INSIDE THE SCHOOL HOUSE GATE

THE RHODE ISLAND ACLU AND STUDENTS' RIGHTS IN SCHOOL

By Daniel Weisman and John Carroll

Inside the School House Gate

The Rhode Island ACLU and Students' Rights in School

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Introduction

It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.

- U.S. Supreme Court Justice Abe Fortas, Tinker v. Des Moines

Schools are special places. They are where we send the young to prepare them for adulthood. We expect that learning will come from reading and the wisdom of teachers. Indeed, most of us had a favorite teacher, developed interests in subjects at school that gave us special intellectual excitement, and discovered our favorite books there.

But other kinds of lessons are taught in school. These lessons are drawn from the experience of being there and watching what goes on: seeing how people interact with each other; observing the daily give and take between teacher and pupil and pupil and pupil – learning from what happens and trying to figure out why. And who among us does not retain unpleasant memories that shade our understanding of what school was like? Perhaps we were punished for something we did not do, we may have been bullied by other students and felt in danger and unprotected, or perhaps we yearned to challenge a student or a teacher we knew was wrong but were afraid to do so, or attempting to do so were cowed into submission.

We learned indelible lessons about power, and its good and bad applications. Either way, we knew we didn't have it, and "they" did. It could be used to save us from difficult situations, like a bully, and to embarrass and punish us for being unprepared, inattentive, misbehaving or, on occasion, unjustly convicted of these transgressions. Power also seemed to be applied unevenly. There were the favored students and the always suspect. Some wielders of power can be remembered as wise and merciful, exercising restraint and judgment; others arbitrary and vindictive. Later in life, when we have power over others, what we take from our school days as the recipients of others' power may instruct us in our own application of power.

Regardless of recollective accuracy, we retain memories of school long after we have left because schools are places of high drama, both intellectual and social. Every day, there are struggles which result in small victories and defeats because this is where young people on a daily basis develop, test and sometimes apply the principles in which they believe most strongly. Students live in a democratic society but they soon learn that schools are far from that: they are highly structured bureaucracies in which power is divided among a hierarchy

within which they occupy the bottom rung. Observed from this position life can sometimes be very difficult.

Public schools are expected to educate our children and protect them from harm, but they are also subject to the commands of state and national constitutions and have an obligation to treat their charges fairly. While teachers and administrators may require substantial discretion to effectively carry out their responsibilities, they are – and should be – limited by legal and community expectations that express society's judgment about the outer limits of that authority.

Civil liberties are especially at risk in schools because of the substantial imbalance of power not only between teachers and pupils, but also between administrators and teachers, and school officials and parents. Wherever such discrepancies exist there is always the potential for abuse because the powerful may be tempted to inflict their own preferences on those beneath them and because the powerful do not always understand how they are and should be limited.

Civil liberties issues which arise in public schools often raise conflicting principles, some libertarian and others not, that can be difficult to work through. Thus, the desire to provide a safe school may conflict in the eyes of school authorities with student speech and dress; that same goal may lead to apparently arbitrary punishments; and the school may decide that safety is best achieved by extending its reach beyond the school house door.

The issues are further complicated by the marginal status of the young: they are not adults and expectations for their behavior reflect this. At a certain age they may be more rebellious than adults and at others they may be more submissive. At various ages they may require different kinds of direction and, as they move toward adulthood, more discretion of their own. But children of six are not the same as young adults of 17 or 18 and one might expect that the rules would reflect that: but the reality is that sometimes they do and sometimes they don't. School systems are often tempted to lay down blanket rules that may be more suitable for some students of a given age and not for others. Disciplinary regimes can be oppressive, arbitrary and even irrational, but are defended on the principles of order and adult authority.

In schools, the prejudices of the community may also be on display, sometimes to the detriment of individuals. A student with eccentric interests or unusual preferences may be isolated or scorned by fellow students and even by teachers and administrators. Students with sexual orientations or political views considered “abnormal” may be subject to discrimination, while others who object to school rituals for reasons of faith or morals may be dealt with arbitrarily. In some school systems, efforts have been made by community groups to make their viewpoint official by banning books or movies from the curriculum, or imposing programs of their own.

The schools are an interesting forum for civil liberties because the issues they raise go to the heart of democratic and constitutional government. Should a majority of the

community have the power to decide what every child can or cannot read, and can this be done at every age? Can administrators punish a whole class of students for the transgressions of a few? Can students criticize teachers or the principal in the school newspaper or a paper published from home? Can the home-based newspaper be distributed on school grounds? Can a gay or lesbian student bring a same-sex date to the school prom? Can the school system prohibit 18 year-olds from wearing on school grounds t-shirts that display "objectionable" content? Can school officials subject every student to a breathalyzer test because they suspect some students have sampled an alcoholic beverage?

The Rhode Island Affiliate of the American Civil Liberties Union (R.I. ACLU) has dealt with issues like these on a regular basis and has tried to work through them in a principled way, often in dialogue with school authorities. Most of these cases come to us as the result of complaints by the offended party; most never go to court but are joined and resolved by the Affiliate in letters to the "offending" parties. Each of the letters speaks to a civil liberties issue of substantial importance, to students, parents and teachers. The Affiliate's views are expressed in the analysis of each issue, but in general our position has been that civil liberties and civil rights should not stop at the school house door.

This book is organized around 27 school rights cases in Rhode Island since 1990. Each case began with a complaint from a student, group of students or parent. In these 27 episodes with 29 letters (because of two follow-up letters), the ACLU's first response was a letter to responsible officials (e.g., school principals, superintendents, school board members), delineating the reasons their actions should be reconsidered. This is the ACLU's common practice. It gives officials the opportunity to review the issues in question, consult with their colleagues, and reconsider in a non-combative process.

The 29 letters were selected because the events that led to ACLU intervention, and the civil liberties issues involved, are very instructive of students' vulnerabilities in school settings. Most resulted in policy changes, but a few were ineffective. Some generated no known response. Where the results are known, we report them in our introduction to each cluster of letters, which are organized by civil liberty topics.

The 29 letters are unedited except for the removal of some complainants' names when their identities were not part of the public record. Each letter articulately and comprehensively, but respectfully, points out the implications of schools' or districts' actions in relation to civil rights law, civil liberties principles, and public policy impacts, and suggests alternative methods of pursuing the objectives in question. Each letter illuminates an important civil liberties principle. Together, the 29 letters indicate the vulnerabilities of children in school, the challenges school officials face every day, and the availability of

alternative measures schools can take to meet their obligations without violating the rights of students.

Eight of the 27 cases involve higher education. Our original plan was to focus on primary and secondary school cases only, but we included episodes from two public and one private Rhode Island institution of higher learning when we realized that some of the vulnerabilities facing younger students also challenge young adults when they reach college.

We appreciate your interest in this topic. Please forward any responses to dweisman@ric.edu or the R.I. ACLU.

Legal Rights of Children in Schools

By John Dineen

The decision of the United States Supreme Court in 1969 in *Tinker v. Des Moines School District* seems to be both the common starting point and the high-water mark for the First Amendment rights of high school and elementary school students. In fact, an argument can be made that Justice Robert Jackson's about-face on the mandatory pledge of allegiance in 1943 was the high-water mark. In *West Virginia v. Barnette*, he changed his mind, along with the Court, in overturning a decision just three years earlier, and ruled that Jehovah's Witness children could not be forced to stand and salute the flag, surely a provocative act in the midst of World War II. He stated: "That [the schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."

One could argue that it's been pretty much downhill for the First Amendment rights of students since 1943, with a brief victory for Mary Beth Tinker's anti-war armband in 1969, where Abe Fortas stated, optimistically, that public school students do not shed their constitutional rights at the schoolhouse gate. In the 1988 *Hazelwood* case, the Court allowed schools to regulate even non-disruptive speech if it appeared to be "school-sponsored" (student newspapers, plays, etc.). And the *Fraser* case in 1986 stopped the presses on in-school "vulgar" or "plainly offensive speech," even if not directly school-sponsored or disruptive. These are restrictions that would not be upheld if applied to adults.

In 2007, the Court further chopped away at student free speech in *Morse v. Frederick* ("Bong hits for Jesus" banner held by students on the side of a public street as the Olympic Torch Relay passed by). If the message is "thought to" encourage illegal drug use, it can be punished, notwithstanding the forty-year old *Brandenburg* distinction (a Supreme Court case routinely applied outside the school setting) between "mere advocacy" of unlawful activity, which cannot be punished under the First Amendment, and "incitement to imminent lawless action," which can.

One of the recurring themes undermining students' free speech rights has been the fear that First Amendment activities may provoke or offend other students and thus cannot be allowed. Judge Pettine here in Rhode Island was one of the few to get it right on this "heckler's veto" argument when, in a 1980 case, he upheld Aaron Fricke's right to take a same-sex date to the high school prom. "Any disturbance that might interfere with the rights of others would be caused by those students who resort to violence, not by Aaron and

his companion, who do not want a fight," wrote Pettine. Unfortunately, the possibility that others may be provoked, or even just "offended," is now repeatedly trotted out as reason enough to suppress student speech.

The actions of students in *Barnette* (1943) and *Tinker* (1969), viewed then by many as dangerously unpatriotic, might today lose out to the watchdogs against the offensive, the upsetting, and the provocative. We may not be heeding Fortas' warning in *Tinker* that "any departure from absolute regimentation may cause trouble" but that "our history says it is this sort of hazardous freedom – this kind of openness – that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society."

Of course, not all is doom and gloom for students' free speech rights. Lower courts, within the strictures laid down by the Supreme Court in these cases, have continued to sustain First Amendment challenges by students to actions of their schools in a variety of contexts, just as they have also begun to grapple with the brave new world of First Amendment issues raised by student use of the Internet, cell phones and other modern technology. And here in Rhode Island, the ACLU has continued to win victories in the courts on behalf of aggrieved students.

Even the progressive Justices of 1943 would likely have been very surprised with the idea that, for example, students are entitled to certain minimal due process rights before they can be suspended, rights which the 1975 Justices found in the seminal case of *Goss v. Lopez*.

Perhaps most important of all, as the many examples in this book make clear, students still have the ability to challenge school authority and vindicate their basic civil liberties without the need for a lawsuit – if they are willing to take a stand. As long as there are Barnettes and Tinkers willing to stand up for their rights, and an ACLU around to defend them, the notion of student rights will remain an important principle rather than, as some school administrators might wish, an oxymoron.

The Letters

First Amendment Rights: Self Expression

Censorship

Commentary by John Carroll

Many Americans, including some school officials, subscribe to the idea that sexuality and children should only mix in health class, and sometimes not even there. As a result, most schools are generally cautious in exposing students to material -- books, music or film -- that contains sexual content. Indeed, some schools flinch at the first complaint they receive about such material. In the Barrington case that follows, the school system decided to ban a film that was the creative product of a former student, submitted as part of his high school project. It was remarkable that a film project with such an origin should achieve general release, but even more remarkable that the school district would decide to ban this example of student success.

Every school district has a formal policy that is supposed to govern the choices of classroom materials. The first showing of the film followed careful procedures, which included parental permission and the excision of a film sequence thought to be especially offensive. But that was not enough for one parent who sought to have the film banned from all of the system's classrooms, a request that was granted.

In the Barrington case, a number of special circumstances ultimately conspired to unravel the administrative decision to ban the film. In the first place, members of the review committee acted in secret and failed to rationalize their actions in a manner consistent with their own guidelines. In the second place, the film script had been written in part by a graduate of the school system, which, in the view of some parents, made it a model for other students to emulate. The clincher was that the media drew attention to the school department's action, which forced the issue into the public forum of the school committee. There, the views of the complainant and her friends were overwhelmed by negative public reaction, aided, we would like to think, by the carefully reasoned letter from the R.I. ACLU.

The timidity of schools in the face of demands for censorship is also illustrated by Coventry's removal of *Slaughterhouse-Five* from a high school reading list. Although this case lacks the special circumstances of the Barrington case, it provides another example of how unthinking censorship of media can occur in our school systems.

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November 4, 2005

Superintendent Ralph Malafronte
Barrington School Department
283 County Road
Barrington, RI 02806

Dear Superintendent Malafronte:

I am writing to express our organization's extreme disappointment with the school district's decision, as described in today's *Providence Journal*, to completely ban the film "Dirty Deeds" from being shown at any time in any classroom in Barrington. We believe this decision sets a dangerous precedent that does damage to the mission of the public schools in Barrington and seriously erodes the principles underlying the district's instructional material selection policy.

Let me begin by noting that the ACLU respects the notion of a review procedure, such as what is in place in the school district, in order to consider complaints about curriculum material in a professional manner. However, questions and concerns necessarily arise from the overwhelming secrecy surrounding the school's decision-making process on this matter. As we understand it, the complaint prompting the review of the film is private, the deliberations of the review committee were done in secret, and the rationale for the decision and documents explaining the decision are not subject to public scrutiny either.

It is also important to stress a few facts, of which you are, of course, aware, regarding the background of this particular complaint. This PG-13 movie was shown in an eighth grade classroom only to students who had received parental permission to watch the film. The film's showing had also been approved by all appropriate school officials. The film was shown to students as part of a screenwriting portion of a language arts class. At least one scene in the film deemed "lewd" was deliberately not shown, though the complaint itself apparently refers to it and a handful of other scenes in the film as being inappropriate. And the film itself is based on a script that was written by a Barrington High School student as part of his senior project.

Under these circumstances, a decision to completely ban the film – "in part or in whole" – strikes us as seriously undermining the district's instructional review policy, making it so malleable as to be meaningless as a defense against community pressure to censor controversial material. As mentioned above, we are somewhat hampered in trying to discern the rationale underlying the judgment in light of the complete secrecy surrounding the decision-making, but it is very hard to square with the school district's instructional review policy itself, despite your claim that the film "does not align" with the policy.

The policy cites eight "general criteria" for evaluating materials. Those criteria are: (1) overall purpose; (2) timeliness or permanence; (3) importance of subject matter; (4) quality of the writing/production; (5) readability and popular appeal; (6) authoritativeness; (7) format and price; and (8) significance of the sources: author, etc. It is difficult to comprehend how those criteria could justify the complete ban that has been imposed on the film. Indeed, some, such as the "popular

appeal" of the material and the "significance of the source" would seem to strongly favor use of the film in certain contexts. The same is true for the "overall purpose," which, as explained for its showing in June, is not only reasonable but also rather compelling.

We therefore have to assume that the rationale for the ban is based on the one "specific" criterion in the policy that could be relevant: "Language Use (Sex, profanity, violence)." Once again, other than as a blatant response to community pressure, nothing in that criterion supports the ban that has been imposed. That criterion requires materials that present "accents on sex and violence" to be "subjected to stern tests of literary and artistic merit and reality by the professionals *who take into consideration the age and grade level of their students*." (emphasis added) The policy goes on to note that "sexual incidents, profanity or violence does not automatically disqualify material for use. Rather the decision should be made on the basis of whether the material is of literary and artistic value."

The ban, we submit, appears to fly in the face of this carefully crafted criterion. First, the policy makes the important, if obvious, point that material with profanity or sexual content should take into consideration the age of the students. A decision to completely ban any classroom – whether in sixth grade or twelfth grade – from screening a PG-13 movie clearly fails to undertake the more nuanced consideration that this policy envisions. As for "literary and artistic value," people can obviously disagree about how good this film is, but for the Barrington School District to conclude that *a film co-written by a Barrington High School graduate based on that student's high school senior project* has no literary or artistic value for any classroom is extraordinary.*

As I mentioned at the beginning, we, of course, have not been privy to the deliberations that led to this decision. And we do not question the right of parents to raise questions about instructional material being shown in the classroom. But when a far-reaching decision to completely ban a film from the school system is made without any obvious support from the school policy's criteria, one can only assume that the decision has been guided, at least in part, by inappropriate criteria. This is a truly regrettable outcome, for both the educational mission in general and Barrington schools in particular. We can only hope that this will not unleash more attempts to inappropriately censor materials in the classroom. We fear otherwise, however, for the message that this decision sends is one that hardly supports robust academic freedom in Barrington's schools.

Sincerely,

Steven Brown
Executive Director

cc: Barrington School Committee

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* We further note that at least some of the formal objections made about the film (such as concerns about depictions of underage drinking) do not appear to form a basis for a finding of inappropriateness under any of the policy's specific criteria.

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December 3, 2005

Patrick A. Guida
1 Old Forge Road
Barrington, RI 02806

Dear Mr. Guida:

I understand that the School Committee will be considering this Thursday the appeal of the school superintendent's decision to ban the showing of the film "Dirty Deeds" in any Barrington classroom. The R.I. ACLU strongly urges you to reverse this extremely troubling and dangerous judgment.

After first learning of the ban, I addressed some of our concerns about it in a letter to Superintendent Malafronte on November 4th. At that time, I sent you a copy. Rather than repeat many of the arguments in that letter, I am taking the liberty of enclosing another copy of it for your information.

However, I write again because we now have the benefit of the documents that were considered and generated by the school district review committee that recommended this ban. Those documents only underscore and confirm the censorship concerns that we raised last month.

According to the documents we received, the *entire* stated rationale offered by the review committee for banning the film – in whole or in part – was that

> there is material in the movie 'Dirty Deeds' that would not pass a 'stern test of literary and artistic merit.' There are 'sexual incidents,' vulgarity (if not 'profanity') and 'violence' that do not 'upgrade human dignity.' For this reason, the committee finds that the movie does not align with the 'Instructional Materials Selection and Review Policy.' Therefore, it should not be used again in the Barrington Public Schools at any grade level."

That explanation completely undermines a key tenet of the school district's instructional review policy – that material should be viewed *as a whole, not in bits and pieces*. In focusing on *particular material* in the movie as the basis for its ban, the review committee's decision is an invitation to widespread censorship of materials in the public schools. Relying on this rationale, untold numbers of classic books and films could be banned – and, in fact, *have been banned elsewhere*.

The review committee's inappropriately narrow focus becomes even more apparent when one considers, as I noted in my earlier letter, that a number of the review policy's "general criteria" for evaluating materials – such as their "overall purpose," "popular appeal" and "significance of the source" – would seem to strongly favor use of the film in certain contexts. But these factors were not even mentioned in the review committee's decision.

Further, however well-meaning the objectors' concerns about the film may be, they uncomfortably mirror the typical cries for censorship of controversial material. The Barrington objectors warn that showing the film "is likely to be **destructive of the character of Barrington school children**, and is further likely to **impair the school children's morals**. It is believed that at least some of the students who were allowed to view the movie 'Dirty Deeds' in the classroom are likely to **copy the immoral and antisocial behavior** depicted throughout the movie." (emphasis in original) Of course, the movie does contain some crude elements, but anyone who believes that a PG-13 film like this is capable of such widespread destruction has simply forgotten what it is like to be a teenager. If the review committee truly believed these dire warnings (and its decision to ban this film's showing in *any* class at *any* time suggests it did), then a wholesale review of *all* literature assignments in the Barrington Public Schools is in order, lest the Town's children not be adequately protected from dangerous literary influences.

Frankly, we believe that the fact that this film was co-written by a recent Barrington High School graduate, and was based on his senior project, should be a cause for celebration, not condemnation, and a testament to the high school senior project concept. Yet by making "Dirty Deeds" the first and only film (as far as we know) to be "banned in Barrington," the review committee has demonized it and done a great disservice to the school district, as well as it students and teachers. As I mentioned in my November letter, people can obviously disagree about the worth of this film as a movie, but we find it truly extraordinary for the Barrington School District to conclude that *a film co-written by a Barrington High School graduate based on that student's high school senior project has no literary or artistic value for any classroom.*

I will close this letter on the following note. In banning "The Adventures of Huckleberry Finn" from its shelves in 1885 (a book that, as you know, still faces censorship battles 120 years later), the Concord, Massachusetts public library objected, on grounds not too unlike those offered here, that the book was "rough, coarse and inelegant, dealing with a series of experiences not elevating, the whole book being more suited to the slums than to intelligent, respectable people." I do not cite this to suggest that "Dirty Deeds" will someday be taught in film school alongside "Citizen Kane," but instead to make the more banal, if overlooked, point that much literature (and film) has elements that might be considered objectionable or offensive. Broadly wielding the censor's ax, however, is not the proper response. The complete ban imposed on this film sends students a message, but it is one that should be foreign to a good educational system.

We hope that you will reverse this unfortunate decision and restore a more robust model of academic freedom to Barrington's schools. Thank you in advance for considering our views.

Sincerely,

Steven Brown
Executive Director

Enclosure

cc: Supt. Ralph Malafronte

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September 28, 2000

John Deasy, Superintendent
Coventry School District
222 MacArthur Blvd.
Coventry, RI 02816

Dear Superintendent Deasy:

I am writing in response to news reports today about your school district's decision to remove *Slaughterhouse-Five* from a required summer reading list at the high school, and possibly to remove it from the summer reading list altogether. The ACLU is extremely concerned about the school district's actions, and we urge you to reconsider them.

It is worth emphasizing two things which this controversy is not about. First, it is not about accommodating individual students who may have objections to a particular reading assignment; your school district already has in place a mechanism to assign substitute books to offended students, and that is exactly what was done here. Instead, it appears that school officials have allowed one individual's objection to dictate the reading assignment for an entire class and for future students.

Secondly, this is not about school teachers deciding that a certain book is not appropriate for a class for pedagogical reasons. To the contrary. We are sure that the English Department's decision to make *Slaughterhouse-Five* required reading this year was a well-considered judgment. That is not surprising, since it is a powerful novel which has been a staple of high school reading lists nationwide for many years. Instead, the book has been removed as required reading because of a parent's objection to some of the content of the book (only 42 pages of which, according to the Providence Journal, she actually read). Its teaching value remains as great as when the English Department first decided to assign the book. Instead, its removal is based solely on the book's allegedly "offensive" content.

While it is true that the book has not been banned from the school, but only removed from a required reading list, the effect of this decision on academic freedom is almost as great. The consequences of even this limited "removal" are extremely troubling, and its chilling effect cannot be discounted. What will the school do when a parent next complains about a required reading assignment during the school year itself? In preparing their course selections for the year, will some teachers now think twice about putting certain books on their syllabus? If *Slaughterhouse-Five* is not appropriate as required summer reading, will it ever be appropriate as required reading during the school year?

In sum, the school district's response to the parent's complaint in this instance unwisely suggests that any book on a class reading list is now fair game, subject to removal if anyone complains about its content. Deleting *Slaughterhouse-Five* as required reading, and possibly from the reading list altogether, simply because of some of its language demeans all classic literature. Worse, it implies -- rightly or wrongly -- that required reading at the high school will now be based on appealing to the lowest common denominator, and on shying away from controversial choices of literature that might offend.

We hope you will agree that the potential chilling impact of this decision and the message that it sends are inappropriate, and that you will therefore reconsider your determination that the book should be removed from future required reading lists.

Thank you for your attention to our concerns.

Sincerely,

Steven Brown
Executive Director

First Amendment Rights: Self Expression

Underground Student Newspaper

Commentary by John Carroll

Free speech is a now a cornerstone of the American system, but it has not always been so. Speech which discredited the government, called it into disrepute, defamed, criticized or embarrassed public officials was called "seditious libel," and was an offense under British law during the Colonial period. Leonard Levy (*Emergence of a Free Press*), the leading scholar of original intent and the First Amendment, argues this understanding was brought into American law, as exemplified by the Sedition Act of 1798 and a number of convictions during the early colonial period. To be convicted under seditious libel, it was enough to criticize the government and truth was far from a defense. If the seditious libel was true, the offense was worsened because it was even more likely to bring disrepute to the government than if the publication was false.

The idea of seditious libel, or some variant thereof, was used in the successful anarchist and socialist prosecutions during and immediately after the First World War. The concept resurfaced again and was used in the 1950's as a tool to incarcerate members of the Communist Party at the height of the Cold War and the McCarthy Red Scares. This tradition of suppression has been in constant tension with the now dominant view that there should be robust and open debate about matters governmental. That view reached ascendancy in the 1964 case of *New York Times v. Sullivan*, when Justice William Brennan argued that there is "... a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."

Nonetheless, the idea of seditious libel has proved to have lasting appeal to persons in authority, among others. When you read the Affiliate's letter to officials at East Greenwich High School you should realize that Mr. Brown is arguing against an idea with a long, if now somewhat discredited, pedigree in American life.

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June 27, 2002

Robert McCarthy, Principal
East Greenwich High School
300 Avenger Drive
East Greenwich, RI 02818

BY FAX AND MAIL

Dear Mr. McCarthy:

I am writing in response to a newspaper article in yesterday's *Providence Journal* describing your attempts to learn the identities of the East Greenwich High School students who mailed an "underground" magazine to the homes of fellow students. While you are quoted as saying that you do not seek their identities for disciplinary reasons, we believe it is totally inappropriate for you to be investigating this matter at all. It can only have a chilling effect on the clearly legitimate exercise of students' First Amendment rights.

While school officials do have the ability to control to some extent the activities of *school-sponsored* newspapers, your comments suggest that you recognize that you have no authority to take action against these particular students for publishing and mailing a magazine on their own time and at their own expense. That should be the end of the matter as far as the school is concerned. If the students responsible for the magazine wish to make themselves known to you, they remain free to do so at any time. But if they wish to exercise their right to remain anonymous, you should not be exercising your official powers, as you have apparently done, to try to ferret out their names.

Rather than being concerned that this publication might be "the start of something that could be more serious," it would be refreshing if you and other school officials instead took the time to applaud the ingenuity, creativity and energy of the students who took the time to put this magazine together. Students who use their brains and creative talents to put together a satirical magazine, even if "sophomoric," deserve praise, not a private investigation. Or is this sort of creative activity off-limits only when it involves satire aimed at life in school?

Frankly, we would expect school administrators to hope, not fear, that it is indeed the start of something more serious: a commitment by these students to a career in writing, perhaps, or even just a commitment to spending more time writing satirical magazines instead of watching sitcoms on television, hanging out on the local corner with friends or otherwise spending their time in less worthwhile pursuits than writing.

Finally, I must also take issue with your comment that "sending anonymous letters making fun of people . . . is about as cowardly as it gets." Leaving aside the fact that, according to the news story, no actual names were used in their magazine, your criticism evinces a rather distressing disregard for the important role that anonymity has played for over two centuries in American literature and politics. Anonymity was a crucial safeguard for those patriots who harshly criticized the King of England before our country was founded, and, as you know, even the arguments favoring the ratification of the Constitution advanced in the Federalist Papers were signed by pseudonymous gentlemen calling themselves "Publius." As the U.S. Supreme Court has noted on more than one occasion, there are many valid reasons for anonymity in literary writings: fear of official retaliation or persecution, concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible.

In criticizing your stance on this matter, I realize that I am relying solely on a few quotes from a newspaper article. Ultimately, though, there can be no justification for the actions you have admittedly taken in an attempt to find the identities of the publishers of "7th Planet," whether the motivation is benign, punitive or merely one of curiosity.

We therefore request that you halt any further investigative attempts along these lines, and that you instead respect the First Amendment rights these students have -- both to publish a satirical newspaper of life at East Greenwich High School and to be able to do so anonymously.

Sincerely,

Steven Brown
Executive Director

First Amendment Rights: Self Expression

Mandatory Silence

Commentary by John Carroll

A policy of silence ordered by a Lincoln elementary school principal illustrates a number of important themes in the protection of civil liberties. Silence was to be required during a major portion of student lunch breaks, and arguments were made that similar policies were in force elsewhere, although that appears not to be the case.

The silence policy illustrates the powerful and sometimes overwhelming desire of many administrators to assure order in their schools. For many of them, keeping order is among their highest priorities, and some go to extraordinary lengths in attempting to assure it. Silence was golden to this principal because it meant that his charges were fully under school control and the danger of disruptive student behavior was minimized.

When faced with a challenge to its policy we see several reactions that typify bureaucratic behavior in relatively well-insulated institutions. We can observe that the first bureaucratic reaction to challenge is obfuscation of the facts. Mr. Brown takes considerable time to lay out this pattern of evasion as part of his demonstration that the policy is not well founded. Even more to the point are the shifting rationales for the policy, what it covers and the precedents for it established at other schools. Inconsistent explanations of the facts and shifting rationales are, of course, clear markers of arbitrary policy.

In the past, much of what school administrators did was closed off from external observers because the school was a sanctuary into which very few persons were granted admission, the administrators were thought to have special expertise in designing and implementing policy, and there was an imbalance of power between student and teacher and even administrator and parent. Deference was the order of the day. While the special position of schools has eroded somewhat since 1991, when this complaint was made, deference to school judgments has not entirely disappeared nor, as we shall see, have arbitrary policies.

It is hard to imagine any comparable governmental policy that would have even a veneer of legitimacy except within the closed doors of the schoolhouse. Teachers and school administrators, like jailers and the military brass, have generally been given broad discretion in constructing policies that are consistent with their goals, although this is a policy the ACLU had often disputed. The facts presented here were rather novel and Steven Brown constructed a response based on his general understanding of the

constitution and the operation of schools, to which all of us have been subjected. In his letter to the administrators, Mr. Brown cites neither case law nor constitutional chapter and verse, but he relies instead on appeals to common sense and fairness, that speak to constitutional values as clearly as a Supreme Court opinion. Implicit in this approach is the view that the Constitution belongs to us all and is not the special purview of the courts, and that the liberty of students is worthy of protection.

AMERICAN CIVIL LIBERTIES UNION

RHODE ISLAND AFFILIATE

February 22, 1991

Dr. Roland Tibbetts, Principal
Northern Lincoln Elementary School
New River Road
Manville, RI 02838

Dr. Kenneth J. Grew
Superintendent of Schools
1624 Lonsdale Ave.
Lincoln, RI 02865

Dear Drs. Tibbetts and Grew:

I am writing you to express our organization's concerns about Northern Lincoln Elementary School's "lunch silence" policy. As you are probably aware, the ACLU's Board of Directors discussed this issue at its meeting last month, and overwhelmingly voted to have me write you to explain our objections and to seek a change in the policy. It has taken me such a long time to prepare this letter because, in reviewing the materials I have received on the topic, I became aware of the incredible evasions and misdirection contained in many of your responses to parents' objections to the policy. It thus was quite difficult for me to comprehend exactly what the actual policy and rationale of the school were. Ultimately, it became abundantly clear to me why the parents feel so frustrated about their dealings on this matter. Therefore, before addressing the substantive reasons for the ACLU's concerns about the policy, I think it worthwhile to first examine the less-than-illuminating nature of the responses that parents and the public have received over the past few months about this situation.

As you know, the two main calls for change from Suzanne Magarian and other parents surround the school's practice of (1) having children sit down at tables before being called up to get their lunch, instead of waiting in line at the cafeteria, and (2) requiring all children, including those who have brought their lunch, to remain quiet until those students buying lunch have been served, and to again require silence five minutes before the end of the lunchroom period. On many occasions, your responses to these concerns have been extremely misleading.

For example, as recently as February 1, Dr. Grew flatly stated in a letter to the editor of the Woonsocket Call that students "line up to purchase their lunches when they enter the cafeteria" and that this change was instituted at the beginning of the school year in September. The parents point out that this is simply not true. Indeed, your statement to this effect is hard to fathom since, in letters you wrote to Mrs. Magarian on September 14 and October 17 -- letters written after the start of the school year -- you specifically acknowledge the continued existence of the seating policy.

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In a similar vein, when Mrs. Magarian first inquired of you about the seating arrangement, you wrote on September 14th that you had spoken to Dr. Tibbetts about it, and that the reason students were requested to be seated was because the cafeteria staff was still washing utensils for their use at the beginning of the period. When Mrs. Magarian pointed out this was incorrect, you indicated for the first time that this rationale had actually been based on your own limited observation during a visit to the cafeteria, not your discussions with Dr. Tibbetts.

Perhaps the major area of contention has been over the duration of the silence period, at the beginning of lunchtime, which lasts until all students have been served their lunch. Although you consistently refer to a "five minute" quiet period, Dr. Tibbetts' own analysis makes clear that the period of silence must, in fact, be much longer than that. For example, in a December 24 letter to the editor in the Call justifying the seating policy, you note that Northern has more students at lunch than other local schools, and thus "allowing only 30 seconds for a child to pick up lunch, [serving students in line] would take us at least ten minutes longer than any other school." Similarly, in a January 7 letter to parents, you tell them that students should not be allowed to stand and wait in line for their food because "it will take approximately twelve minutes for all the students to receive their lunch."

We are thus extremely puzzled as to where the constant reference to "five minutes" comes from. If it takes at least twelve minutes to serve all students if they stood in line, how can a policy of calling students up by tables be not only quicker than that, but be completed in less than half the time? In short, contrary to your attempts to suggest otherwise, the silence period in the cafeteria must of necessity take longer than you would like people to believe. Keeping in mind the five minute rule for the end of the period, well over half the lunch period must be spent in silence.

The muddying of the waters shows up in other ways as well. In the December 24 letter to the editor, Dr. Tibbetts states that "we do ask the students to cooperate by being quiet (not always silent) during the approximately five minutes when receiving lunch ... " There is absolutely no suggestion in any of the other documents I have seen that students are allowed to speak during the "five minutes" of getting lunch, and yet you suggest otherwise here. Is it any wonder that parents and students are confused as to exactly what the formal lunchroom policy is? And when one considers that students can be disciplined for talking inappropriately, this lack of a clear policy is especially disturbing.

You also unequivocally state, contrary to the comprehensive survey that was done by some parents, that your school's lunchroom policy is virtually identical to other nearby schools. Specifically, you wrote in an August 21 letter to Mrs. Magarian that your lunchroom procedures are similar to those in two neighboring schools, which include "asking the children to be quiet while they are entering and exiting, and having detention for those students who misbehave during lunch." But procedures such as those have never been questioned by the parents. Instead, your response manages to conveniently ignore the real areas of debate on the topic: Must students at the other schools who have brought their lunch actually remain quiet while other students' lunches are being served, as happens at Northern, or only upon "entering and exiting," as you have described their policies? We are sure it is the latter. And are students at these other schools also subject to discipline, as students at Northern are, for the "offense" of speaking in the lunchroom? The parents say no, and we are compelled to accept their views on this. Your response says nothing to refute them.

Finally, and perhaps most convincingly of all, of course, are the students' own views on what actually happens during the lunchroom period. As you know, reporters from two different newspapers visited the cafeteria one day, and students left them both with the same conclusion: their visit, where the children did talk during much of the period, provided a unique experience, quite unlike the usual lunchroom period. Your brush-off of the students who wrote a letter to the editor of their own to complain about the lunchroom policy is, unfortunately, a perfect example of the insensitivity the school has shown to this issue, which is of genuine importance to many students and parents.

I have gone on so long about this only to show what the parents and students have been up against. To some extent, their sincere attempts to address the school's lunchroom policies have been like grasping at smoke. They have reason to feel stymied.

As for the policy itself, the ACLU believes that Mrs. Magarian and other parents have raised legitimate concerns, and we sincerely hope that you will consider modifying the silence rule. While we recognize the worthwhile objective of creating more orderliness in the school cafeteria, this goal must also be balanced against the competing interests, concerns, and rights of the school children.

Lunchtime offers children one of the few real sustained periods during the school day to talk with their friends. The socializing that occurs in this context is, we believe, an important element of the schooling process that cannot, and should not, be so easily swept aside. Dr. Tibbetts' notion, as expressed in his January 7 letter to parents, that a silence policy, as opposed to its opposite, allows students to "relax" is

absurd. To the contrary, it can only create unnecessary tension in the lunchroom and among the students.

I have also been surprised by the way you have trivialized the socialization aspect of the school experience, going so far as to suggest that if students want to socialize, they can do it at the YMCA. This is as amusing as it is disturbing, since the rigid procedures you have adopted for the lunchroom can only be considered as furthering your own views of socialization, as they certainly do not serve an academic function.

Of course, this issue may seem minor, but that is because we as adults take for granted our ability to sit freely with our guests, friends, and colleagues and talk with them at mealtime. If a restaurant were to adopt a similar policy of silence to help the facility run better, we would naturally be quite offended. We would almost certainly seek out another restaurant. The schoolchildren, of course, have no such choice.

It seems to us that there are many alternative ways to keep the lunchroom orderly without a silence policy. Most other schools manage to deal quite well with a lunchroom of talking students, as teachers and other school monitors have many tools at their disposal to deal with any unnecessary disruptions or noise. While your current policy may be an efficient method of obtaining order, it also is an unnecessarily rigorous and unfair one. In short, the attempt to maintain order should not be so overriding as to be the be-all and end-all of school policy to the detriment of other values and the legitimate interest of children in talking with their friends during the lunch period.

We therefore urge you to reconsider and rescind the current policy. While school officials can certainly ask children to keep their voices down while "entering and exiting" the lunchroom -- the procedure you cite as being in place in other schools -- we would ask that the "five minute" silence periods be lifted so that children can converse freely throughout the lunch period. There is plenty of time for silence throughout the rest of the school day. Changing the rule at this time would be much more just and fair to the students and would, in the long run, create a healthy respect for tempered authority.

I trust you will give our views your careful consideration, and will let me know if you have any questions. Thank you for your attention to this, and I look forward to hearing from you.

Sincerely,

Steven Brown
Executive Director

cc: Mrs. Eleanora Kelley
Suzanne Magarian

First Amendment Rights: Patriotic Rituals

Pledge of Allegiance

Commentary by John Carroll

Patriotism is one of the core values that most public schools teach students, and there are many rituals designed to achieve that end: the Pledge of Allegiance before school, the singing of the national anthem at school functions, the teaching of American history and other courses on American democracy, and the ever-present displays of the flag, portraits of the founding fathers, and the like. These rituals of the state are extremely common in the school setting and establish a context for student understanding of the political system. As Justice Robert H. Jackson pointed out in *West Virginia v. Barnette* (1943), "Symbolism is a primitive but effective way of communicating ideas."

But how far can schools go in inculcating the value of patriotism? This question arises when a student or parents question the child's participation in these rituals, most commonly when they object to the Pledge of Allegiance or the singing of the anthem. The question becomes exceptionally delicate in periods of national stress, during wartime or a national emergency, when public opinion may be inflamed and any objection seen as traitorous. The second of these ACLU letters was written in just such a context, shortly after the attack on the "twin towers." It responded to a number of instances when school officials attempted to force patriotic rituals on unwilling students and parents. The Department of Education took prompt action and sent an advisory to all school districts reminding them of their obligations to students under the First Amendment.

In a series of cases in the 1940's, American courts dealt with the question of whether the flag salute could be made compulsory for public school children who objected on religious grounds. Jehovah's Witnesses argued that the pledge was contrary to their religion because it forced them to bear false witness to a secular idol, which was a violation of their religious free exercise. However, in its definitive decision in *Barnette*, the Court turned the case on general First Amendment grounds, rather than the narrower free exercise claim. Thus, any student may object on religious or speech grounds to forced patriot recitations. As Justice Jackson, speaking for the majority, said:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

Justice Frank Murphy, writing separately, added:

> Any spark of love for country which may be generated in a child or his associates by forcing him to make what is to him an empty gesture and recite words wrung from him contrary to his religious beliefs is overshadowed by the desirability of preserving freedom of conscience to the full. It is in that freedom and the example of persuasion, not in force and compulsion, that the real unity of America lies.

One of the most remarkable aspects of the North Smithfield case, included in this section and dealing with the punishment of a student for refusing to recite the Pledge, is that the school was acting contrary to more than fifty years of settled law, which demonstrates again how "petty" officials can use their authority to simultaneously bully their pupils and circumvent the law. Although the R.I. ACLU consistently manages to informally resolve complaints like this one, it remains unfortunate that these issues continue to arise, and serves as a reminder of the need for eternal vigilance to protect basic constitutional rights. Following the ACLU's October 16, 2001 letter to Commissioner McWalters, the Department of Education sent an advisory to superintendents, reminding them that students cannot be penalized in any way for refusing to participate in the Pledge of Allegiance.

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May 15, 2001

Steven Knowlton, Principal
North Smithfield High School
412 Greenville Road
North Smithfield, RI 02896

BY FAX AND MAIL

Dear Mr. Knowlton:

Our office received a complaint today from xxxxxxxxxxxxxxxxxxxxxxxxx, whose daughter xxxxxxxx is a tenth grader at your school. According to the xxxxxx, you suspended xxxxxxx from school for one day on Friday for refusing to stand during the daily recitation of the Pledge of Allegiance. We understand that you further advised the family that if xxxxxxx fails to stand tomorrow for the Pledge of Allegiance, she will be suspended for two days.

Because the action you have taken against xxxxxxx is blatantly unconstitutional, I am writing to request that you take immediate steps to insure that she is allowed to remain quietly seated in the classroom during the Pledge of Allegiance if she so chooses, that no retaliation is taken against her for refusing to stand, and that her recent suspension is expunged from her records. We would further ask, to avoid any future problems, that you apprise all homeroom teachers that students have an absolute right to sit quietly during the recitation of the Pledge.

It has been clear for decades that schools cannot coerce students to participate in the Pledge of Allegiance, or to force them to stand during the recitation. Thus, your suspension of xxxxxxx for sitting quietly during the Pledge punishes her for exercising a basic First Amendment right. Here in Rhode Island, the ACLU obtained a court order as far back as 1975 against a school district which required students to stand during the Pledge. There is thus no excuse, more than a quarter of a century later, for any school district to be unaware of the clear case law on this issue and to be imposing such an improper demand on its students.

One of the fundamental principles the flag symbolizes is the freedom not to salute it. It is an unfortunate irony that at North Smithfield High School, instead of being taught how the Bill of Rights applies to their lives, students such as xxxxxxx are being punished for exercising those rights.

In order to address this situation, we would request, as noted above, that you henceforth allow xxxxxxx to sit during the Pledge recitation in her homeroom, if she so chooses; expunge her disciplinary record; and ensure that all teachers in your school are made aware of students' constitutional rights in this regard. I would appreciate being advised promptly if this matter can be resolved without any further action on our part. We hope that it can be so revolved, but if not, we are prepared to take all appropriate legal action.

Thank you in advance for your prompt attention to this important matter.

Sincerely,

Steven Brown
Executive Director

cc: xxxxxxxxxxxxxxxxxxx
Supt. Richard Scherza

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October 16, 2001

Commissioner Peter McWalters
Department of Education
255 Westminster Street
Providence, RI 02903

Dear Commissioner McWalters:

The effects of the September 11th terrorist attacks have reverberated throughout society, including our schools. Those effects, unfortunately, also include actions that have consequences for the exercise of basic civil rights.

Specifically, as the result of two incidents that have been brought to our attention in the past month, we are concerned that, at least in a few instances, some school officials may be confusing chauvinism with patriotism in detriment to the democratic principles that schools should be imparting to their students. I therefore write to request that you consider contacting school officials across the state to remind them of the need to respect dissent and non-conformity during this difficult time.

A few days after the attack, we heard from a Pawtucket high school student who was kicked out of his first class period for refusing to stand for the daily recitation of the Pledge of Allegiance. In another incident recently brought to our attention, a middle school student was called "un-American" by his teacher after he declined to accept an American flag pin being distributed to all children in the school.

We fear that these two incidents may be only the tip of an enormous iceberg, and that other school officials may also be acting on the belief that any form of dissent -- or merely the lack of "appropriate" flag-waving enthusiasm -- is unpatriotic and deserving of rebuke or discipline. Certainly incidents like these send a not-so-subtle message to other students to fall in line with everybody else and not to ask questions. To equate dissent with being unpatriotic is disturbing in any context, but it is particularly pernicious in the school setting, where children are purportedly being taught the importance of democratic values and freedoms. I trust you would agree that students' exercise of the right to dissent can be just as patriotic as flag-waving, and that it is at times like these that respect for differences of opinion is most crucial. School officials should not, by their actions, be teaching a contrary lesson.

In order to reduce the possibility of similar incidents in the future, I would therefore urge you to send a reminder to school officials of the need to respect students' right to dissent. Thank you in advance for your consideration of this request.

Sincerely,

Steven Brown
Executive Director

First Amendment Rights: Patriotic Rituals

"God Bless America"

Commentary by John Carroll

In the case of *Lee v. Weisman*, handled by the R.I. ACLU, Justice Antonin Scalia in dissent made the following observations:

> The founders of our Republic knew the fearsome potential of sectarian religious belief to generate civil dissension and civil strife. And they also knew that nothing, absolutely nothing, is so inclined to foster among religious believers of various faiths a toleration — no, an affection — for one another than voluntarily joining in prayer together, to the God whom they all worship and seek. Needless to say, no one should be compelled to do that, but it is a shame to deprive our public culture of the opportunity, and indeed the encouragement, for people to do it voluntarily. The Baptist or Catholic who heard and joined in the simple and inspiring prayers of Rabbi Gutterman on this official and patriotic occasion was inoculated from religious bigotry and prejudice in a manner that can not be replicated. To deprive our society of that important unifying mechanism, in order to spare the nonbeliever what seems to me the minimal inconvenience of standing or even sitting in respectful nonparticipation, is as senseless in policy as it is unsupported in law.

Scalia's view of religious tolerance may work for those Americans who lack strong religious views, who have no objection to participating in rituals with which they do not agree, or whose definition of God is sufficiently fuzzy (or unimportant to them) that their deity lacks definition. In much of contemporary American life, where many go to church for a sense of community, not for worship, or who choose a church because it is convenient, the doctrinal aspects of faith may be in decline, and for them, Scalia's conception may be acceptable.

For persons in different traditions, however, his version of religious tolerance does not always work. For those who believe that God has well-defined characteristics or that there is a "true" God and all divinities are not equal, and especially for those who believe they must give faithful witness to their religion, Scalia's feel-good version of community prayer can produce an unpleasant challenge to individual religious conscience. For many believers, participating in rituals of another faith, or in public rituals containing careless or watered-down doctrinal definitions, may constitute false witness and hypocrisy.

The alternative view of religious tolerance is that one person's religion should not be forced on another, and the state should stand aside and not choose between competing religious views. This approach allows persons of every persuasion to enter the public sphere, including the classroom, without fear that they will be asked to participate in a ritual with which they do not agree. At the same time, individuals are

free to practice their faith in a manner, time and setting of their own choosing, and can approach others to discuss matters of faith as private choice. For example, school children can pray silently at their desks at any point in the school day that they are not otherwise occupied.

The phrase "God Bless America" may seem to have minimal religious content to some, but every utterance that invokes the name of God has doctrinal content. This saying, for example, embeds the idea that there is a single God rather than multiple Gods or a spiritual essence; and that God is concerned about the fate of discrete nations, and perhaps one nation over others. The phrase also suggests that God responds to supplicants, that God may actively intervene in the affairs of humankind. If Justice Scalia believes these ideas, he is free under the First Amendment's guarantees of freedom of speech and freedom of religion to propagate this vision of God in his private life -- and to enjoy public but not official prayer. However, the First Amendment's Establishment Clause generally prohibits government officials from imposing such rituals on the public at large, some of whom are sure to hold other religious beliefs, or none at all.

The problems are aggravated in a school setting because young children are likely to feel strong cross-pressures between the momentum of the public event and their personal conscience. In its majority opinion, the Court in *Lee v. Weisman* placed particular emphasis on the vulnerability of school children to social and peer pressures, and how difficult it can be for them to resist the temptation to go along. Even when parents intervene to safeguard the child's faith, the student may be singled out by their absence from the classroom or because they remain seated when others are standing. This is a difficult path for many children, best avoided altogether by keeping church and public schools in their separate spheres.

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April 12, 2002

Dear :

Over the course of the last several months, our organization has received complaints about the "God Bless America" signs prominently displayed in various public schools and government buildings in the state, including yours. Because we believe those complaints have merit, I am writing to ask that you consider replacing those signs with ones that are less divisive and more appropriate for a public building, yet that remain consistent with the message these signs seek to convey.

Let me begin by acknowledging the sincerity and good intentions underlying the proliferation of these signs in the wake of the tragic events of September 11th. However, Rhode Island, as a pluralistic state founded on religious freedom, should be particularly sensitive to the divisiveness of government-sponsored displays which promote religion.

There are many ways for governmental bodies to display and promote the patriotism and concern for our country that these signs seek to do. For example, use of the slogan "United We Stand," which has also appeared in posters across the state, is a much more appropriate, and just as effective, substitute that avoids the divisiveness of government-sponsored religious signs. And, of course, employees remain free to show their devotion by private prayers and activities. But prayer -- even one that is only three words long -- does not need, nor should it have, the guiding hand of government for its effectuation. No student should be forced to attend his or her public school, and no resident should be forced to conduct government business, only at the cost of being subject to a religious message that may run directly counter to his or her deeply-held beliefs.

I realize that some people may argue that these signs are not really religious in nature, and that "God Bless America" should be seen as nothing more than a ceremonial slogan. However, such a response, it seems to us, only serves to trivialize what is, at its core, a deeply religious message. It is, after all, an entreaty to God. To denigrate it as merely "ceremonial" seeks to strip a prayer of its core meaning. It reminds us of the attempts by Pawtucket city officials many years ago to justify their sponsorship of a nativity scene by comparing the Christmas creche to a Thanksgiving turkey -- as nothing more than just another secular symbol of a national holiday.

The brilliance of the First Amendment principle barring government entanglement with religion is that it protects not just minority religions from the will of the majority, but it also protects majority religions from being trivialized or politicized by governmental actions that only weaken the meaning of religion itself. Asking God to bless America is not, for many deeply religious people, merely an innocuous statement of faith, especially when tied to governmental sponsorship. There are many for whom their God simply does not recognize national boundaries in the way this prayer suggests.

Of course, the First Amendment is designed to protect members of minority religions and the non-believer as well. A person should not be made to feel like an outsider from his or her own government because it seeks to involve itself in divisive theological matters. Unfortunately, the "non-sectarian" nature of this slogan hardly solves that problem. First and foremost, some people of non-Christian faiths may rightly question its non-sectarianism. For example, in light of the context that has prompted these displays, many Arab-Americans may feel uncomfortable about them, wondering whether the message is truly asking the Muslim as well as the Christian God to bless America.

In any event, for those who sincerely believe that prayer does not belong in government-sponsored settings, and especially in public schools, and for those who belong to no religion, the posting of a "non-sectarian" prayer in government buildings remains offensive and inappropriate. As U.S. Supreme Court Justice Anthony Kennedy noted in addressing a similar situation in *Lee v. Weisman*, our Affiliate's successful challenge ten years ago to public school graduation prayers: "That the [prayer] was in the course of promulgating religion that sought to be civic or non-sectarian rather than pertaining to one sect does not lessen the offense or isolation to the objectors. At best it narrows their numbers, at worst increases their sense of isolation and affront."

It was partly, of course, the religious intolerance of others that fueled the devastating attacks on our country. It would be sad and ironic if we lost sight of the importance of our First Amendment freedoms in attempting to show our support for those very freedoms. I could not improve upon the further insight offered by Justice Kennedy in the course of his opinion in *Weisman*: "The lessons of the First Amendment are as urgent in the modern world as in the 18th Century when it was written. One timeless lesson is that if people are subjected to state-sponsored religious exercises, the State disavows its own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people." As he noted, the "design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the *private* sphere, which itself is promised freedom to pursue that mission."

Before concluding this letter, I think it important to address a peripheral question that you or some of your colleagues may raise in response to this letter. That is, "Doesn't the ACLU have anything else to do?" The answer is, of course we do -- and we're doing it. At any given time we have about 30 lawsuits pending in the courts here in Rhode Island, and we are always in the process of investigating dozens more on a wide range of crucial civil liberties issues. That will continue. Regardless, however, the concerns of those who object to these displays are legitimate, deeply held and cannot be ignored. Perhaps an issue like this is considered "trivial" by some because, unlike many other civil liberties issues, the harm inflicted by these violations of religious freedom can seem so abstract to those not offended. That is unfortunate, for if the violations are not stopped when they are small, there is no stopping bigger ones later.

Indeed, it has been our experience that every major church-state issue generates similar responses. For example, when we first filed suit against the City of Pawtucket's nativity scene, we were told we were being trivial. As time went on, however, most people (including the U.S. Supreme Court) came to recognize the extremely important constitutional issues involved. Our school prayer cases have prompted the same reaction. If the ACLU ignored all these "trivial" First Amendment issues, there would be daily prayer in the public schools; government-sponsored crucifixes, crosses and creches would abound; and enormous tax-funded subsidies to religious institutions would be a foregone conclusion at state budget time.

In sum, we believe there are less divisive ways, other than the use of a religious slogan, for government entities to show their support for the unity that the September 11th attacks have fostered in our country. We would urge you to respect the diversity of religious views in our state by choosing one of those alternatives.

Thank you for your attention to our views, and I look forward to hearing back from you about this.

Sincerely,

Steven Brown
Executive Director

First Amendment Rights: Student Dress Codes

Commentary by John Carroll

There are a number of issues where the R.I. ACLU is the only organization in the state to which an aggrieved party can turn, and school dress codes are one of these. Controversies involving dress codes occur regularly and often come to us as a telephone inquiry from a parent or a student who feels victimized. Office procedure requires that a written complaint be filed, which provides the Executive Director with a factual basis on which to proceed, and at the same time weeds out complainants who are unlikely to take the next step. If the Executive Director believes there is a civil liberties issue, he might decide to send a letter to the authorities complaining about the infringement, which is how most issues are resolved. If the offending party is not responsive and the issue is of sufficient importance, the Executive Director may decide to bring the case to the Affiliate's Board of Directors to consider litigation. Litigation requires a majority vote of the Board, which consists of lay people and lawyers but is advised by legal counsel. The decision to litigate is a significant step, which involves recruitment of counsel to argue the case on the Affiliate's behalf and substantial resources in support of the effort. The outcome is never certain, but in general the Affiliate will not take a case unless it believes that the civil liberties principle is important and there is a reasonable chance of victory.

There are those who think that school dress codes are frivolous matters, and that the discretion of the school is best left unexamined, a position taken by some of the courts. In this view, student dress and decoration are minor matters that the school can regulate in the interests of school safety, pedagogy and student discipline. If students want to wear offending t-shirts, or color dye their hair green for St. Patrick's Day, let them do it at home and not bring these nonconforming behaviors into the school grounds. Underlying this position is the attitude that when students conform to the norm they are less likely to make or be trouble.

In contrast, ACLU views dress codes as infringements on the First Amendment, one of our core values, so we tend to take them very seriously. Typically, dress codes present free speech problems, but they can be closely allied to religious free exercise, as demonstrated by the controversy currently rocking France over its ban on Muslim dress in schools. In Rhode Island, dress codes may manifest themselves as bans on particular kinds of dress thought to teach bad lessons to students, such as t-shirts depicting marijuana leaves or some indication of political or social prejudice. In urban areas, shirts, jackets or symbols thought to be associated with gangs have come under close scrutiny. Statements considered offensive may include sexual innuendos, or cartoons thought to disparage social groups, which may sometimes be meant as social satire

rather than to be taken literally. In the letters that follow, we can see two manifestations of the dress code problem: a potential limitation of political speech (Cranston) and a limitation on the freedom of a student to present herself as a work of art (Portsmouth). Neither of these claims was frivolous, and in the Portsmouth case the student was subject to overt discrimination because of her presentation of self.

In the Cranston case, there was no response to the ACLU's letter and no further complaints were filed with the R.I. ACLU. The Portsmouth student graduated, but in the meantime, the school district received some heavy criticism for its position.

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September 19, 2000

Catherine Ciarlo, Superintendent
Cranston School District
845 Park Avenue
Cranston, RI 02910

Dear Superintendent Ciarlo:

Our office has received a complaint from a parent about your district's student dress code, as promulgated in Policy #5132. Because we believe the parent has raised legitimate concerns, I am writing to share our concerns with you and to urge revision of the policy.

Clearly the most troubling provision in the district's policy is the one which prohibits students from wearing, carrying or distributing any "clothing, insignia buttons, jewelry, labels, arm bands, signs or other items which criticize, insult or degrade, or have potential to incite any individual, group, profession, religion, or religious/political beliefs." The breadth of this ban on student speech is staggering. More to the point, it is blatantly unconstitutional and should be eliminated.

As I'm sure you are aware, it has been over 30 years since the U.S. Supreme Court recognized that students do not shed their First Amendment rights at the schoolhouse gate. This school district policy ignores that teaching. Indeed, the specific exercise of free speech at issue in the famous *Tinker v. Des Moines* case -- the wearing of black armbands to criticize the government's role in the Vietnam War -- would not be allowed under your school district's policy. A student could be disciplined if she were caught carrying some of the political advertisements our local Congressional candidates ran during the recent hotly-contested primary elections.

A school's mission should be to encourage critical thinking among its students, yet this policy actually makes it an offense for a student to wear or carry items which criticize any political beliefs. This the First Amendment does not allow, nor should any school seek to discourage such criticism. Because ideas themselves often incite -- and are often designed to incite -- there is no limit in this policy as to what can be banned. What if an atheist claims to be incited by a fellow student's wearing of a cross necklace? Does a button promoting the teaching of evolution degrade the views of, or have the potential to incite, a fundamentalist student? In short, the standards of this policy are so vague and open-ended that they give school administrators carte blanche authority to arbitrarily and inappropriately suppress the free speech rights of students in Cranston's public schools.

In light of the clear inappropriateness of this section, we would request that you take action to promote its repeal, and in the interim, work to insure that school officials do not enforce it.

Thank you in advance for your attention to this matter, and I look forward to hearing back from you about it.

Sincerely,

Steven Brown
Executive Director

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December 3, 2002

Dear Portsmouth School Committee Member:

"To the Young Children of Portsmouth: Remember that it is very important to judge people by their appearance, not by their skills, achievements, intelligence, compassion or generosity."

I would hope that, as school committee members, you would be shocked if any one of your teachers taught your students such a thing. However, that is precisely the lesson your school district has recently taught elementary school children. Your elementary school principals have passed an unwritten "dress code" directly aimed at senior high school honors student Julie Cahill, preventing her from participating in your Teens Leading Children (TLC) program. On behalf of Ms. Cahill, we urge you to teach children the right lesson by undoing this grievous wrong.

Julie Cahill should be any school's dream of the ideal student. She is a National Honor Society member; a member of the drama club, the Thespian Society, and the school band; assistant editor of the school's literary magazine; and former class president. As a junior last year, she participated in the TLC program, which, as you know, gives high school students the opportunity to mentor fourth graders in the areas of substance abuse and decision-making. At Julie's TLC training session this year, however, Melville school principal Joanne Olson learned something about this seemingly model student – Julie had purple hair and a lip ring. Julie was advised by Ms. Olsen that she was not a good role model for the children because her appearance wasn't of the "normal kind." The other elementary school principals apparently all concurred in this assessment and quickly adopted a new (unwritten) dress code for students participating in the TLC program, barring them from having facial piercings or "abnormally colored" hair.

The narrow-mindedness of this decision is truly extraordinary. Surely it is no secret that role models come in all shapes, sizes, styles and even hair colors. As Julie's resume so obviously shows, people with purple or pink hair, no less than blondes, can be excellent mentors to young kids. At the same time, drug treatment facilities are filled with natural brunettes. Indeed, having a person who chooses to look different might even teach young kids a thing or two about resisting peer pressure – one of the most potent promoters of drug use and poor decision-making.

We have to believe that school administrators' credibility simply loses force with many students if a person with purple hair is treated the same way as a drug dealer in terms of eligibility for mentoring in the TLC program. And what lesson does the banning of Julie teach fourth-graders who encounter "different looking" teens and adults *outside* the school? That such people are not trustworthy and up to no good? If that isn't the lesson, then what exactly *is* the lesson being taught by this decision?

One school official has pointed out that, unlike the immutable characteristic of, say, skin color, Julie is free to remove the dye from her hair and the ring from her lip. But discrimination against blacks is not wrong because they can't help being black – it is wrong because it treats a person unfairly on the basis of a totally irrelevant characteristic.

The blatant and troubling stereotyping underlying this decision is made all the more insupportable by the simple fact that Julie mentored last year, looking very similar to the way she does now, with no untoward consequences. There is surely more than a little irony that one of the four topics presented as part of the TLC program is: "Me Week – You Are Special." In light of school officials' demand for cookie-cutter conformity from Julie, can anybody really teach this topic with a straight face?

Although this year's TLC program is done, Julie still faces consequences from this ill-conceived ban. As a member of the National Honor Society, she is a potential in-school tutor for children at the elementary schools. Should such an opportunity arise, however, Julie will not be able to assist because of the new "dress code."

The ACLU urges you to do the right thing. At your meeting this month, we call upon you to rescind the "dress code" that has been adopted and allow Julie, and others like her, to participate in the TLC program, tutoring, and similar elementary school programs. It is not just the appropriate thing to do; it will also teach elementary school students in your district another very important lesson – that occasionally adults make mistakes and are willing to acknowledge and correct them.

Thank you in advance for your consideration of our views.

Sincerely,

Steven Brown
Executive Director

cc: Supt. Timothy Ryan
Principal Joanne Olson
Principal Dennis Silva
Principal Christina Martin
Principal Robert Littlefield
Julie Cahill

ZERO TOLERANCE POLICIES

Commentary by Daniel Weisman

'Zero tolerance' is the phrase that describes America's response to student misbehavior. Zero tolerance means that a school will automatically and severely punish a student for a variety of infractions. While zero tolerance began as a Congressional response to students with guns, gun cases are the smallest category of school discipline cases. Indeed, zero tolerance covers the gamut of student misbehavior, from including 'threats' in student fiction to giving aspirin to a classmate. Zero tolerance has become a one-size-fits-all solution to all the problems that schools confront. It has redefined students as criminals, with unfortunate consequences."

American Bar Association[1]

We've all heard of absurd cases in which a student is suspended for innocuous infractions, such as carrying a plastic knife to school for spreading peanut butter, under inflexible "zero tolerance" policies. A reference book for school principals warns against these obvious overreactions (Dunkee and Shoop, 2006)[2], with a few instructive examples:

- A Pennsylvania kindergarten student suspended for carrying a plastic hatchet to school, as part of a Halloween costume.
- A fourth grader in Chicago suspended for violating his school's dress code – he forgot to wear a belt.
- A middle school student in Texas suspended for forgetting to give the school nurse the bottle of Ibuprofen in her backpack.
- Another middle school student, in neighboring Louisiana, suspended for bringing her grandfather's pocket watch to show and tell, because a one-inch fingernail knife was on the fob.
- Three kindergarteners in New Jersey suspended for pointing fingers and going, "Bang."

The American Bar Association (2000)[3] reports of a nine-year old boy who found a manicure kit on the way to school and was suspended for carrying the one-inch knife that was in the kit. The ABA cites additional examples from a report by the National Institute for Children, Youth and Families at Spalding University:

- A 14-year-old Ohio girl suspended for 13 days for giving a classmate a tablet of Midol.
- A Virginia high school student suspended for taking a dose of Listerine in violation of the school's zero-tolerance substance abuse policy.

In spite of widespread criticism and publicity, the policy remains in place in many parts of the country. In September, 2009, a six year old Delaware boy was sentenced to 45 days in reform school for bringing his "…camping utensil that can serve as a knife, fork and spoon to school. He was so excited about recently joining the Cub Scouts that he wanted to use it at lunch. School officials concluded that he had violated their zero-tolerance policy on weapons…" [4] Less than six months earlier, in the spring 2009 school term in the same Delaware district, a 13-year-old boy received the same 45-day reform school penalty after "…after another student dropped a pocket knife in his lap."[5]

Rhode Island has had its share of zero tolerance headlines:

- A 12-year-old boy with learning disabilities was disciplined for carrying a small knife to school.[6]
- "A 10-year-old epileptic was suspended for bringing his anti-seizure medication to school;
- "a 7-year-old was suspended for showing off a pocketknife;
- "a 6-year-old kindergartner was suspended for bringing a butter knife to school to cut his cookies."[7]
- A 6-year-old Pawtucket student was suspended for ten days for picking up a friend's toy ray gun.[8]

Zero tolerance policies also apply to children who associate with "perpetrators," knowingly or not. *USA Today* reported a Dallas case of two middle school students who shared soft drinks containing some alcohol with several classmates, without telling them about the alcohol. Ten children were suspended: the two who brought the drinks and eight others who sampled the beverages, in spite of claims that they didn't know about the alcohol. One of the "perpetrators," an honors student who added "a few drops" of grain alcohol to Cherry-7-Up, was expelled and sent to military boot camp.[9]

The ABA adds that some of these cases result in criminal prosecution of school children:

- A Louisiana middle schooler with a behavioral disorder was imprisoned for two weeks for making "terrorist threats" after he "warned the kids in the lunch line not to eat all the potatoes, or 'I'm going to get you.'"
- Two Virginia fifth graders were charged with felonies (case eventually dismissed) for "putting soapy water in a teacher's drink."
- In Texas, a 13-year-old was imprisoned for six days after writing an assigned "scary" Halloween essay, which talked about shooting in school. He received a passing grade. After he spent almost a week in jail, it was determined that the boy had committed no crime.
- A Florida middle school child was imprisoned for six weeks in an adult correctional facility for stealing $2 from another student. The charge, "strong-armed robbery," was filed and defended by the prosecutor's office because the

> theft "fosters and promotes violence in our schools." The ABA reports that "(C)harges were dropped by the prosecution when a 60 Minutes II crew showed up at the boy's hearing."[10]

The Southern Poverty Law Center reports two more cases of criminalization of innocent childhood behavior as a consequence of zero tolerance:

- A Colorado middle school student was convicted of a misdemeanor for taking a lollipop from his teacher's desk jar.
- After having a temper tantrum in class, a Florida five-year-old girl was arrested and removed from her classroom by the local police.[11]

Once a case is referred to the court system, regardless of infraction, the cost to families can exceed $40,000, compared to the $7,000 average annual cost of public education.[12]

Paradoxically, zero tolerance policies can actually result in physical harm to the very students they are designed to protect. For instance, the Youth Law Center reports that an 11-year-old child with asthma died because his school's zero tolerance policy forbad inhalers.[13]

The authors of the principals' guide, discussed above, attempted to design guidelines for acceptable zero tolerance policies. The results are instructive. The guide asserts that "every school district needs tough policies to deal with weapons, drugs, threats, and so forth," but zero tolerance policies must be clearly written (including definitions of infractions) and flexible enough to take individual situations into account, to avoid embarrassing and costly (litigation) overreactions, and to reduce inequities by race, ethnicity and class. The guide offers a model weapons policy, that when examined carefully, illustrates the inherent difficulties with the zero tolerance approach:

> The school district strictly prohibits the possession, conveyance, use or storage of weapons or weapon look-alikes on school property, at school sponsored events or in or around a school vehicle….*On site school administrators retain final authority in determining what constitutes a weapon and evaluating potential danger*. (Italics in the original)

The statement goes on to define "weapons" by providing a list of 22 items, beginning with knife blades, ending with arrows, and then the phrase, "or any other instrument capable of inflicting serious injury." Next come these two troublesome sentences:

> The brandishing of any instrument, piece of equipment, or supply item in the form of a threat of bodily harm to another will cause such an instrument to be considered a weapon. Weapon look-alikes, such as toy guns, may also be considered weapons under this policy.[14]

The guide's attempt to develop a reasonable "zero tolerance" policy has serious flaws, and would permit the three weapons-related absurd overreactions, cited by the

same authors, to occur: the toy hatchet is a weapon look-alike; the one-inch pocket knife could inflict harm; the play-acting "bang" with fingers may be considered threats.

Similarly, "supply items" and "pieces of equipment" are undefined and subject to considerable interpretation. Vesting interpretation powers in the on-site administrator presents the continued threat of uneven enforcement, particularly penalizing students who are members of minority groups, a problem the guide acknowledges and tries to avoid.

The problem here isn't poor defining. It's zero tolerance. The approach to the challenge of discipline from a zero tolerance stance invariably produces the ridiculous scenarios cited by the guide, *USA Today* and the ABA, and traps administrators into meting out unsupportable penalties for minor and unintentional violations.

The Principals' Guide "ideal policy" creates a review level at the school district level, so that building principals' decisions may be appealed, but this process becomes politicized and is open to further discrimination against students from minority groups.

The unintended damage to school children and their families, and on a larger scale, to communities, cannot be overstated.

- Despite widespread adoption of zero-tolerance policies, there is no evidence that objectionable behavior has been reduced.[15] Children learn ways to experiment with forbidden behaviors, and some are enticed to test the rules, further out of sight and reach of adults, increasing opportunities for serious consequences.
- Children learn to disrespect authority and rules when they experience gross injustices.
- Members of minority groups experience the brunt of zero-tolerance consequences more than members of other groups.[16]
- Serious students with outstanding academic records find their college opportunities damaged by suspensions on their transcripts, for transgressions as minor as a sip of beer.
- Children with temporary poor judgment or developmental challenges end up in the court system instead of counseling or other individualized services, which are much more appropriate, effective and cost-efficient (to families and communities, and even to school districts).

We acknowledge that student discipline is an important concern. So does the American Psychological Association, which "…recommends the following changes to zero tolerance policies:

- Allow more flexibility with discipline and rely more on teachers' and administrators' expertise within their own school buildings.
- Have teachers and other professional staff be the first point of contact regarding discipline incidents.

- Use zero tolerance disciplinary removals for only the most serious and severe disruptive behaviors.
- Replace one-size-fits-all discipline. Gear the discipline to the seriousness of the infraction.
- Require school police and related security officers to have training in adolescent development.
- Attempt to reconnect alienated youth or students who are at-risk for behavior problems or violence. Use threat assessment procedures to identify those at risk.
- Develop effective alternatives for learning for those students whose behavior threatens the discipline or safety of the school that result in keeping offenders in the educational system, but also keep other students and teachers safe." [17]

Otherwise stated, the answer is to set down school policies that define unacceptable behaviors and actions, as clearly as possible, but provide appropriate training to site administrators and other school personnel, develop alternative responses depending on the situation (treatment vs. punishment), and tie punishments to contexts and seriousness. This places a burden on site administrators and their staffs, but will avoid the absurd punishments many children have received because of zero tolerance.

Fortunately, responding in large part to advocacy from the R.I. ACLU, the Rhode Island Department of Education and, later, the state General Assembly decided that zero tolerance policies are poor public policy, and ordered school officials to discontinue the practice.[18]

Following are five recent Rhode Island zero-tolerance cases involving the ACLU:

- an attendance policy in Warwick
- a no-alcohol policy in South Kingstown
- a substance-abuse policy in Lincoln
- an anti-bullying policy in East Providence
- an anti-violence policy in Portsmouth (banned yearbook photo)

In addition, the Barrington "in-the-presence-of" tobacco, alcohol and/or controlled drugs policy addressed to student athletes, discussed in the student privacy section, is an extreme case of how far some school districts may consider going to invade students' privacy.

All six cases involve disciplinary triggers that far exceed the severity of students' misbehavior. Subsequent to the ACLU's involvement in opposition to zero tolerance policies, the RI General Assembly passed a law banning them. In the South Kingstown case, the RI Department of Education ruled that some of the school's actions were inappropriate, overturning some of the punishments imposed on the student.

[1] http://www.abanet.org/crimjust/juvjus/zerotolreport.html

[2] http://books.google.com/books?id=YsE3Fx-YldwC&printsec=frontcover&source=gbs_navlinks_s#v=onepage&q=&f=false

[3] http://www.abanet.org/crimjust/juvjus/zerotolreport.html, op.cit.

[4] It's a Fork, It's a Spoon, It's a ... Weapon? http://www.nytimes.com/2009/10/12/education/12discipline.html?ref=education

[5] Ibid.

[6] Macris, G. (1996). State Supports Student Rights. **Providence Journal - Bulletin**. Providence, R.I.: Apr 24, pg. C.01

[7] Rau, E. (1996). Does Zero Tolerance Amount to Overkill? **Providence Journal - Bulletin**. Providence, R.I.: Oct 27,. pg. B.01

[8] *Rau, E. (1997). Family Appeals Suspension for Toy Gun in School.* **Providence Journal - Bulletin**. Providence, R.I.: Feb 07, pg. A.01

[9] http://www.usatoday.com/educate/ednews3.htm

[10] http://www.abanet.org/crimjust/juvjus/zerotolreport.html, op. cit.

[11] Brownstein, R. (2009). Pushed out. Teaching Tolerance, 36, 58-61.

[12] http://www.apa.org/releases/zerotolerance.html

[13] http://www.buildingblocksforyouth.org/issues/zerotolerance/facts.html

[14] http://books.google.com/books?id=YsE3Fx-YldwC&printsec=frontcover&source=gbs_navlinks_s#v=onepage&q=&f=false, op.cit.

[15] http://www.apa.org/releases/zerotolerance.html, op.cit.

[16] http://www.buildingblocksforyouth.org/issues/zerotolerance/facts.html, op.cit.

[17] http://www.apa.org/releases/zerotolerance.html, ibid.

[18] Macris, G. (1996). Op.cit.; http://www.rilin.state.ri.us/statutes/title16/16-21/16-21-21.1.htm

COMMENTS ON PROPOSED REVISION TO
LINCOLN SCHOOL COMMITTEE POLICY JFC-R
May 1, 1997

Before commenting on the specific proposed change to the school district's student behavior code, we should perhaps begin by stating the obvious: drug and alcohol abuse by students attending school-related events, and the particular incidents that have prompted this proposed policy, are a legitimate cause for concern by school officials. We do not in any way question the right of school officials to take appropriate action under those circumstances, including changing school policy to allow for the exclusion of offending students from extra-curricular activities.

At the same time, we are concerned about the haste with which this policy change is being proposed and its concurrent failure to take into account the potential complexity and uniqueness of particular situations. It is also important to note that school officials already have a number of tools in place to address this type of student misconduct. Under current policy, students involved in school-related substance abuse are subject to parental notification, suspension from school, drug abuse counseling requirements, and referral to the police for possible criminal action. While a suspension from extra-curricular activities may be an appropriate additional form of punishment, it should not be so inflexible that it cannot consider the circumstances surrounding any particular infraction.

It appears, however, that the school committee wishes to automatically subject any student violating the policy to a full one-year suspension from all extra-curricular activities. It is our understanding that such a change in the school handbook has already been made. This seems to us unduly harsh and inflexible. It treats alike the student who has had a few sips of beer, the student who is obviously impaired, and the student who has taken a legally prescribed pain-killer before attending an event. In the past few months, the problem with inflexible "zero tolerance" school policies has been the subject of much attention in the state. School districts should act warily before adopting new policies that take such an inflexible approach.

We would also note that the proposed change in Policy JFC-R may be much more broadly written than intended, as it would appear to apply to academic suspensions as well. The proposal refers to "violations of the student behavior code for which a student is subject to suspension and/or expulsion from all extra curricular activities, for a period of up to one year for the first offense." As worded, The "one year suspension" language appears to refer to both extra-curricular activities and academic suspensions.

The infractions at issue in this policy include defying the authority of a teacher, leaving school grounds without permission, and smoking at school. It is not limited to school-related substance abuse violations. Authorizing one-year suspensions -- whether from school or from extra-curricular activities -- for these infractions is incredibly harsh and, in some instances, counter-productive, especially when one considers that this policy addresses first-time offenders. Even if the one-year punishment is clarified to mean only extra-curricular punishment, we consider it unnecessarily strict, whether applied to all the listed infractions or just substance-abuse related violations.

An automatic one-year suspension from extra-curricular activities will naturally, but somewhat ironically, fall most heavily on the more involved and active students. This additional punishment will not, of course, affect the student who does not spend time on the school newspaper, student government activities, and so forth. As for deterrence, it is difficult to believe that a suspension from extra-curricular activities will be more effective than referral to police for criminal prosecution, which is contained in the current policy. And to the extent this new punishment does deter, one must ask whether it will stop students from drinking, or only encourage them to drink after, rather than before, school events.

There is no magic bullet to solving the problem of substance abuse among teenagers. To rush a policy through in the space of a few days is a disservice to the complexity and importance of the issue. We therefore urge the school committee to postpone adoption of this policy, and to take a much broader view on how to address the problem of substance abuse in the school population. At a minimum, an inflexible one-year exclusion rule should be rejected in favor of a more narrow approach that allows administrators to examine the circumstances surrounding infractions of the rule. (We assume that whatever policy is ultimately adopted will apply prospectively only, in order to avoid basic due process problems.)

Thank you in advance for your consideration of our views. We hope you will give them your careful review.

Submitted by: Steven Brown, Executive Director

May 21, 1999

Robert Shapiro, Superintendent
Warwick School Department
34 Warwick Lake Ave.
Warwick, RI 02889

Dear Superintendent Shapiro:

Our office has received complaints from parents in your school district about a new "attendance policy" which is being considered by your School Committee. Because we share the parents' concerns about this policy, I am writing to bring our concerns to your attention.

At bottom, the proposed policy strikes us as unduly and inappropriately strict. Indeed, we would be surprised if teachers and administrators were held to -- or would ever agree to be held to -- the same standards of attendance that students would be under this proposal. Some of our specific objections to the proposal are noted below.

The policy appears to allow excused absences only in four designated categories.* Even the most obvious and common one -- illness -- is crafted in an extremely narrow but intrusive way. In that respect, the policy requires documentation in the form of a physician's "notes identifying specific medical problems and dates." First, if a doctor's note authorizing a student's absence from school is presented, we do not think the school has the additional right to demand the specific diagnosis from the doctor in order to classify the absence as excused. If, for some reason, neither the physician nor the parent wants the "specific" medical problem made known, the school should not be demanding it as a condition of accepting the note.

More importantly, however, children often legitimately stay home due to illness without the necessity, burden or cost of being seen by a physician. Parents should not be forced to go through the various burdens -- financial, time-consuming and physical -- involved in taking their child to a doctor for every illness that prompts a student's absence. We find it hard to understand why a school would refuse to accept as legitimate a parental note about a student's illness.

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* As the proposed policy is written, it is actually unclear to us whether or not the four categories cited therein are meant to be the exclusive grounds for "excused" absences, or just serve as representative examples. If the latter, the proposal provides parents absolutely no guidance -- and school administrators absolutely no standards -- on what the other acceptable grounds for absences might be. This is very troubling in light of the potentially significant penalties students face for unexcused absences. We thus assume that the policy allows only the four specified categories of excused absences.

Even more insulting, it appears that even absences falling into the four listed categories are excused only if the parent files an "appeal" which will be considered by unidentified school administration officials. No timeline is specified for the administrator's decision on this "appeal." But no parent should have to file an "appeal" with a school official in order to keep her child from being punished because, for example, the child was away at a funeral for a close family member. The whole scheme strikes us as incredibly intrusive, paternalistic and a perversion of the notion of *in loco parentis*.

Because of its limited definition of "excused" absences, the policy makes no exceptions for many other legitimate reasons why someone might not attend school on a given day. The potential circumstances are wide-ranging: they could involve such situations as the illness of a family member or other family emergencies, unexpected transportation difficulties, a parent participating in a "take your child to work" day, the wedding of a student's sibling on the West Coast, and so on. Under this policy, a student invited to Washington D.C. to meet the President would be marked with an unexcused absence! In some cases, of course, there may be room for disagreement as to whether a parent's decision to keep a child out of school on a particular day was appropriate, but a school policy that purports to always know better than the parent what is a legitimate absence goes much too far.

The strict standards are all the more troubling because of the serious consequences that follow from such absences: "truant" students "will not be allowed to make up missed work or tests" and will have points deducted from their grade. The ironic effect of this is that the conscientious student out for an "unexcused" absence truly gets punished, while the less-than-stellar student may consider it a <u>reward</u> to not have to make up missed work.

Further, with a rigid and ultimately arbitrary point system for attendance in place, even one extra absence can have serious academic repercussions for a student. (Theoretically, we assume that one point could move a student down a letter grade -- from, for example, a B- to a C+). It is very disconcerting that school officials would dictate in so strict a fashion what constitutes an "excused" absence and then punish students for their parents' often-legitimate decisions in that regard. Regular attendance at school is, of course, important, but an inflexible policy like this will often place the school district in the inappropriate role of acting *in loco parentis* in situations when it simply should not be doing so.

Finally, in addition to its other flaws, we would note that the proposal remains unclear in various respects. For example, no explanation is given as to the types of "social privileges" that are subject to removal as an additional penalty for non-attendance under this policy. In addition, the policy's proposal that schools adopt incentives (for, we presume, good attendance) is totally open-ended, and makes no suggestions as to what those incentives might be. To give one final example, the policy bars "truant" students from making up missed work, but refers to "absent"

students in describing who will not be allowed to attend summer school. We can only hope that this proposal does not mean what it says and purport to deny a student out for 13 days due to a serious illness from attending summer school.

In sum, we recognize the school district's important interest in dealing with truancy. But this proposed policy paints with too broad a brush, and in doing so, unfairly punishes students for conduct which, in many instances, should not be punishable. As noted earlier, there are many justifiable reasons that a student might miss school that would not be "excused" under this policy. And even if one considers it inappropriate to miss a day of school in order, for example, to start an early vacation, students are ill-served by a policy that punishes them in various significant ways because their parents decided to start a long-awaited weekend vacation on Friday.

We therefore urge that you and the School Committee carefully reconsider this proposal in order to address the very legitimate concerns of parents. Thank you in advance for your consideration of our views.

Sincerely,

Steven Brown
Executive Director

cc: School Committee Members

September 14, 1999

Dear Warwick School Committee Member:

We learned only today that the School Committee will be considering, and may be voting on, a revised attendance policy for secondary schools at its meeting tonight. You may recall that back in May, the ACLU sent a letter raising concerns about the attendance policy that was being considered at that time.

While the new proposed policy is different in a number of respects from the version considered earlier in the year, we believe it continues to raise numerous civil liberties concerns. We would therefore once again urge that the policy not be adopted.

The latest policy seems to "address" many of the problems raised by the first draft by simply ignoring them. While some of the problematic provisions have been eliminated, the new proposal gives each school wide-ranging ability to implement its own attendance procedures, with little guidance as the standards that could be imposed. Thus, the limited definition of "excused absences," the requirement of a doctor's note for illness and other provisions with which we had concerns may be missing from this new proposal, but they could all be adopted unilaterally on a school-to-school basis. The lack of any concrete guidance virtually ensures arbitrary implementation and enforcement of attendance standards in the Warwick schools.

The proposal remains similarly unclear on various matters that were unclear in the first draft of the policy, such as: continuing to leave undefined the types of "social privileges" that can be removed for absenteeism; not offering any guidance on the types of "incentives" that should be adopted to encourage attendance; and failing to distinguish between truancy and legitimate absences in barring some students from summer school.

Further, the one penalty that the new policy mandates in each school's attendance policy -- reduction of a students' grade points for unexcused absences -- remains extremely problematic from our perspective. There are many reasons a student may be absent from school during the year. If he or she has performed well academically throughout the term, it makes little sense to automatically lower the evaluation of this long-term effort due to a short-term lapse in attendance. After all, a student who has made an extra effort to keep up with missed work should not be penalized the same way as a student who makes no such effort, but that is the effect of grade reduction policies.

In short, punishing a student for lapses in attendance that may have been beyond his or her control makes as much sense as passing an academically unfit student because he or she has a superior attendance record. Mandatory grade reductions are a blunt and, we believe, inappropriate instrument for promoting good attendance. It would be a questionable tool even for managing undesirable student behavior, much less for school absences that are not the result of truancy. Ultimately, a policy of grade reduction as a penalty for absence serves as an arbitrary disciplinary sanction on student performance.

For these reasons, and for many of the reasons previously expressed in our May 21st letter to Superintendent Shapiro, we urge you to withhold your approval of this proposal. Thank you once again for considering our views.

Sincerely,

Steven Brown
Executive Director

November 5, 1999

Stephen Scott Mueller, Chair
South Kingstown School Committee
307 Curtis Corner Road
Wakefield, RI 02879

BY FAX AND MAIL

Dear Mr. Mueller:

The ACLU has followed with great distress and increasing alarm your School Committee's actions this past month against high school senior Amy Leasca. In the name of a simplistic slogan, so-called "zero tolerance," your School Committee has scarred a young woman who admittedly made a minor error in judgment. For reasons that are unfathomable to us, the Committee apparently wishes to punish her as severely as possible, now going so far as to appeal a modest Commissioner of Education ruling ordering Amy reinstated to the field hockey team. I am writing to urge you and your fellow Committee members to halt this needless destruction of a fine student.

As Amy's case shows all too clearly, inflexible and overreaching "zero tolerance" policies manage to promote rhetoric over reality and simplicity over wisdom. These policies do seemingly have one benefit, however. By being oblivious to nuance, by allowing for no flexibility, by refusing to take into account mitigating circumstances, their implementation requires no thinking. But school administrators should not be appointed, and school committees should not be elected, in order to be mere automatons. To the contrary, one would hope that they are given their positions in the expectation that they will exercise good judgment and common sense. By their very nature, however, "zero tolerance" policies eliminate those fundamental qualities of leadership, and substitute mindless and knee-jerk reactions in their place. Your Committee's unanimous actions against Amy have demonstrated that all too well. As an organization which has seen and dealt with these policies and their unfortunate consequences in a variety of school contexts, the ACLU would hope that school committees would be jettisoning these policies and replacing them with ones more sensible, discerning and judicious -- not reinforcing them with a vengeance.

Amy is a student whom any school district should treasure. The punishment that was imposed on her was shocking enough, but the School Committee's most recent decision to appeal the Commissioner's ruling is even more incredible. Simply because Amy acknowledged taking a sip of liquor, the School Committee is willing to place in jeopardy her access to college scholarships. It is willing to ruin what should be one of the

most upbeat and rewarding years in her young life. Whatever "principle" this appeal of the Commissioner's decision is supposed to uphold, it assuredly is not one that an educational system should be advancing.

Certainly students need to learn responsibility. But no person who has any inkling of human nature can truly believe that the harsh punishment imposed on Amy will teach South Kingstown teens to be more responsible. It may teach them to try harder not to get caught. It may teach them to lie when asked to admit to a violation of a "zero tolerance" policy. It may teach them to be a little more careful as to when, where and with whom they drink. It may even discourage teens from drinking prior to school events -- but teach them to instead wait for more opportune times when they are less likely to get caught. And it will assuredly teach them the inanity of "zero tolerance" policies which treat taking a sip of alcohol the same as getting hopelessly drunk. Amy and the School Committee may believe that her error was in taking a sip of liquor before a school dance. It would be just as accurate to say, however, that her mistake was in being honest when confronted by a school administrator about it.

It also must be emphasized that the punishment being imposed under this "zero tolerance" policy actually undermines, rather than encourages, responsible behavior by students. A student placed on "social probation" for a violation of the alcohol policy is barred from attending all sorts of important and constructive activities that could help keep them away from drinking. The type of positive atmosphere that extra-curricular and other school social activities can provide students should be encouraged, not denied. Amy's mother has pointed out to us that due to her "social probation," Amy is barred from a variety of productive activities in which she had planned to participate -- ranging from Habitat for Humanity to the Model U.N. Perhaps the greatest demonstration of the ridiculousness of "zero tolerance" is the ironic fact that Amy is prevented from attending meetings of the Students Against Drunk Driving chapter at the school! In short, unyielding and indiscriminate policies like this one are quite counter-productive if their goal is to promote responsibility, for they manage to do quite the opposite.

While this letter about the School Committee's actions is admittedly harsh in tone, I would submit it is no less harsh than the punishment imposed so readily on Amy. If the point of punishing her was to teach students that there are consequences for violating the school's alcohol policy, the point has been made. The Commissioner rightly called Amy "an excellent scholar athlete with an exemplary record of school citizenship." As a result of this one indiscretion, she has been suspended from school for five days, and that mark will stay on her record. She has missed almost a month of various school-related activities. Any continued action against Amy is incomprehensibly cruel punishment for the sake of punishment, for it can serve no legitimate purpose.

Page Three
Stephen Scott Mueller
November 5, 1999

"Zero tolerance" is aptly named, for it is simply another name for "intolerance." It should have no place in our school systems. There is no better lesson a school committee could impart to its students than that of tolerance and restraint. The School Committee could do that by reconsidering its recent actions, rescinding Amy's social probation and allowing her to continue to play field hockey. Amy's inappropriate sip of alcohol before the school dance should not be condoned, but neither should vengeful punishment that far outweighs that judgmental error.

At its upcoming meeting, we therefore urge the School Committee to reconsider its decision concerning Amy. Thank you for your attention to our views.

Sincerely,

Steven Brown
Executive Director

cc: School Committee Members
Supt. Jack Harrington
Joslin Leasca

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October 18, 2002

Helio Melo, Chairperson
East Providence School Committee
80 Burnside Avenue
East Providence, RI 02915

Dear Chairperson Melo:

I am writing in response to your School Committee's first passage last week of an "anti-bullying" policy. The ACLU certainly recognizes and supports the School District's interest in a safe and nurturing school environment. However, we believe that this policy is written much too broadly, is unduly vague and is likely to only exacerbate current problems involving the over-suspension of students from school. Despite its good aims, we therefore urge that you not give final approval to this proposal.

It is initially important to recognize that the vast majority of activity that should qualify as "bullying" is undoubtedly already a disciplinary offense. To the extent that East Providence schools do not already punish unwelcome physical contact, there is certainly nothing wrong with a policy explicitly doing so. However, authorizing punishment for such "offenses" as "harmful gossip," "exclusion," and similar forms of "verbal or emotional abuse" is extremely problematic.

For example, how will school officials draw the line between "gossip" and "harmful gossip," and how will students know when they have crossed that line? When does good-natured ribbing of a fellow student turn into punishable "teasing"? Does the school district truly seek to punish the inevitable cliques that form among students -- as they form in virtually every adult social setting -- as inappropriate "shunning" or "exclusion"? The fact is that this proposed policy seeks to punish speech and conduct which most of us as adults routinely engage in to one degree or another. At bottom, this policy proposes, to a large extent, to punish students for being human.

The policy is made even more problematic by its demand for "zero tolerance." Our experience over the years with unthinking enforcement of school "zero tolerance" policies on much more tangible subjects -- such as drugs and weapons -- only heightens our concerns that implementation of this policy will lead to inappropriate and unfair disciplinary actions.

Page Two
Helio Melo
October 18, 2002

An article in the *Providence Journal* announcing first passage of this policy quotes both a school committee member and the deputy superintendent as stating that administrators will need to exercise common sense in enforcing the policy. But the major point of "zero tolerance" policies is to eliminate common sense from the equation, and to require automatic imposition of penalties for any perceived violation. Thus, even before the policy has been implemented, ambiguities surrounding its enforcement have been voiced.

Those comments only highlight the inherent vagueness of the policy and the difficulties that are bound to arise in enforcing it. As a result, it will be virtually impossible for students to know what they can and cannot say or do without potentially violating the policy.

Finally, it is worth noting that this open-ended policy comes on the heels of two reports issued by a state Task Force on Racial Bias and School Discipline. The Task Force determined that schools across the state engage in over-suspension of students. A policy like this can only perpetuate that trend.

Of course, it is more than appropriate for schools to expend efforts to educate students on the inappropriateness of "teasing" and "shunning," and the need for mutual respect among peers. We commend the school district for recognizing the importance of these matters in a school environment. But we believe these attitudes can best be fostered – indeed, can only be fostered -- by example and by pedagogical techniques, not by punitive measures. Indeed, the attempt to enforce such amorphous concepts through a disciplinary policy can only create more problems than it solves, and stifle student speech, diversity and individuality.

We therefore urge that this policy be placed on hold, and that the school district look at other methods for dealing with this admittedly important issue. Thank you in advance for your attention to our views.

Sincerely,

Steven Brown
Executive Director

cc: School Committee Members
Deputy Supt. Manuel Vinhateiro

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December 2, 2006

Robert Littlefield, Principal
Portsmouth High School
Education Lane
Portsmouth, RI 02871

BY FAX AND MAIL

Dear Mr. Littlefield:

We have received a complaint from Patrick Agin, a student at your high school, and his mother regarding the controversy that has arisen surrounding your decision to ban Patrick's planned yearbook photo. As you know, in that photo, Patrick is dressed in a chain mail coat with a prop sword over his shoulder, representing his abiding interest in medieval history. In the name of both freedom of speech and common sense, the ACLU urges you to reconsider your decision and to allow this photo to appear in the yearbook as Patrick's senior photo.

It is our understanding that you have advised Patrick that he can include the photo in the yearbook – for a fee – as an advertisement, just not as his official photo. This concession appears to acknowledge that Patrick's photo is not in fact disruptive or dangerous or even inappropriate in any meaningful way. Nonetheless, you claim that it would be "irresponsible" to allow such a photograph because it could "easily be construed to mean that Portsmouth High School has anything but a no tolerance policy for weapons." We cannot speak for any adults you may have in mind, but I feel confident in saying that no student of Portsmouth High School is going to construe Patrick's picture as meaning that Portsmouth is lax in its view about weapons. I am sure that your school has done a better job teaching your students critical thinking than your statement suggests.

When the Portsmouth High School drama club performs *Romeo and Juliet*, or when the play is assigned in English class, we trust that you do not believe that students take this as the school's official endorsement of fatal sword play, suicide or fateful boy-girl dalliances. It is just as absurd to be treating Patrick's photo as anything other than a representation of his strong and commendable interest in an important aspect of world history.

Frankly, it is difficult for us to comprehend how a student's personal photo in a student yearbook would somehow be construed as officially representing the school in *any* shape or form, much less as reflecting the school's policy on weapons. More to the point, it is *impossible* to comprehend how this particular photograph of Patrick is an extraordinary danger to school values when it appears on one page of the yearbook with other student photos, but is unobjectionable when displayed a few pages later as a "recognition ad," which is, as the school notes, a "message [that] will be a permanent memory."

Page Two
Robert Littlefield
December 2, 2006

You are quoted in one news article as stating that the "yearbook represents our school to a widespread audience for a long time to come." If that is so, we submit that, by censoring Patrick's photo, you are representing the school in a way that gives public schooling a bad name.

In that vein, what is perhaps most distressing of all is that this incident arises in the same school district that put Julie Cahill through the same depressing cookie cutter only a few short years ago. In 2002, as you will recall, Portsmouth school officials were horrified at the thought of having this student member of the National Honor Society, drama club, Thespian Society, school band and literary magazine, not to mention former class president, participate in a mentoring program for elementary school children – all because she dared to have purple hair. It is unfortunate that no lessons appear to have been learned from that sorry episode. As with Julie Cahill, your school district once again appears to enjoy punishing a student not for being bad, but for being different.

Ultimately, this incident only vividly demonstrates that public school "zero tolerance" policies are popular because they eliminate the need to think. For an institution of learning, this is hardly something to celebrate. By failing to distinguish between a photograph of a student who enjoys medieval studies holding a prop broadsword and a photo of a juvenile delinquent holding an Uzi, the school has promoted a vacuous concept like zero tolerance into a policy that prefers rhetoric over reality and simple-mindedness over common sense.

We urge you to consider that the message you are sending about your high school by banning Patrick's photo may not be the one that you think it is, and to allow his unedited photo to appear as his portrait in the student yearbook.

Thank you for your consideration of our views.

Sincerely,

Steven Brown
Executive Director

cc: Heidi Agin-Farrington
Supt. Susan Lusi

STUDENT PRIVACY

Commentary by John Carroll

We began this examination with a discussion of what students learn in school. One area of particular concern for civil libertarians is what students learn from school about the operation of our constitutional democracy. Of course society is not the school writ large, but it is reasonable to expect students to draw wider lessons from the behavior of school officials, especially where those policies intrude on whatever sense of privacy and autonomy the student may have.

In the cases attached to this section, we will see that some lessons might carry authoritarian overtones. In each of these cases, a blanket suspicion of student behavior becomes the rationale for intrusive schemes designed to head off and root out wrong doing. In every case, the school rationalizes the policy by reference to real problems in the school system, such as drunken driving among students in Barrington, for example. Nonetheless, the existence of a systemic problem, real or imagined, does not mean that officials should take measures that fail to treat students with respect. In all of the cases below there is little regard for student privacy, nor is it always clear that school officials understand that guilt is individual rather than collective.

Perhaps it is 1984 in the Rhode Island schools: surveillance cameras are proposed to record the movement of students as they trudge through the institutional corridors, their breath is tested for banned substances when they meet at institutionally organized functions, dogs sniff lockers looking for contraband, and random searches of lockers take place without warning. What strange new world is this?

In addition to teaching lessons at odds with civic values, the policies that schools adopt can have other unintended consequences, which is a central theme in these letters. Mr. Brown's letter of October 27, 2008 to the principal of Barrington High School is a model of this type because it demonstrates with great clarity how carelessly the policy was drafted and how foolish -- and arbitrary -- its consequences might be.

Barrington eventually dropped its camera surveillance plan, but has adopted the breathalyzer policy. Searches of students' cars and lockers, as well as proximity policies, have often been adopted in spite of R.I. ACLU opposition.

AMERICAN CIVIL LIBERTIES UNION
RHODE ISLAND AFFILIATE

June 8, 1993

Eleanora Kelly
300 Reservoir Ave.
Lincoln, RI 02865

Dear Ms. Kelly:

I am writing you, in your capacity as Chair of the Lincoln School Committee, about the School Committee's recently-adopted policy governing weapons in schools.

While the ACLU recognizes the seriousness of students bringing weapons to schools and the need for school districts to respond appropriately to such a problem, we wish to bring to your attention two particular concerns the ACLU has with your Committee's policy.

First, the policy authorizes "inspections of pupils automobiles driven to school." No suspicion of illegal activity is required by this policy in order to initiate such an inspection. We believe this provision is quite problematic and constitutionally suspect. Even in the public school building itself, the U. S. Supreme Court has required "reasonable suspicion" to search a student's property. There is thus no basis for totally eliminating a student's Fourth Amendment protection from unreasonable searches and seizures simply because he or she drove their car to school. It is no more appropriate than searching the cars of faculty members or administrators that are parked on school property. As the Supreme Court has emphasized, students do not shed their constitutional rights at the schoolhouse gate.

We are also concerned about the policy's support for unannounced locker searches without any requirement of "reasonable suspicion." As you probably know, the U.S. Supreme Court has not directly ruled on the question of whether, and what kind of, Fourth Amendment protections apply to lockers in school. While some courts have taken the position that lockers may be searched at any time on the premise that they are "school", rather than "student," property, we believe this premise is, as a matter of policy, inappropriate and fails to adequately take into account students' legitimate privacy interests. As with any other school search, some sort of individualized "reasonable suspicion" should be a condition for searching a student's locker.

RHODE ISLAND AFFILIATE - AMERICAN CIVIL LIBERTIES UNION
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In light of the length of time students must spend in school each day, it is not surprising that their lockers can be the depository for many personal effects -- from notes and letters to items of personal hygiene -- that should rightly be considered private. A policy giving school officials the unfettered right to rifle through a student's belongings in a locker does not sufficiently respect that privacy.

I would also note that there is more than a little irony to such general search policies: some students who learn in their American History classes about the colonists' vehement resentment of the random general searches conducted by British soldiers may rightly become somewhat cynical in seeing themselves subjected to similar searches in the very same building where these lessons of liberty are taught.

Respect for students' personal freedoms is not in any way incompatible with the school district's interest in safe schools. One need not be sacrificed for the other. Requiring individualized suspicion before searching a student's car, locker or other property simply reflects a basic commitment to the fundamental principles of the Fourth Amendment. We therefore hope that you will consider amending your policy to address the concerns we have raised.

Sincerely,

Steven Brown
Executive Director

CC: School Committee Members

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February 4, 2002

Supt. Ralph Malafronte
Barrington School Department
283 County Road
Barrington, RI 02806

Dear Superintendent Malafronte:

I am writing in response to a recent *Barrington Times* article which described proposed plans to install surveillance cameras throughout Barrington High School. The ACLU has numerous and serious concerns about this plan, and we urge that you reconsider and reject it.

Frankly, we find the proposal to be a shocking and extraordinary invasion of students' privacy. Your proposal would place throughout the school high-tech cameras that would not only have the capability to pan, zoom, magnify and track individual students, but would also apparently be connected to the Barrington police department. Surveillance like this is the kind that one would expect in a prison, not a school.

In the article, Principal Gray acknowledges that there have been only minor incidents at the high school, but states that he considers installation of the cameras to be an appropriate response to violence in the schools in other parts of the country. But such high-tech surveillance provides, at best, only a false sense of security. On the other hand, its intrusive effect on students' sense of freedom is undeniable.

The use of surveillance cameras is but the latest in a series of continued overreactions to a few tragic and highly publicized incidents in our nation's schools. But the facts are indisputable: violence in the schools has been decreasing, not increasing, over the past few years, and schools remain one of the safest places children can be -- safer than in their communities, in cars and even within their own homes. Barrington, as you know, is far from an exception to these facts.

We recognize that surveillance cameras are becoming ubiquitous in society, but that is no reason to put them in our schools. The melding of school surveillance with law enforcement is especially disturbing. If the school district really wants to prevent school violence, it should be working to develop trusting relationships with students and treating them all as potential learners rather than potential suspects.

Use of such equipment further raises innumerable important questions, many of which do not appear to have been considered. For example, who will operate the cameras and under whose supervision? What will prevent the targeted surveillance of individual students who have done nothing wrong but are considered "trouble-makers?" How long will tapes be kept, and who will have access to them? How will voyeuristic use of the cameras, or other misuse of this technology, be prevented? Will the surveillance be used to stem inappropriate hand-holding and kissing in the hallways?

The enthusiasm that you and Principal Gray have shown for this technology and the ability to "track" students is extremely disturbing in light of the apparent lack of any recognition of its potentially chilling effect on privacy. It is the enthusiasm of the hunter at the expense of the hunted.

The cameras certainly will not deter a student bent on a mindless, violent attack. To the extent the surveillance aims to deter minor infractions such as vandalism in the schools, we suspect that the cameras will merely displace these incidents to places outside the camera's range. Ultimately, many students are likely to feel an increased sense of mistrust and lack of freedom when the cameras are installed.

Trying to understand and deal with the root causes of student disaffection would be much more appropriate than seeking to track their every move. The ACLU urges you to resist the pressure to adopt measures that will make schools more like prisons and less like communities of learning where young people feel valued and respected. We therefore hope you will reconsider this decision and conclude that your school district's limited tax dollars could best be spent on technology which benefits students rather than the surveillance industry.

Thank you in advance for your careful consideration of our views. I look forward to hearing back from you about this at your early convenience.

Sincerely,

Steven Brown
Executive Director

cc: Principal John Gray
Barrington School Committee

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December 2, 2002

Dear Newport School Committee Member:

I am writing to express our organization's deep distress over the drug-sniffing dog search that was conducted by 20 police officers last week at Rogers High School. The search, which turned up no evidence of drugs, was deemed a "training exercise" for police and their dogs. We urge you to formally prohibit any such activities in the future.

The use of drug-sniffing dogs in the school setting is extremely troubling for a number of reasons. First and foremost, it treats students like convicts and criminal suspects instead of as teenagers who should be learning the value of human rights. Students attending public school should not expect to serve as convenient play-role substitutes for drug dealers.

As adults, we would be appalled if our employer brought in drug-sniffing dogs for "training." It is no more appropriate to do it to captive teenagers in the school setting. Further, since the request for drug-sniffing dogs was not prompted by any particular report of drug activity, it remains abundantly clear that these searches are not about addressing drug problems; instead, they are just blatant displays of raw police power.

Incidents such as these cast a pall over the entire educational experience itself and the values that schools should be instilling in students. As U.S. Supreme Court Justice John Paul Stevens once noted: "The schoolroom is the first opportunity most citizens have to experience the power of government. . . .The values they learn there, they take with them in life. One of our most cherished ideals is the one contained in the Fourth Amendment: that the government may not intrude on the personal privacy of its citizens without compelling circumstances." In our view, the intrusion on privacy and dignity incurred with the use of drug-sniffing dogs in school, and its negative effect on the basic values of an educational system, cannot be understated.

We recognize that some parents may applaud the school's actions as simply a necessary evil to ensure a drug-free school environment, and that some students may have found the entire episode an amusing diversion from their studies. But this incident is neither amusing nor appropriate. Educational institutions simply should not be used as playgrounds for police and the canine corps to rehearse their drug-detecting skills. When schools begin treating their teenagers as drug suspects instead of as students, they have inflicted damage on their educational mission in ways much greater than a few marijuana-possessing students ever could.

We therefore strongly urge the School Committee to prohibit any further use of drug-sniffing dogs in the Newport school system for sweep searches of students and/or their belongings. There are many appropriate ways to teach students the evils of drug use. We hope you will agree that last week's exercise does not represent one of those ways.

Thank you in advance for your consideration of our views.

Sincerely,

Steven Brown
Executive Director

cc: Supt. Mary Canole
Principal Victoria Johnson

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October 27, 2008

John Gray, Principal
Barrington High School
220 Lincoln Avenue
Barrington, RI 02806

Dear Principal Gray:

Recent news stories have described the high school's recent revision of its "student athlete handbook" to provide for punishment of such students if they are merely "in the presence" of tobacco, alcohol or controlled drugs. We are writing to express our organization's strong opposition to this policy and to urge repeal of this particular provision.

Let me begin by emphasizing our recognition of the difficulties that Barrington has faced in dealing with the problem of teen drinking. But that is not a reason for adoption of a policy like this that, we submit, is counter-productive, extremely intrusive of students' civil liberties and bound to lead to arbitrary enforcement. Indeed, other than attempting to show a "toughness" on the problem of underage drinking just for the sake of showing toughness, it is difficult to imagine a useful purpose behind this new policy.

As for its counter-productiveness, students have already pointed out the difficult position it will put them in when they seek to help a fellow student who is, for example, looking for assistance or a ride. One school official was quoted as saying the policy would "make students think more about their decisions." But the decisions that students should be thinking about are the ones that are already prohibited by the policy – possessing, consuming or distributing alcohol. Does the school really want to make a student "think more" about the consequences of deciding to drive home a friend who has had alcohol and who might otherwise drive home himself?

Regarding the policy's effect on students' civil liberties, we believe that this attempt at "guilt by association" is very misguided. One would be hard-pressed to think of other circumstances where one would support punishing somebody merely for being in proximity to another person's activities. Further, as noted below, that other person's activities need not even be improper or illegal in any manner, yet a student could find herself suspended from extra-curricular activities for the existential "offense" of simply being near that individual.

Finally, the breadth of this policy, which has no bounds, is truly astonishing and will inevitably lead to arbitrary enforcement. Under the terms of this policy, an athlete who sits at a dinner table where his parents are drinking wine faces suspension from the team. And a student

sitting in his backyard with his 23-year brother who is sipping from a can of beer is similarly in violation of the policy. So is a student athlete waiting at a bus stop with a person who is smoking a cigarette. As literally worded, student athletes at Barrington High School must think twice about going to any family wedding unless drinking and smoking are prohibited at the event! The list could go on and on.

Perhaps in response to these absurdities, you are quoted in a *Barrington Times* article as saying that "a good amount of discretion will be used when reviewing individual cases."* On the other hand, you are also quoted in that article as saying that this policy was adopted for the purpose of "drawing a clear line in the sand when it comes to drinking." Respectfully, the policy cannot do both. If it is designed to draw a clear line in the sand, its enforcement cannot allow for significant discretion.

In fact, precisely because the policy is so broad and open-ended and will require significant discretion in its enforcement, it provides students no guidance whatsoever as to what actually is and is not allowed. It leaves them at the complete whim of school officials' discretion as to when punishment will be meted out for what is – under any reasonable view – harmless conduct. More accurately, it is not even conduct on their part that subjects them to suspension from their team; it is their mere lawful *presence* at a place that creates this punishment.

Again, we do not wish to diminish the legitimate concerns of school officials in wanting to change the "drinking culture" in Barrington that you refer to. But that is not a reason to throw common sense and students' rights out the window. We respectfully urge the school to remove the penalties against student athletes for merely being "in the presence of" alcohol or other substances, and to instead focus on the students who are, in fact, unlawfully possessing or using these substances.

Thank you in advance for your consideration of this, and I look forward to hearing back from you about it.

Sincerely,

Steven Brown
Executive Director

cc: Supt. Robert McIntyre

* As the policy is actually worded, it does not appear to authorize any discretion at all in its enforcement. But as your comments suggest, a case-by-case review of individuals would be necessary. See R.I.G.L. §16-21-21.1.

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December 26, 2008

John Gray, Principal
Barrington High School
220 Lincoln Avenue
Barrington, RI 02806

Dear Mr. Gray:

I am writing in regards to today's *Providence Journal* article promoting the proposal that the high school institute a "breathalyzer testing" requirement on all students attending school dances. For a variety of reasons, we urge you to resist this suggestion.

As I expressed to you just two months ago when I wrote to object to the school's new policy imposing penalties on athletes merely for being "in the presence of" alcohol or drugs, we appreciate the pressures on school officials to address what everybody acknowledges is a serious problem of underage drinking in Barrington. But too often, the proposed "solutions," like this one, are ineffectual and inappropriately dismissive of students' legitimate rights.

We believe the school's current policy has it right in allowing for breathalyzer testing when there is a reasonable suspicion that a particular student is impaired. Rather than treating every student as a suspect, the current policy recognizes that the privacy rights of students should not be so cavalierly ignored, and that intrusions on those rights should be limited to circumstances when officials have reason to believe a student may have engaged in improper conduct.

The news article stated that Seekonk schools have been using an all-inclusive breathalyzer requirement at school dances for some time, and that this requirement is now taken for granted. That is precisely the problem with the institutionalization of infringements on liberty: after a while, most people become accustomed to them. From our perspective, that is hardly something to brag about.

The article also states that students no longer show up to Seekonk school dances with alcohol on their breath. That may be so, but as I am sure you recognize, that does not mean that students there are drinking less. Social problems like underage drinking are not so easily solved. I have little doubt that Seekonk's policy has only had the ironic effect of encouraging students to "beat the system." Some students may simply decide to wait until after the school function to drink alcohol. Some might ingest drugs that will not be detected. Some, we suspect, forgo the opportunity to attend the dance in order to consume alcohol elsewhere undetected. In short, adopting a policy that merely diverts student drinking to other locations is not, we submit, the same thing as addressing an underage drinking problem.

It is also worth noting the technical challenges inherent in implementing a breathalyzer testing requirement on all students. These tests must be administered properly, and with machines that are properly maintained. A breathalyzer reading will be inaccurate if any part of the machine is not working correctly. Even more problematic than potential technical errors is the inability to distinguish ethyl alcohol from other substances. One of the most common reasons for inaccurate readings is the presence of alcohol in the mouth. Though it is not in the bloodstream and does not cause intoxication, "mouth alcohol" can cause high breathalyzer readings. A variety of over-the-counter medicines, mouthwashes and throat sprays (just the sorts of items that students attending school dances and similar functions may very well use) contain high percentages of alcohol that could lead to "false positives" on a breathalyzer. Since we assume that a zero reading on a breathalyzer will be required, the possibilities for error are not insignificant when every student – not just those suspected of drinking – is subject to a test.

We know that you and the school district have been working very hard to address this serious issue. But I'm sure you are also aware that there are no shortcuts in dealing with a social problem like this. Tragic teenage deaths in the town, not to mention increased and severe penalties, both administrative and criminal, have not solved the problem. We do not, of course, suggest school officials throw up their hands. Ultimately, we believe, school officials can continue to do serious, intensive education about rules against alcohol use by minors at school events. Chaperones can be vigilant, as we understand they are, for signs of alcohol use or any other inappropriate conduct that might warrant intervention, and address such conduct as necessary. Good, careful supervision is always preferable to this type of testing. The current measures are not foolproof, but little is gained by implementing policies like breathalyzer testing that are just as imperfect but that undermine the rights of students as well. For all these reasons, the ACLU strongly urges you to decline the suggestion to implement uniform breathalyzer testing on students at school dances.

If you have any questions about our position, please feel free to let me know. Thank you for your attention to our views.

Sincerely,

Steven Brown
Executive Director

cc: Barrington School Committee

HIGHER EDUCATION

Commentary by Daniel Weisman

Our review of student rights issues in public schools illustrates the importance of ACLU vigilance in responding to violations of basic rights adults take for granted. Does it end after high school or are students' rights at risk at the college level? After all, at that point, students reach adulthood in the eyes of the law; they can advocate for themselves. They are both voluntarily at school and paying for being there, fundamentally changing the need for discipline. The vast majority of public and private universities and colleges have lofty mission statements and self-definitions embracing academic freedom, free inquiry and unrestricted exchange of ideas. In addition, public higher education institutions, as governmental entities, are subject to the protections of the U.S. Constitution.

In this section we will discuss civil liberties issues affecting students in higher education, here in Rhode Island and nationally, and include several R.I. ACLU letters to college and university officials, in response to actions taken against students in violation of constitutional and/or civil liberties principles. We also re-publish an article written in 2002 on the rights of students in higher education, by R.I. ACLU volunteer and RIC professor Dan Weisman.

In his article, Weisman identifies three constellations of student rights most at risk in higher education settings: speech (including the Internet and campus hate speech), due process (e.g., discipline without fair hearings), and privacy (i.e., protection of confidential information). While the law differs between private and public campuses, student rights tend to be similar because most private schools portray themselves as centers of free inquiry, speech and academic freedom, in effect binding themselves to those ideals.

Higher education presents its own set of opportunities and challenges for promoting or abridging civil liberties. In comparison to primary and secondary education, where discipline is a major concern, student self-expression and self-determination are highly encouraged, at least until they create discomfort for other students and/or administrators. At that point, the challenges to protect vulnerable students, preserve the institution's reputation, rein in abhorrent language and actions, avoid conflict both internally and externally, disabuse students of myths and misinformation, keep endowment and grant income flowing, and (perhaps most challenging) educate adults, conflict with each other, sometimes resulting in ill-advised "solutions" that victimize some students and, occasionally, faculty.

We find it noteworthy that some higher education rights infringements are initiated by students themselves, with or without administration approval. Since these actions involve institutional funds, aegis and consequences, they are subject to the same level of scrutiny as actions taken by the administration. As is the case with grades K-12, abuse of power is a problem wherever it occurs.

Here in Rhode Island, with three public institutions of higher education and about 45,000 students, there have been a few recent episodes that raise serious questions about students' vulnerability to rights violations. Following are several situations that have arisen at Rhode Island College and the University of Rhode Island, and one from Roger Williams University, a private institution.

At Rhode Island College, when a student women's rights group promoted the performance of the Vagina Monologues with signs on the main campus road, proclaiming "Keep your Rosaries off our Ovaries," the college chaplain objected and the signs were summarily taken down by campus security personnel, citing concerns about driving and safety and the group's failure to obtain college approval for the postings. Until that point in time, many student organizations had posted various signs in the same places without incident or interference by the college administration. A R.I. ACLU lawsuit successfully overturned the College's policy and obtained compensation for the women's group.

In another Rhode Island College episode, a student overheard other students' racist comments, and filed a grievance when a faculty member refused to discipline the offending students. Instead, the faculty member tried to organize some awareness-raising discussions. The college's grievance procedures required the faculty member to attend a hearing and defend her decision to take no disciplinary action. The racist comments were offensive but not actionable, yet the faculty member had to defend her decision in a formal hearing.

At the University of Rhode Island, a number of events attracted ACLU intervention.

- The Student Senate threatened to punish a student newspaper for printing an objectionable cartoon.
- The entire women's lacrosse team was disciplined because of a late night "brawl" at the off-campus home shared by four team members, and involving members of the men's lacrosse team, none of whom was disciplined although the record showed that the fight was initiated by a male lacrosse team member. The women's team was suspended from competition for a semester; its funds were frozen; it was fined; and members were required to perform ten hours each of community service.
- URI removed from its Web site two articles written by a professor, when a complaint was received objecting to the articles, addressing the subject of international human trafficking, There was no hearing or investigation; the

articles were summarily removed. With ACLU support, the articles were re-posted on the professor's Web site.

- The URI Student Senate ordered the College Republicans to "accurately describe" the university's anti-discrimination policies when it sponsored a whites-only scholarship in opposition to affirmative action. The Senate argued that "compelled speech of facts" is acceptable under the First Amendment. The group was not punished.
- A URI committee recommended changes to student disciplinary rules, including complainants' rights to appeal dismissals of charges; lowering the burden of proof from "clear and convincing evidence" to "more likely than not"; extending disciplinary jurisdiction to off-campus violations of "local, state or federal laws"; expanding search powers beyond written authorization for "plain view" searches to verbal authorization of "closet and refrigerator contents, and a quick look under and around surfaces." Also under consideration was a proposal that disciplinary hearings be held under strict secrecy. Some, but not all, of the proposed changes were adopted.
- URI handed over confidential student records in response to a grand jury request, without notifying the affected students.
- At Roger Williams University, a private institution, the Student Senate attempted to rescind funding for the College Republicans on two recent occasions: for holding a whites-only (anti-affirmative action) scholarship competition, and for publishing offensive homophobic articles in its newsletter.

In most of these instances, R.I. ACLU intervention was successful in protecting the rights of the students facing infringements of their civil liberties. Yet the sheer number of such instances demonstrates that young adults, no less than children, potentially face the unfair erosion of their civil rights.

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December 5, 1998

Daryl Finizio, President
Student Senate
URI
Kingston, RI 02881

Dear Mr. Finizio:

Over the past two days, the ACLU of Rhode Island has followed with concern the controversy that has arisen over *The Good Five Cent Cigar*'s publication of an editorial cartoon deemed by some on campus to be racist. I understand that the executive board of the Student Senate will be meeting tomorrow afternoon to consider freezing all funds for the newspaper for next semester and withdrawing formal recognition of the group. It is my further understanding that the newspaper's student account has been temporarily frozen. I am writing to express our organization's deep concerns about the censorial nature of these responses.

Like most universities, URI has not been immune to its share of inexcusable racist incidents, and the ACLU joins with those who have condemned those incidents in the past. Having seen the cartoon at issue in this latest dispute, however, we are not prepared to place the *Cigar*'s publication of it in that category. Regardless of one's views about the cartoon and what message it is intended to convey, public debate over this controversy is certainly healthy and appropriate. Unfortunately, the actions being considered by the executive board go well beyond this. Proposals to punish the newspaper for its publication of this cartoon are, regrettably, nothing less than acts of censorship which must be condemned as forcefully as racial bigotry must.

Outside the university, the urge to punish and censor speech deemed offensive is an unfortunate reality that the ACLU contends with daily. Across the country, we regularly battle attempts by school officials and parents to ban certain books from the classroom on the grounds that they are offensive. Here in Rhode Island over the years, we have seen public officials raid an art exhibit at RISD, seek to close an exhibit of artwork by John Lennon, and attempt to ban the rap group "2 Live Crew" from performing, all because they or their work were deemed "offensive." But if the freedoms of speech and of the press are to mean anything, they must allow for the unimpeded discussion of controversial subject matter.

Of course, the *Cigar* should not be shielded from criticism when students believe it has done something wrong. But the remedy should be more speech, as has already occurred here, not by acts designed to shut down the newspaper. If this proposal succeeds, freedom of the press at the university will be irreparably damaged, and the precedent set will insure that only the most innocuous views will be espoused by the paper's successor.

Should the school newspaper be barred from expressing any views on controversial racial subjects, such as affirmative action or "hate speech" on campus? Should it be allowed to express only what is deemed the "proper" view on such issues? What if the makeup of the student Senate changes so that what constitutes the "proper" view changes? What about other controversial topics? Today you are considering shutting down the paper for allegedly expressing a wrong view on a racial issue; tomorrow it may be a religious group that feels slighted, or a feminist group. Where does it end? It doesn't, for censorship only breeds more censorship. The net result is a pall of orthodoxy, and a newspaper designed to appeal to the lowest common denominator. This is the antithesis of the free debate that should be the hallmark of a university campus.

Freedom of the press is a cherished right. To punish or censor a student newspaper – or, in this case, to force it to fold altogether – because of disagreement with an editorial decision is simply wrong. Of all people, university students should be especially wary of using censorship as the "solution" to problems or disagreements on campus. Punishing the *Cigar* will do nothing to address the problem of racial hatred on campus; to the contrary, it can only divert attention from addressing those problems in a meaningful way.

As U.S. Supreme Court Justice William O. Douglas once noted: "A function of free speech is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." The same is true for freedom of the press. In 1960, the supervisor of the Montgomery, Alabama police department sued the *New York Times* for a "libelous" advertisement that appeared in that newspaper concerning the "wave of terror" that police department had unleashed against Martin Luther King, Jr. and African-Americans seeking to gain basic civil rights. The advertisement did in fact contain a number of factual inaccuracies. An Alabama jury accommodated the police supervisor by awarding him half a million dollars in damages for these "libels." However, recognizing the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," the U.S. Supreme Court refused to allow that award to stand.

That decision remains a landmark ruling for freedom of the press. But it stands for the basic proposition that one cannot pick and choose what newspapers can be singled out and punished for expressing the "wrong" views. The newspaper that can be shut down for printing a racially "offensive" cartoon can also be shut down for printing an editorial in support of racial equality.

The ACLU urges you and the rest of the executive board of the Student Senate to refrain from this approach and to not take any adverse action against the *Cigar*. Let the debate about the cartoon continue, but we hope you will not make the mistake of punishing the messenger for that healthy debate.

I would appreciate your sharing this letter with the rest of the executive board when it meets tomorrow.

Sincerely,

Steven Brown
Executive Director

cc: Tim Ryan
President Robert Carothers
Linda Levin

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October 15, 2001

Robert Carothers
President
URI
Kingston, RI 02881

Dear President Carothers:

Recent newspaper articles have reported on your University's actions in handing over confidential student records in response to a grand jury subpoena, without first notifying the students whose records were the subject of the subpoena. One of the articles further quotes your school's spokesperson as saying that the records would have been turned over to the government even without a subpoena. I am writing to express our organization's deep concerns about this.

The U.S. Department of Education ("DOE") has apparently advised schools that turning over student records under these circumstances -- "these circumstances" apparently being widespread and non-individualized government investigations prompted by the September 11 attacks -- would not violate FERPA, the federal law protecting the confidentiality of student records. However, such a generous interpretation from the DOE in favor of the government needs to be scrutinized especially carefully under the circumstances, since it is federal officials themselves who are seeking the records without having to follow FERPA's requirements. Indeed, even a cursory examination of the rules would suggest that such an interpretation is clearly contrary to the Department's own regulations. In addition, even if one accepted the validity of that interpretation, that does not mean the University had to turn over the records without advance notice. Finally, as I explain below, it does not even appear that the exception being relied upon even applies at all to this particular situation.

The DOE has claimed that educational institutions can ignore FERPA's notice and consent requirements on the basis of that Act's so-called "emergency health and safety" exception. But the blunderbuss nature of the federal government's request for records and the University's response in releasing them -- without any individualized assessment or showing that the specific individual records being sought are "necessary to protect the health or safety of … individuals," makes the DOE's interpretation of that exemption so large that it swallows the rule. Such an interpretation certainly cannot seriously be deemed to meet the DOE's own regulations which require that this particular exemption be "strictly construed." 34 CFR §99.36(c).

Further, that exemption doesn't even appear applicable in this situation, where the records were sought pursuant to a subpoena. If the government's request for the records truly involved a matter of "emergency" health and safety, the government would have no need to obtain a subpoena. That is because FERPA contains an entirely separate exemption for subpoenaed records. While the University has no obligation to contest the subpoena, FERPA's subpoena exemption specifically requires the institution to make "a reasonable effort to notify the parent or eligible student of the … subpoena in advance of compliance, so that the parent or eligible student may seek protective action." The only exception from the requirement of advance notice is if the "subpoena and the court has ordered that the existence or the contents of the subpoena … not be disclosed." 34 CFR §99.31(a)(9)(ii).

In short, there is no generalized "health and safety" exception to notifying students in response to a subpoena. Nor do we understand it to be the case that the subpoena served on URI barred student notification. The University's failure to notify students of this request thus amounted to an extremely troubling and unwarranted invasion of their privacy without their knowledge.

We recognize that this is, in large part, an academic debate since the records have already been released. Further, Congress is likely to amend FERPA in the coming days to expand that law's exemptions. Nonetheless, the willingness -- indeed, apparent eagerness -- with which the University was willing to ignore FERPA gives us great pause, for this is likely to be only the beginning of government efforts to enlist colleges and universities in similar "fishing expeditions" and dubious "anti-terrorist" efforts -- efforts that will have little effect on our security but a great impact on our freedoms.

According to Ms. Acciardo, the FBI sought information "based on a certain category of people," but not "based on country of origin, race or ethnicity." But when the obvious purpose of the FBI's request was to weed out people based on those very categories, the fact that its "fishing expedition" encompassed other students as well is of small comfort. Nor does the broader, more indiscriminate nature of the request provide solace for anybody concerned about FERPA's major goal of protecting student privacy. The loss of that privacy is not made more palatable by the fact that the loss was shared by a larger number of students.

I realize that we are relying on limited information provided the public by the University about this incident. If we have misconstrued URI's action in any material way, I apologize in advance and would appreciate being so apprised. Otherwise, however, we would urgently request, if you have not already done so, that you notify, however belatedly, all students whose records were turned over as the result of the subpoena. We would further urge the University to begin considering how it will respond to future government actions that might affect the rights of the University community, with the aim of better safeguarding students' civil liberties.

It is precisely in times of crisis that civil liberties must be most safeguarded. Because of their unique mission in society, colleges and universities especially should be vigilant in protecting the rights of students (and faculty) from heavy-handed government actions. That did not appear to happen in this instance. The record of institutions of higher education -- like that of society at large -- in resisting governmental pressure to infringe civil liberties during times of crisis or "war" is spotty at best. Now is the time for URI -- as well as the state's other educational institutions -- to begin preparing for those pressures and, hopefully, preparing in a way that will best protect the university's mission of free inquiry and autonomy.

Thank you for your attention to our views, and I look forward to hearing back from you about this.

Sincerely,

Steven Brown
Executive Director

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February 26, 2004

Erin Bedell, President
RWU Student Senate
Roger Williams University
One Old Ferry Road
Bristol, RI 02809

Dear Ms. Bedell:

On behalf of the Rhode Island Affiliate of the ACLU and its Chapter at your university's School of Law, we are writing to express our deep concern about the Student Senate's continued attempts to punish the College Republican club for its free speech activities. We call upon Senate members to halt these efforts, which we believe are both counter-productive and inimical to the critical goal of any university in promoting wide-ranging, robust and uninhibited speech.

As you know, the Senate's current efforts to sanction the College Republicans are a repeat of troubling actions last fall, when action was taken to eliminate the group's funding in response to a series of homophobic articles that appeared in the club's newsletter, *The Hawk's Right Eye*. As offensive as those stories clearly were, they were just as clearly an exercise of free speech.

The same is true with this latest controversy. As members of the club have said from the beginning, their offer of a whites-only scholarship was an attempt to make a statement about affirmative action. Certainly one can question whether this controversial approach is the best way to generate debate on this subject, but ultimately that is for the speaker – the College Republicans – and not others to decide. The Student Senate itself seemed to recognize this a week ago when it refused to censure the group. College Republican club members were thus understandably perturbed to find themselves facing another resolution only days later over the same activity.

We understand that the most recent resolution, seeking to revoke the charter of the club, was the subject of a discussion and vote yesterday. Although the resolution failed, the Club fears another attempt to take action against it will be offered. Rather than helping the debate, we believe these efforts at censorship only fan the flames of divisiveness, give the Republican club even more attention to their cause, and ultimately only divert attention from a legitimate debate about affirmative action which is at the center of this controversy.

Yesterday's resolution appears to make three points in support of the effort to revoke the club's charter. It is worth addressing them individually, for we believe none of them justifies the proposed action.

First, the resolution claims that while the club's offer of the whites-only scholarship constituted freedom of speech, once the scholarship was actually awarded, the activity ceased to be speech, but became illegal "political action" deserving of punishment. We are quite troubled by the notion of "discriminatory" political action. Political action forms the essence of freedom of speech. We fail to see a distinction between, for example, a racist stating that he plans to run for office, and his actually taking action to do so. Under the resolution's formulation, the first action would be protected, but the latter action would not. Similarly with the supporter of the candidate, who expresses his views about the politician, but then apparently engages in an improper "political action" by voting for him or donating to his campaign.

Second, the resolution states that the award of the scholarship violates the "Commitment to Student Equality Act," which states that clubs "will operate fairly and objectively without regard to race, color, religion, gender, sexual orientation, political ideology, national origin, handicap or age." The problem is that many clubs would, of necessity, fail this test. For example, in examining the University's web site listing of student clubs, we note that Hillel describes itself as "serv[ing] the needs of the Jewish community," the Intervarsity Christian Fellowship "is a mix of Christians from all denominations . . . that share a common faith," the Multicultural Student Union "provides leadership development for cultural minorities on campus," and the Newman Club helps students "explore their relationship with God and the Christian community." The list also includes the "Society of Women Engineers." One cannot sincerely argue that these clubs operate "objectively without regard to" race, gender, religion, etc. Nor should one expect them to. Perhaps the College Republican club and its counterpart, the College Democrats, are the perfect examples of the flaws in this well-intentioned act. How can overtly political clubs like those be expected to operate "without regard to political ideology"?

Finally, the resolution expresses concern that the College Republican's scholarship exploit might jeopardize the University's federal funding. It is difficult for us to understand how the private actions of a private student club involving a private exchange of money could put the university itself in jeopardy. At this point, we are not aware of anybody from the university administration making such a sweeping claim. If it were a legitimate problem, this is surely something that administration officials, not a student body, would and should first address. To the contrary, public statements from officials at both the university and the law school have, quite appropriately, criticized the club's actions as contrary to the institution's commitment to diversity, while recognizing the club's free speech rights to engage in this activity. The student senate should do no less. It is truly unfortunate when a college student body appears to show less concern for the free speech rights of its fellow students than does the university administration.

Like so many issues of freedom of speech, it is also worth noting the indivisibility of the principles involved. While the College Republicans may not wish to give credit where it is due, we must note that the theme underlying its scholarship stunt may be a relative to actions promoted by women's rights groups a few years ago. Through a quick Internet search, we found references at least a few years old to "discriminatory" bake sales conducted on college campuses and elsewhere by feminist groups to protest unequal pay in the workplace. For example, a summer 2002 newsletter of the Madison, Wisconsin chapter of NOW references a "Pay Equity Bake Sale," where it raised $200. According to the newsletter, in order to "raise public awareness of the pay gap between men and women in the USA, we sold baked goods to women for 75 cents and to men for $1.00." The same year, the Feminist Majority Leadership Alliance, a student club at San Francisco State University, held a similar bake sale.

Of course, we do not wish to suggest that a store, or even a student club, could routinely sell items at difference prices based on the customer's race, gender or religion. But in each of these instances, as with the Republicans, political clubs engaged in one-time activities that were clearly efforts at political speech designed to make a political point. It is overkill, to say the least, to threaten a student club with loss of its charter over such an activity.

It is a truism, but one worth repeating, that the cure for "bad" speech is not its censorship, but instead the exercise of "good" speech by others. So it is with this controversy. We hope that Student Senate members will reconsider their actions and agree with this approach. Thank you in advance for considering our views.

Sincerely,

Steven Brown
Executive Director, RIACLU

Bridget Longridge
RWU ACLU

cc: Student Senate Members
Jason Mattera
President Roy Nirschel

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May 26, 2004

Robert Carothers
President
University of Rhode Island
Kingston, RI 02881

Dear President Carothers:

A very disturbing issue of academic censorship at your University has been brought to our attention, and I am writing in the hope that you can promptly intervene to address it.

Last October, university officials asked Professor Donna Hughes, who holds the Carlson Endowed Chair in the University's Women's Studies Program, to "temporarily" remove from her university website two articles she had written about international trafficking in women and children. This is her area of academic expertise. Professor Hughes reluctantly agreed to the request, and the university thereupon removed the posted articles. This action was prompted by a letter Professor Hughes received from a London law firm, threatening to file a defamation suit against her and the University for the inclusion on her website of these two papers. Seven months later, the articles still have not been reposted.

We are concerned from both a procedural and substantive standpoint about the University's actions. Procedurally, we note the apparent lackadaisical manner in which this matter has been handled. When the threat of the lawsuit was first received, the University acted quite quickly in having the material "temporarily" removed, purportedly to give school officials the opportunity to research and consider the legal issues involved. Despite numerous phone calls and e-mails, however, Professor Hughes heard nothing at all from URI officials for months, until finally, in March, she advised the school's legal counsel that she was going to place the articles back on her web site. In quick response, Mr. Saccoccio asked for Professor Hughes's "continued cooperation," but warned that the situation raised liability issues for the University and

> "also raises issues of personal liability for you individually since indemnification cannot be guaranteed at this time. You do have the right to publish or post whatever you please individually, not as a representative of the University, and using your personal resources. However, that does not extend to the use of the University's webpage or use of its resources, until a final decision has been made on this issue."

At a meeting held shortly afterward, officials advised Professor Hughes of the potential financial costs involved in defending a defamation lawsuit, and that is where things stand to this day. Thus, some seven months after this incident first arose, two articles written by a distinguished professor remain censored by the University, even as one of the articles apparently remains accessible on the website of a nationally recognized magazine.

It is hard to minimize the impact of this situation on academic freedom, for the potential ramifications are enormous. If a professor posts a piece critical of a foreign government's leaders, and that government threatens an action in its local courts, will the university require its removal? If a professor writes an on-line article about people accused of being former Nazi officers, and someone threatens suit, will the university remove the article? If the posted syllabus of a course lists a book which someone in France thinks libels them, will the syllabus be taken down? Although we recognize that there are potential costs to the University in facing a defamation suit in England, we think there is an even greater cost to the University when it allows the mere threat of an action by an individual overseas to result in removal of speech of public importance on the university's web site.

A section on academic freedom in the contract between the Board of Governors and the URI AAUP affirms "unqualified acceptance of the principle of freedom in inquiry and expression," and specifically recognizes that teachers are "entitled to full freedom in research and in the publication of the results." The situation Professor Hughes has faced hardly seems to live up to those standards. To the contrary, the University has, by its actions (and inaction) essentially told its academic community that any time a threat of defamation is made against a professor, the University is prepared to immediately capitulate and, if challenged on that capitulation, to take its time reconsidering. It is important to note that Professor Hughes has received no support at all – moral or otherwise – from the University during this time. Rather, she has been warned that the University is not prepared to indemnify her for any liability incurred for these specific academic activities.

We fully appreciate the potentially complicated legal questions raised by a demand letter from a foreign country with different legal procedures. But, as noted above, the University's failure to quickly deal with this threat to academic freedom sends an extremely poor message to Professor Hughes's colleagues and the institution as a whole. In essence, Professor Hughes has been told she can speak to the specific matters giving rise to the defamation threat only to the extent that people can literally hear her voice. In an age where so much information is transmitted, read, researched and stored electronically, the University's unilateral decision to remove articles from her website and force her to fend for herself if she wishes to defend her academic work is extremely troubling.

We urge the University to reverse course and show its support for academic freedom by agreeing to represent Professor Hughes should any action be taken against her. Only in this way can the true mission of the University be fulfilled.

Thank you in advance for your attention to this matter, and I look forward to hearing back from you about it.

Sincerely,

Steven Brown
Executive Director

cc: Professor Donna Hughes
Louis Saccoccio
Frank Annunziato, URI/AAUP

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May 10, 2005

Dear Members of the Faculty Senate:

This letter is in response to your consideration on Thursday of a variety of amendments to university policy as proposed by the Student Rights and Responsibilities Committee. The ACLU has concerns about some of those recommendations, and I am therefore writing at this time to briefly outline those concerns for your consideration.

We recognize that many of the amendments are designed to make the disciplinary process less formal in nature, in recognition of the educational setting in which this all takes place. Although university disciplinary hearings certainly should not take on all the accoutrements of a criminal trial, there are often compelling reasons for a more-than-minimal formalized process in this administrative setting in order to protect the rights of students. The punishment that follows from a disciplinary proceeding – which can, in serious cases, include expulsion – is not something that can be taken lightly, considering its potentially significant ramifications for a student. While a less adversarial structure may strike administrators and university counsel as more appropriate for the university setting, it should not be forgotten that for the student accused of a disciplinary offense, the proceeding *is* adversarial: he or she is charged with an offense that has the potential of affecting his or her academic or professional status. Therefore, protection of rights is crucial.

Before commenting on the specific proposals, we wish to point out that the emphasis in the SRRC's report about balancing the rights of the accused with those of victims is based on a dangerous premise. That emphasis is made in the context of weakening accused students' rights. But whether an administrative proceeding or a criminal trial, the burden of proof must always fall on the accuser. More importantly, in seeking justice, it is particularly critical that safeguards be in place to protect the accused from erroneous verdicts. If one accepts these fundamental principles, then there is no "balance" in the process, nor should there be.

The "balance" argument is troubling for another reason. Although the report often talks about "victims," we assume that in most of the disciplinary proceedings that are initiated on campus, there is no true victim. Instead, in many instances, it is the *University* itself that will be the complainant, and its goal in bringing charges is not to remedy a specific harm that has befallen a student, but instead to vindicate something more abstract, like "community wholeness." It is thus very misleading in this context to justify weakening the rights of accused students by relying on the importance of protecting "victims."

With those general observations in mind, we submit below some brief comments on some of the specific recommendations that you will be considering.

1. A proposal has been made to amend §9.21.29 relating to "Appeals Procedure" to allow a *complainant* to appeal a decision to the University Appeals Board "based on new evidence." The rationale is that this change "better balances the rights of the accusing individual and the accused individual if new evidence were found by either party within a week."

The ACLU opposes allowing a complainant to appeal a dismissed charge. It is difficult to conceive of circumstances where compelling evidence will suddenly come to light within a week of a student's acquittal. But it opens the door for manipulation of the system by a disgruntled complainant. After acquittal, a student should not have to fear suddenly having the same charges resurrected against him or her. This proposed change exemplifies the problem with viewing disciplinary proceedings as a "balance" where an alleged victim's rights must be treated commensurately with those of an accused student.

2. A proposal has been made to amend §9.21.17 to change the standard of proof in disciplinary proceedings from "clear and convincing evidence" to "more likely than not." Once again, the rationale for this change is that it will "balance the rights of the accused with the rights of community members who expect a safe and peaceful environment in which to pursue their education." But that is a non sequitur. After all, the fact that one must prove guilt "beyond a reasonable doubt" in a criminal trial does not serve to undermine "a safe and peaceful environment" in the broader community. The standard of proof simply recognizes that a specific level of certainty is appropriate before punishing a student, and the current University standard further recognizes – quite properly, in our view – that it should be at a level higher than a toss of a coin might predict.

The SRRC explains that "sanctioning for the violation is in the interest of community wholeness," but "community wholeness" is promoted by the current standard. All that the proposed change does is make it easier to find students guilty of disciplinary infractions. But ease of conviction is not a sufficient justification, without much more, to lower the standard of proof. Absent strong evidence that use of a "clear and convincing" standard has made charges impossible to prove (which is clearly not the case), we oppose such a significant change in disciplinary policy.

3. A proposal has been made to amend §9.24.10 to expand the disciplinary system's jurisdiction over off-campus conduct of students if the "alleged offender is repeatedly arrested or cited for violating local, state or federal laws." The Committee report explains that this will allow the University to exercise disciplinary action over such far-ranging (and open-ended) matters as off-campus "harassment" and "excessive alcohol consumption." We believe the University's focus should be on conduct that directly affects and harms students in the University setting, as the policy currently envisions. In the absence of any such allegations, we do not believe it should be the University's business to control, much less punish, a student's off-campus conduct.

It is not enough to say that the University will use this new and broad authority sparingly. The power authorized by this rule change is not narrowly circumscribed, and it casts an inappropriately long shadow over the private conduct of students. College students may not always act like adults, but it is just as improper for the University to act against them "in loco parentis" for conduct taking place outside the school setting.

4. The expansion of administrative search powers proposed by the SRRC is quite troubling. As we understand the changes, a current "plain view" search that can be authorized in writing is being extended to allow verbally authorized non-consensual searches of "closet and refrigerator contents, and a quick look under and around surfaces." These changes are not minor, and they are certainly not a mere clarification of the term "plain view." Once the University is given the authority to begin opening things, whether refrigerators or closets, the principled concept of "plain view" disappears. And once one accepts the idea that closet and refrigerator doors can be opened, future expansions to, for example, desk or bureau drawers are inevitable. After all, one would be hard-pressed to draw a principled distinction between a closet and a drawer. The proposed changes, in our view, unjustifiably diminish students' privacy rights.

5. Finally, we must close by noting one change that was *not* recommended by the SRRC, and that was to the strict secrecy surrounding disciplinary proceedings. The other proposed policy changes that we have discussed have the clear effect of making it easier to convict students. Yet they are being offered in a context where the accused has no right to request an open hearing. Thus, even as the rules seek to reduce (from the defendant's viewpoint) the fairness of the proceedings, the community is prevented from evaluating for itself their fairness. U.S. Supreme Court Justice Louis Brandeis famously referred to sunlight being the best disinfectant, and it holds true here. There is something particularly troubling about adopting a series of recommendations like these at the same time that the procedures it loosens will play out in secret. This can hardly serve to inspire confidence in the disciplinary process as a whole, or these changes in particular.

We hope that you will give our views careful consideration. Thank you in advance for your attention to them.

Sincerely,

Steven Brown
Executive Director

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NEWS RELEASE **MONDAY, DECEMBER 4, 2006**

ACLU FILES FREE SPEECH SUIT AGAINST RHODE ISLAND COLLEGE FOR CENSORING REPRODUCTIVE RIGHTS SIGN DISPLAY

The ACLU of Rhode Island today filed a federal lawsuit against Rhode Island College for censoring a sign display supporting reproductive freedom that was sponsored by a student women's rights group on campus. The signs were taken down after administrators received objections about them from a priest. The lawsuit also challenges a new sign policy that the college has adopted in response to this incident. The suit, filed by ACLU volunteer attorney Jennifer Azevedo, argues that the college's actions and the sign policy violate the First Amendment rights of the student group, the Women's Studies Organization (WSO) of RIC, and its three student officers, Nichole Aguiar, Sarah Satterlee and Jennifer Magaw.

In November of last year, the WSO planned an event involving expression of the group's views on reproductive freedom. The plan involved putting up a series of signs on a grassy area beside the entrance road on RIC property. The signs stated, "Keep your rosaries off our ovaries", "Our bodies, our choice", "Brought to you by RIC Women's Studies Organization" and were intended to coincide with a general day of activism on women's issues to take place on December 5, 2005.

A year ago this evening, shortly after the signs went up, a priest drove onto the campus to conduct a weekly Catholic Mass at the home of RIC President John Nazarian. The priest observed the signs and made reference to them at the weekly service. President Nazarian immediately contacted the campus police and, after talking with them, ordered the signs taken down. President Nazarian subsequently advised the students that there were additional approval stages required to post signs, even though they had previously been assured by administration officials that they had followed all the necessary steps.

The lawsuit notes that both before and since September 2006, when the college adopted a formal policy generally restricting signs alongside the road entrances to the RIC campus, a variety of temporary signs (including signs for the recent local and national elections) have been posted by students, organizations, and the College itself in apparent violation of the policy, but with no attempt by the College to have them immediately removed. The lawsuit asks the court to declare unconstitutional both the College's censorship of the WSO signs and the College's new, selectively-enforced signage policy, and to award unspecified damages to the plaintiffs for violation of their First Amendment rights.

WSO President Nichole Aguiar said today, "College is a place for the free expression of ideas. RIC has denied our organization those rights and we have decided to take action to ensure that RIC is a better place for all students." Added RIACLU volunteer Jennifer Azevedo: "It is unfortunate to see the free speech rights of students on such an important public issue violated by an institution of higher education, and we are hopeful for a favorable court decision vindicating those rights."

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April 19, 2007

Neil Leston, President
URI Student Senate
Memorial Union, Room 201
50 Lower College Road
Kingston, RI 02881

Dear Mr. Leston:

On behalf of the Rhode Island Affiliate of the ACLU, I am writing to express our deep concern about the Student Senate's attempts to impose sanctions on the URI College Republicans for the group's free speech activities. We call upon Senate members to halt these efforts, which we believe are both counter-productive and inimical to the critical goal of any university in promoting wide-ranging, robust and uninhibited speech on political matters.

We have reviewed the various documents and news articles relating to this matter, and we fully concur with President Carothers that the First Amendment simply does not allow the Student Senate to require the College Republicans "to make certain representations that are clearly not their own." It would be unfortunate if the Student Senate were to show less concern for the free speech rights of its fellow students than does the university administration.

I do not wish to reiterate the many points that have already been made by others about this dispute, but in light of the extreme importance of the issues raised by this controversy, I believe a few additional comments are in order.

First, it must be emphasized that the analysis contained in SOARC Chairman Matthew Yates' letter, claiming that no free speech issues are involved in this dispute, simply does not stand up to the most minimal constitutional scrutiny. The claim that the First Amendment allows the "compelled speech of facts" in a political context like this is extremely problematic. If the College Republicans can be forced to submit a letter providing a "brief and accurate" description of the Student Senate's anti-discrimination provisions with which they may disagree, can a student civil rights group supporting racial goals in hiring be forced to submit a letter providing a "brief and accurate" description of U.S. Supreme Court decisions that have ruled various governmental affirmative action policies and statutes unconstitutional?

In any event, the requirement that the group provide a "brief and accurate" description of University non-discrimination provisions completely ignores the fundamental point that a major aspect of the current dispute revolves around the question of *exactly what those provisions cover*. It is the position of the College Republicans that the publication of an advertisement for an unconsummated scholarship program does not violate the Student Senate by-laws requiring non-discrimination by student organizations. We consider this to be an eminently sensible position. That some members of the Student Senate clearly disagree only demonstrates that the forced submission of an "accurate" description of the regulations is not quite as simple or "factual" as some might think.

Like so many issues of freedom of speech, it is also worth noting the indivisibility of the principles involved. While the College Republicans may not wish to give credit where it is due, we must note that the theme underlying this exploit is closely related to actions promoted by women's rights groups a few years ago. Through a quick Internet search, we found references to earlier "discriminatory" bake sales conducted on college campuses and elsewhere by feminist groups to protest unequal pay in the workplace. For example, a summer 2002 newsletter of the Madison, Wisconsin chapter of NOW references a "Pay Equity Bake Sale," where it raised $200. According to the newsletter, in order to "raise public awareness of the pay gap between men and women in the USA, we sold baked goods to women for 75 cents and to men for $1.00." The same year, the Feminist Majority Leadership Alliance, a student club at San Francisco State University, held a similar bake sale. In each of these instances, as with the College Republicans, political clubs engaged in one-time activities that were clearly efforts at political speech designed to make a political point.

As the above suggests, there was nothing novel in this stunt. In fact, just three years ago, College Republicans on the Roger Williams University campus did the very same thing, offering a whites-only scholarship in an attempt to make a statement about affirmative action. That endeavor similarly generated controversy and calls in the Student Senate for limitation on the group's free speech activities. What was true then is just as true now: those efforts only gave the Republican club even more attention to their cause while diverting attention from a legitimate debate about affirmative action which is at the center of this controversy.

It is a truism, but one worth repeating, that the cure for "bad" speech is not its censorship – or, in this case, compelled speech – but instead the exercise of "good" speech by others. So it is with this controversy. We hope that the Student Senate will consider this matter carefully and both reject efforts to de-recognize the URI College Republicans and reverse the demands imposed upon the group by the SOARC.

Thank you in advance for considering our views.

Sincerely,

Steven Brown
Executive Director

cc: President Robert Carothers
Vice-President Thomas Dougan
Matthew Yates, SOARC
Ryan Bilodeau, URI College Republicans

ACLU
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November 19, 2008

President Robert Carothers
University of Rhode Island
35 Campus Avenue
Kingston, RI 02881

BY MAIL AND EMAIL

Dear President Carothers:

We have recently been contacted by eight student members of the URI women's lacrosse team, regarding punishment that has been inflicted upon them and the rest of the team by the Club Sports Intramural Council ("Council"). Those students are xxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxx ("complainants"). Because we believe they have raised a number of legitimate concerns about the underlying basis for the Council's intervention, because they and other teammates appear to have been punished through a very flawed and troubling process, and because we believe there are credible claims of gender bias in the Council's action, we are writing to request that you intervene to rescind these penalties.

Since our concerns are directly tied to many of the facts surrounding both the incident prompting the punishment and the process by which the penalties were imposed, a somewhat detailed recitation of those facts follows.

This complaint stems from a fight that took place in the early morning hours of April 4, 2008 on the grounds of a private residence. The police reports documenting what happened are more than 20 pages long, so it is fair to say that some questions still remain about exactly what happened that morning. Nonetheless, the record also appears to present a number of uncontested facts. First, the fight took place at an off-campus residence in which four members of the women's lacrosse team resided. It occurred in the context of a birthday party for one of those residents, who was a senior. The birthday party was an invitation-only event, and invitees included selected members of the women's lacrosse team and the men's lacrosse team, as well as a number of other individuals. Although there are disputes about exactly what triggered the brawl, it is clear that the fight broke out after 8 to 10 uninvited members of the men's lacrosse team showed up to the house, and at least four of them remained longer than desired after having been asked to leave.

A fair reading of the police reports also strongly suggests that the physical confrontation leading to police involvement was started by a member of the men's lacrosse team, who hit a partygoer with a beer bottle, and was joined in by other members of the men's team. There also appear to be some grounds to believe that three female lacrosse team members, all of whom were seniors at the time, may thereafter have assaulted the men's team member who had wielded the

beer bottle. Of the eleven people charged with offenses by the Narragansett police, the only women lacrosse team members charged were the three seniors. To the best of our knowledge, all the charges were eventually dismissed.

Finally, it is undisputed that none of the eight complainants was at the party, invited to the party, or had any direct knowledge as to what happened at the party. The same holds true for some other members of the women's team who face the same sanctions as these complainants.

A brief summary of the process initiated by the Council is also critical to understanding our concerns about what happened. Although there was a collective women's team meeting with Brian Fetky, coordinator of club sports, shortly after the incident occurred, no other direct contact took place between the complainants and investigators for the Council prior to a meeting of the Council's executive council on May 12 to consider sanctions. The first formal notice that the complainants received about Council action came in a letter to them dated May 30, 2008 – well after the school year had ended – from Eric Litvinoff, President of the Council, and Mr. Fetky. The letter indicated that the executive council of the Council, "based on the evidence and information in the police report and from talking to several investigators in the process," had decided to impose a series of significant sanctions. The letter, addressed to "University of Rhode Island Club Sport Athlete," made no distinction between the men and women's teams in terms of the punishment being recommended. The sanctions included, *inter alia*, a team suspension for the fall semester, a freeze of the team's budget until the spring semester, imposition of a fine, and a requirement that team members each perform ten hours of community service. The letter said the penalties were based on team "involvement in the altercation and lack of cooperation with the investigation."

Except for the imposition of a fine, these sanctions against the women's team were approved by the full Council at a meeting on September 18th. The sanction imposed on the men's team was much less severe. There was no team suspension, budget freeze or community service requirement. Instead, only three of the men's team members alleged to have been directly involved in the brawl were suspended from the team for the fall semester; another member was suspended for one game. The only sanction imposed on the men's team as a whole was a requirement that members "go through an alcohol awareness program and give a presentation to the Club Sports Committee."

Our deep concerns about the Council's actions fall into three general categories and they are individually addressed below.

1. **Designation as a "team" offense**. From the beginning, the complainants have, quite rightly in our view, raised concerns about the whole notion of a "team offense" having occurred. It is undisputed that only some members of the women's lacrosse team had been invited to the party. Many were completely unaware of it. To consider the party a "team event" because it was celebrating the birthday of a team member and thus, not surprisingly, included some members of the team is like calling a professor's birthday celebration at a local pub with a handful of colleagues a "faculty meeting." The party simply was not a team activity in any logical sense of the word. Indeed, since four team members lived together in the residence where the incident took place, the Council's reasoning would suggest that virtually anything that occurred at the

house could be attributable to the team. Presumably, if the four students drank beer at dinner one night, the entire lacrosse team could face sanctions for the housemates' activity.

Treating the incident as a team offense is made all the more absurd by the fact that the only women's team members ever alleged to have been involved in the altercation were all seniors at the time and, therefore, not around for any of the Council's punishment imposed against the team this year. But even assuming the Council felt it had some grounds to punish the team as a whole – for example, suspending team play for a semester in order to serve as some sort of (misguided) message to the vast majority of team members who had no control over what happened – it was another step entirely, and simply beyond the bounds of reasonableness, to also punish the team members *individually*. Yet that is precisely what these sanctions do. The complainants have been told they will be required to perform ten hours of community service for the "offense" of – well, of simply being a member of the women's lacrosse team. After all, it is not alleged that the complainants were at the party, that they were invited to the party, or that they had any first-hand information about the event.[1] The guilt-by-association implied by the May 30th letter's reference to the team's "involvement in the altercation" is irrational and incomprehensible. It is impossible to imagine exactly what lesson the Council was trying to impart to these innocent complainants by imposing such a sanction.

2. **The Council's procedures**. The May 30th letter from Mr. Levitkoff and Mr. Fetky advised the complainants that the "teams need to be educated on proper conduct and to be aware of the consequences of their actions." The same might be said of the Council. The meagerness of its "standards of conduct and disciplinary procedures" as contained in the Club Sports Resource Manual is troubling enough, but it is unclear whether the Council even followed those minimal standards. According to the manual, once an incident report has been filed, "two representatives from the team will meet with the executive council" to go over the report. As far as the complainants have been able to determine, no such meeting ever took place, nor were the complainants ever provided a copy of this incident report. Instead, team members were called together for a collective meeting where they were informed that the matter was being investigated and were afforded the chance to talk with a school counselor. For the complainants, that seemed to be the end of the matter until, much to their shock, they received the May 30th letter.[2]

The Council's notification letter was also maddeningly vague. As noted above, the letter based the proposed punishment on the team's "involvement in the altercation and lack of cooperation with the investigation." As for the first justification, the only women's team members alleged to have been involved in the fight were seniors who had graduated and thus

[1] The allegation concerning the team's alleged "lack of cooperation" is discussed *infra*.

[2] Most of the complainants were also called in for a one-on-one interview with a representative from the Student Life office as part of the university's separate disciplinary investigation of the brawl. Although the complainants feel they were subjected to unfair and accusatory questioning at these meetings, which could be the subject of a separate letter of complaint, the Council never indicated to the students that these interviews – on a totally distinct track from the Council's investigation – were at all relevant to the Council proceedings. Certainly, no evidence of relevance was ever provided to the complainants by the Council. In fact, at least two of the complainants were asked to come in for an individual meeting with the Student Life official and, unable to make the interview, were never asked to reschedule it. In any event, any attempt to equate the complainants' failure to provide information they did not have with a "lack of cooperation" merits no discussion.

were not subject to the Council's sanctions. There were no allegations that any of the *current* team members had been involved in the fight. In fact, the vast majority of non-senior members were not even at the party. Basing any punishment on the team's "involvement in the altercation" is completely untenable.

Therefore, any possible sanctions must stand or fall on the team's alleged "lack of cooperation." Yet nowhere is this "lack of cooperation" explained. The police reports, on which the Council purportedly based this conclusion, provide no such clue, as we were unable to find any mention in them of a lack of cooperation by the women. To the contrary, the reports are replete with interviews with many of the participants and witnesses, including those from the women's lacrosse team. In fact, the police reports indicate that it was *underclassmen members of the women's team* (i.e., the members who are bearing the Council's punishment for "non-cooperation") who provided information to the school and police linking the three female seniors to the assault.[3] Although sports officials did apparently interview the three seniors and a few of the other team members who were at the party, they did not individually meet with the complainants who, consequently, never even had an opportunity to show a "lack of cooperation."

Thus, other than the Council's say-so, there is absolutely no evidence in the record that the complainants have seen that provides even a hint of the non-cooperation that led to these serious sanctions. There is nothing indicating what this alleged non-cooperation consisted of or how, or how many, team members even fit into the category of failing to cooperate. How was the team expected to defend itself against such a charge?

Under these circumstances, we are particularly astonished that the Council deemed this non-cooperation a "major" offense, authorizing the most serious penalties available. It is sufficiently disconcerting that the Council's procedures differentiate among minor, moderate and major penalties without offering any definitions of these terms; its categorization of the offense in this case as "major" defies belief. While one might understand the Council deeming assault of fellow students with beer bottles to be worthy of a "major penalty" (assuming that team penalties should apply to individual members' conduct, which we would dispute), it is quite shocking that the Council found a "failure to cooperate" deserving of the same level of severity. The severity is even more inexplicable in light of the nebulous (or, more accurately, virtually non-existent) evidence in support of the finding. Perhaps most startling is that, based on the sanctions that were actually imposed on the men's team (discussed further below), the Council appears to have considered non-cooperation as being *more* serious than actual assaults on fellow students.[4]

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[3] In addition, if we rely on the police reports to count heads, it appears that there were, at most, only a few non-senior members of the team who may have even witnessed the brawl and, therefore, only a few whom the Council could even try to allege had been non-cooperative. (Obviously, any student not there could provide, at most, only rumor and innuendo, which we assume the Council neither sought nor wanted.) Although the police reports do suggest that one team member may not have been forthcoming in divulging her direct knowledge of the three seniors' alleged participation in the fight, there is no actual finding to that effect. In any event, we trust that the Council was not claiming that this one insinuation about one team member constituted the grounds for the Council's finding of *team* non-cooperation, particularly since the information being relied upon came from team members who did just what the Council said had not been done – cooperated.

[4] We do not know what, if any, punishment, may have been imposed through the university's regular disciplinary process on students who were involved in the fight, but this, of course, would be irrelevant to the Council's determination of what penalties should be imposed against the *teams themselves or persons not even present* for the fight.

All of this only highlights the unacceptable arbitrariness inherent in the minimal, vague and open-ended nature of the Council's procedures and standards.

3. **The disparate treatment of the men's and women's teams**. Finally, we must agree with the views of the complainants who believe that they were subjected to discriminatory treatment by the Council. After examining all the facts, it is difficult not to reach that conclusion. As explained above, none of the women's team members who face the Council's penalties was ever charged with illegal or improper conduct. The vast majority of the current members were not even present when the brawl took place. In contrast, three of the *men's* team members who were charged with criminal offenses (and, we assume, some of the other team members who went to the party uninvited) *are* still on the team. Yet the Council saw fit to punish only those three individuals (and one other), not the team itself. In light of the team punishments imposed on the women, the Council's stand is all the more surprising when one considers that it was the *men* who allegedly initiated the brawl, and that it was the *men* who had gone to the women's residence uninvited in the first place, not vice versa, which led to the brawl. In other words, even without trying to untangle all of the factual disputes as to precisely what happened on the morning of April 4th, it is abundantly clear that, to the extent any culpability lies, it clearly falls more on members of the men's team than the women's team.

The vast difference in the punishment imposed is thus unfathomable. The only rationale provided by the Council, as stated in the minutes of the September 18th meeting, is that "the men's team was very cooperative with the investigation, but the women's team was hesitant to cooperate."[5] Leaving aside the Council's very questionable decision to focus more on the issue of cooperation than on culpability for the events of April 4th, and leaving aside the lack of any evidence from the police reports that the men were any more cooperative than the women, the solicitous treatment provided the men's team is unjustifiable merely from reviewing the minutes of the Council's own meeting.

According to those minutes, when one of the representatives from the men's team was given the opportunity to speak to the Council, "it seemed like, in his version, that the lacrosse players involved wanted nothing to do with the fight and only participated in self defense." In other words, at the Council's own hearing, a full five months after the brawl took place, a men's team representative was still denying that he or any members of his team involved in the fight had done anything wrong. Yet the Council decided they deserved less punishment than the women because of their "cooperation"! This is particularly ironic considering that the alleged basis for the Council's actions, as expressed in its May 30th letter, was that "both teams need to be educated on proper conduct and to *be aware of the consequences of their actions*." (emphasis added)

It is impossible to reconcile those stated goals with the disparate punishment imposed against the women. Consider:

[5] Whether or not it was intentional, we find this wording quite striking. Note that it doesn't state that the women failed to cooperate, only that they were "hesitant" to do so. In light of the absence of any direct evidence of non-cooperation, one is left wondering whether the penalties against the team revolved solely upon a belief that the women somehow didn't show enough eagerness in their cooperation, whatever that means.

- The complainants, who were not at the party or even aware of it, are barred (like the rest of her teammates) from playing lacrosse for an entire semester. The men's team, including some of the members who were present at the fight and whose uninvited presence was clearly a catalyst for what transpired, does not miss out on even one game.[6]

- The complainants, who were not at the party or even aware of it, are required (like the rest of their teammates) to perform ten hours of community service, while no member of the men's team, including those who were at the party uninvited – even those who allegedly participated in the brawl – has any such sanction imposed on them.

- Spokespeople for the women's team plead for leniency on behalf of the team members who everybody acknowledges had absolutely nothing to do with the April 4th brawl or its aftermath, yet their team activity is still suspended for a semester and all the team's members are required to perform community service. A spokesperson for the men's team refuses to take any responsibility for the actions of members whom everybody acknowledges *were* involved in, or present at, the fight, and the team gets rewarded for its "cooperation" by having no suspension of any games whatsoever.[7]

In short, the Council's generous treatment of the men represents an intolerable double standard. It most certainly did not educate them on "proper conduct" or on an awareness of the "consequences of their actions." We hesitate to think of the lesson it *did* teach them. Quite clearly, dispensing with a semester of women's lacrosse was much more palatable to the Council than the idea of doing the same for men's lacrosse, even though, by any reasonable measure, the women's team bore much less blame. In sum, claims of discriminatory treatment are impossible to discount.

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[6] To add insult to injury, we have been apprised that at least two of the three men's team members who were suspended for the fall season – and possibly all three of them – are actually studying abroad this semester and thus not missing any games they would not have missed anyway. Since the Council did not meet to impose the penalties until after the fall semester had started, they should have been well aware of this situation if it is true.

[7] It also remains quite puzzling to us as to how this differential punishment even arose. As we previously noted, the May 30th letter unmistakably implied that the recommended penalties were to apply to both the men's and women's teams and their members. The letter was addressed to "club sport athletes," not the women's team. It discussed the "sanctions brought against the *Men's and Women's* Lacrosse teams." The final paragraph of this short letter used the phrase "both teams" three times. Many of the complainants therefore assumed, quite understandably, that the list of sanctions in the letter they received applied to both teams. However, it is at least one complainant's recollection that at the September 18th Council meeting, it was disclosed that the men had received a different letter that listed the less severe penalties ultimately imposed on them. If this is so, it raises legitimate questions as to whether the letter to the women was deliberately worded in such a misleading way, in order to keep them in the dark that they were facing much more severe punishment than the men.

On the other hand, it is just as problematic if this recollection is incorrect and the teams *did* receive the same letter. Since the investigation had already been completed when the May 30th letter went out, any Council reliance in September on the women's alleged "lack of cooperation" to justify differential sanctions could only be seen as a *post hoc* rationalization for changing the recommended punishment solely to benefit the men.

Frankly, the university's obliviousness to the women's distress at the inconsistent penalties that were administered is itself a tremendous cause for concern. Less than a week ago, Steven Maurano from the Board of Governors wrote one of the women's team parents in response to the parent's complaint about the Council's actions. While expressing sympathy for the women's team's concerns, Mr. Maurano's response waxes eloquent on the notion that "when you belong to a group, team or organization . . . your actions may impact the future of that entity as well as its other members, whether they were involved in those actions or not. Clearly, that was the case in this instance, as unfortunate that may be." Quite unclearly, however, his response fails to explain at all why this principle was somehow deemed inapplicable to the men – who unambiguously bore even more responsibility for what happened than the punished women, yet who, unlike the women's team, suffered no meaningful consequences whatsoever as a team.

Parents of some of the women's team members have already pointed out most of these concerns to the Council, the sports club and other school officials. Unlike them, we have no personal or vested interest in urging reversal of the Council's decision. Based on the information we have reviewed, however, we can reach no other conclusion than that those concerns are well-founded.

The Council's actions have, we believe, done a true disservice to the members of the women's lacrosse team and to the mission of the University. This issue is now in your hands. We strongly urge that, in the interests of fundamental fairness and of equal treatment, the discipline imposed by the Council against the complainants and the women's lacrosse team members be rescinded. We recognize that it is too late to undo some of the punishment, but a reversal of the Council's actions against the women *in toto* would at least vindicate the members' concerns about unfair treatment, would remove the reputational stain that the Council's punishment has placed upon them on campus, and would send the Council a message about the need to be much less cavalier in the way it metes out punishment.

In light of the length of the letter, I have not included the supporting documentation upon which we rely for our conclusions. However, I would be happy to share those materials with you at your request.

Thank you in advance for your prompt attention to this important matter, and I look forward to hearing back from you about it.

Sincerely,

Steven Brown
Executive Director

cc: Thomas Dougan, Vice-President of Student Affairs
Jodi Hawkins, Director of Recreational Services
Brian Fetky, Coordinator of Club Sports

CIVIL LIBERTIES OF STUDENTS IN HIGHER EDUCATION

by Daniel Weisman

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Students in higher education face a variety of challenges to their civil liberties, through such mechanisms as censorship, thought and behavior codes, private and arbitrary disciplinary procedures, and release of records to governmental authorities and corporations. This paper reviews students' legal rights in private and public schools, some typical civil rights challenges experienced by students, and recent court cases. Findings include: the freedoms of speech, press and assembly are violated most often (e.g., campus hate speech codes) when students take unpopular or "politically incorrect" positions; when violations are challenged, or made public, the college or university usually backs down or loses in court; the courts have not been as supportive of privacy rights as they have of speech and due process rights; while private schools are not literally subject to constitutional requirements, the courts have held them to similar standards for other reasons; and for the most part, the use of Internet resources does not change student rights, but there are some differences. The paper concludes with some suggestions for students and university administrators.

More than 15 million students are enrolled in 3,600 colleges and universities across the country (U.S. Bureau of the Census, 2002; Foundation for Individual Rights in Education [FIRE], 2002). In addition to their studies and other responsibilities, they face a variety of challenges to their civil liberties, including but not limited to their rights to speech, press, assembly, privacy and due process (Kors and Silverglate, 1998; FIRE, 2002). In the very environments in which they and their families might reasonably expect to find fairness, intellectual respect, expansive freedom of inquiry and open exploration of the human condition, students often encounter censorship, thought and behavior codes, private and arbitrary disciplinary procedures, and release of records to governmental authorities and corporations.

This paper will begin with a review of the legal bases for most student rights that come under attack by college and university administrators, examine some of the more prevalent civil rights challenges experienced by students over the last twenty years, explain how the courts have responded when students sought redress over rights violations, and suggest some alternative approaches to balancing individual rights and the interests of institutions of higher education.

THE BASIS FOR STUDENT RIGHTS THAT ARE OFTEN VIOLATED

While there is no singular body of law delineating the rights of students, there are several laws and traditional practices that guarantee basic liberties to students who attend either public or private colleges or universities. For students in public institutions of higher education, the U.S. Constitution, especially the Bill of Rights and the Fourteenth Amendment, describe the limits of governmental actions with regard to individuals. For example, freedoms of speech, assembly, and religion (free exercise and establishment) are contained within the First Amendment. The Fifth and Fourteenth Amendments define due process and equal protection.

Besides the U.S. Constitution, the U.S. Congress has enacted legislation protecting the rights of particularly vulnerable people. For example, the Family Rights and Privacy Act of 1974 (FERPA) protects the privacy of some student records, and the Civil Rights Act of 1964 (and subsequent amendments) addresses workplace discrimination, unequal treatment, harassment and other abuses. Often, these laws apply to both private and public institutions, albeit differently, extending the umbrella of protection beyond public colleges.

States have the power to expand (but not reduce) civil rights and liberties of individuals, so state constitutions, statutes and tort law may define student rights beyond those protected federally. At the local level, public and private campuses may be guided by collective bargaining agreements (with faculty, staff and, more recently, graduate students employed as research or teaching assistants), and/or institutional mission statements and other literature describing the philosophy of the college or university (e.g., student handbook) and amounting to a binding contract.

These sources of student rights, like much of the U.S. legal system, are constantly shifting for several reasons. The concept of individual rights is dynamic and evolves as our society grows (Walker, 1990, pp.6-7). Events such as the recent terrorist attacks create new sensitivities, reactions, fears and, ultimately, policies at both private and public levels. The U.S. population is constantly changing, placing burdens on colleges to be appropriate and responsive to all student populations. Technologies create new opportunities for educational inquiry as well as rights abuses (e.g., the Internet). The U.S. legal system is fragmented to the extent that laws and regulations are made at nine different levels: administrative, legislative and judicial branches at each of three locales: local, state and federal. It is also a system that continually reshapes interpretations of the law on the basis of situation-specific case decisions. So the same Constitutional phrase can be applied differently by the courts in response to the minute details of individual lawsuits.

The result is a dynamic system that continually refines and redefines the law through legislative, administrative and judicial processes. What is certain is that most of the issues that affect higher education, as well as other arenas of human enterprise,

continue to evolve, with the consequence that student, faculty, staff and institutional rights also shift over time.

STUDENTS' CIVIL LIBERTIES AT RISK AND COURT ACTIONS

As stated above, this discussion will focus on student civil liberties issues that have received the most attention in recent years either in the courts or in other arenas of public policy. These issues fall into categories of speech (including press and assembly), due process and privacy. Following are some illustrative recent cases for each of the three categories.

SPEECH (PRESS AND ASSEMBLY)

A common denominator among speech cases is an episode of offensive expression by a member of the campus community. The statements are usually vulgar, insensitive, hurtful and widely repudiated. But the issue here is not the message but the principle of free expression on both public and private campuses. When the constitutional (public colleges) and contractual (private colleges) right to speech comes into conflict with the sensitivities of college administrators, the First Amendment often is discarded and the speaker's First Amendments rights are violated.

Student newspapers, published both on and off campus, have been confiscated by college officials, who object to content, veracity or political correctness of messages or ads. In some cases, students have "stolen" free student newspapers that were stacked up in trafficked areas of the campus, with no response from college officials. A recent federal court case involved a student yearbook confiscated by officials at Kentucky State University, because the students included a current events section and made the cover purple instead of KSU's colors (Kincaid v. Gibson). In that case, decided in 2001, a federal appeals court ruled that KSU violated students' rights: "We will not sanction a reading of the First Amendment that permits government officials to censor expression in a limited public forum in order to coerce speech that pleases the government," according to Judge R. Guy Cole, writing for the majority (Student Press Law Center [SPLC], 2001).

The freedom of assembly is challenged sometimes, especially when the student group embraces an unpopular cause. In April, 2002, for example, 41 students were arrested and charged with trespassing at the University of California at Berkeley for holding a pro-Palestinian rally. The student group, Students for Justice in Palestine, was also suspended. The suspension was later rescinded, but the university's actions prompted the ACLU to comment: "The University's reaction to the sit-in has a chilling effect on the students' right to free speech, especially at a time when freedom of expression is so critical to our democracy. Expressing ideas that are controversial and unpopular must be vigilantly protected. The important First Amendment principles at

stake do not permit administrative action that appears to be unprecedented and to make an example of this controversial group" (American Civil Liberties Union [ACLU], 2002a).

Sometimes universities seek to restrict student speech as an easy solution to difficult public image problems. In May, 2002, a federal district court ruled that the University of Illinois "violated the free speech rights of students and faculty when they required 'pre-clearance' for any statements about the school's controversial use of Native American Chief Illiniwek as a mascot" (ACLU, 2002b). An ACLU press release assessed the implications of the decision: "Citing a 1977 case from the U.S. Court of Appeals for the Eighth Circuit, the decision notes, 'it is axiomatic that the First Amendment must flourish as much in the academic setting as anywhere else. To invoke censorship in an academic environment is hardly the recognition of a healthy democratic society'" (ACLU, 2002b).

The landmark case that is widely cited as the foundation of students' rights was Tinker v. Des Moines Independent Community School District (393 US 503 [1969]). Several students were suspended from a public high school for wearing black armbands in protest of the Vietnam War. The school system defended its action by expressing fear that the demonstration would spark student unrest. The United States Supreme Court found that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," and school officials may not punish or prohibit student speech unless they can clearly demonstrate that it will result in a material and substantial disruption of normal school activities or invades the rights of others. "In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," wrote Justice Abe Fortas for the majority. "In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution." [Quotes from the decision.] Subsequent court decisions asserting college students' rights to free speech frequently have referenced Tinker.

Private colleges are not immune from free speech issues. According to the Student Press Law Center (SPLC), while private institutions usually are not required to conform with constitutional protections, other factors may come into play, notably, the schools' own rules, guidelines, literature and catalogs (SPLC, 1995). An example is a case at Princeton University, which began in April, 1978, when a non-student (Chris Schmid), who was distributing literature from the U.S. Labor Party, was arrested and prosecuted for trespassing. In state court, Princeton University argued that its "institutional academic freedom," i.e., power to control its own environment, was sufficient grounds to eject Mr. Schmid and to sustain trespassing charges. Schmid countered that his free speech and assembly rights (as enumerated in both the U.S. and N.J. Constitutions) were

violated by the private institution. The court eventually sided with Schmid (State v. Schmid), but not on Constitutional grounds, but because Princeton's own literature portrayed itself as an open forum (e.g., from Princeton's regulations: "Free speech and peaceable assembly are basic requirements of the University as a center for free inquiry and the search for knowledge and insight."), so it had violated its own contract with its students and its community (Kors and Silverglate, 1988, pp. 59-63).

The concept of "institutional academic freedom" dates back to 1940, when the American Association of University Professors (AAUP) issued its Statement of Principles on Academic Freedom and Tenure (AAUP, 2002), delineating both faculty and institutional academic freedoms. That document was subsequently legitimized by the U.S. Supreme Court's McCarthy era rejections of loyalty oaths in public institutions (Kors and Silverglate, 1998, pp. 50-59), and has served as a guide for subsequent cases in which faculty and institutional rights have come into conflict.

While some ambiguity regarding academic freedom remains unresolved (AAUP, 2002), the courts have viewed institutional academic freedom as pertaining narrowly to the school's central mission and not as a basis for imposing values on students, with the exception of private (particularly religious) colleges that widely publicize their philosophies in unambiguous terms (Kors and Silverglate, 1998, pp. 52-57). It should be noted that faculty academic freedom was broadly defined in the AAUP's 1940 document (AAUP, 2002. pp. 1-7), and the courts have been more reluctant to set limits on professors' speech than on institutional freedoms, but there are limits on both (Kors and Silverglate, 1998, p. 277). To date, no clear court decision has clarified guides for resolving conflicts between institutional and individual academic freedoms, except for the consistently clear message that "institutional academic freedom supplements, but does not supplant, the First Amendment freedom right of professors" (AAUP, 2002, p. 8).

Student academic freedom has not been specifically defined in the AAUP's 1940 statement or in subsequent case law. But the principles set forth in the AAUP's documents, beginning in 1940 and continuing through the present time, contain widely recognized implications for the implied existence of corollary student academic freedoms, including free expression and freedom to seek truth, disagree and learn (Kors and Silverglate, 1998, p. 52-53).

SPEECH ON THE INTERNET

Over the last two decades, the Internet has become an essential tool for people involved in higher education. For students and faculty, it is both a research tool and a platform for self-expression. It is also a connection to the outside world, and vice versa. For the most part, the principles guiding free speech and freedom of the press apply to the Internet. But, because the Internet is electronic, digital, almost boundless and there is no control

over sources or destinations of information, some special issues arise, some as yet unresolved.

The AAUP (1997) identified two areas which may need to be clarified in the future, both involving sexually explicit materials. First, while university libraries are not required to obtain every book requested by faculty and/or students, there is likely to be discussion about the limits that institutions may want to establish with regard to electronic materials, especially sexually explicit content. At least one federal court has upheld a public university's restrictions of such materials. Second, distribution of print materials is easier to control than posting of electronic products. Of particular concern is avoiding Internet posting of child pornography (AAUP, 1997).

As is the case of speech, content-neutral criteria should guide schools' approaches to managing their interactions with the Internet. Considerations such as time of use and amount of time on line, if applied equitably, are acceptable. But user codes with vague terms or which ban content run afoul of the First Amendment, as do speech codes (AAUP, 1997; SPLC, 1998a). Student press rights on the Internet are similar to those in place for print publications. For example, administrators in public colleges cannot censor or restrict student newspapers' online publication. On the other hand, colleges and universities are not obligated to link student sites to their websites as long as the criteria are content-neutral (SPLC, 1998a).

Internet service providers (ISPs) have been held not liable for their subscribers' messages, so colleges cannot claim they are liable for libelous student messages (SPLC, 1998b). However, students themselves and/or their publications face more exposure to libel cases when they publish electronically because the product can reach more people (SPLC, 1998b). So far, copyright laws apply to the Internet about as they do to print media, so materials should be reproduced with the owners' permission (SPLC, 1998b).

For private colleges and universities, the issues are similar to those discussed in the speech and press sections: these schools are not bound by constitutional guidelines, but they may be committed to speech, press and expression protections for students because of their literature or procedures, or various federal and state laws (SPLC, 1998a).

Privacy issues and the Internet will be reviewed in the privacy section.

HATE SPEECH AND SPEECH CODES

Over the last two decades of the 20th Century, many if not most college campuses have adopted codes or guidelines limiting student speech (Associated Press, 2002). Campus speech codes are usually taken in the interest of protecting minority, female and gay students from harassment or discomforting comments by other students, often in response to a precipitating expression or act with ethnic or racial content (Calleros, 1997). Precise numbers of campuses with hate speech codes are unknown but a survey conducted in 1993 by the National Association of Student Personnel Administrators

found that 47.5% of responding institutions in the region sampled (seven eastern states) had codes in place and another 18.7% were considering adopting codes (Palmer et al., 1997, p. 117).

Campus hate speech codes are usually defended in court (with very little success) on the basis of a 1942 U.S. Supreme Court ruling (Chaplinsky v. New Hampshire), in which the Court established the "fighting words" exception to the First Amendment, and the "hostile environment" concept authored in 1985 by the Equal Employment Opportunity Commission, on the basis of the 1964 Civil Rights Act (Namazi and Cahill, 1994). While the "fighting words" doctrine has declined as a legal justification for speech codes, proponents continue to look for defenses. Namazi and Cahill (1994) suggested constructing an equal opportunity argument, similar to the approach used successfully in the Cleveland school voucher case this year. This approach would characterize hate speech as jeopardizing equal educational opportunity by putting targeted students at a serious disadvantage in classrooms and other campus locations. Equal opportunity enjoys higher status in the Court than fighting words and might stand up to the Court's concern for free speech.

To date, though, the fighting words doctrine is the most current court-tested rationale for campus speech codes. Fighting words are those that "by their very utterance inflict injury or tend to excite an immediate breach of the peace" (Kors and Silverglate, 1998, p. 40). A related doctrine, "group defamation," was coined by the Supreme Court in a 1952 decision, Beauhamais v. Illinois, which forbade expression in public places which "exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots" (Kors and Silverglate, 1998, p. 41).

Almost immediately, the Court began diluting these doctrines and has been doing so consistently since they were first expounded. As campus speech code cases are challenged in the federal courts, the codes are struck down even though they are defended on the bases of "fighting words" and other doctrines that would limit free speech (ACLU, 1996; Kors and Silverglate, 1998, pp. 82-86). The courts have been more tolerant of speech limitations that are "content neutral," that is they apply equally to all groups and messages, and they curtail speech for everyone equally at specified times, places and circumstances. For example, loud speech between Midnight and 7 AM may be banned on campus so everyone can sleep undisturbed (Kors and Silverglate, 1998, p. 47).

The requirement that workplaces must avoid being hostile environments, particularly regarding race and gender, began to be extended to college and university campuses in the late 1980s and has yet to be reviewed by the Supreme Court. However, lower federal courts, citing previous Supreme Court decisions, have consistently ruled that the free speech provisions of the First Amendment take precedence over regulations issued by a federal agency. In 1991, for example, the federal district court in eastern Wisconsin ruled (UWM Post, Inc. et al. v. Board of Regents of the University of

Wisconsin) that the University of Wisconsin's speech code violated the First Amendment, rejecting the hostile environment defense and noting that the EEOC regulations apply to workplaces, not public educational settings (Kors and Silverglate, 1998, pp. 88-91; Palmer et al., 1997, p. 113).

The Supreme Court has provided some help for universities which are interested in balancing collegial environments and free speech. In R.A.V. v. St. Paul (1992), the Court ruled that a city ordinance prohibiting visual messages on public or private property that would arouse negative responses on the basis of race, ethnicity or gender was unconstitutional because the law addressed particular content. In Wisconsin v. Mitchell (1993), the Court ruled that a state law enhancing penalties for crimes that were motivated by bias was constitutional (Palmer et al., 1997, pp. 114-115). While neither case emanated from a college campus, both have implications for how the Court might assess campus codes, yet a survey of college administrators soon after those decisions found that most were not aware of the decisions and even among those who knew of the cases, less than half would apply them to formulation or revision their own campus codes (Palmer et al., 1997, pp. 117-118).

There is a distinction between speech and conduct. The former has been protected in federal and state courts, even on some private campuses, when the consequence is essentially hurt feelings, discomfort or embarrassment. The latter is subject to regulation when it "targets a particular individual" and "interferes with a student's ability to exercise his or her right to participate in the life of the university" (ACLU, 1996). Acts of violence, destruction of property, invasion of privacy and intimidation (e.g., taunting, threatening phone calls) should be punishable under appropriate statutes addressing behavioral actions (ACLU, 1996). But with regard to speech, even tasteless and obnoxious speech, there is no right not to be offended.

DUE PROCESS

Campus speech codes usually result in violations of students' rights to due process in disciplinary proceedings. Typical scenarios involve an offensive statement or an action that is interpreted by campus officials and/or purported victims as offensive, the transgressor being informed by an advisor or other official that he (gender specificity deliberate) has been accused of violating the speech or behavioral code, a closed hearing in which charges are explained and the student is invited to prove his innocence, and the meting out of a disciplinary decision, usually ranging from an official reprimand to suspension or expulsion. There are several civil liberties violations in these proceedings and the courts have repeatedly overturned campus disciplinary punishments.

A well-publicized example of due process and speech codes occurred at the University of Wisconsin in 1987, where a fraternity held a mock slave auction. Under a speech code which was drafted with previous court decisions in mind, students were disciplined for intentionally creating an environment that was hostile towards

education. University officials (including then–Chancellor Donna Shalala) attempted to build the code on the basis of institutional academic freedom (learning environment) and to avoid violating professors' academic freedom by excluding them from the code. Nevertheless the U.S. district court for Eastern Wisconsin found the code unconstitutional primarily because it regulated speech and was vague (Kors and Silverglate, 1998, pp. 167-68).

Due process rights are anchored in the Fifth and 14th Amendments of the Constitution and, over the years, have been separated into categories of substantive and procedural rights. The former pertains to government abuse of its power. The latter covers the procedures that are employed to determine whether an accused person is guilty or innocent. In addition, the Fourth Amendment protects people from unreasonable search and seizure, such as illegal room or Internet account searches.

Procedural rights consist of four components (Kors and Silverglate, 1998, pp 271-275):

Right to prepare a defense and legal counsel Right to cross examine witnesses and accusers Right to a public trial or procedure Right to an impartial trial or procedure.

In a review of 35 instances of speech code enforcement by college and universities, Kors and Silverglate (1998, pp. 151-178) found the common denominator of violations involving some or all of these four elements of procedural due process.

As is the case for free speech, private institutions may find themselves bound to due process requirements also, not for constitutional reasons but because they either embrace procedural rights in their literature or establish a due process procedure, however inadequate (Kors and Silverglate, 1998, p. 296). Two cases in the same state (New York) are illustrative of this issue and its ambiguity. In 1994, Hofstra University fired a faculty member for harassment but the New York State Supreme Court reversed the firing because Hofstra had a procedure that committed the institution to due process (Kors and Silverglate, 1998, p. 296). In 1999, a New York State appellate court dismissed a lawsuit against Cornell University, in which a professor (accused of sexual harassment) alleged that the university's enforcement of its speech code violated his due process rights, even though the allegations turned out to be unfounded (Center for Individual Rights [CIR], 1999).

PRIVACY

The Fourth Amendment provides the constitutional basis for privacy: "The right of the people to be secure in their persons, houses, papers, and effects, against unusual searches and seizures shall not be violated…" Federal laws have both delineated and eroded student rights, notably the Family Educational Rights and Privacy Act of 1974 (FERPA), which forbids release of student records without the student's consent, and the USA/Patriot Act of 2001, which permits government agencies to require colleges and

universities to release student records without students' consent or even knowledge (ACLU, 2002c). [In addition, the states vary on privacy rights they guarantee along 21 different components, such as credit, employment, medical, school records and wiretaps (Electronic Privacy Information Center, 2002).]

Signed on October 26, 2001 by President Bush, the USA/Patriots Act contains numerous provisions in response to the September 11, 2001 terrorist attacks, and remains to be tested in the courts. For students, particularly salient is the new power given to law enforcement officials to obtain secret orders for release of information formerly protected under FERPA, purely on the grounds of the U.S. Attorney General's assertion that the information is needed for a terrorism investigation (ACLU, 2002c). Furthermore, the Act gives federal authorities the right to obtain students' personal and academic information that previously was strictly protected, including campus activities, test scores and financial records (ACLU, 2000c). For foreign students studying in the U.S. on visas, the Act gives federal authorities even more access to information, including the establishment of a national database (ACLU, 2002c).

The Fourth Amendment (public education) and FERPA (public and private schools) otherwise would appear to protect students from release of information to third parties, but the U.S. Supreme Court ruled on June 21, 2002, that FERPA does not include students' right to sue institutions if they released confidential information (Greenhouse, 2002). The case involved a student at a private university who sued the school because confidential and inaccurate information had been released, costing the student a job. The court ruled on the basis of an individual's right to sue, not the validity of FERPA, so it appears that Congress could choose to close this loophole in the law. Earlier in 2002, the ACLU reported that the Nevada public university system sold the names and address of former students to credit card companies, an apparent violation of FERPA (ACLU, 2002d).

Another privacy concern is the use of Social Security Numbers as student identification numbers. This is a prevalent practice in colleges and universities, and poses threats to students' privacy because of the possibility of identify theft, easy access by third parties to students' computer accounts, library privileges and records, grades and other records, and breaking into students' bank accounts, all of which have occurred (Privacy Rights Clearinghouse [PRC], 2001; Schwartz, 2002). In 1992, a federal district court ruled that Rutgers University's use of SSNs on class rosters violated students' privacy rights but Rutgers was granted an exception to FERPA, permitting it to use SSNs as student identification numbers (PRC, 2001). In July, 2002, news stories reported that Princeton University had accessed Yale University's web site to obtain data about students, on the basis of SSNs (Schwartz, 2002).

Privacy on the Internet remains an unresolved issue. On the one hand, anything posted is likely to be seen by unintended people because most email is insecure. So, the sender's expectation should be that there is less privacy than with print mail (AAUP, 1997). Also, the fact that the institution owns the hardware and manages the network

may foster the (unsubstantiated) perception that it should have some access to the content (AAUP, 1997). In sum, as the Internet and email have become essential elements for faculty and students, privacy protections have not followed and need to be addressed (AAUP, 1997).

SUMMARY AND SUGGESTIONS

The rights of students at public and private colleges and universities, like civil liberties for many vulnerable populations, are both at risk and in flux. Some rights are more secure than others. At the administrative level, there is persuasive evidence that students' rights are abused frequently and the vast number of violations go unnoticed and unquestioned. When rights violations are challenged, the results vary by topic area and auspice of the school.

The freedoms of speech, press and assembly are violated most often when students take unpopular or "politically incorrect" positions, or express themselves in ways that embarrass the institution. A recent example was at Ohio State University's June, 2002 commencement exercise when some students turned their backs on the featured speaker, President Bush, and were ejected by the police (Bush and Free Speech, 2002). Institutions' procedures for implementing policies that prohibit offensive speech often violate basic due process procedures. When these violations are challenged, or even made public, in the vast majority of cases the college or university backs down or loses in court. So speech and due process rights, while under threat, tend to be sustained when asserted.

Privacy rights are articulated well in the U.S. Constitution and long-standing federal law, but the post-terrorism wave of legislation has presented serious threats to the rights of students, especially those from other countries. The courts have not been as supportive of privacy rights as they have of speech and due process rights. The recent Supreme Court decision permitting routine drug tests for public school students who wish to participate in extracurricular activities, while not directed to college students, indicates how tentative our privacy rights are.

While private schools are not literally subject to constitutional requirements, the courts have held them to similar standards for other reasons. Free speech and due process rights do exist for most private college students. Privacy rights are about as weak in private schools as they are in public colleges and universities.

The record appears to indicate that colleges and universities need to rethink speech and behavior codes. Rather than try to ban or control offensive speech, schools should pursue strategies that bring repugnant ideas out into the open where they can be challenged intellectually. Besides the fact that thought control doesn't work, it is also illegal whenever it is subjected to judicial review.

Neiger et al. (1998, pp. 201-204) proposed a "model policy" for "constitutionally sound" codes. It would ban:

> fighting words or physical behavior "directed at a specific person or group of persons" and (not "or") is likely to result in violence behavior or campus demonstrations which "materially" interfere with others' work or rights, or the operation of the university behavior that threatens to interfere with an individual's safety or participation in college events

From the review outlined earlier, it appears that the first proposal would withstand court review but the other two suggestions contain criteria that are overly ambiguous.

Calleros (1997) developed an approach to objectionable behavior without sacrificing free speech. He advocated that university administration must articulate its rejection of bias, discrimination and hatred so that offending students know they are in opposition to the institution's philosophies, but that the offenders should not be disciplined for their ideas. Calleros delineated a curriculum for training university personnel to engage in constructive conversations with members of the campus community, and for interacting with offenders without violating their rights. The curriculum consists of a series of true vignettes involving hate speech and behaviors, and asks participants to determine constitutionally acceptable responses within the context of an institution that abhors hate speech. Adoption of the curriculum might require preparation of group facilitators in constitutional issues related to campus speech.

Schools should also define and punish acts that target specific individuals or destroy property, as distinguished from thoughts and words. Given the consistent record of the courts overturning colleges' and universities' disciplinary decisions, it appears self evident that schools should adopt due process standards that are followed in legal proceedings.

For students (and faculty) who encounter speech codes or procedures to implement them, the best strategy appears to be to go public. According to the record reviewed here, publicizing these procedures and/or bringing them to court, where basic protections are more reliable, are effective strategies.

With regard to privacy, these are difficult times. Social Security Numbers should not be used as student identification numbers. SSNs should not be posted with grades or used in ways that can jeopardize students' privacy or property. Other privacy rights are under attack in the post-terrorism reaction period. The USA/Privacy Act will be tested in the courts, and hopefully many of its most odious provisions will be overturned. Maybe the best advice for students is to be careful with their personal information. One protection, developed in the private sector and recently adopted by the University of Pennsylvania, is to designate a "chief privacy officer" with responsibility for protecting students' privacy throughout the campus, including health, financial and admissions-related data (Schwartz, 2002).

For the most part, the use of Internet resources does not change student rights. Speech rights are no less protected in email or web access than when exercised verbally or in print. There are some issues that arise with regard to the nature of electronic communications but the general guideline is to avoid violating student rights while accommodating the special circumstances of the Internet. Privacy on the Internet remains a thorny issue, but colleges and universities should take steps to protect users' privacy, avoid ambiguous rules, protect sensitive records from easy access (such as students' transcripts), involve the full campus community in Internet privacy discussions, and inform all affected persons when electronic privacy is disrupted in any way (AAUP, 1997).

REFERENCES

American Association of University Professors [AAUP] (2002, May). Academic freedom of individual professors and higher education institutions: The current landscape. Retrieved June 17, 2002, from www.aaup.org/com-a/aeuben.htm

AAUP (1997). Academic freedom and electronic communications. Retrieved June 17, 2002 from http://www.aaup.org/statements/spchstate/statelec.htm

American Civil Liberties Union [ACLU] (2002a, May 7). In Letter to UC Berkeley Chancellor, ACLU opposes suppression of pro-Palestinian student protest. Retrieved June 24, 2002, from http://www.aclu.org/news/2002/n050702d.html

ACLU (2002b, May 28). Federal court finds University of IL violated rights of students and faculty in mascot debate. Retrieved June 24 2002, from http://www.aclu.org/news/2002/n052802d.html

ACLU (2002c, April 10). In the wake of new anti-terror law, NYCLU launches statewide campaign to inform college students of their rights to privacy of records. Retrieved June 17, 2002, from www.aclu.org/news/2002/nyclu_letter_0409.pdf

ACLU (2000d). ACLU press releases. Retrieved June 28, 2002, from www.aclu.org/news/2002/pressind.html

ACLU (1996). ACLU briefing paper: Hate speech on campus. Retrieved June 17, 2002, from http://www.aclu.org/library/pbp16.html

Associated Press (2002, April 28). Universities struggle with free speech, hate speech. Retrieved June 17, 2002 from

http://www.freedomforum.org/templates/document.asp?documentID=16143

Bush and free speech at OSU. (2002, July 8). The Nation, p. 7.

Calleros, C.R. (1997). Preparing for the worst – and striving for the best: Training university employees to respond clearly, constructively, and constitutionally to hateful speech on campus. Journal of Law and Education, 26(4), 41-68.

Center for Individual Rights [CIR] (1999, May 12). Mass v. Cornell University. Retrieved June 27, 2002, from www.cir-usa.org/recent_cases/maas_v_cornell.html

Electronic Privacy Information Center [EPIC] (2002, June 19). Privacy laws by State. Retrieved June 27, 2002, from http://www.epic.org/privacy/consumer/states.html

Foundation for Individual Rights in Education [FIRE], (2002). Due process. Retrieved June 28, 2002, from http://www.thefire.org/index.php/process.php3

Greenhouse, L. (2002, June 21). Supreme Court finds law on educational privacy isn't meant for individuals. New York Times, p. A15.

Kors, A.C. & Silverglate, H.A. (1998). The shadow university: The betrayal of liberty on America's campuses. New York: Free Press.

Namazi, N. and Cahill, J.H. (1994). University hate speech codes: A necessary method in the process if eradicating the universal wrong or racism. Truro Law Review, 10(2), 561-592.

Neiger, J.A., Palmer, C.J., Penney, S.W. and Gehring, D.D. (1998). Addressing hate speech and hate behaviors in codes of conduct: A model for public institutions. NASPA Journal, 35(3), 193-206.

Palmer, C.J., Penney, S.W., Gehring, D.D. and Neiger, J.A. (1997). Hate speech and hate crimes: Campus conduct codes and Supreme Court rulings. NASPA Journal, 34(2), 112-122.

Privacy Rights Clearinghouse (2001, June 21). College and university privacy issues: Social Security Numbers and smart cards. Retrieved June 27, 2002, from www.privacyrights.org/ar/college-privacy.html

Schwartz, J. (2002, August 4). Privacy vs. security on campus. New York Times, wk 3.

Student Press Law Center [SPLC] (1998a). Student media guide to Internet law (part 1). Retrieved June 28, 2002 from http://www.splc.org/legalresearch.asp?id=22

SPLC (1998b). Student media guide to Internet law (part 2). Retrieved June 28, 2002 from http://www.splc.org/legalresearch.asp?id=23

SPLC (1995). Private schools and press freedom. Retrieved June 26, 2002 from http://www.splc.org/legalresearch.asp?id=8

U.S. Bureau of the Census (2002). Attendance status of college students 15 years old and over, by age, sex, year and type, October, 2000. Retrieved June 28, 2002, from http://www.census.gov/population/socdemo/school/ppl-148/tab10.txt

Walker, S. (1990). In defense of American liberties: A history of the ACLU. New York: Oxford.

CONCLUSION & ACKNOWLEDGEMENTS

The idea for a book of letters from Steven Brown, Executive Director of the R.I. ACLU, to school officials, or any officials for that matter, came about when we were members of the affiliate's Church-State Committee. At a typical meeting, one or more topics would lead to the conclusion that we needed "a letter from Steve" to present the ACLU's objection to some iteration of publicly sponsored religion, or, on occasion, a policy or practice that interfered with free exercise of religion.

The committee's hope was that the letter would be so compelling in its clarity and reasoning, that the miscreant official would correct his or her error. Of course, the letters were always clear, concise, and expertly written. Sometimes, the official would see the point and change the practice in question. More often, follow-up letters and other ACLU interventions would be needed. But, as Church-State Committee members, we were always impressed with the cogency and air-tight reasoning that resonated in "a letter from Steve."

But this book is not about Steven Brown or his writing skills. Like the ACLU, this book is about the principles he so articulately defends. We produced this book to present one category of rights the ACLU protects every day: the rights of children in school. Parallel books could be written about rights of people with disabilities, immigrants, people in prisons, minority group members, and so on.

We began by recognizing that schools are special places with unique opportunities and challenges. We talked about the ways schools affect children, both positively and negatively. In particular, we examined 27 instances of schools' abuse of their power over children and, in higher education, adults. In most cases for which results are known, ACLU involvement led to some modification of schools' mistreatment of students. In an additional number of cases, ACLU's letters gave administrators pause, and perhaps some student abuse was lessened. Finally, in a small number of instances, administrators went on with their plans.

Even in those few instances, where a student's or family's complaint was not successful, the students learned valuable lessons in citizenship. With the ACLU's assistance, their legitimate concerns were heard. Maybe they didn't get complete satisfaction, but they received support and validation. They learned that you can "fight city hall" and require officials to explain and defend their actions.

In reviewing these cases, we two long-time civil libertarian activists relearned the essential lesson that an organization dedicated to "eternal vigilance" in support of the Bill of Rights is essential if those rights have a chance of existing for the most vulnerable among us, and consequently for all of us.

This compendium documents a significant role the ACLU plays in protecting civil liberties: raising concerns with officials in an effort to correct infringements without necessarily engaging in litigation. The landmark court cases are important and make headlines, but in many cases, merely identifying the unintended consequences of a policy or practice is enough to change an administrator's mind, or even raise enough questions so that some rethinking occurs.

We hope you enjoyed this book nearly as much as we enjoyed putting it together. If any case or episode described here grabbed your interest, thank the R.I. ACLU. For without them, it is likely that most if not all of these scenarios would have gone unchallenged.

Daniel Weisman is an "ACLU Lifer," having grown up in a civil liberties family with a particular interest in separation of church and state. When Dan's daughters, Merith and Deborah, encountered religious invocations and benedictions at their Providence, RI middle school, the family complained to the R.I. ACLU, claiming that the practice was a violation of the Establishment Clause of the First Amendment. The R.I. ACLU took the case. That suit resulted in the 1992 landmark US Supreme Court affirmation of separation (*Lee vs. Weisman*), banning prayers at public school graduations. Dan is also long-time emcee of the R.I. ACLU's public access television program, Rights of a Free People. He is a professor of social work at Rhode Island College and lives in Barrington, RI.

John Carroll is a long time member of the ACLU and was an active member of the Rhode Island Affiliate. He has especially fond memories of the Church-State Committee, where he learned to appreciate religious freedom as a complex issue which protects one of the core values of the Republic: freedom of conscience. He is retired from the political science faculty at the University of Massachusetts Dartmouth and currently lives in Newburyport, Massachusetts.

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