette	Hector G. Godinez High School	Santa Ana, CA	14
The Ranger Review	Lewis-Palmer High School	Monument, CO	15
The International Post	International Studies Learning Center	South Gate, CA	9
Crimson Times	Everett High School	Everett, MA	4
The Falcon	Crescenta Valley High School	La Crescenta, CA	6
Clarion	Cleveland High School	Portland, OR	146
Mustang News	Capuchino High School	San Bruno, CA	0
RHS Newswire	Richmond High School	Richmond, CA	11
Rampage	Southeast Polk High School	Runnels, IA	172
Silvertip	Mission Hills High School	San Marcos, CA	27
Pantherbook	Franklin High School	Franklin, MA	99
Jefferson Journal	Thomas Jefferson High School	Denver, CO	40
Spartan Press	Lathrop High School	Lathrop, CA	2
The SAGA	Pleasant Valley High School	Chico, CA	107
Crimson Chronicle	Paso Robles High School	Paso Robles, CA	50
LACES United	Los Angeles Center for Enriched Studies	Los Angeles, CA	11
The Santa Rosan	Santa Rosa High School	Santa Rosa, CA	28
Ridge Review	Oak Ridge High School	El Dorado Hills	0
The Dickinsonian	Chapman High School	Chapman, CA	27
The Prospector	Manitou Springs High School	Manitou Springs, CO	1

HAZELWOOD-STATE NEWSPAPERS

Newspaper	High School Name	Location	# of editorials
Hilltop Echo	Milford High School	Milford, UT	0
The Crimson Talon	Paul V. Moore High School	Central Square, NY	9
The Roar	Potomac Senior High School	Dumfries, VI	0
Devil's Advocate	Henry Clay High School	Lexington, KY	11
The Crest Press	Strawberry Crest High	Dover, FL	0
The Flyer	Kettering Fairmont High School	Kettering, OH	23
The Carthaginian	Carthage High School	Carthage, TX	19
The Panther Chronicle	North Valleys High School	Reno, NV	0
The Talon	East Lake High School	Tarpon Springs, FL	56
The Spartan Scituation	Scituate High School	North Scituate, RI	0
Madison Rampage	Madison Comprehensive High School	Mansfield, OH	5
Fort Hill Sentinel	Fort Hill High School	Cumberland, MD	5
The Panther Press	Klein Oak High School	Spring, TX	18
BETA Buzz	Business, Education and Technology Academy	Edinburg, TX	16
The Journal	Decatur High School	Decatur, TX	17
The Bluffer	Poplar Bluff Senior High School	Poplar Bluff, MO	18
The Zone	Central High School	Keller, TX	32
The King's Page	Rufus King International School, High School Campus	Milwaukee, WI	55
Knight Life	Loy Norrix High School	Kalamazoo, MI	106
Pow Wow	Yselta High School	El Paso, TX	6
IAM News	International Academy of Macomb	Clinton Township, MI	9
The Predator	Wharton High School	Tampa, FL	4
The Oracle	Glenbrook South High School	Glenview, IL	19
Tiger Tales	Joliet West High School	Joliet, IL	46
The Chronicle	William Mason High	Mason, OH	88

CODE-STATE NEWSPAPERS

Newspaper	High School Name	Location	# of editorials
Cougar Prints	Edna Karr High School	New Orleans, WA	0
The Paw Print	Clarion-Limestone High School	Strattanville, PA	9
The Gauntlet	Kamiak High School	Mukilteo, WA	0
The Leopard Tales	Belle Vernon High School	Belle Vernon, PA	1
Lions Roar	Kennewick High School	Kennewick, WA	0
KAHN	Kutztown Area High School	Kutztown, PA	0
Trojan Crier	Troy High School	Troy, PA	0
Bulldog Bugle	Simon Gratz High School	Philadelphia, PA	0
The Panther Press	Saegertown Jr./Sr. High School	Saegertown, PA	5
The Talon	Hockinson High School	Bush Prairie, WA	22
The Echo	Wilson Area High School	Easton, PA	5
Panther Press	East Pennsboro Area Senior High School	Enola, PA	5
Pitchfork	Cambridge Springs High School	Cambridge Springs, PA	4
The Warrior	Penn-Trafford High School	Harrison City, PA	0
The Monthly Roar	Camp Hill Senior High School	Camp Hill, PA	0
The Tiger Times	Fleetwood Area High School	Fleetwood, PA	13
The Patriot Press	Liberty High School	Renton, WA	29
The Tribune	York Suburban High School	York, PA	42
The Seahawk	Anacortes High School	Anacortes, WA	9
The Hornet	Enumclaw High School	Enumclaw, WA	6
BHSTV	Bremerton High School	Bremerton, WA	0
Tiger News	Fairview Middle School	Fairview, PA	0
Lion's Tale	New Hope-Solebury High School	New Hope, PA	24
The Talon	Tumwater High School	Tumwater, WA	3
SusQ Sentinel	Susq-Cyber Charter School	Bloomsburg, PA	0

APPENDIX B

RUBRIC

PRAISE/CRITICISM EDITORIALS

Editorials of Praise: Pieces that voice approval of, compliment, or support the actions or policies advocated by a person or group. Examples: complimenting students about the quality of a pep rally, approving of passage of statewide ballot proposition, lauding construction of new school facilities.

Editorials of Criticism: Pieces that voice disapproval of, or criticize, the actions or policies advocated by a person or group. Examples: criticizing a school district's new tardy/absence policy, taking peers to task for littering hallways, disapproving of United States foreign policy.

Subgroups: Editorials of praise and criticism should be divided into subgroups as follows:

School: focusing on the school environment, including school policies, facilities, curriculum, personnel, and actions by school officials;

State/Local: focusing on state or local government, including counties, cities, and other non-school-related government bodies;

National: focusing on the federal government or its officials, including the President;

International: focusing on the international community or international institutions, such as the United Nations.

ENTERTAINMENT EDITORIALS

Seasonal Editorials: Pieces that do not take issue positions, but instead provide commentary on recurring yearly events, including holidays (Valentine's Day, Christmas, etc.) and school events (prom, graduation, homecoming).

Humorous Editorials: Editorials that consist primarily of jokes, parody, or satire.

Motivational Editorials: Pieces that aim to inspire or motivate readers, such as by urging them to study hard or be the best they could be.

INFORMATIONAL EDITORIALS

Editorials that do not take a position on issues, but instead provide information to readers in a relatively objective fashion.

CAUSE-APPEALING EDITORIALS

Editorials that urge readers to take action on some issue, such as supporting a cause (like the "Green" movement) or taking some action ("clean up your trash").

DEBATE EDITORIALS

Editorials that provide relatively equal space to divergent viewpoints. Subcategorized as follows:

Pro/Con: pieces by two or more authors that present both sides of an issue, such as the pros and cons of legalizing marijuana;

Man-on-the-Street: pieces that consist solely of a collection of quotes, from multiple sources, explaining in one or two sentences their view on a given topic or questions;

Other: any other pieces similar in tone that present multiple sides of an issue, without explicitly or implicitly taking a side.

CONTROVERSIAL EDITORIALS

Controversial editorials include the following subcategories:

Drugs/Substance Abuse: focusing on illegal drug use, tobacco or alcohol use by students, or criminalization and other government policies concerning these activities;

Race: focusing on race, illegal immigration (including the DREAM Act), stereotypes, or race-based discrimination;

Religion: discussing specific religious faiths, or the intersection of religion and government (such as school prayer);

Sexual: topics related to sexual activity, including birth control, pregnancy, abortion, sex education, and homosexuality (including same-sex marriage);

Crime/Violence: topics related to criminal activity, violence committed by/against students, gang-related activity, vandalism, or other general-interest criminal justice editorials.

APPENDIX C³⁷⁹BREAKDOWN OF EDITORIALS BETWEEN
HAZELWOOD-, TINKER-, AND CODE-STATE NEWSPAPERS

	Praise	Criticism*+	Entertainment	Informational	Cause- Appealing	Debate*+	Other*#	Total
<i>Tinker</i>	41 (4.04%)	329 (32.41%)	163 (16.06%)	107 (10.54%)	192 (18.92%)	112 (11.03%)	71 (7.00%)	1,015
<i>Hazelwood</i>	28 (4.98%)	149 (26.51%)	75 (13.35%)	65 (11.57%)	92 (16.37%)	97 (17.26%)	56 (9.96%)	562
Code-state	8 (4.45%)	41 (23.16%)	33 (18.64%)	19 (10.73%)	33 (18.64%)	36 (20.34%)	7 (3.95%)	177

FOCUS OF EDITORIALS OF PRAISE

	Govt: School	Govt: State/Local	Govt: National	Govt: International	Peer	Other	Total
<i>Tinker</i>	15 (36.59%)	3 (7.32%)	3 (7.32%)	1 (2.44%)	7 (17.07%)	12 (29.27%)	41
<i>Hazelwood</i>	9 (32.14%)	5 (17.86%)	3 (10.71%)	0	7 (25.00%)	7 (25.00%)	28
Code-state	5 (62.50%)	1 (12.50%)	1 (12.50%)	0	1 (12.50%)	0	8

379. Throughout Appendix C, the asterisks appended to categories—e.g., Criticism* in the first table—reflect that the proportion of editorials of that category in the *Tinker* sample was of statistically significant difference than the proportion in the *Hazelwood* sample, at a 95% confidence interval rating. Categories that also reflect statistically significant differences between the *Tinker* and code-state samples are indicated with a plus sign, e.g., Criticism*+ in the first table. Categories that reflect statistically significant differences between the *Hazelwood* sample and the code-state sample are indicated with a number sign, e.g., Other*#, in the first table.

FOCUS OF EDITORIALS OF CRITICISM

	Govt: School*+	Govt: State/Local*	Govt: National	Govt: International	Peer*+#	Other	Total
<i>Tinker</i>	159 (48.33%)	11 (3.34%)	26 (6.08%)	8 (2.43%)	59 (17.93%)	72 (21.88%)	329
<i>Hazelwood</i>	53 (35.57%)	13 (8.72%)	4 (2.68%)	2 (1.34%)	41 (27.52%)	36 (24.16%)	149
Code-state	11 (26.83%)	2 (4.88%)	1 (2.44%)	1 (2.44%)	18 (43.90%)	8 (19.51%)	41

TYPES OF ENTERTAINMENT EDITORIALS

	Humorous#	Seasonal	Motivational	Other	Total
<i>Tinker</i>	12 (7.36%)	82 (50.31%)	58 (35.58%)	11 (6.75%)	163
<i>Hazelwood</i>	5 (6.67%)	41 (54.67%)	29 (38.67%)	0	75
Code-state	13 (39.39%)	18 (54.55%)	0	2 (6.06%)	33

TOPICS OF CONTROVERSIAL EDITORIALS

	Drugs/Substance Abuse	Race	Religion	Sex or Sex- Related	Crime/Violence	Total
<i>Tinker</i>	24 (17.78%)	27 (20.00%)	21 (15.56%)	38 (28.15%)	28 (18.52%)	135
<i>Hazelwood</i>	6 (12.00%)	6 (12.00%)	10 (20.00%)	21 (42.00%)	7 (14.00%)	50
Code-state	3 (25.00%)	2 (16.67%)	1 (8.33%)	5 (41.67%)	1 (8.33%)	12

CONTROVERSIAL EDITORIALS BY SAMPLE

	Number of Controversial Editorials	Total Number of Editorials	Percentage of Controversial Editorials*+
<i>Tinker</i>	135	1,015	13.30%
<i>Hazelwood</i>	50	562	8.90%
Code-state	12	177	6.78%