

EXAMINING THE EFFECTS OF THE *HOSTY V. CARTER* DECISION AND PRIOR
RESTRAINT ON THE COLLEGIATE PRESS: A QUALITATIVE STUDY

A Thesis Presented to
The Faculty of the Graduate School
At the University of Missouri

In Partial Fulfillment
Of the Requirements for the Degree
Master of Arts

By
GLORIA ELENA ENLOE
Dr. Charles Davis, Thesis Committee Chair

MAY 2011

The undersigned, appointed by the dean of the Graduate School,

have examined the thesis entitled

EXAMINING THE EFFECTS OF THE *HOSTY V. CARTER* DECISION AND PRIOR
RESTRAINT ON THE COLLEGIATE PRESS: A QUALITATIVE STUDY

Presented by Gloria Elena Enloe

A candidate for the degree of

Master of Arts

And hereby certify that, in their opinion, it is worthy of acceptance.

Professor Charles Davis

Professor Earnest Perry

Professor Anna Romero

Professor Christina Wells

This work is dedicated to my daughter, Lillianna, and my husband, Shawn. Lillianna was my inspiration to begin this journey, instilling in me the desire to be a role model and the confidence to try. I could not have completed this program without the support, love and encouragement of Shawn. I will forever be grateful to both of them for putting up with me as I struggled and cheering me on when I met with success. We did this together.

ACKNOWLEDGEMENTS

I would like to thank my thesis adviser and committee chair Charles Davis for his advice, guidance and patience throughout this process. Dr. Davis has been an inspiration to me throughout my time in the graduate program, and instilled in me a fire for the First Amendment and the rights of the collegiate press. He was the inspiration for this thesis topic, and I could not have completed this program without his help.

I would also like to thank the other members of my thesis committee: Earnest Perry, Anna Romero and Christina Wells. They have offered wonderful feedback and advice, and have gone to great lengths to find time in their schedules to help me reach my goals.

I also need to thank Sarah Smith-Frigerio for helping me through the thesis process and the graduate program. She was always there to answer any questions I had and made sure I did what I needed to do to graduate.

TABLE OF CONTENTS

Acknowledgements	ii
Abstract	v
Chapter	
1. Introduction.....	1
Purpose Statement	
Definition of Terms	
2. Literature Review.....	10
Theory of Self Governance	
Prior Restraint	
First Amendment Rights of High School Students	
First Amendment Rights of College Students	
3. Research Methodology.....	44
Qualitative Research Paradigm	
Researcher's Role	
Data Collection Type	
Data Recording	
Reporting the Findings	
4. Findings.....	51
Historically Independent Newspapers	
The Role of the Advisor	
The Effects of Prior Restraint on Quality	

The Effects of Prior Restraint on Curriculum	
5. Conclusion.....	67
What Was Learned	
Limitations of the Study	
Suggestions for Future Research	
Appendix.....	82
Bibliography.....	84

EXAMINING THE EFFECTS OF THE *HOSTY V. CARTER* DECISION AND PRIOR
RESTRAINT ON THE COLLEGIATE PRESS: A QUALITATIVE STUDY

Gloria Enloe

Dr. Charles Davis, Thesis Committee Chair

ABSTRACT

The purpose of this study was to determine what effects, if any, the *Hosty v. Carter* decision has had on the collegiate press in the Seventh Circuit. The researcher aimed to determine if student editors of newspapers at public universities in Wisconsin, Indiana and Illinois had encountered instances of prior restraint and were self-censoring or altering the tone of their writing to avoid censorship.

Through a series of in-depth interviews with eight student editors, the researcher found that members of the collegiate press have not experienced any successful prior restraint attempts since the *Hosty* decision was handed down. This is due to the fact that many of the student newspapers were historically independent, funded by a variety of sources, often extracurricular in nature, and served as public forums. The student newspapers were also able to maintain their independence with the help of a supportive faculty advisor.

Research participants also expressed their belief that a policy of prior restraint would have a negative impact on the quality of a student newspaper and the journalism curriculum at a public university.

Chapter 1

Introduction

Schools across the country are meant to serve as learning laboratories for students of all ages. It is in schools that students learn to think critically, form opinions, and become exposed to a “marketplace of ideas.” (Milton, 1644) As it is in schools that students learn to become adults that can live and work in American society, the Supreme Court has long held that students do not shed their Constitutional rights at the schoolhouse gate (*Tinker v. Des Moines Independent School District*, 1969). But in the forty years since *Tinker*, schools and courts have slowly tried to strip away some of the rights enjoyed by student journalists.

One area of particular concern is that of prior restraint. Of all forms of government censorship of the media, prior restraint is the most drastic. Emerson defines prior restraint as the act of government imposing official restrictions on speech before publication (1955). This differs from a system of subsequent punishment, under which a penalty could be imposed upon a speaker making libelous remarks or who published articles that violated the law. With subsequent punishment, speech can take place, but the speaker is held accountable for the content of that speech; with prior restraint, the speech cannot take place at all. That is why Chief Justice Warren Burger said prior restraint is “the most serious and least tolerable infringement on First Amendment rights.” (*Nebraska Press Association v. Stuart*, 1976) While the threat of prosecution

after publication may chill speech and the press, prior restraint freezes it (*Nebraska Press Association v. Stuart*).

Free speech is a principle upon which the United States of America was founded, and the freedom to criticize the government without getting permission ahead of time is essential in a self-governing society, and it's also a practice of the press that has long been protected by the Supreme Court. Despite attempts by various administrations at the local, state and federal levels of government to silence the press, the Court has, on several occasions, blocked or overruled those attempts (see *Nebraska Press Association v. Stuart*, *Near v. Minnesota*, *New York Times Co. v. United States*). All of these cases, though, involved professional publications edited and published by adults. The Court has failed to extend similar protection to student publications.

The classic example of the government allowing prior restraint of a student publication is *Hazelwood School District v. Kuhlmeier*. In that case, the Court upheld a principal's right to pull several articles from a student newspaper before it was published. The reasoning the Court used to allow the silencing of the student press seemed to be in stark contrast to *Tinker v. Des Moines Independent Community School District*. The *Hazelwood* decision, though, involved a high school student newspaper, and the Court stressed, at the time, that it was not taking a position on whether the rationale used in *Hazelwood* would apply at the collegiate level. The Seventh U.S. Circuit Court of Appeals took care of that with *Hosty v. Carter*.

It was with this decision that the Seventh Circuit paved the way for allowing college administrators to review the content of certain student publications prior to publication. Using the *Hazelwood* standard, Judge Easterbrook claimed that college

administrators had the right to regulate expression in student newspapers that were not public forums. Easterbrook claimed it was not clear whether the paper in question in this case, the *Innovator*, was a public forum. The court therefore granted Dean Cater qualified immunity from charges that she violated students' First Amendment rights when she stopped the printing of the *Innovator*.

While the decision only applies to the Seventh Circuit's jurisdiction of Wisconsin, Illinois and Indiana, the Supreme Court has refused to hear the case, which could lead to a similar application of the *Hazelwood* standard in other states. It's not a stretch to believe that other universities in other districts would take cues from *Hosty*; ten days after the ruling, the general counsel for the California State University System sent out a memo telling university presidents that they may have more latitude to censor student newspapers (Pittman, 2007). And the University of Louisiana at Monroe imposed a policy of prior review on its student newspaper (Lipka, 2006). The decision could also embolden administrators wishing to restrict the content of other school activities, such as speakers, plays, and special events (Rooksby, 2007).

Further challenges are possible because the Court has never definitively determined if the *Hazelwood* standard should apply at the university level. It is clear that lower courts need guidance on the issue. The *Hosty* decision does not provide any guidance; it creates further chaos and confusion and worse, establishes a precedent that university officials could receive qualified immunity if they violate a student's First Amendment rights, whereas in the past, the only precedent involved a high school publication (Finnigan, 2005). Ng stresses that the circuit split "opened a qualified

immunity loophole that can easily be exploited by university administrators” (2007, p. 347).

The aim of this study is to determine how the *Hosty v. Carter* decision has affected the collegiate press in the Seventh Circuit, by speaking to members of the collegiate press. The study will ask if, since the decision was handed down, members of the collegiate press have experienced instances of prior restraint, creating a chilling effect on the student press and negatively impacting the journalism curriculum. Instances of prior restraint will include college administrators reviewing articles prior to publication, altering articles prior to publication, or removing articles from a student newspaper prior to publication. For purposes of this study, a faculty advisor editing articles for typos or reviewing articles and making suggestions, in order to uphold journalistic standards, will not be considered prior restraint. Universities, are, after all, learning laboratories, where students are to learn about responsible, professional journalism practices. It would be irresponsible of universities to “idly allow their student journalists to print libelous articles, without any sort of formal reactions or guidance” (Rooksby, 2007, p. 35). Rooksby goes on to note that such a lack of guidance could lead to libel suits against students and a tarnished reputation for the school, which funds newspapers and has the right to “expect professional journalistic practices from the newspaper.” (p. 40) In *Kincaid v. Gibson*, a victory judgment for students challenging a university’s decision to refuse to distribute the student-produced yearbook, the court found that the yearbook was a limited public forum; in other words, a publication that would not be subject to prior restraint, even under the *Hosty* ruling. But the court did point out that the university had a policy of appointing an advisor that, in order to uphold responsible standards of

journalism, could make changes to work submitted by students, as long as such changes did not include the alteration of content (2001). And, in a separate opinion, concurring in part and dissenting in part, Boggs wrote that “some minimum standards of competence could be a reasonable ‘manner’ restriction,” while stressing that viewpoint discrimination would be illegitimate (2001). Therefore, if a faculty advisor reviews articles prior to publication, and suggests making non-content related changes by talking to a student editor, that advisor will not have met the standards of prior restraint set forth in this study

There are three distinct questions that will be examined here: 1) Has the *Hosty v. Carter* decision had a “chilling effect” on the student press in the Seventh Circuit, in that students have experienced instances of prior restraint, and therefore self-censor? 2) Does the collegiate press believe that a policy of prior restraint would negatively impact the quality of a student newspaper? 3) Does the collegiate press believe that a policy of prior restraint would affect the quality of the journalism curriculum, in that the curriculum would not allow students to develop critical thinking skills, exercise judgment, and be prepared for a job in the professional press?

As a student journalist trained in a university outside the reach of the Seventh Circuit, this researcher enjoyed quite a bit of freedom when it came to story selection and content, as well as the tone of my writing. As a professional journalist charged with acting as the Fourth Estate of government, I believe that all journalists should enjoy the freedoms provided by the First Amendment, and not be silenced by any form of government. This type of freedom has to start in institutions of higher education, as it is there that students learn how to become professional journalists. It is in colleges and universities that students must learn to tackle controversial topics, present all sides of a

story, and make decisions that they will soon have to make in the field of journalism. It is impossible to teach students about the important role the press plays in a self-governing society without allowing students to experience the same freedoms and responsibilities that the professional press enjoys and upholds.

Just as this is a topic that is important to journalists, it is one that is clearly important to students. Student journalists, particularly those who are under the specter of the *Hosty* decision, need to know what rights they and their peers have, and whether this decision has impacted the types of stories that are printed in college newspapers. Even students at schools outside the Seventh Circuit should know whether their peers are self-censoring, or facing direct censorship from administrators, as such actions can have an impact on the entire country. Censorship of student publications can also affect the perception of potential employers in the professional press, who may be leery of hiring new graduates who have no experience in covering controversial topics or acting as watchdogs of government. Just as it is important for collegiate journalists to enjoy First Amendment freedoms, it is important for the entire profession of journalism; it will be impossible for the press to continue to carry out its Fourth Estate responsibilities if the reporters who are coming out of school have no experience in fulfilling such obligations.

It is equally important that educators and faculty advisors to student publications understand how the *Hosty* decision has impacted the collegiate press. Faculty members often rely on feedback from their students when it comes to creating and adjusting their curriculum, and this study will let faculty know whether prior restraint can, from a student's point of view, have an impact on the journalism curriculum. It will also be enlightening for advisors to know whether the students who work on college newspapers

are holding back, self-censoring or failing to glean the experiences necessary to one day become working journalists. Such revelations could even hold sway in other jurisdictions where courts will consider challenges to the First Amendment rights of student journalists. This is a topic that should be important to anyone who supports the First Amendment, and anyone who is concerned with the future of journalism.

Purpose Statement

The purpose of this research will be to explore what effects, if any, the *Hosty v. Carter* decision has had on printed student newspapers at the collegiate level. The Supreme Court has a history of striking down prior restraint, with Chief Justice Warren Burger stating in *Nebraska Press Association v. Stuart* that, “If it can be said that a threat of criminal or civil sanctions after publication ‘chills’ speech, prior restraint ‘freezes’ it at least for the time.” (1976) Through a series of in-depth interviews with collegiate journalists attending public universities under the jurisdiction of the Seventh Circuit, this study will seek to determine, from a collegiate journalist’s point of view, if the *Hosty v. Carter* decision has led to instances of prior restraint, which in turn “freeze” speech by causing students to self-censor. The study will also explore whether student journalists believe a policy of prior restraint would have a negative impact on the quality of a student newspaper; students will also be asked if they believe prior restraint would negatively impact a journalism curriculum. Members of the collegiate press will be asked how invested they would be in, and how hard they would work on, a publication deemed a non-public forum; they will also be asked to evaluate whether they were able to develop critical thinking and judgment skills while working on the student newspaper during the course of their college career. At this stage in the research, self-censoring will be

generally defined as choosing not to investigate or write certain stories, or consciously editing one's own writing so as not to anger administrators, for fear of an administrator exercising prior restraint of an article.

Definition of Terms

Prior Restraint: Actions taken by the government to prohibit speech in advance of publication. The rule against prior restraint is derived from English common law and the Supreme Court has called prior restraint the “essence of censorship” and declared it unconstitutional, due to the First Amendment freedom of the press and the due process clause of the Fourteenth Amendment. For this study, actions that will be considered prior restraint include any administrator reviewing a publication prior to it being published, as well as the action of an administrator to edit, cut or remove an article from a publication prior to it being published. A faculty advisor reviewing or editing articles in order to uphold journalistic standards will not be considered prior restraint.

Government: For purposes of this study, government will be defined as any administrator of a public university or college.

Student Publication: Any print newspaper that is run by students. Students must write, edit and distribute the newspaper. The newspaper may or may not be funded by the university or college, and students may or may not receive academic credit for publishing it.

Public Forum: For purposes of this research, a public forum shall be defined as a student-run print newspaper that allows students to express their views about a range of topics, through reporting on and discussing issues important to their campus and local community. Though not all students can write articles for the paper, the paper is

considered as serving as the “voice” of the students at the university or college.

Administrators are not able to review public forums prior to publication and cannot exercise prior restraint.

Non-public Forum: For purposes of this research, a non-public forum shall be defined as a student-run print newspaper that allows students some individual expression, but is subject to prior review and restraint by university or college administrators. Student newspapers that are designed to act as agents of the school will also be considered non-public forums. In this study, student newspapers are considered non-public forums if the college or university has a stated or written policy allowing prior restraint, or if administrators or advisers already actively exercise prior review and restraint.

Journalism Curriculum: Any course in which journalism is taught to college students, including classes in which students publish newspapers. For purposes of this study, any program that allows college students to learn and grow professionally in the field of journalism will be considered part of a journalism curriculum. Therefore, even if students do not receive academic credit for working on the student newspaper, and all writing takes place outside a traditional classroom, students will be allowed to cite their experiences on the student newspaper when asked to evaluate their school’s journalism curriculum.

This study shall be divided into four parts: the review of the literature, methodology, findings and conclusions.

Chapter 2

Review of the Literature

At the heart of the matter of just how much freedom the collegiate journalist should enjoy is the First Amendment. When drafting the Constitution, the country's founding fathers declared that Congress shall make no law abridging the freedom of the press, a declaration that continues to protect the press today. The Supreme Court has also determined that the Fourteenth Amendment prevents the state from interfering with any Constitutional rights of American citizens, including the freedom of speech (Brennan, 1965). During the last century, the Court has taken up a number of cases that examine how much freedom the press enjoys. This study requires a careful examination of the Court's case law involving prior restraint, the rights of students, and the rights of the scholastic press. By examining the Court's decisions, readers can determine if the Seventh Circuit Court of Appeals appropriately applied the *Hazelwood* standard to college newspapers that are not clearly designated as public forums. This will help answer the multi-prong question posed by the research:

- Has the *Hosty v. Carter* decision had a "chilling effect" on the student press in the Seventh Circuit? Are student journalists aware of the decision, and have there been any attempts by public universities to exercise or allow prior restraint? Do student journalists self-censor, refusing to cover certain stories or altering the

tone of their writing to comply with perceived acceptable standards set forth by administrators?

- Does the collegiate press believe that a policy of prior restraint would affect the quality of student newspapers?
- Does the collegiate press believe that a policy of prior restraint would affect the quality of the journalism curriculum? Would such a policy impede a student journalist's ability to exercise judgment, develop critical thinking skills and prepare oneself for a job with the professional press?

It is not just the Supreme Court's rulings on the press that will be examined within this study. The theory of self-governance is one of the reasons why the freedom of the press is so important, and an examination of this theory will guide the reader through the research.

While some of the cases and theories that will be discussed have had a tremendous impact on the field of journalism, they do have limitations when they are extended to college campuses. As it pertains to self-governance, though college campuses are populated by adults, the student body does not have the right to self-govern in all aspects of campus life. There are rules and regulations that have been established to maintain order; universities have the right to ban weapons or alcohol, or place other restrictions on students. This study is also restricted to student journalists who attend public universities in the Seventh Circuit, where court precedent would allow some instances of prior restraint of the collegiate press; the study will not examine whether the presence of a free

collegiate press outside the Seventh Circuit improves a student body's ability to self-govern.

Additionally, some of the Supreme Court decisions that will be analyzed here involve only the professional press; the Court itself has made distinctions between the rights of the professional press and the rights of the student press. While it has overturned instances of prior restraint for publications like the *New York Times*, the Court has upheld instances of prior restraint in high school publications, as it did in *Hazelwood v. Kuhlmeier*. The Court has also refused to hear *Hosty v. Carter*, which, while not likely, could be interpreted as implied consent. The prior restraint doctrine of the Court as it pertains to student publications is not as absolute as it is when applied to the professional press. This study will not be able to explain whether the Supreme Court would rule against all instances of prior restraint of the collegiate press, or whether it will hear any such cases in the future.

Before examining the Court's history with cases involving the professional press and the First Amendment rights of students, this study will examine one theory that has shaped the practices of the press since the founding of the country: the theory of self-governance.

Theory of Self-Governance

The theory of self-governance is tied to the idea that political speech must be protected at all costs. The key proponent of this idea was Alexander Meiklejohn. He noted that "Public discussion of public issues, together with the spreading of information and opinion bearing on those issues, must have freedom unabridged by our agents." (1961, p. 257) Meiklejohn was not an absolutist on the First Amendment, but more of a

libertarian, maintaining that “the First Amendment provides an absolute guarantee of freedom only to political speech” (Canavan, 1999, p. 14). Meiklejohn’s view on the First Amendment was based on his theory of self-governance; that, while the people are governed, they create subordinate agencies to carry out limited governing, and that “All Constitutional authority to govern the people of the United States belongs to the people themselves.” (1961, p. 253) His theory of self-governance can be traced back to the founding of the country.

The theory of self-governance was a core belief of the founding fathers. The framers of the Constitution, notably Thomas Jefferson and James Madison, firmly believed that a government should rule only by the will of the people, and that the people had a right to self-govern by freely electing officials who would represent their interests. Madison stated in the Virginia Resolutions of 1798 that “The people, not the government, possess the absolute sovereignty.” The echo of Madison’s words can be found in Meiklejohn’s view of government agents: “Though they govern us, we, in a deeper sense, govern them. Over our governing, they have no power. Over their governing, we have sovereign power.” (1961, p. 257) Both Madison and Meiklejohn knew that for self-governance to work, though, the people had to be informed. That is why freedom of the press was a concept so important that it became the foundation of the First Amendment.

Madison championed the rights of the press to discuss public affairs, stating again in the Virginia Resolutions that, “[T]he press has exerted a freedom in canvassing the merits and measures of public men, of every description ... On this footing the freedom of the press has stood; on this foundation it yet stands.” (1798) Meiklejohn also supported a free press, seeing the press as a way to keep the citizens informed, and “The

welfare of the community requires that those who decide issues shall understand them.” (1948, p. 25) A free press serves as a means by which the people can effectively self-govern. Similarly, collegiate journalists should be called upon to exercise self-governance of the society in which they live and learn: the college campus. It is only through proper application of the First Amendment to student publications that collegiate journalists can help their peers self-govern, a responsibility shared by all Americans. This self-governance theory has much in common with Vincent Blasi’s idea that the First Amendment serves as a checking value on the government.

The founding fathers established three branches of government so that each one may have checks upon the other, preventing any one branch from becoming too powerful. The press has often been viewed as a fourth branch of government, watching and reporting on the actions of public officials. Blasi claims, then, that free expression has merit because of its checking value: the ability of the press to check the abuse of official power (1977). Blasi’s stance on the freedom of the press can be seen in his opposition to prior restraint. Blasi is not alone in his opposition, as can be seen in the Supreme Court’s case law involving prior restraint.

Prior Restraint

Prior restraint is any attempt by the government to keep information from the public. In most instances of prior restraint, a government agency or official attempts to keep a newspaper or some other material from being published. It is with the blocking of publication that this research concerns itself. While the Court’s opinions on the meaning of the First Amendment are varied, the doctrine of prior restraint is a constant (Redish, 1984). The Court has consistently ruled against the government’s right to interfere with

the press on issues of prior restraint. The Court's thinking can be traced back to English common law and Blackstone's stance on the prior restraint doctrine, which was that freedom of the press was essential, "but this consists in laying no *previous* restraints upon publications, and not in freedom from censure from criminal matter when published." (1769) More contemporary commentators, most notably Blasi and Emerson, are also supporters of the Court's prior restraint doctrine.

Most supporters of the Court's prior restraint doctrine favor subsequent punishment, or the ability of the government to penalize someone after information is published, if that information violates libel, privacy or other statutes. But with subsequent punishment, the material reaches the public eye, something that's not possible with prior restraint (Schauer, 1978). As Chief Justice Warren Burger stated in the famous prior restraint case, *Nebraska Press Association v. Stuart*, "If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." (1976) Even if information that is restrained is eventually released, the news might be so old that it is obsolete (Emerson, 1955). Blasi thus supports placing the issue before the public at least once, saying, "[O]nce a communication is disseminated it becomes to some extent a *fait accompli*. The world is a slightly different place," and the effects of the speech can't be undone (1981, p. 51). While Redish claims that the difference is not necessarily of constitutional magnitude (1984), one could argue that today, it certainly can be. Once something is placed on the Internet, it can remain there virtually forever, to be seen and heard by people from all over the world. This might not have been something that could be foreseen in 1984, but technology has

certainly made even one utterance of a communication significant and readily available for public consumption.

Another flaw with prior restraint is that it runs the risk of being overused, since such injunctions are generally easy to obtain. Emerson notes that subsequent punishment requires time, resources, and expenses, while prior restraint requires only “a simple stroke of the pen.” (1955, p. 657) The prior restraint system is also plagued by the fact that it requires adjudication in the abstract (Blasi, 1981). The courts cannot know what the consequences of the speech will be, so the courts must weigh the value of the speech against social harm that is based solely on speculation (Blasi, 1981). The Supreme Court itself argued in *Nebraska Press Association v. Stuart* that in order for prior restraint to stand, the government would first have to prove that publication of the information in question would create a clear and present danger; however, the danger would have to be of an immediate nature with mere conjecture being insufficient (Hopkins, 2009). With prior restraint, any proposed danger is based on conjecture, since the consequences of speech can’t possibly be known with certainty before the speech is uttered.

Perhaps the worst characteristic of prior restraint, though, is that it gives more power to the government than to the people, violating the theory of self-governance upon which the country was founded. Emerson warns against leaving in the hands of an administrator wide, unregulated discretion (1955). And Blasi argues that a system of prior restraint encourages regulatory agents or government officials to overuse their power (1981). The Court has tipped the power back to the people by ruling that the government must always meet the heavy burden of justifying prior restraint, which is almost always presumed to be unconstitutional. The Court’s tendency to side with the

press in prior restraint cases can be seen in three important decisions: *Near v. Minnesota*, *New York Times Co. v. United States* and *Nebraska Press Association v. Stuart*.

Near v. Minnesota

It was in *Near v. Minnesota* that the Court for the first time adopted a clear stance against the use of prior restraint. In 1927, Jay M. Near had published several articles in his publication, *Saturday Press*, that were deemed to be malicious and scandalous libels. Near alleged that local law enforcement in Minneapolis made no attempts to curtail a gangster's gambling and bootlegging operations. Near also leveled charges against the chief of police, the mayor and other officials. The articles were deemed to be a nuisance under a Minnesota statute, and Near was ordered not to publish any more material.

It is with the order that Near not publish any future material that the Court took exception. Much of what Near wrote was inflammatory and, at times, anti-Semitic. It could also have been libelous. But he was not merely punished after the fact, but prevented from publishing any further material. The lower court moved from subsequent punishment to prior restraint. That is why the majority of the Court found the statute to be the "essence of censorship" and unconstitutional (*Near v. Minnesota*, 1931). In the majority opinion, Hughes remarked that the law was a means not of protecting private citizens from libel, but of allowing the government to regulate and control criticism of the government. The concern that the law was about protecting public officials from criticism over misconduct appears over and over again in Hughes' opinion.

By clearly stating that prior restraint was a violation of the First Amendment, the Supreme Court handed down a victory to the press. Scholars have declared that *Near* is "one of the most important of all free speech cases in the Supreme Court" (Chafee, 1941,

p. 381), and “a great monumental pylon at the extreme end of freedom’s orbit” (Gerald, 1948, p. 127). With the *Near* decision, the Court started to solidify its position on prior restraint; eventually, the Court declared that any prior restraint laws that come before the Court do so with a heavy presumption against their constitutionality (*Bantam Books, Inc. v. Sullivan*, 1963). Then, in the midst of President Nixon’s presidency, a *New York Times* reporter uncovered a story that would lead to what many consider the most important freedom of the press victory in history.

New York Times Co. v. United States

In 1969, Daniel Ellsberg was working at a government think tank, when he started digging into the Pentagon archives. It was there that he found a 7,000 page study that was labeled “Top Secret—Sensitive.” The Pentagon Papers, as they came to be known, revealed “widespread miscalculation, bureaucratic arrogance, and deception on the part of U.S. policymakers.” (Davis, 2010, Week 3: Prior Restraint notes) There was nothing particularly dangerous about the papers, but the information contained within would prove embarrassing for several members of the Nixon administration. Ellsberg, upon reading the study, became disenchanted with the war in Vietnam and slipped a copy of the documents to Neil Sheehan of the *New York Times*. After Sheehan’s first article appeared in the *Times*, the Attorney General warned the *Times* against further publication and won a restraining order against the paper, which was later extended to the *Washington Post*. But just 17 days later, the Supreme Court stepped in.

In a 6-3 decision, the Court ruled in favor of the *New York Times*, stating that the government did not meet the “heavy presumption against [the] constitutional validity” of prior restraint (1971). The government had argued that the material leaked to the

newspapers was protected under the Espionage Act of 1917, and that publication of the Pentagon Papers was a threat to national security. But the Pentagon Papers were historical documents that did not contain any information about troop levels or movements and Justice Brennan found that their publication would not cause an inevitable, direct, and immediate event. Justice Black essentially mocked the argument that the government made, suggesting that the only threat the United States faced was the threat of public embarrassment; in his argument, Black noted that “security” was a broad and vague generality, and that while free speech does involve risk, the founding fathers were aware of those risks and found that free speech is the only real security (1971).

Nebraska Press Association v. Stuart

Just five years after the landmark *New York Times* decision, the Court was presented with another prior restraint case in *Nebraska Press Association v. Stuart*. This case dealt with gag orders and how to balance the First Amendment rights of the press against the Sixth Amendment rights of a defendant in a criminal trial. Erwin Simants had been arrested for the murder of six people in a small Nebraska town, and the judge in the case issued a gag order on the media, prohibiting the release or publication of any testimony or evidence. The judge had reasoned that pretrial prejudicial publicity would make it impossible for Simants to receive a fair trial, which would violate his Sixth Amendment rights. The Nebraska Press Association filed suit and several months after Simants was tried, convicted and sentenced, the case made its way to the Supreme Court. The Court unanimously found that the gag order was an unconstitutional prior restraint on the press. Out of this case was born a test that the Court could use when presented with future prior restraint cases.

To exercise prior restraint, the government would first have to prove that publication of the information in question would create a clear and present danger; however, the danger would have to be of an immediate nature with mere conjecture being insufficient (Hopkins, 2009). The government would then have to show that no other measures other than prior restraint could be used. The Court also saddled the government with the chore of proving that prior restraint would be effective; that if the speech was stopped, the danger cited by the government would also stop. If the danger would remain, the government would not be able to exercise prior restraint. The final step of the test refers to the order issued by the government. Orders that are vague and overbroad are defective. Therefore, to exercise prior restraint, the government has the heavy burden of meeting *all* of the following criteria: the danger created by publication is serious; the danger is imminent; the speech is the cause of the danger and stopping it will stop the danger; no alternatives to prior restraint will work; and the terms of the prior restraint are neither vague nor overbroad (Hopkins, 2009).

It was in this case that Chief Justice Warren Burger labeled prior restraint as “the most serious and least tolerable infringement on First Amendment rights.” (1976) Like Blasi and Emerson, the Court has adopted a policy that favors subsequent punishment to prior restraint, stating that a “free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand.” (*Southeastern Promotions, Ltd. v. Conrad*, 1975) The Court takes this stance since the First Amendment primarily exists to protect the public’s right to receive information (Linvack, 1977). The Court has positioned itself as assuming that most speech is constitutionally protected, stating that the “special vice of a prior restraint is that

communication will be suppressed ... before an adequate determination that it is unprotected by the First Amendment.” (*Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 1973)

It is important to note, however, that each of these landmark cases involved the professional press. The Court has had quite a different history with the student press, which is the area this study takes into consideration. The Court has also made a distinction between the high school press and the collegiate press. The direction of this study is to determine how the collegiate press is impacted by the *Hosty v. Carter* decision. Since the rationale behind the *Hosty* decision was based on a Supreme Court case that examined the free speech rights of high school students, it is necessary to briefly examine the case law that shapes those rights.

First Amendment Rights of High School Students

The task of balancing a student’s First Amendment rights, while simultaneously maintaining a healthy and orderly learning environment, is not an easy one. Students, teachers and administrators all struggle with just how much control a school has over a student’s behavior. But the Court made it clear, in a landmark decision, that students do, in fact, have First Amendment rights and schools have a limited ability to restrict student expression.

Tinker v. Des Moines Independent School District

The groundwork of student’s First Amendment rights is the *Tinker v. Des Moines Independent School District* decision. In December of 1965, students Mary Beth and John Tinker, along with Christopher Eckhardt, wore black arm bands to school one day to express their opposition to the war in Vietnam. The school had heard about the plan

ahead of time and quickly enacted a policy banning the wearing of armbands. Upon arriving at school, the Tinkers and Eckhardt were told to remove their armbands; when they refused, they were suspended. The students' father filed an injunction, asking that the students not be punished. The case made its way to the Supreme Court in 1969, when the Court ruled, 7-2, in favor of the students.

The school district had argued that it enacted a ban on armbands to prevent disruptions and maintain discipline in the school. Administrators claimed they had to protect the safety and welfare of all students, and feared the armbands might evoke strong emotions in other students, especially during a time of intense protests; they justified the policy against armbands out of their fear of a disturbance, and a need to prevent any interference with learning. The students, though, argued that passively and quietly wearing the armbands was a form of expression and therefore protected speech under the First Amendment. The students also argued against the policy itself, stating that any policy that prohibits self expression, without evidence to prove such a policy is necessary to maintain discipline or protect the rights of others, is not constitutionally valid.

The Court sided with the students, noting that both students and teachers maintain their First Amendment rights on school grounds, with Justice Abe Fortas' famous line: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." (1969) The Court also maintained that while the school honestly feared there would be a disturbance, the mere fear of such an outburst was not enough to trump the right to freedom of expression; Fortas noted that while there are risks with free speech, such risks are necessary and the foundation upon which the country was built. The fact that this expression took place on

school grounds actually gave weight to the arguments of the students; since schools are meant to be learning laboratories, preparing students for the real world, the same freedoms that would hold in the real world should hold on school grounds.

Though *Tinker* is arguably one of the most important First Amendment victories for students, it is not an absolute victory. The *Tinker* decision never gave students absolute First Amendment rights to free speech and in fact could be limited to political speech. The Court itself made the political speech distinction clear in later rulings (Zirkel, 2007). And in *Tinker*, Fortas noted that while political speech would be protected in not just classrooms, but cafeterias and playing fields, it could not interfere with school operations or the rights of others on school grounds (1969). This was tempered by the fact that school administrators must be able to provide evidence that a form of speech did in fact cause disruptions in the learning environment or infringed on the rights of others in order to constitutionally ban that speech.

It is also important to note that this decision was handed down in the midst of the civil rights era and the anti-war movement, when the Court often generously extended constitutional freedoms to formerly vulnerable groups of people (Strossen, 1998). It does seem that *Tinker* stands alone in granting rights to high school students, as the attitude of the Court has shifted tremendously in the past forty years. In a more recent case, Justice Thomas actually advocated reversing *Tinker* altogether! He noted that the Court has already scaled back the standard of *Tinker*, and that such action was completely appropriate (*Morse v. Frederick*, 2007). It does in fact seem that while the Court as a whole has not adopted this sentiment in word, its later rulings indicate that it may have in spirit.

Bethel School District v. Fraser

The *Tinker* case is not a student press case, but it does lay the groundwork for the protection granted to the high school student press. A similar case was *Bethel School District v. Fraser*, which came to the Court after Matthew Fraser delivered a two-minute campaign speech during a school assembly that was filled with sexual innuendo. Several students hooted during the assembly and the next day, several teachers complained. Fraser was suspended for three days, but filed suit and won at the district and appellate levels, with the courts noting that his speech was not overly disruptive and therefore protected. The Supreme Court did not agree.

Though it did not overturn *Tinker*, the justices claimed that the circumstances were different. In *Tinker*, the students wore armbands while walking the halls of the school, engaging in pure expression that was not disruptive. Fraser, though, made his remarks in a school-sponsored assembly, leading to hoots from the audience that could be construed as disruptions. Writing for the 7-2 majority, Chief Justice Burger argued that school officials have more control over the content of a school-sponsored event; that the schools must instill morals and values in students and can thus disassociate itself from lewd speech that is at odds with the school's mission; and that the schools must foster a civil, mature learning environment that teaches the students the boundaries of socially appropriate behavior (1986). Burger also mentioned that the *Tinker* case referred to political speech, but that Fraser's remarks were not political viewpoints, despite the fact that he was making a campaign speech about a fellow student running for school office.

Though Burger tries to draw a distinction, and move *Fraser* under the umbrella of *Tinker*, the differences between the two cases are slight and Burger is splitting hairs.

Seventeen years after *Tinker*, the Court continued to scale back student rights, without trampling on its own precedent in an outright manner.

Morse v. Frederick

The “school-sponsored activity” distinction cited in *Fraser* has been applied by the Court in other student expression cases. In *Morse v. Frederick*, the Court upheld a school’s right to punish a student who unfurled a banner outside the school. The case began just before the 2002 Olympic Winter Games in Utah, as the Olympic Torch Relay passed through Juneau, Alaska, right in front of the Juneau-Douglas High School. The principal allowed students to watch the event, and though it was outside the school, it was a sanctioned school event. As the relay passed by the school, one of the students, Joseph Frederick, displayed a 14-foot banner that read, “BONG HiTS 4 JESUS.” The principal claimed that the banner advocated a pro-drug message and confiscated it and suspended Frederick for ten days, prompting him to claim his free speech rights had been violated.

The Court, though, narrowly found that Frederick’s First Amendment rights had not been violated. The Court rejected Frederick’s claim that he was not at school, but at an outside event. Chief Justice Roberts pointed out that the event took place during normal school hours at a school-sanctioned event, where the students had to adhere to the school district’s rules on student conduct (2007). Roberts also argued that the banner promoted illegal drug use and that the principal had a right to restrict such speech. In a concurring opinion, Justice Thomas actually advocated for reversing *Tinker*, claiming that the ruling, “effected a sea of change in students’ speech rights, extending them well beyond traditional bounds,” and that the “Constitution does not afford students a right to free speech in public schools.” (2007) The other justices held that their ruling should be

narrow, and still allow students to have free speech rights on political issues, as long as those rights don't disrupt the school environment. That's how Justice Alito reconciled *Morse* with *Tinker*, claiming that advocating drug use could lead to violence. That argument is flimsy, but it's been enough for the Court to restrict students' free speech rights. And the reasoning applied in both the *Fraser* and *Tinker* case was evident in a student press case that was a stunning blow to students' free press rights.

Hazelwood School District v. Kuhlmeier

Several students enrolled in a journalism class at Hazelwood East High School in St. Louis published the student newspaper, the *Spectrum*. The paper had a history of covering serious topics, and for the spring edition, the students put together a two-page spread, containing stories about teenage pregnancy and divorce (Hopkins, 2009). The principal had always reviewed the proof pages of the *Spectrum* before it was published and, upon reviewing the spring edition, objected to the articles on teenage pregnancy and divorce. The principal was worried that the girls quoted in the article on teenage pregnancy could be identified, despite the use of pseudonyms; and he was also worried that one of the students in the article on divorce, who criticized her father, was identified by name. Claiming that the articles were an invasion of privacy, the principal pulled them prior to publication.

The Court upheld the principal's right to pull the articles, claiming that since the *Spectrum* was published as part of a journalism class, it was part of school-sponsored speech (or activity), and not a public forum, such as a sidewalk or street, where nearly all forms of speech by all people are protected. Since the newspaper was not a public forum but an extension of the curriculum, it was not constitutionally protected speech (Hoover,

1998). The Court also claimed that school administrators have a right to restrict speech in a school-sponsored vehicle, since that speech could be interpreted as reflecting the stance of the school. The *Hazelwood* decision stressed that since the school lends its name and resources to the *Spectrum*, the school has a substantial interest in regulating and editing its comments (1988).

The primary problem with the *Hazelwood* ruling is the complete dismissal of the rationale applied in the *Tinker* case. In *Tinker*, the Court claimed that school officials could only censor student speech if it caused disruptions in the learning environment or infringed upon the rights of others. The speech in *Hazelwood* certainly didn't cause a disruption; it never even had a chance to reach the student body, and Fortas noted in *Tinker* that mere fear of an outburst is not enough to suspend a student's First Amendment rights (1969). But, even if the articles had made it to print, it's unlikely that the content would cause a substantial disruption or create any danger for other students. It's also hard to argue that the articles in question invaded the other students' rights to privacy, as the students quoted in the article on pregnancy were given pseudonyms and knew their statements would be printed in a paper that's viewed by the entire school.

While the Court didn't overrule *Tinker* with *Hazelwood*, the latter decision does seem to ignore the precedent set by *Tinker*. The Court may have maintained that students are entitled to First Amendment rights, but, at the high school level, a seriously scaled-back version of the First Amendment is in effect. *Hazelwood* has seriously impacted the ability of a high school student press to write material that is significant or that allows students to understand the environment in which they are to learn. While that's alarming, at least the Court has not yet allowed such restrictions to flow to university settings.

First Amendment Rights of College Students

Traditionally, college and university students have enjoyed more free speech rights than high school students, due in part to their age. College and university students are, for the most part, adults, and the Court has largely held that they have the same First Amendment rights on campus as normal citizens do in the community at large. In college cases, there is none of the talk of the school having the right to regulate speech it deems lewd or offensive; indeed, the Court has held that the “Mere dissemination of ideas – no matter how offensive to good taste – on a state university campus may not be shut off in the name alone of ‘conventions of decency.’” (*Papish v. Board of Curators of the University of Missouri*, 1973) The Court, in fact, made that statement not long after issuing one of its earlier university speech decisions.

Healy v. James

The *Healy v. James* case arose out of the social unrest sweeping the country in 1969, when a group of students at Central Connecticut State College wanted to form a local chapter of a left-wing group, Students for a Democratic Society, or SDS, on campus. SDS chapters on other campuses across the country had been associated with instances of civil disobedience and even violence. The president of the college denied official recognition of the local SDS chapter, stating that the organization’s philosophies were “antithetical to the school’s policies,” that its independence from the national chapter would be “doubtful,” and that the chapter would be a “disruptive influence at the college.” (*Healy v. James*, 1972) The students wishing to form the chapter claimed that their First Amendment rights of free speech and assembly had been violated.

The Court agreed with the students, stating that “colleges and universities are not enclaves immune from the sweep of the First Amendment.” (1972) That statement echoes the decision reached in *Tinker*, that students do not shed their constitutional rights at the schoolhouse gate (1969). The decision the Court reached on this case is of paramount importance, because it touches on so many aspects of the free speech rights of college students.

The Court found that the president’s denial of recognition of the SDS chapter was a form of prior restraint; he was, after all, refusing to grant official status to the group before it had even had a chance to take any action or be a disruptive influence at the school. Had the president tried to disband the group after they met and incited some sort of violence on campus, his actions would not have been considered prior restraint but, instead, subsequent punishment. In *New York Times*, the Court found that any system of prior restraint bears a “heavy presumption against constitutional validity” and that the government carries the heavy burden of justifying any such restraint (1971). Since the president engaged in prior restraint, a heavy burden rested on the college to justify its decision to reject recognition of the group (LaVigne, 2008). The president could not deny recognition to a group just because he disagreed with its philosophies, regardless of how repugnant or abhorrent he found their views (1972).

The Court also called upon Milton, stressing that the college classroom and its surroundings are a distinct “marketplace of ideas.” (1972) In writing for the majority, Justice Powell called for the safeguarding of academic freedom and stated that free speech rights are especially vital on the college campus; the Court cited that this precedent has been set by *Keyishian v. Board of Regents*, *Sweezy v. New Hampshire*, and

Shelton v. Tucker: “the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.” (1960) Instead of having limited First Amendment freedoms on university campuses, Powell said that the rights of college students should be the same as those enjoyed by the community at large (1972). Powell did acknowledge that schools do have a responsibility to control conduct and maintain order, but said that need did not mean the First Amendment should not apply with less force on college campuses (1972). Instead, Powell said, it would be reasonable for a college to have a rule that new groups intend to comply with “reasonable campus regulations.” (1972) *Healy* would become a precedent-setting case, with the Court calling upon it just one year later to decide a scholastic press case from Missouri.

Papish v. Board of Curators of the University of Missouri

Barbara Papish was a journalism graduate student at the University of Missouri who distributed an underground newspaper containing speech the school dubbed indecent. On the cover of the newspaper was a political cartoon showing policemen raping the Statue of Liberty and the Goddess of Justice; there was also a story in the paper with a headline reading, “Motherfucker Acquitted.” Papish was expelled for distributing the paper, with the school claiming that she violated a university by-law requiring students to “observe generally accepted standards of conduct” and prohibited indecent speech (1973).

When the case went to the Eight Circuit Court of Appeals, the court found that a student’s freedom of expression could be subordinated to the “conventions of decency in the use and display of language and pictures” on a college campus (1972). The ruling echoes opinions expressed by the Court in *Bethel*, which allowed the prohibition of lewd

speech, and *Morse*, which allowed the restriction of speech that advocates illegal activity. Those cases, though, involved high school students; the Court itself made a distinction between high school students and university students when it heard the case.

On appeal, the Court said that *Healy* made “clear that the mere dissemination of ideas, no matter how offensive, may not be shut off in the name of conventions of decency.” (1973) The Court stated that neither the cartoon nor the headline were obscene or otherwise unprotected, so it was clear that the university’s actions were motivated solely by the *content* of the newspaper, which was unconstitutional (1973). With this decision, the Court maintained that public universities can’t ban indecent or offensive speech that does not disrupt order or infringe upon the rights of others; this is in stark contrast to cases the Court has decided involving high school students, which demonstrates that the Court is willing to grant greater freedom to college students.

Widmar v. Vincent

Another aspect of the First Amendment is the freedom of religion, and it’s a right that also extends to college campuses. *Widmar v. Vincent* is a significant case because it allows religious groups access to educational facilities, but it also analyzed the type of forum in which speech takes place. This forum analysis is something that was considered in *Hosty v. Carter*, and will be discussed in greater detail later in this study.

A Christian group at the University of Missouri at Kansas City, Cornerstone, had been holding meetings on campus for nearly four years. It was a formally recognized student group that held open meetings and the university allowed such groups to use its facilities. But in 1977, members of Cornerstone were told they could no longer use university rooms for its meetings, with school officials citing the Establishment Clause;

since the First Amendment banned the establishment of religion, the school had adopted a policy that prohibited the use of university facilities for religious worship. The members of Cornerstone filed suit, claiming their rights to free speech and to exercise religion had been violated.

The Court, while acknowledging that the university had a point in not wanting to violate the Establishment Clause, instead focused on what type of forum in which the students were meeting. In *Perry Education Association v. Perry Local Educators' Association*, the Court had outlined three types of forums: the traditional public forum, where all speech is protected, which includes sidewalks and parks; a limited public forum, and a nonpublic forum (1983). Limited public forums are places that have been opened to the public for a designated purpose (LaVigne, 2008). The Court found, in *Widmar*, that the university had created a forum generally open for use by student groups, or a limited public forum. The Court found that to ban a group from using a limited public forum, the university would have to show that such a ban was “necessary to serve a compelling state interest and that it was narrowly drawn to achieve that end.” (1981) The exclusion of a group based on the religious content of the group’s speech does not meet that requirement.

Rosenberger v. Rector and Visitors of the University of Virginia

Another religious case, that also involved the scholastic press, came before the Court again in 1995. A student organization at the University of Virginia, Wide Awake, published a Christian magazine. The university provided student activity funds to student newspapers to cover the printing costs of those publications, but denied funding to Wide

Awake because its publication was religious. As was the case in *Widmar*, the university worried that funding a religious publication would violate the Establishment Clause.

The Court once again did a forum analysis, concluding that the university had opened a limited forum when it subsidized student newspapers, and that the school must “respect the lawful boundaries it has itself set.” (1995) The ruling stated that viewpoint discrimination of speech in a limited public forum is impermissible if the speech is otherwise within the forum’s limitations (1995). Additionally, since the university funded different types of student newspapers, the Court found that it was not promoting its own message, but rather creating an open forum that fostered a wide array of viewpoints on campus.

The Court’s use of forum analysis has been adopted by other courts, including the Seventh Circuit Court of Appeals. What that circuit court has not adopted, though, is the precedent the Supreme Court established, which grants greater First Amendment rights to university students than to high school students. The *Hosty v. Carter* case makes it clear that the Seventh Circuit draws no such distinction between the two classes of students, and it has established its own troubling precedent.

Hosty v. Carter

On the campus of Governor’s State University in Illinois, the student newspaper was *The Innovator*. The Dean of Student Affairs and Services, Patricia Carter, informed the printer that no issues if the paper should be printed until a university official reviewed the content. Student editors filed suit, claiming such action was unconstitutional prior restraint. But Carter claimed the *Hazelwood* ruling gave the school the right to exercise such control. In *Hosty v. Carter*, a three-judge panel on the Seventh Circuit Court of

Appeals originally ruled that the *Hazelwood* rationale was “not a good fit” for university students, who are older and have different needs and maturity levels than high school students (2003). However, the full court eventually heard the case and overturned the panel’s decision. Carter was granted immunity from allegations that she violated the students’ First Amendment rights, with the court stating that it was reasonable for her to assume that school officials could review the content of *The Innovator* prior to publication.

At the heart of the ruling was the matter of whether *The Innovator* was a public or nonpublic forum. Judge Easterbrook noted that it could not be assumed that the paper was a public forum, and that the framework of *Hazelwood* gave the school the right to regulate expression (2005). The public forum issue will be discussed in much greater depth later in this review.

However, it is important to briefly note here, that under *Hosty*, prior restraint can only be exercised over non-public forums or papers that are considered agents of the school. Any college paper that is clearly identified as a public forum is free from prior restraint. Even if a college newspaper is not an absolute public forum, it could be considered a limited purpose public forum, which would only allow university officials to limit speech if the limits were not related to viewpoint and were narrowly drawn to effectuate a compelling state interest (*Widmar v. Vincent*, 1981). Even if a student newspaper does not have a clearly stated or written forum designation, a court can decide a paper is a public forum if it has historically catered to expressive activity (*San Diego Committee Against Registration and the Draft (CARD) v. Governing Board of Grossmont*

Union High School, 1986). The issue is intent: what did the university intend the student newspaper to do? And how does one identify intent?

Though this is often not explicitly stated, intent can be found in the types of powers granted to student editors. Tenhoff argues that universities create public forums when they designate student editors, who often have the power to decide page length, publication dates, and assign stories to students; he asks, “If the university did not intend to create a forum for student expression when it created the paper, then why would it delegate plenary power over the paper to the student editors?” (1991). Despite the fact that many lower courts have found that most college newspapers are public forums, Mark Goodman, the executive director of the Student Press Law Center, notes that the *Hosty* decisions give schools the opportunity to argue that the student newspapers were never intended to be public forums (SPLC News Flash, 2005). Despite the fact that the ruling was limited to the Seventh Circuit, the outcry after the ruling came from across the country.

Reaction to Hosty v. Carter

The reaction to the decision from the student press and First Amendment advocates was immediate and hostile. Greg Lukianoff, Director of Legal and Public Advocacy for the Foundation for Individual Rights in Education declared that “the summer of 2005 will be remembered as a rough season for student rights.” (2005) Another commentator worried that “independent college journalism may soon be a relic of the past ... potentially throughout the country.” (Silverglate, 2005) Yet another said the ruling dealt a serious blow to college press freedoms (Hudson, 2005). Student journalists felt the same way, with one noting, “Thanks to the Seventh Circuit, the new

reality may be that truly free school-sponsored speech will exist on public college campuses only so long as administrators on that campus want it to exist.” (Hiestand, 2006)

One of the critics of the *Hosty v. Carter* decision came from within the Seventh Circuit itself. In his dissent, Judge Evans contended that there was a precedent for making a distinction between college students and high school students. Evans claimed that the Court has always treated minors uniquely under the law, but that college students, for all intents and purposes, are young adults (2005). Evans viewed high school students, who are, for the most part, under 18 years of age, as minors; but college students, in all but rare instances, are at least 18 years of age.

While this ruling is limited to the Seventh Circuit for now, the Supreme Court has refused to hear the case. Therefore, it is important to examine the *Hosty* decision, and why the majority erred in applying the *Hazelwood* standard to a university setting.

Rationale Against Hosty

Differences of High School and College Students

Universities are unique from public high schools in many ways, most notably in the differences in age and maturity of the student bodies. The students on university campuses are adults, and would presumably be a more mature audience than high school students. College students became adults practically overnight, when the 26th Amendment was ratified, giving eighteen-year-olds the right to vote (Ludeman, 1989). The relative immaturity of a high school student was one rationale that was behind the *Hazelwood* decision, but it doesn't make sense to apply it at the collegiate level (Ng, 2007). This is a view shared by Evans, whose dissenting opinion noted that the Court has

always made a distinction between high school students and college students who are young adults (2005). The *Hosty* decision, in fact, violates years of Supreme Court precedent, such as the aforementioned *Widmar*, in when the Court noted that university students are young adults who are less impressionable than younger students (1981). Additionally, the Court has made distinctions between high school cases like *Tinker*, and college ones, like *Healy*, in which it was determined that college students deserve the same constitutional protections as the general public (1972). The Court actually wrote that “[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large.” (*Healy v. James*, 1972) The Court has specifically protected the First Amendment rights of college student publications in cases like *Papish* and *Rosenberger*. *Papish* explicitly stated that university officials could not regulate speech based on its content (1973); *Rosenberger* spoke specifically to the “chilling of individual thought and opinion” imposed by prior restraint, stating “The first danger of liberty lies in granting the State the power to examine publications” (1995). In the *Hosty* dissent, Evans concluded that the concerns present in *Hazelwood* don’t apply to college students, “who are certainly (as a general matter) more mature, independent thinkers,” making it clear that “*Hazelwood* does not apply beyond high school contact.” (2005)

Differing Goals and Missions

It is also important to note that the purposes of high schools and universities are quite different. Most students are required, at least until the age of 16, to attend high school, while going to college is completely voluntary. That is why each setting teaches

different things, and has different goals. K-12 education aims to impart community values to students, while higher education has students question community values (Rooksby, 2007). While it's sensible and even necessary for elementary and secondary schools to inculcate values in children, adults must be able to shape their own values, without coercion from any institution (Tenhoff, 1991). Therefore, it is important that college students be given the latitude to question values, policies and decisions to a greater extent than high school students. This is something that the Supreme Court itself has recognized.

Borrowing from Milton, the Court has referred to the college setting as a "marketplace of ideas" where students are prepared for the professional world "through a wide exposure to a robust exchange of ideas." (*Keyishian v. Board of Regents*, 1967)

This was made explicitly clear when the Court made the following statement in the 1957 *Sweezy v. New Hampshire* case:

To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation ... Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding.

The Court has also pointed out the differing goals of high school and college education, specifically declaring that the purpose of a university is to facilitate a wide range of speech, while a public school must assume "custodial and tutelary responsibility for children." (*Board of Education v. Earls*, 2002) The Court also stated that public schools are responsible for the "preservation of the values on which our society rests." (*Ambach v. Norwick*, 1979) The *Hosty* decision inexplicably ignored years of Supreme

Court precedent when it failed to note the differences between high school and college publications.

The Court has a history of protecting the First Amendment rights of college students, largely because of the idea that university classrooms should serve as marketplaces of ideas. But Lyons notes that in order for a marketplace of ideas to function properly, First Amendment protections must be strong; she goes on to state that this is especially important for student newspapers, as they are the primary source of information for college students about their campus and society (2006). It has actually been argued that for this reason, universities have a strong interest in providing a student newspaper for the expression of diverse opinions and thoughts (Applegate, 2005). Any newspaper operating under a policy of prior restraint, though, is unlikely to provide an environment where diverse opinions and thoughts will be shared because of the chilling effect prior restraint has on the press. The chilling effect is very real. After the *Hazelwood* ruling, a survey of Indiana high school journalists showed that 60% of respondents were “less likely to publish controversial and/or investigative articles ... as a result of *Hazelwood*.” (Kovacs, 1991) Additional data shows that students are more accepting of administrative censorship of student publications and are reluctant to challenge authority (Lomicky, 2000). If the *Hazelwood* ruling has indeed had a chilling effect on the high school press, it is reasonable to deduce that an opinion that applies the *Hazelwood* rationale to the collegiate press would have a similar chilling effect.

Preparation for the Professional Press

Colleges and universities also differ from high schools in that they serve as a stepping stone to the real world; they are the last institutions of education standing

between high school students and the professional world. They are meant to be institutions where students can learn how to work and live in the professional world. Journalism courses, in particular, are meant to simulate, to some extent, the experience of working in an actual newsroom. But with the *Hosty* ruling and the possibility of censorship at both the undergraduate and graduate level, “we’re going to have students learning journalism for eight years under conditions that bear no resemblance to real conditions.” (Gratz, 2005) Any student who attended a university that adhered to the standards set forth in *Hosty* would, upon becoming a professional journalist, be “less likely to practice ethical and responsible journalism, and less likely to report on controversial topics of societal importance.” (Pittman, 2007) College newspapers arguably must act as the fourth estate of the society in which they operate: the college campus. If the collegiate press is to keep watch over the college, just as the professional press keeps watch over government, the collegiate press must be free, as the professional press is, from control of its content (Applegate, 2005). Without being able to act as watchdogs on their college campus societies, it would be impractical to expect recent graduates to act as watchdogs on the government.

Sanders notes that universities are often the first places where journalists traditionally enjoy free speech rights, but if *Hazelwood* follows them after high school, their introduction to a fully functioning free press would be delayed, which would be disastrous for the journalism profession (2006). It is in college that journalists first learn to take responsibility for what they publish, and prepare themselves for a career in professional journalism (Nimick, 2006). Extending the *Hazelwood* standard to these newspapers would leave “[C]ollege-trained journalists with no practical experience

handling controversial subject matter, nor with any more than an academic understanding of the role of the Fourth Estate.” (Peltz, 2001) When censorship is allowed on a college campus – and prior restraint is the highest form of censorship – “it could threaten the training of today’s news-editorial majors working in the campus press.” (Holmes, 1986)

The Public Forum Debate

One of the distinguishing factors of the *Hosty* decision was that the court ruled that it could not be determined if the *Innovator* was a public forum. Part of the rationale for that was that the paper was funded by a school. But it’s erroneous to conclude that simply because a university financially supports a publication, the government can control typically constitutionally protected speech (Nimick, 2006). That was the finding of the U.S. District Court of Colorado, which ruled in *Trujillo v. Love* that university authorities cannot “change the functions of the newspaper” simply because they control its financing (1971). Court precedent clearly shows that simply funding a student-run newspaper does not grant university officials the right to exercise prior restraint or editorial control. The Fifth Circuit Court of Appeals stated in *Bazaar v. Fortune* that *any* university publication should be considered an open forum (1973). If colleges are meant to be marketplaces of ideas, the newspapers must be allowed to publish controversial articles, and act as public forums where students can openly voice those ideas. As Goodman stated in reaction to the *Hosty* ruling, student newspapers are traditionally presumed by their very nature to be forums for free expression (SPLC News Flash, 2005).

The idea that student newspapers are public forums has long been the sentiment of the courts, until the *Hosty* decision. Prior to this ruling, the Court of Appeals for the

First Circuit and the Court of Appeals for the Sixth Circuit had explicitly refused to apply the *Hazelwood* standard to college student publications (Nimick, 2006). In *Student Government Association v. Board of Trustees of the University of Massachusetts*, the First Circuit noted that student newspapers operated as open or limited public forums with broad First Amendment protections, and that *Hazelwood* was not applicable to college newspapers (1989). The Sixth Circuit reached a similar conclusion with *Kincaid v. Gibson*, ruling that the college yearbook was a limited public forum (2001). It would therefore make sense that the *Innovator*, which was financially independent, published as an extracurricular activity, and had a policy of student editors being autonomous, should be considered, at the very least, a limited public forum, free from prior review.

It is important to remember that this research is beset by certain restrictions. The theories presented here are generally accepted to pertain to the professional press; the Court has never issued a definitive ruling on whether the *Hazelwood* ruling should be applied to the collegiate press, and so it is not clear if the Justices would extend their established First Amendment theory to college campuses. Additionally, the refusal by the Court to hear the *Hosty* case implies that the Court may never consider this topic.

The theory of self-governance, though an established part of American history, and exercised by citizens today, has never been an absolute on college campuses. The Court stated in *Hazelwood* that the rights of students in public schools are not the same as the rights of adults in other settings; the Tenth Circuit Court of Appeals noted that “Nowhere is this more true than in the context of a school’s right to determine what to teach and how to teach in its classrooms.” (*Axson-Flynn v. Johnson*, 2004) Courts have maintained that students at college campuses do relinquish some of the rights citizens

have in their homes. The reasoning behind this is that the release of some of these rights is necessary to maintain order and ensure the safety of all students on the campus.

Additionally, the Eleventh Circuit Court of Appeals found that university classrooms are not automatically public forums, and that educators can exercise reasonable control over a student and professor's speech in the classroom, as long as the actions are related to limited pedagogical concerns, even at the university level (*Bishop v. Aronov*, 1991).

Therefore, while aspects of the theory of self-governance should be applied to colleges and universities, the transfer is not absolute.

The research is also limited in that it takes into account only the views of collegiate journalists, and only those that attend public universities that could be affected by the *Hosty* ruling. As it does not provide the views of students outside the Seventh Circuit, this research does not reveal whether students in a *Hosty*-area school have the same experiences as those from schools outside the Seventh Circuit. And while students do evaluate whether they feel the journalism curriculum has been impacted by the *Hosty* decision, the research does not evaluate whether faculty members, who create the curriculum, were influenced by the decision.

Despite the limitations of the theories that guided this study, and of the methods employed, this research will reveal under what presumptions collegiate journalists operate, and, if five years after the *Hosty* decision was handed down, it has had at least a perceived impact on the collegiate press.

Chapter 3

Methodology

As previously stated, the impetus for this study came from the Seventh U.S. Circuit Court of Appeals. That court ruled, in 2005, that the Supreme Court's decision in *Hazelwood v. Kuhlmeier*, which allowed administrators at high schools to exercise prior restraint over some student newspapers, could be extended to college and university campuses. One year later, the Supreme Court refused to hear the case, meaning the *Hosty v. Carter* decision will stand in the states over which the Seventh Circuit has jurisdiction: Wisconsin, Indiana, and Illinois.

The purpose of this research is to explore what effects, if any, the *Hosty v. Carter* ruling has had on the collegiate press. Since the decision allowed the application of the *Hazelwood* standard to institutions of higher education, this research will examine one aspect of that standard: the right of administrators to review a publication prior to publishing, which is also known as prior restraint. This study will ask whether the *Hosty* decision has had a chilling effect on the collegiate press, by asking students if they self-censor or feel they are not free to cover controversial topics. The researcher will also attempt to determine whether policies of prior restraint can negatively impact a university's journalism curriculum, from the student's point of view. Students were asked whether they were able to develop critical thinking and judgment skills, and

whether they felt they were prepared to work in the professional press after working on a college newspaper. The researcher hypothesizes that:

- The *Hosty v. Carter* decision will have had a chilling effect on the collegiate press, revealing itself in instances of student reporters deciding not to cover some stories that would be critical of the school or administration, or would be controversial. Students will also edit the tone of their writing to sound less critical of the school or administration.
- Students will believe that a policy of prior restraint at a newspaper would negatively impact the quality of the publication
- Students will believe that a policy of prior restraint can negatively impact the journalism curriculum, by reducing one's ability to exercise judgment, develop critical thinking skills, and be prepared for a job in the professional press.

Qualitative Research Paradigm

The researcher has chosen to take a qualitative approach to the study, using in-depth interviews with collegiate journalists in public universities under the jurisdiction of the Seventh Circuit. Qualitative research is exploratory in nature, and seeks to explore and understand a phenomenon or trend from the participants' points of view (Creswell, 2009). As the aim of the study is to understand how the collegiate press views the *Hosty* decision and their schools' policies on prior restraint, it is highly appropriate to use a qualitative method of research.

Using a qualitative approach works well with studies where there has been limited research on the topic. Since the *Hosty v. Carter* decision was handed down just five years ago, there has not been much research on what kind of impact the decision has had

on the collegiate press. Though many First Amendment commentators and newspaper advisers have responded to the *Hosty* decision, there has been scant attention paid to whether students in the Seventh Circuit have been affected, or how they view prior restraint. Shank defines qualitative research as “a form of systematic empirical inquiry into meaning” (2002, pg. 5); as it relates to inquiry into meaning. Ospina notes that Shank is stressing that the researcher tries to understand how others make sense of their own experience (2004). This is similar to Creswell’s statement that most qualitative researchers approach their topic with a social constructivist worldview (2009). Creswell says, “The goal of the research is to rely as much as possible on the participants’ views of the situation being studied.” (p. 8) That is exactly what is being attempted with this study; the researcher is trying to determine how the participants, student reporters, view prior restraint, and its impact, or lack thereof, on their work as members of the collegiate press.

This study is shaped by many of the characteristics of qualitative research, set forth by Creswell.

- Natural setting: In qualitative research, participants are not brought into a lab or other contrived setting. Data, either through observation or interviews, is collected in the field. This can have a number of benefits, including the fact that the participants will be allowed to take part in the study in their natural setting, and will likely be more comfortable. Collecting data in a natural setting is a hallmark of qualitative research, as noted by Denzin and Lincoln, who say that researchers study things in their natural settings in order to understand the meaning participants bring to phenomena (2000). In this study, due to monetary

and geographic limitations, participants will be interviewed by phone. While this does not allow for face-to-face interaction, this method will allow participants to take part in the study in their natural setting.

- **Participants' meaning:** The goal of this research is to learn what thoughts the participants have about the *Hosty* decision, and their schools' policies on prior restraint and student publications. The views of the researcher and the views presented in the literature review are not the focus of the study.
- **Emergent design:** The research process for this study is necessarily fluid. The researcher must first determine if, in any of the schools under the Seventh Circuit, there is awareness among the collegiate press of the *Hosty v. Carter* decision. Additionally, while a list of predetermined questions has been designed and is included in this study, the researcher reserved the right to ask additional questions that naturally emerged during the interview process.

Researcher's Role

Qualitative researchers are, by definition, the key instruments in their research (Creswell, 2009). It is imperative, then, that any biases and personal values are revealed so that they do not negatively impact the study. This research topic was chosen because I consider myself a strong supporter of the First Amendment, and come close to having a qualified absolutist view of the First Amendment, seeing the right of free speech as impregnable (Smolla, 1992). I believe that while the government can and should regulate when and where speech takes place, it does not have the right to regulate the content of speech (Brennan, 1965). When it comes to student publications, I see the *Hazelwood v.*

Kuhlmeier ruling as a huge blow to the civil rights of all students, and believe it directly contradicts the ruling the Court issued in *Tinker v. Des Moines Independent School District*. I believe that the decision to apply the *Hazelwood* standard to the university setting is shortsighted and runs contrary to Court precedent.

It is also important to note that I have worked as a professional journalist, as a reporter and anchor for several radio stations in the Midwest. Though I have never been involved in a First Amendment court battle, I follow such battles closely. I understand what it is like to be a student reporter and a professional reporter, and believe this worldview will have a positive impact on the study, in that it will allow me to relate to the participants and ultimately understand the meaning they apply to the situation of prior restraint.

Data Collection Type

This research relies on data obtained from qualitative, in-depth interviews. The interviews were semi-structured in nature; there was a brief list of predetermined questions, developed by the interviewer that served as conversation starters. Attempts were made to ask all the participants at least some of the same questions, to determine if there was any consistency to the answers or any themes that appeared throughout several conversations (Berger, 2000). The researcher conducted phone interviews with students from universities in Illinois and Indiana.

Unlike in quantitative research, where participants are often randomly selected, the participants for this study were very specifically selected (Creswell, 2009). The researcher selected interview participants that were members of the collegiate press at public universities under the jurisdiction of the Seventh Circuit, as it is only in that

jurisdiction that the *Hosty* decision holds weight. Interview participants were identified by finding all the accredited, public universities in the states of Wisconsin, Illinois, and Indiana. Once the schools were identified, the researcher found information about the universities' student newspapers online. The researcher then contacted the newspapers directly to ask for interviews with the editors-in-chief. Interview participants were students who worked as editors for a student newspaper, either as part of a class or extracurricular activity, and have had articles printed in the newspaper in question. Interviews were conducted by phone and did not run over 45 minutes.

A total of eight in-depth interviews were conducted. Two interviews were conducted with student editors in Indiana, and six interviews were conducted with student editors in Illinois. Three student editors were contacted in Wisconsin, but none agreed to participate in this study.

Data Recording

All interviews were recorded and transcribed by the researcher. The researcher also took notes during the interviews. The researcher also took many of the steps suggested by Gibbs (2007) to ensure reliability, including checking notes taken during interviews during transcription, to make sure there were no obvious mistakes. Also, the researcher developed a definition of codes and broke material into topics prior to trying to come up with a whole picture (Creswell, 2009).

To further ensure validity, the researcher relied on thick descriptions that allow the reader to understand and, to a certain extent, "see" the setting in which the participants work (Creswell, 2009); this will also allow future researchers to understand the natural settings of the collegiate press in this study and compare it with their

experiences (Miller, 1992). Member checking was also used, in that the researcher, during the interviews, read statements back to the participants to make sure she understood what it was the participants were trying to say. The researcher has also attempted to ensure the study's validity by revealing her own bias, and will present any discrepant information, or data evidence that runs counter to the predominant themes identified in the study, should it arise during the research process (Creswell, 2009).

Reporting the Findings

Qualitative research was born out of the humanities and social science, and the traditional medium of qualitative analysis is human language (Jensen and Jankowski, 1991). The goal of this research is to understand the circumstances under which the collegiate press works, and how the participants feel about prior restraint and how it affects them. It is therefore necessary to use narrative to tell their story, and to include the use of thick descriptions, which will allow the readers to thoroughly understand the world in which these reporters live and work, and share their perspective. The findings are revealed in narrative form, providing readers with a holistic view of the phenomenon of prior restraint on college campuses, and its impact on the collegiate press.

Chapter 4

Findings

One purpose of this study was to determine what kind of impact, if any, the *Hosty v. Carter* decision had on student newspapers at public universities in the Seventh Circuit. The most striking finding of this research was that *Hosty* has not cast a shadow over many of the schools in the Seventh Circuit. Of all the students interviewed, very few had even heard of the *Hosty v. Carter* decision, and of those that did, most had heard it in the context of a classroom setting, usually in a media or communication law class. None of the interview participants had any experiences with their faculty advisor or a university administrator implementing a policy of prior restraint or successfully attempting to exercise prior restraint. As of yet, it would seem that the *Hosty* decision has not had a chilling effect on the collegiate press.

It is, however, important to acknowledge that the research examined only perceptions of the collegiate press; the viewpoints of faculty advisors and administrators were not examined in this study. So, while the collegiate press believes that it has a great deal of freedom from prior restraint, that perception may be skewed. This could be one reason that the findings run counter to what the researcher expected to find. Despite this possibility, the study does a service in revealing how prior restraint is viewed at the collegiate level. The findings also illustrate ways in which student newspapers in the

Seventh Circuit have managed to escape the implementation of prior restraint policies; examining them can help prevent a chilling of the collegiate press in the future.

Historically Independent Newspapers

Of the eight student editors interviewed, not one had experienced a successful instance of prior restraint during their tenure on the student newspaper. Only a handful of students had ever had brushes of any kind with prior restraint. One student editor recounted that an administrator asked the newspaper's faculty advisor to pull an article, but the advisor explained that the student staff decides all content issues, and the administrator let the subject drop. At another newspaper, after many university administrators objected to the newspaper's practice of publishing the city's police blotter, a committee was actually formed to determine whether or not the university should force the paper to remove the blotter. The committee ultimately fell apart before any action could take place. Other student editors had taken part in hostile interviews with administrators, who made it clear they did not agree with articles that were going to appear in the paper, but there were no real attempts to stop publication or pull content. And many of the student editors said that often, they do hear objections from within the university about articles that appeared in the paper, but it's largely *after* the fact; it's a form of *subsequent* consequence as opposed to *prior* restraint. Even the most absolutist First Amendment theorists do not object to the idea of subsequent punishment and would not argue that subsequent punishment has the same chilling effect on the collegiate press as prior restraint does. The participants in this study reported that they were not swayed or bothered by complaints from their readers, further evidence that there is not a chilling effect of the collegiate press on campuses in the Seventh Circuit.

The fact that universities in the Seventh Circuit haven't yet tried to exercise policies of prior restraint, even though they may be upheld, is a victory for the collegiate press. This research uncovered several findings that bode well for the collegiate press; most importantly, it identified factors that allow student newspapers to remain independent, with all editorial decisions on content coming from the student staff.

All the student editors who participated in this study agreed that the reason why they were able to work independently of the university was that the paper had a history, or, in some cases, a formal, written policy establishing itself as an independent, student-run publication. Two of the student editors worked at newspapers with constitutions stating that the newspaper is completely student-run, with all content decisions coming from the student editorial staff; the constitutions went on to say that no administrator or faculty member can see articles or page proofs prior to publication. One of the student editors noted that she, and the newspaper she edited, have a wonderful relationship with the university president, who signed an agreement acknowledging that neither he, nor anyone else in the administration, can influence the content of the student newspaper. Those students that worked at papers lacking any formal, written policy, stated that the newspapers had a long history of being forums for student opinion that were free from university control or influence; one student editor noted that when he joined the staff of the student newspaper, he heard stories about all the controversial, yet award-winning stories the paper had published. He was able to list several stories he himself covered that often shed the university in a less-than-flattering light, and said he never had a story dropped in his lap that he decided not to pursue because it might have negative undertones for the school. The interview participants said that it did not appear that

there was any desire on the part of university administrations to end the practice of having a student newspaper that operated as a public forum, free from censorship.

In addition to adopting a constitution with clearly stated protections, this study revealed other ways in which students newspapers can continue to maintain their independence, even if they are ever faced with the threat of censorship. These methods were those adopted by many of the student newspapers included in this study: the student newspapers have a variety of funding streams; they are often extracurricular as opposed to academic in nature; and the papers strive to act as public forums, which would largely be exempt from the *Hosty* decision.

It is one thing for a student newspaper to say it is independent, but many of the interview participants explained that their newspapers managed to maintain that independence by being largely self-funded. Two student editors worked for newspapers that were funded solely by ad revenue, which generated enough money to not only cover printing costs, but also pay all employees a stipend or per-article salary. Many of the newspapers were funded by a mix of both ad revenue and university funding, often from student affairs activity fees. Of those types of papers, many received only a fraction of their budget from the university; in one instance, the newspaper receives 90% of its budget, or over \$900,000 a year, through ad sales. There were three student newspapers that received the majority of their funding from the university, but the newspapers did still generate some income through ad sales.

A student newspaper's ability to fund itself is important, if it hopes to secure itself firmly outside the *Hosty* sphere. *Hosty* was based largely on *Hazelwood School District v. Kuhlmeier*. In that decision, the Supreme Court decided that the student newspaper,

the *Spectrum*, could be censored because it was not a public forum. The *Spectrum* was school-sponsored speech, in large part because it was funded by the school, and the Court found that the school's subvention of the paper's costs set it apart from the *Tinker* decision (Hosty v. Carter, 2005). It would be nearly impossible for a university to insist that a student newspaper this is completely or largely self-funded is not a public forum. Even if a student newspaper only earns a fraction of its operating budget from advertising revenue, that fraction represents a break from university control. A student newspaper's ability to generate some of its own money allows that newspaper to retain its independence. Better yet, the student newspapers in this study that used university funds used student activity funds or publication fee funds, as opposed to general funds, which granted those newspapers even more independence.

The student editors interviewed for this study often worked at newspapers that were extracurricular in nature; of all the student newspapers associated with this study, only two offered students academic credit for working on the student newspaper. At one university, students had to enroll in a specific journalism class in order to work on the paper; at another, students could enroll in a class and submit articles to the paper, or simply work at the paper independently, which was the most popular option at that university. All of the students who worked at the newspapers covered in this study were paid staff members, drawing either a regular stipend or per-article salary. Overwhelmingly, though, the interview participants stressed that they were not receiving academic credit for their work, and most preferred it that way; one student editor was completely opposed to having the student newspaper written in a classroom setting, saying, "I know at other schools, you have to write a story, and it gets graded in class.

That's a form of prior restraint, because someone sees the story before it goes to print, and it's possible that it could be changed." Though few but the most absolute of absolutists would liken editing to prior restraint, this participant said that keeping the student newspaper completely separate from the classroom was vital to the newspaper's autonomy; it's why she stressed that the newspaper was never part of the School of Communications but rather part of Student Affairs. Another student mentioned that the university he attended didn't even have a journalism major, so the paper operated almost completely autonomously. Most of the interview participants did their writing within the offices of the newspaper, which were separate from offices housing journalism or communications faculty and staff. The fact that the newspapers were largely extracurricular in nature is of particular importance when considering the *Hosty* decision; the court in that case declared that the *Hazelwood* standard could apply at the collegiate level, and that decision allows regulation of speech that is connected to the curriculum (2005). Therefore, speech that is not connected to the curriculum, for which students receive no academic credit, is far less likely to be subject to regulation, even in the Seventh Circuit.

Another aspect of the *Hosty* decision the student editors unconsciously touched on was the public forum issue. The language within the decision is a bit confusing and contradictory, but at one point, the court notes that papers that are public forums cannot be censored by the university, but papers that are published by the university or operated as closed forums can be subject to content supervision (2005). The decision is confusing because the court seemed to agree that the *Innovator* was a public forum, but that didn't matter, because Dean Carter was granted qualified immunity from liability because she

may not have known the *Innovator* was operating in a public forum. However, the question addressed here is whether the student newspapers that are part of this study are public forums, free from censorship. All of the interview participants stressed that their newspapers were indeed public forums, either in word or deed. Two of the student editors said that the newspapers' constitutions stated that the papers were public forums for student opinions. All of the other student editors said they "believed" their newspapers were public forums; more than one said the paper was "the voice of the student body." Many of the student editors stressed that all students, not just journalism majors, could apply for jobs at the student newspaper, and that reporters frequently solicited student opinions on hot-button issues. Another issue the Seventh Circuit Court of Appeals noted in *Hosty* was that part of determining whether a student newspaper was a public forum was what role the faculty advisor played. If the faculty advisor was only allowed to give advice, as opposed to exercising some control over content, this would put a paper in a better position of declaring itself a public forum. The student editors interviewed in this study all claimed that part of the reason they were able to exercise independence and be free from prior restraint was because of the role played by their advisors.

The Role of the Advisor

One statement that was repeated by nearly every student editor interviewed was that "we are completely student-run." To the participants, part of the reason they considered the paper a student-run organization was because of the limited role the faculty advisor played. Every newspaper covered in this study had an advisor of some sort; most were faculty advisors, but one paper had a part-time advisor who was actually

not part of the faculty, but worked for a large, professional, Chicago newspaper. Many of the faculty advisors in this study had previously worked in the professional press, and many of the interview participants saw their advisors as operating “separately” from the rest of the faculty. One student stressed that their faculty advisor didn’t even have an office in the same building as other journalism professors, but was housed within the offices of the newspaper. Most of the students described their advisors as serving in a truly advisory role: they could give advice, address style issues, and critique the paper once it came out. But, as one student editor noted, “I am the boss of the whole newspaper.”

The feeling that the student editors were in charge of content came not just from belief, but from action. Many of the interview participants stated that their advisors were not allowed to see page proofs or articles prior to publication; one student editor claimed that the page proofs for the newspaper were stored on a server that was inaccessible to anyone but student editorial staff. All of the student editors stated that their advisors seemed happy with allowing the student editorial staff to control content, and were proponents of the First Amendment rights of students. As previously stated, in one instance, a faculty advisor had to defend the student’s right to publish material to an angry administrator; many of the other interview participants said that they believed their faculty advisor would serve as a valuable ally in a prior restraint case, should one arise. One student editor noted that their faculty advisor had done a lot of work with the Student Press Law Center in Washington D.C. and often discussed First Amendment cases with the students. Another student noted that when going to the faculty advisor for advice, the

advisor stressed, “I am giving you this advice, but you don’t have to take it.” Another student said, “Our advisor has never told us, ‘You can’t do that.’”

It is clear that one constant among student newspapers that can act free from university oversight is that of a supportive advisor. A supportive advisor is one who gives advice and offers guidance, but does not make editorial decisions based on content. It was also striking that all of the students saw their advisor as an ally, someone who was “on their side.” Even if prior restraint issues do not arise, when students believe they will have someone help them fight censorship efforts, they will be much more optimistic about the amount of freedom they have when it comes to publishing the student newspaper. The findings of this study will reveal, in the following section, that student optimism often translates into a student’s willingness to tackle controversial topics, something they’ll have to do should they join the ranks of the professional press.

This study posed a multi-pronged question: Has the *Hosty v. Carter* decision had a “chilling effect” on the student press, and does the collegiate press believe that a policy of prior restraint affects the quality of a student newspaper and the journalism curriculum? This study so far has demonstrated that, from the collegiate journalist’s point of view, the *Hosty* decision has not had a chilling effect on the student newspapers covered here. Even though the student journalists had not had any direct encounters with prior restraint, this study still intended to reveal how the collegiate press felt about prior restraint in general. Thus, during the course of this research, participants were asked if they believed that prior restraint could negatively affect the quality of publications, and negatively affect the journalism curriculum, by not allowing students to exercise

judgment, develop critical thinking skills or prepare themselves for jobs in the professional press.

The Effects of Prior Restraint on Quality

The interview participants in this study were not familiar with the *Hosty v. Carter* decision, and most of what they knew about prior restraint came from law classes and discussions with peers and their teachers. However, all of the participants, not surprisingly, were strongly opposed to prior restraint of the collegiate press. One student editor said, “I don’t think you can be a journalist *for* prior restraint. I don’t think that exists. If you’re *for* prior restraint, you’re not a journalist, you’re just a writer.” The student editors interviewed were often able to come up with examples that showed they were opposed to prior restraint, and would not be deterred by the threat of it. Those examples reveal that the collegiate press in the Seventh Circuit is still willing to take chances.

All of the student editors who took part in this study claimed that they have never self-censored in terms of the tone of their writing or story-selection. All interview participants said that “making the administration angry” was never a concern when deciding what to write or what to cover. One student editor stressed that his tone, in editorials, was actually quite aggressive, and that “the more controversy I stir up, the better.” All of the participants did state that they felt they had the freedom to cover controversial stories, even those that may put the university in a bad light. One student editor recounted that his university had sent out a survey to determine how diverse the campus was, and some of the findings cast the university in a less-than-flattering light. The student interviewed an administrator and was preparing an article for publication

when the administrator went to the faculty advisor, asking that the article be pulled. In this instance, the faculty advisor defended the student's right to decide what to put in the paper, and the matter was dropped. Other student editors noted that their papers have covered controversial topics such as students objecting to new buildings going up on campus, or not being happy with services they received at the student health center. Another student editor said that his paper had covered a story about the university president having accidentally plagiarized items in his doctoral dissertation; that same paper also revealed that a recently hired provost resigned after only ten days on the job, and a massive search, because the provost didn't like the chancellor's "management style." As this student editor said, "The administration had egg all over their face. We've done a lot of stuff that made the university look really, really bad, but it was the truth."

The researcher was interested in determining whether the students would act differently if they operated under a policy of prior restraint. However, nearly all of the interview participants said they would never work for a newspaper, either student-run or professional, that had a policy of prior restraint. One student editor said working under a policy of prior restraint would be too frustrating; another said they wouldn't be comfortable with people being able to see content they're writing or editing; and two student editors said they'd rather just start a blog than work for a paper with a policy of prior restraint. Two student editors said they would work at newspapers with such policies if that was the only work they could find, but that they would be looking for alternatives; one of those students said if his work in particular was targeted, he'd likely

resign. And one student editor said he would work for a newspaper with a policy of prior restraint “if the money was right.”

One of the reasons the student editors cited for not wanting to work for a newspaper with a policy of prior restraint was that they felt the quality of the newspaper would suffer. Many of the student editors said that policies of prior restraint would negatively affect a journalist’s dedication and willingness to work hard. One student editor noted, “If you’re working on a story and you know it’s going to be pulled, you’re not going to work that hard. Why even bother?” Another student added, “There’s nothing worse than putting your heart and soul in an article then be told, ‘We’re not going to run this.’” Other interview participants claimed that prior restraint would give journalists a cynical attitude, and make them feel disconnected. Another student editor said that prior restraint could change the whole mentality of the paper: “There wouldn’t be much actual reporting. The quality would suffer because it wouldn’t be objective at all. You’re writing for approval of an administrator instead of writing for your readers.” One student editor said that she could see students who work for papers with policies of prior restraint getting discouraged, and contrasts that to the situation she finds herself in.

We have increased enthusiasm for what we do because we know that people can’t see our content ahead of time. We know they cannot change what we’re doing. We work a little harder to make sure our information is correct. Newspapers that do not have people combing through their articles before they print are more confident in their work and more enthusiastic about what they do because it feels real.

Even two of the student editors that expressed a willingness to work at a newspaper with a policy of prior restraint claimed that such a policy would not affect their dedication and work habits, but that they could see it affecting others’.

The overall attitude of the interview participants was that a policy of prior restraint would have a negative impact on the quality of newspapers, at either the collegiate or professional level. The interview participants also made statements that indicate a policy of prior restraint could negatively affect a journalism curriculum.

The Effect of Prior Restraint on Curriculum

Before delving into how a policy of prior restraint can affect the journalism curriculum at a university, it is worthwhile to examine how an absence of such a policy can affect a curriculum. Again, all of the interview participants worked at student newspapers at universities that did not exercise prior restraint of the press. And all of the interview participants agreed that working at the student newspaper had helped them develop judgment skills. The student editors stressed that their news judgment skills were sharpened, allowing them to select stories that were of interest to their readers, and furthered the mission of their newspapers. Other student editors said that their experiences on the student newspaper had also helped them make difficult decisions quickly and become more assertive. One student said, “I’ve learned to look deeper, find out why something matters. That’s something you don’t get from classes.” Two other student editors claimed that they learned more working at the student newspaper than they did in journalism classes.

The student editors also agreed that working at the newspaper had helped them develop their critical-thinking and problem-solving skills. Again, many students claimed that they were better able to develop those critical thinking skills in a newspaper setting as opposed to a classroom setting. Two student editors claimed that they are always faced with problems they have to solve or that they have to “put out a bunch of fires.”

Another student editor said, “We are constantly using critical thinking skills and analyzing what could happen if we did this. We have more foresight of what could happen and what we need to do.” One student editor also mentioned that working at the newspaper has given him a lot of practical experience, which is something that is an important part of any journalism curriculum.

Many college students begin looking for jobs in the professional world once they graduate. Therefore, the researcher asked interview participants to evaluate whether their time on the student newspaper had prepared them for a job in the professional press. The unanimous response was: absolutely. One student editor remarked that he already did freelance work for a professional publication, and that the way that newspaper functioned was almost identical to how his student newspaper functioned. He went on to say that working at the student newspaper, “Made me better a writer, thinker, and leader. It was the best decision I made in college, without a doubt.” Another student noted that working at the student newspaper not only prepared her for the professional press, but made her want to find a job with the professional press even more. About a third of the interview participants said they felt they were prepared for jobs with the professional press, but were likely to pursue jobs in other fields. Those participants said their experiences with their newspapers had been positive, but they were either pursuing different passions, worried about the future of the newspaper industry, or worried about the long hours and lack of a “personal life” they would have if they were journalists.

The student editors participating in this study stressed that prior restraint can negatively impact a university’s journalism curriculum because part of that curriculum should be preparing students to work in the professional press. One student editor said

that all students should be able to cover controversial stories, if only just for practice. Another student editor said prior restraint policies can't prepare students for jobs as professional journalists: "It's difficult to learn under a policy where anything you're doing can possibly be pulled away from you. If you're learning under censorship, how can you practice journalism after you graduate?" Many student editors also said that they should be able to decide what goes in the student newspaper because they will be expected to decide what goes in the newspaper if they ever work as professional editors. All of the student editors agreed that the collegiate press should have the same types of freedom to cover controversial topics that the professional press does; one participant said that newspapers were formed to cover controversial topics, and another participant said that just as professional newspapers are a check on government, student newspaper should be a check on the university administration. There was also concern from one student editor, should the *Hosty v. Carter* decision be implemented at all schools in the Seventh Circuit, that there could be devastating effects on the journalism field. "That judge is completely out of touch. He has no idea what the press is about. His decision would shut off the flow of qualified journalists entering the industry."

It's necessary to reiterate that all of the student editors interviewed viewed their tenures with their student newspapers as positive; many of them felt they learned a lot, often more than they learned in class, and all felt they were prepared to find jobs in the professional press if they so desired. The students felt that they were able to develop their judgment, critical-thinking and problem-solving skills while they worked for the newspaper, which would be viewed as a mark of success for any journalism course. It is no coincidence that these students viewed their experiences and ability to learn as

favorable and that they were free from policies of prior restraint. The findings of this study reveal that it is fair to say the students would not have similar experiences if they did work at newspapers with policies of prior restraint; all of the interview participants agreed that such policies would discourage students and prevent them from developing the skills necessary to work as a member of the professional press. Therefore, a university with a policy that allows prior restraint of the student newspaper prevents that university from doing what it should be doing: helping students think critically, improve their judgment, and prepare them for the professional world.

Chapter 5

Conclusions

This study has concerned itself with the rights of collegiate journalists in the wake of the *Hosty v. Carter* decision. With that opinion, the Seventh Circuit Court of Appeals stated that the *Hazelwood* rationale, typically applied to high school newspapers, could be applied, in certain cases, to college newspapers. The decision stands alone at the circuit level; both the First and Sixth Circuit Court of Appeals have explicitly refused to apply the *Hazelwood* standard to collegiate student newspapers, in *Student Government Association v Board of Trustees of the University of Massachusetts* and *Kincaid v. Gibson*, respectively.

The fact that no other circuit agrees with the findings of the Seventh Circuit is enough to demonstrate just how erroneous and dangerous the *Hosty* ruling is. But the decision also flies in the face of years of Supreme Court precedent! The Court, in 1972, ruled that college students deserve the same constitutional protections as the general public (*Healy v. James*). One of the most fundamental constitutional protections the general public has is that of a free and independent press, which operates outside the reach of prior restraint due to cases like *New York Times Co. v. United States* and *Nebraska Press Association v. Stuart*. The Court continued to uphold the free speech rights of college students in 1973 with *Papish v. Board of Curators of Missouri* and as recently as 1995 with *Rosenberger v. Rector & Visitors of the University of Virginia*.

Yet the Seventh Circuit ignored the guidance that has been issued in First Amendment cases involving the collegiate press and handed down a decision that, in theory, limited the First Amendment rights of collegiate journalists. The college journalist, despite his or her advanced age, maturity, and different needs, is placed on the same playing field as the high school journalist. That is something the Supreme Court has never done, and is a practice that denies university students their basic rights and makes it impossible for them to practice self-governance.

The *Hosty* decision is also troubling in that it grants university officials the ability to attempt to silence the press through prior restraint without facing any consequences. The fact that Dean Carter was granted qualified immunity from charges that she violated students' First Amendment rights could embolden other administrators to take her lead. If they are granted immunity from damages, the only thing that would stop them from trying to exercise prior restraint would be that they have no desire to do so. That's a risky gamble to take. And if a college or university were to take note of *Hosty*, and subsequently decide to apply the *Hazelwood* standard to college newspapers, the result could be an unprecedented chilling of the collegiate press. This study was designed to determine if, in the five years since the *Hosty* decision was handed down, any of those negative chilling effects have become a reality.

What Was Learned

The researcher hypothesized that *Hosty v. Carter* would have had a chilling effect on the collegiate press, revealing itself in instances of student reporters deciding not to cover controversial stories or stories that would be critical of the school or administration. It was additionally believed that students would edit the tone of their writing to sound

less critical of the school or administration. This study, though, found that in the past five years, the *Hosty* decision has not had a tremendous impact on the collegiate press in the Seventh Circuit; very few members of the collegiate press were even familiar with the decision and the implications it carried.

Though the findings run counter to the hypothesis posed, and are bound to gratify champions of student rights, they are not all that revolutionary. There was intense backlash immediately after the decision was handed down; but there were those that theorized that *Hosty* would not be a huge blow to students' First Amendment rights, as it was ultimately decided on qualified immunity grounds, as opposed to a strict application of the *Hazelwood* standard (Lyons, 2006). The court did not apply the *Hazelwood* standard to the *Innovator*, but rather found that it was reasonable for Dean Carter to think that *Hazelwood* did apply (Rooksby, 2007). Even if the decision had explicitly stated the *Hazelwood* standard could apply to all college student newspapers, the threat to the First Amendment rights of the collegiate press would be theoretical; it would only have an effect if a college or university acted on the ruling.

There are several reasons why a college or university would not want to control the content of student newspapers. Most universities and colleges already distribute publications that bare the imprimatur of the school and do not need to extend their influence to forums meant to serve the student population. While that's a bit of an altruistic reason to maintain a free and independent student press, colleges and universities do have a vested interest in keeping student newspapers hard-hitting and investigative in nature: those are the very types of student newspapers that win awards and accolades, which reflect well on the university and its journalism program.

Additionally, if colleges and universities exercise control of student newspapers, they expose themselves to liability. That's something even Christine Helwick, the general counsel for the University of California state system, realized. Helwick somewhat infamously sent out a memo stating that *Hosty* may give administrators on CSU campuses more power to censor student newspapers; she later backtracked, saying she was not making policy recommendations, since "Once you exercise control, you expose yourself to liability." (Lipka, 2006, p. A36)

Another reason *Hosty* may not had a huge impact on the collegiate press is because it's a bad decision: no one is looking to it for guidance. The arguments the judges use to reach their decision were illogical, flimsy, and did not in any way adhere to precedent. As previously stated, no other circuit court has similarly allowed prior restraint of the collegiate press. Courts aren't citing *Hosty* in scholastic press cases, and though the Supreme Court refused to hear the case, it can't be assumed that it did so because the justices agreed with the decision. As Lyons notes, the Court often waits until a number of challenges are made before it decides to hear a case and make a definitive ruling (2006).

Despite the perception of student journalists that they have not been impacted by *Hosty*, one must still exercise caution. After all, this study only examined the viewpoints of students, who could believe they have more freedom than they actually do. Student editors may not be aware of challenges from administrators that were directed, and deflected, by faculty advisors. Since the findings of this study can't be universally applied, and because *Hosty* does create a precedent that could indeed lead to university control of student newspapers, it's important that First Amendment advocates find ways

to keep that from happening. It is in that area that the findings of this study are truly worthwhile.

Once it was determined that collegiate journalists in the Seventh Circuit believed they were not subject to prior restraint, the study sought to determine what factors allow those student newspapers to maintain their independence. Two of the interview participants knew they had control over the editorial content of their student newspaper because it was granted to them in writing: the student newspapers had formal constitutions declaring that all editorial decisions were made by the student staff of the newspaper, and that no one in the university could influence content. Every student newspaper on every campus across the country should have a similar constitution. Adopting a written policy on the practices in which the paper can engage would forever eliminate the need for courts to determine what kind of forum a student newspaper is, and would make it clear to students and faculty what function the student newspaper is supposed to serve. If the *Hosty* decision did any good, it was in alerting the collegiate press and First Amendment advocates to the need for student newspapers to declare themselves public forums, free from prior restraint, *in writing*. It is troubling that not all the student newspapers covered in this study had written constitutions, but even those that didn't had something in common with those that did: they had a history of operating independently of the university administration. All eight interview participants worked for student newspapers that had long practiced covering controversial topics that, at times, put the university or certain administrators in a negative light. It is important to note that the student journalists acknowledged they did their fact-checking and strived to craft well-written stories; those steps make it hard for a university to mask efforts to pull

articles from a newspaper as anything other than censorship for non-pedagogical reasons. As one college journalist remarked, “As long as we’re right, what can they do?”

Other factors that allowed these student newspapers to maintain their independence included funding, the extracurricular nature of the paper, and the paper’s informal designation as a public forum. The participants in this study worked for student newspapers that were not funded solely by the university. Some student newspapers in this study operated on a budget derived solely from advertising revenue, though most were funded by a mix of advertising revenue and student activity fees. One student newspaper that operated on a mixed-funding model raised about 90% of its million-dollar-a-year budget through advertising; even if that university stopped funding the paper, the paper could very likely survive without those funds. That’s a very important point to make; if a university can’t take away a newspaper’s funding, how can it really stop that paper from being published and distributed? Self-sufficiency grants a level of autonomy to any activity, including operating a student press, and every student journalist in this study worked for a newspaper that was at least partially self-sufficient.

The majority of interview participants also worked at student newspapers that were extracurricular in nature; they did not receive any academic credit for working on the newspaper, and all writing took place outside of a classroom setting. This meant that the student newspaper was separate from the curriculum; this is particularly important because in *Hazelwood*, the inspiration for *Hosty*, the Court ruled that speech that was connected to the curriculum could be regulated. While it’s illogical to apply *Hazelwood* to the collegiate press, if one did, a newspaper that is not connected to the curriculum would have far more autonomy than one that’s written in a classroom. The majority of

student journalists in this study are making extracurricular statements, outside of traditional classrooms, where free speech has even more protection.

The issue of public forums also arose during the interview process. All the participants claimed that their newspapers were public forums, even if they were not acknowledged as such in writing. The student journalists said they saw their newspapers as public forums because they tried to be a voice for the entire student body, and the reporters tried to represent all sides of an issue. Additionally, since many of the student newspapers were not connected to the curriculum, any student could apply for a job and work for the student newspaper. That type of openness is a key characteristic of a public forum. Even under the strictest interpretation of *Hosty*, a university or administrator would not be able to exercise prior restraint of a student newspaper that was a public forum. The problem is, it is often left up to courts to decide whether a newspaper is a public forum, and the answer isn't always clear to judges. Therefore, student journalists that wish to operate their newspapers as public forums should claim that forum status on the masthead of the newspaper.

Another consistent factor among the participants of this study was that they all claimed to have supportive advisors who were removed from editorial decision making. The student journalists in this study maintained that all editorial decisions were made by the staff, with advisors simply offering guidance and critiquing the paper after it was published. In over a third of the cases, an advisor couldn't even attempt to exercise prior restraint because they could not see the student newspaper prior to publication. It seems unlikely that any of the advisors would want to take such a step. All the interview participants saw their advisors as First Amendment advocates that would act as allies if

prior restraint ever became an issue. One student journalist even recounted a story of a time when the advisor did have to stand up to an administrator who wanted an article pulled from the paper. It's possible that other advisors have taken similar steps without the knowledge of the participants of this study. The role the advisors play is the role an advisor would typically play on a student newspaper that truly operated as a public forum. Advisors are akin to editors, or, as one participant said, a managing editor. They can look for typos, offer advice, warn student journalists about the dangers of libel and inaccuracy, and see to certain administrative duties. But an advisor that wishes to teach students how to write and work for the professional press must allow student journalists to operate as the professional press does; the participants in this study were fortunate enough to have advisors that wanted them to learn.

The latter half of this study concerned itself with the views the collegiate press has of prior restraint; specifically, how prior restraint can impact the quality of the student newspaper and the quality of the journalism curriculum. Not surprisingly, all of the interview participants were opposed to the idea of prior restraint of the collegiate press -- after all, few student journalists would be willing to give up their own free speech rights and would naturally be inclined to protect the rights of fellow student journalists. That's a good sign for the future of journalism, as these future journalists understand what a threat prior restraint of the press is, even if they are not subject to it. The findings reveal that student journalists in the Seventh Circuit believe that a policy of prior restraint would negatively and significantly affect the quality of student newspapers. Three students specifically said they could not see how a student newspaper could operate under a policy of prior restraint. One commented that such a policy would change the

entire mentality of the newspaper, switching it from a forum for student voices to a mouthpiece for the university. Other participants said prior restraint would create a frustrating work environment and make student journalists feel disconnected from their readers. Again, the findings do not run contrary to what one would expect; what did stand out, though, was that the majority of participants said they would not work for a newspaper that operated under a policy of prior restraint. The rights that professional journalists have can only be maintained if journalists will continue to fight for them. It's gratifying and reassuring to know that future journalists are willing to stand up for their rights, and refuse to work at a paper where their words would be frozen. Many of the interview participants also showed a somewhat subconscious disdain for those that wouldn't fight prior restraint. One participant said that "you can't be a journalist *for* prior restraint," and that someone who writes for a paper that allows prior restraint isn't a journalist, but "just a writer." The participants all agreed that anyone who did work for a newspaper that exercised prior restraint probably wouldn't be dedicated to their job and wouldn't work very hard, both of which would adversely affect the quality of a publication.

The final goal of this study was to determine if a policy of prior restraint could have a negative impact on the journalism curriculum. The majority of the participants in this study did not work for newspapers that were part of the journalism curriculum. For purposes of this research, though, those newspapers are to be viewed as not just publications, but places where college students could learn and prepare themselves for the professional press. As was earlier laid out in the definitions for this study, such places are considered part of the journalism curriculum. All the interview participants

said that by working at the student newspaper, they were able to exercise judgment and develop critical thinking and problem-solving skills. Since the students all worked for student newspapers that were free from prior restraint, it's not unreasonable to believe that a healthy amount of academic freedom leads to true learning. Had the students worked for newspapers where their writing was closely monitored and censored, it's doubtful that they would have had the opportunity to develop and exercise the same skill set.

When the participants of this study were asked to evaluate how much they learned by working on a student newspaper, they were also asked if they felt they were prepared for a job in the professional press. All of the interview participants stressed that their tenures on the student newspaper had prepared them for a job with a professional media organization. They also agreed that students who work for newspapers with policies of prior restraint would not be ready for the professional world. The interview participants said that it would be difficult for students to learn when they're under the constant threat of censorship, and that they would not be prepared to make the types of decisions that are necessary if they are to act as editors. Even journalists who are not editors often have to make editorial or content-based decisions, and the study participants agreed that learning how to make those types of decisions should start in college – something that is less likely to happen in a setting that favors prior restraint. One student even claimed that the wide-spread implementation of *Hosty* could “shut off the flow of qualified journalists entering the industry.” The participants of this study all believed that part of a university's journalism curriculum should include preparing students for the professional press, but that a policy of prior restraint would not allow that to happen.

Limitations of this Study

This study is not without its limitations. The researcher only interviewed collegiate journalists in the areas affected by the *Hosty* decision: Wisconsin, Indiana, and Illinois. It could be argued that since the decision only impacts students in three states, it is not important and will not have much of an impact on journalism curriculum at large, or the broader field of journalism. But it is the precedent that is troubling, and it was useful to determine if, on a small scale, the threat of prior restraint has the potential to “freeze” the collegiate press. The very nature of this research also meant that it was impossible to interview editors at every newspaper at every public university in the Seventh Circuit, and the sample size was not very large; a quantitative study could have led to a higher response rate, and could have yielded responses from most, if not all, public universities in the Seventh Circuit. While a qualitative approach often leads to more in-depth, thoughtful replies, a quantitative approach, such as a survey, could have produced more replies on surface issues from more participants. However, the findings presented here do provide insight into how student newspapers are operating in the Seventh Circuit, and the fact that all the interview participants were free from prior restraint does show that there is some consistency in the Seventh Circuit.

Another way in which this study was limited was that it was only the opinions and expressions of student editors that were presented. The participants spoke very highly of their newspapers and could have been reluctant to say anything that might cast the publication in a negative light. Editors also tend to have a higher degree of autonomy than other staff members on a student newspaper; rank-and-file student journalists may see the publication for which they work in a very different, far more restrictive light. The

study could have also benefitted from the insight of faculty members. The study, in particular, asked students to evaluate how the *Hosty* decision has impacted the journalism curriculum; it would be worthwhile to ask faculty members, who create the curriculum, if they were influenced by the *Hosty* decision.

In addition to asking student journalists if they self-censor or edit their writing to comply with the wishes of administrators, it would be helpful to analyze the content of student newspapers in the areas under the jurisdiction of the Seventh Circuit. It is one thing for student journalists to claim that they write controversial articles and do not try to please university administrators; it is quite another to review the stories those students write and see what kind of topics they are covering. This type of approach would have yielded more insight into the type of journalism that is actually occurring at universities in the Seventh Circuit, as opposed to just what type of journalism student journalists perceive is happening. Future research could even go a step further and compare publications from the schools covered in this study to publications from universities outside the Seventh Circuit; this could help researchers determine if the threat of prior restraint really does affect the content of student newspapers.

Suggestions for Future Research

This study confined itself to the area within the reach of *Hosty*: the Seventh Circuit. It would be helpful to this field of research if future studies questioned not only students in the Seventh Circuit, but those outside of Wisconsin, Indiana and Illinois as well. It would be enlightening to develop a picture of the kinds of freedom student journalists perceive they have, nationwide. Comparing the sentiments of students from

within and without the Seventh Circuit would be an extension of gathering feedback from a nationwide pool of participants.

Another area that could be explored is how faculty members and administrators view *Hosty* and its effects on the collegiate press. Comparing the perceptions students have of the *Hosty* decision to those that faculty members and administrators have may reveal that students think they have more liberties than they actually do. Educators may not realize that students don't realize what they can and can't cover as journalists.

Determining how administrators view prior restraint could also help determine just how much of an impact *Hosty* will have on the First Amendment rights of students in the near future. If there is no desire on the part of administrators to censor student newspapers, *Hosty* may not be the death knell of a free collegiate press, but rather just a troubling precedent.

Future researchers could also dig even deeper into the types of stories student journalists can pursue. A quantitative study could ask students at schools nationwide what kinds of stories they think they could cover in their student newspapers. A number of different scenarios could be presented, and students could be asked if they think a story on a controversial or risqué topic would be published or censored. It would be very interesting to present administrators and faculty members of those same schools with the same scenarios. The results could reflect whether students, faculty and administrators share the same opinions on the amount of freedom student journalists actually have at their schools. Also, since faculty members tend to work more closely with students and may be more sympathetic to a student's First Amendment rights than an administrator, a study comparing the thoughts of faculty versus those of administrators on student press

freedom could be very revealing. Faculty members and administrators could be presented with scenarios, as presented above, and be asked if they think student journalists *would* be able to publish articles on those scenarios in the student newspaper; those same two groups could also be asked if student journalist *should* be able to publish those articles. The answers could be very different.

Another area that lends itself to further research is content analysis. Researchers could compare student publications from universities in the Seventh Circuit to those from universities outside the court's jurisdiction. This research could examine whether student newspapers on campuses outside the Seventh Circuit cover more controversial or hard-hitting stories than student newspapers within the Seventh Circuit. Similarly, researchers could evaluate student newspapers from within the Seventh Circuit that were published both before and after the *Hosty* decision was handed down, and determine if there has been a rise or decline in controversial stories or instances of investigate journalism that target university administrations.

Finally, since part of this study was concerned with whether students who were subject to prior restraint of their work are properly prepared for jobs in the professional press, future research could concentrate on the opinions and experiences of first-year professional journalists. After working in the professional press for one year, reporters who graduated from a school with a policy of prior restraint could be asked if they felt they were properly prepared to work in the professional press. A study evaluating how new journalists handled controversial material and fulfilled the responsibilities of acting as the Fourth Estate would reveal whether the *Hosty* decision has had an impact on the professional press, in addition to the collegiate press. Related research could also ask

employers in the professional press how they feel about the *Hosty* decision, and whether it may have or has had an impact on their hiring decisions.

This study is by no means an exhaustive look at the rights of collegiate journalists, and whether the *Hosty v. Carter* decision has affected how the collegiate press operates. The study has revealed, though, that for now, it does not seem that the decision has had a chilling effect that many feared it would. It is the researcher's contention that merely because prior restraint has not become an active policy on campuses within the Seventh Circuit that one should ignore the *Hosty* decision and what it could mean for the future of collegiate journalism. It would be wise for student journalists who wish to maintain the autonomy of their student newspapers to take cues from this study. This study reveals several ways in which student newspapers can maintain their independence; those that favor a student press free from prior restraint should be proactive, making sure that the student newspapers on their campuses share the same characteristics as those covered in this study. Administrators, faculty members, and other decision makers at public universities should also note that student journalists believe they should be free from prior restraint, and that a lack of that freedom could negatively impact the quality of student newspapers and the entire journalism curriculum of a university. The perceptions of students being taught should be taken into consideration when developing a curriculum, and when determining whether a student newspaper at a public university should act as a public forum.

Appendix

The following questions were asked of all interview participants. The interviews were semi-structured in nature, and often went off-script. However, all participants were asked and responded to the questions listed here.

- Have you heard of the *Hosty v. Carter* ruling?
- In *Hosty v. Carter*, in 2005, the Seventh Circuit Court of Appeals ruled that when it comes to prior restraint, the *Hazelwood* standard could apply to college newspapers that were not designated public forums. Prior restraint, for purposes of this research, also refers to prior review and prior censorship; that is, university administrators, faculty, or staff can review material prior to publication and censor or edit it, based on the content of the article. This can also be described as content discrimination. This is different from reviewing and editing material in order to uphold journalistic standards. What are your initial thoughts on the ruling?
- Does your university have a formal written or clearly stated stance on prior restraint, prior review, or prior censorship?
- Is your paper a designated public forum?
- Has a faculty advisor or college administrator ever discussed the *Hosty v. Carter* decision with you? If so, what were their views?
- Has any faculty advisor or college administrator ever objected to a story idea or an article that was to appear in the student newspaper? How were those objections voiced and handled?
- As a student reporter, have you ever exercised self-censorship, by deciding not to cover a story or consciously altering the tone of your writing? Why or why not?

- Do you feel that you have the freedom to cover controversial topics, even those that might put the college or a member of the administration in a bad light?
- Do you feel that working on the student newspaper has allowed you to exercise judgment? Please explain and/or give examples
- Do you feel that working on the student newspaper has allowed you to develop critical thinking skills? Please explain and/or give examples.
- Do you feel that your experiences on the student newspaper have prepared you for a job with the professional press?
- Have your experiences changed your mind about going into the journalism profession?
- Do you feel that administrators or advisors have the right to review, pull, or edit stories prior to publication?
- Do you feel all student reporters should be able to cover controversial topics?
- Do you think college student reporters should be held to the same standards and face the same limitations as high school student reporters?
- Would you work on a paper that allowed prior review, prior restraint, or prior censorship?
- If so, would you feel invested in the paper and work hard on it?

References

- Abrams v. United States*, 250 U.S. 616 (1919).
- Ambach v. Norwick*, 441 U.S. 68 (1979).
- American Communications Association, C.I.O. v. Douds*, 339 U.S. 382 (1950).
- Applegate, D. A. (2005). Stop the presses: The impact of *Hosty v. Carter* and *Pitt News v. Pappert* on the editorial freedom of college newspapers. *Case Western Reserve Law Review*, 56(1), 247-283.
- Axson-Flynn v. Johnson*, 356 F.3d 1284 (10th Cir. 2004).
- Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).
- Bazaar v. Fortune*, 476 F.2d 570 (5th Cir. 1973).
- Berger, A. (2000). *Media and communication research methods: An introduction to qualitative and quantitative approaches*. Thousand Oaks: Sage Publications.
- Bethel School District v. Fraser*, 478 U.S. 675 (1986).
- Bishop v. Aronov*, 926 F.2d 1074 (11th Cir. 1991).
- Blackstone, W. (1769). Commentaries on the laws of England 151-52.
- Blasi, V. (1977). The checking value in First Amendment theory. *American Bar Foundation Research Journal*, 1977(3), 521-649.
- Blasi, V. (1981). Toward a theory of prior restraint: The central linkage. *Minnesota Law Review*, 66(1), 11-94.
- Board of Education v. Earls*, 536 U.S. 822 (2002).
- Board of Regents of the University of Wisconsin v. Southworth*, 529 U.S. 217 (2000).
- Brennan, W. J. (1965). The Supreme Court and the Meiklejohn interpretation of the First Amendment. *Harvard Law Review*, 79(1), 1-20.
- Canavan, F. (1999). Speech that matters. *Society*, 36(6), 11-15.
- Carter, T. B., Franklin, M. A., & Wright, J. B. (1999). *The First Amendment and the fifth estate: Regulation of electronic mass media*. Eagan: West Publishing Company.
- Cass, R. A. (1987). The perils of positive thinking: Constitutional interpretation and negative First Amendment theory. *UCLA Law Review*, 34(5&6) 1405-1492.

- Chafee, Z. (1967). *Free speech in the United States*. Cambridge: Harvard University Press.
- Creswell, J. (2009). *Research design: Qualitative, quantitative, and mixed methods approaches*. Thousand Oaks: Sage Publications.
- Dennis v. United States*. 341 U.S. 494 (1951).
- Denzin, N., & Lincoln, Y. (2000). *Handbook of qualitative research*. London: Sage Publications.
- Emerson, T. I. (1955). The doctrine of prior restraint. *Law and Contemporary Problems*, 20(4) 648-671.
- Emerson, T. I. (1963). Toward a general theory of the First Amendment. *Yale Law Journal*, 72(5) 877-956.
- Finnigan, M. (2006). Extra! Extra! Read all about it! Censorship at state universities: *Hosty v. Carter*. *University of Cincinnati Law Review*, 74(4), 1477-1496.
- Gerald, J. (1948). *The press and the Constitution, 1931-1947*. Minneapolis: University of Minnesota Press.
- Gibbs, G. R. (2007). *Analysing qualitative data*. London: Sage Publications.
- Gratz, I. (2005). *Student Press Law Center Fall 2005 Report*, 26(3). Retrieved from http://www.splc.org/report_edition.asp?id=37
- Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).
- Healy v. James*, 408 U.S. 169 (1972).
- Hiestand, M. (2006, July 6). The *Hosty v. Carter* decision: What it means. *Associated Collegiate Press*. Retrieved from <http://www.studentpress.org/acp/trends/~law0705college.html>.
- Holmes, I. (1986). *Censorship of the campus press: A study of 18 university newspapers*. The Gannett Foundation.
- Hoover, C. (1998). The *Hazelwood* decision: A decade later. *NASSP Bulletin*, 82(599), 48-56.
- Hopkins, W. W. (1996). The supreme court defines the marketplace of ideas. *Journalism and Mass Communication Quarterly*, 73(1) 40-52.
- Hopkins, W. (2009). *Communication and the law*. Northport, AL: Vision Press.

- Hosty v. Carter*, 325 F.3d 945, 948 (7th Cir. 2003).
- Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005).
- Hudson, D. L. (2005, June 30). How much will *Hosty* ruling affect campus expression? *First Amendment Center*, Retrieved from <http://www.firstamendmentcenter.org/analysis.aspx?id=15502>.
- Jensen, K., & Jankowski, N. (1991). *A handbook of qualitative methodologies for mass communication research*. New York: Routledge.
- Keyishian v. Board of Regents*, 385 U.S. 589 (1967).
- Kincaid v. Gibson*, 236 F.3d 342(6th Cir. 2001).
- Kovacs, M. (1991). The impact of *Hazelwood* in the state of Indiana. *Quill & Scroll*, 65(3), 4-8.
- LaVigne, C. (2008). *Hazelwood v. Kuhlmeier* and the university: Why the high school standard is here to stay. *Fordham Urban Law Journal*, 35(1), 1191-1223.
- Linvaack, T. R. (1977). The doctrine of prior restraint. *Harvard Civil Rights-Civil Liberties Law Review*, 12(3) 519-558.
- Lipka, S. (2006). Stopping the presses. *Chronicle of Higher Education*, 52(26), A35-A36.
- Lomicky, C. S. (2000). Analysis of high school newspaper editorials before and after *Hazelwood School District v. Kuhlmeier*: A content analysis case study. *Journal of Law & Education*, 29(4), 463-476.
- Ludeman, R. B. (1989). The formal academic grievance process in higher education: A survey of current practice. *NASPA Journal*, 26(3), 235-240.
- Lukianoff, G. (2005, September 3). Wronging student rights. *Boston Globe*, A17.
- Lyons, J. B. (2006). Defining freedom of the college press after *Hosty v. Carter*. *Vanderbilt Law Review*, 59(5), 1771-1810.
- Madison, J. (1798). Virginia Resolutions.
- Meiklejohn, A. (1948). *Free speech and its relation to self government*. New York: Harper.
- Meiklejohn, A. (1961). The First Amendment is an absolute. *The Supreme Court Review*, 245-266.

- Mendelson, W. (1962). On the meaning of the First Amendment: Absolutes in the balance. *California Law Review*, 50(5), 821-828.
- Miller, D. (1992). The experiences of a first-year college president: An ethnography. (Unpublished doctoral dissertation). University of Nebraska-Lincoln.
- Milton, J. (1644). *Areopagitica*.
- Morse v. Frederick*, 551 U.S. 393 (2007).
- Near v. Minnesota*, 283 U.S. 697 (1931).
- Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976).
- New York Times Co. v. United States*, 403 U.S. 713 (1971).
- Ng, R. B. (2007). A house divided: How judicial inaction and a circuit split forfeited the First Amendment rights of student journalists at America's universities. *Hastings Constitutional Law Quarterly*, 35(2), 345-372.
- Nimick, V. A. (2006). Schoolhouse rocked: *Hosty v. Carter* and the case against *Hazelwood*. *Journal of Law and Policy*, 14(2), 941-998.
- Ospina, S. (2004). Qualitative research. *Encyclopedia of research*. London: Sage Publications.
- Papish v. Board of Curators of the University of Missouri*, 464 F.2d 136 (8th Cir. 1972).
- Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667 (1973).
- Peltz, R. J. (2001). Censorship tsunami spares college media: To protect free expression on public campuses, lessons from the 'college *Hazelwood*' case. *Tennessee Law Review*, 68(3), 481-556.
- Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983).
- Pittman, R. D. (2007). The college student media as house organ: Reflections on an off-key decision in *Hosty v. Carter*. *Houston Law Review*, 44(1), 131-160.
- Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973).
- Planned Parenthood of Southern Nevada v. S. Nev., v. Clark County School District*, 941 F.2d 817 (9th Cir. 1991).
- Redish, M. (1984). The proper role of the prior restraint doctrine in First Amendment theory. *Virginia Law Review*, 70(1), 53-100.

- Rooksby, J. H. (2007). Rethinking student press in the 'marketplace of ideas' after *Hosty*: The arguments for encouraging professional journalistic practices. *Journal of College and University Law*, 33(2), 429-472.
- Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995).
- San Diego Committee Against Registration and the Draft (CARD) v. Governing Board of Grossmont Union High School*, 709 F.2d 1471 (9th Cir. 1986).
- Sanders, C. (2006). Censorship 101: Anti-*Hazelwood* laws and the preservation of free speech at colleges and universities. *Alabama Law Review*, 58(1), 159-178.
- Schauer, F. (1978). Fear, risk and the First Amendment: Unraveling the "chilling effect". *Boston University Law Review*, 58(5), 685-732.
- Shank, G. (2002). *Qualitative research. A personal skills approach*. New Jersey: Merrill Prentice Hall.
- Silverglate, H. A. (2005, Oct. 17). Assault on college press. *The National Law Journal*. Retrieved from <http://www.thefire.org/article/6344.html>
- Smith v. California*, 361 U.S. 147 (1959).
- Smolla, R. (1992). *Free speech in an open society*. New York: Alfred A. Knopf.
- Southeastern Promotions, Ltd. v. Contrad*, 420 U.S. 546 (1975).
- SPLC News Flash, Student Media Experts React to Governors State University Ruling. (2005, June 22). Retrieved from www.splc.org/newsflash.asp?id=1039.
- Stembridge, P. R. (2000). Adjusting absolutism: First Amendment protection for the fringe. *Boston University Law Review*, 80(3), 907-938.
- Strossen, N. (1998). *Students' rights and how they are wronged*, 32 University of Richmond Law Review Association 457.
- Student Government Association v. Board of Trustees of the University of Massachusetts*, 868 F. 2d 473 (1st Cir. 1989).
- Sweezy v. New Hampshire*, 354 U.S. 234 (1957).
- Tenhoff, G. C. (1991). Censoring the public university student press: A constitutional challenge. *Southern California Law Review*, 64(2), 511-548.
- Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

Trujillo v. Love, 322 F. Supp. 1266 (D. Colo. 1971).

Widmar v. Vincent, 454 U.S. 263 (1981).

Zirkel, P. (2007). Bong hits? *Phi Delta Kappan*, 89(2), 158-159.