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HEMLOCK IN THE MARKETPLACE: HOW FREEDOM OF THE PRESS FOR COLLEGE NEWSPAPERS POISONS THE FIRST AMENDMENT

MICHAEL HOPKINS*

I. INTRODUCTION

Why, right after I really understood that “no law” means no law and announced it, a certain critic of mine wrote a letter and said that he had been waiting to express his opinion of me for a long time, but had been afraid of the libel laws. “Now,” he said, “I am at last free under your interpretation of the First Amendment to express my precise opinion of you. Mr. Justice, you are a sonofabitch.”¹

Even Supreme Court Justice Hugo Black, the fierce proponent of “no law”² abridgment of First Amendment rights³ and putatively proud recipient of the moniker “sonofabitch,”⁴ understood the time and place propriety for First Amendment expression by students as exemplified in *Tinker v. Des Moines Independent Community School District*.⁵ Dissenting in *Tinker*,⁶

* J.D. Candidate, May 2008, The John Marshall Law School. I have my wife Carla to thank for this and every endeavor I manage to complete; her patience with me is legendary. I should disclose that I was an undergraduate in the English program at Governors State University in 2000 and a student of professors whose names appeared on the pages of the *Innovator*. After graduating, I worked for Governors State, at various times, in four capacities: as a writer in Public Affairs, as an adjunct instructor in the College of Arts and Sciences, as a consultant, and as a coordinator in the College of Health Professions. My argument here, however, is entirely my own.

1. Everette E. Dennis & Donald M. Gillmor, *Hugo L. Black: “No Law” Means No Law*, in JUSTICE HUGO BLACK AND THE FIRST AMENDMENT 3, 6 (Everette E. Dennis et al. eds., 1978).

2. See *id.* at 3-4 (asserting that Justice Black was adamant and vocal about the First Amendment’s “no law” language and insisted on its literal meaning).

3. See *id.* at 4 (stating that Justice Black’s interpretation of the First Amendment would brook no compromise and that he believed there could be no abridgement).

4. See *id.* at 6 (explaining that Black’s absolutist view was a source of ridicule for him, yet the justice maintained his good humor in response).

5. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 517 (1969) (Black, J., dissenting) (“While I have always believed under the First and

Justice Black lamented the emergence of an educational anarchy brought on by the “loudest mouthed” and “maybe not the brightest” students.⁷ More than thirty-five years later, Black’s predictions⁸ appear presciently incarnate in one of *Tinker*’s distant progeny: *Hosty v. Carter*.⁹ In *Hosty*, the demise of a public university newspaper, *The Innovator*, gave rise to outcry from students, including M.L. Hosty, and various media outlets that freedom of the press had been imperiled by an oppressive Illinois university.¹⁰

Fourteenth Amendments neither the State nor the Federal Government has any authority to regulate or censor the content of speech, I have never believed that any person has a right to give speeches or engage in demonstrations where he pleases and when he pleases.”).

6. *Id.*

7. *Id.* at 525. In his dissent, Justice Black objected to what he perceived as a transfer of power from the elected officials of the state to the Supreme Court when the Court held a school could not make or enforce a rule against high school students’ wearing armbands in the classroom without violating their First Amendment rights. *Id.* at 515. Justice Black recognized that the protest attendant to the wearing of the armbands diverted students’ attention from their studies, making the restriction reasonably prophylactic. *Id.* at 518. Black’s concern extended beyond a single act of protest, however. He objected that the majority’s holding in *Tinker* would put schools and teachers in a position subordinate to students, who lack the wisdom to run the schools. *Id.* at 525. He contested the holding, as well, in terms of the actual state of the Court’s precedent, calling it a “myth” that “any person has a constitutional right to say what he pleases, where he pleases, and when he pleases.” *Id.* at 522.

8. *See id.* (arguing that “[o]ne does not have to be a prophet” to see that students will, as a result of the opinion, be willing to defy teachers and “practically all orders”). Opinions attendant to student speech often blur their rhetoric between high school and college students. Justice Black’s dissenting lamentation in *Tinker*, a case involving high school students, appears predicated on then extant turmoils on college campuses. *Id.* at 525. He speaks specifically to “rioting” and “property seizures,” as well as destruction and picket lines. *Id.*

9. 412 F.3d 731 (7th Cir. 2005), *cert. denied*, 126 S. Ct. 1330 (2006).

10. *See* John K. Wilson, *Freedom of Repression: New Ruling Will Allow Censorship of Campus Publications*, IN THESE TIMES, August 1, 2005, at 10 (arguing *Hosty* expands censorship on college campuses to any publication or activity supported by student fees); *see also* Irwin Gratz, *From the President: Youth Must Get the Message About the Value of A Free Press*, THE QUILL, August 1, 2005, at 5 (arguing students cannot learn to be journalists when their work is subjected to censorship); Don Corrigan, *Appellate Court Levels Blow Against College Press Rights*, ST. LOUIS JOURNALISM REVIEW, July 1, 2005, at 21 (“Supporters of free press rights for college newspapers are expressing outrage . . . over *Hosty v. Carter*.”); *Fire’s Spotlight: The Campus Freedom Resource*, Governors State University Speech Code Rating, <http://www.thefire.org/index.php/schools/438> (last visited July 9, 2007) (rating Governors State University with a symbolic red light to represent the school’s censorship of speech); Harry Silvergate, *Assault on College Press*, FIRE, Oct. 17, 2005, <http://www.thefire.org/index.php/article/6344.html> (arguing the *Innovator* case may signal the end for independent college journalism, likening

The facts leading up to *Hosty* culminated in a complaint against the University, its board of trustees, and a host of others,¹¹ for perceived violations of the plaintiffs' First Amendment rights by way of prior restraint.¹²

From the plaintiff editors' perspective, it seemed the University would stop at nothing to crush their First Amendment rights and hamper the newspaper's operations.¹³ Among acts calculated as a pattern of harassment by the University¹⁴ were the following: purchasing new equipment for the newspaper — two digital scanners and three Macintosh computers;¹⁵ replacing a computer after the plaintiffs complained it was non-functioning;¹⁶ securing software, so it couldn't be stolen;¹⁷ a meandering administrator, who was frequently absent from his office when the plaintiffs looked for him;¹⁸ refusing to provide a private facsimile machine or mailbox;¹⁹ cancelling a meeting of the media board because its chairman was hospitalized;²⁰ authorizing printing of *The Innovator* despite cancellation of the media board meeting;²¹ relying on university police, rather than an administrator, to investigate an *Innovator* office break-in;²² allowing a two-hour phone outage;²³ and, returning what appeared to be personal mail to an *Innovator* editor, rather than providing postage at state expense.²⁴ Nonetheless, had the University's pattern of harassment been limited to these infractions, the events would

it to a relic akin to typewriters and eight-track cassette players); Linda P. Campbell, *Censorship Ruling Hits College Papers*, DETROIT FREE PRESS, August 16, 2005 (calling the opinion "an exercise in intellectual contortion" and arguing the court understated the educational value of student papers in exposing students to diverse viewpoints).

11. The complaint cut a wide swath across the university, with named defendants drawn in from the president to the mailroom and, seemingly, all points in between, from provost to dean and faculty member to secretary. *Hosty v. Governors State Univ.*, No. 01 C 500, 2001 LEXIS 18873, at *2-3 (N.D. Ill. 2001).

12. *Hosty v. Governors State Univ.*, 174 F. Supp. 2d 782, 783 (N.D. Ill. 2001). Plaintiffs additionally sought equitable relief and punitive damages. *Id.*

13. *See id.* at 784. ("Defendants . . . allegedly engaged in a campaign of prior restraints designed to frustrate plaintiffs' rights of freedom of speech and press").

14. *Id.*

15. *Hosty*, 2001 LEXIS 18873, at *3-4.

16. *Id.* at *4.

17. *Id.*

18. *Id.*

19. *Id.* at *5.

20. *Id.* at *8.

21. *Id.*

22. *Id.* at *9.

23. *Id.* at *10.

24. *Id.*

stand for little more than the memory of two particularly hard-to-please student editors.²⁵ Instead, and apparently in reaction to articles that were critical of University administration and faculty,²⁶ the University's dean of student services suddenly demanded review of the paper prior to releasing payment for printing.²⁷

It has been argued that only the most convoluted reasoning could excuse the dean's actions as something less than a clear violation of the editor plaintiffs' First Amendment rights;²⁸ yet, the

25. See *id.* at *14-19 (holding that nearly all defendants were entitled to qualified immunity with respect to these events). Specifically, the court noted the plaintiffs bore the burden of showing defendants violated clearly established rights, yet had presented no case law to establish their constitutional right to a particular type of computer, or the administrator's duty to investigate crimes; nor did they present evidence that returning mail for insufficient postage was an attempt to frustrate their freedom of speech. *Id.* at *15-16. The court was also sympathetic to the notion that hospitalization, and allowing a newly assigned media board liaison time to become acquainted with the issues to be discussed at media board meetings, were legitimate reasons for cancelling two of those meetings, particularly when funding for *The Innovator* – from the plaintiffs' view, ostensibly revoked by the meeting cancellations – was fully approved by the defendant administrator/liaison and available, if they had an issue to publish. *Id.* at *17. The court also noted the expediency of securing valuable software and was reluctant to find responsible stewardship tantamount to a First Amendment violation. *Id.* at *15-18.

Other issues complained of as First Amendment violations and resolved in defendants' favor were a secretary's refusal to "process *Innovator* materials," and the changing of *The Innovator*'s office locks – twice – after plaintiffs complained of break-ins, which required plaintiffs to call campus police for entry and being allowed said entry. *Id.* at *9-10.

26. *Hosty v. Carter*, 325 F.3d 945, 946 (7th Cir. 2003), *rev'd and vacated en banc*, 412 F.3d 731 (7th Cir. 2005).

27. *Id.* at 947. Patricia Carter, the dean of student services, contacted the printer and told him she would have to review the paper before it went to press. The printer informed the plaintiffs, and "[s]parks were ready to fly." *Id.*

28. See Michael O. Finnigan, Jr., *Extra! Extra! Read All About It! Censorship at State Universities: Hosty v. Carter*, 74 CIN. L. REV. 1477, 1492-93 (2006) (arguing that the *Hosty* court, sitting en banc, confused the holding in *Hazelwood v. Kulmeier* by ignoring limiting language that kept the holding from being applicable to college students and failing to distinguish it on the facts). The *Hosty* court predicated its holding on *Hazelwood v. Kulmeier*, a Supreme Court case about high school censorship. 484 U.S. 260 (1988); see *Hosty*, 412 F.3d at 734 (interpreting the censorship issue in *Hosty* through the public forum analysis used in *Hazelwood*). However, *Hazelwood* ambiguously provides ample opportunity for the reader to conclude it applies to college students, or that it does not apply to college students. On the side of the argument that it does not apply to college students is the point that the Court does not need to decide whether "substantial deference" should be extended to colleges administrators dealing with the expressive activities of college and university students. *Hazelwood*, 484 U.S. at 273 n.7. *Hazelwood* also offers rationales that take into account the age and emotional maturity of potential

Seventh Circuit did precisely that, extending qualified immunity to the dean for the muddling attendant to the issue of prior restraint in terms of college students.²⁹ Muddled or not, the legal debate misses a vital point: state colleges are not the larger world, but places of learning, where prior restraint would reasonably work to prevent harm and better prepare student journalists for the realities of real world journalism. In fact, current law creates an artificial harbor of confusion and manipulation that does not serve First Amendment principles.

This Comment will further explore *Hosty* and its legal implications; Part II of this Comment surveys the legal pedigree as it culminates in *Hosty*. Part III argues that extending First Amendment protection to student journalists contravenes justice and results in a superadded constitutional right. Lastly, part IV makes a case for prior restraint for college publications comparable to real world restraints placed upon the real media outlets.

II. BACKGROUND

A. *Tinker*

During the latter part of the 1960s, national turmoil bled into the schools.³⁰ Students began to see schools as platforms for social

audiences and repeats language from *Brown v. Board of Education*, 347 U.S. 483, 493 (1954), that schools are “a principal instrument in awakening the child . . . [and] in preparing him for later professional training.” *Id.* at 272. On the other side of the coin, the Court explains that activities such as school sponsored publications may be distinguished from the personal expression shown in *Tinker*. *Id.* at 270-71. *Hazelwood* characterizes publications as part of the curriculum, and, therefore, a forum that educators are entitled to control. *Id.* at 271. In harmonizing that statement with *Papish v. Board of Curators of University of Missouri*, 411 U.S. 960 (1973) (per curiam), a case holding the school could not suspend an editor/college student for including objectionable content in a newspaper she edited, the *Hazelwood* Court explained that the paper was produced off campus as an “underground” publication, and that school officials had “merely allowed it to be sold on a state university campus.” *Id.* at 271 n.3.

Arguably, the Court would not need to harmonize a holding applicable to high school newspapers with a holding applicable to college newspapers unless it intended a nexus between the two. Likewise, the Court did not limit its concerns in *Hazelwood* to age and maturity level. It included the school’s right to disassociate itself from speech that was “ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane” or, last in this list of possibilities, “unsuitable for immature audiences.” *Id.* at 271.

29. See *Hosty*, 412 F.3d at 739 (holding that *Hazelwood v. Kuhlmeier* has created legal and factual uncertainties that the administrator was not bound to know or navigate).

30. See JOSEPH J. HEMMER, JR., *THE SUPREME COURT AND THE FIRST AMENDMENT* 91 (1986) (explaining that the aim of student groups in the latter

and political action,³¹ while others fought to maintain the schools' traditional role as "apolitical centers of learning."³² Students would gain the upper hand.

In 1969, in *Tinker*,³³ Justice Fortas, writing for the Court's majority, held that school officials, as an arm of the state,³⁴ could not prohibit high school students from wearing armbands in protest of the Vietnam War.³⁵ The Court considered the problem, devoid of attendant disruptions, as one of "pure speech."³⁶ The Court embraced the oft-stated idea that American liberty, in particular, demands that risks be taken – risks that eschew order for the threat of disruption – whenever student speech is involved.³⁷ Specifically, the Court placed as preeminent the importance of constitutional protection in the schools, proffering the Holmesian notion of the marketplace of ideas³⁸ and its

half of the 1960s was to convert educational institutions from places of learning to entities for political and social action).

31. *Id.*

32. *Id.*

33. 393 U.S. 503 (1969).

34. *Id.* at 509.

35. *See id.* at 509-14 (stating that school officials in the person of the State must demonstrate something more than a desire to avoid speech it does not wish to contend with if it is to make rules prohibiting an expression of opinion). This must be put in terms of conduct that would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school". *Id.* at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

The *Tinker* holding stands quite expansively for the extension of First Amendment rights to high school students. Justice Fortas, writing for the majority, went so far as to adopt the notion that prohibiting high school students from wearing armbands in protest of the Vietnam War was akin to ancient Sparta's conscription of the city-state's seven-year-olds into state barracks for education and training. *Id.* at 511-12. In keeping with the Sparta sentiment, Justice Fortas made strong pronouncements in *Tinker*, building a formative wall against encroachment. He stated that neither students nor teachers "shed their constitutional rights to freedom of speech at the schoolhouse gate," and proclaimed that this had been the position of the Court for "almost 50 years." *Id.* at 506. The single exception lies in speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Id.* at 513.

36. *See id.* at 508 (singling out the mere act of wearing an armband from actions that are aggressive, disruptive, or matters of group demonstration).

37. *Id.* at 508-09. The plaintiffs in *Hosty* argued that *Tinker* unambiguously articulated First Amendment protection for student expression, rendering any argument of uncertainty by the university defendants incredible. *Hosty*, 174 F. Supp. 2d at 785-86.

38. *See* DAVID LOWENTHAL, PRESENT DANGERS 45-47 (2002) (arguing that Holmes' conception of the marketplace of ideas departs from the Founders' conceptions of the First Amendment). Lowenthal argues Holmes' marketplace is a virtual switch of founding philosophies, which supplants the Founder's philosophical affinities for John Locke's *Letter on Toleration* and *Treatises of Civil Government* with Mill's *On Liberty*, coupled with Darwinian conceptions

unequivocal place in the classroom.³⁹ The Court tacitly subordinated instruction to speech:

The principal use of which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students.⁴⁰

B. Student Speech After *Tinker*

Despite the strength of these pronouncements, student expression after *Tinker* met a mixed bag of judicial holdings. The Sixth Circuit took a step south of *Tinker* just one year after it was decided, holding in *Guzick v. Drebus*⁴¹ that a high school did not violate a student's First Amendment rights when its principal suspended the student for refusing to remove a button advocating attendance of an anti-war demonstration.⁴² That same year, in

of survival of the fittest. *Id.* at 45-46. In Lowenthal's analysis, however, the marketplace departs even from Mill, who, Lowenthal argues, gave no assurances that the truest ideas would emerge from uninhibited discourse. *Id.* at 46. The ultimate result of Holmes's marketplace, therefore, is not that unpopular minorities would be protected from the majority (the Founders' intent), but a more Darwinian effect, in which sheer force leads to an unappealable rule of the strong. *Id.* at 47. Where the result of an unrestrainable college press makes anyone with access to its pages the strongest by default, Justice Black's "loudest mouthed" and "maybe not the brightest" students become the sole beneficiaries of a philosophical bait and switch.

39. See *Tinker*, 393 U.S. at 512 (positing that the nation's future leaders will be those students exposed to diverse viewpoints and "a robust exchange of ideas").

40. *Id.* The apparent subordination of the school's role of education to one of accommodation did not sit well with Justice Stewart, who objected in his concurrence to the Court's assumption that children possess the same rights as adults. *Id.* at 514-15. Justice Black's dissent went further, taking umbrage at the Court's preempting the judgment of elected state officials and their implementation of disciplinary regulations. *Id.* at 517. The majority of the *Tinker* Court saw no limits to time or place on a student's expression while in school: "A student's rights . . . do not embrace merely classroom hours." *Id.* at 512.

For Justice Harlan, the Court also seemed to go too far. His dissent stated that he would, in similar cases, require the plaintiff to shoulder the burden of showing the regulations complained of were motivated by something "other than legitimate school concerns." *Id.* at 526.

41. 431 F.2d 594 (6th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971).

42. *Id.* at 595. The *Guzick* court, completely cognizant of *Tinker*'s holding, strained to break free of it and uphold the school's right to suspend the student. Latching onto *Tinker* dicta that noted not all symbols had been prohibited by the school district and that the armband symbols were to be an ephemeral expression, the *Guzick* court found purchase in the fact that the school in question had a long-standing rule against wearing buttons. *Id.* at 597. The court also pointed out that past experience had shown a racially mixed student body prone to wearing badges with racial messages such as

1970, college press suffered a marginal setback in terms of obscenity. In *Antonelli v. Hammond*,⁴³ the Federal District Court for the District of Massachusetts held that requiring a student editor to submit the school-funded paper to a faculty advisory board was prima facie unconstitutional.⁴⁴ The caveat was that such prior restraint might have been constitutional if narrowly confined to eliminate obscenity from print,⁴⁵ and if the proper procedural safeguards had been in place.⁴⁶ Prior restraint found some refuge in *Eisner v. Stamford Board of Education*⁴⁷ as well, with the Second Circuit holding that a school regulation requiring prior review of material distributed by students on campus was unconstitutional only for lack of procedure.⁴⁸ Nevertheless, prior restraint was struck down, and more forcefully so, in 1972, in *Fujishima v. Board of Education*,⁴⁹ where the Seventh Circuit took issue with the *Eisner* court⁵⁰ and held that *Tinker* could not stand for the proposition that students must announce their intent to distribute in advance, as to allow school officials to pass judgment on the distribution before it ever happens.⁵¹

C. Hazelwood

In 1988, in *Hazelwood v. Kulmeier*,⁵² the Supreme Court undertook a different prior restraint issue – one that would become the source of contention in *Hosty*.⁵³ In *Hazelwood*, high

“White is Right” and “Say it Loud, Black and Proud.” *Id.* at 596.

43. 308 F. Supp 1329 (Mass. D.C. 1970).

44. *Id.* at 1336.

45. *Id.* at 1335.

46. *Id.* at 1135-36. The material that sparked the concern over obscenity was Eldridge Cleaver’s “Black Moochie,” which the paper’s editor included in paper’s submission to the printer. *Id.* at 1332. The printer, taking offense to the language in Cleaver’s article, refused to print and complained to the college’s president, who subsequently refused to fund publication unless each issue was submitted to an advisory board and vetted for obscenity. *Id.* The decision of the advisory board would have been absolute, though ostensibly limited to its task of keeping obscenity from the paper. *Id.* at 1334. In a telling show of support, the controversial Cleaver issue was published despite the pauper’s purse: student editors at several other Massachusetts state colleges worked to have the paper printed without the college’s support. *Id.* at 1333.

47. 440 F.2d 803 (2d Cir. 1971).

48. *Id.* at 809-10.

49. 460 F.2d 1355 (7th Cir. 1972).

50. *Id.* at 1358.

51. *Id.*

52. 484 U.S. 260 (1988).

53. See Jeffrey R. Young, *Censorship or Quality Control?: Lawsuit by Student Newspaper Editors Tests How Much Oversight Administrators Can Assert*, THE CHRONICLE OF HIGHER EDUCATION, August 9, 2002, <http://chronicle.com/free/v48/i48/48a03601.htm> (last visited July 8, 2007) (explaining concern among student and professional journalism organizations

school student journalists produced an issue of the *Spectrum*,⁵⁴ the student paper for Hazelwood East High School,⁵⁵ that contained articles about teen pregnancy⁵⁶ and divorce.⁵⁷ Before publication, the journalism teacher, in accordance with prior practice, submitted the paper to the school principal for review.⁵⁸ The principal expressed concern that the article on pregnancy invaded the privacy of three pregnant students.⁵⁹ He was also concerned that the parents of a student interviewed in the article about divorce should be able to respond to remarks the student made about their marriage, or be given the opportunity to consent to publication.⁶⁰ Seeing little alternative, other than not printing the paper at all,⁶¹ the principal instructed the journalism teacher to publish without the two pages on which the articles appeared.⁶²

Consequently, three of *Spectrum's* former staffers sued, complaining of violation of their First Amendment rights.⁶³ After the district court held for the school⁶⁴ and the Eighth Circuit held for the students,⁶⁵ the Supreme Court granted certiorari.⁶⁶ The Court opened its opinion with *Tinker's* admonition that students "do not shed their constitutional rights to freedom of speech at the schoolhouse gate."⁶⁷ From there, *Tinker* fell into disrepair. Instead of using *Tinker's* more expansive view, the *Hazelwood* Court framed the issue in terms of whether the *Spectrum* was a public forum.⁶⁸ The Court stated that school facilities become public forums only when they have been opened "by policy or practice" for use by the general public.⁶⁹ Following that logic, the Court stated that facilities not otherwise opened were not, by

over the Illinois attorney general's filing a brief bringing *Hazelwood v. Kuhlmeier* into the equation). Mark Goodman, director of the Student Press Law Center stated that *Hazelwood* could have "a devastating impact on the future of the First Amendment on college campuses." *Id.*

54. 484 U.S. at 262-63. The *Spectrum* was funded by the Board of Education and supplemented by proceeds from sales. *Id.*

55. *Id.* at 262.

56. *Id.* at 263.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *See id.* at 263-64 (explaining that the principal thought there was not enough time to edit the articles and get the paper printed prior to the end of the school year).

62. *Id.* at 264.

63. *Id.* at 262.

64. *Id.* at 264 (referencing *Kuhlmeier v. Hazelwood*, 607 F. Supp. 1450 (1985)).

65. *Id.* at 265 (citing *Kuhlmeier v. Hazelwood*, 795 F.2d 1368 (1986)).

66. *Id.* at 266.

67. *Id.*

68. *Id.* at 267.

69. *Id.*

definition, public, and school officials could therefore impose reasonable restrictions on student speech.⁷⁰ The Court further posited that the school possessed a degree of control over student expression that might create the impression that it bears “the imprimatur of the school.”⁷¹

Utilizing this line of reasoning, most facts in *Hazelwood* supported the school’s position. The *Spectrum* was produced in a Journalism II class,⁷² under the direction of a journalism teacher,⁷³ and students received grades for their performance.⁷⁴ The school had not opened the pages of the *Spectrum* to anyone, but instead reserved them for “a supervised learning experience for journalism students.”⁷⁵ Thus, the Court held the school was entitled to reasonably regulate the paper’s contents.⁷⁶ Whether *Hazelwood* could apply to college newspapers would be one of the issues the Seventh Circuit would tackle in *Hosty*.

D. Hosty

Hosty was the First Amendment mouse that roared.⁷⁷ The Seventh Circuit took two cracks at it.⁷⁸ In the first, the only issue was whether *Hazelwood* so muddied the constitutional waters that a college administrator could not see bottom, thus entitling the administrator to qualified immunity after she pulled *The Innovator’s* purse strings.⁷⁹ For a three judge panel, Judge Evans

70. *Id.*

71. *Id.* at 271.

72. *Id.* at 267.

73. *Id.*

74. *Id.*

75. *Id.* at 270.

76. *Id.*

77. See *First Amendment – Prior Restraint – Seventh Circuit Holds That College Administrators Can Censor Newspapers Operated as Nonpublic Fora*, 119 HARV. L. REV. 915, 918 (2006) (admonishing school officials that the Seventh Circuit’s second and final *Hosty* holding does not extend “carte blanche” to censorship). The second *Hosty* decision changes virtually nothing in terms of a state college’s ability to censor student newspapers; such censorship remains well beyond a state college’s authority. *Id.* at 919. The circumstances under which censorship might be extended after the extension of *Hazelwood* to college campuses appear fairly limited to newspapers produced as part of a journalism curriculum. *Id.* *Hazelwood* itself predicated much of its logic on the assessment that the *Spectrum* was unequivocally part of the Journalism II curriculum. *Hazelwood*, 484 U.S. at 267. College papers produced as part of a journalism curriculum are rare, however; a survey of 101 college papers, for example, yielded only one that was part of the curriculum. *First Amendment*, 119 HARV. L. REV. at 919 (2006). Further, efforts by college administrators to transform student newspapers into nonpublic fora would very likely face First Amendment challenges, from viewpoint discrimination to exclusion from limited public fora. *Id.* at 920-21.

78. *Hosty*, 325 F.3d at 946.

79. *Id.* at 948.

answered no:⁸⁰ *Hazelwood* was not a fit for college students and could not have given a reasonable person the impression that it was.⁸¹ In its second opinion, after rehearing en banc, the court held that *Hazelwood* muddied the waters after all, that *Hazelwood* did apply to colleges, but that censorship would not be allowed in an open forum.⁸² Most importantly, however, the court then held that a reasonable trier of fact could find *The Innovator* operated in a public forum, and thus, could not be censored by the University.⁸³ In other words, it upheld the prohibition *against* censorship, deeming that for the administrator the issue had been sufficiently uncertain to entitle her to qualified immunity.⁸⁴

III. ANALYSIS

Three salient fallacies attach themselves to First Amendment rights for college journalists: (1) students are entitled to greater constitutional protection than other journalists; (2) age, education, and ability are coterminous; and (3) there are no counterfeits in the marketplace of ideas.

A. A License to Libel

Hosty and other prophesies of doom notwithstanding, the Supreme Court has forcefully spoken on the subject of prior restraint for college newspapers. In *Rosenberger v. Rector and Visitors of the University of Virginia*,⁸⁵ the Court's majority fell into lockstep with *Tinker's* concern for a student's exposure to divergent viewpoints. The Court emphasized that the "first danger to liberty"⁸⁶ lies in that netherworld where the state may examine publications for the ideas they present and undermine the university's "tradition of thought and experiment."⁸⁷ The

80. *Id.* at 950.

81. *Id.* at 948.

82. *Hazelwood*, 412 F.3d at 735, 738.

83. *Id.*

84. *Id.* at 738.

85. 515 U.S. 819 (1995).

86. *Id.* at 835.

87. *Id.* One wonders if the Court was contemplating that one of the fun activities attendant to this "tradition of thought and experiment" would be students suing their fellow students. Certainly the *Hosty* plaintiffs wasted little time in naming other students in their lawsuit. See Brief of Defendant-Appellant at 5, *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005) (No. 01-4155) (noting that defendants included university students). One of these students was chair of the university's Student Communication and Media Board. *Id.* at 6. Another was not only a student, but another *Innovator* journalist as well. See Staff Box, THE INNOVATOR, Governors State University, July 10, 2000, at 3, available at http://www.govst.edu/uploadedFiles/gsu_library/Zone_Shlaes/Innovator_29_5_July_10.pdf (identifying defendant Claude Hill IV as an *Innovator* columnist). Hill also identified himself as a student representative of the Illinois Board of Higher Education Student Advisory Committee.

Court said:

The quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment. For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers of the Nation's intellectual life, its college and university campuses.⁸⁸

This view, when applied to student newspapers in state colleges and universities, creates a unique enclave of protection in which the University's tradition of thought and experiment causes real harm to real people,⁸⁹ with state-sanctioned impunity.⁹⁰

Claude Robert Hill IV, Letter to the Editor, THE INNOVATOR, Governors State University, July 10, 2000, at 3, available at http://www.govst.edu/uploaded/Files/gsu_library/Zone_Shlaes/Innovator_29_5_July_10.pdf. The inescapable corollary to the student status of some of the defendants in *Hosty* is this: The Court's decisions in favor of student journalists are less protective of some students than they are a positive chill over the intellectual pursuits of all students. The message is "learn, gain experience, and test what you've learned – but do so at your own risk." Little else can be attained when a select few are privileged among all others, and the metaphor of marketplace, with its images of lofty debates, contemplative chin-scratching, and agreements to disagree is rankly abused by a cursed juice of hebona.

88. *Id.* at 836. The Court restated what might be called a Pandora's Box Rule: Once the state has opened a limited forum, it may no longer reign in speech that operates within the forum's limitations. *Id.* at 830. The rule requires an analysis that distinguishes between permissible content discrimination that preserves the limited forum's purpose and impermissible viewpoint discrimination that excludes speech otherwise operating within the forum's limited purpose. *Id.* The rule was stated somewhat differently in *Hazelwood v. Kuhlmeier*, where the Court stated a public forum is created only when the school opens the Pandora Box "by policy or by practice." 484 U.S. at 267 (1988); see also *Perry Education Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37, 46-47 (1983) (holding that the state may limit communicative activities only where limitations are not predicated on the speaker's point of view and that a public forum is created where it is opened by policy or practice to indiscriminate use).

89. See STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH: AND IT'S A GOOD THING, TOO 108-09 (1994) (arguing that arguments holding free speech as paramount can only do so by stripping speech of its context). Fish responds to an assertion that the academic community must eschew speech codes on campus for freedom of expression with the argument that such speech-supportive platitudes find purchase primarily by turning a blind eye to speech-related harms. *Id.* at 109. Fish states that viewing these injuries as superficial ignores their "grievous and deeply wounding" nature. *Id.* Fish also addresses the oft proffered platitude that the answer to harmful speech is more speech, noting that more speech in and of itself cannot erase the harms inflicted. *Id.* Of course, there is a stronger flaw in the "more speech" platitude, and that is the underlying fantasy that we all live our days and evenings by 18th century candlelight, imbued with unlimited time for thought and speech and response. Imagine the prolific debates on the Constitution emerging in 21st century America, being endlessly executed and replied to. The "more speech" argument fails miserably or is of limited value.

90. See *Milliner v. Turner*, 436 So.2d 1300, 1302-03 (La. Ct. App. 1983),

Student journalists at state universities are afforded the same First Amendment protections as the commercial press,⁹¹ and university officials may not engage in prior restraint.⁹² As one court put it, “[t]he state may no more restrict the right of a private paper, or be held accountable for any libel it might publish, than can [a state university] control or be responsible for possible libels published in its student paper.”⁹³

This liability dead zone for state universities was recently accepted by the Court of Appeals of Minnesota. In *Lewis v. St. Cloud State University*,⁹⁴ a 2005 case of first impression in the state,⁹⁵ a plaintiff dean sued his university for a defamatory article published in the university’s student paper, the *Chronicle*.⁹⁶ Like *The Innovator in Hosty*, the *Chronicle* operated in a limited public forum over which the University exercised no control.⁹⁷ However, at issue in *Lewis* was not censorship, but legal responsibility for the libelous article.⁹⁸ The court referred to the Minnesota rule that a newspaper publisher could be held vicariously liable under a principal/agent theory.⁹⁹ However, the court held vicarious liability did not extend to universities, with the First Amendment creating a bastion of impunity for the university.¹⁰⁰ When the plaintiff argued such a holding created a “liability-free zone,” the court countered that the disadvantage of worthy plaintiffs was effectively collateral First Amendment damage and not “necessarily bad public policy.”¹⁰¹

writ denied, 442 So.2d 453 (La. 1983) (holding a state statute that provided a cause of action was pre-empted by the First Amendment).

91. Brian J. Steffen, *A First Amendment Focus: Freedom of the Private-University Student Press: A Constitutional Proposal*, 36 J. MARSHALL L. REV. 139, 143 (2002).

92. *Milliner*, 436 So.2d at 1302.

93. *Id.* (citing *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973)).

94. 693 N.W.2d 466 (Minn. Ct. App. 2005), *rev. denied*, June 14, 2005.

95. *Id.* at 469.

96. *Id.*

97. *Id.* at 472.

98. *Id.* at 471.

99. *See id.* (noting a publisher has the power to select and discharge employees, as well as control content, by virtue of its authority over employees).

100. *See id.* at 472 (holding that a university’s policy freeing student funded publications from censorship and First Amendment constraints freed the university from liability).

101. *See id.* at 473 (stating that, while the court had sympathy for the plaintiffs argument that holding the university could not be liable would create a “liability free zone,” accommodation was needed between compensation for injury inflicted by defamation and the First Amendment). On June 6, 2007, Illinois took a nearly-unanimous step toward liability-free zone legislation. In the wake of *Hosty*, the Illinois House and Senate passed the College Campus Press Act. Meg McSherry Breslin, *Student-Press Freedom Act OKd; Governors State Case Led to Bill*, CHICAGO TRIBUNE, June 7, 2007,

That fact that the plaintiff might have sued the student journalist and editor¹⁰² solves nothing. The likelihood of judgment-proof defendant¹⁰³ is perhaps the least interesting difficulty.¹⁰⁴ More compelling is the nature of the potential plaintiffs when faculty or administrators are the subjects of the defamation. They are self-selected as those least likely to sue students: It is the business of educators to develop students, not seek judgments against them.¹⁰⁵

Given the limited scope of personages on a school campus, those most vulnerable to libel or invasions of privacy are rarely public figures.¹⁰⁶ This has the bizarre result of creating plaintiffs who need only meet a standard lower than *New York Times v.*

at Metro 1. The Act specifically provides that “[a] state-sponsored institution of higher learning” will enjoy immunity from liability for “expressions” in campus media. S.B. 729, 95th Gen. Assem. (Ill. 2007). As of this writing, the Act awaits action by Illinois Governor Rod Blagojevich.

102. *Id.*

103. See Jeff Kessler, *Dollar Signs on the Muscle . . . and the Ligament, Tendon, and Ulnar Nerve: Institutional Liability Arising from Injuries to Student-Athletes*, 3 VA. J. SPORTS & L. 80, 104 (2001) (stating that directly suing a student athlete for an intentional tort confronts a plaintiff with a judgment-proof defendant, even though the defendant might easily be adjudged liable); see also Assaf Hamdani, *Who’s Liable for Cyberwrongs*, 87 CORNELL L. REV. 901, 910-11 (2002) (noting the difficulty in making college students, who lack the resources to pay damages, liable for the violation of copyright laws); see also Ben Depoorter & Sven Vanneste, *Norms and Enforcement: The Case Against Copyright Litigation*, 84 OR. L. REV. 1127, 1160 (2005) (arguing judgment-proof issues are of concern where copyright infringers are students who cannot pay damages).

104. See *Leeb v. Delong*, 198 Cal. App. 3d 47, 58 (Cal. Ct. App. 1988) (arguing that a student editor would be unlikely to pay damages and has no impetus to refrain from the publication of defamatory material). The *Leeb* court also noted that the responsibility of a school district to protect students against defamation is as compelling as its responsibility to protect the rights of the editor-tortfeasor. *Id.*

105. Telephone Interview with Dr. Jacqueline Kilpatrick (Oct. 22, 2006). Kilpatrick was a target of the October 3, 2000 issue of *The Innovator*. Though the attack on her reputation made her angry, for her to consider legal action, she said, the article “would have to be so egregious I couldn’t live with it. Suing a student is a huge thing. I’m loathe to do that.” *Id.* Kilpatrick added the very faculty who offer the most support to students and their extracurricular activities, like a student newspaper, are often selected for attack. *Id.* In Kilpatrick’s case, she served on Governors State University’s Media Communications Board. “Not only the most vulnerable, but the most involved set themselves up as targets,” she explained. *Id.* “You could teach, go home, and hide, and not have to worry about this sort of thing.” *Id.*

106. See DAN B. DOBBS, *THE LAW OF TORTS* § 418 (2000) (explaining how public school teachers and principals may or may not be held to be public officials); see also JOHN L. DIAMOND, ET AL., *UNDERSTANDING TORTS* at 442-43, § 21.03 (2000) (arguing that status as a public official becomes less certain the farther away the subject of defamation is from the decision-making structure and that most courts hold public school teachers are not public figures).

Sullivan,¹⁰⁷ or *Gertz v. Robert Welch, Inc.*,¹⁰⁸ yet who nevertheless have limited or even no redress for their injuries.¹⁰⁹

The *Lewis* plaintiff's observation of a liability-free zone was hardly new. Nearly twenty years ago, in *Leeb v. Delong*,¹¹⁰ the Court of Appeals of California made a cogent observation regarding prior restraint of student newspapers. This took nothing more than stating the obvious: Where a school district does not exercise control over the content of a student publication, and where it has no exposure to tort liability as a result, there is a "license to libel [for the student journalist] unique in Anglo-American jurisprudence."¹¹¹ Holdings like *Lewis's* and *Hosty's* sustain this superadded First Amendment right.

B. *Oh, Like You're So Mature*

In the analysis of freedom of the press issues between college and high school students, age distinctions flow in and out of arguments – conflation loses sight of differences, and efforts to separate lose sight of similarities. This confusion undermines analysis from the outset. However, one constant remains: Opposition to *Hazelwood's* application to colleges relies in no small part on the differences in ages and intended audiences.¹¹²

Proponents of a free college press decry any hint of restraint on college journalists because of their maturity.¹¹³ Indeed, arguments for college press restraints that assume any chronological immaturity of student readers or journalists must fail; it is not at all unusual for college students to be in their late

107. 376 U.S. 254, 267 (1964) (holding that a public official must prove actual malice to recover damages for defamation).

108. 418 U.S. 323, 351 (1974) (defining public figures as those who inject themselves into a public matter of controversy or who have such fame and notoriety that they are quickly recognized); see also *DIAMOND*, *supra* note 106, at 446 (explaining how the Court reasoned, in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), that public figures assume the risk of reputational harm).

109. See *DIAMOND*, *supra* note 106, at 447-48 (explaining that even in matters of public concern, a private plaintiff could, depending on state law, recover for actual injuries caused by defamation, though actual malice might still be the standard for presumed or punitive damages).

110. 198 Cal. App. 3d 47 (Cal. Ct. App. 1988).

111. *Id.* at 59.

112. See *Hosty*, 412 F.3d at 739 (Evans, J., dissenting) (arguing the majority failed to acknowledge the legal distinctions between minors and college students). Evans makes the observation as well that high school students are less mature and more prone to exercising poor judgment. *Id.* at 740. Evans also argues the purpose of secondary schools differs from college, the former being tutelary and the latter a vehicle to expose students to the marketplace of ideas. *Id.* at 741.

113. See Daniel A. Applegate, *Stop the Presses: The Impact of Hosty v. Carter and Pitt News v. Pappert on the Editorial Freedom of College Newspapers*, 56 CASE W. RES. 247, 264 (arguing the age of majority confers rights on college students not afforded high school students).

twenties or thirties. Thus, if some rule that accepts the notion of restraint of a college press is to be fashioned, it must find its source in something other than a student journalist's having had a limited amount of time to loiter on the planet.

At Governors State University, the center of the *Hosty* storm, the average student age is thirty-four.¹¹⁴ Presumably, this maturity should leave students receptive to and, ultimately, sharper for their exposure to newspaper covers depicting Jesus with an erection,¹¹⁵ or statements that college professors operate telephone sex lines.¹¹⁶ But the maturity sentiment is built on a false predicate.

Given the average age of a Governors State University student, it is reasonable to assume the "average" university student at GSU is likely the parent of a child, or children, ages

114. Governors State University Facts and Figures, http://www.govst.edu/aboutgsu/t_aboutgsu.aspx?id=204 (last visited Nov. 8, 2007).

115. See THE INSURGENT, Eugene, March 2006, at 1, 11, 13-14, 17-18, available at http://commentator.dreamhosters.com/Insurgent_17.4.pdf (depicting Jesus with an erection while hanging from the cross; a variation of Michelangelo's painting of God touching Adam, with Adam, with an erection, touching back by fondling God's penis; Jesus engaged in a homosexual encounter; Jesus as the Coppertone Girl, complete with dog pulling down his swimsuit while he carries the cross; and Jesus as a naked and pregnant woman on the cross). THE INSURGENT is a student newspaper at the University of Oregon. See also Speeches and Writings by Dave Frohnmayer, President, University of Oregon, *Offensive Material in a Student Publication*, <http://president.uoregon.edu/speeches/material.shtml> (last visited July 9, 2007) (stating the university cannot control content or discipline student journalists); see also *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 670 (1973) (holding that a student editor could not be disciplined for the distribution of a newspaper with a cartoon of police raping the Statue of Liberty on its cover). Of note in the *Papish* factual history is the student's previous distribution of material deemed pornographic while high school students were attending campus with their parents. *Id.* at 668 n.3. While the Court suggested the university might have stood on better ground had it proceeded on the issue of time, place, and manner restraints on distribution, *id.* at 670, this ignores the portability of the newspaper beyond initial distribution and its likely deposit anywhere on campus, no matter what original time, place, or manner restrictions were in place.

116. See *Walko v. Kean Coll. of N.J.*, 235 N.J. Super. 139, 145-47 (1988) (holding that freedom of the press guarantees outweighed individual interest where a mock ad under the title "Whoreline" advertised a college administrator's being available for phone sex). The court reasoned that by way of *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), the ad had absolute constitutional protection. *Id.* at 149. The court extended protection against plaintiffs, both private and public. *Id.* at 150. Then the court found the plaintiff's status within the college community made her a public figure. *Id.* at 152. In deciding on these grounds, the court avoided the question of whether *Hazelwood* was applicable to college newspapers, asserting, since the ad was constitutionally protected, the *Hazelwood* question need not be reached. *Id.* at 154 n.5. This puts the cart before the horse. Were *Hazelwood* applicable, none of the court's other reasoning would be.

newborn to sixteen. Where protestations are predicated on forging new minds within the university community,¹¹⁷ lost in the calculus is that community means just that: community. At a school where the average student age is thirty-four, there are bound to be children in tow.¹¹⁸ Where children follow, children see; where older children follow, older children read. And so the cases have come full circle, with a potential reading audience back to the ages tendered in *Hazelwood*. Current First Amendment protections for college journalists apparently leave no barrier between the five-year-old in tow and an image of Jesus on the cross with an erection. Libel aside, this seems a freedom of dubious value to the college student or journalist.

Notwithstanding maturity issues, there is a strong similarity between high school and college journalists: Neither has the education or experience to be a journalist. News organizations hire reporters who have, minimally, a bachelor's degree.¹¹⁹ Advancement may even require a graduate degree.¹²⁰ Even that may not be enough for the fledgling reporter to find voice at a major news outlet.¹²¹ Larger news organizations enjoy the luxury of demanding several years of experience.¹²² In preparing for a career as a journalist, then, high school students and college students are less part of separate and distinct categories of journalists than they are individuals engaged in a continuum of preparation.¹²³ That one may be older and more mature in one stage of the process than in another does not suddenly imbue the student with a completed education or experience.¹²⁴

117. See Finnigan, *supra* note 28, at 1494 (contrasting the speech environments of high school and college and arguing the latter as the place for an "unfettered exchange of ideas").

118. See E-mail from Charles Connolly, Executive Director of Marketing and Communications, Governors State University, to Michael Hopkins, author of this Comment, (Oct. 25, 2006, 19:50 CDT) (on file with author) (stating that on any given night, anywhere from twelve to forty children may follow their parent-students through the university); see also *supra* note 114 (stating that more than 35,000 elementary, middle, and high school students visit the campus yearly for educational and cultural programs).

119. See U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, NEWS ANALYSTS, REPORTERS, AND CORRESPONDENTS 268 (2006-07), available at <http://www.bls.gov/oco/ocos088.htm#training> (stating employers prefer college graduates with degrees in journalism or mass communications).

120. *Id.*

121. See *id.* (stating that advancement opportunities may be enhanced for those with graduate degrees).

122. See *id.* (explaining that most reporters must begin their careers in smaller news outlets).

123. See *id.* (noting that high school courses in journalism and English provide the foundation for college programs).

124. It is, of course, conceivable that a practicing journalist might return to school for an undergraduate or graduate degree and, in fact, write for the student newspaper as well. While this scenario is possible, it remains that

College is where future professionals learn their craft; it is not a forum for accomplished professionals to ply their trade.¹²⁵ Given the harm irresponsible and unethical journalism can inflict,¹²⁶ there seems little difference between allowing a first year medical student to perform unassisted surgery and allowing a student journalist all of the powers of the First Amendment.¹²⁷

C. Whose Speech Is It, Anyway?

In *Tinker*, Justice Black was clearly bothered by the origin of the protected speech. Without addressing it directly, he noted non-plaintiff siblings of the *Tinker* plaintiffs, aged eight and eleven respectively, also defied the school rule against black armbands.¹²⁸ He followed this observation by making note of the religious and political affiliations of the plaintiffs' parents.¹²⁹ The subtext is clear: It wasn't the *students'* speech the court was protecting.¹³⁰ The student papers in *Hosty* give rise to the same question Justice Black seemed concerned with: Whose speech is it, anyway?

At the heart of the *Hosty* case are publications prominently featuring *The Innovator's* one-time advisor, Geoffrey de Laforcade, and his disputes with the University over his termination.¹³¹ It

even this journalist will enjoy, as a *student* journalist, what he or she does not enjoy in daily employment: the *carte blanche* that exists in the liability free zone. See *supra* Part III.A.

125. See *Leeb*, 198 Cal. App. 3d at 58 (arguing that the purpose of student journalism is to prepare students for employment in a profession where prior restraint *does* exist, in the form of the blue pencil "poised for defamation prevention").

126. FISH, *supra* note 89, at 109; see also *Milliner*, 436 So.2d at 1301 (reviewing the trial court's holding that a professor accused of being a racist in a predominantly black university and another's being labeled "a proven fool" were both libeled by the student paper so accusing and labeling).

127. See R. GEORGE WRIGHT, *THE FUTURE OF FREE SPEECH LAW* 100 (1990) (arguing that, in the context of high school students, society does not mandate students be allowed to perform surgeries or prescribe drugs to assure competent physicians will someday be the result). Wright argues that the role of the school is to ensure students acquire social skills and the academic foundation to proceed, eventually, into their professions. *Id.*

128. *Tinker*, 393 U.S. at 516 (1969) (Black, J., dissenting).

129. *Id.*

130. See WRIGHT, *supra* note 127, at 98 (acknowledging the student plaintiffs in *Tinker* were likely influenced by the strong ideologies of their parents).

131. M.L. Hosty, *De Laforcade's Contract Dispute Reaches 3rd Phase Arbitration*, THE INNOVATOR, Governors State University, Oct. 31, 2000, at 1, available at http://www.govst.edu/uploadedFiles/gsu_library/Zone_Shlaes/Innovator_29_8_October_31.pdf; M.L. Hosty *Senate Briefs: News from the GSU Student Senate*, THE INNOVATOR, Governors State University, Aug. 28, 2000, at 8, available at http://www.govst.edu/uploadedFiles/gsu_library/Zone_Shlaes/Innovator_29_6_August_28.pdf; De Laforcade, Letter to the Editor, THE INNOVATOR, Governors State University, Oct. 31, 2000, at 4, available at http://www.govst.edu/uploadedFiles/gsu_library/Zone_Shlaes/

was a termination the student editors were unwilling to acknowledge.¹³² Hosty's writing for the paper gave one-sided voice to de Laforcade's claims against the University and administrators who refused to renew his contract. One article, which spanned several pages, included accusations of document alteration, racist comments, and mail tampering.¹³³ In the same issue, a letter to the editor penned by de Laforcade laid blame squarely at the feet of the college dean for a former colleague's suffering through kidney failure, as well as the colleague's inability to pay his aging mother's bills.¹³⁴ In a previous edition, Hosty stated that the dean's college was engaged in "confirmed unprofessional behavior . . . which may prove to be illegal."¹³⁵ The article threatened student senate investigation of racial and religious discrimination and addressed de Laforcade's dismissal.¹³⁶ Hosty further implied contract and due process violations on the part of the dean.¹³⁷ Dr. Jacqueline Kilpatrick, who stated that de Laforcade was "unhappy" with her, likewise became a target of the paper.¹³⁸

Of course, this may mean nothing more than fealty to a respected former advisor, articulated through poorly-written and ethically unsound attacks.¹³⁹ On the other hand, it stands for the

Innovator_29_8_October_31.pdf.

132. *Hosty*, 412 F.3d at 738 (recounting plaintiffs' insistence that de Laforcade retained his status as advisor to *The Innovator* even after he was no longer employed by the university).

133. See M.L. Hosty, *De Laforcade's Contract Dispute Reaches 3rd Phase Arbitration* THE INNOVATOR, Governors State University, Oct. 31, 2000, at 1, 6, 8, 10, available at http://www.govst.edu/uploadedFiles/gsu_library/Zone_Shlaes/Innovator_29_8_October_31.pdf (proffering de Laforcade's "firm opinion" that the college's division chair had falsified documents to protect the dean's "privilege of firing" him; stating de Laforcade claimed the dean had referred to Hispanic students as "just a lot of 'Hispanic housewives,'" recounting de Laforcade's claim his mailbox had been moved and his mail opened).

134. De Laforcade, *supra* note 131.

135. M.L. Hosty, *supra* note 131, at 8.

136. *Id.*

137. *Id.*

138. Telephone Interview with Dr. Jacqueline Kilpatrick (Oct. 22, 2006).

139. See Memorandum from Stuart Fagan, Governors State University President, to Governors State University Community (Nov. 3, 2000), available at <http://collegefreedom.org/Fagan.htm> (arguing that, "[w]ith few exceptions," the Oct. 31, 2000, edition of *The Innovator* failed to meet accepted journalistic standards). Fagan's memorandum responded directly to an assertion made in the M.L. Hosty authored *Senate Briefs* that he had responded to a statement that GSU students were "punk kids" with "complicit, conspiratorial laughter." *Id.* Fagan stated no such event or exchange had occurred. *Id.* Fagan added:

I respect the right of reporters to pursue the truth (as they perceive it). However, I will not sit idly by, without comment, and allow the reputation of the university to be sullied by newspaper reporting that is inaccurate, insulting, and that might be driven, in part, by self-interest.

proposition that the unrestricted First Amendment protection to student journalists and college newspapers in public universities provides a medium and a vehicle for attacks that have nothing to do with the marketplace of ideas, but rather with the personal agenda of anyone who has favorable access to an untouchable student journalist.

IV. PROPOSAL

First Amendment protection for college newspapers is a myopic aberration. Courts should adopt a deferential standard of reasonableness in student newspaper cases, without any of the forum analysis suggested by *Hazelwood* and *Hosty*. Further, state-run institutions must be put in the position of publisher¹⁴⁰ in order to remove the student journalists' license to libel.¹⁴¹

The fundamental flaw in the current conception of First Amendment rights for college journalists is an anomalous creation of protections that do not exist outside of this artificial bubble. The anomaly results in a virtual license to libel by those least trained in, and least restrained by, professional ethics.¹⁴² Students are likely judgment proof,¹⁴³ and institutions simply have no liability for harms inflicted with their tacit support.¹⁴⁴ Further, this bubble exists in an insular academic community that has broader social implications than the courts have imagined in their cauldron of speech conception. Students' children and other children brought to campus for various activities are likewise a part of the campus community;¹⁴⁵ thus, the vision of a college campus as a unique environment filled with wide-eyed and adult minds reaching for knowledge and emerging from a crucible of ideas, forged wiser for a better world, is untenable.¹⁴⁶ It is a naive

Let's agree to disagree: with honor and fairness.

Id.

140. See *Bazaar v. Fortune*, 476 F.2d 570, 574 (5th Cir. 1973), *cert denied.*, 416 U.S. 995 (1974) (holding that a state university is an arm of the state and can, therefore, never stand in the shoes of private publisher). This proposition stands as a salient example of the anomalous nature of the student newspaper in a state institution. The *Bazaar* court stated that once the university recognizes a student activity, it can only censor that activity consistent with the First Amendment. *Id.* In terms of student newspapers, this is functionally analogous to the publisher of *The New York Times* giving license to its reporters and editors to ignore the existence of the publisher and, indeed, giving them free reign to act in ways that are detrimental to the publisher's interests.

141. See *supra* Part III.A.

142. See *id.*

143. See *supra* text accompanying note 103.

144. See *supra* Part III.A.

145. See *supra* Part III.B.

146. See FISH, *supra* note 89, at 107 (arguing that the college and universities are not fortresses of free speech). Fish notes that, while the free

and myth-laden conception. Instead, this vision is, by design, more suited to the abuse of others within the community and the susceptibility to abuse by any who can gain access to the medium.¹⁴⁷

A. *Let's Be Reasonable*

*Alabama Student Party v. Student Government Association of the University of Alabama*¹⁴⁸ serves as a workable template for an applicable reasonableness standard¹⁴⁹ to correct the reigning myopia. In *Alabama Student Party*, the Eleventh Circuit faced a First Amendment issue analogous to prior restraint of student newspapers by a state university:¹⁵⁰ Whether it was constitutional for the University to place restrictions on the distribution of student government campaign materials and limit debates to the week of the election.¹⁵¹

In *Alabama Student Party*, the court framed the issue by observing two important properties of the university election. First, the elections were for a student government association, which the University was not obliged to have in the first place.¹⁵² Second, the question of the constitutionality of election restrictions over student election activities was inherently distinguishable

expression of ideas in the academic environment is most often a positive good, there are times when it simply is not, when it, in fact, undermines the greater purpose of an academic institution. *Id.* Fish argues the primary purpose of a university is not to provide a proving ground for free expression; if it were, Fish contends, there would hardly be a need for classes, examinations, or even libraries. *Id.* He states, “[F]ree expression requires nothing more than a soapbox or an open telephone line.” *Id.*

147. *See supra* Part III.C.

148. 867 F.2d 1344 (11th Cir. 1989).

149. *See id.* at 1346-47 (recognizing that *reasonableness* traces its pedigree to *Tinker*, thus making application to rules governing student elections a logical extension of the standard).

150. *See id.* at 1347 (describing the university's view of its student government association and attendant elections as part of a “learning laboratory’ similar to the student newspaper”). The court noted that the laboratory environment gave students an opportunity to learn about democracy within an operating democratic process, with the caveat that the forum was not open to the public, but instead served as a “supervised learning experience.” *Id.* Notably, the court also addressed the *Hazelwood* holding that the school could exercise prior restraint where the newspaper was part of the curriculum and took it a step further, stating that “the mere establishment of the student newspaper does not magically afford it all the First Amendment rights that exist for publications outside of a school setting.” *Id.* Albeit, the court, while not stating so expressly, seemed to predicate its reference on an understanding of *Hazelwood*'s being applicable to a non-public forum. *Id.*

151. *Id.* at 1345.

152. *Id.* at 1346.

from regulations of election activities outside of the academic environment.¹⁵³

The court's reasoning was based on a common-sense appraisal that the existence of the student government was justified because it provided an experience that supported the University's "educational mission."¹⁵⁴ Thus, the court held school officials are to be given a degree of deference when navigating First Amendment waters and allowed to impose limits on speech when those limits further the institution's educational mission.¹⁵⁵

The Federal District Court for the District of Montana found the Eleventh Circuit's reasoning sound¹⁵⁶ and, in another student government election case, *Flint v. Dennison*,¹⁵⁷ refused to apply a strict scrutiny standard applicable in general elections to university elections.¹⁵⁸ Agreeing with the court in *Alabama Student Party*, the *Flint* court noted the vital distinction between the application of First Amendment law outside of the University and within, stating that a university may place reasonable restrictions on speech for the purpose of preserving "the quality and availability of educational opportunities."¹⁵⁹

It is difficult to imagine how a reasonableness standard should be more applicable to student elections than to student newspapers. The latter certainly possess a greater potential for harm to others. It follows, then, that there is an even greater need

153. See *id.* at 1346 (noting that academic election rules could not withstand constitutional scrutiny in the "real world," but finding the purpose of elections in the academic environment sufficiently proprietary to warrant a different, reasonableness analysis).

154. *Id.* at 1345.

155. *Id.* at 1347.

156. See *Flint v. Dennison*, 361 F. Supp. 2d 1215, 1219 (D. Mont. 2005), *aff'd*, 488 F.3d 816 (9th Cir. 2007) (explaining the Eleventh Circuit's application of a reasonableness standard in *Alabama Student Party* was derived from a survey of Supreme Court case law); see also Bernard James & Joanne E. K. Larson, *The Doctrine of Deference: Shifting Constitutional Presumptions and the Supreme Court's Restatement of Student Rights After Board of Education v. Earls*, 56 S.C. L. REV. 1, 5 (2005) (arguing that law and policy suffer a disjuncture resulting from a lack of clarity that makes any position tenable where one sticks to a favored set of cases regarding student rights).

157. 361 F. Supp. 2d 1215 (D. Mont. 2005).

158. See *id.* at 1218-19 (referencing *Welker v. Cicerone*, 174 F.Supp. 2d 1055 (C.D. Cal. 2001), and the California court's holding that the strict scrutiny standard applied in a similar student election case, the *Flint* court rejected the *Welker* court's requirement that a university must demonstrate a compelling interest and restrictions narrowly tailored to meet those interests before it could restrict student campaign spending).

159. *Id.* at 1218. The court justified the viability of the educational mission rationale, in part, with reference to the student government's faculty advisor's assessment that student government facilitates learning the intricacies of governance, from budgeting to dealing with conflicts of interests. *Id.* at 1220. Seminars enhanced that experience. *Id.*

for latitude in molding the learning experiences of student journalists – perhaps protecting them, as well as others, from themselves.¹⁶⁰

B. *Neither Ethics, Nor Conscience*

Prior review, and, if necessary, restraint, should not only be allowed, it should be expected wherever reasonable to guide students toward professional ethics and conscience. To be sure, the editors of *The Innovator* could have used such guidance. The Illinois College Press Association conducted an independent review of the *Hosty* plaintiffs' conduct – and found it unethical.¹⁶¹ Geoffrey de Laforcade, the faculty advisor whose plight and complaints were featured so prominently in editions of *The Innovator*,¹⁶² stated that the *Hosty* plaintiffs had a great deal to learn about journalism, but that the learning experience is exactly what a student paper provides.¹⁶³ Yet de Laforcade also stated he had declined the administration's requests that he be more persuasive with the student editors when they crossed into questionable territory, claiming his role was that of "professional conscience" not censor.¹⁶⁴

A censor would have been better suited to guiding the *Hosty* plaintiffs toward careers as responsible and capable journalists. Neither conscience nor ethics appears to have been up to the task, and the facts in *Hosty* demonstrate that actual prior restraint would have been reasonable.¹⁶⁵ It would have enhanced the

160. The Illinois House and Senate have voiced their disagreement. The text of the College Campus Press Act, passed by both Houses on June 6, 2007, provides that all student-produced campus media is a public forum and not subject to prior review by university officials. S.B. 729, 95th Gen. Assem. (Ill. 2007). As of this writing, the Act awaits action by the Illinois Governor Rod Blagojevich. California and Governor Schwarzenegger likewise disagree. Schwarzenegger signed AB 2581 into law on August 8, 2006. Steven Cischke, *Gov. Signs Law Protecting College Student Newspapers*, Metropolitan News Enterprise, Aug. 29, 2006, at 3. The bill was, among other things, a reaction to the Seventh Circuit's final *Hosty* holding. *Id.* It acts, however, merely as a reaffirmation of prior restraint restrictions, allowing only that "[n]othing in this section shall be construed to authorize any *prior restraint* of student speech or the student press." Cal. Educ. Code § 94367(d) (2007).

161. Young, *supra* note 53 (listing, among the students' ethical lapses, conflicts of interest, such as their writing investigative articles about one of their teachers, without acknowledging that relationship or assigning a reporter who did not have a conflict, and *Hosty*'s writing a column on the Student Senate without acknowledging her role as the Senate vice-president). The same review criticized the university's response as overzealous and, probably, illegal. *Id.*

162. *See supra* Part III.C.

163. Young, *supra* note 53.

164. *Id.*

165. *See* Deborah H. Holdstein, University Professor of English and Rhetoric, Letter to the Editor, THE INNOVATOR, Governors State University,

University's mission of educating the plaintiffs, and in the words of the *Flint* court, "preserve[ed] the quality . . . of educational opportunities."¹⁶⁶

C. License to Libel – Revoked

This reasonableness would protect college officials from overzealous First Amendment litigation against them, in their

Oct. 31, 2000, at 3, available at http://www.govst.edu/uploadedFiles/gsu_library/Zone_Shlaes/Innovator_29_8_October_31.pdf (arguing an article critical of a faculty member, unsigned and presented as news, appeared to be the work of a single, aggrieved student, who referred to herself as an "unnamed student" within the article). Holstein further stated that, as far as she knew, faculty members named in the article had not been contacted for comment and that ethical journalistic practices would have required that the faculty member held out for criticism be offered a chance to respond. *Id.*

Incredibly, *The Innovator's* response to Holdstein's first observation was that the article was unsigned due to a layout error caused by a thunderstorm and, that despite its origin on the paper's front page, the article's completion on a features page made it opinion and not news. Letters to the Editor, *The Innovator Responds*, THE INNOVATOR, Governors State University, Oct. 31, 2000, at 3, http://www.govst.edu/uploadedFiles/gsu_library/Zone_Shlaes/Innovator_29_8_October_31.pdf.

Questionable ethical practices were by no means limited to Holdstein's observations. Margaret Hosty, Hosty's namesake, wrote a regular column from a Christian perspective for *The Innovator* titled *The Moral Minority*. THE INNOVATOR, Governors State University, Oct. 31, 2000, at 16, available at http://www.govst.edu/uploadedFiles/gsu_library/Zone_Shlaes/Innovator_29_8_October_31.pdf; Oct. 3, 2000, at 16-17, available at http://www.govst.edu/uploadedFiles/gsu_library/Zone_Shlaes/Innovator_29_7_October_3.pdf; Aug. 28, 2000, at 20-21, available at http://www.govst.edu/uploadedFiles/gsu_library/Zone_Shlaes/Innovator_29_6_August_28.pdf; and July 10, 2000, at 11-12, available at http://www.govst.edu/uploadedFiles/gsu_library/Zone_Shlaes/Innovator_29_5_July_10.pdf. While this might otherwise sidetrack discussion toward the Establishment Clause, here it serves to illustrate another departure from ethical grounding: In the October 31, 2000, issue, Hosty's long-winded devotion to the Christian perspective appeared in the same issue as a Hosty-authored article that singled out a Muslim instructor, Dr. Rashidah Muhammad, for accusations of racism, preferential treatment of African American students, and suppression of Christian-themed discussions, which, Hosty wrote, were "squelched by Muhammad, a practitioner of the Islam religion." M.L. Hosty, *Is Dr. Muhammad Failing Her Students: A Trinity of Dubious Service*, THE INNOVATOR, Governors State University, Oct. 31, 2000, at 1, available at http://www.govst.edu/uploadedFiles/gsu_library/Zone_Shlaes/Innovator_29_8_October_31.pdf. Interestingly, the article concludes on the same page *The Moral Minority* begins. *Id.* More tellingly, Hosty's article about Muhammad, amid its wanderings, presses the point that Muhammad would not hire one of *The Innovator's* writers, a former student of Muhammad's, for a teaching position. *Id.* at 12. Hosty then follows with the writer's litany of complaints against what she alleged to be Muhammad's classroom behavior. *Id.* Given this context, any claim to impartiality, fairness, or ethical conduct in Hosty's authorship of the Muhammad article strains credulity.

166. *Flint*, 361 F. Supp. 2d at 1219.

personal capacities, in federal courts.¹⁶⁷ Conversely, however, it would allow a remedy against the same officials, in their personal and official capacities, in state courts¹⁶⁸ for individuals libeled by student newspapers.¹⁶⁹ As publishers, university administrators would be held accountable for publication and resulting injuries, thereby defeating the liability-free zone currently in existence.¹⁷⁰ This approach also acknowledges a reality that First Amendment zealotry¹⁷¹ ignores: Without a publisher to whom student journalists or editors are answerable, the journalistic experience of working on newspapers in state colleges is not rooted in reality, and, therefore, there is no justification to extend absolute First Amendment protections to our most inexperienced journalists.

V. CONCLUSION

First Amendment protection for student journalists in state universities is detrimental to learning objectives and offers a unique medium for harm. Instead of adopting the *Hazelwood* forum analysis in college newspaper censorship cases, a deferential reasonableness standard should be applied in issues of prior restraint. This would allow journalistic freedom comparable to that which exists in the real world,¹⁷² in which real journalists operate, with the institution in the position of publisher and responsible for preventing libelous or unethical content, as well as content that is at odds with the institutional environment or interests.

167. See DOBBS, *supra* note 106, at 694 (explaining Eleventh Amendment immunity shields states from suit in federal courts); see also *Hosty*, 174 F. Supp. 2d at 784 (dismissing § 1983 claims against Governors State and its board of trustees due to Eleventh Amendment bar to private parties' suit against a state, state agency, or state official).

168. Sovereign immunity may create complexities on this count, to be sure. While Illinois constitutionally abolished sovereign immunity, ILL. CONST. art. XIII, § 4, the legislature brought it back in the form of the State Lawsuit Immunity Act. 745 ILL. COMP. STAT. 5/1 (2007). However, the Act made an exception to immunity through the Court of Claims Act. *Id.* The result, in part, was a Court of Claims with jurisdiction over actions sounding in tort against state universities. 705 ILL. COMP. STAT. 505/8. Damages awarded through the Court of Claims are limited to \$100,000. *Id.*

169. See *supra* Part III.A.

170. See *id.*

171. See RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 358 (2003) (citing an intensity of devotion to freedom of speech that nears religiosity and delves into a rhetoric of absolutes).

172. See Bob Roberts, *High Court Decision Disappoints INBA, Student Journalists; INBA Suggests Guarantees*, Illinois Broadcasters Association <http://www.inba.net/articles.php?mode=comments&id=80> (last visited July 9, 2007) (quoting Margaret Hosty, "This is a training ground for journalists and it should be a place where student journalists should be able to report as *they would in the real world*") (emphasis added).

