Keeping Free Speech Free in the College Marketplace of Ideas: California Legislation as an Imperfect Solution to Censorship by University Administrators

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PICTURE JANE SMITH, an English major in her last month of college at a private California university. Jane writes a weekly column for her school's student-run newspaper. Last week, Jane published a controversial article criticizing the administration for an unfair grading policy. Administrators, including the college dean, demanded that the newspaper print a correction, refused to pay the newspaper's publisher until the newspaper complied, and threatened Jane with suspension for similar articles. The student newspaper, taking Jane's side, refused to print a correction. However, it cannot publish further issues without the university's payment to the printer and ceases publication.[1] Jane graduates, having lost the opportunity to publish three more columns.

Jane brings claims for declaratory and injunctive relief against the college, as well as the college dean and other administrators, under two separate statutes. Her first claim falls under California Education Code section 66301,[2] as amended by Assembly Bill 2581 ("A.B. 2581").[3] A.B. 2581 was passed in response to the Seventh Circuit's re-

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1. This scenario is a hybrid of the facts of *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005), and *Antebi v. Occidental College*, 47 Cal. Rptr. 3d 277 (Ct. App. 2006).

2. *See* CAL. EDUC. CODE § 66301 (West 2003 & Supp. 2007) (prohibiting public colleges from imposing disciplinary sanctions on students for speech or other expression that would be protected by the First Amendment outside the school).

3. *See* Assemb. B. 2581, 2006 Leg., Reg. Sess. (Cal. 2006).

cent decision in *Hosty v. Carter*, as well as a memorandum distributed to the presidents of the California State University ("CSU") discussing *Hosty*.[4] *Hosty* received widespread criticism for applying a restrictive standard to college students' speech that departed from previous federal cases.[5] Responding to this threat, California legislators designed A.B. 2581 to prevent college administrators from using *Hosty* to silence the student press.[6]

Reviewing this claim, the court rules that Jane lacks standing because section 66301 only applies to *public* college students in California,[7] and she attends a private college. Despite this setback, Jane is confident she will prevail in her second claim, brought under California's Leonard Law, California Education Code section 94367.[8] The Leonard Law extends First Amendment protections to private college students in California by statute.[9] However, because Jane's suit is against administrators, not her college, and the Leonard Law specifically prohibits colleges from censoring students, the court questions whether she may sue the administrators directly.

Elaborating on this uncertainty, the court reasons that public college students only obtained specific statutory authority to sue their administrators after A.B. 2581 added new language to Education

4. 412 F.3d 731; *see* ASSEMB. COMM. ON JUDICIARY, AB 2581 BILL ANALYSIS 2 (May 9, 2006), *available at* http://info.sen.ca.gov/pub/05-06/bill/asm/ab_2551-2600/ab_2581_cfa_20060505_165444_asm_comm.html [hereinafter BILL ANALYSIS] ("[E]xisting law could be considered sufficient to cover both administrators and the student press. However, a recent court decision[, i.e., *Hosty*], and [the] CSU memo, led [the author and sponsor] to introduce this bill . . . ."); *see also* Evan Mayor, *California Governor Signs College Student Press Freedom Bill: Law Passed in the Wake of the* Hosty v. Carter *Decision Is the First of Its Kind in the Country*, STUDENT PRESS L. CENTER, Aug. 28, 2006, at 1, www.splc.org/printpage.asp?id=1316&tb=newsflash [hereinafter Mayor, *California*] (discussing *Hosty* as a motivating factor for A.B. 2581). While Seventh Circuit case law is not normally a concern in California, Christine Helwick, general counsel to the CSU system, sent a memo to the presidents of the schools, stating that *Hosty* may give CSU campuses "more latitude than previously believed to censor the content of subsidized student newspapers." *See* Memorandum, California State University Office of General Counsel, to CSU Presidents, from Christine Helwick, General Counsel, Subject: Recent Court Decisions (June 30, 2005), at 1, *available at* http://www.splc.org/csu/memo.pdf [hereinafter Memorandum].

5. *See, e.g.*, Michael O. Finnigan, Jr., Note, *Extra! Extra! Read All About It! Censorship at State Universities:* Hosty v. Carter, 74 U. CIN. L. REV. 1477, 1478 (2006).

6. *See* Mayor, *California*, *supra* note 4, at 1.

7. *See infra* Part II.A.

8. CAL. EDUC. CODE § 94367 (West 2002).

9. *See id.* § 94367(a). In *Antebi*, the California Court of Appeal held that a recent private college graduate lacked standing to sue under the Leonard Law because the student sued after graduation, even though the alleged censorship occurred while he was a student. Antebi v. Occidental Coll., 47 Cal. Rptr. 3d 277, 280 (Ct. App. 2006).

Code section 66301.[10] Comparing section 66301's specific prohibition of administrative censorship with the Leonard Law's failure to discuss administrators in the private school context,[11] the court reasons that the Leonard Law was not meant to cover censorship by private university administrators. Further, the court suggests the legislature would have included language similar to A.B. 2581 in the Leonard Law if it intended to provide students with direct relief against administrators for their actions.[12] The hassle of litigation and threat of suit, the court reasons, may interfere with administrators' effectuation of their duties. Thus, the court concludes that these concerns preclude Jane's suit against her college's administrators.

Continuing its analysis of Jane's Leonard Law claim, the court cites a recent California Court of Appeal case, *Antebi v. Occidental College*,[13] which read a "current enrollment" standing requirement into the Leonard Law.[14] Following *Antebi*, the court holds that Jane lacks standing under the Leonard Law because she is no longer currently enrolled. Jane's case is dismissed, and she vows never to write for another newspaper again.

Unfortunately, Jane's situation is consistent with a history of institutional intolerance for free expression in California's universities. In 1964, thousands of college students at the University of California at Berkeley campus participated in sit-ins, rallies, and protests in their fight for freedom of speech and expression in higher education.[15] Significantly, the free speech movement accomplished the students' goals: the administration capitulated and gradually allowed free politi-

10. *See* Assemb. B. 2581, 2006 Leg., Reg. Sess. (Cal. 2006); Mayor, *California*, *supra* note 4, at 1.

11. *Compare* CAL. EDUC. CODE § 66301(a) (West Supp. 2007) *with* CAL. EDUC. CODE § 94367.

12. The Leonard Law does not state that private college students may sue administrators, and until A.B. 2581 amended section 66301, public college students could not sue administrators directly for censorship. *Compare* CAL. EDUC. CODE § 66301 *with* CAL. EDUC. CODE § 94367.

13. 47 Cal. Rptr. 3d 277.

14. Taking the hypothetical one step further, if Jane had attended a public college, the court might apply *Antebi*'s reasoning to dismiss a section 66301 suit against the college's administrators. Section 66301 and the Leonard Law have nearly identical language, such that the court could read the same current-enrollment requirement into section 66301 that *Antebi* read into the Leonard Law. *See* discussion *infra* Part III.C.

15. *See* ROBERT COHEN & REGINALD E. ZELNIK, THE FREE SPEECH MOVEMENT: REFLECTIONS ON BERKELEY IN THE 1960S, at i (2002); MAX HEIRICH, THE SPIRAL OF CONFICT: BERKELEY, 1964, at 1–2 (1971).

cal expression on Berkeley's campus.[16] However, decades later, college and graduate students in California continue to petition courts with claims of censorship by university administrators.[17]

Jane's dilemma, one example of these claims, demonstrates that the legislature must amend section 66301 and the Leonard Law in order to adequately protect California college students' speech from administrative censorship. Section 66301, as amended by A.B. 2581, only goes halfway in response to *Hosty v. Carter*: it applies to public college students but does not mention private college students.[18] Likewise, the Leonard Law—the statute to which private college students in California must turn—only states that "private postsecondary educational institutions" may not censor their students.[19] Second, the current-enrollment requirement that *Antebi* reads into the Leonard Law[20] seriously reduces the opportunity for private college students to invoke the protections of the Leonard Law.[21] The same crippling standing limitation of *Antebi* could also be read into California Education Code section 66301, which has a remedial provision identical to that in the Leonard Law.[22] If *Antebi*'s standing limitation were read into section 66301, it would prevent recent graduates, both public and pri-

16. *See* THE CRISIS IN AMERICAN EDUCATION: REVOLUTION AT BERKELEY, at xxix (Michael V. Miller & Susan Gilmore eds., 1965) ("December 8: Academic Senate meets and votes 824 to 115 for the five-point proposal made by the Committee on Academic Freedom against the control of student speech and political advocacy. FSM states full support for the faculty position."). The Free Speech Movement ("FSM") was formed from a united front of student leaders as well as an executive committee of representatives from various organizations. *See id.* at xxvi.

17. *See* Brown v. Li, 308 F.3d 939, 945 (9th Cir. 2002); Head v. Trustees of Cal. State Univ., No. C05-05328WHA, 2006 WL 2355209, at *1 (N.D. Cal. 2006); Gallagher v. Univ. of Cal. Hastings, No. C011277PJH, 2001 WL 1006809, at *1 (N.D. Cal. 2001); *Antebi*, 47 Cal. Rptr. 3d at 279; Head v. Trustees of Cal. State Univ., No. H029129, 2007 WL 118882, at *1 (Cal. Super. 2007); *see also* Khademi v. S. Orange County Comm. Coll., 194 F. Supp. 2d 1011, 1016 (C.D. Cal. 2002) (concerning students' challenges to community college district's policies regulating the time, place, and manner of student speech).

18. *See* Assemb. B. 2581, 2006 Leg., Reg. Sess. (Cal. 2006); *see* discussion *infra* Part II.A.

19. CAL. EDUC. CODE § 94367(a) (West 2002).

20. *See Antebi*, 47 Cal. Rptr. 3d at 280.

21. *See* Scott Sternberg, *California Court Says Former Occidental Student Can Not Sue Under Leonard Law: Antebi Vows to Appeal, Pursue Defamation Charges*, STUDENT PRESS L. CENTER, Sept. 13, 2006, at 1, http://www.splc.org/printpage.asp?id=1323&tb=newsflash. As one commentator notes, "[t]he summer of 2005 will be remembered as a rough season for student rights. The worst legal decision of the summer was *Hosty v. Carter*. . . . Another harmful summer ruling was *Antebi v. Occidental College*." Greg Lukianoff, *Wronging Student Rights*, BOST. GLOBE, Sept. 3, 2005, at 1, *available at* http://www.thefire.org/pdfs/8c9a1e56af22dda5de9f471f9588971f.pdf (italics added).

22. *Compare* CAL. EDUC. CODE § 66301(b) (West Supp. 2007) *with* CAL. EDUC. CODE § 94367(b).

vate, from bringing suit against universities for retaliatory or disciplinary censorship. Section 66301 and the Leonard Law should be retooled to ensure true freedom of speech for both public and private college students in California.

Part I of this Comment reviews key federal court cases addressing censorship of student speech. It also analyzes *Hosty*'s unprecedented application of *Hazelwood* to college speech and argues that the *Hazelwood* standard will have a chilling effect on college students' expression. Part II summarizes current California law related to college students' expression, including A.B. 2581, the Leonard Law, and *Antebi*.

Part III shows that A.B. 2581 is an incomplete response to the threat posed by *Hosty* because it only applies to public college students. This Part then demonstrates that unlike section 66301, the Leonard Law does not prohibit administrators or other officials from censoring private college students. This Part then critiques the new standing limitations read into the Leonard Law by the California Court of Appeal in *Antebi*.

Part IV argues that in order for A.B. 2581 to go the full distance in fostering a "marketplace of ideas"[23] in California, the legislature should pass additional bills to protect private college students from *Hosty*-type administrative censorship. Under *Antebi*'s reasoning, private college students in California will have more difficulty meeting standing requirements in pursuing claims for unlawful censorship. Likewise, public college students are vulnerable to the possibility that a California court will apply *Antebi*'s standing requirements to section 66301. As a solution, Part IV suggests that the legislature amend the Leonard Law and Education Code section 66301 to allow suits by former students who recently graduated or were expelled from a college or university as a result of their unpopular speech, provided that the former students were censored or disciplined by the institution for expression that occurred while they were enrolled as students. These amendments are essential to prevent administrators from regulating the free flow of ideas in California's colleges. Freedom of speech may never be an absolute right, but regulation of college students' speech

23. Justice Oliver Wendell Holmes crafted the "marketplace of ideas" metaphor to describe the process of separating truth from falsity. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 899 (2001). He believed "'the best test of truth is the power of the thought to get itself accepted in the competition of the market.'" *Id.* (quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

should be minimized to ensure true academic freedom and a robust exchange of ideas, necessary for fostering democracy.[24]

I. Federal Cases Framing the Free Speech Rights of College Students

A. *Hazelwood v. Kuhlmeier* and Public/Non-Public Forum Analysis

In *Hazelwood v. Kuhlmeier*,[25] the United States Supreme Court permitted sweeping administrative censorship of a high school newspaper.[26] The high school principal at Hazelwood East deleted two pages of articles from the May 13, 1983 issue of the school's newspaper before it was published as part of a journalism class.[27] The deleted articles concerned "students' experiences with pregnancy," and "the impact of divorce on students at the school."[28] The Court first asked whether a high school newspaper was a "forum for public expression" deserving the same First Amendment protections as general public fora for speech and assembly.[29] In performing this forum analysis, the court considered whether "school authorities have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public,' . . . or by some segment of the public, such as student organizations."[30] The court distinguished *Tinker v. Des Moines School District*,[31] a previous case where students wore armbands in a manner unrelated

24. *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (discussing the importance of "safeguarding academic freedom" and holding state regulations restricting teachers' conduct to be unconstitutionally overbroad). In somewhat ominous tones, the Supreme Court in *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), warned against the consequences of censorship, noting that "[t]o 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; otherwise our civilization will stagnate and die." *Id.* at 250.

25. 484 U.S. 260 (1988).

26. *See generally id.*

27. *Id.* at 262. Approximately 4500 copies of the newspaper were distributed to students, school personnel, and community members that year. *Id.*

28. *Id.* at 263.

29. *Id.* at 267.

30. *Id.*

31. 393 U.S. 503 (1969); *Hazelwood*, 484 U.S. at 267. Substantial language in *Tinker* supports free student speech in public schools:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students . . . . They are possessed of fundamental rights which the state must respect . . . . They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.

393 U.S. at 511. Famously, the *Tinker* opinion goes on to state:

to school curricula.[32] Unlike the armbands in *Tinker*, the court in *Hazelwood* found that the student articles were written for their journalism class and were school-sponsored speech within the curriculum, which the court found was not a public forum.[33]

After concluding that the high school paper constituted a non-public forum, the *Hazelwood* court further held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[34] The Court deferred to the principal's stated reasons for the censorship finding that there were legitimate pedagogical concerns, including lack of time to make changes, protecting younger students from references to sexual activity, and avoiding offending parents.[35] Significantly, the majority stated in a footnote that "[w]e need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level."[36]

B. Circuit Court Cases After *Hazelwood* and Before *Hosty*

In *Hazelwood*, the United States Supreme Court focused on whether the high school newspaper operated in a public forum and reasoned that secondary students in public schools do not automatically enjoy rights "coextensive with the rights of adults in other settings."[37] Because of its limited scope, circuit courts have been reluctant to apply *Hazelwood* to college speech or to speech that is part of a limited or designated public forum when determining whether school officials' restraints on student speech are constitutionally permissible.[38]

> Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots.

Id. at 513.

32. *Hazlewood*, 484 U.S. at 270–73. *See Tinker*, 393 U.S. at 511.

33. *Hazelwood*, 484 U.S. at 270–71.

34. *Id.* at 273. The First Amendment would be implicated when the censorship of a school-sponsored publication had "no valid educational purpose." *Id.*

35. *Id.* at 263–64, 273.

36. *Id.* at 273 n.7.

37. *Id.* at 266 (quoting Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 682 (1986)).

38. *See* Kincaid v. Gibson, 236 F.3d 342, 346 (6th Cir. 2000) (holding *Hazelwood* inapplicable to a college speech dispute over a college yearbook because (1) *Hazelwood* dealt with a high school setting, and (2) the yearbook was part of a limited public forum, as opposed to the non-public forum the *Hazelwood* newspaper operated in); Student Gov't

Both the Tenth and Eleventh Circuits have applied *Hazelwood* to college speech disputes,[39] and both circuits held that the school programs implicated in those cases were nonpublic fora—similar to the *Hazelwood* newspaper—rather than traditional public fora.[40] Although these cases are troubling for their willingness to apply *Hazelwood* to college speech, the Tenth and Eleventh confined the extension of *Hazelwood* to curricular speech.[41] Similarly, the Ninth Circuit has applied *Hazelwood* to a First Amendment claim for censorship of a graduate student's thesis.[42] In *Brown v. Li*, the court held that there was no First Amendment violation because the student's thesis was required as part of the master's program and was subject to "reasonable regulation" under the *Hazelwood* standard for regulation of curricular student speech.[43]

As these Ninth, Tenth, and Eleventh Circuit cases demonstrate, no circuit court decision before *Hosty v. Carter*[44] has applied *Hazelwood* to extracurricular speech—speech occurring in limited or traditional public fora.[45]

C. *Hosty v. Carter* and Its Inappropriate Application of *Hazelwood* to the College Marketplace of Ideas

In *Hosty*, three students from Governors State University[46] filed a suit for civil damages under 42 U.S.C. § 1983 against Governors State University and several officials and administrators.[47] The students were editors and reporters for *The Innovator*, the student-run bi-

Ass'n v. Bd. of Trustees, 868 F.2d 473, 480 n.6 (1st Cir. 1989) (stating *Hazelwood* "is not applicable to college newspapers").

39. *See* Axson-Flynn v. Johnson, 356 F.3d 1277, 1289 (10th Cir. 2004); Bishop v. Aronov, 926 F.2d 1066, 1071, 1073–74 (11th Cir. 1991).

40. *See Axson-Flynn*, 356 F.3d at 1285; *Bishop*, 926 F.2d at 1071.

41. *See Axson-Flynn*, 356 F.3d at 1285; *Bishop*, 926 F.2d at 1074.

42. *See* Brown v. Li, 308 F.3d 939, 951–52 (9th Cir. 2002).

43. *Id.* at 952.

44. *See* Hosty v. Carter, 412 F.3d 731, 743 (7th Cir. 2005) (Evans, J., dissenting) ("The decisions the majority cites in support of its position [applying *Hazelwood* to the facts of *Hosty*], moreover, are inapplicable. *Bishop v. Aranov* and *Axson-Flynn v. Johnson* both concerned free speech rights *within* the classroom.") (internal citations omitted); Virginia J. Nimick, Note, *Schoolhouse Rocked:* Hosty v. Carter *and the Case Against* Hazelwood, 14 J. L. & POL'Y 941, 943 (2006) ("*Hazelwood*'s application in *Hosty* place[s] the Seventh Circuit in direct conflict with its sister Circuits . . . .").

45. *See Hosty*, 412 F.3d at 743.

46. Governors State University is located in Illinois in the Seventh Circuit. *See* Governors State University, http://www.govst.edu/ (last visited Mar. 9, 2007). In Judge Easterbrook's merciless opinion, he pokes fun at the ungrammatical title of the school, which lacks a possessive apostrophe in the word "Governors." *Id.* at 732 (majority opinion).

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

monthly newspaper at Governors State University, which served as "'the main source of information about campus life.'"[48] The suit arose after one of the plaintiffs published an article in *The Innovator* "attack[ing] the integrity" of Dean Roger K. Oden, the Dean of the College of Arts and Sciences at Governors State.[49] University officials took offense, claiming the article contained factual inaccuracies.[50] However, *The Innovator* refused to retract the article or print the administration's position.[51] Several administrators then "issued statements accusing *The Innovator* of irresponsible and defamatory journalism."[52] Dean Patricia Carter, Dean of Student Affairs and Services, subsequently told *The Innovator*'s printer not to publish anything that she had not approved in advance.[53] Staff at *The Innovator* refused to submit issues for prior approval, and the printer was unwilling to risk not getting paid.[54] The newspaper only resumed publishing after new management replaced the plaintiffs.[55]

The defendants, including Dean Carter, argued they were entitled to qualified immunity.[56] The district court granted qualified immunity to all defendants except Dean Carter.[57] On Carter's interlocutory appeal of her qualified immunity claim, a panel of the

48. Nimick, *supra* note 44, at 968–69.

49. *Hosty*, 412 F.3d at 732–33.

50. *Id.*; Margaret L. Hosty, *De LaForcade's Contract Dispute Reaches 3rd Phase Arbitration*, INNOVATOR, Oct. 31, 2000, at 1, *available at* www.splc.org/pdf/innovator.pdf. The Student Press Law Center opined that De Laforcade

> believes Carter halted printing because the Oct. 31 issue angered the administration. Hosty, managing editor of *The Innovator*, wrote an article for that issue about a grievance De LaForcade had filed against the University regarding his dismissal. In the same issue, a letter to the editor by De Laforcade appeared, which he says was unrelated to his complaint and was written before he knew that Hosty had written about the incident for that issue.

Editors Sue University for First Amendment Violations, STUDENT PRESS L. CENTER, Mar. 30, 2001, at 1, http://www.splc.org/newsflash.asp?id=259&year=2001.

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

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* According to the district court, plaintiffs additionally alleged that after the disputed article was published, there were break-ins to *The Innovator*'s office, the locks were changed but the students were not provided with keys for access for weeks, and both the plaintiffs' mail and the plaintiffs' e-mail messages were "tampered with" and thrown away or deleted. Hosty v. Carter, No. 01C500, 2001 WL 1465621, at *3 (N.D. Ill. 2001), *aff'd*, 325 F.3d 945, 950 (7th Cir. 2003), *vacated by* 412 F.3d 731 (7th Cir. 2005). Plaintiffs could not support some of these assertions with evidence linking the defendants to the alleged wrongdoing. *Id.*

56. *Hosty*, 2001 WL 1465621, at *5.

57. *See id.* at *5. Those defendants who had no connection to the censorship were dismissed, and others received qualified immunity. *Id.* at *5–*7. The district court also

Seventh Circuit Court of Appeals affirmed the district court's denial of qualified immunity.[58] However, the Seventh Circuit granted Carter's petition for rehearing en banc[59] and eventually reversed the district court's ruling in a 7–4 decision.[60] Two of the judges who participated in the three judge panel decision dissented to the en banc reversal.[61]

The en banc opinion began its analysis with *Hazelwood* and found that the Supreme Court did not limit *Hazelwood*'s holding to high school speech.[62] *Hosty* reasoned that age is only relevant when the justification for restriction of speech depends on the maturity of the audience.[63] The court argued that "there is no sharp difference between high school and college papers" when the school officials' alleged justification for censorship depends on other factors such as "high standards" and "dissociating the school" from strong positions.[64] Rejecting the district court's holding that "*Hazelwood* is inapplicable to university newspapers," the court held that *Hazelwood* applies to "student newspapers at colleges as well as elementary and secondary schools."[65] After *Hosty* adopted the *Hazelwood* framework, the court concluded *The Innovator* did not operate in a traditional public forum, but participated in a designated or limited public forum.[66]

Turning to qualified immunity, the en banc court held that a reasonable person in Dean Carter's position would not necessarily know

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rejected the defendant's contention that *Hazelwood* applied because *The Innovator* was an "autonomous student organization," "not part of a class." *Id.* at *7.

58. *Hosty*, 325 F.3d 950.

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

60. *Id.* at 732, 739.

61. Judges Rovner and Evans participated in both the panel decision and the en banc dissent. *Id.* at 739 (Evans, J., dissenting); *Hosty*, 325 F.3d at 946.

62. *Hosty*, 412 F.3d at 734.

63. *Id.*

64. *Id.* at 735 (quoting Hazelwood v. Kuhlmeier, 484 U.S. 260, 271–72 (1988)).

65. *Id.* at 734–35. The court also relied on the aforementioned Tenth and Eleventh Circuit decisions, which applied *Hazelwood* to curricular college speech in a non-public forum. *Id.* at 735. However, unlike those cases, the *Hosty* court concluded that *The Innovator* operated in a designated public forum "where the editors were empowered to make their own decisions." *Id.* at 737–38. The court reached this conclusion because of the requisite deference towards plaintiffs on summary judgment motions. *Id.* at 738. This reasoning is contrary to a Sixth Circuit decision rejecting *Hazelwood*'s application and holding that a student yearbook operated in a limited public forum. *See* Kincaid v. Gibson, 236 F.3d 342, 346 (6th Cir. 2000); *supra* note 37 and accompanying text.

66. *Hosty*, 412 F.3d at 737. In contrast, *Hazelwood* held the high school newspaper in that case was part of a non-public forum. *See Hazelwood*, 484 U.S. at 270–71. Yet, the Supreme Court in *Hazelwood* allowed the high school principal to exercise "greater control" over the newspaper precisely because it was part of the school curriculum. *Id.* at 271–72.

that a demand to review the paper before paying the printer violated the First Amendment.[67] Thus, the court found that Dean Carter was eligible for qualified immunity, shielding her from damages liability.[68] After five years of litigation, the censored plaintiffs received no vindication of their rights. The United States Supreme Court denied their petition for certiorari on February 21, 2006.[69]

Despite *Hosty*'s application of *Hazelwood* to college speech in a designated public forum, there are several legal arguments that support restricting *Hazelwood* to the high school realm.[70] First, policy considerations weigh against *Hazelwood*'s infiltration of the college campus. *Hazelwood*'s unfriendly treatment of high school students' speech in a curricular newspaper was grounded in a generally reduced recognition of rights for high school students.[71] There are many differences between college and high school students—including age, experience, level of responsibility, and environment—indicating that the two groups should be treated differently.[72] Probing these differences, Judge Easterbrook expresses doubt about the maturity of college students as a whole: "Not that any line could be bright; many high school seniors are older than some college freshmen, and junior

67. *Hosty*, 412 F.3d at 739. This holding ignores the simple fact that the printer's owner and president warned Dean Carter that her demand for prior review was likely unconstitutional. *See* No. 01C500, 2001 WL 1465621, at *2 (N.D. Ill. 2001), *aff'd*, 325 F.3d 945, 950 (7th Cir. 2003), *vacated by* 412 F.3d 731 (7th Cir. 2005); Finnigan, Jr., *supra* note 5, at 1477.

68. *Hosty*, 412 F.3d at 739.

69. 546 U.S. 1169 (2006).

70. Commentators have noted that *Hosty*'s use of the *Hazelwood* standard in a college setting defies the language of *Hazelwood* and contradicts other Supreme Court and circuit court precedent. *See, e.g.*, Finnigan, Jr., *supra* note 5, at 1491 ("The en banc court's reliance on *Hazelwood* resulted from a fairly strained reading of that opinion, as well as a blatant manipulation of that case's holding . . . ."); Jessica B. Lyons, Note, *Defining Freedom of the College Press After* Hosty v. Carter, 59 VAND. L. REV. 1771, 1785–86 (2006); Nimick, *supra* note 44, at 193; Chris Sanders, Comment, *Censorship 101: Anti-*Hazelwood *Laws and the Preservation of Free Speech at Colleges and Universities*, 58 ALA. L. REV. 159, 170 (2006); *see also* Daniel Applegate, Note, *Stop the Presses: The Impact of* Hosty v. Carter *and* Pitt News v. Pappert *on the Editorial Freedom of College Newspapers*, 56 CASE W. L. REV. 247, 273 (2005) ("Extending *Hazelwood* to college newspapers would strip college newspapers of their editorial freedom and autonomy and simply turn them into a branch or appendage of the college.").

71. *See* Hazelwood v. Kuhlmeier, 484 U.S. 260, 266–67 (1988); *Hosty*, 412 F.3d at 740–41.

72. *See, e.g.*, Applegate, *supra* note 70, at 264–71 (discussing crucial differences between high school and college students, including the greater maturity of college students, the fact that they are older, and the freedoms of college life); Finnigan, Jr., *supra* note 5, at 1495 ("Having reached the age of majority, adult college students enjoy many rights under the law that minors do not. Only by downplaying these important distinctions does the majority in *Hosty* arrive at its result.").

colleges are similar to many high schools."[73] He then goes on to state that "there is no sharp difference between high school and college papers" in upholding high standards, ensuring that speech is grammatical, and verifying that the school is not associated with controversial positions.[74]

In vehement disagreement, the *Hosty* dissent gave two reasons for the law's differential treatment of high school and college students. First, it noted that "high school students are less mature and the missions of the respective institutions are different. These differences make it clear that *Hazelwood* does not apply beyond high school. . . ."[75] Second, the dissent argued, "the missions" of high school and college institutions "are quite different."[76] While secondary schools are responsible for students' well being and education, the main mission of a university is "to expose students to a 'marketplace of ideas.'"[77] Universities serve a unique role in fostering free expression. As one commentator notes: "The need for a viable marketplace of ideas is the underlying principle of most First Amendment protections, both within the university and the greater community. . . . Courts have consistently recognized the special role of the university as a marketplace of ideas deserving special constitutional protection."[78] By granting too much deference to administrative regulation of college students' speech, a university's goals in promoting creative thought and curious inquiry may be stifled.[79]

In applying *Hazelwood* to a dispute over the free expression of college students, *Hosty* disregarded other circuit court decisions and distorted *Hazelwood*'s reasoning.[80] While logically unsound, *Hosty* is also troubling from a policy perspective. Even though the case is not binding authority in most states, it nonetheless provides a chisel to those who would chip away at college students' rights to publish their ideas

73. *Hosty*, 412 F.3d at 734.

74. *Id.* at 735.

75. *Id.* at 740 (Evans, J., dissenting).

76. *Id.* at 741.

77. *Id.* at 741 (citing Keyishian v. Bd. of Regents, 385 U.S. 589 (1967)); *see also* Mayor, *California*, *supra* note 4, at 1.

78. Lyons, *supra* note 70, at 1794.

79. "[I]ntellectual curiosity of students remains today a central determination of a university's success and asserting that restriction of that curiosity 'risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses.'" *Hosty*, 412 F.3d at 741 (Evans, J., dissenting) (quoting Rosenberger v. Rector, 515 U.S. 819, 836 (1995)).

80. *See, e.g.*, Finnigan, Jr., *supra* note 5, at 1491 (arguing *Hosty* displayed "a complete disregard for all cases prior to *Hazelwood* specifically addressing student newspapers in a university setting").

free of administrative oversight and review.[81] *Hazelwood*'s devastating impact on high school students' newspapers might be replicated on college campuses with *Hosty*. After *Hazelwood*, high school principals had "nearly unbridled discretion" to control student media.[82] In his dissent to the en banc decision, Circuit Judge Evans noted that "[t]he majority's holding . . . is particularly unfortunate considering the manner in which *Hazelwood* has been used in the high school setting to restrict controversial speech."[83]

As the *Hosty* dissent observed, high school administrators exercised their prerogative to censor student speech in increasing numbers after *Hazelwood*.[84] In 2002, the Student Press Law Center[85] recorded 529 censorship-related calls from high school students, a 240% increase since 1996.[86] Unfortunately, this increase in student reports of censorship corresponds to an increase in judicial tolerance of high school censorship. The Ninth, Seventh, and Sixth circuits have all upheld the reasonableness of primary and secondary school officials' decisions to restrict speech after *Hazelwood*.[87] With *Hosty*, *Hazel-*

81. A school wishing to infringe these rights merely needs to establish regularized content review and approval for pedagogical purposes before rewriting student articles. Indeed, the general counsel for CSU noted that while *Hosty* is "only applicable in three Midwestern states," it potentially provides "more latitude" for administrative censorship of subsidized student papers. *See* Mayor, *California*, *supra* note 4, at 1.

82. *See* Richard J. Peltz, *Censorship Tsunami Spares College Media: To Protect Free Expression on Public Campuses, Lessons from the "College* Hazelwood*" Case*, 68 TENN. L. REV. 481, 533 (2001) (asserting college administrators will not differ from high school administrators who "took advantage of their expansive powers" under *Hazelwood* to "convert the student publications to student *public relations*") (emphasis added); *see also* Mark J. Fiore, Comment, *Trampling the "Marketplace of Ideas": The Case Against Extending* Hazelwood *to College Campuses*, 150 U. PA. L. REV. 1915, 1929–30 ("As a result of the *Hazelwood* decision, secondary schools have censored student speech far more rampantly in the past decade than in previous years.").

83. *Hosty*, 412 F.3d at 742 (Evans, J., dissenting).

84. *Id.*

85. The Student Press Law Center "is an advocate for student free-press rights and provides information, advice, and legal assistance at no charge to students and the educators who work with them." Student Press Law Center, http://www.splc.org/ (last visited Apr. 16, 2007).

86. Nimick, *supra* note 44, at 957.

87. *See* Baxter v. Vigo County Sch. Corp., 26 F.3d 728, 737–38 (7th Cir. 1994) (approving elementary school principal's decision to prohibit student from wearing shirts with certain messages); Planned Parenthood v. Clark County Sch. Dist., 941 F.2d 817, 829–30 (9th Cir. 1991) (upholding reasonableness of school district's decision to prohibit family planning advertisements in high school newspapers under *Hazelwood*); Poling v. Murphy, 872 F.2d 757, 764 (6th Cir. 1989) (upholding high school administration's exclusion of student from student council elections because of student's speech).

wood's chilling impact on high school speech also looms over the college marketplace of ideas.[88]

II. California Assembly Bill 2581, the Leonard Law, and *Antebi v. Occidental*

A. A.B. 2581: California's Response to *Hosty v. Carter*

California Senator Leland Yee introduced A.B. 2581 on February 24, 2006[89] in response to a memo written by CSU General Counsel Christine Helwick.[90] Helwick's memo advised the CSU presidents that their universities could benefit from *Hosty*: "[T]he case appears to signal that CSU campuses may have more latitude than previously believed to censor the content of subsidized student newspapers, provided that there is an established practice of regularized content review and approval for pedagogical purposes."[91] Jim Ewert, legal counsel for the California Newspaper Publishers Association, stated mildly that "[Helwick's] memo raised some concerns amongst student

88. Muted campus speech and professional journalism are plausible results of *Hosty*. Prior to *Hosty*, a Sixth Circuit panel applied the *Hazelwood* framework to a college speech dispute. *See* Kincaid v. Gibson, 191 F.3d 719, (6th Cir. 1999), *vacated by* 236 F.3d 342 (6th Cir. 2001) (en banc). The Sixth Circuit, sitting en banc, rejected the panel's application of *Hazelwood* to the college setting. *Kincaid*, 236 F.3d at 346, 346 n.5. However, before the *Kincaid* en banc decision, commentators predicted that *Hazelwood* would chill college students' speech. *See* Peltz, *supra* note 82, at 533 ("[T]here is no reason to expect college administrators . . . to respond differently from how high school administrators responded to *Hazelwood*. To the extent that high school administrators took advantage of their expansive powers to convert the student publications to student public relations on 'pedagogical' grounds, one should expect no less, or no more, from college administrators, who are embroiled in the intensely competitive business of higher education."); Fiore, *supra* note 82, at 1916 ("Were the *Hazelwood* standard applied to public colleges and universities, the federal courts would drastically deviate from their long-standing tradition of recognizing the nation's campuses as a 'marketplace of ideas.'"). Similarly, the dissent in *Hosty* expressed its displeasure that "as a result of today's holding, Dean Carter could have censored the *Innovator* by merely establishing 'legitimate pedagogical reasons.' This court now gives the green light to school administrators to restrict student speech in a manner inconsistent with the *First Amendment*." 412 F.3d at 742 (Evans, J., dissenting) (emphasis added).

89. Complete Bill History, A.B. No. 2581, http://leginfo.ca.gov/pub/05-06/bill/asm/ab_2551-2600/ab_2581_bill_20060828_history.html (last visited Apr. 18, 2007). Yee was a California Assembly Member when he introduced A.B. 2581. *See* Senator Leland Yee, California State Senate, http://dist08.casen.govoffice.com/ (click biography link) (last visited Apr. 4, 2007); Mayor, *California*, *supra* note 4, at 1 (stating the bill's sponsor was "assemblyman Leland Yee").

90. *See* Mayor, *California*, *supra* note 4, at 1.

91. *See* Memorandum, *supra* note 4, at 1. *Hosty*, a Seventh Circuit decision, is only persuasive authority in California, which is part of the Ninth Circuit. Nevertheless, Helwick brought *Hosty* to the attention of the leaders of the California State University system. *Id.*

press advocates."[92] In a university system with over 400,000 students, Helwick's memo implied potential censorship of staggering numbers of college students in California.[93]

A.B. 2581 amended California Education Code section 66301 to prohibit administrators, as well as regents, board members, and trustees of California's colleges and universities from censoring students for speech that would be protected by the Federal and California Constitutions outside the campus.[94] After a series of slight revisions, A.B. 2581 was passed by the state senate by a vote of 31–2 on August 10, 2006[95] and signed into law by Governor Schwarzenegger on August 28, 2006.[96] The bill inserted the following new provision into California Education Code section 66301(a):

> Existing law prohibits the Regents of the University of California, upon their adoption of a specified resolution, and the Trustees of the California State University and the governing board of a community college district, from making or enforcing any rule subjecting a student to disciplinary sanction solely on the basis of conduct that is speech or other communication that, when engaged in outside a campus is protected from governmental restriction by specified provisions of the California Constitution or the United States Constitution. . . . This bill would additionally prohibit *any*

92. *See* Mayor, *California*, *supra* note 4, at 1.

93. "With 24 campuses and more than 400,000 students, the California State University system is the largest in the country." Evan Mayor, *Memo Linking California with* Hosty *Decision Worries Students*, STUDENT PRESS L. CENTER, Sept. 15, 2005, at 1, http://www.splc.org/printpage.asp?id=1064&tb=newsflash [hereinafter Mayor, *Memo*].

94. *See* Assemb. B. 2581, 2006 Leg., Reg. Sess. (Cal. 2006); CAL. EDUC. CODE § 66301 (West Supp. 2007). This "speech friendly" legislation is an apt response by the state with more college students and more colleges and universities than any other state in the United States. The California community college system has "more than 2.5 million mostly part-time students" and "describes itself as the largest postsecondary education system in the world." Ria Sengupta & Christopher Jepsen, *California's Community College Students, California Counts: Population Trends and Profiles*, PUB. POL'Y INST. CAL., Nov. 2006, at 1, www.ppic.org/content/pubs/cacounts/cc_1106RSCC.pdf. As of 2005, California had 399 degree-granting institutions, compared to New York, the state with the second highest number, which had 307. Digest of Education Statistics Tables and Figures, Table 244, 2005, http://nces.ed.gov/programs/digest/d05/tables/dt05_244.asp [hereinafter Table 244]. Of those 399 degree-granting institutions, 255 were private. *See id.* Comparing enrollment figures, as of Fall 2002, California had 2,474,024 students enrolled in degree-granting institutions, and the state with the second highest enrollment figures, Texas, had 1,152,369 students enrolled. Thus, in 2002, California had more than one million more students enrolled in its higher education institutions than any other state. Digest of Education Statistics, Ch. 3 Postsecondary Education, Table 189, 2004, http://nces.ed.gov/programs/digest/d04/tables/dt04_189.asp.

95. *See* Assembly Bill 2581 History, Assemb. B. No. 2581, Ch. 158, *available at* http://leginfo.ca.gov/pub/05-06/bill/asm/ab_2551-2600/ab_2581_bill_20060828_chaptered.pdf; *see also* Mayor, *California*, *supra* note 4, at 1.

96. *See id.*

> *administrator of any campus of those institutions from making or enforcing any rule subjecting a student to disciplinary sanction . . . .*[97]

Following this new provision of subdivision (a), subdivision (b) provides specific remedies for students subject to disciplinary sanctions as a result of their speech:

> Any student enrolled in an institution, as specified in subdividision (a), that has made or enforced any rule in violation of subdivision (a) may commence a civil action to obtain appropriate injunctive and declaratory relief as determined by the court. Upon a motion, a court may award attorney's fees to a prevailing plaintiff . . . .[98]

Reading the above language in isolation from other California law, A.B. 2581 appears to protect college students in California from a *Hosty* reenactment by prohibiting college administrators from disciplining students for their speech. However, section 66301, as amended by A.B. 2581, only protects *public* college students in California from administrative censorship.[99] The newly amended statute states that "[n]either the Regents of the University of California, the Trustees of the California State University, the governing board of any community college district, nor any administrator of any campus of those institutions, shall make or enforce any rule . . . ."[100] Thus, the speech protections provided in section 66301 only apply to students at state colleges and universities. An assessment of college students' speech protections in California should include private college students, who also participate in expressive activities.[101] Since students at private universities in California cannot invoke section 66301 when

97. *Id.* CAL. EDUC. CODE § 66301(a) (West Supp. 2007).

98. CAL. EDUC. CODE § 66301(b). Section 66301 only applies to public college students in California. Private college students must invoke the Leonard Law to bring suit against their administrators. *See* discussion *infra* Part III.A.

99. *See* CAL. EDUC. CODE § 66301(a), (b); *supra* note 96 and accompanying text.

100. *See id.* § 66301(a).

101. *See, e.g.*, Brian J. Steffen, *Freedom of the Private University Student Press: A Constitutional Proposal*, 36 J. MARSHALL L. REV. 139, 142 (2003) ("The rights of private university student journalists have always been considered in comparison with their counterparts at public institutions, and any evisceration of press rights at public universities would doubtlessly embolden officials of at least some private universities to tighten their control over student publications."). Steffen argues that "the differences between public and private universities have diminished as public higher education has grown in size and influence." *Id.* at 149. He also asserts "[t]here is little evidence that prospective students seek out private higher education in order to be insulated from ideas." *Id.* at 150.

their free speech rights are trampled,[102] they must turn to other statutes or case law.[103]

B. The Leonard Law: California's Unique Statutory Protection for Private College Students' Expression

The First Amendment provides a measure of protection to public college students' speech, publications, and other expression.[104] However, "most courts have refused to find a sufficient connection between the state and private educational institutions to make First Amendment guarantees binding on private schools."[105] Since the First Amendment does not reach private college students, states may protect private college speech through their constitutions or statutes.[106] California appears to be the only state to have done so.[107]

In 1992, California Senator Bill Leonard[108] drafted a law requiring private colleges and universities in California to abide by the First Amendment of the United States Constitution as well as article I, section 2 of the California Constitution.[109] "The Leonard Law, named for

102. "The SPLC has noted that '[O]fficial control of student journalists at many private schools remains a legal and practical reality.'" *Id.* at 170. According to Steffen, the Student Press Law Center received "321 complaints from university student journalists about censorship by college officials in 1991," though that number "does not differentiate" between public and private universities. *Id.* at 142.

103. Steffen critiques the effectiveness of various methods for protecting student speech at private universities, including legal theories asserted in case law and statutes. *See generally id.* However, another critic endorses statutes as superior "method[s] to vouchsafe" freedom of expression on college campuses. Sanders, *supra* note 70, at 173.

104. U.S. CONST. amend. I. *See* Steffen, *supra* note 101, at 140.

105. *Id.* at 158.

106. *See, e.g.*, CAL. CONST. art. I, § 2; CAL. EDUC. CODE § 94367 (West 2002).

107. "California's so-called 'Leonard Law', named for the state legislator who shepherded the bill through the State Assembly, is the only state law to date specifically intended to protect speech and press rights on private campuses that courts have upheld as constitutional." Steffen, *supra* note 101, at 168. *See also* Corry v. Leland Stanford Junior Univ., No. 740309 (Cal. Super. Ct. Feb. 27, 1995) (order granting preliminary injunction) ("[I]t does not appear that any other state has enacted a statute similar to Education Code § 94367 . . . .").

108. Bill Leonard, a Republican, served the California state legislature for twenty-four years, and served as Assembly Republican Leader in 1998. *See* Bill Leonard, Board of Equalization, Dist. 2, http://www.billleonard.org/bio.php (last visited Mar. 19, 2007).

109. CAL. EDUC. CODE § 94367 (West 2002). The law was enacted in response to the proliferation of college hate speech codes. *See* Jon B. Gould, *The Precedent that Wasn't: College Hate Speech Codes and the Two Faces of Legal Compliance*, 35 LAW & SOC'Y REV. 345, 354 n.6 (2001). The relevant portion of article I, section 2, of the California Constitution states: "(a) Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." CAL. CONST. art. I, § 2(a). The Leonard Law is unique in that private college students in other states do not enjoy similar protection under the First Amend-

its sponsor, Bill Leonard, is unusual among states and was adopted in direct response to the rise of college hate speech codes."[110] The Leonard Law specifically prohibits private, postsecondary educational institutions from disciplining students for expressive activity that would be protected by the First Amendment outside of the institution:

> No private postsecondary education institution shall make or enforce any rule subjecting any student to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside the campus or facility of a private postsecondary institution, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article 1 of the California Constitution.[111]

Senator Leonard also put teeth into the law by allowing private students to file civil suits for injunctive and declaratory relief and allowing for recovery of attorney's fees.[112] This provision mostly mirrors that of California Education Code section 66301, excerpted above:

> Any student enrolled in a private postsecondary educational institution that has made or enforced any rule in violation of subdivision (a) may commence a civil action to obtain appropriate injunctive and declaratory relief as determined by the court. Upon motion, a court may award attorney's fees to a prevailing plaintiff in a civil action pursuant to this section.[113]

In *Corry v. Leland Stanford Junior University*,[114] the first case filed under the Leonard Law, the Santa Clara Superior Court invalidated Stanford University's speech code[115] for being overbroad and containing impermissible content-based restrictions and simultaneously upheld the constitutionality of the Leonard Law.[116] Even though the

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ment. *See* Steffen, *supra* note 101, at 168. A federal law was proposed in 1991 "that would have granted injunctive and declaratory relief to students and faculty at some private colleges who believed that campus speech policies infringed on their First Amendment rights .... Unlike the Leonard Law, however, the Hyde legislation never emerged from committee." *Id.* at 169.

110. Gould, *supra* note 109, at 354 n.6.

111. CAL. EDUC. CODE § 94367(a).

112. *Id.* § 94367(b).

113. *Id.*

114. No. 740309 (Cal. Super. Feb. 27, 1995) (order granting preliminary injunction), *available at* http://www.ithaca.edu/faculty/cduncan/265/corryvstanford.htm.

115. The speech code prohibited discriminatory harassment and attempted to define it. Part of the definition included use of "insulting or 'fighting' words" and prohibited "'discriminatory intimidation by threats of violence and also includes personal vilification of students on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin.'" *Id.* at 1 (internal numbering). The court enjoined the speech code because it went beyond fighting words to prohibit insults and "offensive speech." *Id.* at 41–42.

116. *Id.* at 24, 41–42. The court held Stanford's speech code was overbroad and "clearly punishe[d] students for words which may not cause an imminent breach of the

Leonard Law was off to a successful start, its tenure has been quiet since *Corry*.[117]

C. *Antebi v. Occidental*: New Limits on the Leonard Law

Despite the Leonard Law's triumph over constitutional challenges in *Corry*, the California Court of Appeal in *Antebi v. Occidental College*[118] recently limited the Leonard Law's reach. During the spring 2004 semester, Jason Antebi, a senior at Occidental College,[119] held a "shock jock" radio show consisting of "political satire, parody, provocative humor, and mockery" of anyone and everyone.[120] Antebi's commentary on the show, as well as politically controversial decisions he made as a member of the student council, angered other students.[121] Three students published statements deriding his character, and Antebi responded with provocative remarks.[122]

The dispute escalated when the three students filed sexual harassment complaints against Antebi, and the dean of students "removed Antebi from the show."[123] Sandra Cooper, general counsel for Occidental, yelled at Antebi in a public hallway, calling him a "'racist,' 'sexist,' 'misogynist,' 'anti-Semite,' 'homophobe,' 'unethical[,]' and 'immoral trash.'"[124] Occidental's Title IX officer investigated the com-

peace . . . ." *Id.* at 8. The court also ruled that the speech code was an impermissible content-based restriction. *Id.* at 10–11. *See supra* note 114.

117. *Corry v. Stanford* and *Antebi v. Occidental* are the only cases of record filed under the Leonard Law. It could be argued that the Leonard Law has served its purpose by thwarting Stanford's broad content-based hate speech code, thereby deterring private institutions from censoring students, either individually or through broad policies. *See* Gould, *supra* note 109, at 354.

118. 47 Cal. Rptr. 3d 277, 280 (Ct. App. 2006).

119. Occidental College is a private school in California. *Id.* at 278.

120. *Id.*

121. *Id. See* Opening Brief for Appellant at *2, Antebi v. Occidental Coll., 47 Cal. Rptr. 3d 277 (Ct. App. 2006) (No. 186951) [hereinafter Opening Brief].

122. *Antebi*, 47 Cal. Rptr. 3d at 278. Antebi claimed he was harassed and defamed by other students and asserted that he attempted to file harassment complaints with the administration, but was told to "'fight [his] own battles.'" *See* Opening Brief, *supra* note 121, at *3.

123. *Antebi*, 47 Cal. Rptr. 3d at 278.

124. *Id.* The Court of Appeal allowed Antebi to continue with his claim against Cooper for defamation. *Id.* at 280–81. While the court does not present Antebi's speech in a favorable light, "[t]here is compelling evidence that the college misrepresented facts—including baselessly accusing Antebi of crimes like vandalism and stalking—in order to dissuade civil liberties groups from coming to his aid and used the incident as an excuse to dissolve the troublesome student government." Lukianoff, *supra* note 21, at 1. *See also* Opening Brief, *supra* note 121, at *3–*4 (alleging Occidental administrators told Antebi to take care of his own complaints against other students, but noting that the same authorities took up other students' complaints about Antebi).

plaints as well as additional allegations against Antebi.[125] The officer also suggested that the school have Antebi apologize to the three students and recommended counseling.[126] When Antebi refused to apologize, the associate dean ordered "disciplinary censure" until the end of the semester, when Antebi would graduate.[127]

In March 2005, Antebi filed a lawsuit based on eight separate causes of action[128]—including the Leonard Law—in California superior court against Occidental, its Board of Trustees, and Occidental's Director of Communications.[129] The trial court dismissed Antebi's case without leave to amend because Antebi did not exhaust internal remedies and his only remedy was administrative mandamus.[130] On appeal, the California Court of Appeal affirmed the trial court's ruling on separate grounds.[131] The Court of Appeal found that only currently-enrolled students could bring suit under the Leonard Law.[132] Because Antebi was not a currently-enrolled student, the court held that he lacked standing to bring his Leonard Law claim.[133] Antebi's lawyers filed a brief with the California Supreme Court seeking review of the decision.[134] On October 25, 2006, the California Supreme

125. *Id.* Some students alleged that Antebi "threatened physical violence and retribution in emails to the gay community, and that he had defaced brochures with terms derogatory towards women." *Id.*

126. *Antebi*, 47 Cal. Rptr. 3d at 279.

127. *Id.*

128. The relevant cause of action for this Comment is "(7) declaratory relief under California's Leonard law." *Id.* The Leonard Law protects "speech or other communication." CAL. EDUC. CODE § 94367(a) (West 2002).

129. *Antebi*, 47 Cal. Rptr. 3d at 279.

130. *Id.* Specifically, the district court dismissed the case due to Antebi's failure to exhaust the college's administrative remedies, including administrative mandamus. *Id.*; CAL. CODE CIV. PROC. § 1094.5 (West 1980).

131. *Antebi*, 47 Cal. Rptr. 3d at 279–80.

132. *Id.* The court cited section 94367(b), which provides: "Any student enrolled in a private postsecondary institution that has made or enforced any rule in violation of subdivision (a) may commence a civil action to obtain appropriate injunctive and declaratory relief . . . ." CAL. EDUC. CODE § 94367(b).

133. *Antebi*, 47 Cal. Rptr. 3d at 280.

134. *See* Marnette Federis, *Lawyers for Former Occidental Shock Jock Ask California Supreme Court for Review: Lower Court Ruled Antebi Could Not Sue Under Leonard Law*, STUDENT PRESS L. CENTER, Sept. 29, 2006, http://www.splc.org/newsflash.asp?id=1339&year=. According to Greg Lukianoff, the president of The Foundation for Individual Rights in Education, which assisted Antebi's case, "'The court of appeal's interpretation of the Leonard Law completely eviscerates what the law is trying to do.'" *Id.* California Education Code section 66301, which provides speech protection to public college students in California, has similar language to the Leonard Law. *See* CAL. EDUC. CODE § 66301(a)–(b) (West Supp. 2007). If Antebi had been a public college student in California, he might have been subject to the same standing limitation under section 66301. *See infra* discussion Part III.B.

Court denied Antebi's petition for review and depublication request.[135]

III. Administrators Escape Liability Under the Leonard Law, and *Antebi* Threatens the Leonard Law and Section 66301

A. The Leonard Law Does Not Allow Private College Students to Sue Administrators Directly

Section 66301, as amended by A.B. 2581, is an essential step toward fostering free expression in public colleges in California. As a result of A.B. 2581, public university administrators, in addition to trustees, regents, and directors, are prohibited from imposing disciplinary sanctions on college students for their speech.[136] However, section 66301 does not go the full distance. It leaves students at private institutions vulnerable to administrative censorship for their speech, since the statute is only applicable to officials of public colleges and universities in California.[137]

As a result, private college students in California must rely on the Leonard Law if they are subject to disciplinary sanctions for their speech. However, it is unclear whether private college students may obtain relief directly from the administrators who impose disciplinary sanctions on the students, such as Dean Carter's order to stop the presses in *Hosty*,[138] because administrators are not mentioned in the Leonard Law. The Leonard Law was originally passed with school speech codes in mind—not the behavior of administrators.[139] Like section 66301, the Leonard Law is phrased as a prohibition on disciplinary sanctions imposed in retaliation for expressive activity.[140] Yet, instead of prohibiting certain officials from censoring speech, the Leonard Law prohibits "private postsecondary educational *institution[s]*" from imposing disciplinary sanctions for students' speech.[141] Part (b) states that the student may commence a civil action but does not say

135. 2006 Cal. LEXIS 14130, at *1 (Oct. 25, 2006).

136. *See* CAL. EDUC. CODE § 66301; Mayor, *California*, *supra* note 4, at 1.

137. *See* § 66301(a) ("(a) Neither the Regents of the University of California, the Trustees of the California State University, the governing board of any community college district, *nor any administrator of any campus of those institutions* . . . .").

138. *See* Hosty v. Carter, 412 F.3d 731, 733 (7th Cir. 2005).

139. *See* Gould, *supra* note 109, at 354 n.6.

140. *Compare* CAL. EDUC. CODE § 66301(a) ("Neither the Regents . . . *nor any administrator* . . . shall make or enforce . . . .") *with* CAL. EDUC. CODE § 94367(a) (West 2002) ("No private postsecondary educational institution shall make or enforce . . . .").

141. CAL. EDUC. CODE § 94367(a) (emphasis added).

who a student may sue.[142] Subdivisions (c) through (f) are likewise silent in this regard.[143]

Noticeably lacking from the statute is an explanation of what or whose actions constitute disciplinary sanctions by a "private postsecondary institution."[144] Since the statute does not mention administrators or other officials, courts may be reluctant to allow students to sue administrators directly under the Leonard Law.[145] If students cannot sue administrators, they may need to link administrators' misconduct with the university to preserve their Leonard Law claims.[146] A private university sued under the Leonard Law could be held liable—if not directly, then through the doctrine of respondeat superior—for the administrator's unconstitutional censorship.[147] Through respondeat superior, students who bring Leonard Law claims may succeed in holding private universities liable for administrators' censorship, even if they cannot proceed directly against administrators. Unfortunately, the Leonard Law will not deter administrators from censoring students if students cannot include them in their suits. The administrators will escape the negative consequences of litigation, including the hassle of court appearances, the humiliation of a judicial rebuke for wrongdoing, and public scrutiny of the administrator's decisions.

There are only two cases to refer to for guidance as to whether private college students may bring Leonard Law claims directly against private university administrators.[148] *Corry v. Stanford*,[149] the Leonard Law's test case, is not helpful because the students in that case filed a general suit against Stanford University and three individual

142. *See id.* § 94367(b).

143. *See id.* § 94367(c)–(f).

144. *Id.* § 94367(a).

145. *Id.*

146. Employment law provides that an employer may be directly liable for the torts of its employees because of the employer's negligent selection, training, or supervision. *See* 2 CAL. EMP. L. § 30.01 (2006). Additionally, the employer may be held vicariously liable, even if not directly liable, for torts committed "within the scope of the tortfeaser's employment." *See id.* § 30.05. However, the question arises as to whether a violation of the Leonard Law gives rise to a tort. These considerations may complicate a student's Leonard Law claim and detract focus from the actual perpetrator of the censorship—the administrator.

147. *See id.* § 30.05.

148. One commentator notes that as of Spring 2006, no appellate court decision exists upholding "student press rights at private university institutions." *See* Nancy J. Whitmore, *Vicarious Liability and the Private University Student Press*, 11 COMM. L. & POL'Y 255, 262 (2006).

149. No. 740309 (Cal. Super. Ct. Feb. 27, 1995) (order granting preliminary injunction).

defendants.[150] The students sought a declaratory judgment that Stanford's speech code was an unconstitutional, content-based restriction on speech, as well as a violation of California's Leonard Law.[151] The court treated all the defendants as one entity, and the defendants' arguments addressed Stanford's speech code and the speech rights of the institution, rather than individual liability concerns.[152] Because the constitutionality of Stanford's speech code was at issue,[153] rather than individuals' actions, *Corry* did not address vicarious liability. In *Antebi*, the California Court of Appeal did not object to the plaintiff's suit against several university administrators.[154] However, since the court found that Antebi lacked standing,[155] it did not determine whether the administrators could be held individually liable under the Leonard Law or whether the defendants were properly joined.

Thus, *Corry* and *Antebi* do not resolve the issue of whether the Leonard Law encompasses administrative censorship of private college students' speech. Though students are not specifically precluded from suing administrators under the Leonard Law, they may not be able to proceed against administrators directly. If the administrators cannot be held individually liable, they will not be deterred from disciplining students for controversial or troublesome speech. With so little judicial guidance and the Leonard Law's vague language, private college students in California would benefit from statutory language specifically prohibiting administrators of private institutions from censoring students.[156]

150. Stanford students brought suit against Stanford University, as well as ranking Stanford administrators Sally Cole, Gerhard Casper, and John Freidenrich. *See* Register of Actions/Docket, Corry v. Leland Stanford Junior Univ., No. 740309, http://www.sccaseinfo.org/pa5.asp?full_case_number=1-94-CV-740309 (last visited Apr. 18, 2007). However, the caption of the opinion merely states, "The Leland Stanford Junior University, et al., Defendants," without enumeration. *See Corry*, No. 740309.

151. *Corry*, No. 740309, at 2, 3.

152. *See, e.g., id.* at 3–4 ("[I]t is Defendants' position that the Leonard Law would be unconstitutional as applied to Defendants' speech code in a number of ways.").

153. *See id.*

154. Antebi v. Occidental Coll., 47 Cal. Rptr. 3d 277, 279–80 (Ct. App. 2006) ("Antebi brought this action in superior court against Occidental, its Board of Trustees, Ayala, Harowitz, Mitchell, Cooper, Talesh, and James Trandquada, Occidental's director of communications."). After dismissing Antebi's Leonard Law claim for lack of standing, the court rejected the idea that the Board of Trustees of Occidental could be held liable in Antebi's suit because "a director of a nonprofit corporation cannot be personally liable for the debts, liabilities, or obligations of a corporation." *Id.* at 280.

155. *See id.* at 280.

156. The author and sponsor of A.B. 2581 added language to section 66301 prohibiting administrators from censoring students, even though "existing law could be considered sufficient to cover both administrators and the student press." *See* BILL ANALYSIS, *supra* note

B. *Antebi* Cripples the Leonard Law and Subjects Private College Students to the Risk of Expulsion for Their Speech

Antebi held that only currently-enrolled students may file suit under the Leonard Law.[157] The court decided that Antebi had to be enrolled to bring a Leonard Law claim because: (1) based on the "plain language" of section 94367(b), "the student must be enrolled when the legal action begins"; (2) the legislature could have easily included language such as "or *who was enrolled*," indicating the law is meant to apply only to currently-enrolled students; and (3) the standing restriction is consistent with the remedies provided—injunctive and declaratory relief—which the court argues will only benefit current students.[158]

Each of *Antebi*'s reasons in support of the current-enrollment requirement can be refuted and are susceptible to challenges. First, in contrast with the court's "plain language" reasoning, the statutory language supports the conclusion that the person must have been enrolled as a student when the censorship occurred. Antebi took this position.[159] Opposing Antebi's argument, the court reasoned that "the Legislature easily could have extended application of the statute with the words 'any student enrolled or *who was enrolled.*'"[160] Playing the court's game, if the legislature had wanted prospective plaintiffs to be enrolled when they brought suit under the Leonard Law, the legislature could easily have stated, "Any student *currently* enrolled." It did not.

Additionally, the language, "shall make or enforce any rule,"[161] merely links the enrollment to the time when a specific activity occurred. "Enrolled" is a word with many possible time frames[162] that

4, at 1-2. Private college students would likewise benefit from a clear prohibition on administrative censorship in the Leonard Law.

157. *Antebi*, 47 Cal. Rptr. 3d at 280.

158. *Id.* Education Code section 94367, subdivision (b) states: "Any student enrolled in a private postsecondary institution that has made or enforced any rule in violation of subdivision (a) may commence a civil action to obtain appropriate injunctive and declaratory relief as determined by the court." CAL. EDUC. CODE § 94367(b) (West 2002).

159. He asserted that "the language requires only that the student be enrolled at the time of the unlawful act . . . ." *Antebi*, 47 Cal. Rptr. 3d at 280.

160. *Id.*

161. CAL. EDUC. CODE § 94367(a).

162. The following examples demonstrate the ambiguous nature of the word "enrolled" for establishing timing: "students who are currently enrolled should see me"; "students who were enrolled beginning January 11th should see me"; "we both enrolled in the class last spring"; "we enrolled in the course"; "students enrolled in the course" (this latter phrase could mean students enrolled in the course now, or students who were enrolled

changes meaning with specific descriptors.[163] The court conveniently uses descriptors consistent with its reading of *current* enrollment,[164] but the statute lacks such helpful words.[165] The word "enrolled" is the same for past as well as present tense, and without helpful context, the Leonard Law's current language also supports an "enrollment at the time of censorship" reading. Thus, a plain reading of the statute does not warrant the *Antebi* court's conclusion that the student must be enrolled at the time the suit is filed.

Second, the statute's goal, evidenced by the Leonard Law's plain language, is to protect students from institutional censorship while they are enrolled at private colleges and universities.[166] The *Antebi* court concluded that the current enrollment reading of the Leonard Law "is consistent with the structure of the statute as a whole," and that the statute's remedies—injunctive and declaratory relief—would not be useful to non-students.[167] Accepting *Antebi*'s reasoning, if the student must be currently enrolled when filing suit, must the student have been continuously enrolled since the alleged sanction? What if the student took a semester off after being censored and brought a Leonard Law claim before returning to the private college?[168] *Antebi* does not address these scenarios and the Leonard Law does not contemplate detailed inquiries into the students' enrollment history. Contrary to the court's logic, the statute as a whole focuses on the relationship between the parties when the censorship occurs, not on the student's enrollment status after the sanctions are imposed.[169]

Third, the court's conclusion that recent graduates will not benefit from injunctive or declaratory relief is short-sighted.[170] Non-students may value the deterrent effect of a declaratory judgment and feel vindicated by a court's determination that the university violated

previously). As these few examples demonstrate, the *Antebi* court's linguistic argument collapses under scrutiny.

163. Clarifying words or phrases include: currently enrolled; enrolled at the time of; who was enrolled; who is enrolled.

164. *See Antebi*, 47 Cal. Rptr. 3d at 280.

165. *See* CAL. EDUC. CODE § 94367(b).

166. *See id.* § 94367(a) ("No private postsecondary institution shall make or enforce any rule subjecting any student to disciplinary sanctions . . . ."); Steffen, *supra* note 101, at 168.

167. *Antebi*, 47 Cal. Rptr. 3d at 280.

168. In this situation, the student would likely lack standing under *Antebi*'s reasoning, even though the student is temporarily not enrolled. *Id.* at 280.

169. *See* CAL. EDUC. CODE § 94367(a) ("No private postsecondary educational institution shall make or enforce any rule subjecting any student to disciplinary sanctions . . . ."); § 94367(b) ("Any student enrolled in a private postsecondary institution that has made or enforced any rule in violation of subdivision (a) . . . .").

170. *Antebi*, 47 Cal. Rptr. 3d at 280.

their rights. It is also possible that the university's disciplinary sanction will be a continual source of injury to the graduate, such as a black mark on the student's record or removal of the student's written work from academic circulation.[171] By focusing on whether a person is currently enrolled at the time the suit is filed, instead of whether the person was a student when the censorship occurred, *Antebi* prevents an entire group of censored students from vindicating their rights to free expression.[172] The status of the person at the time the suit is filed is irrelevant, provided that the person was a student at the time the alleged censorship was imposed. The harm does not evaporate when the censored student graduates or leaves the institution.[173]

Antebi's holding is also troubling for the behavior that it encourages. The case provides a roadmap for censorship of college speech.[174] Greg Lukianoff, the president of the Foundation for Individual Rights in Education,[175] explains one loophole that *Antebi* carves into the Leonard Law: "[S]chools can avoid censorship lawsuits by simply expelling the student before he or she can file a lawsuit . . . ."[176]

Lukianoff elaborates on another loophole, stating: "Under the way that the court has interpreted [the law], a university would have free reign to censor a student in the last semester of his senior year almost as much as they'd like to . . . ."[177] In this way, censorship could occur in a student's final months or days before graduation, making it

171. *See, e.g.*, Brown v. Li, 308 F.3d 939, 944–45 (9th Cir. 2002) (refusing to place graduate student's masters thesis on file in library because of controversial "disacknowledgments" section).

172. *See* Federis, *supra* note 134, at 1 ("'The court of appeal's interpretation of the Leonard Law completely eviscerates what the law is trying to do.'"). *Cf.* Sternberg, *supra* note 21, at 1 (quoting Lukianoff for the idea that Universities can expel students or censor them in their last semesters "'also as much as they'd like to.'").

173. *See* Lyons, *supra* note 70, at 1795; *see also* Finnigan, Jr., *supra* note 5, at 1495 (criticizing *Hosty*'s result and asking, "[w]hen are people supposed to learn of their constitutional rights? When barred from exercising them fully in high school and college, they will be hard-pressed to learn how to be good journalists because they are being taught censorship at every level of their development in the profession. Does the Seventh Circuit expect them to graduate from college and magically realize that now it is acceptable to question authority and government decisions?").

174. *See Sternberg, supra* note 21, at 1; Opening Brief, *supra* note 121, at *27–*28 ("[I]f two days before graduation a student gives a political speech that the administration does not like, the administration can punish the student with impunity. And the Leonard Law, which was designed to avoid just such an outcome, is powerless to stop it.").

175. *Sternberg, supra* note 21, at 1.

176. *Antebi*, 47 Cal. Rptr. at 278–79. Antebi refused to apologize to the other students and was placed under "disciplinary censure" from May 14, 2004 to May 17, 2004. *Id.* at 279.

177. *See id.*

difficult if not impossible for the student to appeal to the administration and ultimately file suit while still enrolled.[178] These loopholes allow university administrators to shred students' constitutional rights to freedom of expression with impunity. If *Antebi* stands uncorrected, private college students will be denied standing under the Leonard Law if they commence a lawsuit so much as one day after they graduate or if they are expelled.

Lukianoff further derided *Antebi*'s result, stating: "The court of appeal's interpretation of the Leonard Law completely eviscerates what the law is trying to do."[179] According to Lukianoff, even Leonard Law creator Bill Leonard "disagrees with the courts' interpretation."[180] Similarly, the brief that Antebi's lawyers filed with the California Supreme Court contends that *Antebi* "reduced the scope of the Leonard Law and the 'protections it was designed to provide.'"[181] These concerns were also raised in a letter that The First Amendment Project,[182] Student Press Law Center, and the American Civil Liberties Union of Northern California[183] sent to the California Supreme Court on September 12, 2006.[184] Unfortunately, the California Supreme Court denied review as well as Antebi's depublication request.[185]

By allowing *Antebi* to stand as good law, the California Supreme Court ensures that other courts will consider *Antebi* when they hear Leonard Law claims. Other courts may interpret the law differently, but they will have to distinguish *Antebi* because it is currently the only

178. In *Antebi*, for example, Antebi was a senior when he was removed from his radio show on March 11, 2004, and he did not file suit until March 2005. *See id.* at 278, 279 ("Rameen Talesh, the associate dean of students . . . ordered disciplinary censure" of Antebi "until May 17, 2004.").

179. Federis, *supra* note 134, at 1.

180. Sternberg, *supra* note 21, at 1.

181. Federis, *supra* note 134, at 1. Both the trial and appellate courts denied Antebi standing, but the trial court did so because it held Antebi was only entitled to review through administrative mandamus. *See Antebi*, 47 Cal. Rptr. at 277.

182. "The First Amendment Project is a nonprofit advocacy organization dedicated to protecting and promoting freedom of information, expression, and petition." First Amendment Project, FAP Mission, http://www.thefirstamendment.org/about.html (last visited Apr. 8. 2007).

183. "The ACLU of Northern California works to preserve and guarantee the protections of the Constitution's Bill of Rights." ACLU of Northern California, Mission, http://www.aclunc.org/about/index.shtml (last visited Apr. 8, 2007).

184. *See* Sternberg, *supra* note 21, at 2.

185. *See* Antebi v. Occidental Coll., No. S146525, 2006 Cal. LEXIS 14130, at *1 (Cal. Oct. 25, 2006 Sup. Ct.).

published case construing the Leonard Law.[186] In this way, *Antebi*'s standing limitations may cut out censored private college graduates students or expelled students who would bring censorship complaints under the Leonard Law.

C. *Antebi*'s Standing Limitations Endanger the Free Speech Rights of Public College Students

Antebi also places public colleges students at risk of eleventh-hour censorship. Education Code section 66301, the statute that protects public college students' free speech rights, and the Leonard Law share nearly identical language in their remedial subdivisions.[187] Section 66301(b) provides, "Any student enrolled in an institution, as specified in subdivision (a), that has made or enforced any rule in violation of subdivision (a) may commence a civil action to obtain appropriate injunctive and declaratory relief. . . ."[188] Similarly, section 94367(b) provides, "Any student enrolled in *a private postsecondary* institution that has made or enforced any rule in violation of subdivision (a) may commence a civil action to obtain appropriate injunctive and declaratory relief . . . ."[189] The *Antebi* court's conclusion that only currently-enrolled students have standing to bring Leonard Law claims was based on the language of section 94367 subdivision (b).[190] Since section 94367(b) mirrors the language of section 66301(b), California courts could easily apply *Antebi*'s current-enrollment requirement to public college students bringing suit under section 66301(b).

Due to these similarities between section 66301(b) and the Leonard Law, public college students are vulnerable to each of *Antebi*'s three language-based arguments for a current-enrollment requirement.[191] A court construing the "any student enrolled in an institution" language of section 66301(b) will likely be presented with *Antebi*'s reasoning by defendants eager to have the case dismissed if

186. A search on "Leonard Law" or "94367" reveals that *Corry*, an unpublished Leonard Law case preceding *Antebi*, is the only other Leonard Law case on record since the law was passed in 1992. *See* CAL. EDUC. CODE § 94367 (West 2002); *see also* discussion *supra* Part II.B.

187. *Compare* CAL. EDUC. CODE § 66301(b) (West Supp. 2007) *with* CAL. EDUC. CODE § 94367(b).

188. CAL. EDUC. CODE § 66301(b).

189. CAL. EDUC. CODE § 94367(b) (emphasis added). The only difference between the two statutes is that section 94367 subdivision (b) states "private postsecondary educational institution," in the same place where section 66301(a) enumerates "[n]either the Regents . . . nor any administrator of any campus of those institutions." CAL. EDUC. CODE § 66301(a).

190. *See* Antebi v. Occidental Coll., 47 Cal. Rptr. 3d 277, 280 (Ct. App. 2006).

191. *Id.* at 280; *see also supra* Part III.B.

the section 66301(b) plaintiff was no longer a student when he or she filed suit. In such a case, a court would be hard-pressed to ignore *Antebi*'s interpretation of nearly identical language, since the case stands as good law in California.

With A.B. 2581, the California Legislature bolstered section 66301 against the threat of *Hosty* just before the California Court of Appeal issued its opinion in *Antebi*.[192] *Antebi* deserves an equally strong legislative response. *Antebi* not only undermines the Leonard Law's protections for private college students but also lays the framework for a court to read new standing limitations into the scope of section 66301. These potential standing restrictions may embolden public college administrators in California to impose disciplinary sanctions on students immediately before they graduate. Additionally, administrators may expel students to divest the school of troublesome ideas while simultaneously depriving the former students of standing.[193] With over 2,474,024 students enrolled in public and private higher educational institutions in California,[194] *Antebi* provides free speech advocates with cause for concern. *Antebi*'s standing limitation diminishes opportunities for college students to hold school administrators liable for unconstitutional censorship and potentially stifles the marketplace of ideas in California. If former students of both public and private institutions lose the protections of the Leonard Law and section 66301 due to this limitation, they may be forced to rely on the Federal and California Constitution to vindicate their rights.[195] Public college students may find other legal theories to support their censorship claims, but private college students may face insurmountable barriers if they lose the Leonard Law's protection.[196]

192. *See* A.B. 2581, 2005–06 Assemb., Reg. Sess. (Cal. 2006) (passed by California Senate Aug. 10, 2006); *Antebi*, 47 Cal. Rptr. 3d 277 (decided Aug. 15, 2006).

193. *See* Federis, *supra* note 134, at 1; Sternberg, *supra* note 21, at 1.

194. *See* Digest of Education Statistics, Table 189, *supra* note 94.

195. *See* Steffen, *supra* note 101, at 143, 159 (discussing judicial recognition of First Amendment protection for public university student journalists and private university students as a result of the state action doctrine); *see also id.* at 162 (noting that some state constitutions provide more protection for free expression than the Federal Constitution).

196. *See id.* at 170. ("[C]obbling together various statutory, policy-based, contractual, common law and state constitutional approaches to protecting press rights leaves a considerable number of [private college] students and faculty without legal protection.").

IV. The Legislature to the Rescue: Suggested Amendments to the Leonard Law and Education Code Section 66301

A. Protecting Private College Students from *Hosty* Through Amendments to the Leonard Law

In California, *Hosty* captured the senate floor when a key legal advisor to the largest state university system in the country suggested that *Hosty* permits increased censorship of student newspapers.[197] Helwick's comment inspired California's legislature to respond with A.B. 2581.[198]

A.B. 2581 goes further than any other state law in bringing the full range of First Amendment protections to the college press.[199] Jim Ewart, counsel for the California Newspaper Publishers Association, was "thrilled" with Schwarzenegger's decision to sign A.B. 2581.[200] "This law sends a very strong message to administrators that the student press is just as deserving of strong free press protection as professional media."[201] Even though it is not California's first college speech-friendly law,[202] A.B. 2581 shows that California lawmakers are still attentive to the "marketplace of ideas" that college campuses foster when students are free to express their views without fear of disciplinary sanctions.

The bill's sponsor, Assemblyman Yee, hailed the merits of A.B. 2581:

> College journalists deserve the same protections as any other journalist . . . . Having true freedom of the press is essential on college campuses and it is a fundamental part of a young journalists [sic] training for the real world. Allowing a school administration to censor is contrary to the democratic process and the ability of student newspapers to serve as the watchdog and bring sunshine to the actions of school administrators.[203]

197. *See* Memorandum, *supra* note 4, at 1. The CSU system is "the largest in the country." Mayor, *Memo*, *supra* note 93, at 1.

198. *See* BILL ANALYSIS, *supra* note 4, at 1-2; *see also* Mayor, *California*, *supra* note 4, at 1 (stating A.B. 2581 was drafted in response to *Hosty*).

199. *See* Lyons, *supra* note 70, at 1785. In particular, "the legislation makes California the first state in the nation to specifically prohibit censorship of college student newspapers." Mayor, *California*, *supra* note 4, at 1.

200. Mayor, *California*, *supra* note 4, at 1.

201. *Id.*

202. *See* CAL. EDUC. CODE § 66301(a) (West Supp. 2007); CAL. EDUC. CODE § 94367 (West 2002).

203. Mayor, *California*, *supra* note 4, at 1. Yee focused on the protection A.B. 2581 would give to college newspapers, since the bill was passed in response to the CSU general

However, section 66301, as amended by A.B. 2581, only protects public college students from administrative censorship.[204] As one way to close the gap between public and private students' legislative protections from censorship, private college students could seek designated public-forum status for their newspapers. Public college students in the Seventh Circuit had little success with this approach after *Hosty*.[205] Similarly, before California's legislature responded to Helwick's memo with A.B. 2581, CSU's media advisers encouraged student newspapers at CSU campuses to obtain designated public-forum status.[206] The rationale for seeking public-forum status is that the papers would be exempt from "any effects the *Hosty* decision may have in California."[207] However, these designated public-forum labels are inferior alternatives to state legislation prohibiting administrative censorship. If students and universities must agree on the status of student newspapers piecemeal, some newspapers may not achieve the more protective public-forum status.[208] Also, college speech appears in many contexts other than newspapers, such that designated public-forum status for a handful of newspapers will not cover the extent of college students' speech.

In light of these considerations, legislation is a superior tool to provide private college students in California with meaningful redress for administrative censorship.[209]

In California's 255 private degree-granting educational institutions, students must rely on the ambiguous language of the Leonard Law to protect them from the type of administrative censorship dis-

counsel's comment that *Hosty* might allow school administrators to censor CSU student newspapers. *Id.* However, A.B. 2581 prohibits college administrators from censorship of "speech or other communication," not just college newspapers. A.B. 2581, 2005–06 Assemb., Reg. Sess. (Cal. 2006). The main accomplishment of A.B. 2581 is its expansion of liability to the administrators of California's public colleges and universities. *See* CAL. EDUC. CODE § 66301(a). Before the bill was passed, Education Code section 66301 only prohibited the Trustees, Regents, and Boards from disciplining their public college students. *See* CAL. EDUC. CODE § 66301 (West 2003).

204. *See* discussion *supra* Part III.A.

205. The Student Press Law Center encouraged universities in the Seventh Circuit to grant public-forum status to their newspapers in writing, but only four schools granted that status as of late 2006. *See* Lyons, *supra* note 70, at 1804.

206. *See id.*

207. Mayor, *Memo*, *supra* note 93, at 1.

208. *See* Lyons, *supra* note 70, at 1804.

209. *See* Sanders, *supra* note 70, at 176 ("[T]he best bet for protecting college students' free speech rights would be the adoption of a modified version of the California college press free statute.").

played in *Hosty*.[210] Unfortunately, the Leonard Law's protection of private college students' speech falls short of section 66301's protections for public college students' speech. A comparison of the two laws evidences subtle differences in the wording of the Leonard Law that may lead to a narrower scope of speech protection for students at private institutions.[211]

Because private college students are not protected by section 66301 or A.B. 2581, the legislature should pass a sister bill to provide private college students with clear statutory protection from administrative censorship.[212] The amendment should forbid officials at every level of private college administration from disciplining students for speech that would otherwise be protected by the First Amendment.[213] The sister bill could add an additional provision to the language of section 94367(a).[214] The newly amended statute would read: "No private postsecondary educational institution *or its administrators* shall make or enforce any rule subjecting any student . . . ." Alternatively, the following provision (e) could also be added: "*(e) Nothing in this section prohibits a student from suing an administrator, officer, or other official of the private postsecondary educational institution in part (b), even if the individual's actions do not constitute disciplinary sanctions by the postsecondary institution.*" This provision would give notice to private university administrators that they may be held individually liable for censorship, even if the institution employing them cannot be held liable for their actions. This provision would also reduce the possibility of protracted vicariously liability disputes between the institution and administrators because the administrator would not escape liability by

210. There were 255 private institutions of higher learning in California as of 2005. *See* Table 244, *supra* note 94; *see also* Hosty v. Carter, 412 F.3d 731, 732–33 (7th Cir. 2005). *Hosty* presents the classic censorship scenario involving "a clash between a school's administration and its students." Nimick, *supra* note 44, at 968.

211. *Compare* CAL. EDUC. CODE § 66301 (West Supp. 2007) *with* CAL. EDUC. CODE § 94367 (West 2002).

212. This sister bill would ensure that private college students will not need to overcome vicarious liability disputes when they bring Leonard Law claims against administrators*See* Part III.B. *supra.*

213. The language could model section 66301 by specifically enumerating titles of high ranking officials, as well as prohibiting any administrator from imposing disciplinary sanctions. Such an amendment could read: "No president, chancellor, director, or board member, nor any administrator of a private postsecondary institution, shall make or enforce any rule subjecting any student to disciplinary sanction . . . ." By mirroring section 66301, as amended by A.B. 2581, administrators would not be able to evade the Leonard Law by hiding behind private institutional entities.

214. *See* CAL. EDUC. CODE § 94367(a).

asserting that the statute only prohibits the institutional entity from censoring students.

These proposed amendments to the Leonard Law are also consistent with the legislative intent behind A.B. 2581.[215] The California Legislature passed A.B. 2581 to specifically prohibit public college administrators from expanding their censorship of public college students under *Hosty*'s reasoning because the original version of section 66301 did not encompass an administrator's actions.[216] If the Leonard Law is not amended in a similar fashion, private college students bringing Leonard Law claims may not be able to sue administrators directly for censorship. Leland Yee did not differentiate between public and private college students' speech when he explained the merits of A.B. 2581: "Having true freedom of the press is essential on college campuses . . . . Allowing a school administration to censor is contrary to the democratic process and the ability of a student newspaper to serve as the watchdog and bring sunshine to the actions of school administrators."[217]

B. Neutralizing *Antebi*'s Threat to College Speech by Amending the Leonard Law and Section 66301

Following *Antebi*'s reasoning, the plain language of the Leonard Law can be interpreted to limit standing to currently-enrolled students.[218] Because the California Supreme Court denied Antebi's petition for review,[219] and because students have limited power to demand public-forum status for their media,[220] California's legislature should cure the deficiency that *Antebi* reads into the Leonard Law. As section 66301 and the Leonard Law have very similar language, a legislative amendment patching the *Antebi* loophole in the Leonard Law could also apply to section 66301.

First, any amendment would need to specify that recent graduates or expelled students have standing to sue under the statutes if they were censored or disciplined for speech or other expressive activity that occurred while they were students. In this way, college administrators could not expel students and then claim that the former students lack standing because they are not enrolled.

215. *See* BILL ANALYSIS, *supra* note 4, at 1-2.
216. *See id.*
217. Mayor, *California*, *supra* note 4, at 1.
218. *See* Antebi v. Occidental Coll., 47 Cal. Rptr. 3d 277, 280 (Ct. App. 2006).
219. 2006 Cal. LEXIS 14130, at *1 (Cal. Oct. 25, 2006).
220. *See* Lyons, *supra* note 70, at 1804.

Second, the amendment would need to specify that only *recently* enrolled former students can bring their claims, so as to ensure that both parties have access to evidence when claims are brought and to eliminate indefinite liability for universities and their administrators. The amendment would quantify what "recently" means by providing a fixed grace period or statute of limitations for former students to file their censorship claims. The statute of limitations could extinguish all claims of disciplinary sanctions when a one or two year period expires after the students leave. Beginning the statute of limitations after students lose their enrollment status will provide a longer grace period than when the statute of limitations is trigged by the disciplinary sanctions because students might be censored long before they leave college. If the statute of limitations begins to run after the student graduates, students will have more time to negotiate an agreement or appeal the disciplinary decision within the school's internal dispute resolution procedures.[221] Antebi participated in some internal dispute resolution procedures, though he was censored near the end of his tenure at Occidental.[222]

These standing amendments incorporated into section 94367(b) might read:

> Any student or former student who was enrolled in a private post-secondary institution at the time that the institution made or enforced any rule in violation of subdivision (a) may commence a civil action to obtain appropriate injunctive and declaratory relief, as determined by the court, within a two year period following the student's departure from the institution.[223]

Similar language could be substituted into section 66301(b): "*Any student who was enrolled in an institution, as specified in subdivision (a), at the time that the institution . . .*."[224] With these proposed revisions, former students who were censored for their expression while they were students will be allowed a reasonable time to pursue their censorship claims under sections 66301 and 94367. College students are not always aware of their rights and remedies and should not be expected to

221. The former advisor for *The Innovator* asserted that the *Hosty* plaintiffs "tried everything they could before filing a lawsuit . . . . [I]t was the lawyers that advised [them] to sue." *Editors Sue University for First Amendment Violations*, STUDENT PRESS L. CENTER, Mar. 30, 2001, at 1, *available at* http://www.splc.org/newsflash.asp?id=259&year=2001. Antebi appealed the associate dean of students' decision to discipline him with the President and Board of Trustees of Occidental College. *Antebi*, 47 Cal. Rptr. 2d at 279. However, the appellate record did not include the outcome of his appeal. *Id.*

222. According to Antebi, Occidental's administration finished investigating him for his speech "just days before his graduation." Opening Brief, *supra* note 121, at *28.

223. *See* CAL. EDUC. CODE § 94367(b) (West 2002).

224. *See* CAL. EDUC. CODE § 66301(b) (West Supp. 2007).

call a lawyer immediately after administrators react to their speech. Antebi was censored in his final days as a college student;[225] it is not surprising that he filed suit after he graduated.[226] Under this revised version of the Leonard Law, Antebi would have had standing to pursue his free speech claims against Occidental College and its administrators.

Conclusion

California's legislature diligently guarded the "marketplace of ideas" present on college campuses when it passed A.B. 2581 in response to the threat of *Hosty v. Carter.* However, A.B. 2581 protects only public college students' speech from administrative censorship, failing to do the same for the speech rights of private college students. When administrators at private universities censor students for controversial views, the silenced students must rely on the Leonard Law. While the Leonard Law forbids "private postsecondary institution[s]" from disciplining students for their speech or expression,[227] it does not mention administrators. Courts may dismiss Leonard Law claims asserted directly against administrators because the statute is silent as to whether individuals may be sued. Without the deterrent effect of Leonard Law liability, private university administrators may censor students without fear of retribution.

In order to discourage private college administrators from censoring students' speech, the California Legislature should amend the Leonard Law to specifically foreclose censorship by these individuals. Through this legislation, California would achieve parity between the speech protections afforded to public and private college students.

In addition to this amendment, the legislature should also repair the damage the Leonard Law sustained under *Antebi v. Occidental* and prevent collateral damage to section 66301. *Antebi* held that private college students must be currently enrolled to bring suit under the Leonard Law, reasoning that the statutory language compelled this requirement.[228] By inventing a current-enrollment requirement for Leonard Law standing, *Antebi* decreases opportunities for censored private college students to invoke the Leonard Law's protections. At the same time, *Antebi* encourages private college administrators to ex-

225. *See supra* notes 175, 221 and accompanying text.

226. Antebi graduated from Occidental in 2004. He filed suit in superior court in March, 2005. *See Antebi,* 47 Cal. Rptr. 3d at 279.

227. CAL. EDUC. CODE § 94367(a).

228. *See* 47 Cal. Rptr. 3d at 280.

pel students to divest them of standing or censor them immediately prior to their graduation. Unfortunately, section 66301 could be subject to *Antebi*'s questionable logic since the statutes share nearly identical language. Consequently, section 66301 and the Leonard Law should be amended to close the *Antebi* standing loophole by allowing recent graduates to sue if they were censored while they were students.

It may seem natural that college students—young adults of legal voting age—should be afforded the same free speech rights on campus that they enjoy in their communities. However, public college students in California have only enjoyed the right to express controversial views on college campuses for the past forty years.[229] Colleges and universities provide a "marketplace of ideas"—an open forum for learning and exchange of opinions where students engage in critical analyses of everything from the campus administration to world politics. Students emerge from this setting with exposure to a variety of views and theories and the seasoned ability to apply their questioning minds in their communities. Regulation and censorship of college students' speech not only trample their rights but also reduce the pool of future political commentators, investigative journalists, and creative thinkers by discouraging full freedom of expression. California lawmakers should continue their honorable mission of protecting the "marketplace of ideas" at public and private institutions by amending the Leonard Law to bar administrative censorship and supplementing the Leonard Law and section 66301 to allow recent graduates to sue for censorship by university administrators.

229. *See supra* notes 14, 15 and accompanying text.

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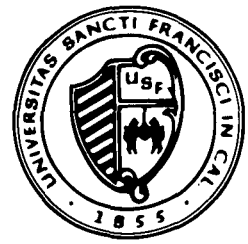

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