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# Subtle Censorship: The Problem of Retaliation Against High School Journalism Advisers and Three Ways to Stop It

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## ABSTRACT

*This Article explores whether the problem of retaliation against high school journalism advisers is best addressed through courts, local school boards or state legislatures. Student journalists across the United States are threatened by a new, more-subtle form of censorship. Instead of principals cutting articles out of student newspapers or threatening expulsion for controversial editorials, student journalists' most-trusted confidant and ally—their journalism adviser—is under fire, facing retaliation by school officials through discipline, reassignment, and even termination. This retaliation exploits a loophole in student journalists' protections, results in indirect censorship and chills student speech. After comparing the alternatives, this Article argues that the best path to ending retaliation against journalism advisers is through state legislatures adopting statutes that prohibit adviser-retaliation, grant students a cause of action, and require local school districts to adopt consistent policies protecting student publications.*

## I. INTRODUCTION

The war between student journalists and their would-be censors is never-ending. As long as students speak their minds and adults seek to

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silence them, school officials will continue to erect barriers inhibiting a free and vibrant student press. Although students in some states have stalwart defenses to direct attacks by way of state statutes and constitutional provisions, these protections have not ended the battle or even caused a ceasefire that would allow the student press to thrive. Instead, school officials have merely shifted the battlefield and changed their tactics, setting their sights on a target students rely on as trusted confidant: journalism advisers. This new breed of indirect censorship—retaliation against advisers—allows school officials to bypass students' defenses against direct censorship and causes very real consequences: the chilling of student speech.

Although names like Amy Sorrell, Terry Nelson, and Janet Ewell are virtually unknown outside the field of scholastic journalism, they are hero-martyrs among student-press advocates: they are journalism advisers whose careers have been laid siege or destroyed by administrators attempting to silence students through adviser-retaliation. Their stories put a human face on the victims of adviser-retaliation. Amy Sorrell was placed on administrative leave and reassigned after one of her student writers published a four-paragraph column promoting tolerance of gay high school students.<sup>1</sup> Terry Nelson was fired after "allowing" her student newspaper's editorial board to protect the identity of an author that submitted a critical letter-to-the-editor.<sup>2</sup> And Janet Ewell was confronted by her principal and removed from advising after her students wrote critical editorials concerning cafeteria food and dirty bathrooms.<sup>3</sup> All of these advisers' experiences tell a startlingly similar story: student journalists write something that administrators do not like and the journalism adviser is retaliated against to silence the students.

Although it may be tempting to dismiss this problem as trivial, student journalism deserves consideration and support. In many ways, student journalists parallel their professional counterparts: they subscribe to

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1. See Theodore Kim, *Journalism Advocates Decry Teacher's Ouster over Student's Article in Paper*, U.S.A. TODAY, May 9, 2007, at A2, available at [http://www.usatoday.com/news/education/2007-05-08-journalism-teacher\\_N.htm](http://www.usatoday.com/news/education/2007-05-08-journalism-teacher_N.htm); Michelle Garcia, *Better Seen and Not Heard?*, THE ADVOCATE, June 19, 2007, at 34; Amy Sorrell, *Welcome to Woodlan High*, NAT'L LESBIAN & GAY JOURNALISTS ASSOC., [http://www.nlgja.org/publications/articles/sorrell\\_woodlan.htm](http://www.nlgja.org/publications/articles/sorrell_woodlan.htm) (last accessed Nov. 1, 2010).

2. See Warren Watson, *Honored, Taunted, Fired and Rehired*, THE AM. EDITOR, Nov.–Dec. 2004, at 20.

3. See Melanie Hicken, *Teacher Scores Victory in Fight for Student Free Speech*, THE ORANGE COUNTY REG. (Aug. 7, 2008), <http://www.ocregister.com/news/ewell-126380-bill-student.html>.

model codes of ethics,<sup>4</sup> are members of professional organizations,<sup>5</sup> and make decisions about news and editorial coverage.<sup>6</sup> Admittedly, not every student publication is a bastion of enlightening, quality journalism. For every publication that chronicles the complex problem of white flight, advocates well-considered editorial positions on sex education, and offers carefully considered political endorsements in upcoming elections,<sup>7</sup> there may be another that exists solely to air grievances between jocks and the resident glee club or debate the finer points of Justin Bieber's haircut. But, regardless of whether these publications churn out content adult readers find interesting, they deserve protection from censorship. Student newspapers are one of the few outlets that allow high school students to express themselves, debate and engage with ideas, and grow into meaningful, participating citizens.

In this Article, I aim to bring attention to retaliation against journalism advisers as a form of indirect censorship and discuss three routes that may help put an end to the problem. In Part II, I explain the problem of indirect censorship, describing the role of the journalism adviser and exactly what retaliation as indirect censorship looks like. In Parts III, IV, and V, I explore three different routes to stopping adviser-retaliation: constitutional litigation, local school board policies and state statutes. In Part VI, I argue that the most effective vehicle to combating retaliation as indirect censorship is state legislatures adopting adviser-protection statutes, and I provide a model adviser-protection statute that embraces the advantages and mitigates the disadvantages of other approaches. I conclude by reaffirming the importance of ending adviser-retaliation as indirect censorship and noting what efforts may be necessary to safeguard the future of the student press.

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4. For a sample code of ethics, see NAT'L SCHOLASTIC PRESS ASSOC., MODEL CODE OF ETHICS FOR HIGH SCHOOL JOURNALISTS (1st ed., 2009), available at [http://studentpress.journ.umn.edu/nsipa/pdf/wheel\\_modelcodeofethics.pdf](http://studentpress.journ.umn.edu/nsipa/pdf/wheel_modelcodeofethics.pdf). Although each student newspaper may adopt its own code, this model "was created to help guide students in the direction of responsible journalism." *Id.*

5. For examples of these organizations, see JOURNALISM EDUC. ASSOC., <http://www.jea.org/index.html> (last visited Nov. 7, 2010); NAT'L SCHOLASTIC PRESS ASSOC., <http://studentpress.journ.umn.edu/nsipa/> (last visited Nov. 7, 2010); QUILL & SCROLL INT'L HON. SOC., <http://www.uiowa.edu/~quill-sc/> (last visited Nov. 7, 2010); COLUMBIA SCHOLASTIC PRESS ASSOC., <http://cspa.columbia.edu/index.html> (last visited Nov. 7, 2010).

6. Iowa Code § 280.22(5) (2008) ("Student editors of official school publications shall assign and edit the news, editorial, and feature content of their publications . . .").

7. NICHOLAS D. KRISTOF, FREEDOM OF THE HIGH SCHOOL PRESS 3 (1983) (citing EDGAR G. JOHNSTON & ROLAND C. FRANCE, STUDENT ACTIVITIES IN SECONDARY SCHOOLS 89 (1952)).

## II. THE PROBLEM OF ADVISER-RETALIATION AS INDIRECT CENSORSHIP

Attempts to censor student speech and student publications are by no means a new phenomenon. Two scholars even suggest that “the vast majority of American high school newspapers have always been censored.”<sup>8</sup> This is not to say, though, that conflicts over censorship have not ebbed and flowed over time. Undoubtedly, changes in newspaper-production, culture, and law have intermittently fueled and quelled disagreements between the student press and authority figures. For example, the earliest of student newspapers were “not produced under the auspices of the schools but were prepared by groups of students working in [sic] their own time without supervision.” Additionally, the counter-culture movement of the 1960s resulted in heightened conflicts between students and authority figures.<sup>9</sup> Similarly, the legal landscape has changed dramatically over time, thanks to decisions such as the Supreme Court’s landmark ruling in *Tinker v. Des Moines*, establishing that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>10</sup>

But, despite an evolving landscape, censorship remains a constant threat to the student press, retreating and re-emerging in new and always-changing forms. One author has suggested “[t]he risk that school authorities will be tempted to use any censorship powers they possess to suppress pointed or disrespectful criticism is a near certainty,”<sup>11</sup> and the numerous instances of censorship discussed in this Article support that claim. Because students are protected (albeit to varying degrees)<sup>12</sup> from *direct* administrative censorship, indirect censorship has proliferated.<sup>13</sup> “Censorship 2.0,” as student-press advocate Frank LoMonte has defined

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8. Lillian Lodge Kopenhaver & J. William Click, *High School Newspapers Still Censored Thirty Years After Tinker*, 78 JOURNALISM & MASS. COMM. Q. 321, 328 (2001).

9. KRISTOF, *supra* note 7.

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

11. Leon Letwin, *Administrative Censorship of the Student Press—Demise of the Double Standard?*, 28 S.C. L. REV. 565, 583 (1977).

12. See Part III.A.1 *infra* (discussing the *Tinker* and *Hazelwood* cases).

13. Lillian Lodge Kopenahver, *Censorship Becomes Way of Life for High School Journalists*, CONTEMP. EDUC., Winter 1995, at 89–91.

it, “involves pressure indirectly applied.”<sup>14</sup> Instead of a principal or superintendent directly telling a student editor that he or she cannot publish a story, the school official may try to prevent publication indirectly by slashing the publication’s budget, restricting access to interview subjects, or retaliating against the publication’s adviser. Although indirect censorship can take many forms,<sup>15</sup> the form of indirect censorship discussed in this Article is retaliation against student publication advisers based on the content of student speech.

### A. Who Are Journalism Advisers and What Do They Do?—The Role of Student Publication Advisers in Public High Schools

Before turning to the problem of retaliatory discipline against advisers, it is important to understand exactly who journalism advisers are and what they do.<sup>16</sup> Survey results indicate that most journalism advisers are female, have at least a master’s degree, and majored in a subject other than journalism.<sup>17</sup> The average journalism adviser has been a teacher for roughly fourteen years,<sup>18</sup> but has only taught journalism for

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14. Frank LoMonte, *Student Journalism Confronts a New Generation of Legal Challenges*, 35 HUM. RTS. 8, 8. LoMonte notes that “Censorship 2.0” may consist of actions such as “changes to the governing structure of the student newspaper, reassignment (or outright firing) of the faculty adviser, or crippling cuts to the publication budget.” *Id.*

15. For discussion of indirect censorship other than retaliation against journalism advisers, see, for example, *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973) (retaliation through withholding publication funding); *Schiff v. Williams*, 519 F.2d 257 (5th Cir. 1975), *cert. denied*, 423 U.S. 834 (1975) (retaliation through dismissal of certain associate student editors); Kathleen Parrish, *Students Denied Conference Trip to Northampton: School Board Won’t Pay for Newspaper Staff to Attend Conference, Some Say It’s Retaliation*, THE MORNING CALL (Allentown, Pa.), Mar. 11, 1997, [http://articles.mcall.com/1997-03-11/news/3129127\\_1\\_school-newspaper-students-views-two-student-representatives](http://articles.mcall.com/1997-03-11/news/3129127_1_school-newspaper-students-views-two-student-representatives) (retaliation through denying publication staff and adviser professional development opportunities); *Students Have Rights, Too*, EUREKA TIMES STANDARD (Eureka, Ca.), May 3, 2008, at OP (retaliation through theft of published newspapers); Coppola Complaint, *infra* note 63, at 21–22 (retaliation through requiring students immediately convert to Windows, rather than Macintosh computers, and placing administrative official in newsroom during deadline to “monitor” activities of student reporters); Matt Wynn, *Threat of Censorship Has ‘Chilling Effect,’* QUILL MAG., April 2002, at 40, 40 (retaliation by locking students out of newsroom).

16. The role of the journalism adviser—and in particular, the relationship between the adviser and the student editors—has changed significantly over time. For the purposes of this Note, discussion of the adviser’s role is confined to its modern state, as discussed in Part II.A. For an in-period discussion of the newspaper adviser’s role in the 1930s, see LAMBERT GREENAWALT, *SCHOOL PRESS MANAGEMENT AND STYLE* 179–95 (1930).

17. Mary Peterson Arnold, *Student Freedom of Expression and High School Journalism Advisers: A Legal and Educational Dilemma* 115 (Aug. 1994) (unpublished Ph. D. thesis, University of Iowa) (on file with University of Iowa Library system).

18. *Id.* at 116 (citing Jack Dvorak, *Research Report: Secondary School Journalism in the United States*, IND. HIGH SCHOOL JOURNALISM INSIGHT, April 2002, at 4), reported an average of 14.4 years, noting the data was consistent with another survey’s finding of 14.6 years.

half that time.<sup>19</sup> Roughly 80% of advisers are tenured, leaving the other 20% subject to probationary contracts and without-cause dismissal.<sup>20</sup> Although there is some variation in the precise characteristics of each individual newspaper adviser, this data puts a human face on the discussion.<sup>21</sup>

Many attempts have been made to define the role of the journalism adviser in public high schools. Among those advocating broad definitions, the Student Press Law Center, in an amicus brief, has argued that:

“advisers . . . have many roles, both formal and informal. They explain journalism conduct to student editors and help create a supportive environment for editors before and after they make numerous decisions about style, structure, presentation, ethics and content under tight deadlines and the press of multiple time demands.”<sup>22</sup>

Other authors make similar broad statements, such as “the role of the adviser shapes up clearly as one of advising and guiding—but not of actually doing the editorial work himself or herself”<sup>23</sup> and that “[t]he adviser should be a sort of supreme court, advising not on each and every problem but instead as an arbitrator or concilator on major issues.”<sup>24</sup> These definitions are vague and not particularly helpful.

Others have attempted—with varying degrees of success—to narrow down the role of a journalism adviser into concrete, defined terms. On the more-helpful end of the spectrum, the Journalism Education Association (“JEA”) has compiled professional standards for the role and defines the journalism adviser’s position by contrasting it with that of the traditional English teacher.<sup>25</sup> JEA notes that, in addition to teaching grammar, style

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19. Arnold, *supra* note 17, at 117.

20. *Id.* at 209.

21. For a more complete personification of journalism advisers, see Arnold, *supra* note 17, at 86–91 (“A Day In the Life”).

22. Brief for Student Press Law Center et al. as Amici Curiae Supporting Appellants, *Lane v. Simon*, 495 F.3d 1182 (10th Cir. 2007) (Nos. 05-3266, 05-3284), at 16, *available at* 2006 WL 728564.

23. BRUCE W. SMITH, *PROBLEMS OF HIGH SCHOOL PUBLICATIONS* 26 (1950).

24. *Id.* at 28.

25. This distinction—between the adviser and a “typical” teacher—is undoubtedly more important than many realize; advisers are, in many ways, more similar to extracurricular coaches than the teacher assigned to a freshman English course. As one author notes, “The principal will understand that, just like the football coach expects to be given complete freedom to plan his game strategies and manage the team, the newspaper adviser, as a professional scholastic journalist properly trained to perform a specific function, hopes for cooperation and little interference.”

and general writing skills, advisers must also teach “listening, speaking, leadership skills, cooperative processes, press law and ethics, fiscal responsibility, and media design and production.”<sup>26</sup> On the less-helpful end of the spectrum, a book written explicitly for journalism advisers manages astonishingly to opine for seventy-five pages about best-practices for advisers, yet not once attempts to define the role in any meaningful way.<sup>27</sup> Perhaps tellingly, another book targeted toward advisers begins with a tongue-in-cheek faux-dictionary definition of the term. Among its more entertaining definitions, it notes that an adviser is a “unique individual; all things to people; interpreter of social responsibility of student press; supervisor of creative students; familiar with deadlines, financial obligations and pleasing publics” and that advisers are “often considered by superiors as spendthrift, by spouse as neglectful, by printer’s representative as moneybags, by student editor as censor, by self as martyr.”<sup>28</sup> These light-hearted definitions, perhaps inadvertently, convey the problem in trying to define precisely what a journalism adviser does—indeed, the journalism adviser must be all of these things and serve multiple masters.

Because of the difficulties in creating a fully comprehensive list of adviser responsibilities, the broad definition advocated by the Student Press Law Center will be used throughout this Article, with the understanding that the level of editorial control and input the adviser exerts over a publication—or is required by his or her principal to exert over a publi-

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MARIO R. GARCIA, *THE (NEW) ADVISER: LEARNING THE CRAFT* 6 (1974). A similar analogy is drawn in Arnold, *supra* note 17, at 71, and by Leslie Shipp in *September 2010 Podcast: Tyler Buller, Former School Board Member in Johnston, Iowa, and Leslie Shipp, Newspaper Adviser at Johnston High School, Discuss Local Policies that Can Help Protect Student Press Rights*, STUDENT PRESS L. CENT. (Sept. 2010), <http://www.splc.org/podcasts/Sept10podcast.mp3>, at 13:00.

26. *Standards for Journalism Educators*, JOURNALISM EDUC. ASSOC. (Apr. 26, 2009), <http://www.jea.org/resources/standards.html>.

27. See ROBERTA FRY & KATHLEEN DYER KEILMAN, *THE ALL-AMERICAN ADVISER* (1963). One of the only attempts to even indirectly address a definition of the role, notes that the journalism adviser is “the only person in [the] school who works with a group of students for an entire school year to turn out a regular series of an educational product . . . for the benefit of the school.” *Id.* at 10. This definition does little to enlighten readers as to what exactly journalism advisers do.

28. GARCIA, *supra* note 25.

cation—may vary from school-to-school,<sup>29</sup> jurisdiction-to-jurisdiction,<sup>30</sup> or even from one school-year to another.<sup>31</sup>

Although the adviser's role may sound relatively straightforward to those unfamiliar with the student press, advisers in public high schools must live a "perilous paradox."<sup>32</sup> Advisers are expected to "champion [their] students' right to freedom of expression" on the one hand and "must obey a supervisor" on the other.<sup>33</sup> Advisers must fulfill the dual-role of a trusted confidant and ally to student editors while remaining a school employee subject to the orders of administrators and a Board of Education; they must balance divided loyalties and attempt to serve two masters.<sup>34</sup> These two competing roles are often in conflict and create sharp differences in the perceptions of journalism advisers versus school principals, when it comes to student publications.<sup>35</sup> It is this conflict that often gives rise to retaliation against advisers, ultimately chilling the protected speech of their advisee student journalists.

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29. See Thomas W. Dickson, *Attitudes of High School Principals About Press Freedom After Hazelwood*, JOURNALISM Q., 1989, at 169, 169–72 (reporting survey results of Missouri principals indicating size of school was a significant factor in whether newspapers were produced as part of a class, if producing the newspaper was an official class activity, if the principal engaged in prior review of newspaper content, and the likelihood of the principal to censor "objectionable" content); Arnold, *supra* note 17, at 133 (reporting significant discrepancies between in role of adviser among urban, suburban and rural schools).

30. See Mark Paxton & Tom Dickson, *State Free Expression Laws and Scholastic Press Censorship*, JOURNALISM & MASS COMM. EDUCATOR, Summer 2000, at 50, 55–56 (reporting survey results that indicate, while there are many similarities in adviser conduct among states with freedom of expression laws and states without, there are several areas of significant divergence, including if the adviser "should correct factual errors" and if the adviser is "ultimately responsible for content").

31. *Id.* at 171 (reporting survey results indicating 8.1% of principals expected to change procedures concerning student publications and journalism advisers following the *Hazelwood* decision).

32. Ken Steinken, *Teaching Censorship to the Next Generation*, COLUMBIA JOURNALISM REV., Nov.–Dec. 2000, at 68, 68.

33. *Id.*

34. Arnold, *supra* note 17, at 24.

35. See Kopenhaver & Click, *supra* note 8, at 327–28. (surveying high school newspaper advisers and high school principals, identified a number of areas where principals and advisers had conflicting views. For example, 87% of principals, but only 55% of advisers, believe school officials "should have the right to prevent publication of articles [thought to be] harmful even if such articles might not be found libelous, obscene or disruptive by a court of law;" 33% of principals, but only 20% of advisers, believe "articles in which quoted sources criticize the school board should never appear in the student newspaper;" and 87% of principals, but only 65% of advisers, agreed that "the student newspaper should advance the public relations objectives of the school." *Id.* at 328–29.

## B. What's Happening to Journalism Advisers—How Retaliation Against Advisers is Affecting Student Publications

There is no shortage of examples where school district administrators have retaliated against advisers for what student journalists have written or published. And, at least among cases reported to the Student Press Law Center, instances of retaliation are not confined to certain states or geographical regions.<sup>36</sup> The most common scenario leading to retaliation is one where student journalists publish stories or editorials that, although neither unethical or unlawful, are deemed by school officials to be “too controversial” or “too negative” for a student publication.<sup>37</sup> When this happens, “[a]dvisers can easily be caught in a storm of conflict.”<sup>38</sup> Then, as the problem escalates and other actors become involved, “[t]he adviser can become the primary target of the school administrator, the school board, and parents and other members of the community.”<sup>39</sup> As more and more people search for a scapegoat for the students’ published material, the adviser’s head is often the first on the chopping block.

At least among reported instances of retaliation, the level of discipline levied against advisers appears varied and does not always result in termination. For example, some advisers have been transferred to other buildings within the school district and reassigned to teach non-journalism English courses,<sup>40</sup> some have been moved into administrative posi-

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36. See, e.g., *H.S. Adviser Suspended After Newspaper Reports Student’s Arrest*, STUDENT PRESS L. CENT. (Nov. 19, 2004), available at [http://www.splc.org/news/newsflash\\_archives.asp?id=913&year=2004](http://www.splc.org/news/newsflash_archives.asp?id=913&year=2004) (Indiana); *Adviser Removed at Calif. High School After Challenging Principal’s Censorship*, STUDENT PRESS LAW CENTER (Jul. 9, 2008), available at <http://www.splc.org/news/newsflash.asp?id=1787> (California); *Illinois High School to Remove Paper Adviser Over Drug Articles*, STUDENT PRESS L. CENT. (Mar. 17, 2008), available at [http://splc.org/news/newsflash\\_archives.asp?id=1713&year=2008](http://splc.org/news/newsflash_archives.asp?id=1713&year=2008) (Illinois); *Adviser Gets \$130,000 in Settlement with College*, STUDENT PRESS L. CENT. (Aug. 10, 2006), available at <http://www.splc.org/news/newsflash.asp?id=1309> (Kansas); *Fla. District Pays \$20,000 to Settle Adviser’s Lawsuit*, STUDENT PRESS L. CENT. (June 11, 2004), available at [http://www.splc.org/news/report\\_detail.asp?id=1156&edition=31](http://www.splc.org/news/report_detail.asp?id=1156&edition=31) (Florida). (For more recent news flashes concerning censorship of student journalism, including retaliation against advisers, see generally News Flashes, STUDENT PRESS L. CENT., <http://splc.org/news/newsflash.asp> and STUDENT PRESS L. CENT. REP., STUDENT PRESS L. CENT., <http://splc.org/news/report.asp>.)

37. See Arnold, *supra* note 17, at 51.

38. Arnold, *supra* note 17, at 3.

39. *Id.* at 4.

40. Erica Hudock, *Worth Fighting For: A Column for Advocating Tolerance for Homosexuals Turned Adviser Amy Sorrell’s Year Upside Down*, 27 STUDENT PRESS L. CENT. REP., Spring 2007, at 6; Steven Harmon & Linh Tat, *Tri-City Teachers Back Bill Protecting Student Journalism*, OAKLAND TRIB. (Cal.), Mar. 10, 2008.

tions,<sup>41</sup> and still others have had journalism courses removed from their teaching schedule without explanation or warning.<sup>42</sup> Some advisers even flee the profession and seek less-taxing jobs, where they won't have to risk losing their career (and income) by doing their job and allowing students to express themselves. Another serious risk—particularly for probationary teachers who do not have the level of protection afforded their tenured colleagues—is that an administrator will take out his disdain or unhappiness with a student publication through the teacher's annual evaluation and personnel file.<sup>43</sup> The harms caused by disciplining teachers in this way can be just as severe as those that result from terminating an adviser's employment.

In addition, even in school districts where advisers have not been overtly retaliated against because of student publication content, the fear of retaliation looms over advisers as they counsel student editors and reporters.<sup>44</sup> In a 1994 study, more than one-third of advisers reported at least one confrontation where principals said that a student-written story or editorial could not be published or had to be revised before the principal would permit publication.<sup>45</sup> Although not universally held, this fear of retaliation is significant: as many as one-fifth of advisers believe their principal would “prefer to dismiss an adviser than stand up for freedom of expression in the newspaper.”<sup>46</sup> It stands to reason that this number would be even higher if it took into account forms of discipline less severe than outright dismissal or termination.

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41. Will Bigham, *Journalism Faculty Would Be Protected*, INLAND VALLEY DAILY BULL. (Ontario, Cal.), Mar. 30, 2008.

42. Hicken, *supra* note 3.

43. *See* Arnold, *supra* note 17, at 82–84.

44. *See* Vincent F. Filak, Scott Reinardy & Adam Maksel, *Expanding and Validating Applications of the Willing to Self-Censor Scale: Self-Censorship and Media Advisers' Comfort Level with Controversial Topics*, 86 JOURNALISM AND MASS COMM. Q. 368, 376–79 (2009) (reporting that “fear of reprisal” and “perception of principal's comfort” were statistically significant in lowering the comfort level of advisers allowing students to publish stories concerning sexual topics, substance use/abuse topics, curriculum topics, and administrative topics).

45. Thomas W. Dickson, *Self-Censorship and Freedom of the Public High School Press*, JOURNALISM EDUCATOR, Autumn 1994, at 56, 59 (reporting that that 37% of advisers and 34% of student editors reported that the “principal . . . told the adviser or the editor that a story or editorial couldn't run or would have to be changed before it could run”).

46. Kopenhaver & Click, *supra* note 8, at 329 (reporting that 21% of advisers and 10% of principals agreed with the statement that “our principal would prefer to dismiss an adviser than stand up for freedom of expression in the newspaper”).

### *1. Why Retaliation Matters—The Impact of Retaliation on Students and the Chilling of Student Speech*

Among the negative effects flowing from retaliation against journalism advisers as indirect censorship, the focus here is on how retaliation affects the adviser's students. Specifically, this Article concerns the chilling effect retaliation has on students—how, after retaliation occurs, students are hesitant, unable, or unwilling to practice journalism to the best of their ability, out of a fear that their adviser will be subject to discipline or further retaliation.

Although no reported cases have explicitly addressed retaliation chilling student speech at the high school level,<sup>47</sup> the concept of administrative censorship chilling speech is nothing new. As far back as 1973, courts have noted that censorship by school officials will “choke off criticism, either of themselves, or of school policies.”<sup>48</sup> In his dissent in *Hazelwood v. Kuhlmeier*, Justice Brennan made a chilling-effect argument with his oft-quoted admonishment that “[t]he young men and women of Hazelwood East expected a civics lesson, but not the one the Court teaches them today.”<sup>49</sup> Justice Brennan noted that, “[i]nstead of teaching children to respect the diversity of ideas that is fundamental to the American system, the Court today teaches youth to discount important principles of our government as mere platitudes.”<sup>50</sup> This captures the chilling effect that can result from censorship, whether overt (the Hazelwood East principal cutting articles out of the student newspaper) or indirect (if he had disciplined the newspaper's adviser instead). No matter the source, censorship chills student speech, teaching students that fully exploring their freedom of expression will result in consequences to them or their teachers.

While inherently somewhat difficult to quantify, there is significant evidence that the risk of retaliation against a journalism adviser stifles

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47. At press time, there is a case pending before the Iowa Court of Appeals—*Lange v. Diercks*, 11-0191—concerning retaliation against a high school journalism adviser. Likely to be heard in 2012, this case may be the first state appellate decision to directly address whether state statutes or the state or federal constitutions prohibit adviser-retaliation. In his appeal, adviser Ben Lange challenges discipline he received from the Allamakee Community School District in northern Iowa after his students published a satirical “April Fool’s Day” edition. See generally *Lange v. Diercks*, LACV025191, unreported (on file with author).

48. *Baughman v. Freienmuth*, 478 F.2d 1345, 1351 (4th Cir. 1973).

49. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 291 (1988) (Brennan, J., dissenting).

50. *Id.* at 290 (internal quotations omitted) (internal citations omitted) (internal alterations omitted).

and chills the speech of student journalists. Nearly two-thirds of principals and advisers believe that students self-censor the content of their publications.<sup>51</sup> One scholar has even compared the widespread, prolific self-censorship of high school journalists to the self-censorship of American broadcast network executives during the McCarthy Era.<sup>52</sup> Disciplining advisers certainly has the potential to send a clear, less-than-subliminal message to student editors: “Lay off stories [the administration doesn’t like] or your adviser will be sacked or censored.”<sup>53</sup> Although there do not appear to be any surveys or reports that quantify the rationale behind student self-censorship, anecdotal evidence suggests that students are all too aware that what they write may result in the termination of a favorite teacher or trusted adviser.

High school journalists in particular appear to be highly cognizant of the risks they face when retaliation or censorship rears its head.<sup>54</sup> For example, some students attempt to do whatever it takes—including self-censorship—to keep their publications in print, out of loyalty to the work or their peers. As one Nebraska high school journalist noted in a magazine piece, once his student journalist colleagues were aware of a threat to their publication and adviser, “the staff seem[ed] to be implementing self-censorship in an effort to keep the publication going.”<sup>55</sup> Survey results also demonstrate student awareness, with students reporting that if their newspaper were more controversial, their adviser would be fired,<sup>56</sup> that censorship conflicts over controversial articles put advisers at “risk of losing their jobs or . . . getting transferred on permanent bus duty”<sup>57</sup> and that students believed “their adviser would be fired if they demanded freedom of the press.”<sup>58</sup> Speaking retrospectively about their reaction after discipline or threatened discipline against their advisers, some student journalists even use the precise term “chilling effect” to

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51. See Kopenhaver & Click, *supra* note 8, at 329.

52. See David L. Martinson, *School Censorship: It Comes in a Variety of Forms, Not All Overt*, THE CLEARING HOUSE, May–June 2008, at 211, 212–13.

53. John Wicklein, *Censor or Be Sacked*, QUILL MAG., July 2005, at 30–31.

54. For a handful of typical comments made by students concerning the chilling effect as they experienced it, see KRISTOF, *supra* note 7, at 28–32.

55. Wynn, *supra* note 15, at 41.

56. KRISTOF, *supra* note 7, at 22. (For purposes of this survey, being more “controversial” referred to “includ[ing] news or editorials critical of school staff and mak[ing] little effort to be ‘polite,’” rather than any tendency to include profane or otherwise allegedly inappropriate materials.). *Id.* at 22.

57. *Id.* at 28 (internal quotations and alterations omitted).

58. *Id.* at 86.

discuss how their staffs behaved.<sup>59</sup> These anecdotes all carry a common theme: high school student journalists are keenly aware their speech could lead to retaliation against their adviser and they modify their speech accordingly.

Based on this, the lack of reported adviser-retaliation cases at the high school level might seem surprising. Though it is impossible to say with absolute certainty why these issues are not more commonly litigated, especially when they are so widespread in survey data,<sup>60</sup> it appears that cases are often settled out of court, addressed by union representation, or don't move forward because students and advisers lack the resources to pursue legal action.<sup>61</sup> In addition, the relatively few cases concerning adviser-retaliation that have made it to the appellate level are complicated by other tangential issues or employee-misconduct problems that complicate their usefulness as precedent or illustrations of the problem of indirect censorship.<sup>62</sup> However, several cases concerning retaliation against college journalism advisers are relatively straightforward and have well-developed facts as a result of the underlying litigation. These cases can effectively illuminate the problem of adviser retaliation as it applies to both college and high school journalists.

## *2. Coppola and Lane: Two Federal Cases Highlight the Chilling Effect Caused by Retaliation Against Journalism Advisers*

A New Jersey case, *Coppola v. Larson*, clearly demonstrates the cause-and-effect relationship between retaliation against a publications adviser and the resulting chilling effect on student journalists. In *Coppola*, the plaintiff student journalists alleged that administrators' termination of newspaper adviser Karen Bosley's employment was in retaliation for the *Viking News* student newspaper's critical news and editorial coverage of the university administration.<sup>63</sup> According to the students'

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59. Wicklein, *supra* note 53, at 33 (“[T]he subsequent firing has had a chilling effect on editorial decision-making”).

60. See Kopenhaver & Click, *supra* note 8, at 327–29 (reporting survey results concerning administrative censorship, self-censorship, and conflicts between student editors, advisers, and principals' views).

61. For discussion of the barriers to litigation concerning adviser-retaliation, see Part III.A below.

62. *E.g. Nicholson v. Bd. of Educ.*, 682 F.2d 858 (9th Cir. 1982) (adviser-retaliation claim complicated by employee's probationary status, loss of district property, and allowing students to violate unrelated lawful school policies).

63. Verified Complaint, *Coppola v. Larson*, not reported, No. 06-2138, 2006 WL 1782268, at 4–8 (2006 D. N.J.) [hereinafter “Coppola Complaint”].

complaint, after the *Viking News* published articles critical of a change in the university's activity-time policy in November of 2006,<sup>64</sup> the college president summoned the student editors to his office.<sup>65</sup> He then instructed them to "show restraint" with future news coverage, threatened to "take action" against the *Viking News* if certain changes were not made, and told the student editors not to listen to "some little devil" working behind the scenes of the newspaper.<sup>66</sup> After the meeting, the students wrote an editorial giving a first-hand account of their meeting with the president, describing his comments as "intimidating" and "a clear threat to [their] First Amendment rights."<sup>67</sup>

Less than six weeks after the students' first-hand-account editorial was published, administrators sent adviser Bosley a letter informing her that the administration was seeking to terminate her employment.<sup>68</sup> The administration then eliminated the journalism workshops that served as "the primary means by which the [student newspaper] would solicit new staff members" and installed an administrator that "sat in on production meetings" and "looked over the shoulders of [newspaper] staff while they were preparing articles, processing photos and laying out pages."<sup>69</sup> Because of these actions by administrators, the student journalists "were intimidated" and "refrained from writing articles that were critical of the administration."<sup>70</sup> One student reporter even felt so threatened that she quit the *Viking News*.<sup>71</sup> The plaintiff student journalists sought injunctive relief in federal district court claiming, among other theories, that the removal of Bosley had chilled their speech.<sup>72</sup> The district court agreed, granting injunctive relief to enjoin the administrators from removing Bosley on the theory that "such a retaliatory removal would . . . have an impermissibly chilling effect on the Paper's student editors' freedom of expression."<sup>73</sup>

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64. This series of articles, concerning the activity-time change at the university, later earned the *Viking News* staff the Enterprise/Investigative Reporting Award from the New Jersey Press Association in the New Jersey Collegiate Press Association's annual journalism contest. *Id.* at 8.

65. *Id.* at 7.

66. *Id.* at 7. As the students note in their complaint, it appears almost certain that the only possible meaning for the "some little devil" comment was that the college president was referencing the involvement of Bosley. *Id.*

67. *Id.* at 8, citing Exhibit 15 ("Meeting Not Just 'Fact Correct'" story from the *Viking News* student newspaper).

68. *Id.* at 9.

69. *Id.* at 11.

70. *Id.* at 11.

71. Coppola Complaint, *supra* note 63, at 11.

72. *Id.* at 10.

73. *Coppola v. Larson*, CIV. 06-2138(SRC), 2006 WL 2129471 (D.N.J. July 26, 2006).

Student reporters for the *Kansas State Collegian* made a similar claim in *Lane v. Simon*. In *Lane*,<sup>74</sup> the plaintiff student journalists alleged that adviser Ron Johnson had been replaced specifically because administrators objected to the content of the *Collegian* student newspaper.<sup>75</sup> Johnson was fired, the students contended, because administrators were “very critical of the quality of the reporting, writing and editorial decisions by the student journalists.”<sup>76</sup> The defendant administrators even conceded that a “content analysis” of the student publication formed the basis for their decision to terminate Johnson.<sup>77</sup> At trial, one of the plaintiffs who served as editor of the *Collegian* testified that her decisions about front-page content were directly tied to fears about Johnson’s current and future employment with the university.<sup>78</sup> The student journalists specifically noted a “chilling effect” in their appellate brief and noted that the fear of retaliation “bore deadly fruit” when the *Collegian* acted contrary to its own standards for publication in an effort to appease campus authorities.<sup>79</sup> An amicus brief filed by the Student Press Law Center also championed the chilling effect argument, noting that the only plausible rationale for the defendant administrators’ actions was to issue an “odd but harsh rebuke of the students’ journalistic autonomy and editorial discretion.”<sup>80</sup> Although the Tenth Circuit Court of Appeals ultimately found that the plaintiff student journalists lacked standing to pursue their claim in federal court,<sup>81</sup> the facts in *Lane* still illustrate the chilling effect students experience after retaliation against their adviser.

The common thread running through the *Coppola* and *Lane* cases is that, as a direct result of action against journalism advisers, student jour-

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74. Complaint at 5–10, *Lane v. Simon*, 2005 WL 1366521 (D. Kan. 2005) (No. 04–4079-RDR), 2004 WL 2079833 [hereinafter “*Lane* Complaint”].

75. *Id.* at 5–6.

76. Brief for Appellant at \*7, *Lane v. Simon*, 495 F.3d 1182 (10th Cir. 2007) (Nos. 05-3266, 05-3284), 2005 WL 374249 at \*7 [hereinafter “*Lane* Appellant Brief”].

77. Response at 9, *Lane v. Simon*, 2005 WL 1366521 (D. Kan. 2005) (No. 04-4079-JAR), 2004 WL 2079844.

78. Reply Brief for Appellant at 22, *Lane v. Simon*, 495 F.3d 1182 (10th Cir. 2007), (Nos. 05-3266, 05-3284), 2006 WL 1354132 at \*22 [hereinafter “*Lane* Reply Brief”] (“[W]e had to second-guess everything we were doing. What if we put this story on the front page? Is that going to make Ron gone for sure? Will the administration do something further?”).

79. *Lane* Appellant Brief, *supra* note 76, at \*17–18.

80. Brief for Student Press Law Center et al. as Amici Curiae Supporting Appellants, *Lane v. Simon*, 495 F.3d 1182 (10th Cir. 2007) (Nos. 05-3266, 05-3284), 2006 WL 728564 [hereinafter “SPLC Amicus Brief”].

81. *See Lane v. Simon*, 494 F.3d 1182 (10th Cir. 2007). For further discussion of the standing issues and resolution of the case, see Part III.A.2 below (discussing obstacles to resolving indirect censorship through litigation).

nalists' speech was chilled in both abstract and tangible ways. Students modified their editorial policies, changed what they were writing, and, perhaps most importantly, lost out on the opportunity to contribute to their education and that of their peers through honest, insightful student journalism. The facts in *Coppola* and *Lane*, developed through college-press litigation, are in accord with the anecdotal evidence concerning high school journalists. As a result, it is highly likely that factual scenarios concerning retaliation against a high school journalism adviser would parallel these two cases.

Having established the problem of adviser-retaliation as indirect censorship and explored examples, the question is then: What can be done to stop it? Should students seek refuge in the courts, bringing federal- and state-constitution claims? Should students appeal to their local school boards, proposing policies that would direct administrators to not retaliate against advisers? Or should students turn instead to state legislatures, proposing statutes that would prohibit retaliation statewide? Below, I discuss each of these three routes to stopping adviser retaliation—litigation, local policies and state statutes—in turn, highlighting the nature, advantages and disadvantages of each.

### **III. ROUTE 1: STUDENTS OR ADVISERS CAN SEEK RELIEF THROUGH LITIGATION UNDER FEDERAL OR STATE CONSTITUTIONS**

Litigation to vindicate free speech and free expression rights can proceed in either state or federal courts, relying either on state constitutions or the federal Constitution. The greatest benefit of litigation concerning student-press rights—indeed, concerning many civil liberties issues—is that the courts can fashion a remedy appropriate to a plaintiff's particular circumstances. Plaintiff student journalists censored by the termination of their adviser can seek injunctive relief restoring their adviser to her position. Student journalists faced with censorship when their adviser is reassigned to teach Freshman English can request a temporary restraining order to prevent the transfer. And student journalists in a protracted battle with school officials over indirect censorship can seek a declaratory order stating the rights and obligations of their publication and the school district. The ability to request a remedy that, in fact,

remedies the problem of indirect censorship should not be underestimated.

Yet, despite the advantage provided by fashioning appropriate remedies, there are several potential concerns when students bring litigation—whether based on federal- or state-constitution claims—as a mechanism to stop retaliation against journalism advisers. First, students may have difficulty even acquiring the resources to begin litigation, given that most high school students are unemployed, dependent minors. As the Student Press Law Center noted in an amicus brief, “Only the handful of students with the necessary financial resources, peer and parent support and sheer courage end up fighting unconstitutional censorship in court.”<sup>82</sup> Survey data also support the Student Press Law Center’s claim; as few as 7.9% of surveyed students would consider taking the case to court after their newspaper is censored.<sup>83</sup>

Second, even if a landmark case does make it to the appellate level, there is no guarantee that the ruling will be enforced throughout a jurisdiction without additional litigation. One scholar has eloquently described this problem, noting that, “The law should not be seen as a magic wand that will rid schools of censorship with a swish through the air, but as a useful tool if the students have the fortitude to use it.”<sup>84</sup> Unless that tool is used by aggrieved students, it does nothing to solve the problem of adviser-retaliation as indirect censorship. The concern that cases may not have a practical effect without additional litigation is confirmed by reports from as far back as 1974 (just five years after the Supreme Court made its landmark student-speech ruling in *Tinker*). One well known report noted that “[e]ven school officials who are well aware of court decisions supporting a free high school press are prone to either ignore the court-approved standards for guidelines or apply them in such as way as to censor the paper.”<sup>85</sup>

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82. Brief for Student Press Law Center as Amici Curiae Supporting Respondents, *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) (No. 86-836), 1987 WL 864173, at \*18 n.9. [hereinafter “SPLC Hazelwood Brief”].

83. KRISTOF, *supra* note 7, at 24. In responding to the same question, 28.4% of student-editor respondents said they would do nothing if an article they wrote was censored, while 58.6% said they would “complain and perhaps circulate petitions.” *Id.* at 24.

84. *Id.* at 89.

85. CAPTIVE VOICES, THE REPORT OF THE COMMISSION OF INQUIRY INTO HIGH SCHOOL JOURNALISM 42 (J. Nelson ed. 1974). This report also provides a useful discussion of relevant journalism practices during the 1970s, though the applicability of some of its findings to modern scholastic journalism is unclear.

Although these general advantages and disadvantages apply to both federal- and state-constitution litigation, each claim also has its own particular strengths and weaknesses as a route to stopping adviser retaliation. Below, I discuss both avenues. I argue that federal-constitution litigation may provide a remedy to students seeking to vindicate adviser-retaliation claims, so long as students can overcome the obstacle of Article III standing, and that state-constitution litigation may provide an opportunity for success if plaintiff student journalists are willing to wade into untested waters.

### **A. Federal-Constitution Litigation: Success Possible, But Students Must Overcome the Requirements of Article III Standing**

The advantages and disadvantages of federal-constitution litigation are best understood through the lens of the *Coppola* and *Lane* cases discussed in Part II.B.2 above. As these cases demonstrate, minor differences in the facts and legal arguments underlying student-press cases can lead to entirely different results. Throughout Part III.A, *Coppola* and *Lane*—the only two reported cases of adviser-retaliation in federal court—will be used to breathe life into this discussion.

To understand the potential of federal-constitution litigation as a shield against adviser-retaliation, I first discuss the legal framework for student journalists' First Amendment claims, and then discuss the problem of Article III standing as an obstacle to federal-constitution litigation.

#### *1. The Federal Landscape: Despite a retreat from Tinker, students writing for school-sponsored, limited-public-forum publications still have First Amendment protections*

The state of student-press law at the federal level has changed significantly over the last half-century. Rather than rehash this oft-discussed topic at length, the purpose here is only to highlight the state of the law as it most directly affects adviser-retaliation, in order to frame federal law's effect on potential litigation as a remedy for ending adviser-retaliation.<sup>86</sup>

Generally speaking, the first three-quarters of the 20th century saw a movement toward supporting the free-speech rights of students in public high schools. Beginning with its decision in *West Virginia v. Barnette*,

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86. For an accessible, in-depth treatment of the topic, see generally LAW OF THE STUDENT PRESS, STUDENT PRESS L. CENT. 11–54 (3d ed. 2008).

the Supreme Court has repeatedly held that students in public high schools are afforded at least some free-speech rights under the First Amendment.<sup>87</sup> Another landmark case for student-speech rights came sixteen years later in *Tinker v. Des Moines*, when the Supreme Court held that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>88</sup> The rule that emerged from *Tinker* was that student speech could not be censored unless it was reasonably forecast to “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.”<sup>89</sup> Perhaps even more relevant to students engaged in high school journalism, the Court noted that a school official seeking to censor student speech must “show that [his or her] action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint” and that their concerns went beyond an “undifferentiated fear or apprehension of disturbance.”<sup>90</sup> *Tinker* remained the law of the land concerning the First Amendment’s application to student speech in public schools for nearly twenty years before new Supreme Court precedent began to chip away at the protection afforded by *Tinker*’s “substantial disruption” standard.<sup>91</sup>

Since the 1980s, the Court has crafted out at least three different classifications of speech that are not held to the *Tinker* “substantial disruption” standard. Two of these classifications are relatively narrow, while one has proven to be much more far-reaching.

The two narrow classifications of speech not held to the *Tinker* standard are (1) offensively lewd and indecent speech and (2) speech promoting illegal drug use. The exception for lewd and indecent speech traces to *Bethel v. Fraser*, where the Supreme Court upheld discipline of a high school student for giving a “sexually explicit monologue” as part of a student government nomination speech.<sup>92</sup> A comparable exception

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87. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding that students in public schools could not be compelled to salute the United States flag or recite the Pledge of Allegiance).

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

89. *Id.* at 509.

90. *Id.* at 508–09.

91. For snapshots of lower appellate precedent during the time period between *Tinker* and *Hazelwood*, see Letwin, *supra* note 11, at 572–85 (discussing case law in the Fourth Circuit concerning high school student newspaper censorship); Jill H. Krafte, Comment, *Tinker’s Legacy: Freedom of the Press in Public High Schools*, 28 DEPAUL L. REV. 387, 405–17 (1978) (discussing case law in the Fourth, Seventh, and Second Circuits).

92. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986).

for speech that is “reasonably viewed as promoting illegal drug use” emerged in *Morse v. Frederick*, where the Court held that a student could be punished for displaying a “Bong Hits 4 Jesus” poster.<sup>93</sup>

The third classification is potentially broader and may pose a far greater danger to high school journalists. In *Hazelwood v. Kuhlmeier*, the Supreme Court retreated from its position in *Tinker*, allowing for restriction of student speech so long as that censorship is “reasonably related to legitimate pedagogical concerns.”<sup>94</sup> In other words, administrators have to show a reasonable educational justification for censorship. The Court’s decision in *Hazelwood* was, by the Court’s own language, limited to certain non-public-forum, “school-sponsored publications . . . that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.”<sup>95</sup> This distinction in forum-status—whether the publication was opened by school officials as a limited public forum for student speech—appears crucial to the Court’s analysis, given the extensive discussion it received in the majority opinion.<sup>96</sup> The language of the Court even suggests that, had it upheld the Eighth Circuit’s finding that the *Spectrum* student newspaper was a public forum,<sup>97</sup> it may have found the students’ speech was protected by the First Amendment.<sup>98</sup>

Tragically, the relatively narrow language adopted by the Court in *Hazelwood* has not stopped school officials from interpreting that ruling as a license to censor high school journalists.<sup>99</sup> Since 1988—the year *Hazelwood* was decided—the Student Press Law Center has seen an increase of more than 350% in calls for help from student journalists. Even student publications that have operated under a policy and practice

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

94. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272–73 (1988).

95. *Id.* at 270–71.

96. *Id.* at 267–71.

97. *Kuhlmeier v. Hazelwood Sch. Dist.*, 795 F.2d 1368, 1372–73 (8th Cir. 1986), *rev’d*, 484 U.S. 260 (1988). In its analysis, the Eighth Circuit stressed several factors that led it to conclude the *Spectrum* student newspaper was a public forum, including that it “operated as a conduit for student viewpoint . . . [and t]he students chose the staff members, determined the articles to be written and printed, and determined the content of those articles.”

98. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270 (1988) “[Because the *Spectrum* is not a public forum], [i]t is this [reasonableness] standard, rather than our decision in *Tinker*, that governs this case.”)

99. *Hazelwood Sch. Dist. v. Kuhlmeier: A Complete Guide to the Supreme Court Decision*, STUDENT PRESS L. CENT. (2008), <http://splc.org/pdf/HazelwoodGuide.pdf>. However, these statistics do not indicate whether *Hazelwood* increased the rate of censorship actually taking place, or if perhaps instead it increased student awareness and led to more calls for legal guidance.

of serving as a limited open forum for student expression—the type of publication that *Hazelwood* does *not* govern—have faced censorship by administrators and school officials.<sup>100</sup>

Given the current contours of federal law, students filing suit in federal court to vindicate rights injured by adviser-retaliation have some limited chance of success. However, this statement is very qualified. Because of *Hazelwood*, the likelihood of success on the merits diminishes—perhaps to zero—unless the aggrieved students write for school-sponsored<sup>101</sup> publications that have been opened up as limited public forums by school district policy or practice. Because this type of publication is generally subject to the *Tinker* standard, a direct analogue can be drawn to the *Coppola* case, where students at a public college were successful in their federal First Amendment claim.<sup>102</sup>

In *Coppola*, student editors for the college student newspaper filed suit after the university president terminated their associate-professor adviser in retaliation for editorials critical of university policy.<sup>103</sup> If those facts were replaced in a hypothetical, where student editors for a high school student newspaper filed suit after the superintendent terminated their adviser in retaliation for editorials critical of district policy, the law appears to compel the same result: one vindicating the students' rights following the chilling effect caused by retaliation against the adviser.

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100. See, e.g., *Their Last Resort: The Report's Nicole Ocran Details the Devastating Role Censorship Played in the Mass Editorial Exodus from a Once-Great High School Paper*, STUDENT PRESS L. CENT. REP., Spring 2010, at 4, available at [http://www.splc.org/news/report\\_detail.asp?id=1549&edition=52](http://www.splc.org/news/report_detail.asp?id=1549&edition=52). The article notes that, "In every issue of *The Statesman* . . . the masthead stated that the newspaper is a public forum." *Id.* Despite this statement, the students have repeatedly battled administrators over censorship. *Id.*

101. Non-school-sponsored publications are, by their very nature, unlikely to have advisers. However, these publications (often referred to as "underground newspapers") do receive substantial First Amendment protection. For a discussion of the issues surrounding independent, non-school-sponsored student publications, see LAW OF THE STUDENT PRESS, *supra* note 86, at 99–119.

102. College-press cases, much like their pre-*Hazelwood* high school counterparts, rely a great deal on the *Tinker* formulation of the "substantial disruption" test. However, unlike the high school press post-*Hazelwood*, newer precedent concerning college media generally affirms—or even further extends—the protection afforded to college journalists. See LAW OF THE STUDENT PRESS, *supra* note 86, at 59–61; see also *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 282 (1988) (Brennan, J., dissenting) (analogizing multiple college-free-press cases to discussion of the student newspaper distributed at Hazelwood East High School). However, some recent lower court decisions—for example, *Hosty v. Carter*, 325 F.3d 945 (7th Cir. 2003), *vacated en banc*, 412 F.3d 731 (7th Cir. 2005)—may foreshadow a chipping-away at the freedoms enjoy by college student journalists. LAW OF THE STUDENT PRESS, *supra* note 85, at 72–74.

103. See *supra* notes 63–72 and accompanying text (discussing the facts and procedural history of the *Coppola* case).

While there do not appear to be any reported federal First Amendment cases concerning retaliation of high school newspaper advisers, students have been able to succeed on a variety of anti-censorship claims under *Tinker*.<sup>104</sup> There is no reason the same principles—particularly from cases that discuss a chilling effect—should not be applied equally to facts where an adviser was retaliated against based on student speech.

## B. The Problem of Standing

In every reported federal case concerning adviser retaliation as indirect censorship, school district or university defendants have raised the problem of Article III standing. Article III of the Constitution requires that federal cases address a “case or controversy.”<sup>105</sup> This is now understood as requiring litigants to establish: (1) an injury in fact; (2) a causal link between the injury and the defendants’ conduct; and (3) that the injury is likely to be redressed by a favorable judicial decision.<sup>106</sup>

Aside from the general barriers to young people bringing litigation in their own name,<sup>107</sup> student journalist plaintiffs also commonly run into a problem of mootness. The mootness doctrine limits the jurisdiction of courts when a case no longer presents a live controversy.<sup>108</sup> For example, if the initial litigants have graduated since filing suit, a court is likely to find that there is no live case or controversy because the student plaintiffs are no longer enrolled in school and subject to school officials. This is especially problematic for high school journalists who, at a bare minimum, will see a 100% turnover on their publication staffs every four years due to regular graduation. If one assumes that leadership positions (such as editors-in-chief and section editors) are held by juniors or seniors, the window for successful litigation shrinks to just one or two years before the injury becomes moot.

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104. See, e.g., *Gambino v. Fairfax Cnty. Sch. Bd.*, 429 F. Supp. 731 (E.D. Va. 1977) (finding censorship of student newspaper articles concerning birth-control unlawful); *Reineke v. Cobb Cnty. Sch. Dist.*, 484 F. Supp. 1252 (N.D. Ga. 1980) (finding censorship of student newspaper articles concerning attitudes toward homosexual teachers unlawful); *Scoville v. Bd. of Educ.*, 425 F.2d 10 (7th Cir. 1970), cert. denied, 400 U.S. 826 (invalidating suspension of students following distribution of underground newspaper); *Sullivan v. Hous. Indep. Sch. Dist.*, 333 F. Supp. 1149 (S.D. Tex. 1971), vacated on appeal, 475 F.2d 1071 (5th Cir. 1973) (invalidating expulsion of students following distribution of underground newspaper).

105. See U.S. CONST. art. III, § 2.

106. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

107. See *supra* notes 82–83 and accompanying text (discussing barriers to students initiating litigation, including cost, resources and minors’ ability to bring claims on own behalf).

108. See generally 1A C.J.S. *Actions* §78 (2011) (discussing mootness doctrine).

Students may be able to overcome the barrier of Article III standing by using certain legal tactics. For example, there is at least some legal authority to suggest that a journalism adviser may be able to bring a third-party-standing claim on behalf of students in relation to a funding cut.<sup>109</sup> Other tactics might include seeking compensatory damages in addition to declaratory and injunctive relief,<sup>110</sup> adding additional parties (such as future editors-in-chief or underclassmen),<sup>111</sup> and arguing that administrative censorship is “capable of repetition yet evading review.”<sup>112</sup>

The problem of mootness as it applies to high school journalists is well-illustrated by *Board of School Commissioners v. Jacobs*. In *Jacobs*, one of the only student-speech cases granted certiorari by the Supreme Court between *Tinker* and *Hazelwood*, the Court declined to hear high school journalists’ challenge to school board policies because those students had already graduated by the time the case reached the Court.<sup>113</sup> The Court explicitly noted that, even though the district and appellate courts had found in favor of the plaintiff student journalists, the Court had no choice but to vacate the judgment and dismiss the student journalists’ complaint as moot.<sup>114</sup>

Even though there are no federal cases specifically concerning the problem of mootness as it applies to the termination of advisers in public high schools, cases concerning retaliation against college advisers

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109. *See State Bd. for Cmty. Coll. & Occupational Educ. v. Olson*, 687 P.2d 429 (Colo. 1989). The Colorado Supreme Court held that a journalism adviser could assert his students’ free-speech and free-association First Amendment claims through third-party standing. One limitation on applying the principles of this case beyond the community-college level is that the court spent some time discussing the constitutional rights of the adviser as a collegiate professor to use certain instructional methods. *Id.* at 433–434. It is unclear whether such a broad deference to academic instruction would be afforded to public high school teachers or advisers.

110. *See* Robert Corn-Revere, Rory Eastburg & Micah Ratner, *Keeping Your Case Alive After Graduation: A Student Plaintiff’s Guide to Avoiding Mootness*, STUDENT PRESS L. CENT. REP., Winter 2008–09, 35, available at [http://www.splc.org/news/report\\_detail.asp?id=1478&edition=48](http://www.splc.org/news/report_detail.asp?id=1478&edition=48).

111. *Id.* (citing Trial Order, *Lane v. Simon*, No. 04-4079-JAR (D. Kan. 2004), at 1–2, available at 2004 WL 2079844 [Hereinafter “Lane Trial Order”]). In *Lane*, the initial plaintiffs (editor-in-chief Katie Lane and adviser Ron Johnson) joined another party (editor Sarah Rice) on oral motion in an attempt to combat mootness and standing issues. Lane Trial Order at 1–2, n.2.

112. *See* Corn-Revere, Eastburg & Ratner, *supra* note 110. Although only a handful of student-speech cases have addressed whether censorship is an act “capable of repetition yet evading review,” the balance of courts have found against plaintiff students and held that they did not have standing. *See Lane v. Simon*, 494 F.3d 1182 (10th Cir. 2007); *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1098 (9th Cir. 2000); *but see Lee v. Weisman*, 505 U.S. 577 (1992) (ultimately decided on Establishment Clause rather than Free Speech grounds).

113. *Bd. of Sch. Comm’rs of Indianapolis v. Jacobs*, 420 U.S. 128 (1975) (per curiam).

114. *Id.* at 128–30.

can be analogized to further demonstrate this issue. This problem can also be explored through the lens of the *Coppola* and *Lane* cases discussed in Part II.B.2 above.

In *Lane*, the defendant university argued in its response that both plaintiff student journalists and the plaintiff journalism adviser lacked standing to bring their claims.<sup>115</sup> The district court agreed with the defendants' argument that the plaintiff journalism adviser lacked standing because *his* First Amendment rights had not been affected by the university's conduct.<sup>116</sup> However, the court also concluded that the plaintiff student journalists had standing to bring their claims.<sup>117</sup> The Tenth Circuit reversed on the student journalists' standing, finding that because both plaintiffs had graduated, "defendants can no longer impinge upon the plaintiffs' exercise of freedom of the speech [and therefore] plaintiffs' claims for declaratory and injunctive relief are moot."<sup>118</sup> This highlights the mootness problem of student journalists attempting to litigate problems when faced with imminent graduation, as even relatively fast-moving appeals may come too late to preserve the students' claims.

In *Coppola*, the plaintiff student journalists survived the defendants' Article III standing challenge.<sup>119</sup> The *Coppola* court, in fact, spent little time discussing the standing arguments raised by the defendant administrators. Although the court does not explicitly state a rationale for this in its opinion, it is likely that problems of standing were mitigated by the timetable for litigation. In *Coppola*, the timetable was rapidly accelerated because the plaintiffs had filed an application for a temporary restraining order. As a result, briefing was completed roughly a month after the complaint was filed; about a month later, the court entered its decision.<sup>120</sup> Because the *Coppola* case was not appealed, it is unknown whether the plaintiff student journalists would have maintained standing long enough to see a resolution of the case on its merits.

*Coppola* and *Lane* together establish that, if students are able to overcome the obstacle of Article III standing, they may be able to succeed on

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115. Lane Trial Order, *supra* note 111, at 11–12.

116. *Id.* at 9. The issue of the journalism adviser's standing was not addressed on appeal to the 10th Circuit Court of Appeals because that appeal was brought solely by plaintiff student editors Katie Lane and Sarah Rice; adviser Ron Johnson was no longer a party to the litigation. See Lane v. Simon, 495 F.3d 1182 (10th Cir. 2007).

117. Lane Trial Order, *supra* note 111, at 9.

118. Lane v. Simon, 495 F.3d 1182 (10th Cir. 2007).

119. See *Coppola v. Larson*, CIV. 06-2138(SRC), 2006 WL 2129471 (D.N.J. July 26, 2006).

120. *Id.* at 1.

the merits of their federal claim and obtain judicial relief. As discussed in Part III.A.1 above, success may be especially likely if the students write for limited-public-forum, school-sponsored publications; but even then, it is not guaranteed. To succeed in federal court, students must both survive the pitfalls of standing and risk unclear outcomes under current precedent.

#### *A. State-Constitution Litigation: Wading into Untested Waters*

Although the U.S. Constitution sets the floor for protected speech and conduct, “individual states may grant broader protection under each of [their] constitutions.”<sup>121</sup> This can be an advantage for litigants because, when given the choice between federal or state constitution claims, the state claim is guaranteed a result on the merits that is no worse—though perhaps no better—than the federal claim would have achieved.

A hypothetical claim filed in Kansas versus California highlights this potential advantage.<sup>122</sup> If litigants reside and file a state-constitution claim in Kansas state courts, litigants would likely achieve the same result as if they had filed in federal court, because the Kansas Constitution’s free speech guarantee is “generally considered coextensive with the [federal] First Amendment.”<sup>123</sup> However, if litigants instead reside and file a state-constitution claim in California state courts, they may achieve a more favorable result on the merits, because Article I, Section 2 of the California state constitution is understood as a “more liberally construed version of the [federal] First Amendment.”<sup>124</sup> The varying levels of protection afforded by state constitutions are a variable that may provide an advantage over federal-constitution litigation, depending on the legal landscape of the litigants’ state.

However, even if a particular state constitution does provide additional free-speech protections, state-constitution litigation is not without its

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121. Alexander Wohl, *The Hazelwood Hazard: Litigation and Legislating in the State Domain when Federal Avenues Are Closed*, 5 ST. THOMAS L. REV. 1, 13 (1992) (quoting *Desilets v. Clearview Reg’l Bd. of Educ.*, No. C-23-90 (N.J. Super. Ct. Law Div. May 7, 1991), *aff’d* on other grounds, 630 A.2d 333 (N.J. Super. A.D. 1993), *aff’d*, No. A-133-93 (N.J. Sept. 22, 1994)).

122. Kansas and California are used here in the hypothetical because both have virtually identical student free expressions statutes, as discussed in Part V.A below, but different levels of state-constitution protection for free speech.

123. Kan. Op. Atty. Gen. Op. No. 89–38, 1989 WL 455495 (Kan. A.G.) at \*3 (citing *State v. Russell*, 227 Kan. 897, 899 (1980)).

124. *E.g. Leeb v. Delong*, 198 Cal. App. 3d 47, 52, n.1 (Cal. 1988) (discussing the California state constitution’s free-speech protection).

drawbacks. The primary disadvantage to using state-constitution litigation to vindicate students' rights is the serious lack of judicial precedent. While federal precedent on adviser retaliation is sparse at best,<sup>125</sup> state precedent is virtually nonexistent.<sup>126</sup> As a general matter, only a "limited number of state courts have been asked to apply sections of their state constitutional provisions pertaining to freedom of expression to [cases concerning high school newspapers]."<sup>127</sup> This dearth of constitutional application in state courts means that, in the vast majority of states, students looking to litigate issues pertaining to general student-speech issues—let alone the very narrow issue of adviser-retaliation as indirect censorship—have to roll the dice, relying on little or no existing precedent when determining whether to file a claim.

As with claims in federal court, plaintiff student journalists may also run into obstacles establishing standing at the state level. While standing requirements in state courts may be less stringent than Article III standing,<sup>128</sup> some state courts have found that student journalists do not have standing to bring adviser-retaliation claims and that students' claims are non-justiciable.<sup>129</sup> Because of the potentially significant discrepancies between jurisdictions, it is difficult to make any broad proclamation as to whether students can avoid standing problems by grounding their claims in state-constitution provisions.

Another concern with state-constitution litigation is that state courts appear to prefer resolving student free speech litigation under the First Amendment of the federal constitution, rather than its state counterparts.<sup>130</sup> That is exactly what happened in one of the few reported cases addressing high school newspaper censorship through state-constitution

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125. See *supra* Part III.A.1.

126. Although there do not appear to be any reported state-constitution challenges concerning adviser retaliation as indirect censorship. See *Desilets*, No. C-23-90 (N.J. Super. Ct. Law Div. May 7, 1991) for an example of a state-constitution challenge grounded in other related student-speech rights.

127. Wohl, *supra* note 121, at 12–13.

128. See *Leeb*, 198 Cal. App. 3d at 51–52 (permitting litigation concerning censorship of high school newspaper despite mootness because "the constitutional issue raised is of continuing public interest and likely to recur in circumstances where . . . there is insufficient time to afford full appellate review").

129. See *Barcik v. Kubiaczyk*, 873 P.2d 456 (Or. App. 1994) (finding plaintiff student journalists lacked standing on appeal because they had graduated before the district court entered a judgment in their favor), *aff'd in part*, 895 P.2d 765 (Or. 1995) (holding plaintiff student journalists lacked standing with the exception of a student who had disciplinary notices placed in his record).

130. Wohl, *supra* note 121, at 13–14.

claims.<sup>131</sup> Further, even if the students raise mixed state and federal questions in their state-constitution claims, they will have to meet the requirements of Article III standing unless the state court's decision rests on adequate and independent state grounds.<sup>132</sup> If the claims lack adequate and independent grounds, students will face the very same Article III standing concerns discussed in Part III.A.2 above and will have forfeited one of the few advantages associated with state-constitution claims.

#### IV. ROUTE 2: LOCAL SCHOOL BOARDS CAN ADOPT POLICIES THAT PROTECT ADVISERS FROM RETALIATION BASED ON LAWFUL STUDENT SPEECH

Students may also be able to seek refuge from indirect censorship by asking their local school boards to adopt policies that prohibit retaliation against journalism advisers based on lawful student speech. Because the particulars of school boards vary among jurisdictions, it is useful to first note some of the characteristics common to school board members and the boards they serve on. First, virtually all boards consist solely of members elected in non-partisan elections.<sup>133</sup> The exact number of members per board varies, but the vast majority have between five and eight members.<sup>134</sup> Seats are generally held for staggered terms of four years or less<sup>135</sup> and are acquired through relatively low-cost campaigns.<sup>136</sup> Roughly two-thirds of boards delegate at least some governance func-

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131. *Desilets v. Clearview Bd. of Educ.*, 647 A.2d 150, 154 (N.J. 1994) (“[B]ecause this case can be decided on federal constitutional grounds, we have no reason to consider the State constitutional claim.”).

132. *Michigan v. Long*, 463 U.S. 1032 (1983) (“[W]e find that we have jurisdiction in the absence of a plain statement that the decision below rested on an adequate and independent state ground.”). For further discussion of the “adequate and independent state ground” rule, see 4 AM. JUR. 2d §§ 44–49 (2010).

133. FREDERICK M. HESS, NATIONAL SCHOOL BOARDS ASSOCIATION, SCHOOL BOARDS AT THE DAWN OF THE 21ST CENTURY 32–33 (2002), available at <http://www.nsba.org> (under the “School Governance” drop-down select “Other Board Resources”) [hereinafter “NSBA SURVEY”]. This study reported that 96.2% of school board members were elected rather than appointed and that more than 89% of school boards members were elected in apolitical, nonpartisan elections. *Id.* at 33.

134. *Id.* at 28.

135. *Id.* at 29 (reporting that 63.2% of board members served four-year terms, while 30.4% served terms less than four years. Only 6.5% of board members serve terms longer than four years).

136. *Id.* at 34–35 (reporting that 75.6% of board members spent less than \$1,000 on their election or re-election campaign, the majority of which came from personal assets).

tions to committees, which may include a sub-quorum number of board members.<sup>137</sup> Although the exact structure and type of committees present may vary from board-to-board, most have standing committees dedicated to budget/finance, building facilities, and policy.<sup>138</sup>

The characteristics of board members themselves are relatively homogenous. The average board member is a white<sup>139</sup> male<sup>140</sup> with a household income between \$50,000 and \$149,000 per year.<sup>141</sup> He has at least a four-year college degree<sup>142</sup> and is almost certainly more than forty years old.<sup>143</sup> Although he is not paid for serving on the school board,<sup>144</sup> the average board member spends as many as twenty-five hours on board business in a given month.<sup>145</sup> He generally considers himself either “moderate” or “conservative” in his political views.<sup>146</sup>

For school boards, “[p]olicy is the equivalent of local law . . . [It] carries the force of law for public employees, students, or visitors on school property, all of whom are duty-bound to abide by it.”<sup>147</sup> Although policies can address a wide variety of topics, “in short [they] explain what school employees should do, are duty-bound to do, or are forbidden from doing.”<sup>148</sup> The particulars of the policy-development process are generally left to local boards’ discretion, but policy changes most often come about through administrative recommendation, a recommendation from a board committee, or introduction by an ad-hoc citizen advisory

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137. *Id.* at 29.

138. *Id.* (reporting 70.5% of boards have a budget/finance committee; 64.1% a building facilities committee; and 64.0% a policy committee).

139. NSBA SURVEY, *supra* note 133, at 26 (reporting 85.5% of board members are white).

140. *Id.* at 25 (reporting 61.1% of board members are male).

141. *Id.* (reporting 67.6% of board members report an income between \$50,000 and \$149,000).

142. *Id.* at 27 (reporting 67% of board members have at least a four-year degree and 38.3% of those have a graduate degree).

143. *Id.* at 28. The survey results showed that more than 90% of respondents were older than 40, with the following breakdown: 40.1% in the 40–49 range, 33.8% in the 50–59 range, 20.3% in the 60-or-older range. In contrast, only 0.5% of board members fell in the 20–29 range and just 5.4% in the 30–39 range. *Id.*

144. *Id.* at 21 (reporting 67.2% of school boards members receive no compensation for their service).

145. NSBA SURVEY, *supra* note 133, at 17 (reporting 27.3% of board members devote 0–10 hours to board business monthly and 41.8% devote 11–25 hours).

146. *Id.* at 38 (reporting 44.5% of board members consider themselves moderate; 35.7% conservative; and just 15.9% liberal).

147. Edwin C. Darden, *Policy, the Law, and You*, AM. SCH. BOARD J., April 2008, at 54, 54.

148. *Id.* at 55.

committee.<sup>149</sup> Policy is generally adopted by a majority vote, often after two readings in consecutive meetings for public comment.<sup>150</sup>

Policies regulating student publications fall within the bounds of a board's policymaking power, should a board choose to exercise that authority.<sup>151</sup> A policy regulating retaliation against journalism advisers based on student speech, then, is also within that policymaking power. Though there is no centralized registry of school board policies across the nation, at least one school district has adopted an adviser-protection policy at the local level.<sup>152</sup> The Student Press Law Center has also advocated including an adviser-protection policy in its Model Policy Statement for local school districts since at least 1988.<sup>153</sup>

To explore the use of these policies as a shield against adviser-retaliation as indirect censorship, I discuss the advantages and benefits of such a policy in Part IV.A below, noting that local-policy reform is not especially complex and can provide a concrete reference for administrators. I then discuss the disadvantages and risks of such a policy in Part IV.B, noting the institutional difficulties in proposing, adopting, maintaining, and enforcing these policies at the local board level.

### **A. Adoption of a School Board Adviser-Protection Policy Can Be Relatively Simple and May Provide A Bulwark Against Pressure to Retaliation Against Advisers**

The policy-development process for most school boards is relatively simple—at least compared to the legislative process in a state legislature or litigation in state or federal courts. The policies of the Los Angeles Unified School District (“LAUSD”) Board of Education—the largest

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149. See IOWA ASSOCIATION OF SCHOOL BOARDS, SCHOOL BOARD MEMBER HANDBOOK 36 (2009), available at <http://www.ia-sb.org/> (search “2009 school board member handbook”).

150. *Id.* at 37.

151. Indeed some states, such as Iowa and California, *require* local boards adopt a student publications code in their policy manuals. See IOWA CODE § 280.22(4) (2008); CAL. EDUC. CODE § 48907(b) (West 2008).

152. See Board Policy 502.2, Johnston Community School District (2009), *amended*, Board Policy 502.2, Johnston Community School District (2010). The 2001, 2009 and 2010 version of these policies can be found in Appendix B at the end of this Article. In the interest of full disclosure, the author served on the Johnston Community School District Board of Directors when Board Policy 502.2, including the adviser-protection provision, was adopted in 2009.

153. *Model Guidelines for High School Student Media*, STUDENT PRESS L. CENT. (1998), <http://www.splc.org/knowyourrights/legalresearch.asp?id=6>. The SPLC also submitted a version of these model guidelines in its amicus brief in the *Hazelwood* case. SPLC Hazelwood Brief, *supra* note 82, at \*8a–9a.

popularly-elected school board in the country—are generally representative of most school boards’ policy-development procedures. In LAUSD, any community member, including students and parents, may make a written request to have an item placed on the board’s agenda for discussion, subject to requirements of notice and form.<sup>154</sup> That request is then forwarded to an appropriate committee for discussion and then referral to the full board.<sup>155</sup> Once referred to the full board, an individual board member must then move for adoption of that policy.<sup>156</sup> That motion must be seconded,<sup>157</sup> and is subject to approval by an up-or-down vote, requiring a majority of a quorum of board members.<sup>158</sup> Applying these general procedural requirements to the proposal of an adviser-protection policy is relatively simple. In the most ideal of circumstances, a community member could propose a policy, see it referred to committee, find supportive board members to move and second adoption, and have a final vote for approval within a month’s time.

Among the steps required for approval, the first step—drafting an appropriate policy—may seem the most daunting, especially for non-lawyers. However, persons hoping to propose an adviser-protection policy in their district need not necessarily be trailblazers; at least one other school district has adopted an adviser-protection policy<sup>159</sup> and the Kansas and California statutes discussed in Part V below could provide a strong framework or template. In addition, adding a paragraph or policy subsection concerning adviser-retaliation shouldn’t require radical alteration of a district policy’s structure, as policies concerning student-press law issues are already required to contain a certain level of specificity. For example, they must detail the standards used in school officials’

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154. For example, LAUSD appears to allow any party to submit an item, so long as the request is presented in writing to the board secretary. Los Angeles Unified School District Policy 132 (2010), available at <http://laschoolboard.org/files/BoardRules1-10.pdf>. Other districts more explicitly state who may submit policy recommendations. *E.g.* Des Moines Public School District Policy 221, available at <http://www.dmps.k12.ia.us/Departments/Administration/AdministrativePoliciesProcedures/Series200.aspx> (“Policies may be proposed by any member of the board, the Superintendent of Schools, a lay group or organization, any citizen of the district or a member of the professional staff with the approval of the superintendent.”).

155. *Id.* at Policy 132.

156. *Id.* at Policy 72.

157. *Id.* at Policy 71.

158. *Id.* at Policy 94. To be clear, the single-vote-adoption described here is only accurate for districts that require a single reading for new policies. Some districts may self-impose a two-reading requirement for adoption of new policies, requiring policies be read and brought for public comment in two consecutive meetings. *See* IOWA ASSOCIATION OF SCHOOL BOARDS, *supra* note 149, at 37.

159. *See supra* note 152.

determinations,<sup>160</sup> define legal terms concerning prohibited speech,<sup>161</sup> provide adequate notice to students and other parties,<sup>162</sup> and provide opportunities for appeal in a reasonably brief amount of time.<sup>163</sup> Promulgating regulations that address the conduct of the district in relation to a certain employee—the journalism adviser—is not particularly different from the type of regulations likely already present.

In a practical sense, a local adviser-protection policy puts a relatively concrete barrier between advisers and administrative retaliation. For example, if a community member or parent calls the principal to demand he take action against an adviser because of controversial editorials in the student newspaper, the principal can rely on clear-cut district policies instead of “fuzzy concept[s] like ‘the *Tinker* standard for student free speech.’”<sup>164</sup> In all likelihood, it will be much easier for a principal to show the complaining parties a one- or two-page policy taken from the district policy manual on his desk than it is for him to synthesize the complex points of law made in the combined 128 pages of the *Tinker*, *Bethel*, *Hazelwood*, and *Frederick* decisions.<sup>165</sup> A district adviser-protection policy would also prevent the principal from personally taking retaliatory action against an adviser because the policy gives the district superintendent’s office the authority—without additional Board of

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160. *Nitzberg v. Parks*, 525 F.2d 378 (4th Cir. 1975) (requiring a school district include a definition of “substantial disruption” in board policies and administrative procedures concerning censorship of student speech).

161. *Hall v. Bd. of Sch. Com’rs of Mobile Cnty., Ala.*, 681 F.2d 965 (5th Cir. 1982) (finding that school district policy had to define key terms, such as “distribution,” “political or sectarian,” and “special interest” in order for its policy to survive constitutional scrutiny). The Fourth Circuit, in *Baughman v. Freienmuth*, also discussed this requirement at length, noting that “use of terms of art such as ‘libelous’ and ‘obscene’ are not sufficiently precise and understandable by high school students and administrators untutored in the law to be acceptable criteria. Indeed, such terms are troublesome to lawyers and judges. No judge other than a justice of the Supreme Court has confessed that obscenity ‘may be indefinable.’” 478 F.2d 1345, 1350 (4th Cir. 1973).

162. *Nitzberg*, 525 F.2d at 383.

163. *Hall*, 681 F.2d at 973.

164. Tyler Buller, *Stirring the Pot: Policies That Give Your Student Journalists the Freedom to Learn Benefit the Students and the District, Too*, AM. SCH. BOARD. J., June 2010, at 25, 26, available at [www.splc.org/pdf/StirringthePot\\_Buller.pdf](http://www.splc.org/pdf/StirringthePot_Buller.pdf).

165. See *Tinker v. Des Moines Indep. Cmnty. Sch. Dist.*, 393 U.S. 503 (1969) (23 pages); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986) (21 pages); *Hazelwood Sch. Dist. et al. v. Kuhlmeier et al.*, 484 U.S. 260 (1988) (30 pages); *Morse v. Frederick*, 551 U.S. 393 (2007) (54 pages). In addition, even if a principal were able to effectively synthesize these four cases, they still do not encompass every possible facet of student-press law. See *supra* Part III.A for further discussion of these cases.

Directors authorization—to direct lower-level administrators to refrain from retaliation.<sup>166</sup>

Beyond the direct effects adviser-protection policies have in preventing retaliation, there is also evidence that school policies generally supportive of student-speech rights contribute to a culture where advisers feel less pressure to interfere with student journalism or infringe on student speech in the first place. For example, advisers in a county with “a particularly strong tradition of supporting student newspaper freedom” reported a statistically significant decrease in measures concerning expectations that an adviser interfere with or censor student work.<sup>167</sup> In the same county, principals were also significantly more likely to disagree with an expectation that advisers censor materials that were unflattering to the school district.<sup>168</sup> The presence of a district policy addressing student-press rights has also been found statistically significant in increasing advisers’ comfort level with students publishing controversial articles.<sup>169</sup> This increase in comfort level likely also reflects a decrease in the perceived risk of retaliation. The effect policies have on district attitudes toward student-speech should not be underestimated; after all, if the district’s attitude is that students should be given wide latitude in pursuing legitimate journalistic investigations, it’s not particularly likely an adviser would face retaliation for students publishing the results of those investigations.

## **B. School Boards’ Political Nature May Be An Obstacle to the Adoption, Maintenance and Enforcement of Adviser-Protection Policies**

Although the policy-development process *can* be simple and straightforward,<sup>170</sup> the politics of local school boards may inhibit boards adopting, maintaining and enforcing adviser-protection policies. Convincing school board members that student journalists need more—not less—protection from censorship is unlikely to be an easy sell. Administrators

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166. Lillian Lodge Kopenhaver, David L. Martinson & Peter Haberman, *First Amendment Rights in South Florida: Views of Advisers and Administrators in Light of Hazelwood*, THE SCH. PRESS REP., Fall 1989, at 11, 17 (reporting that “[i]n several instances since the [student-press-supportive] guidelines were approved, when an administrator tried to censor a publication, he/she was reminded of the guidelines by the superintendent’s office”).

167. *Id.* at 13–16.

168. *Id.* at 16–17.

169. See Filak, Reinardy & Maksl, *supra* note 44, at 376–79.

170. See *supra* Part IV.A.

and other school officials often fear the student press will expose controversial or embarrassing school happenings to the greater community.<sup>171</sup> Indeed, school board members' desired relationship with the student press is likely well summarized by the title of a piece from the *American School Board Journal*: "The student press and the ways you can control it."<sup>172</sup> Although student-speech issues are—at least in theory—nonpartisan in nature, it would not be surprising if the predominantly moderate and conservative leanings of school board members<sup>173</sup> contributed to difficulties in finding support at the board level. The difficulty in making the case for an adviser-protection policy is even greater when student journalists are the ones proposing the policy change, as more than 90% of board members are at least twenty years the students' senior and part of a different generation altogether.<sup>174</sup> In addition, many school districts rely on state associations or independent consulting companies to recommend changes and updates to their policy manual. One of these companies—Northeast Ohio Learning Association ("NEOLA")—serves seven upper-Midwest states and has promoted policies that severely limit student-press rights in favor of tight administrative control.<sup>175</sup> School districts that rely on these mass-produced policies are even more unlikely to consider changes from outside actors, like students proposing an adviser-protection policy.

Even if a school board does adopt an adviser-protection policy, that policy may be subject to repeal by subsequent boards. Although all potential routes to preventing adviser-retaliation are subject to repeal or

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171. See Michael Murray, *I Didn't Always Think Well of the Student Press*, THE SCH. ADMINISTRATOR, March 2008, <http://splc.org/pdf/aasafreepressarticle2.pdf> (for a principal discussing his initial, negative perspective of student journalism); but see Kathleen Klink, *Freeing the Student Press for Their Good and Ours*, THE SCH. ADMINISTRATOR, April 2002, <http://splc.org/pdf/aasafreepressarticle.pdf> (for the perspective of a pro-student-press administrator).

172. M. Chester Nolte, *The Student Press and the Ways You Can Control It*, AM. SCH. BOARD J., March 1978, at 35. The lead of the article also illustrates this attitude, noting, "Before you get crushed, mashed and vilified by your student newspaper, here are a few pointers on the ways you can legally control some of what your student editors have to say." *Id.*

173. See *supra* note 146 and accompanying text.

174. See *supra* note 143 and accompanying text. Some school districts, however, do include student representatives on their boards of education. For a discussion of these student representatives, see generally Lottie L. Joiner, *The Student's Voice*, AM. SCH. BOARD J., January 2003, at 12. For a perspective cautioning against the inclusion of student representatives and student feedback in board policymaking, see *Your Turn*, AM. SCH. BOARD J., March 2003, at 4.

175. Stefanie Dazio, *Pushing Policies: NEOLA's One-Size-Fits-All Restrictions Can Weaken High School Media*, STUDENT PRESS L. CENT. REP., Spring 2010, at 8, available at [http://www.splc.org/news/report\\_detail.asp?id=1550&edition=52](http://www.splc.org/news/report_detail.asp?id=1550&edition=52).

change over time (for example, statutes can be repealed by subsequent legislatures and cases can be overruled by later state or federal courts of last resort), local school board policies are especially susceptible to change because of the small membership of these boards and the high turnover of individual board members.<sup>176</sup> For example, the policy adopted in Johnston, Iowa<sup>177</sup> was repealed just over a year later, following a turnover of three members on a seven-member board.<sup>178</sup>

Students may also run into problems in attempting to enforce an adviser-protection policy. The most problematic aspect of relying on district policies for protection is the lack of extra-district judicial enforcement; students cannot seek injunctive relief to compel a school district to follow its own discretionary policies. As a result, merely having an adviser-protection policy “on the books” is no guarantee against indirect censorship. Ironically, the Board of Education for Hazelwood East High School—home of the now (in)famous *Hazelwood* case—had adopted policies guaranteeing that “[s]tudents are entitled to express in writing their personal opinions” and that “[s]chool sponsored student publications will not restrict free expression or diverse viewpoints within the rules of responsible journalism.”<sup>179</sup> These policies, of course, did nothing to prevent the principal from censoring non-disruptive, student-written stories concerning teenage pregnancy, teenage marriage, and adult divorce.<sup>180</sup> These problems in enforcement raise the question of whether an adviser-protection policy does any good at all if aggrieved students cannot compel enforcement through extra-district actors.

### V. ROUTE 3: STATE LEGISLATURES CAN PASS STATUTES PROHIBITING RETALIATION BASED ON LAWFUL STUDENT SPEECH

As with judge-made state-constitutional law, state legislatures are free to grant protections beyond those afforded by the federal constitution by adopting state statutes. Taking this approach to combat deficiencies in

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176. See *supra* notes 133–135 and accompanying text.

177. See *supra* note 152 and accompanying text.

178. See Todd Erzen, *Board Rescinds Wording Covering Speech*, DES MOINES REG., Sept. 16, 2010, at S1, available at 2010 WLNR 18425237.

179. Brief for Student Press Law Center as Amici Curiae Supporting Respondents, *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (No. 86-836), 1987 WL 864173 at 10–11 (discussing Hazelwood School District Board Policies 348.5 and 348.51).

180. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

the federal First Amendment should be familiar to any scholar of student-press law, as it was the route taken by numerous states following the *Hazelwood* decision in 1988.<sup>181</sup> Currently, seven states have adopted so-called anti-*Hazelwood* statutes<sup>182</sup> and two state boards of education have promulgated anti-*Hazelwood* rules with similar effect.<sup>183</sup> These statutes and rules, with some limited variation among them, re-establish the *Tinker* substantial-disruption standard for student speech, granting student journalists in those states protection beyond that afforded by the federal First Amendment. However, despite granting expansive protections to student journalists, a vast majority of these statutes do not address the problem of adviser-retaliation as indirect censorship.

To explore how statutes might close the loophole of indirect censorship, I discuss existing state adviser-protection statutes as case studies, the political difficulties in adopting state student-press statutes, and potential pitfalls of relying on statutes to eliminate adviser-retaliation.

### A. Existing Statutes as Case Studies: Contrasting the Legislative History of Kansas and California's Adviser-Protection Statutes

Only two states—Kansas and California<sup>184</sup>—have adopted adviser-protection statutes, and the two statutes' roads to adoption couldn't be more different. The Kansas legislative history paints a picture where an adviser-protection clause was largely—if not entirely—ignored by legislators debating a general student-press bill, while the California legislative history reflects a laser-focus on combating the problem of adviser retaliation and closing the existing loophole in state law.

Kansas' statute, originating as S.B. 62 in January of 1991,<sup>185</sup> was an anti-*Hazelwood* statute providing broad protection to student journalists in Kansas public high schools.<sup>186</sup> It was referred out of the Senate Education Committee with amendments unrelated to the adviser-protection clause

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181. For a period account of the anti-*Hazelwood* legislative movement as it unfolded, see generally Wohl, *supra* note 121, at 18–29.

182. See ARK. CODE ANN. §§ 6-18-1201–1204 (2008); CAL. EDUC. CODE § 48907 (2009); IOWA CODE § 280.22 (1988); KAN. STAT. ANN. §§72-1504-1506; MASS. GEN. LAWS ANN. ch. 71, § 82 (2009); OR. REV. STAT. §336.477 (2007); COLO. REV. STAT. § 22-1-120 (2008). For up-to-date information on current and pending state legislation, see *State Legislation*, STUDENT PRESS L. CENT. <http://www.splc.org/knowyourrights/statelegislation.asp> (last visited Oct. 17, 2010).

183. WASH. REV. CODE. § 392-400-215 (2008); 22 PA. CODE § 12.9 (2010).

184. KAN. STAT. ANN. § 72-1506(d) (2008); CAL. EDUC. CODE SEC. 48907(g) (2008).

185. S. JOURNAL, 1991 Leg., 1st Sess., at 29 (Kan. 1991).

186. S.B. 62, 1991 Leg., 1st Sess. (Kan. 1991).

and passed by the full Senate on a 37–2 vote.<sup>187</sup> In the Kansas House, it was referred out of the House Education Committee without amendment and recommended for passage by the full House.<sup>188</sup> S.B. 62 was passed by the full House on a 79–42 vote.<sup>189</sup> A group of twenty-four Representatives voting no entered objections into the Journal, primarily concerning the general nature of the bill, rather than the adviser-protection provision.<sup>190</sup> S.B. 62 was signed by the governor on February 21, 1992.<sup>191</sup> Period news coverage of the bill similarly does not mention the adviser-protection provision.<sup>192</sup> Although the legislative history is relatively scarce, the quiet inclusion of an adviser-protection provision suggests either that its inclusion was considered minor or that legislators originally opposing or supporting the bill in its entirety were not swayed by inclusion of that particular provision.

In stark contrast to the situation in Kansas, California's adviser-protection statute was adopted independently of its general student-press statute and in direct response to the problem of adviser-retaliation as indirect censorship. The California adviser-protection statute, S.B. 1370, was originally introduced in February of 2008.<sup>193</sup> After a hearing in the Senate Judiciary Committee, the bill was recommended to the full Senate on a unanimous 5–0 vote.<sup>194</sup> Despite registered opposition from

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187. S. JOURNAL, 1991 Leg., 1st Sess., at 333 (Kan. 1991).

188. H. JOURNAL, 1992 Leg., 1st Sess., at 1249 (Kan. 1992). Before coming for a full vote on the House floor, the House Committee of the Whole also entered a recommendation for passage. H. JOURNAL, 1992 Leg., 1st Sess., at 1287 (Kan. 1992).

189. H. JOURNAL, 1992 Leg., 1st Sess., at 1302 (Kan. 1992).

190. Specifically, their objections were as follows:

“We vote no on SB 62. It goes far beyond the state purpose of allowing free discussion of controversial issues. Although intended to cover political or controversial subject matter, it also protects bad judgment and bad taste. This concern is compounded by the fact that this will cover grade school and junior high students. In the real world editors and publishers screen materials they publish. The Supreme Court has acknowledged the right to reasonably restrict debate in school publications. Freedoms must be balanced by accountability and responsibility. This bill teaches freedom without responsibility.”

H. JOURNAL, 1992 Leg., 1st Sess., at 1302–3 (Kan. 1992).

191. S. JOURNAL, 1992 Leg., 1st Sess., at 1285 (Kan. 1992).

192. See, e.g., *Free Speech Protections for Students Are Law*, WICHITA EAGLE, Feb. 22, 1992, at 3D; *Community Colleges Not Covered By Publications Act*, *Stephan Says*, WICHITA EAGLE, Nov. 4, 1992, at 3D.

193. LEGISLATIVE COUNSEL'S DIGEST, S.B. 1370, 2008 Leg., Gen. Sess., at 99 (Cal. 2008), available at <http://www.leginfo.ca.gov/bilinfo.html> (select 2007–2008 under “session” and insert “S.B. 1370” in the “Search by Bill Number” field).

194. BILL ANALYSIS, SENATE JUDICIARY COMMITTEE, S.B. 1370, 2008 Leg., Gen. Sess., at 1 (Cal. 2008). This legislative history, as well as the history cited in *infra* notes 195–199, is available online at <http://www.leginfo.ca.gov/bilinfo.html> (select 2007–2008 under “session” and insert “S.B. 1370” in the “Search by Bill Number” field).

the Association of California School Administrators and the California School Boards Association,<sup>195</sup> the final bill passed the full Senate on a 31–2 vote.<sup>196</sup> The bill passed the Assembly on a 67–6 vote,<sup>197</sup> after adding language to clarify legislative intent regarding school districts’ ability to discipline teachers that fail to meet instructional standards.<sup>198</sup> It was signed by the governor on September 28, 2008.<sup>199</sup> From the outset, the bill’s author noted:

[S]ince passage of [California’s anti-*Hazelwood* statute], some administrators have tried to control student speech by threatening, disciplining, demoting, or even firing faculty members, including journalism advisers. The protections provided in current law become worthless if administrators are allowed to continue to indirectly control student speech through this loophole in the law.<sup>200</sup>

As this statement of intent demonstrates, S.B. 1370 was prompted by specific circumstances left unaddressed by the current student-press statute, unlike the general student-press statute adopted in Kansas.

Although the adviser-protection statutes in California and Kansas came about through starkly different routes, they must be seen as success stories, given that the other forty-eight states—including the other seven states with anti-*Hazelwood* statutes or regulations—have yet to adopt adviser-protection provisions in their own state codes.

## **B. The Political Nature of State Legislatures May Prevent Adoption of an Adviser-Protection Statute**

As a general matter, it appears that passing student-press legislation is a very difficult endeavor. In the first eight years after the *Hazelwood* decision, roughly 83% of efforts (24 of 29) to pass anti-*Hazelwood*

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195. BILL ANALYSIS, SENATE RULES COMMITTEE, S.B. 1370, 2008 Leg., Gen. Sess., at 4–5 (Cal. 2008). Specifically, the Association of California School Administrators argued that the bill was “overly broad in that it protects all teachers, not just journalism teachers. ASCA asserts that the bill could lead to teachers using freedom of speech to get out of discipline, transfer or other reprimands.” *Id.* at 5.

196. S. JOURNAL, 2008 Leg., Gen. Sess., at 4782 (Cal. 2008).

197. ASSEM. JOURNAL, 2008 Leg., Gen. Sess., at 5737 (Cal. 2008).

198. BILL ANALYSIS, SENATE THIRD READING, 2008 Leg., Gen. Sess., at 4 (Cal. 2008).

199. COMPLETE BILL HISTORY, S.B. 1370, 2008 Leg., Gen. Sess., at 1 (Cal. 2008).

200. BILL ANALYSIS, SENATE JUDICIARY COMMITTEE, S.B. 1370, 2008 Leg., Gen. Sess., at 3 (Cal. 2008).

statutes at the state level failed.<sup>201</sup> Opposition to these measures appears to come largely from state school administrator and school board associations.<sup>202</sup> In Illinois, pressure from administrators was so significant that the governor vetoed a state student-press statute passed by nearly-unanimous, veto-proof majorities in both houses.<sup>203</sup> The Illinois legislature's eventual refusal to override the veto demonstrates just how effectively school officials can lobby against student-press statutes.<sup>204</sup> Other opponents have emerged in different state contexts, such as the unexpected editorial opposition from professional media in Colorado.<sup>205</sup>

Even in a state legislature that is generally supportive of student-press rights, certain specific components of legislation—including adviser-protection provisions—are likely to be lost along the way in legislative compromise. For example, a companion to the bill that eventually became Iowa's anti-*Hazelwood* statute originally included an adviser-protection provision.<sup>206</sup> When the sponsoring state representative moved for adoption of an amendment to replace the Senate Bill (lacking an adviser-protection provision) with the House Bill (including the adviser-protection provision), it lost on a 31–51 voice vote.<sup>207</sup> The final Senate Bill (lacking an adviser-protection provision) easily passed the House 80–14<sup>208</sup> and the Senate 39–5,<sup>209</sup> before the governor signed it on May 11, 1989.<sup>210</sup> Similarly, in Oregon, the Senate Committee on Judiciary removed the adviser-protection provision originally included in the stu-

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

202. See *supra* note 195 and accompanying text; *accord So Close They Could Smell It: Illinois Lawmakers Back Off Support for Anti-Hazelwood Law After 11th Hour Opposition by School Officials*, STUDENT PRESS L. CENT. REP., Nov. 17, 1997, [http://splc.org/news/newsflash\\_archives.asp?id=44&year=1997](http://splc.org/news/newsflash_archives.asp?id=44&year=1997) (“Claiming that the bill would create greater liability for school boards, the School Management Alliance, a coalition of school boards, principals and other school administrators from throughout the state, asked residents to urge senators to vote no on the [bill].”).

203. *Illinois Governor Vetoes Anti-Hazelwood Legislation*, STUDENT PRESS L. CENT. (Aug. 22, 1997), [http://splc.org/news/newsflash\\_archives.asp?id=28&year=1997](http://splc.org/news/newsflash_archives.asp?id=28&year=1997). The bill passed the Illinois House 109–4 vote and the Illinois Senate on a unanimous 57–0 vote. *Id.*

204. See *supra* note 202 and accompanying text.

205. Wohl, *supra* note 121, at 34.

206. See H.F. 487, 73rd Gen. Assem., Reg. Sess. (Iowa 1989). H.F. 487, if adopted, would have amended the Iowa Code to include, “A journalism advisor shall not be disciplined, fired, transferred, or removed from the journalism advisor’s position for refusing to suppress free expression rights of students journalists protected under this section.” *Id.*

207. H. JOURNAL, 73rd Gen. Assem., Reg. Sess., at 1435 (Iowa 1989).

208. *Id.* at 1436-37.

209. S. JOURNAL, 73rd Gen. Assem., Reg. Sess., at 1712–13 (Iowa 1989).

210. H. JOURNAL SUPPLEMENT, 73rd Gen. Assem., Reg. Sess., at 2124 (Iowa 1989).

dent-press law<sup>211</sup> before the statute's eventual passage on a 16–14 vote in the Senate<sup>212</sup> and a 39–21 vote in the House.<sup>213</sup> The one-vote margin in the Oregon Senate likely reflects that the adviser-protection provision was dropped as part of a larger compromise. More recently, a Nebraska bill reintroduced in the spring of 2011 also had its adviser-protection provision dropped to increase the likelihood of the bill's passage.<sup>214</sup> These bill histories suggest that the legislative process and legislative bargaining bear a substantial risk losing an adviser-protection along the way to passing a student-press statute.

### C. State Statutes Without Enforcement Mechanisms and Requirements that Local School Boards Adopt Consistent Policies May Be Ineffective

Examples abound where, in spite of state statutes that impose additional protections for student journalists, censorship has continued. Iowa school administrators have attempted to ban critical editorials from a school newspaper<sup>215</sup> and Colorado school board members have attempted to promulgate lists of “inappropriate” topics for student publications,<sup>216</sup> to name just two. Both the Iowa and Colorado statutes lack any explicit independent-enforcement mechanism that would allow aggrieved students to remedy violations.<sup>217</sup> This effectively leaves aggrieved students in the dark, unsure of exactly where to turn for vindication of their rights.

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211. SENATE AMENDMENTS TO A-ENGROSSED H. B. 3279, 74th Leg. Assem., Reg. Sess., at 1 (Or. 2007).

212. S. JOURNAL, 74th Leg. Assem., Reg. Sess., at 182 (Or. 2007).

213. H. JOURNAL, 74th Leg. Assem., Reg. Sess., at 215 (Or. 2007). Interestingly, the number of yes votes in the House remained constant both before and after the adviser-protection policy. Compare *id.* at 215, with *id.* at 150.

214. See *Neb. Legislator Reintroduces Student Speech Bill: New Language Addresses Opponent Concerns*, STUDENT PRESS L. CENT. (Feb. 4, 2011), <http://www.splc.org/news/newsflash.asp?id=2185>.

215. Bruce L. Plopper & William D. Downs, Jr., *Arkansas Student Publications Act: Implementation and Effects*, JOURNALISM AND MASS COMM. EDUCATOR, Spring 1998, at 74, 75 (citing *Free Press Law Prevents Principal from Acting on Discipline Threats*, STUDENT PRESS L. CENT. REP., Spring 1991, at 23).

216. *Id.* (citing *Story on Gay Teen Life Sparks Controversy*, STUDENT PRESS L. CENT. REP., Spring 1992, at 19).

217. See COLO. REV. STAT. ANN. § 22-1-120 (2008); IOWA CODE ANN. § 280.22 (2008). To be clear, it is likely undisputed that students could bring suit through various state deprivation-of-rights claim, should they so choose. This, however, is not explicitly addressed in the statute—and perhaps more importantly, is not made clear in a way that an aggrieved high school journalist would comprehend.

One route to strengthen the effectiveness of state statutes is to include a requirement that local school districts adopt policies consistent with, or even identical to, the state statute. The Massachusetts legislature used this approach in response to the *Hazelwood* decision. From its enactment in 1974 through 1988, the Massachusetts statute did not require local school districts adopt the broad protections granted by the statute; in other words, it was entirely aspirational and ultimately optional.<sup>218</sup> However, just one week after the *Hazelwood* decision was handed down, a state representative filed a bill to compel school districts to incorporate the statute's requirements into their local policies. That bill remains law in Massachusetts today.<sup>219</sup> Although a statute addressing student-press rights arguably *should* be binding on school districts without requiring adoption of consistent local policies, survey data supports the notion that advisers—and by extension principals—are more concerned with what their local policies say than the state code.<sup>220</sup>

## VI. THE BEST ROUTE TO ENDING RETALIATION AGAINST ADVISERS IS THROUGH STATE LEGISLATURES ADOPTING STATUTES THAT PROHIBIT SUCH RETALIATION

On balance, the best approach to ending adviser retaliation is state legislatures adopting statutes that prohibit retaliation. A properly tailored statute, such as the model statute discussed below, can incorporate the benefits of all three approaches—litigation, school board policies and state statutes—and minimize the disadvantages of each. Specifically, a properly tailored statute can provide access to appropriate remedies (like constitutional litigation) and mitigate problems of enforcement, while minimizing the hurdle of constitutional standing and risk of local policies' swift repeal. Although no approach is perfect, adopting a state statute provides a balanced, practical approach to stopping adviser retaliation.

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218. Wohl, *supra* note 121, at 22, n.95.

219. *Id.* at 22, n.95. See also MASS. GEN. LAWS ANN. § 71.82.

220. Filak, Reinardy & Maksl, *supra* note 44, at 376–79.

## **A. A Proposed Model Statute: How 207 Words Can Solve the Problem of Adviser Retaliation as Indirect Censorship**

Though there are many formulations of what a model adviser-protection statute might contain,<sup>221</sup> the model proposed here attempts to address the issues discussed in Parts V.B and V.C below in a concise manner, in language that aggrieved student journalists and their advisers can understand without the benefit of legal training. This model statute is also written in a generic format, for a state that already has a student-press law in effect. References to “the state student-press statute” and “the state constitution” would appropriately be replaced with appropriate citations, such as Iowa Code § 280.22 and the Iowa Constitution.

### **Proposed Model Adviser-Protection Statute**

#### **1. Definitions**

a. “Protected speech” refers to any speech or expressive conduct protected by this section, local board policy, the state student-press statute, the state constitution, or the United States Constitution.

b. “Student” refers to all persons enrolled in public high schools in this state.

#### **2. Retaliation Against School Employees Prohibited**

a. No employee shall be transferred, reassigned, demoted, suspended, disciplined or otherwise retaliated against for:

b. Acting solely to protect a student engaged in protected speech;

c. Refusing to abridge or infringe upon protected speech; or

d. Disobeying an unlawful order to regulate or otherwise interfere with or inhibit protected speech.

#### **3. Cause of Action for Aggrieved Students**

a. Students enrolled in a public high school may commence a civil action to recover damages and obtain injunctive or declaratory relief as determined by a court of competent jurisdiction for violations of this section.

b. A student’s cause of action shall not expire upon graduation if the violation of this section occurred while the student was enrolled in a public high school.

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221. For examples, see Wohl, *supra* note 121, at 29–33; *Model Legislation to Protect Student Free Expression Rights*, STUDENT PRESS. L. CENT. (2010), available at <http://www.splc.org/knowyourrights/legalresearch.asp?id=7>.

#### 4. Requirement for Adoption of Consistent Local Policies

- a. All school districts incorporated in this state must adopt a student publications policy consistent with the requirements of this section, including its definition of protected speech.

### **B. Properly Tailored Statutes Can Incorporate the Benefit of Access to Appropriate Remedies from Litigation and Eliminate Problems of Standing and Uncertainty**

With careful drafting, an adviser-protection statute can incorporate the benefits of constitutional litigation, without any of the drawbacks. The most appealing aspect of using state- or federal-constitution litigation to vindicate student-press rights harmed by adviser-retaliation is the ability to seek a specialized remedy, appropriate to the harm suffered.<sup>222</sup> However, the same benefit can be achieved with a state statutory claim under this model adviser-protection statute. Section 3(a) of the proposed statute explicitly allows students to seek compensatory, injunctive, or declaratory relief, clearly laying out aggrieved students' options. Based on the proposed model statute's language, there is no reason that every remedy available through constitutional litigation would not also be made available through litigation under the statute.

The proposed model statute also eliminates the problems of standing and outcome-uncertainty common to state- and federal-constitution litigation.<sup>223</sup> As discussed in Part III.A.2 above, Article III standing can be a significant barrier to student journalists when they graduate before the case arrives at a court of last resort. This problem is eliminated in section 3(b) of the proposed model statute by explicitly allowing a state statutory claim to survive graduation, bypassing a state's common-law mootness or standing limitation, so long as the violation occurred while the student was enrolled in one of the state's public high schools. Although no statute can come complete with pre-packaged precedent and judicial construction, the model statute is also likely to result in far less ambiguity and uncertainty than would result from state- or federal-constitutional litigation. In large part, this is because the statute's lan-

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222. See *supra* Part III.A. For example, the remedy could be a standard injunction (ordering an adviser be restored to her position), a temporary restraining order (preventing an adviser from being terminated for refusing to censor protected speech), a declaratory order (detailing the rights of students or whether a school policy violates student-press rights), or even damages (recovering costs student incurred following seizure of self-published materials).

223. See *supra* Part III.

guage (“No employee shall be transferred, reassigned, demoted, disciplined or otherwise retaliated against . . .”) can more easily be applied to the facts of a case than the federal First Amendment (“Congress shall make no law . . . abridging the freedom of speech, or of the press”)<sup>224</sup> or its state counterparts (“A law may not restrain or abridge liberty of speech or press.”).<sup>225</sup> The clarity of the statute should also provide a better reference for student litigants to assess whether or not to bring a claim.

### **C. State Statutes Can Incorporate the Concrete-Reference Benefit of Local School Board Policies and Mitigate Problems of Enforcement, But Are Still Subject to Repeal**

Statutes can also incorporate the strengths of local school board policies to combat adviser-retaliation, without running into problems of enforcement. One of—if not the—strongest advantages to using local board policies to combat adviser-retaliation is that policies provide a concrete reference point for school administrators and officials in dealing with community members and parents.<sup>226</sup> However, this advantage can also be realized by adopting a state statute that requires local school districts adopt rules or policies consistent with statutory requirements. In the model statute, this is accomplished in section four. Through that statutory provision, drafters can ensure that local school districts adopt adviser-protection policies in board policy manuals, providing administrators and board members additional education concerning the law (potentially heading off future conflicts) and giving administrators a clear-cut local policy for use in addressing community members or parents. Because as few as 14% of American school districts have adopted publication policies, even one additional state requiring policy-adoption can have a significant impact on attitudes toward scholastic journalism and may ultimately benefit students.<sup>227</sup>

In addition, unlike the problem of enforcement with local board policies—where students have no extra-district judicial-enforcement mech-

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224. U.S. CONST. amend. I.

225. *E.g.*, C.A. CONST. art. I, §2.

226. *See supra* Part IV.

227. KRISTOF, *supra* note 7, at 26. Because Kristof’s study was completed in 1980, there is some risk that the results may be dated. At the time of publication, there were no other available aggregate analyses of school publications policies.

anism<sup>228</sup>—the proposed model statute can be enforced through state courts in ordinary statutory litigation. As a result, instead of having to depend on intra-district appeals procedures (such as asking the superintendent to overturn a principal’s decision to discipline an adviser), students can turn to the courts and seek compensatory, injunctive, and declaratory relief. This ensures that indirect censorship can actually be stopped in its tracks, rather than hoping mere passive disapproval by school officials will end the problem.

One disadvantage of school board policies—the susceptibility to political change and potential repeal<sup>229</sup>—cannot be eliminated entirely by pursuing an adviser-protection statute. Although legislative bodies in all fifty states are larger than five-to-seven-member school boards, terms of office are generally either the same length or even shorter. As a result, high turnover is still possible and adviser-protection statutes may be subject to repeal by subsequent legislatures. Pursuing a statute through the legislative process, however, mitigates this risk. State legislatures are significantly more institutionally complex than school boards and thus more resistant to changes in status quo or repeal of past actions. Once an adviser-protection bill is enacted and signed into law, it can only be repealed by a new bill. This new bill would have to pass both houses of the legislature and survive a veto (or be vetoed and subsequently overridden) in order to repeal the adviser-protection statute. This is significantly less likely than a five-member school board having three new members vote “yes” on a policy to repeal the adviser-protection policy at a subsequent meeting. Tellingly, no state (so far) has repealed an enacted student-free-press law.

## VII. CONCLUSION

A model adviser-protection statute is not and never will be an instant panacea to the problem of indirect censorship. In order to fully reap the benefits of a statute, states and interest groups—press associations, scholastic journalism organizations, First Amendment advocates, professional media, and others—must work to educate and inform students, advisers, administrators and school board members about the law and

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228. *See supra* Part IV.B.

229. *See supra* Part IV.B.

how it affects them. Without a sustained educational campaign, adviser-protection statutes may fall prey to the same problems as anti-*Hazelwood* statutes, where as many as one-third of advisers misidentify whether or not their state has passed such a law.<sup>230</sup> Student-press advocates and attorneys must also remain vigilant, devoting time to counseling student editors and providing pro-bono representation to students and advisers facing censorship in spite of adviser-protection statutes.

Concerns facing the student press—including adviser-retaliation as indirect censorship—are not to be taken lightly. In terms of both substantive quality and sheer numbers, student publications have intrinsic value in giving students a voice. In a public-high-school world where most students cannot vote, hold office, or otherwise explicitly participate in the political process, student newspapers provide a place where “students express their views, suggestions and criticisms”<sup>231</sup> and contribute to a dialogue between faculty, administrators, students, and the community. Today’s student newspapers are not a small, irrelevant niche of the journalism field: by some accounts, “[t]he majority of newspapers in America are student newspapers” and “[t]he majority of journalists in America are student journalists.”<sup>232</sup> Providing protection against adviser-retaliation will help safeguard the future of student journalism and prevent this student-press majority from being silenced.

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230. See Filak, Reinardy & Maksl, *supra* note 44, at 382, n.37.

231. Krafte, *supra* note 91, at 403 (footnote omitted).

232. J. Marc Abrams & S. Mark Goodman, *End of an Era? The Decline of Student Press Rights in the Wake of Hazelwood School District v. Kuhlmeier*, DUKE L. J. 706, 732 (1988).

## Appendix A

### PROPOSED MODEL ADVISER-PROTECTION STATUTE

#### (ADAPTED FOR IOWA LAW)

#### 1. Definitions

- a. “Protected speech” refers to any speech or expressive conduct protected by this section, local board policy, Iowa Code § 280.22, Section 7 of the Iowa Constitution, or the First Amendment of the United States Constitution.
- b. “Student” refers to all persons enrolled in public high schools in the state of Iowa.

#### 2. Retaliation Against School Employees Prohibited

- a. No employee shall be transferred, reassigned, demoted, suspended, disciplined or otherwise retaliated against for:
  - i. Acting solely to protect a student engaged in protected speech;
  - ii. Refusing to abridge or infringe upon protected speech; or
  - iii. Disobeying an unlawful order to regulate or otherwise interfere with or inhibit protected speech.

#### 3. Cause of Action for Aggrieved Students

- a. Students enrolled in a public high school may commence a civil action to recover damages and obtain injunctive or declaratory relief as determined by a court of competent jurisdiction for violations of this section.
- b. A student’s cause of action shall not expire upon graduation if the violation of this section occurred while the student was enrolled in a public high school.

#### 4. Requirement for Adoption of Consistent Local Policies

All school districts incorporated in the state of Iowa must adopt a student publications policy consistent with the requirements of this section, including its definition of protected speech.

## Appendix B

### JOHNSTON COMMUNITY SCHOOL DISTRICT BOARD POLICY 502.2: FREEDOM OF EXPRESSION

(ADOPTED MAY 7, 2001)<sup>233</sup>

Students of the School District are protected in their exercise of freedom of expression by the First Amendment to the Constitution of the United States and the Constitution of the State of Iowa. Understanding the meaning of the First Amendment's protection of free speech is an important part of the learning process, and school is an appropriate place for inquiry and learning through the expression and exchange of ideas.

Student expression must be appropriate to assure that the students learn and meet the goals of the school activity and that the potential audience is not exposed to material that may be harmful or inappropriate for their maturity. Students will be allowed to express their viewpoints and opinions as long as the expression is responsible. The expression shall not, in the judgment of the administration, encourage the breaking of laws, cause defamation of persons, be obscene or indecent, or cause a material and substantial disruption to the educational program. The administration, when making this judgment, shall consider whether the activity in which the expression was made is school-sponsored and whether review or prohibition of the student's speech furthers an educational purpose. Further, the expression must be done in a reasonable time, place, and manner that is not disruptive to the orderly and efficient operation of the school district.

Students who violate this policy may be subject to disciplinary measures, up to and including expulsion. Employees shall be responsible for insuring students' expression is in keeping with this policy. It shall be the responsibility of the superintendent to develop administrative regulations regarding this policy.

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233. Adopted on a 6-0 vote (one member absent). See E-mail from Janet Jensen, Secretary to the Superintendent, Jan. 28, 2011. On file with author.

## Johnston Community School District Board Policy 502.2

(As Amended April 13, 2009) [Additions Italicized]<sup>234</sup>

Students of the School District are protected in their exercise of freedom of expression by the First Amendment to the Constitution of the United States and the Constitution of the State of Iowa. Understanding the meaning of the First Amendment's protection of free speech is an important part of the learning process, and school is an appropriate place for inquiry and learning through the expression and exchange of ideas.

Student expression must be appropriate to assure that the students learn and meet the goals of the school activity and that the potential audience is not exposed to material that may be harmful or inappropriate for their maturity. Students will be allowed to express their viewpoints and opinions as long as the expression is responsible. The expression shall not, in the judgment of the administration, encourage the breaking of laws, cause defamation of persons, be obscene or indecent, or cause a material and substantial disruption to the educational program. The administration, when making this judgment, shall consider whether the activity in which the expression was made is school-sponsored and whether review or prohibition of the student's speech furthers an educational purpose. Further, the expression must be done in a reasonable time, place, and manner that is not disruptive to the orderly and efficient operation of the school district.

Students who violate this policy may be subject to disciplinary measures, up to and including expulsion.

Employees shall be responsible for insuring students' expression is in keeping with this policy. *However, an employee shall not be dismissed, suspended, disciplined, reassigned, transferred, or otherwise retaliated against solely for acting to protect a pupil engaged in the conduct authorized under this section or Board Policies 504.3 or 504.4, or refusing to infringe upon conduct that is protected by this section, the First Amendment to the United States Constitution, or Section 7 of Article I of the Iowa Constitution.*

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234. Adopted on a 4-3 vote (all members present). See MINUTES, JOHNSTON COMMUNITY SCHOOL DISTRICT BOARD OF DIRECTORS, April 13, 2009, available at <http://www.johnston.k12.ia.us/boardofeducation/minutes/2009/041309.pdf>.

*It is the intent of the Board of Education that nothing in this section shall be construed to diminish the district's ability to take actions authorized by current law in order to maintain instruction consistent with statewide academic standards.*

It shall be the responsibility of the superintendent to develop administrative regulations regarding this policy.

## **Johnston Community School District Board Policy 502.2**

**(As Amended Sept. 13, 2010)**<sup>235</sup>

Students of the School District are protected in their exercise of freedom of expression by the First Amendment to the Constitution of the United States and the Constitution of the State of Iowa. Understanding the meaning of the First Amendment's protection of free speech is an important part of the learning process, and school is an appropriate place for inquiry and learning through the expression and exchange of ideas.

Student expression must be appropriate to assure that the students learn and meet the goals of the school activity and that the potential audience is not exposed to material that may be harmful or inappropriate for their maturity. Students will be allowed to express their viewpoints and opinions as long as the expression is responsible. The expression shall not, in the judgment of the administration, encourage the breaking of laws, cause defamation of persons, be obscene or indecent, or cause a material and substantial disruption to the educational program. The administration, when making this judgment, shall consider whether the activity in which the expression was made is school-sponsored or has an indirect impact to the school community and whether review or prohibition of the student's speech furthers an educational purpose. Further, the expression must be done in a reasonable time, place, and manner that is not disruptive to the orderly and efficient operation of the school district.

Students who violate this policy may be subject to disciplinary measures, up to and including expulsion.

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235. Adopted on a 4–1 vote (two members absent). See MINUTES, JOHNSTON COMMUNITY SCHOOL DISTRICT BOARD OF DIRECTORS, Sept. 13, 2010, available at <https://eboard.eboardsolutions.com/Meetings/PrintMinutes.aspx?S=100100&MID=107>.

Employees shall be responsible for ensuring students' expression is in keeping with this policy.

It shall be the responsibility of the superintendent to develop administrative regulations regarding this policy.