RETHINKING STUDENT PRESS IN THE "MARKETPLACE OF IDEAS"† AFTER *HOSTY*: THE ARGUMENT FOR ENCOURAGING PROFESSIONAL JOURNALISTIC PRACTICES

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I. INTRODUCTION

On February 21, 2006, the Supreme Court denied certiorari to Margaret L. Hosty, Jeni S. Porche, and Steven P. Barba, former student editors and staff writers of Illinois' Governors State University ("GSU") student newspaper, the *Innovator*.[1] By denying their petition, the Court effectively ended the trio's five-year legal battle in which they sought 42 U.S.C. § 1983 relief from Patricia Carter, Dean of Students at GSU.[2] The students had argued that Dean Carter's actions, which effectively required that they submit prospective issues of the *Innovator* to her office for administrative approval before going to press, violated their First Amendment rights by creating a prior restraint on speech.[3] In a June 2005 en banc opinion of the Seventh Circuit Court of Appeals that overturned the appellate

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† The first reference to the "marketplace of ideas" concept is often traced to Justice Holmes dissenting opinion in *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), in which he wrote, "[T]he ultimate good desired is better reached by free trade in ideas . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . ." In *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589 (1967), the Court first used the concept in reference to colleges and universities, stating that "[t]he classroom is peculiarly the 'marketplace of ideas.'" *Id.* at 603.

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

2. *Id.* at 733.

3. Reply Brief for the Petitioners, Hosty v. Carter, 126 S. Ct. 1330 (2006) (No. 05-377), 2006 WL 148596.

court's earlier panel decision,[4] Judge Easterbrook held that *Hazelwood School District v. Kuhlmeier*,[5] a case traditionally deemed to concern only secondary and elementary educational settings,[6] provides a framework for limiting speech that applies to subsidized student newspapers at colleges and universities.[7]

The Seventh Circuit's decision—and the Supreme Court's subsequent denial of petitioners' petition for a writ of certiorari[8]—set off a storm of negative reactions among journalists, college media, and free speech advocates.[9] As one commentator put it, "One must ask: How do we go from thinking of American college and university campuses as the 'quintessential marketplace of ideas,' as courts referred to them not so long ago, to places where state officials may now be permitted to censor student speech . . . ?"[10] The Student Press Law Center ("SPLC"), a consummate defender of speech rights in student media, decried the appellate court's en banc decision as being "in stark contrast to over three decades of law that has provided strong free speech protection to college student journalists and protected them from censorship by school officials unhappy with what student media published."[11] The *Chronicle of Higher Education* sent out an emergency

4. Hosty v. Carter, 325 F.3d 945 (7th Cir. 2003), *reh'g granted*, 412 F.3d 731 (7th Cir. 2005).

5. 484 U.S. 260 (1988).

6. *Hosty*, 412 F.3d at 733.

7. *Id.* at 735.

8. Hosty v. Carter, 126 S. Ct. 1330 (2006).

9. The Seventh Circuit's decision alone prompted much of this hand wringing. In an amicus brief filed by the Student Press Law Center on behalf of many others in support of the petitioners' petition for a writ of certiorari, the amici warned that the Seventh Circuit's decision to extend *Hazelwood*'s standard to college campuses, specifically college student media, would have "disastrous consequences." Brief for Student Press Law Center et al. as Amici Curiae Supporting Petitioners at *2, Hosty v. Carter, 126 S. Ct. 1330 (2005) (No. 05-377), 2005 WL 2736314, *available at* http://www.splc.org/pdf/hostypetitionbrf.pdf. Another commentator, who made the following statement before the Supreme Court's decision to deny certiorari, stated that "[t]he decision of the en banc Seventh Circuit undermines the unique and critical role of the college campus as a marketplace of ideas." Richard M. Goehler, *Hosty Is a "Recipe for Confusion and Conflict,"* 23 COMM. LAW. 21, 24 (2005). Only a case note in the *Harvard Law Review* seemed to urge caution, with the author stating that "the decision's effects will likely be limited," and "those concerned about the decision will largely find their fears unwarranted." *First Amendment—Prior Restraint—Seventh Circuit Holds that College Administrators Can Censor Student Newspapers Operated as Nonpublic Fora*—Hosty v. Carter, 119 HARV. L. REV. 915, 922 (2006) [hereinafter Recent Cases].

10. Mike Hiestand, *The Hosty v. Carter Decision: What it Means*, Associated Collegiate Press, TRENDS IN COLLEGE MEDIA, Jul. 6, 2005, http://www.studentpress.org/acp/trends/~law0705college.html. This same commentator later called the result of the *Hosty* decision "scary as hell." Mike Hiestand, *Living in a Post-Hosty World*, Associated Collegiate Press, TRENDS IN COLLEGE MEDIA, Mar. 2, 2006, http://www.studentpress.org/acp/trends/~law0306college.html. Another commentator, this one also writing after the Supreme Court's decision not to hear the case, stated rather hyperbolically that the Seventh Circuit's decision had effectively "*overrule[d]* more than thirty years of First Amendment jurisprudence." Virginia J. Nimick, Note, *Schoolhouse Rocked:* Hosty v. Carter *and the Case Against* Hazelwood, 14 J.L. & POL'Y 941, 996 (2006) (emphasis added).

11. *Supreme Court Announces It Will Not Hear Appeal in College Censorship Case*, STUDENT PRESS LAW CTR., Feb. 21, 2006, http://www.splc.org/newsflash.asp?id=1190&year=.

email bulletin to all its subscribers—something it does for an event only of the most pressing nature (this bulletin also announced the resignation of Harvard's president, Larry Summers)—the very day the Court denied certiorari in the case.[12]

Clearly there is much concern within higher education as to what this case might mean for free speech in the college and university community. However, by giving a closer inspection to the particular facts of this controversy and the court decisions surrounding it, I will argue that the decision should give free speech advocates and college and university student journalists (and their supporters) less cause for concern than what mainstream commentators have deemed may be warranted. I will also suggest ways in which college and university administrators can seek to influence student press quality and encourage professional journalistic practices within the proper legal framework. Part II will provide background information on the *Innovator*, its editors, and how this controversy came to fruition. Part III will discuss *Hazelwood* and its relevant progeny, and also look at how this line of cases was interpreted before *Hosty*. Finally, Part IV will address the framework laid out in Judge Easterbrook's *Hosty* opinion before coming to the conclusion that the scope and implications of the decision are much more limited than what the commentators cited above would have readers believe. This last part will also address how *Hosty* underscores a possible need for forging closer relationships between college and university administrations and student newspapers so as to ensure that student journalists leave college not only with an appreciation for a free press, but a professional one as well.

II. THE *INNOVATOR*, ITS EDITORS, AND HOW THIS CONTROVERSY CAME TO FRUITION

A. Background on Governors State University

GSU (located in University Park, Illinois, near Chicago) started in 1969 as a community college with no grades, no departments, and a strong focus on interdisciplinary studies.[13] Since then, GSU—publicly funded and chartered by the Illinois General Assembly—has adopted many of the trappings of a modern university, with four colleges (arts and sciences, business and public

In the same press release, SPLC's executive director Mark Goodman warned that no matter where colleges and universities are located, "public college or university administrators looking to crack down on their student media had better be ready for a fight," and "[w]e will not hesitate to take other schools to court in defense of student press freedom." *Id.*

12. The email linked to an article by Sara Lipka, in which SPLC's Goodman was quoted as saying, "You can't teach journalism in an American democracy and have a censored press. That would be a great tool if you were trying to prepare students for life in China." Sara Lipka, *Advocates of Student-Press Freedom Denounce Supreme Court's Decision Not to Hear Censorship Case*, CHRON. OF HIGHER EDUC., Feb. 22, 2006, *available at* http://chronicle.com/daily/2006/02/2006022202n.htm.

13. Governors State Univ.: About GSU, http://www.govst.edu/AboutGSU/ (last visited Mar. 7, 2007).

administration, education, and health professions)[14] and a full-time faculty, most holding doctorates.[15] At the same time, GSU boasts of being accessible to a wider swath of students than other institutions, styling itself as "a campus for working adults."[16] For example, GSU offers many classes in the evenings, on weekends, and online; provides financial aid to part-time students; enrolls a student body 38% minority, 71% women (including many single working mothers), with an average age of 34; and offers certificate programs in seventeen fields.[17] GSU admits only students who are, in effect, in their junior or senior years of undergraduate study.[18] For admission to GSU, a prospective student must possess at least an associate's degree or, alternatively, must have amassed at least sixty semester hours of academic credit at another institution.[19]

On GSU's student affairs' web page that lists the clubs and organizations at the university, one finds an average number of honor societies, vocationally-related clubs (e.g., social work club, masters of public administration club, physical therapy student association, etc.), and student interest clubs (e.g., soccer club, computer science club, Bible students fellowship) for an institution of six-thousand largely non-traditional students.[20]

B. The *Innovator*

Conspicuously absent from the listings, however, is any mention of the *Innovator*, the student-run newspaper at the heart of the *Hosty* dispute.[21] Hosty

14. GSU Catalog 1999-2001: General Information, http://www.govst.edu/apply/catalog/catalog.1999/gen.info.html (last visited Mar. 7, 2007).

15. About GSU, *supra* note 13.

16. *Id.*

17. *Id.*

18. Undergraduate Admissions Requirements, http://www.govst.edu/apply/undergrad.htm (last visited Feb. 6, 2007).

19. *Id.*

20. Governors State University—Student Life—Clubs and Organizations, http://www.govst.edu/sas/t_sl.aspx?id=1314 (last visited Feb. 6, 2007).

21. There is a listing for the new student newspaper, fittingly called *The Phoenix*. With a perhaps not so subtle jab at what hastened the demise of its predecessor, the paper lists as its purpose: "To inform and entertain the university community in the production of a *responsible, non-biased newspaper*" (emphasis added). *Id*. Hosty cried foul at how the new paper was created, stating in an interview, "Certainly the creation of the new newspaper was a violation of due process, they did not open the interviews to the public, and [the new editors] were administrative appointments." Jon Pike, *Free Speech vs Illinois*, CONFLUENCE, Jan.–Mar. 2003, at 2, *available at* http://www.stlconfluence.org/article.asp?articleID=97 (last visited Feb. 6, 2007).

The Phoenix is currently the center of a new controversy at GSU involving student-administrator relations. On August 29, 2005, former Phoenix editor-in-chief Stephanie Blahut and former copy editor David Chambers filed suit in federal court in Illinois, claiming that GSU administrators were responsible for a move that put an adjunct faculty member in the editor-in-chief position at the paper, among other First Amendment, Fourteenth Amendment, civil conspiracy, and violation of the Open Meetings Act allegations. *See* Blahut v. Oden, No. 1:05-CV-04989, 2005 WL 261126, at *12–*17 (N.D. Ill. Aug. 29, 2005). The complaint also alleges that a photographer for the paper was barred by a campus police officer from taking pictures at a

and Porche[22] were both graduate students in the Masters of English program when they took over as editors of the *Innovator* in 2000.[23] Porche served as editor-in-chief of the publication while Hosty served as managing editor. According to Dean of the College of Arts and Sciences Roger Oden, Hosty also served as news editor, features editor, opinions editor, ad manager, copy editor, columnist, and contributor.[24] By all accounts—their own included—these two women bore the brunt of the production responsibilities for the *Innovator*, which officially said it printed bimonthly, but in reality appeared less frequently.[25] Apparently, a dearth of volunteers forced the duo to write many of the articles that they otherwise would have assigned to others.[26] According to the paper's advisor Geoffroy de Laforcade, a former lecturer of history and integrative studies at GSU, "It was not the best student paper in the history of higher education . . . but it was on the way to becoming a very good one."[27] Participation in the *Innovator* was completely voluntary and was not part of any course or classroom activity. Its publication was funded largely by mandatory student activity fees that were levied on all students in the form of tuition, in addition to some advertising revenues generated by the newspaper.[28]

Although de Laforcade served as advisor to the publication, his role in the eyes of GSU was to be a limited one, consisting chiefly of reviewing stories intended for publication at the request of the student editors, or advising them on "issues of journalistic standards and ethics," but never making content decisions.[29] De

commencement ceremony. *Id.* at *10. In its motion to dismiss filed February 10, 2006, the Illinois Attorney General's Office called the students' claims "patently frivolous," and wrote that the only claim with some merit (the issue of the photographer not being allowed to photograph commencement) was "so minor in nature and so content-neutral" that it should be disregarded by the court. Evan Mayor, *Governors State University Faces Another Lawsuit from Student Journalists*, STUDENT PRESS L. CTR., Feb. 23, 2006, http://www.splc.org/newsflash.asp?id=1196&year=2006.

22. Although Steven Barba has been a party to the litigation throughout all levels, for whatever reason he has been left out of media accounts and interviews. It is safe to assume that Hosty and Porche were at all times the most relevant actors in this dispute, and thus this section focuses exclusively on them.

23. *See* Jeffrey R. Young, *Censorship or Quality Control?*, CHRON. HIGHER EDUC., Aug. 9, 2002, at A36.

24. *See* Letter from Dr. Roger K. Oden, Dean of the Coll. of Arts & Sci. & Professor of Political Sci., Governors State Univ., to Governors State Univ. Students (Nov. 2, 2000), *available at* http://collegefreedom.org/Oden.htm.

25. *See* Young, *supra* note 23.

26. *Id.* at A37.

27. *Id.*

28. *See* Hosty v. Carter, 325 F.3d 945, 946 (7th Cir. 2003); Petition for Writ of Certiorari at *3, Hosty v. Carter, 126 S. Ct. 1330 (2005) (No. 05-377), 2005 WL 2330125.

29. *See* Hosty v. Governors State Univ., No. 01-C-500, 2001 WL 1465621, at *1 (N.D. Ill. Nov. 15, 2001). *See also* Petition for Writ of Certiorari at *4, *Hosty*, 126 S. Ct. 1330 (2005) (No. 05-377), 2005 WL 2330125 (quoting President Fagan as saying "the newspaper would be reviewed, looked at by the faculty advisor but in no sense would the faculty advisor have a right to approve."). Although he agrees that it was never his job to make content decisions, de Laforcade hotly contests that the university had any set opinion on how he should do his job. Interview with Geoffroy de Laforcade, Assistant Professor of History, Longwood Univ. (Sept. 6,

Laforcade viewed his responsibilities similarly, although he has also stated that one of his primary functions was to be on the lookout for potentially libelous articles written by the student journalists, "to protect them and advise them of any possible liability," in accordance with national newspaper advising guidelines.[30] He also assisted the paper by writing occasional columns and reviews, and by helping to get positive stories about GSU—such as faculty accomplishments and publications—on the radar screen of student journalists looking for news leads.[31] The Student Communications Media Board ("SCMB"), a group consisting of students appointed by the student government, was responsible for overseeing all student media on campus; their written policy vis-à-vis the *Innovator* was that the *Innovator*'s student staff would "determine content and format of their respective publication[] without censorship or advance approval."[32] Thus, the student editors were given complete editorial control over the newspaper's subject matter and content. A disclaimer on the masthead of each issue of the *Innovator* informed readers that the paper was edited and published by students, and that the views expressed in the paper "may not reflect the views of GSU," and should not be regarded as such.[33]

C. Controversy Brews

From the beginning of their time at the helm, Hosty and Porche established a reputation for bringing a hardcore, investigative approach to their writing.[34] According to Hosty, before she and Porche took over, the paper contained mostly public relations fluff that served the interests of the university; once in charge, they tried to bring a more critical edge to the paper's journalism.[35] In one article she wrote, Hosty rebuked GSU's financial aid office, which was supervised at the time by Respondent Patricia Carter, GSU's Dean of Students.[36] Articles of this sort no doubt bothered the GSU administration, but it was a series of articles in the October 31, 2000 issue of the newspaper that provided the fodder for the instant controversy. In one article[37] from the news section of the issue, Hosty questioned the teaching abilities of Rashidah Jaami' Muhammad, the chairwoman of the

2006). It was only when the paper displeased GSU administrators, he contends, that they then wanted him to supervise the students and police the content of the newspaper. *Id.* According to de Laforcade, one administrator even went so far as to instruct him to "reel them [the student journalists] in," a suggestion he found ethically inappropriate to follow. *Id.*

30. *See* Interview with Geoffroy de Laforcade, *supra* note 29.

31. *Id.*

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

33. Petition for Writ of Certiorari at *5, Hosty v. Carter, 126 S. Ct. 1330 (2005) (No. 05-377), 2005 WL 2330125.

34. *See* Young, *supra* note 23.

35. *See id.*

36. Petition for Writ of Certiorari at *5, *Hosty*, 126 S. Ct. 1330 (2005) (No. 05-377), 2005 WL 2330125.

37. M.L. Hosty, *Is Dr. Muhammad Failing Her Students?, A Trinity of Dubious Service*, THE INNOVATOR, Oct. 31, 2000, at 1 (a copy of the first page of the article is available at www.splc.org/pdf/innovator.pdf).

English department in which Hosty was a student (although she did not mention this fact in the article).[38] Hosty wrote, "The administration's willful ignorance of the deplorable state of affairs in the English department with Muhammad at the mast is reminiscent of the blind leading the blind, and some students have minds and futures too bright to allow them to become entirely misled."[39] The article also quoted students who accused Muhammad of making racial slurs and giving misinformation in her role as their academic advisor.[40] In this same issue, Hosty quoted a student who had been at a meeting of GSU administrators and who stated that he had heard an administrator comment that he was "tired of dealing with these punk [GSU] kids."[41] The administrator denied having ever said such a thing.[42] In yet another controversial article in the October 31 issue, Hosty criticized Dean Oden for what she alleged was his role in not renewing the teaching contract of de Laforcade.[43]

Needless to say, GSU officials found the accusations made in these articles a bit disconcerting, if not unfair. Their anger was compounded when editors of the *Innovator* refused to retract the factual statements in the articles that the administration deemed false, or even to print response letters offered by the administration.[44] The university made its first official statement with regard to the controversial issue on November 2, 2000, when Dean Oden wrote a "Response to *Innovator*, the Newspaper of Governors State University, October 31, 2000 Edition." In this letter to all GSU students, faculty, and staff, Dean Oden aired the following grievance:

> The *Innovator* of October 31, 2000 contains a letter to the editor by the *Innovator*'s Faculty Advisor, Geoffrey [sic] de Laforcade. The University terminated Geoffrey de Laforcade's employment effective August 21, 2000. The newspaper contains an article entitled "De Laforcade's Dispute Reaches 3rd Phase Arbitration," under the byline of M.L. Hosty. . . . Geoffrey de Laforcade's letter to the editor and M.L. Hosty's article [are] a collection of untruths and I believe that they know they are untrue. I also believe they are being written with the intent and purpose to damage my reputation. I will vigorously defend my name, person, and reputation against defamation.[45]

38. Young, *supra* note 23 (quoting Hosty, *supra* note 37).

39. *Id.* De Laforcade has said that he suggested to the editors that a student reporter not enrolled in the English department address the concerns raised by Hosty in regards to Muhammad. The student editors, however, allowed Hosty to go ahead and write the article, and de Laforcade did not see it as his duty to intervene, as the reporting was not libelous. Furthermore, "there was always the right of response." Interview with Geoffroy de Laforcade, *supra* note 29.

40. Young, *supra* note 23 (quoting Hosty, *supra* note 37).

41. *Id.*

42. *Id.*

43. Petition for Writ of Certiorari at *5, Hosty v. Carter, 126 S. Ct. 1330 (2005) (No. 05-377), 2005 WL 2330125.

44. Hosty v. Carter, 412 F.3d at 733.

45. Letter from Dr. Oden, *supra* note 24. There is dispute among the parties as to why this

This letter proved to be the fountainhead for a flurry of debate that would continue for several months. In a letter to the editor of the *Innovator*—which, it is worth noting, editor-in-chief Porche contends was never delivered to her or the *Innovator*'s office[46]—dated November 3, 2000, just a day after Dean Oden's statement, GSU President Stuart Fagan issued the following statement:

> With few exceptions, the October 31st edition of the *INNOVATOR* [sic] just did not measure up to accepted journalistic standards of professionalism. . . . The *INNOVATOR* did not enlighten nor did it inform the GSU community through thoughtful, accurate and fair reporting. Instead of fairness in reporting, the reader was presented with an angry barrage of unsubstantiated allegations that essentially—and unfairly—excoriated some members of the university faculty and administration (myself included). The "Senate Brief" column is an example. For the record, at the October 18th strategic planning meeting referenced, there was never any discussion in which GSU students were referred to as "punk kids" or to which my response was complicit, conspiratorial laughter. That exchange just did not happen. . . . I have—and will always be—a proponent of the free press. . . . 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 this university to be sullied by newspaper reporting that is inaccurate, insulting, and that might be driven, in part, by self-interest. Let's agree to disagree: with honor and fairness.[47]

In the same document, President Fagan accused the paper's editors and writers of giving a "one-sided recitation of the issues," and then taking "on the role of judge, jury, and executioner, without cause, with the wrong facts, and without due process."[48] Although it was not willing to go quite as far in its criticism of the paper, the Illinois College Press Association—a representative body comprised of student journalists from four-year college student newspapers in Illinois[49]—later conducted a review of the *Innovator*'s practices after the controversy became public and found that the newspaper had made "several ethical lapses."[50]

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particular edition of the *Innovator* was offensive. When asked in an interview what some of the hot-button topics were that the October 31 issue addressed, Porche responded, "We don't know. In my opinion, it's never been pointed out to us exactly what problem if any the University had with this issue. The communication has never been that good from the University as to what the problem was." Pike, *supra* note 21. Hosty added, "[GSU President Stuart] Fagan could not even say under oath, when he was deposed, he could not cite what he found so offensive in it. When they put the paper in front of him in court, he could not cite what was inaccurate in it or what was so offensive. They just said, 'It was the general buzz on campus.'" *Id.*

46. Letter from Jeni Porche, former Editor-in-Chief, *Innovator*, to Stuart Fagan, President, Governors State Univ. (Nov. 16, 2000), *available at* http://collegefreedom.org/Porche.htm.

47. Letter from Stuart Fagan, President, Governors State Univ., to Governors State Univ. Cmty. (Nov. 3, 2000), *available at* http://collegefreedom.org/Fagan.htm.

48. *Id.*

49. ILL. COLL. PRESS ASS'N, CONSTITUTION AND BYLAWS (2000), http://www.icpaonline.net/ICPA%20Constitution%20and%20Bylaws.pdf.

50. Young, *supra* note 23.

Because he wanted to defend the students and the paper that he felt were being unfairly attacked, de Laforcade sent an open letter to President Fagan the same day Fagan had issued his letter.[51] In it, the *Innovator*'s faculty advisor, a former journalist himself, said that the students were "working hard in the pursuit of transparency and accountability, and for the durable creation of a first-class student medium of expression and discussion."[52] He called the students' achievements "impressive" and said that "[w]ith limited resources, a true quest for improvement, immense effort and admirable dedication, they are doing their job: they are learning."[53] He has later stated that the GSU administration never took much interest in the *Innovator*, and that had it ignored any problems it had with the paper surrounding the October 31 issue, "they would have all gone away."[54] In his opinion, the administration was chiefly upset over Hosty's article concerning his termination as instructor at GSU.[55] Because of the confidential nature of de Laforcade's contract dispute with GSU, Hosty was not able to ascertain all of the facts relevant to the controversy, and her sympathy toward the paper's faculty advisor might have come across in her news reporting.[56] According to de Laforcade, as far as free speech was concerned, the crux of the controversy surrounding the October 31 edition of the paper was whether "when a faculty member's contract is not renewed, is that kind of personnel matter within the province of student reporting, or is it confidential? That's what this comes down to, and both the students and the [GSU] administration were on very different sides of that question."[57]

D. Off to Court

Hosty, Poche, and Barba alleged a laundry list of grievances in their original complaint against GSU and several of its student affairs officials. Among them were contentions that they had been denied access to computer software and manuals; that the SCMB changed the *Innovator*'s office computers from IBM computers to Macintosh computers without the editors' permission; that the *Innovator* staff lacked a private facsimile machine or mailbox; that *Innovator*'s office phones had been suspiciously disconnected for approximately two hours on October 25, 2000; that a university employee destroyed *Innovator* advertisement forms and failed to process *Innovator* purchase orders; that important SCMB

51. Interview with Geoffroy de Laforcade, *supra* note 29.

52. Letter from Geoffroy de Laforcade, Faculty Advisor to the *Innovator*, to Stuart Fagan, President, Governors State Univ. (Nov. 3, 2000), *available at* http://collegefreedom.org/Advisor.htm.

53. *Id.*

54. Interview with Geoffroy de Laforcade, *supra* note 29.

55. *Id.* De Laforcade claims that he received no word concerning his termination until months after the internal deadline had passed for notifying untenured faculty of their employment status for the coming year. *Id.* He thus instituted grievance proceedings, and GSU eventually settled out of court with de Laforcade regarding this matter. *Id.*

56. *Id.*

57. *Id.* He also elaborated, "The message the administration sent the students seemed to be, 'You can talk about politics all you want, but not the politics of the university.'" *Id.*

meetings were cancelled; and that *Innovator* email messages were tampered with and deleted by an unknown party.[58] District Court Judge Conlon found that most defendants accused of committing these acts were entitled to qualified immunity and therefore she granted the defendants' motion for summary judgment.[59] Under the protections offered by the Eleventh Amendment to the United States Constitution, state employees performing discretionary functions are shielded from liability for civil damages and granted qualified immunity so long as their conduct does not violate clearly established statutory or constitutional rights that a reasonable person would have known.[60] In analyzing the alleged unconstitutional conduct of the defendants, Judge Conlon determined that the plaintiffs had failed to meet their burden of showing that the defendants' asserted conduct violated clearly established constitutional rights.[61]

Patricia Carter, dean of students at GSU, was the only defendant not granted summary judgment.[62] Her continued involvement in the case stemmed from two phone calls that she placed in late October and early November of 2000—around the time of Dean Oden's, President Fagan's, and Professor de Laforcade's letters to the GSU community—to Charles Richards, president of Regional Publishing Corporation, the self-proclaimed largest printer of high school and college newspapers in America, and the printer of the *Innovator*.[63] In a letter delivered to the *Innovator* staff in mid-November and addressed "To Whom It May Concern," Richards wrote the following:

> Recently I received a phone call at my office from a person who said she was Dean Patricia Carter calling from Governors State University on behalf of the GSU administration. She told me that Regional Publishing was not to print any more issues of "The Innovator" [sic] without first calling her personally and then she, herself, or someone else from the administration department would come to our printing plant, read the student newspaper's contents, and approve the paper for

58. Hosty v. Governors State Univ., No. 01-C-500, 2001 WL 1465621, at *1–*4 (N.D. Ill. Nov. 15, 2001).

59. *Id.* at *5–*7. Four defendants were also granted summary judgment because the plaintiffs had not alleged that these defendants were personally involved with any unconstitutional conduct. *Id.* at *4.

60. "[Q]ualified immunity shields government officials performing discretionary functions from civil litigation." Brandt v. Bd. of Educ. of City of Chicago, 420 F. Supp. 2d 921, 933 (N.D. Ill. 2006). To determine if it applies, a court "looks to whether a reasonable public official in the individual [defendant's] position[] would have understood that his or her actions were unlawful in the factual situation at hand." *Id.* at 934.

61. *Hosty*, 2001 WL 1465621, at *5–*7. For example, vis-à-vis the Macintosh computers with which the school replaced the *Innovator*'s IBM computers, the court plainly stated that "[p]laintiffs do not present any case law that establishes a right to a certain type of computer." *Id.* at *5. The fact that the plaintiffs listed many grievances that are easily recognizable to lawyers as not being constitutional torts covered under 42 U.S.C. § 1983 may be attributable to the fact that plaintiffs brought their action *pro se*.

62. *Id.* at *7.

63. Letter from Charles Richards, President, Reg'l Publ'g Corp., to *Innovator* staff (Nov. 14, 2000), *available at* http://collegefreedom.org/Printer.htm.

> printing by us. The same person called back later and made the same request. I replied that I would call her but that my interpretation of the current law precludes such administrative approval prior to printing. It is my understanding that the entire cost of printing this newspaper comes from GSU student activity funds. However, I am not an attorney, so the final decision on the proper handling of this matter should not be left to me.[64]

Dean Carter admitted to having made the phone calls, but contended that she instructed Richards to call her regarding the newspaper only so that a faculty member could review the paper for "journalistic quality."[65] In subsequent phases of the litigation, Dean Carter made clear that journalistic quality meant nothing more than checking for grammatical errors and the like, but not altering content.[66] She contended that such a step was necessary because Professor de Laforcade, the *Innovator*'s erstwhile advisor, had been dismissed in late August 2000 and that his replacement was not readily available to assist the *Innovator* staff because of his location far from campus.[67]

For his part, de Laforcade still considered himself the advisor of the *Innovator*, even after he was no longer employed by GSU as an instructor. In a press statement he released on February 16, 2001, he stated, "As far as I am concerned, the editors regard me as their advisor, and I continue to perform the work of advisor. I will not step down until the university admits to its improprieties, establishes procedural transparency, and allows the paper to publish freely."[68]

Whatever the nature of the advisory role de Laforcade played at that point to Porche and Hosty, it no longer pertained to advising them on publication of the *Innovator*. Although the SCMB authorized a printing of a December 2000 issue of the *Innovator*, Porche and Hosty felt there was no point in going to press with it as students had already left for winter vacation.[69] Furthermore, the students felt that

64. *Id.*

65. *Hosty*, 2001 WL 1465621, at *2.

66. *Id.*

67. *Id.* Interestingly, de Laforcade was never asked to testify or give a deposition in the case. Interview with Geoffroy de Laforcade, *supra* note 29.

68. Press Statement, Geoffroy de Laforcade *(*Feb. 16, 2001), *available at* http://collegefreedom.org/Advisor21601.htm. Although the official advisor to the *Innovator* for over a year, and then a self-proclaimed unofficial advisor for some time after his termination, de Laforcade claims never to have been contacted by President Fagan's office regarding issues or controversies pertaining to the newspaper. *Id.* He contends that the president's office ignored his efforts "to enter into a dialogue with them whenever the editors ran into difficulties," and that Dean Carter and Provost Keys never addressed him as advisor or sought him out to discuss matters pertaining to the newspaper, except once when through the university counsel, Alexis Kennedy, de Laforcade claims that they attempted to get him to convey to the editors the administration's anger regarding some of the *Innovator*'s publication policies. *Id.* In short, according to de Laforcade, the administration made no efforts to have any meetings with him or the student staff of the paper once it became evident that it was upset with the *Innovator*. Instead, the administrators went straight to writing campus-wide memos. Interview with Geoffroy de Laforcade, *supra* note 29.

69. *Hosty*, 2001 WL 1465621, at *3.

Regional Publishing would be hesitant to print another edition of the *Innovator* after Dean Carter's phone calls to the publisher. This hunch was later verified through the deposition of Regional Publishing's manager who stated that Regional Publishing did not want to risk printing the newspaper and not being paid by GSU.[70] Thus, the students filed suit in the Federal Court for the Northern District of Illinois, claiming that Dean Carter had committed a prior restraint on publication of the *Innovator*, thereby infringing the students' First Amendment rights.

Subsequently, all of the defendants moved for summary judgment. In denying that motion to Dean Carter, Judge Conlon found merit in the students' assertions, claiming "Dean Carter was not constitutionally permitted to take adverse action against the newspaper because of its content or because of poor grammar or spelling. Accordingly, there is a disputed issue of material fact as to whether Dean Carter's asserted conduct violated plaintiffs' clearly established First Amendment rights."[71] She denied granting Dean Carter qualified immunity, denied granting her motion for summary judgment, and thereby marked that the real battle over free speech between the *Innovator* and the GSU administration had just begun.[72]

III. THE INTERPRETATION OF *HAZELWOOD* AND ITS PROGENY, PRE-*HOSTY*

A. Background on *Hazelwood*

Judge Easterbrook begins section two of the Seventh Circuit's en banc decision in *Hosty* by stating, "*Hazelwood* provides our starting point."[73] He refers, of course, to *Hazelwood v. Kuhlmeier*,[74] the Supreme Court's seminal 1988 decision in which it held that educators (in the public primary- and secondary-school contexts) "do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so

70. *Id.* at *2.

71. *Id.* at *7.

72. At this point, well before the students had contemplated that their case might be appealed all the way to the Supreme Court, they seemed aware of the consequences that ongoing litigation can bring. In response to a question regarding what the personal cost of bringing the suit had been, Porche responded,

> The Academic Community [sic] is a small one. Time and emotional currency. Letters of recommendation from our department, gone. We were outstanding students, I don't mind saying that. That's not something that you can make up in a few weeks someplace else. It's been interesting in terms of the schools we're applying for our doctorate degrees. How many people at those schools know people who know us from here, who have been misinformed about us? We were living in an unbelievably hostile environment around here. It felt like wartime around here.

Pike, *supra* note 21.

73. *Hosty*, 412 F.3d 731, 734. Interestingly, the famous *Hazelwood* case provided District Court Judge Conlon with her ending point. In the penultimate paragraph of her decision denying Dean Carter's motion for summary judgment, Judge Conlon called *Hazelwood* "distinguishable because it involved a high school as opposed to a university." *Hosty*, 2001 WL 1465621, at *7.

74. 484 U.S. 260 (1988).

long as their actions are reasonably related to legitimate pedagogical concerns."[75] The Court left open, in its infamous footnote number seven, whether such wide censorship liberties are constitutionally available to administrators at the college and university level.[76] For the years following *Hazelwood* but before *Hosty*, many believed—given the different nature of higher education—that they were not.[77]

The *Hazelwood* decision marked a departure from the seemingly wide protection of student speech that the Court had annunciated in *Tinker v. Des Moines School District*.[78] The *Tinker* Court held that student speech may be regulated if it "would substantially interfere with the work of the school or impinge upon the rights of other students."[79] Applying this standard to the facts, the Court found that suspending students for wearing black armbands to school in protest of American involvement in the Vietnam War was not constitutionally permissible.[80]

With *Tinker* as a backdrop, the plaintiffs in *Hazelwood* argued that a public high-school principal does not have the constitutional authority to delete pages from a school newspaper when such censorship serves no valid educational goal.[81] The dispute arose over the decision of the principal at Hazelwood East High School in Saint Louis County, Missouri, to excise two full pages of the May 13, 1983 issue of the student newspaper *Spectrum*.[82] Much of the material on those two pages that were removed was unobjectionable to the principal. As for the offending articles, he found the material "'inappropriate, personal, sensitive, and unsuitable' for student consumption."[83]

Spectrum was written by members of the Journalism II class at the high school and was supervised by the instructor who taught the journalism course. The fateful issue contained two articles that received a second glance by the principal's watchful editorial eye. The first concerned several students' experiences with teenage pregnancy, while the second dealt with a student's reactions to his parents' divorce. The principal worried that readers of the article on teenage pregnancy would be able to identify the students interviewed in the article, despite the use of anonymous quotes. He felt that this would be unfair to the two students, their boyfriends, and their parents. Moreover, he was concerned that the article would be read by younger students for whom the content might be inappropriate. As for the article on divorce, the principal objected because the author of the article

75. *Id.* at 273.

76. *Id.* at 273 n.7 ("We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level.").

77. *See*, *e.g.*, STUDENT PRESS LAW CENTER, LAW OF THE STUDENT PRESS 54 (2d ed. 1994) ("The Supreme Court's 1988 decision in *Hazelwood School District v. Kuhlmeier* had no direct legal impact on the free press rights of college students.").

78. 393 U.S. 503 (1968).

79. *Id.* at 509.

80. *Id.*

81. Brief for the Respondent at *34, Hazelwood v. Kuhlmeier, 484 U.S. 260 (1987) (No. 86-836), 1987 WL 864173.

82. *Hazelwood*, 484 U.S. at 264.

83. *Id.* at 278 (Brennan, J., dissenting).

openly criticized her father, who had not been given an opportunity to consent to the article's publication, or respond to some of the allegations and characterizations made in it. With little time remaining before the issue of *Spectrum* was to go to press, the principal decided to delete two entire pages from the newspaper that contained the offending articles without giving the student-authors any notice, opportunity to respond, or chance to change the articles.[84]

As a result of the principal's actions, three former *Spectrum* staff members sued the school district and various school officials. The district court found no First Amendment violations and thus delivered a verdict in favor of the school district;[85] a divided Eighth Circuit reversed.[86] The Supreme Court, in a 5-3 decision, reversed the appellate court and upheld the district court's findings. Justice White wrote for the majority, couching his opinion in two underpinnings: one concerning forum analysis[87], the other addressing the toleration/promotion distinction.[88]

B. Dissecting *Hazelwood*: Forum Analysis

The Court's decision in *Perry Education Association v. Perry Local Educators' Association*[89] outlines its approach to forum analysis. There the Court demarcated the three different types of fora. Places such as parks, streets, and courthouse squares are traditional public fora, as they are "places which by long tradition or by government fiat have been devoted to assembly and debate."[90] It is very difficult for the government to impose content-based speech restrictions in the traditional public forum, and any regulation of that sort must pass strict scrutiny. The government, however, may institute a time, place, or manner restriction, so long as it is content-neutral, narrowly tailored to serve a significant government interest, and leaves open ample alternative channels for communication.[91]

Limited public fora (also called designated public fora[92]) are those public properties (in the broad sense) that the government has opened on a limited basis for expressive use by the public.[93] Although the government is not required to create such fora, if it does, "it is bound by the same standards as apply in a

84. *Id.* at 263–65.

85. *See* 607 F. Supp. 1450 (E.D. Mo. 1985).

86. *See* 795 F.2d 1368 (8th Cir. 1986).

87. C. Thomas Dienes & Annemargaret Connolly, *When Students Speak: Judicial Review in the Academic Marketplace*, 7 YALE L. & POL'Y REV. 343, 371 (1989).

88. Bruce C. Hafen & Jonathan O. Hafen, *The* Hazelwood *Progeny: Autonomy and Student Expression in the 1990s*, 69 ST. JOHN'S L. REV. 379, 397 (1995).

89. 460 U.S. 37 (1983).

90. *Id.* at 45.

91. *Id.*

92. Although many lower courts (like the Ninth Circuit, for example) distinguish limited public fora from designated public fora (requiring the latter to pass strict scrutiny, while the former need only pass a reasonableness test), the Supreme Court seems to use them interchangeably, as will this Note. *See* Hopper v. City of Pasco, 241 F.3d 1067, 1074 (9th Cir. 2001).

93. *Perry*, 460 U.S. at 46.

traditional public forum,"[94] and thus any content-based restrictions imposed on speech in one of those fora must pass strict scrutiny. Examples of this type of forum include public libraries[95] and state fairgrounds.[96] In these fora, the government can limit use to certain groups or confine speech to certain subject matter.[97]

The final type of forum is a nonpublic forum which, by definition, is not open to the general public.[98] Examples in this category include military installations[99] and prisons.[100] In nonpublic fora, "the State may reserve the forum for its intended purposes . . . as long as the regulation . . . is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[101] Time, place, and manner regulations are also permitted in the nonpublic forum.[102] Here, too, it is important to keep in mind the Court's admonition that "[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse."[103]

As two commentators put it, "When speech takes place in the 'nonpublic forum' the result is generally preordained: the government wins, the speaker loses."[104] Thus, the first issue that Justice White addressed in his opinion was the determinative one. The *Spectrum* was not the sort of forum that could be considered a traditional public forum. The question, then, was whether it was a limited public forum or a nonpublic forum. If *Spectrum* were a limited public forum, the student journalists would be afforded more leeway to make editorial decisions and could not be constitutionally subjected to the censorship that their school principal had rendered. If *Spectrum* were a nonpublic forum, however, then the principal would be afforded more deference by the Court, and the principal's actions could be explained as merely a reasonable effort to limit the subject matter that was covered in *Spectrum*, not an attempt to suppress expression because of the principal's distaste for the journalists' viewpoints.

Justice White conducted a forum analysis by weighing the evidence presented by each side to sway the Court into finding that *Spectrum* either was or was not a

94. *Id.*

95. *See* Faith Ctr. Church Evangelistic Ministries v. Glover, 462 F.3d 1194 (9th Cir. 2006) (holding that a library meeting room is a limited public forum).

96. *See* Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640, 655 (1981) (finding that "[t]he Minnesota State Fair is a limited public forum").

97. *Perry*, 460 U.S. at 46.

98. *Id.* at 47.

99. *See* Greer v. Spock, 424 U.S. 828 (1976) (holding that military installation is not a public forum).

100. *See* Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119 (1977) (holding that a prison is not a public forum).

101. *Perry*, 460 U.S. at 46.

102. *Id.*

103. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985).

104. Dienes & Connolly, *supra* note 87, at 372.

limited public forum.[105] In light of *Spectrum*'s curricular nature and the content-control and general supervision exercised by the paper's advisor (the journalism teacher) and school principal, Justice White found *Spectrum* to be "a supervised learning experience for journalism students," and "[a]ccordingly, school officials were entitled to regulate the contents of *Spectrum* in any reasonable manner."[106]

C. Dissecting *Hazelwood*: The Toleration/Promotion Distinction

In regards to the second underpinning for the decision, the toleration/promotion distinction, Justice White wrote, "The question whether the First Amendment requires a school to *tolerate* particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to *promote* particular student speech."[107] Under this rationale, a school is not allowed to affirmatively curtail the expression of students,[108] but it is allowed to "disassociate itself" from "speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences."[109] Herein lies the distinction that Justice White drew between tolerating speech, a la *Tinker*, and promoting it. Whether a school is *actually* promoting the speech of students in a particular case is debatable; however, the danger lies, according to the majority, in a community's reasonably perceiving its school as sponsoring speech that is harsh, vulgar, embarrassing, or otherwise "inconsistent with 'the shared values of a civilized social order.'"[110] In short, a community is not likely to view a school decision to permit students to wear black armbands in protest of a war as equivalent to school support for the students' cause; a community is more likely, however, to view a school decision to print a newspaper containing edgy or unprofessional articles as bearing the imprimatur of the school.

D. *Hazelwood*'s Legacy

Hazelwood is important in the history of education law not just to the extent that it limits *Tinker*, but also to the extent that it expanded the conception of school curricula. As two commentators noted soon after the Court's landmark decision, "'Curriculum' is no longer limited to the basic subjects taught, but includes marginal activities like school plays, school newspapers, and clubs, as well as any activity that might give the appearance that it might be sanctioned by the school. . . . *Hazelwood* [severely limits] the occasions when *Tinker* applies."[111]

105. Hazelwood v. Kuhlmeier, 484 U.S. 260, 267–70 (1988).

106. *Id.* at 270.

107. *Id.* at 270–71 (emphasis added).

108. Unless such expression "'materially and substantially interferes with the requirements of appropriate discipline in the operation of the school . . . or impinges upon the rights of other students.'" Tinker v. Des Moines Indep. Cmty. Sch. Dist, 393 U.S. 503, 509 (1969) (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

109. *Hazelwood* , 484 U.S. at 271.

110. *Id.* at 272 (quoting from Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986)).

111. Dienes & Connolly, *supra* note 87, at 375.

The decision, with its dual underpinnings, also implied that forum analysis *alone* is not enough to compel a determination in every case of school limitation of speech. For example, had the *Tinker* Court applied forum analysis to the classroom in which the black armband was worn, it no doubt would have had to conclude that such a setting was a nonpublic forum, in which case school censorship of political speech could be allowed. Setting aside the issue of political/symbolic speech (and the greater deference it receives) that was also present in *Tinker*, the dual underpinnings of *Hazelwood* show the importance of looking at the nature of the school action (is it passive or active?) in context (where/in what type of forum did it occur?), while also asking whether the action, or lack of it, gives to the public the appearance of school sponsorship or approval.

Not everyone was pleased with the Court's decision in *Hazelwood*. One author called the outcome "philosophically flawed [in that it] promotes a stilted view of public education."[112] Another critiqued the majority's decision on a variety of grounds, calling the public forum doctrine the Court employed "a flawed analytical tool that focuses a court's attention on classification of the place involved in a First Amendment dispute rather than on the constitutional rights, values, and interests at stake."[113] The same author alleged that the Court reached the wrong outcome in its application of the public forum doctrine, and that the Court's distinction between individual expression and school-sponsored expression ignored and de-emphasized the balancing methodology the Court employed in *Tinker*, which he felt should have been faithfully applied to the two excised articles in question.[114]

These complaints echo some of the criticisms that Justice Brennan unleashed on the majority in his rather ferocious dissent, joined by Justices Marshall and Blackmun. Justice Brennan characterized the majority's opinion as camouflaging invidious viewpoint discrimination against the promotion of "irresponsible sex" as "'mere' protection of students from sensitive topics."[115] Instead of applying forum analysis, Justice Brennan argued for a stricter application of the *Tinker* standard than the majority rendered; applying *Tinker*, Justice Brennan would have held that the censorship was not in response to any material disruption of class work, nor was it necessary to prevent student expression from invading the rights of others, and that therefore, the censorship could not be maintained.[116] The dissent also found the Court's finding of a distinction between personal expression and school-sponsored expression unsubstantiated based on prior cases such as *Tinker* and *Bethel School District Number 403 v. Fraser*; [117] the dissent regarded this distinction as illusory at best.[118] Finally, the dissent contended—even if the

112. W. Wat Hopkins, Hazelwood v. Kuhlmeier*: Sound Constitutional Law, Unsound Pedagogy*, 16 N. KY. L. REV. 521, 521 (1989).

113. Jeffrey D. Smith, *High School Newspapers and the Public Forum Doctrine:* Hazelwood School District v. Kuhlmeier, 74 VA. L. REV. 843, 856 (1988).

114. *Id.* at 857, 861.

115. *Hazelwood*, 484 U.S. at 288 (Brennan, J., dissenting).

116. *Id.*

117. 478 U.S. 675 (1986) (sustaining the suspension of a student who used a sexual reference in a student assembly address while supporting another student for elective office).

118. *Hazelwood*, 484 U.S. at 281.

censorship were permissible—that more delicate means of censoring the newspaper could have been deployed, and that the principal's "brutal manner" in which he censored the paper showed "[s]uch unthinking contempt for individual rights [that] is intolerable from any state official."[119]

E. Applying *Hazelwood* to the College/University Level?

Although the *Hazelwood* Court noted that its framework may or may not apply to the higher education setting,[120] some warily (and perhaps rightly) read the Court's dictum in footnote seven to mean that there is no guarantee that the Court would not extend the same federal rationale to the college or university campus.[121] Others, however, confidently predicted that the decision would have no bearing on collegiate-level student newspapers.[122]

Drawing from the Court's jurisprudence in the area of free speech on privately-owned shopping centers, one commentator suggested that educational speech policy should be established on the state level, thus taking the *Hazelwood* decision effectively out of the picture.[123] Giving force to this rationale was the Court's 1980 decision in *Robins v. PruneYard Shopping Center*[124] in which it upheld the California Supreme Court's determination that its own state constitutional guarantee of free expression exceeded federal constitutional protection and granted an affirmative right to individuals to use privately-owned shopping centers for non-disruptive speech activities.[125] Central to the Court's decision was the statement that a state has the "sovereign right and the police power to adopt by statute or constitution individual liberties more expansive than those found in the Federal Constitution."[126] Because many states have constitutional provisions that provide *affirmative* free speech rights[127] (as contrasted by the mere *restraint* on

119. *Id.* at 290.

120. *Id.* at 273 n.7.

121. *See* Nancy J. Meyer, *Assuring Freedom for the College Student Press After* Hazelwood, 24 VAL. U. L. REV. 53 (1989).

122. *See* Arval A. Morris, Commentary, *Censoring the School Newspaper*, 45 ED. LAW REP. 1, 17 (1988) ("[I]t is most unlikely that the *Hazelwood* precedent would apply to most college or university newspapers"); J. Marc Abrams & S. Mark Goodman, Comment, *End of an Era? The Decline of Student Press Rights in the Wake of Hazelwood School District v. Kuhlmeier*, 1988 DUKE L. J. 706, 728 (1988) (arguing that "the older age of college newspaper reporters, the concomitantly higher age of these newspapers' readers, the increased independence generally granted to students in higher education, and the acknowledgement that such students are, in fact, young adults with full legal rights in our system," are the reasons why courts will limit *Hazelwood*'s impact to the high-school level).

123. Meyer, *supra* note 121, at 76.

124. 447 U.S. 74 (1980).

125. *Id.*

126. *Id.* at 81.

127. *See*, *e.g.*, CAL. CONST. art. I, § 2(a) ("Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right"); COLO. CONST. art. II, § 10 ("[E]very person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty"); ME. CONST. art. I, § 4 ("Every citizen may freely speak, write and publish sentiments on any subject, being responsible for the

state action embodied in the federal First Amendment), free speech actions brought under state law would be more likely to find ultimate deference to the speaker. Such reliance on state law would help alleviate some of the inequalities brought about by the public/private distinction in that once a private educational institution established a newspaper for student expression, those using it would not be burdened by the federal 'state action' doctrine and would thus enjoy the same affirmative speech rights given to all those in the particular state.[128]

Most free speech cases at the college and university level, however, have continued to be brought under the federal First Amendment. Although courts have been tempted to extend and apply *Hazelwood* to the college and university setting,[129] few, if any, have fully done it.[130] No doubt this has occurred for good

abuse of this liberty"); PA. CONST. art. I, § 7, ("The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty").

128. Meyer, *supra* note 121, at 76. Interestingly, in the wake of *Hosty*, at least one state has already affirmatively expanded college student speech rights through state law, and others are considering it. In August of 2006, California Governor Arnold Schwarzenegger signed into law a bill that prohibits prior restraint and other forms of censorship of the college and university press. Mike Hiestand, *California Leads Way With "Anti-Hosty" Laws*, Associated Collegiate Press, TRENDS IN COLLEGE MEDIA, Nov. 1, 2006, http://www.studentpress.org/acp/trends/~law1006college.html [hereinafter Hiestand, *California Leads*]. The bill was approved by a vote of 31–2 in the California Senate and was unanimously passed by the California Assembly. Evan Mayor, *California Governor Signs College Student Press Freedom Bill*, STUDENT PRESS LAW CTR., Aug. 28, 2006, http://www.splc.org/newsflash_archives.asp?id=1316&year=2006. According to the legal counsel for the California Newspaper Publishers Association, the bill was drafted in response to the *Hosty* decision, *id.*, thus leading some commentators to call it the first anti-*Hosty* law. Hiestand, *California leads*. Similar laws have been proposed in other states, including Illinois. *See* Erica Hudock, *Washington State House of Representatives Approves Free Student Press Bill,* STUDENT PRESS LAW CTR., Mar. 13, 2007, http://www.splc.org/newsflash.asp?id=1473; Erica Hudock, *Oregon Legislator Prepares Free Press Bill Modeled After Washington State Bill*, STUDENT PRESS LAW CTR., Mar. 2, 2007, http://www.splc.org/newsflash.asp?id=1456; Brian Hudson, *Illinois Senate Passes College Press Freedom Bill*, STUDENT PRESS LAW CTR., Mar. 15, 2007, http://www.splc.org/newsflash.asp?id=1479.

129. *See*, *e.g.*, Cohen v. San Bernardino Valley Coll., 883 F. Supp. 1407, 1413 & n.8 (C.D. Cal. 1995) (noting in a dispute involving a community college professor's First Amendment challenge of a disciplinary sanction based on his sexually-charged teaching style, that "cases dealing with high school students may not fully apply in the college or university context. . . . Nonetheless, many of the First Amendment concerns remain the same, regardless of the education level."); Silva v. Univ. of N.H., 888 F. Supp. 293, 313 (D.N.H. 1994) (using *Hazelwood* only to the extent that it provides insight into whether a governmental regulation—here, the discipline doled out to a professor for his use of sexually explicit language and metaphors in the classroom—is reasonably related to legitimate pedagogical concerns); DiBona v. Matthews, 269 Cal. Rptr. 882, 893–94 (Cal. Ct. App. 1990) (questioning and ultimately declining to apply *Hazelwood*'s 'school sponsorship' rationale in the context of community college administrators' cancellation of a drama class because of a controversial play that was to be performed); Walko v. Kean Coll. of N.J., 561 A.2d 680, 687 n.5 (N.J. Super. Ct. Law Div. 1988) (stating that there is "no need in this case to consider the key question of the applicability of *Hazelwood* . . . to a state college's student paper" in a First Amendment claim brought by a community college professor allegedly defamed in a "spoof" edition of the college's newspaper). The dissent in *DiBona*, however, argued for a more stringent application of *Hazelwood*, stating, "*Hazelwood* clearly

reason: the underlying goals of K-12 and higher education are drastically different. The former, being compulsory, concerns itself with imparting discrete bodies of knowledge; the latter, being entirely optional, concerns itself with the creation, articulation, and dissemination of new knowledge. The former aims to inculcate community values and prepare students for participation in democracy, whereas the latter aims to question and explore the meaning of community values. The goals of both systems are different, if not at times opposing. Therefore, two commentators in 1996 were perhaps justified in their concern that "the cross application of cases from secondary to post-secondary education" would inevitably lead to the dilution of the notion that higher education is a "marketplace of ideas."[131]

One pre-*Hazelwood* decision, *Healy v. James*,[132] is particularly worth noting because of its clear elucidation of free speech rights in the unique context of colleges and universities. Although it involved a university's denial of recognition to a student group and not censorship of a student newspaper,[133] it set the standard for how First Amendment issues at the college and university level were treated before *Hazelwood*. After *Hazelwood*, some courts disrupted the clarity *Healy* had established by being tempted to apply,[134] and in some cases partially applying,[135] *Hazelwood*'s forum analysis in reaching their conclusions in cases involving free speech disputes at colleges and universities. Incidentally, *Healy* is also the case that petitioners in *Hosty* urged the Court to rely on, instead of *Hazelwood*, in granting their petition for a writ of certiorari.[136] Although the Court declined to grant the petitioners a writ of certiorari, and the Seventh Circuit opinion did not address or cite *Healy* at all, it is still worth mentioning because of its strong language in support of freedom of speech at colleges and universities, as expressed in Justice Powell's opinion of the Court:

> [T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." The college classroom with its surrounding

authorizes the kind of action taken by school administrators in this case." *DiBona*, 269 Cal. Rptr. at 898.

130. *See infra* Part III.F.

131. Gail Sorenson & Andrew S. LaManque, *The Application of* Hazelwood v. Kuhlmeier *in College Litigation*, 22 J. C. & U. L. 971, 986 (1996).

132. 408 U.S. 169 (1972).

133. *Id.* at 170–71.

134. *See supra* note 129.

135. *See infra* Part III.F.

136. *See* Petition for Writ of Certiorari at *15, Hosty v. Carter, 126 S. Ct. 1330 (2005) (No. 05-377), 2005 WL 2330125 (stating "[t]he Seventh Circuit's decision in this case cannot be reconciled with *Healy* and its progeny. . . . Nothing this Court held or wrote in *Hazelwood*, however, detracts from its holdings in *Healy* . . . or even arguably operates to excuse the otherwise unconstitutional conduct in which Dean Carter engaged in this case . . . .").

> environs is peculiarly the "marketplace of ideas," and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom.[137]

The Court went on to hold that "[t]he College, acting here as the instrumentality of the State, may not restrict speech or association because it finds the views expressed by any group to be abhorrent."[138] The Court made no mention of the concern that would later be part of the main focus in *Hazelwood* (albeit in the high school context), that of the school's being seen as promoting offensive or questionable speech by students. The Court instead focused on how "the College's denial of recognition [to the student group] was a form of prior restraint"[139] that was clearly impermissible absent some proof that the group intended to violate valid campus policies.[140]

Later courts reaffirmed the general holding of *Healy*—that First and Fourteenth Amendment protections apply to students in the collegiate context. In *Papish v. Board of Curators of the University of Missouri*,[141] where a student had been expelled for distributing a newspaper on campus that contained a crude cartoon and headlines, the Court found that "*Healy* makes it clear that the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name of 'conventions of decency.'"[142] Even though the offensive paper disseminated in *Papish* was not affiliated with the university, there is little reason to believe that the Court would have approached the case differently had there been an affiliation.

Circuit courts used these decisions to reach similar outcomes, pre-*Hazelwood*, in disputes involving student newspapers at colleges and universities. In *Joyner v. Whiting*,[143] the Fourth Circuit held that a college or university may not withdraw funding for a student newspaper because it disagrees with the paper's editorial comment (even when that comment is segregationist, if not racist).[144] Similarly, in *Bazaar v. Fortune*,[145] the Fifth Circuit found that a college or university may not prevent publication and distribution of a student publication (here, a literary magazine) on the grounds that it contained inappropriate language that was generally in poor taste.[146] The Fifth Circuit also added that "[i]t seems a well-

137. *Healy*, 408 U.S. at 180–81 (citations omitted).

138. *Id.* at 187–88. The group at issue was Students for a Democratic Society ("SDS"), and the university was concerned with the group's affiliation with the national SDS organization and the potential lawlessness associated with it in popular opinion. *See id.* at 172.

139. *Id.* at 184.

140. *Id.* at 193–94.

141. 410 U.S. 667 (1973) (per curiam).

142. *Id.* at 670.

143. 477 F.2d 456 (4th Cir. 1973).

144. *Id.* at 460.

145. 476 F.2d 570 (5th Cir. 1973).

146. *Id.* at 572, 580. Although the court does not reproduce the inappropriate language (as the defendants did not explicitly specify it), the court wrote that it surely included "use of 'that four-letter word' generally felt to be the most offensive in polite conversation. . . . and its derivatives." *Id.* at 573.

established rule that once a University recognizes a student activity which has elements of free expression, it can act to censor that expression only if it acts consistent with First Amendment constitutional guarantees."[147]

These cases are undoubtedly foundational decisions in terms of establishing the judiciary's willingness to recognize college students' First Amendment rights as being nearly concomitant with those of lay members of society. *Hazelwood*, however, changed the landscape in that it left open the possibility that its deferential standard could potentially apply at the college and university level,[148] thereby inducing more than one administration to actually ask a court to apply it.

F. Applications of *Hazelwood* to Colleges and Universities

Only a few courts have been willing to take college and university administrations' invitations (and indeed, only a few administrations have had occasion to make the invitation) to use *Hazelwood* in the post-secondary context, and in so doing, lend possibly undeserved deference to institutions of higher education. Most notable of these cases is *Bishop v. Aronov*[149] in which the Eleventh Circuit held that the University of Alabama did not violate the constitutional rights of a professor of exercise physiology when it prohibited him from voicing his religious preferences and opinions during class discussions, and also, from holding an optional, after-class meeting for his students and other interested persons at which he lectured on and discussed the topic, "Evidences of God in Human Physiology."[150] The *Bishop* court acknowledged the difference between high school and college and university classroom settings, but nevertheless called *Hazelwood*'s reasoning "suitable to our ends, even at the university level . . . insofar as [*Hazelwood*] covers the extent to which an institution may limit in-school expressions which suggest the school's approval."[151] Likening the facts at hand to the *Hazelwood* principal's ability to limit school expressions that suggested the school's approval, the Court found that the University of Alabama had dominion over what is taught by its professors in that "the University's conclusions about course content must be allowed to hold sway over an individual professor's judgments" when those judgments significantly bear on the curriculum and give the appearance of endorsement by the school.[152] However, the Eleventh Circuit disagreed with the District Court's conclusion that the professor's classroom was an open forum during instructional time.[153] The Eleventh Circuit stated simply, "This is not a forum case," and that the professor's classroom "is not an open forum," and left it at that.[154] Because the Eleventh Circuit found the classroom "not an open forum," one might think that

147. *Id.* at 574.
148. *See supra* note 76.
149. 926 F.2d 1066 (11th Cir. 1991), *cert. denied*, 505 U.S. 1218 (1992).
150. *Id.* at 1078.
151. *Id.* at 1074.
152. *Id.* at 1077.
153. *Id.* at 1071.
154. *Id.*

the court would next apply the nonpublic forum analysis used in *Hazelwood*. However, the Eleventh Circuit avoided any use of the term nonpublic forum, and did not use that rubric to ground its opinion.

Despite the Eleventh Circuit's use of the "fear of endorsement" rationale of *Hazelwood*, the facts in *Bishop* are crucially different from the context of *Hazelwood*; while *Hazelwood* involved a free speech dispute between *students* and administrators, *Bishop* involved a dispute between *faculty* and administrators. Therefore, ostensibly *Bishop* should provide less predictive value than one might think when it comes to how courts would apply *Hazelwood* to college-level newspapers (where the disputes are between students and administrators), assuming a court were willing to make that leap.

The more recent Tenth Circuit case, *Axson-Flynn v. Johnson*,[155] comes closer to approaching a fact situation that could be read as analogous to the underlying facts of *Hazelwood*, only on a collegiate level. In this case, a Mormon acting student refused to say the word "fuck" or take God's name in vain during various classroom acting exercises at the University of Utah's Actor Training Program.[156] Instructors in the program had told the student that she could choose to continue in the program if she modified her values, and that if she did not, she could leave.[157] She chose to leave (although she was never formally asked to do so) and filed suit on First Amendment grounds, claiming that the instructors had compelled her speech and violated her rights to free exercise of religion.

On appeal from the district court's award of summary judgment for the defendants, the Tenth Circuit found that the speech at issue constituted "'school-sponsored speech' and is thus governed by *Hazelwood*."[158] Taking note that—like in *Hazelwood*—the student's speech occurred within a curricular activity and could thus be seen as bearing the school's imprimatur, the court narrowly held that "the *Hazelwood* framework is applicable in a university setting for speech that occurs in a classroom as part of a class curriculum."[159] Admitting the differences in maturity and sophistication between high school and college and university students, the court commented that such factors would help determine whether any restrictions on speech were reasonably related to legitimate pedagogical concerns.[160] In this case, the court found that it could not determine whether the university's justifications for trying to get the student to use language she objected to were truly pedagogical or rather mere pretexts for religious discrimination;[161] therefore, the court remanded the case for further proceedings on the issue.[162]

155. 356 F.3d 1277 (10th Cir. 2004).

156. *Id.* at 1280–81.

157. *Id.* at 1282.

158. *Id.* at 1285.

159. *Id.* at 1289.

160. *Id.*

161. The justifications the university offered included teaching students how to step outside their own values and characters by forcing them to assume very foreign characters and reciting offensive dialogue; teaching students to preserve the integrity of authors' works; and being able to measure true acting skills by gauging students' abilities to portray offensive parts. *Id.* at 1292.

162. *Id.* at 1293.

Outside of the curricular and faculty/administrator feud confines discussed above, no circuit court prior to the Seventh Circuit in *Hosty* ever had the occasion to apply *Hazelwood* in a collegiate context,[163] let alone to a collegiate newspaper.[164] The Sixth Circuit came rather close, however, sitting en banc in *Kincaid v. Gibson*.[165] The case involved the confiscation of the student-produced yearbook *The Thorobred* at Kentucky State University. The mass confiscation was fueled by administrators' concerns that the yearbook was of poor quality and that its contents were inappropriate.[166] Although the majority's opinion stated that it granted en banc review "to determine whether the panel and the district court erred in applying *Hazelwood* . . . to the university setting,"[167] the court did little to squarely answer that question, other than to state, in a footnote, that "*Hazelwood* is factually inapposite to the case at hand," and that "*Hazelwood* has little application to this case."[168] The court's conclusion in this regard seemed to stem from its finding that the yearbook should be analyzed as a limited public forum rather than a nonpublic forum, as the circuit panel and district courts had found.[169] Thus, the court seemed to state that, even though a collegiate publication was involved, *Hazelwood* is inapposite because forum analysis leads to the conclusion that *The Thorobred* is a limited public forum, and not a nonpublic forum, as was the case with *Spectrum* in *Hazelwood*.[170] The extent to which this decision signals Sixth Circuit disapproval for the application of *Hazelwood* to post-secondary student newspapers is unclear.

Although no circuit court case explicitly involved college or university level newspapers post-*Hazelwood* but pre-*Hosty*, one district court in Michigan did have occasion to deal with the potential applicability of *Hazelwood* to this medium. In *Lueth v. St. Clair County Community College*,[171] the court used *Hazelwood* to help determine whether a college or university newspaper was a nonpublic or limited public forum.[172] Looking at the factors that the Court found determinative in finding *Spectrum* to be a nonpublic forum, this court concluded that the student

163. Just because the Seventh Circuit was being asked to apply *Hazelwood* does not mean that it actually did, see *infra* Part IV.C–D.

164. This is not to say that no circuit passed judgment, *sua sponte*, on *Hazelwood*'s applicability to the college and university level. The First Circuit, in a footnote in a case involving a First Amendment suit brought by students in response to their school's decision to withdraw funding from a legal services organization that had previously allowed its members to sue on behalf of students, stated that the Court's *Hazelwood* decision "is not applicable to college newspapers." *See* Student Gov't Ass'n v. Bd. of Trs. of the Univ. of Mass., 868 F.2d 473, 480, n.6 (1st Cir. 1989) (dictum).

165. 236 F.3d 342 (6th Cir. 2001) (en banc).

166. *Id.* at 345.

167. *Id.* at 346.

168. *Id.* at 346 & n.5.

169. *Id.* at 346.

170. The court did not mention or explore the toleration/promotion distinction aspect of *Hazelwood*.

171. 732 F. Supp. 1410 (E.D. Mich. 1990).

172. *Id.* at 1414–15.

newspaper at issue was clearly a "forum for public expression."[173] However, as this case involved a community college administrator's prohibition on publishing an advertisement for a Canadian strip club, commercial speech was implicated, unlike in *Hazelwood*. Thus, the court stated that the administrators must satisfy the Supreme Court's requirements for regulation of commercial speech.[174] It used commercial speech doctrine to conclude not only that the administrators' interest in regulating the ad in question was substantial, but also that the regulation itself—which involved indiscriminate exclusion of any publication of the offending ad, even though the school only found certain language in the ad to be inappropriate—was not narrowly tailored to serve that interest.[175] Other than using *Hazelwood* to find that this newspaper was a limited public forum, the court made no comments about *Hazelwood*'s general utility in the college and university newspaper context, and it did not indulge in any toleration/promotion discussion as found in *Hazelwood*. Ironically, the one case with facts quite similar to those presented in *Hosty* offers little insight into the controversial issue—the applicability of *Hazelwood* to the collegiate newspaper context—that Judge Easterbrook tackled head on.

IV. UNDERSTANDING *HOSTY* AND ITS IMPLICATIONS

A. Dissecting the Opinion

In the introduction to the majority's discussion of the *Hosty* controversy, Judge Easterbrook tips his hand to the reader as to how the court was to rule in the case. The first paragraph reads, in entirety:

> Controversy began to swirl when Jeni Porche became editor in chief of the *Innovator*, the student newspaper at Governors State University. None of the articles concerned the apostrophe missing from the University's name. Instead the students tackled meatier fare, such as its decision not to renew the teaching contract of Geoffrey [sic] de Laforcade, the paper's faculty adviser.[176]

With *Hazelwood* as its starting point, the Seventh Circuit goes on to give a selected account of what the *Hazelwood* Court stated. Judge Easterbrook writes that the Court held that "[w]hen a school regulates speech for which it also pays" that the school can then regulate the speech so long as it is reasonably related to legitimate pedagogical concerns.[177] This somewhat overstates the more nuanced approach the Court actually took in *Hazelwood*. In *Hazelwood*, the issue was not merely that the school district paid for *Spectrum* and thus could reasonably regulate it pursuant to pedagogical concerns. Also important to the Court was that by virtue of its

173. *Id.* at 1415.
174. *Id.*
175. *Id.* at 1416.
176. Hosty v. Carter, 412 F.3d 731, 732 (7th Cir. 2005).
177. *Id.* at 734.

dissemination, *Spectrum* appeared to bear the imprimatur of the school.[178]

This distinction is important to bear in mind, for one can easily see how a college or university student newspaper, paid for with public funds, does not necessarily give a reader the impression that the college or university endorses the paper or the views expressed in it. However, Judge Easterbrook's interpretation of *Hazelwood* starts from the premise that whoever pays for a paper might be able to regulate it, regardless of whether readers can discern if the payor in fact sponsors and vouches for the contents of the publication. Thus, Judge Easterbrook immediately ignores the toleration/distinction element of the *Hazelwood* analysis, focusing instead on the simpler issue of payment. This judicial sleight of hand gets the reader conditioned to where Judge Easterbrook wanted to go.

Judge Easterbrook next guides the reader through a discussion of forum analysis, noting how the Court itself has established that age does not control the forum question.[179] Using such cases as *Rosenberger v. Rector and Visitors of the University of Virginia*[180] for support,[181] he states that no public school, at any level, may discriminate against religious speech in a public forum, including classrooms made available to extracurricular activities.[182] From this statement of the status quo, he takes the reasoning one step further and states, "If private speech in a public forum is off-limits to regulation even when that forum is a classroom of an elementary school . . . then speech at a non-public forum, and underwritten at public expense, may be open to reasonable regulation even at the college level—or later."[183] Here, again, one notes how Judge Easterbrook touches on the issue of who pays the speaker's bill while overlooking the concomitant consideration, under *Hazelwood*, of whether one could reasonably conclude that the payor approved of or agreed with the speech for which it paid. He cites *Rust v. Sullivan*,[184] a Supreme Court case upholding limitations on physician speech regarding family planning in the government-funded Title X context, as further

178. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988).

179. *Hosty*, 412 F.3d at 735.

180. 515 U.S. 819 (1995) (holding that the University of Virginia could not discriminate based on viewpoint in underwriting the speech of student-run publications—in this case, a student newspaper from a Christian perspective).

181. Judge Easterbrook also cites for support *Good News Club v. Milford Central School*, 533 U.S. 98 (2001) (holding that a local Christian club could not be refused equal access and use of school rooms for engaging elementary school children in Christian songs, prayer, Bible readings, and the like immediately following the regular school day); *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993) (holding that a school district impermissibly discriminated on the basis of viewpoint when it permitted public school property to be used for the presentation of all views about family issues and childbearing except those dealing with the subject matter from a religious standpoint); *Hedges v. Wauconda Community Unit School District Number 118*, 9 F.3d 1295 (7th Cir. 1993) (holding, *inter alia*, that a junior high school policy violated the First Amendment insofar as it prohibited distribution of religious material on school grounds which students would reasonably believe to be sponsored, endorsed or given official imprimatur by the school).

182. *Hosty*, 412 F.3d at 735.

183. *Id.*

184. 500 U.S. 173 (1991).

support for his reasoning. The federal government, however, was unquestionably regarded as the speaker in *Rust* as it unilaterally created the program and speech (i.e., the message) at issue; the same cannot be said of student newspapers at public colleges and universities, where students help initiate the creation of such fora and go on, in most cases, to unilaterally supply the speech contained in the newspapers. By relying on *Rust* for the principle that publicly-funded speech in nonpublic fora can be reasonably regulated, Judge Easterbrook seems to implicitly espouse the general belief that the government is reasonably seen as promoting any speech that it helps fund, regardless of the specific nature of the speech and forum at issue.

Next, he states the court's controversial conclusion "that *Hazelwood*'s framework applies to subsidized student newspapers at colleges as well as elementary and secondary schools."[185] This conclusion is much easier to reach if one focuses merely on who funds the student speech. If Judge Easterbrook had directly considered whether readers of the *Innovator* regarded the paper as bearing the imprimatur of GSU—analogous to the Supreme Court's consideration of whether readers of *Spectrum* regarded the paper as bearing the imprimatur of Hazelwood East High School—he might have arrived at a different conclusion regarding the feasibility of extending *Hazelwood* to the college setting.

Unlike other commentators who are bothered by Judge Easterbrook's conclusion, I am bothered not so much by the obvious differences between the nature of high school and college and university students,[186] but more so by the equally obvious distinction between high school and collegiate student journalism. Most readers (whether they are in college or not) would reasonably find high school newspapers to bear the imprimatur of the schools that pay for them while it is uncertain that the same could be said for college and university papers. This could depend on the nature of the relationship between the paper and the college or university, but in many cases it is doubtful that readers would perceive any school imprimatur of the student publication. For example, in addition to being editorially independent, many collegiate student newspapers are also financially and physically independent from the colleges and universities they serve, further tending to indicate ideological distance and separation from the institution, even though they may be supported by the school through indirect financial means.[187]

185. *Hosty*, 412 F.3d at 735.

186. *See* Daniel A. Applegate, Note, *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. L. REV. 247, 273–276 (2005).

187. Indirect financial means could include free use of college or university office space, furniture, computer equipment, and the like. *See, e.g.*, The Cavalier Daily, Overview, http://www.cavalierdaily.com/about.asp (last visited Feb. 6, 2007) (University of Virginia paper; financially independent but operates out of the basement in student union building); The Daily Tar Heel, A Brief History of the Tar Heel, http://www.dailytarheel.com/history/ (last visited Feb. 6, 2007) (The University of North Carolina at Chapel Hill paper; financially independent, but operates out of the student union, for which it now pays the University a fee); The Independent Florida Alligator, About Us, http://www.alligator.org/pt2/aboutus.php (last visited Feb. 6, 2007) (University of Florida paper; financially and physically independent); The State News, About the State News, http://www.statenews.com/aboutus.phtml (last visited Feb. 6, 2007) (Michigan State University paper; financially and physically independent). These types of student newspapers are

Other state institutions, however, have student newspapers that are run by school organizations, almost like clubs, and are generally overseen by student publications boards.[188] Papers of these sort account for how the majority of student newspapers are structured. However, even with these types of papers where one could argue that there is more administrative oversight, it is also unlikely that a reader would believe that the publication bears the imprimatur of the college or university it serves.[189] As the Seventh Circuit has itself stated, post-*Hosty*, "subsidized student organizations at public universities are engaged in private speech, not spreading state-endorsed messages. . . . It would be a leap . . . to suggest that student organizations are mouthpieces for the university."[190] Only at those few institutions where students receive credit for working on the student newspaper—or where such newspapers are closely ensconced with journalism programs—would it even seem plausible that readers could view the newspaper as bearing the imprimatur of the college or university.[191] Despite these nuances, in reaching his conclusion, Judge Easterbrook instead focused on who foots the speaker's bill, which is a much easier line of thought for the reader to follow when censorship, not readership, is what brought the parties to court.

B. What It All Means

So far, free speech and collegiate press advocates might find this all quite disturbing. However, it is not as disheartening as it appears on first glance. In essence, *Hosty* is a case about qualified immunity from liability in damages. Dean Carter filed an interlocutory appeal regarding the district court's denial of her motion for summary judgment; therefore, the procedural posture of this case is

typically run by non-profit corporations on whose boards of directors students and faculty serve (in addition to others not affiliated with the institution). Such corporations typically include statements in their papers (and in online versions of their papers not housed on university servers) to the effect that the publication does not necessarily reflect the views of the university, faculty, or students that it serves, further enforcing the point that university administrators bear no responsibility for the paper's contents.

188. *See, e.g.*, The College of William and Mary Office of Student Activities, Publications Council, http://www.wm.edu/studentactivities/funding/council.php (last visited Feb. 6, 2007) (The Flat Hat, the College of William & Mary paper; semi-dependent financially and physically housed in the student union building); University of Wyoming, Student Publications Board, http://www.uwyo.edu/studentpub/pubBoard/ (last visited Feb. 6, 2007) (The Branding Iron, the University of Wyoming paper; same as above). Many newspapers of this sort offer their content online; when they do, they often (but not always) do so using their college's Web space as opposed to a stand alone Web site, which the papers mentioned *supra* in note 187 always use, in order to keep organizational separation.

189. Like completely independent student news organizations, these publications also tend to print disclaimers stating that the views expressed in their paper do not necessarily represent those of their affiliated university, its faculty, or its students. *See, e.g.*, The Argonaut (The University of Idaho paper), Legal Information & Policies, http://www.uiargonaut.com/content/view/42/73/ (last visited Feb. 6, 2007).

190. Christian Legal Soc'y v. Walker, 453 F.3d 853, 861 (7th Cir. 2006).

191. Although these sorts of institutions are scarce when it comes to daily student newspapers, they may be more common at institutions that publish their student newspaper less frequently (such as GSU), although no statistics on this are available. *See infra* note 216.

quite unique. The Seventh Circuit was not being asked to apply *Hazelwood* analysis.[192] In fact, the panel's decision, written by Judge Evans, did not mention forum analysis or the toleration/promotion distinction at all. Instead, the Seventh Circuit was concerned with whether it was reasonable for Dean Carter to think that *Hazelwood* applied to the collegiate newspaper context such that her decision to censor the *Innovator* could entitle her to qualified immunity.[193] If her belief that the *Hazelwood* framework applied to the collegiate setting was not reasonable—as Judge Evans contended in both his panel opinion[194] and in his en banc dissent[195]—then her appeal would fail. The Seventh Circuit ultimately found that *Hazelwood* does apply in the strict sense that its framework extends to the collegiate context, although the court conceded that a consensus has not been reached across circuits, and that the issue is cloudy.[196]

This conclusion should not come as much of a surprise. As the history of *Hazelwood* and its progeny discussed above shows, *Hazelwood* has been used, partially used, commented upon, summarily dismissed, and flatly ignored in a variety of cases involving free speech in the college and university community. As the Seventh Circuit noted, "This circuit had not spoken on the subject until our panel's opinion, which post-dated Dean Carter's actions."[197] Therefore, when it comes to ruling on the precise question presented in this case—should the district court have found that Dean Carter was entitled to qualified immunity because the law regarding censorship of collegiate student newspapers was not clearly established—it does not seem illogical to find that her actions, even if

192. Two student commentators have already overstated the Seventh Circuit's opinion in this case, stating that "[t]he court went on to apply the *Hazelwood* framework to the case," and that "[t]he Seventh Circuit's decision in *Hosty v. Carter* represents the first unequivocal application of *Hazelwood* to post-secondary student press." Applegate, *supra* note 186, at 258; Nimick, *supra* note 10, at 967. This is simply not true. There is a difference between *applying* and *extending* the *Hazelwood* framework. The former would entail the court's determining that the *Innovator* was a nonpublic forum that contained speech that could reasonably be found to bear the imprimatur of GSU. If both these characterizations were true, the determinative issue would then become whether Dean Carter's censorship of the paper was reasonably related to legitimate pedagogical concerns, as per the discussion in *Hazelwood*. However, this multi-faceted analysis was not undertaken in *Hosty*. In light of the whole opinion, when the *Hosty* court opined that "*Hazelwood*'s framework applies to subsidized student newspapers at colleges," it more precisely seems to mean, given the procedural posture of the case regarding the question of qualified immunity, that *Hazelwood*'s reach is not necessarily limited to elementary- and secondary-school settings. Hosty v. Carter, 412 F.3d 731, 736 (7th Cir. 2005). That is to say, its framework *could* apply, or in fact *extends*, to the college setting. This is drastically different, though, than actually applying that framework. The Seventh Circuit did not have to address the question of whether *Hazelwood*'s framework could have been applied successfully to defend Dean Carter's action.

193. *See Hosty*, 412 F.3d at 739 (en banc) ("Disputes about both law and fact make it inappropriate to say that any reasonable person in Dean Carter's position in November 2000 had to know that the demand for review before the University would pay the *Innovator*'s printing bills violated the first amendment."); Hosty v. Carter, 325 F.3d 945, 947 (7th Cir. 2003) (panel decision) ("The pivotal issue for us is whether Dean Carter was entitled to qualified immunity.").

194. *Hosty*, 325 F.3d at 949–50.

195. *Hosty*, 412 F.3d at 745 (dissenting).

196. *Id.* at 738.

197. *Id.* at 739.

constitutionally deficient, were supportable if made in good faith.

In his dissenting opinion, Judge Evans makes much of the fact that *Hazelwood* was written with a high school setting in mind, and that high school students are different from college and university students, particularly when it comes to matters of maturity, in ways that would necessitate supervision in the high school setting but not in the collegiate setting.[198] Judge Evans also mentions the different missions that inform the respective institutions (the mission of colleges and universities being "to expose students to a 'marketplace of ideas.'").[199] Because of these differences, he felt it was inappropriate to extend *Hazelwood* to the collegiate setting.

C. Implications for the Future

The question then becomes, what precedent does this case establish for the future? Should college and university journalists really fear that the presses will be halted and their offices locked should they decide to print an article critical of a college official, or shed light on an administration's underbelly? I think not.

A clearer statement of the court's holding is the following: "*Hazelwood*'s framework applies to subsidized student newspapers at colleges as well as elementary and secondary schools" (the court's language),[200] *only to the extent that the forum in question is nonpublic* (my language). Judge Easterbrook is correct to point out that forum analysis in the educational setting should not be overly caught up in whether the speech occurs in a curricular context.[201] As support for this, he gives the hypothetical example of a group of students who are asked by a university's alumni office to write an article for publication in the university's alumni magazine.[202] Surely, he reasons, this is a nonpublic forum, yet the university would be free to print only those essays that best expressed the university's own viewpoint.[203] In forming this conclusion, though, he again neglects to mention the toleration/promotion distinction of *Hazelwood*. Although what he writes is true—"Extracurricular activities may be outside any public forum, as our alumni-magazine example demonstrates, without also falling outside all university governance"[204]—he fails to mention that this is also true because alumni magazines, which are usually mailed out directly from colleges universities and are thought to have been created by administrators (not students), would bear the imprimatur of their schools, just as *Spectrum* did in the high school context.

The Seventh Circuit's decision could be read as support for administrators who wish to say that they reasonably did not know that they were violating a

198. *See id.* at 739–42.

199. *Id.* at 741.

200. *Id.* at 735.

201. *Id.* at 738 ("*Hazelwood*'s framework . . . depends in large measure on the operation of public-forum analysis rather than the distinction between curricular and extracurricular activities.").

202. *Id.* at 736.

203. *Id.*

204. *Id.*

constitutional right by instructing the printer of their college's or university's student newspaper to seek administrative approval before commencing publication.[205] Indeed, as mentioned at the outset of this Note,[206] many worry that *Hosty*'s legacy will be just that. However, this fear is irrational given that the majority opinion explicitly states that "[i]f the paper operated in a public forum, the University could not vet its contents."[207] This statement makes administrations' censorial limitations quite clear: administrative content-control of student newspapers is impermissible if the paper operates as a limited public forum. To the extent that future Dean Carters wish to halt the presses, they will not be granted qualified immunity under *Hosty* so long as a reasonable person in their position would know that the student newspaper at issue operated as a limited public forum, and thus any efforts to vet its contents would be unlawful.

Although the court did "not think it possible on this record to determine what kind of forum the University established,"[208] it admitted that many factors would seem to indicate that the control over the forum was in the students' hands, thereby making it a limited public forum.[209] As discussed in Part II and in the court's opinion, the *Innovator*'s content was controlled by its own staff and the student-run SCMB.[210] The court does, however, mention two possible factors that could lead one to conclude that the *Innovator* was a nonpublic forum. These include a provision in the SCMB's charter stating that the newspaper is responsible to the director of student life—presumably a subordinate of Dean Carter's—and a provision that mandates that the newspaper have a faculty advisor.[211] The court appropriately acknowledged both of these factors without rigorously examining either; the exact forum determination of the *Innovator* was not the real issue. However, given de Laforcade's professed lack of any control over the publication's content, the fact that SCMB's charter mentions a presumption of non-involvement by the director of student life, and the silence as to this person and his/her functions in the record, it is almost certain that the *Innovator* operated in a limited public forum and therefore should have been free from the censorship tactics employed by Dean Carter.

205. Commentators have made this point forcefully. *See, e.g.*, Michael O. Finnigan, Jr., Comment, *Extra! Extra! Read All About It! Censorship at State Universities:* Hosty v. Carter, 74 U. CIN. L. REV. 1477, 1487, 1496 (2006) ("[P]ublic university officials now have a better argument for qualified immunity by relying on *Hosty* in support of a claim that a reasonable person would not have known that she was violating a constitutional right," and "[w]hereas Dean Carter was only able to rely on a high school newspaper case, *Hosty* now establishes a speech-restrictive precedent in the university context.").

206. *See supra* notes 9–12.

207. *Hosty*, 412 F.3d at 736–37.

208. *Id.* at 737. It is important to note that the court explicitly did not reach a determination on this issue of the *Innovator*'s forum status. *Contra* Nimick, *supra* note 10, at 992 (stating that the Seventh Circuit ultimately found that the *Innovator* was a designated or limited public forum).

209. *Hosty*, 412 F.3d at 737.

210. *Id.*

211. *Id.* at 737–38.

D. Moving Forward

More than anything, the *Hosty* opinion highlights the distinction between *extending Hazelwood* to the college and university context (i.e., stating that its framework could be applied in some instances) and actually *applying Hazelwood* to a collegiate forum (like a student newspaper). The latter would entail finding the forum in question to be nonpublic, determining that a person could reasonably believe that the speech conveyed in the forum bore the imprimatur of the school, and finding that the censorship exacted as a result of that speech was reasonably related to addressing a legitimate pedagogical concern. None of these conclusions was reached in *Hosty*, and therefore there should be little fear that this decision will have much impact on college and university student newspapers. [212] As the president of the SPLC has admitted, most college and university newspapers, by designation or tradition, operate as limited public fora.[213] For this reason in particular, the reach of *Hosty* appears minimal.

Furthermore, the decision is binding only in the Seventh Circuit, so only colleges and universities in Illinois, Indiana, and Wisconsin are affected by it. Other circuits are free to accept it as persuasive or reject it as unpersuasive in future litigation involving conflicts between collegiate newspaper editors and administrators. Also, as previously stated, most college and university newspapers already function as limited public fora. The only action that could be taken on behalf of students to make certain that their newspaper remains a limited public forum would be to ensure that language to that effect is inserted into the policies and procedures of the student affairs office's documents concerning student groups (that is, if the newspaper is not already financially and organizationally independent). Indeed, the SPLC has spearheaded an effort to get college and university students in those three states comprising the Seventh Circuit "to call upon their schools to pledge their commitment to free speech by explicitly designating their student media as 'public forums' where student editors have the right to make editorial decisions free from administrative interference."[214]

It is unlikely that a threat to a free student press exists at most colleges and universities, particularly at traditional four-year colleges and universities of a selective nature. Such campuses tend to place substantial faith in their students' ability to fully participate in student activities unfettered by administrative

212. Furthermore, there should be absolutely no fear that the *Hosty* decision will cast a chilling effect on faculty's curricular speech, as has been preposterously suggested by one commentator. *See* Nimick, *supra* note 10, at 993–95. The precepts of academic freedom—observantly recognized by the courts for decades and zealously protected by the American Association of University Professors (among other groups)—in addition to the narrowness of the *Hosty* decision itself, assure that no such incursions into faculty speech will occur as a result of this case.

213. *U.S. Court Throws Out Censorship Claim by Governors State U. Student Journalists*, STUDENT PRESS LAW CTR., June 20, 2005, http://www.splc.org/newsflash.asp?id=1033.

214. *Supreme Court Announces It Will Not Hear Appeal in College Censorship Case*, STUDENT PRESS LAW CTR., Feb. 21, 2006, http://www.splc.org/newsflash.asp?id=1190. *See also* Student Press Law Center, The Public Forum List, http://www.splc.org/legalresearch.asp?id=91 (last visited Feb. 6, 2007).

intervention.[215] At colleges and universities where students are less likely to be

215. The University of Virginia is typical of such institutions. At Virginia, in order to receive university funds, student organizations must register for contracted independent organization ("CIO") status. *See* University of Virginia Student Activities Center, Explanation of Student Activities at UVA, http://www.virginia.edu/newcombhall/sac/cio_explanation.php (last visited Feb. 6, 2007). As the name suggests, CIOs are not part of the school but exist and operate independently. *Id.* According to the terms of CIO agreements, Virginia may exercise administrative control over a CIO's activities occurring on university property (e.g., use of university space) or over matters covered by the university honor or judicial systems. *Id.* Otherwise, the actual functioning and operation of CIOs is left completely to the students running them. *Id*. Although *The Cavalier Daily*, the student newspaper at Virginia, is not a CIO, other student newspapers and magazines function within the CIO system. *See* The University of Virginia Student Activities Center, Organization Search, http://www.virginia.edu/newcombhall/sac/search_list_cat.php (last visited Feb. 6, 2007) (listing student publications under the heading, "Fine Arts Organizations"). Furthermore, if CIOs only experience limited oversight from the college or university, obviously non-CIO student organizations that provide their own funding, such as *The Cavalier Daily*, are even further removed from any possible administrative intervention.

There are, however, a few notable exceptions to the level of administrative distance regarding student activities (particularly, student newspapers) that is typical at most selective colleges and universities. For example, students at the University of Texas at Austin are currently undergoing negotiations with the Texas Board of Regents as to whether *The Daily Texan*, their daily student newspaper, will remain subject to prior review by its advisors before publication. Karla L. Yeh, STUDENT PRESS LAW CTR., *Daily Texan Student Publications Board Pushing to End Mandatory Prior Review*, Dec. 6, 2006, http://www.splc.org/newsflash_archives.asp?id=1386&year=2006; Brian Hudson, STUDENT PRESS LAW CTR., *Texas Student Media Board Votes to Eliminate Prior Review*, Mar. 8, 2007, http://www.splc.org/newsflash.asp?id=1460. Under a policy in place since 1971, but recently eliminated by vote of the Texas Board of Regents, the paper's advisors review the paper before it goes to print, but after the students who work on the paper have left the office for the day. *Id*. At the University of Southern California, controversy recently arose when Michael L. Jackson, the Vice President for Student Affairs, overrode the staff of *The Daily Trojan*, the student newspaper, by blocking the appointment of the student the staff had selected to serve as their top editor. Elizabeth F. Farrell, *U. of Southern California Forces Out Student Editor of Campus Newspaper*, CHRON. OF HIGHER EDUC., Dec. 6, 2006, *available at* http://chronicle.com/daily/2006/12/2006120604n.htm. Jackson said he denied the student's reapplication for the job (the student was currently serving as editor-in-chief) because the student wanted to drastically change the duties of the position, giving the student newspaper more independence both financially and managerially, in contrast to the stated requirements for the position. *Id*. Jackson therefore invoked the heretofore unexercised authority granted to him by the paper's arrangement with the university's student media board to block the appointment. *Id*. At the behest of editors at *The Harvard Crimson*, eighteen collegiate student newspapers around the country published an editorial decrying Jackson's decision shortly after he made it. Marnette Federis, STUDENT PRESS LAW CTR., *College Student Newspapers Around the Country Run Editorial in Support of Former USC Editor*, Dec. 7, 2006, http://www.splc.org/newsflash.asp?id=1388.

It is important to remember that neither of these controversies involves the censorship (alleged or actual) by an administrator of student newspaper content. Although one might think that the former arrangement at the University of Texas at Austin meant that college and university officials had a watchful eye over what got printed, refusing to print articles they do not like, there was no hint of censorship under the arrangement, and all factors indicate that the review required by the regents was in fact purely perfunctory. At USC, the problem seems not to be that an administrator exerted power that he did not have, but rather exerted power that he (and his

involved in student activities (at less selective colleges, for example, some smaller colleges, non-residential colleges, or colleges with a large population of "non-traditional students" like GSU, or at community colleges), there might be a reason for more concern that the administration would want to flex its censorship muscles over a student newspaper. If a college or university's paper is currently non-existent, fledgling, or otherwise requires more faculty involvement, administrators might be inclined to link involvement with the newspaper to receiving academic credit, so as to encourage participation. This would also, perhaps, lead them to want some control over content.

However, even this concern might be misplaced, for as one commentator has put it, "[M]ost college publications are under the primary control of students, with little or no oversight from college officials."[216] As the *Hosty* opinion explicitly states, while "being part of the curriculum may be a *sufficient* condition of a non-public forum, it is not a *necessary* condition."[217] Thus, there are surely other factors to consider in determining whether a college or university newspaper operates in a limited public or nonpublic forum, but having a curricular tie-in is prime among them. Other suggestions of what might come from this case—that administrators could condition school funding on the paper's acquiescence to administrative editorial control, or that a school might dissolve its current funding scheme and create a new one whereby student publications are subject to school editorial control—commentators have rightfully dismissed as unfounded.[218]

The *Hosty* decision is likely to have more of an impact on those collegiate student activities *other* than newspapers that are less clearly, either by tradition or designation, regarded as being limited public fora. Administrators wishing to levy content restrictions over other student fora that have quasi-school oversight—such as extra- and co-curricular speakers, discussion series, theatrical productions, and special events programming—might find the Seventh Circuit's *Hosty* decision an invitation to do so. To the extent that these fora are not limited public fora but rather nonpublic fora at a given college or university, a court subscribing to the Seventh Circuit's *Hosty* decision could uphold an administrator's censorship in those, or similar, domains.

Those fearful of this case's impact should also remember that few college and

predecessors) had not previously used. In my opinion, both the recently resolved situation at Texas and the ongoing one at USC should be characterized as struggles between students and administrators over the student newspaper's structure (who ultimately oversees it) and direction (who should oversee it) as a student *organization*, not as a newspaper. The difference is crucial. There is nothing wrong with administrative intervention into the discussion and debate over how a student newspaper functions within a particular university framework; censorship arises only when that intervention crosses from organizational and structural questions into the realm of substantive newspaper content decisions. In these two cases, the former definitely happened, but the latter most certainly did not.

216. *See* Mark J. Fiore, Comment, *Trampling the "Marketplace of Ideas": The Case Against Extending* Hazelwood *to College Campuses*, 150 U. PA. L. REV. 1915, 1962 (2002) (referencing a 1997 survey that found only one out of one-hundred and one daily college newspapers to be closely related to a curriculum).

217. Hosty v. Carter, 412 F.3d 731, 736 (7th Cir. 2005).

218. *See* Recent Cases, *supra* note 9, at 920–21.

university administrators will likely *want* to exert content control over student press. Christine Helwick, general counsel for the University of California State System ("CSU"), was criticized in 2005 after the Seventh Circuit's decision when she circulated a memo to CSU campuses telling administrators that "CSU campuses may have more latitude than previously believed to censor the content of subsidized student newspapers."[219] She later commented that she was merely reporting the court's decision without making any policy recommendations, stating that having editorial control is not necessarily in the university's interest.[220] As she aptly noted, "Once you exercise control . . . you expose yourself to liability."[221] Logic would indicate that few colleges and universities would want to exercise editorial control when the risks would be great while the payoff would likely be negligible.

Those fearful of the case's impact should also not view the Supreme Court's denial of certiorari to the petitioners' petition in *Hosty* as tacit approval of the Seventh Circuit's decision. The Court commonly waits for enough of the circuits to speak, and disagree to varying extents, before weighing in on an issue of contention. This reality, however, is probably of little consolation to Margaret Hosty, Jeni Porche, and Steven Barba. The real question, then, is whether an injustice was done to the plaintiffs in this case? To a certain extent, yes. Some would argue that Dean Carter—possibly with the support of her superiors—shot a cannon to kill a mouse.[222] Censorship, no matter the occasion, is always very serious medicine. When administered as it was at GSU, so as to curtail student speech that the administration found tasteless, unfounded, and offensive, one must question whether colleges and universities truly live up to their historic billing as being the "marketplace of ideas."[223] As this controversy shows, there are gradations when it comes to how far a school is willing to let the free speech of students reign.

E. Reflections and Commentary on Student Journalism

Although the SPLC, in an amicus brief it filed in the *Hosty* case, stated that "[s]tudent news organizations are an important training ground for professional journalists," [224] it is important to note that training does not have to come at the expense of professionalism. This is not to say that there is no place for errors or lapses of professional judgment in the training process. Naturally, such occurrences—although regretful—are bound to occur, and are indeed part of the

219. Sara Lipka, *Stopping the Presses*, CHRON. OF HIGHER EDUC., Mar. 3, 2006, at A36.

220. *Id.*

221. *Id.*

222. I use this metaphor, slightly retooled, paraphrased from Justice Blackmun's quote in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1036 (1992) (Blackmun, J., dissenting) ("Today the Court launches a missile to kill a mouse.").

223. *See* Fiore, *supra* note 216.

224. Brief for Student Press Law Center et al. as Amici Curiae Supporting Petitioners, Hosty v. Carter, 126 S. Ct. 1330 (2005) (No. 05-377), 2005 WL 2736314, *available at* http://www.splc.org/pdf/hostypetitionbrf.pdf.

overall learning experience. I only suggest that when such errors become habitual or particularly egregious, such as when student editors do not seem to care that they are making them or fail to strive to learn from them, and when such errors implicate a college or university's pedagogical and reputation-related interests, it is not completely outlandish, from an administrator's perspective, to seek to mitigate such errors to the extent that one is legally able.

Some commentators might argue that administrators need not try to mitigate such errors because libel laws and market forces will bring accountability. Although these factors undoubtedly rein in unprofessional practices in commercial journalism, they are not appropriate tools for handling journalistic indiscretion in the college and university setting. Given the educational function of helping prepare students for fulfilling and meaningful contributions to society, it would be downright irresponsible for colleges and universities to idly allow their student journalists to print libelous articles, without any sort of formal reaction or guidance as to the professional expectations of the field (and the school). Not only would such laissez-faire administrating lead to unfortunate libel suits against students,[225] the school would also suffer unneeded public relations consequences for declining to deal with a problem that it could have helped prevent. By providing student journalists with guidelines for professional journalistic practices and asking that student newspapers uphold them as part of what it means to print a newspaper, colleges and universities could help students understand the societal expectations placed on those in positions of trust and responsibility. This suggestion is not outlandish when one considers that most colleges and universities ask all students (not just student journalists), via policies stated in student handbooks, not to lie, cheat, steal, etc., during their time at the institution. In fact, students' continuation in higher education is contingent on their abiding by those rules, which also happen to be society's rules (both legal and moral). Is it then too much to expect of our student journalists—a self-selected group—that they strive to uphold established journalistic ethics as an underlying condition to their receiving monies and space to publish a student newspaper?

One could easily argue that "[n]ewspapers themselves are effective at determining what material should or should not be printed," [226] and that with

225. *See, e.g.*, Mazart v. State of New York, 441 N.Y.S.2d 600 (N.Y. Ct. Cl. 1981), where editors of the student newspaper *The Pipe Dream* at SUNY Binghamton were held personally liable for damages resulting from the printing of a libelous letter to the editor. The court found that the university had no duty to furnish guidance to the student editors as to news gathering guidelines or what constituted libel as the students were adults and therefore presumed to already know the law. *Id.* at 606. The university was thus found to be neither negligent nor vicariously liable. *Id.* This case shows that inaction by universities when it comes to informing student journalists of professional journalistic practices does not necessarily guarantee that colleges and universities will avoid potential litigation when students are sued. Minimal efforts on the part of administrators could seemingly ensure that neither student nor school is sued, as affirmatively providing student journalists with information on professional practices would lessen the likelihood that libelous pieces would be printed. Such efforts would not signal college or university control over publications but rather foresight in protecting the interests of its students in addition to its own.

226. Applegate, *supra* note 186, at 281–82.

college and university newspapers, the marketplace—not the administration—should hold journalists accountable for professional practices. Under this theory, if one newspaper has unpopular views, unprofessional reporting, or particularly shoddy practices, students may choose not to read it, and in fact, start a competing paper. Advertisers, always looking to reach the widest possible audience with their money, would follow the trend, thereby forcing the first paper to mend its unseemly ways or risk becoming irrelevant (or even obsolete).

But relying on market forces to correct indiscretions in student journalism is not a solution to the problem. Administrations relying on such forces to work could potentially waste valuable institutional time and resources of the student affairs department, trying to help the new publication get off the ground. Furthermore, assisting the formulation of a new publication—and ostensibly, eventually providing money for it should it be qualified to receive it—is taxing given the transient nature of students' time at institutions. Money given to these publications would take away from the total allocation given to other, worthier groups, not to mention that it would be duplicative if another newspaper were still functioning. Worse yet, if the new publication were to be a private, financially independent one (from the beginning), there would be even less hope of holding it accountable. On top of all this, by doing nothing, the college or university would again be subjecting its reputation to sullying on account of having its student newspaper appear substandard to faculty, students, alumni, would-be students, and donors. In short, relying on market forces to encourage accountability in student journalism would be too slow, damaging, and unpredictable. Just as with a reliance on libel law, higher education administrations' leaving student journalism accountability to the market would mean shirking an educational and *legal* opportunity to promote professionalism in the student press.

F. The Argument for Encouraging Professional Journalistic Practices

In situations where the student press operates independently from administrative oversight, most college and university administrations are not likely to provide student journalists with information regarding the legal realities and responsibilities associated with journalism, even though doing so would be legal and in both parties' best interests. For example, in her November 16, 2000 response to President Fagan's letter addressed to her and the GSU community, Porche stated that "[i]t is the anger, confusion, and questioning of the people that provide the leads that give fire to certain articles. The journalist is only the instrument."[227] Throughout her letter, Porche seems to subscribe to the view that a journalist's job is simply to retell reality as it has been conveyed to her by others. Lacking in her lengthy response is any acknowledgement of her right—even duty—to exercise editorial judgment and discretion as to what gets printed. In her words, "I have no right to discourage, let alone reject material that is not my 'taste.'"[228] Yet, in the very next sentence, she claims to take full responsibility for

227. Letter from Porche, *supra* note 46.

228. *Id.*

all material in the *Innovator*.[229] Porche goes to great lengths to explain the thorough job she and others do fact-checking; this may be the case, but it does not mitigate the reality that stories could be submitted that, while not factually incorrect as the actors remember them, could contain opinion masquerading as fact (e.g., the statement that President Fagan reacted to a colleague's comment with complicit, conspiratorial laughter, unless corroborated by President Fagan, is strictly a matter of opinion). When stories of this sort are suggested, many editors would reject them as too speculative, or perhaps too vindictive, to be true, thorough 'fact-checking' notwithstanding. When such submissions are received, editors must make a value judgment that, in a very real way, reflects their taste. Will their paper stand for unsubstantiated mudslinging passed off as fact, or equitable reporting of newsworthy events? It is specious to act as if taste plays no part in an editor's responsibility for content. Despite Porche's comments to the contrary, the two are inextricably intertwined, and I see it as part of a school's educational responsibility to alert student journalists to this professional reality, so as to help protect the student journalists' reputations, while at the same time protecting the university's own.

Students deciding to publish a shoddily written diatribe or poorly researched article for mass publication and distribution is different from wearing a jacket emblazoned with offensive language denouncing the draft in public.[230] The former action will affect, to some extent, the reputation of the author's college or university,[231] whereas the latter action will not. There is a difference then, in testing boundaries on one's own time during college and testing them on somebody else's dime (i.e., the school's).

This is not to say that boundaries cannot be pushed through direct extra-curricular involvement—they can.[232] But, with positions of responsibility comes accountability. Why should colleges and universities be unable to hold students accountable when they transgress or shirk their responsibilities? To the extent that those responsibilities coalesce with the mores of society or the academic community, there is answerability. Every day across this nation, students are held accountable for underage drinking, cheating, stealing, lying, and sexual assault, often times by a school's own internal honor system. Although many of these actions would be deemed illegal (or simply bad) by broader societal standards, not all of them would be. For example, students could be severely reprimanded by a

229. *Id.*

230. *See* Cohen v. California, 403 U.S. 15 (1971) (holding that a man wearing a jacket in public reading "Fuck the Draft" could not be convicted of a crime because of First Amendment protections, unless he intended to incite lawlessness and such disobedience actually occurred).

231. A college student-athlete's 'mooning' an opponent or an opponent's fans on the field of play, or presenting an outstretched middle finger to a referee, would also impact the reputation of one's college or university. In neither case would an independent observer believe that such an inappropriate action bore the imprimatur of the school, although such action would likely reflect poorly on the school's image.

232. Indeed, many supported student organizations are often formed on the basis of a controversial belief or agenda, such as Students for a Free Tibet, Students for a Sensible Drug Policy, or National College Students for Life, to name but three examples.

college or university honor committee (or similar body) for reading an English language version of a book required as part of a foreign language course, or for plagiarizing—short of copyright infringement—another scholar's work, even though these infractions have no direct analogue outside of the higher education setting. All of these transgressions, however, reflect a broader consensus as to what comprises proper behavior. At colleges and universities, students are not immune from the accountability that comes with being responsible citizens of society, or the educational community. Adulthood entails responsibility whether one is in higher education or not.

So, how does this discussion factor into student decision-making as part of a college or university newspaper? Although I admit that Dean Carter shot a cannon, I would say that she was trying to kill something just a tad larger than a mouse. Maybe it was a rat. Regardless of the metaphor, the record indicates that Hosty and Porche practiced a few journalistic methods that were downright unprofessional and injurious to the paper's reputation, not to mention their own. Passing off opinion as fact, writing "investigative" pieces in which the writer has a conflict of interest, and using one's position of power to focus on personal causes, are all serious ethical issues in journalism. I am not suggesting that these boundaries of professional propriety are always upheld in the real world; as recent revelations of misdoings by *New York Times* reporter Jayson Blair show,[233] even some of the world's greatest newspapers are not immune from unprofessional conduct within. Many of the boundaries crossed are not even legal boundaries. Yet, society still expects these norms to be upheld, and seeks to enforce them when they are not. At the least, a journalist's professional reputation is sullied, or a journalist might lose his job, when ethical bounds are transgressed. In more egregious cases, people are sued and held liable for any damages, financial or otherwise, that might result. Regardless of what ultimately happens, there are consequences for actions. My argument is that a college or university administration may step in if need be when student journalists persistently misunderstand the societal covenant that freedom of speech combined with responsibility begets accountability.

But I do not advocate firing a cannon when such situations arise.[234] Consonant with an approach discussed by Judge Boggs in his concurring and dissenting opinion in *Kincaid v. Gibson*,[235] I believe that administrators can use procedural mechanisms in dealing with limited public fora at their schools. In applying these devices to the facts in *Hosty*, GSU could have mandated in the *Innovator*'s bylaws

233. *See*, *e.g.*, Cesar Soriano, *Jayson Blair Lands a Book Deal*, USA TODAY, Sept. 10, 2003, *available at* http://www.usatoday.com/life/books/news/2003-09-10-blair-book_x.htm.

234. Indeed, as the pre-*Hosty* decision of the Fourth Circuit established in *Joyner v. Whiting* in 1973, cannon shots that amount to censorship of constitutionally protected expression "cannot be imposed by suspending the editors, suppressing circulation, requiring imprimatur of controversial articles, excising repugnant material, withdrawing financial support, or asserting any other form of censorial oversight based on the institution's power of the purse." Joyner v. Whiting, 477 F.2d 456, 460 (4th Cir. 1973). Some of these draconian tactics were deployed by Dean Carter and her colleagues to everyone's detriment.

235. *See* Kincaid v. Gibson, 236 F.3d 342, 358 (6th Cir. 2001).

that the publication seek to interview for comment (when practicable) all persons whose actions were reported as fact in the newspaper, or mandated that the *Innovator* give all students and staff quoted in the paper the opportunity to verify the accuracy of the quotation before an issue went to print.[236] GSU could also reasonably declare its expectation that all articles be spell-checked and proof-read for grammatical errors by a student editor before publication. So as to ensure equal access to participation in the paper, it could have mandated that each student only hold one position with the paper,[237] or expressed a preference that only articles (not letters to the editor) written by students be printed in the paper.[238] My point is that, because of its concern for Hosty's and Porche's understanding of the norms that society expects of journalists, GSU *should* have mandated some, if not all, of these things.[239] Instead, GSU chose to "alter[] student expression by obliterating it,"[240] which is never a prudent didactic, or legal, tool.[241]

236. If a material dispute arose as to the accuracy of a quotation, the paper would be free to print its version of the quotation according to how its reporters heard/transcribed the quotation. However, this requirement would at least then put the quoted speaker on notice that her speech was about to be (in her opinion) misquoted or quoted out of context, and thus afford her the time and opportunity to prepare counter speech accordingly, if she so desired.

237. The American Society of Newspaper Editors, which maintains a collection of various organizations' and newspapers' codes of ethics, would be a good starting point for formulating further guidelines for encouraging journalistic professionalism in college student media. *See* AMERICAN SOCIETY OF NEWSPAPER EDITORS, CODES OF ETHICS (2006), *available at* http://www.asne.org/index.cfm?id=387; SOCIETY OF PROFESSIONAL JOURNALISTS, CODE OF ETHICS (2006), *available at* http://www.spj.org/ethicscode.asp.

238. At least one court has mentioned that such a condition would be permissible. *See* Antonelli v. Hammond, 308 F. Supp. 1329, 1337 (D. Mass. 1970) ("For example, it may be lawful in the interest of providing students with the opportunity to develop their own writing and journalistic skills, to restrict publication in a campus newspaper to articles written by students. Such a restriction might be reasonably related to the educational process."). Although the SPLC maintains that school officials cannot "[b]an the publication or distribution by students of material written by non-students," see STUDENT PRESS LAW CENTER, LAW OF THE STUDENT PRESS 231 (2d ed. 1994), I believe that public forum analysis would support such a restriction, as the government can unquestionably limit the use of limited public fora to certain groups, see s*upra* note 97, and would certainly be justified in doing so in order to prevent a *student* newspaper from becoming overwhelmed by articles written by *non*-students. Just like student yearbooks print headshot photos of all students (not just the headshot photos of some students with the addition of some non-student headshot photos) in order to receive funding, student newspapers could similarly be required to be chiefly *by* and *for* students to the extent that they only publish student-produced material (ideally this should be a preference and not an inflexible regulation, as reasonable exceptions should be allowed for recent former students who are not technically enrolled as current students for the semester but who still want to write for the newspaper—students studying abroad, participating in externships or internships, or merely taking a semester off, for example). This is not a regulation of content but rather one of form.

239. Indeed, many publications—most of them financially and organizationally independent (see *supra* notes 187–189)—have taken many of these obligations upon themselves voluntarily; others that have not should, at the school's instigation if need be.

240. Kincaid v. Gibson, 236 F.3d 342, 355 (6th Cir. 2001).

241. These suggestions are similar to the recommendations made by Nancy J. Whitmore regarding student press in the private university context in her excellent article, *Vicarious Liability and the Private University Student Press*, 11 COMM. L. & POL'Y 255 (2006). Whitmore argues that, contrary to SPLC suggestions, the adoption of formal policy statements that give

I am not advocating that any administrator, administrative board, or faculty advisor be permitted to supervise the content of student newspapers in any way. I am merely saying that administrations that help fund—directly or indirectly—a student newspaper should be entitled to expect professional journalistic practices from the newspaper. When it comes to enforcement of such standards, self-regulation by student journalists themselves should be the primary and ultimate goal. If for some reason this mode of enforcement fails or is a non-starter, college and university administrators would be permitted to step in. However, enforcing these standards does not mean that administrators have license to exercise prior restraint; rather, enforcing these standards means that administrators should be able to act through the appropriate media advisory board or other channel—when, *post hoc*, an editorial decision is deemed particularly egregious (and in violation of written policy), or an editor habitually contravenes established professional standards (as declared in written policy)—to request the student editors to take their own corrective action (i.e., demote or remove the parties responsible) consistent with the newspaper's bylaws or charter,[242] as would be reasonable given the nature of the relationship between a public college or university and a student newspaper that receives public funding.

How do these proposed procedural mechanisms for the limited public forum differ from 'pedagogical reasons' that are permitted only in the nonpublic setting? They have nothing at all to do with viewpoint and everything to do with professionalism.[243] As Judge Boggs noted in *Kincaid*, the case involving the

student journalists the right to make all content decisions will not insulate private schools from liability for torts committed by their dependent student presses because of trends in vicarious liability law. *Id.* She suggests that private colleges and universities, as publishers of student-produced content, must "work to implement a policy that not only mitigates the university's liability risks but also provides a richer, more exhaustive experiential learning environment for the students." *Id.* at 284. Many of the practices and conduct that she suggests be covered by a "communication tort policy," such as rebuttals and corrections, fact checking and the red flagging of accusatory language, could also be implemented in the public university context—as I am indeed suggesting above—as mere procedural restrictions. Furthermore, there is no reason that her suggestion that "[t]he scope of corrective action may include the running of retractions or corrections to the record to the dismissal of student journalists" could not equally apply in the public university setting, as long as students in fact made those determinations. *Id.*

242. Of course, student journalists would be free to ignore these entreaties by the administration and risk that the college or university might reduce or remove its financial support of the publication at the start of the next funding cycle, as a result of the student journalists' refusing to embody the professionalism that is required to make a newspaper a newspaper. But chances are that student journalists would be receptive to their school's interest in enhancing the quality of the publication, so long as administrators do not overstep their bounds and make suggestions on content, which I emphatically believe would never be appropriate.

243. Implementing the professional journalism standards that I am suggesting would nominally affect content, in the strictest meaning of the word. For example, mandating that articles be spell-checked, or that all those persons whose actions are reported as fact be interviewed (when practicable) for comment, would mean that the paper's contents might be changed in minor ways. These would all be cosmetic changes, however, that go to the heart of maintaining a newspaper's professionalism. Such regulations would *not* be initiated out of concern for or disagreement with the newspaper's underlying content, substance, or viewpoints expressed in its articles, and thus would be permissible.

confiscation of student yearbooks,

> I believe some minimum standards of competence could be a reasonable 'manner' restriction. After all, if the students were to have chosen a 'yearbook' consisting of a sack of condoms, or 98% white space, or a reproduction of the more obscure portions of "Finnegan's [sic] Wake," the court's decision that the administration had relinquished all control over even the *form* of the material in the yearbook would be much less compelling.[244]

In other words, requiring that a student newspaper actually use the school funds it is given to produce a student newspaper is not an impermissible regulation, even though the paper operates in a limited public forum.[245] To the extent that the suggestions offered above are merely refinements of what it means to publish a newspaper (i.e., that it attempt to follow some modicum of journalistic integrity and professionalism), they should be viewed as permissible procedural devices as well.

G. Professional Collegiate Journalism in Practice

Thankfully, a recent controversy on a campus within the Seventh Circuit's domain suggests that potential problems like the one presented in *Hosty* can be self-corrected by student journalists, as my approach envisions, without the need for significant administrative intervention. The editor-in-chief of *The Daily Illini*, the financially and organizationally independent student newspaper at the University of Illinois at Urbana-Champaign, brought controversy to his campus in early 2006 by publishing a Danish cartoon unfavorably depicting the Prophet Muhammad that infuriated Muslims around the world and incited violence in many areas.[246] The newspaper's bylaws state that inflammatory material must be

244. *Kincaid*, 236 F.3d at 358 (emphasis added) (concurring in part and dissenting in part). Judge Easterbrook, in his *Hosty* opinion, offered a similar example but for a different reason. In discussing a school's right—because it foots the student newspaper's bill—to exercise oversight of the newspaper if it is a nonpublic forum, he offered the following thought experiment: "Suppose the University had given the *Innovator* $10,000 to publish a semester's worth of newspapers, and Porche then had decided that the students would get more benefit from a booklet describing campus life and cultural activities in surrounding neighborhoods. Both paper and booklet are forms of speech, but the fact that the publication was not part of the University's curriculum and did not carry academic credit would not have allowed Porche to divert the money from one kind of speech to the other." Hosty v. Carter, 412 F.3d 731, 736 (7th Cir. 2005).

245. This argument is similar in its simplicity to the logic of *Olson v. State Board for Community and Occupational Education*, 759 P.2d 829 (Colo. Ct. App. 1988), where the Colorado Court of Appeals held that it was not impermissible for the administration of Pikes Peak Community College to de-fund its student newspaper because of the paper's failure to comply with new budgetary application procedures, after finding that the defendant's decision to de-fund the paper was not substantially motivated by any displeasure over the paper's contents. *Id.* at 830–31. Similarly, nothing should prevent a college administration from de-funding a student newspaper if the paper's editors consistently fail to produce what is recognizable—viewed from the standpoint of professional and standard student journalistic practices—as a student newspaper.

246. Amy Rainey, *'Daily Illini' Editor Who Published Controversial Cartoons Is Fired*,

discussed in the newsroom before publication; the bylaws also require that the publisher, the Illini Media Company (IMC), be notified before any publication of such material so that it can prepare itself for any ensuing reaction.[247] Acton Gorton, the newspaper's editor-in-chief, showed the page containing the controversial cartoon to some staff members, but did not invite discussion from other editors as to whether it should be published, as the paper's bylaws required him to do.[248] He also failed to alert IMC that the paper would be publishing the controversial cartoon. Accordingly, when the cartoon's publication prompted outrage on the campus—particularly among its Muslim members—the IMC's board of directors conducted an investigation of the matter, focusing particularly on the editors' decision-making and communication.[249] When the investigation confirmed that Gorton failed to follow procedure vis-à-vis the controversial cartoon, he was terminated from his position as editor-in-chief.[250]

What is most noteworthy about this situation is that the IMC board of directors consists of four student members and four faculty members.[251] Although the analogy is not perfect, one sees in practice how fellow students can, and will, hold their journalism peers accountable for the responsibilities that they have voluntarily undertaken. Although Gorton may claim that "[t]his is really an issue of trying to restrict my freedom of speech,"[252] it clearly is not—it is a simple issue of accountability. Just as the editors of newspapers across the world cannot publish controversial material like the cartoon in question without some fear of their readers' reaction, Gorton should not be insulated from the real-world consequences that often come to those in charge when such polemical publishing decisions are made.[253]

CHRON. OF HIGHER EDUC., Mar. 31, 2006, at A39, *available at* http://chronicle.com/weekly/v52/i30/30a03902.htm.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. Illini Media, http://www.illinimedia.com/IMC/imedia.html (last visited Feb. 6, 2007).

252. Rainey, *supra* note 246.

253. In another recent controversy involving a college student journalist—this one having nothing to do with an editorial decision—one further notes students' ability to self-police possible infractions of journalistic integrity in accordance with standards in place at a public college or university. At the University of Michigan at Ann Arbor, the editor-in-chief of *The Michigan Daily*, Donn M. Fresard, caused a stir when he decided to accept membership in a nameless secret society of sorts that has ties to a racially insensitive and exclusionary past. Samantha Henig, *The Editor and the Nameless Society*, CHRON. OF HIGHER EDUC., July 28, 2006, *available at* http://chronicle.com/weekly/v52/i47/47a02501.htm. Many alumni, students, and students on the publication's staff were outraged and felt that Fresard's affiliation with the club was not only distasteful, but also amounted to a conflict of interest, as the campus group is often the subject of news items and editorials. *Id.*

As would responsible and professional journalists, the editors of the student publication met and voted on the matter (pursuant to its bylaws), and while more than half of the editors felt that Fresard's involvement with the club would constitute a conflict of interest, this figure was shy of the two-thirds majority required to remove him from office. *Id.*; THE BYLAWS OF *THE MICHIGAN DAILY* (Nov. 11, 2005), *available at*

I am not advocating that controversial cartoons that touch on matters of deep international import have no place in collegiate student publications—they most certainly do, should students wish to publish them. In fact, of all times to follow procedural restrictions, a student newspaper should be most eager to do so in potentially controversial situations such as these. Abiding by such policies will only show the publication's commitment to journalistic professionalism and put it on firm footing in its relationship with the college or university's administration. Student journalists' likely inclination to want to follow such reasonable restrictions arrives at my overall point, that reasonable procedural restrictions—restrictions on the order of IMC's bylaws that require somewhat of an editorial board consensus before going to print with controversial material, in addition to requiring that prior notice be given to the publisher—can be legally, ethically, and professionally responsible solutions to curtailing what is often, essentially, irresponsible student journalism. Such provisions do not risk destroying the "marketplace of ideas" as they have nothing to do with the substantive content of expression.[254] Rather, such provisions may offer the key to ensuring that the important "marketplace of ideas" continues to be imbued with the very integrity that underlies its survival.

http://www.michigandaily.com/media/paper851/documents/dhsuvvts.pdf.

The real issue to be concerned about here, in my opinion, was less that Fresard's involvement with the club would present a conflict of interest and more that it would "compromise [his] integrity or damage [his] credibility" (something journalists should avoid doing according to Section III.2 of the *Daily*'s bylaws), although this, too, was unlikely, given that the club in question is a prominent campus group. *Id.* With these considerations in mind, the outcome of the vote is understandable; although the club may be tied to a sordid past, Fresard's involvement in it would not likely sully the reputation of the student newspaper, nor would it present irresolvable conflicts of interest.

Regardless of the result of the vote, I find it encouraging that the student journalists felt committed enough to the publication and the responsibility that comes with their positions as editors to even *have* a vote. I would never suggest that a public college or university could *sua sponte* remove a student in a similar circumstance (nor would the University of Michigan even be able to do this here if it wanted to, as *The Michigan Daily* is a financially and organizationally independent non-profit corporation), but rather that it could—consistent with permissible procedural restrictions—expect the organization to have a vote pursuant to its bylaws. Otherwise, the publication could face losing some of its student activities funding during the next funding cycle for not living up to what it means to be a professional student newspaper.

254. Although the IMC policy required student consensus and advance notice regarding publication of controversial content, it does not follow that this regulation is therefore content-based and not content-neutral. The IMC policy does not reference specific categories of speech that it deems controversial; thus, regardless of *why* the material might be regarded as controversial, the IMC has its policy so as to prepare for the potential *consequences* of publishing controversial speech, no matter what the underlying controversy. This distinction is further justified by the Court's decision in *Renton v. Playtime Theatres*, 475 U.S. 41 (1986), in which it upheld a city's ordinance imposing particular zoning regulations on movie theaters showing adult films because the restrictions were justified by the "secondary effects" of such theaters on the surrounding neighborhoods, and not by an interest in suppressing adult films. Similarly, absent any indication to the contrary, IMC's policy is also designed to address the secondary effects of controversial speech, not to suppress controversial speech or speakers themselves.