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ABSTRACT

This monograph acquaints advisers, administrators, and students with college press law as it now stands, based on court decisions concerning official student publications and underground newspapers. Chapters focus on the status of the First Amendment on the college campus with regard to student publications, the question of permissible control and censorship by administrators, the role of the publications adviser as teacher or censor, the legal responsibilities of student publications, advertising, and additional matters of concern. (KS)

College Student Press Law

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Foreword

The National Institute of Education (NIE), recognizing the gap between educational research and classroom teaching, has charged ERIC (Educational Resources Information Center) to go beyond its initial functions of gathering, evaluating, indexing, and disseminating information, to a significant new service: information transformation and synthesis.

The ERIC system has already made available—through the ERIC Document Reproduction Service—much informative data, including all federally funded research reports since 1956. However, if the findings of specific educational research are to be intelligible to teachers and applicable to teaching, considerable bodies of data must be reevaluated, focused, translated, and molded into an essentially different context. Rather than resting at the point of making research reports readily accessible, NIE has now directed the separate ERIC Clearinghouses to commission from recognized authorities information analysis papers in specific areas.

Each of these documents focuses on a concrete educational need. The paper attempts a comprehensive treatment and qualitative assessment of the published and unpublished material trends, teaching materials, the judgments of recognized experts in the field, reports and findings from various national committees and commissions. In their analysis the authors try to answer the question, "Where are we?"; sometimes find order in disparate approaches; often point in new directions. The knowledge contained in an information analysis paper is a necessary foundation for reviewing existing curricula, planning new beginnings, and aiding the teacher in *now* situations.

The purpose of this monograph is to acquaint advisers, administrators, and students with college student press law as it now stands based on court decisions which have been made concerning student publications and underground newspapers. The book is not meant to be predictive with respect to the law and the authors are not giving legal advice. Rather, they focus on the implications of the court decisions with respect to the rights and responsibilities of students, advisers, and administrators.

Bernard O'Donnell
Director, ERIC/RCS

Preface

Freedom of the press as it applies to college and university student publications is often misunderstood or misinterpreted. Courts have established that the student press is entitled to essentially the same rights as the professional press, and those who work with student publications—students, advisers, administrators, and others in related positions—have long felt the need for a definitive book enumerating pertinent legal cases and decisions and providing interpretive commentary on these decisions.

At its 21st annual convention in St. Louis in October 1975, the National Council of College Publications Advisers, the only national professional association of advisers to all college student publications, commissioned Dr. Robert Trager of Southern Illinois University at Carbondale to prepare a comprehensive publication on college student press law. He asked Donna L. Dickerson, a graduate student, to collaborate on the work.

With courts on all levels handing down decisions affecting college student publications, it is imperative that those who work with these publications or who have occasion to interact with them understand those decisions so as to develop a realistic attitude toward the contemporary student press.

As the first volume in the NCCPA College Student Press Series, *College Student Press Law* has been published in cooperation with the ERIC Clearinghouse on Reading and Communication Skills (ERIC/RCS). Other volumes in the NCCPA Series dealing with topics related to publications advisers and others associated with the student press will follow.

Special thanks are due to Dr. Dwight Teeter of the University of Kentucky, co-author of *Law of Mass Communications*, for his consultation on *College Student Press Law*, and to Linda Reed, Coordinator of Publications of ERIC/RCS, for her work with the manuscript.

Lillian Lodge Kopenhaver
President, NCCPA
April 1976

The American Court System

For the purposes of discussing college students' freedom of expression, American courts can be divided into state and federal court systems. For federal courts, the trial-level court, where a case is first heard, is the District Court. There are approximately ninety District Courts placed generally according to population throughout the country. Appeals from these courts go to the Courts of Appeals. There are eleven of these, each having jurisdiction over a certain geographical area. For instance, the Court of Appeals for the Seventh Circuit has jurisdiction over Illinois, Indiana, and Wisconsin. Decisions made by the Seventh Circuit become mandatory precedents for District Courts in these states. That is, the District Courts must follow the Seventh Circuit's decisions in cases with similar sets of facts. But decisions are mandatory precedents only for lower courts in appropriate jurisdictions. District Courts outside the Seventh Circuit do not have to follow Seventh Circuit precedents, nor do other Circuit Courts of Appeals, nor do state courts. All courts in the country must follow precedents set by the Supreme Court of the United States. If courts do not follow mandatory precedents when they are expected to, the higher court will reverse the lower court's decision (although in unusual circumstances appeals courts will reverse their own precedents).

Cases that are not mandatory precedents for a court may be persuasive precedents. While the Fifth Circuit, for instance, need not follow precedents set by the Seventh Circuit, or by a District Court, it may deceide that the precedent is persuasive (though not mandatory) and decide to do so.

Thus, while most cases involving college publications have been decided at levels below the Supreme Court of the United States, they may be mandatory precedents for some courts and persuasive precedents for all others.

The First Amendment on the College Campus

The First Amendment's guarantee of freedom of speech and the press is now generally construed to mean freedom of expression in many different forms and is one of the fundamental rights guaranteed by the Constitution. The Amendment states that "Congress shall make no law . . . abridging the freedom of speech, or the press. . . ." In a series of decisions, the Supreme Court has held that the Fourteenth Amendment clearly protects a citizen's First Amendment guarantees of freedom of speech and press against infringement by *state* officials. Thus, while freedom of expression for students is based on the First Amendment, the doctrine is made mandatory for the states through the Fourteenth Amendment, section 1, clause 2: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws" [Gitlow, 1925*].

As a limitation on governmental power, freedom of the press is not confined to ideas which comply with present government policy with which a majority of the population agrees [Kingsley, 1959]. Justice Holmes wrote, "If there is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought—not free thought for those who agree with us, but freedom for the thought we hate" [United States, 1929, at 654-655]. The American system of government must not allow suppression or censorship of expression, even though it is hateful or offensive to those in power or strongly opposed by the public [Cox, 1965]. Provided the expression is not libelous [New York Times Co., 1964; Gertz, 1974] or obscene [Miller, 1973] or does not incite violence and lawlessness [Chaplinsky, 1942; Brandenburg, 1969], there is a national commitment to the idea that public issues may be debated, and those debates may include sharp, sometimes unpleasant attacks on ideas, opinions, and public officials [New York Times Co., 1964; Terminiello, 1949].

Freedom of the press has also been extended to distributing, writing, and

* For the full citations for all cases discussed here, see the List of Cases.

printing [Talley, 1960; Tucker, 1946; Lovell, 1938], as well as to the right to receive and to read information and opinions [Stanley, 1969; Lamont, 1965; Thomas, 1945].

Freedom of expression and freedom of press are nowhere more important and worthy of defense than in colleges and universities. Universities are seen as the training ground for democracy, and "to impose any strait-jacket upon the intellectual leaders in our colleges and universities would imperil the future of our nation" [Sweezy, 1957]. This view of American education has flourished in case after case and has become the starting line for extending constitutional guarantees to students on college campuses.

Courts have held that the Constitution applies to all persons, including students, and when a public institution denies constitutional rights, a student has a cause of action under the Fourteenth Amendment [e.g., West Virginia, 1943; Tinker, 1969]. As Justice Abe Fortas stated in *Tinker*, the leading case extending constitutional rights to students, "It can hardly be argued that either students or teachers shed their constitutional right to freedom of speech or expression at the schoolhouse gate" [Tinker, 1969, at 511]. Students enjoy the same constitutional protections as other citizens, and a state may not impose limitations on these protections as a condition to attending a state university [Dickey, 1967]. In numerous cases, school officials and administrators have been forbidden to censor expression which they dislike and have been constantly reminded that they are not the "unrestrained masters of what they create," having no power to tell a student what thoughts to communicate [Antonelli, 1970].

While freedom of the press is stronger on the university campus than on the high school campus, that freedom is not absolute. In fact, freedom of the press and freedom of expression can give way to several administrative considerations. The landmark decision granting constitutional protection to the student press, *Dickey* v. *Alabama State Board of Education* [1967], enunciated the major qualification. At Troy State College in Alabama, student editor Gary Dickey wrote an editorial critical of the state governor and legislature. The editorial was in response to criticism that a campus magazine received after publishing quotations from such diverse persons as Bettina Aptheker, an avowed Communist; black power advocate Stokely Carmichael; and former Army Chief of Staff General Earl Wheeler. Members of the Alabama legislature contended that the college should not have allowed the magazine to be distributed. Frank Rose, president of the University of Alabama, supported the publication and was criticized for his support. Dickey's editorial supported Dr. Rose, but the newspaper's faculty adviser refused to allow publication. Dickey then asked Troy State President Ralph Adams about publication and was told that Troy State had a rule forbidding editorials which criticized the governor or legislators. Adams' Rule, as it later became known, said that because the college was a public institution owned and operated by the state and because the governor and legislature were

acting for the state as owner, they could not be criticized. Adams said editorials laudatory of state officials were acceptable.

Dickey was given an article, "Raising Dogs in North Carolina," as a substitute for the editorial. Dickey refused to run the substitute and left the editorial space blank with the word "Censored" written diagonally across it. During the summer, he was informed that he would not be allowed to reenter Troy State during the fall on the grounds of "willful and deliberate insubordination." In this significant case for student press freedom, the District Court quoted from a case cited with approval in *Tinker* in stating that "state school officials cannot infringe on their students' right of free and unrestricted expression . . . where the exercise of such a right does not materially and substantially interfere with requirements of appropriate discipline in the operation of the school" [Dickey, 1967, at 618, quoting from Burnside, 1966, at 749].

Thus, "material and substantial interference" is a qualification for freedom of the press on university campuses, just as "clear and present danger" is the signal for censorship in the public press.

In a second case involving a college publication, students at Fitchburg (Mass.) State College tried to reprint an article, "Black Moochie," written by Eldridge Cleaver. The article was censored by the school president, who also ordered that all future editorial material for the newspaper be approved by an editorial board made up of faculty members. While the District Court held that such an advisory board constituted direct and unconstitutional prior restraint on expression, the opinion noted that freedom of the press is not absolute. Free speech, the court said, does not mean unrestricted speech, and the rights of students "may be modified by regulations reasonably designed to adjust these rights to the needs of the school environment." The "needs" were defined as the school's obligation to "maintain the order and discipline necessary for the success of the educational process" [Antonelli, 1970]. Thus, if a school-supported publication infringes on the order and discipline of the campus, censorship will be allowed.

Most school officials are not willing to wait until disruption occurs before censoring publications. Instead, most censorship is prior restraint based on a fear of some future and potentially violent disruption. The courts, however, have taken a second look at these soothsayer activities by administrators and have been unwilling to allow an unfounded fear of disruption to account for unharnessed censorship. For example, after officials at Texas Tech University prohibited circulation of a student organization's newspaper, the court said it was not enough that school administrators anticipated the possibility of some disruption, saying that an unfounded fear of disruption cannot overcome the First Amendment guarantee of free expression [Channing Club, 1971].

Even if there is no substantial disruption or threat to the discipline and order of the campus, the state may regulate "to some degree the form of the

expression fostered" [Antonelli, 1970]. In other words, certain rules and regulations may be permitted as long as they are not imposed arbitrarily and are not confined to the expression of ideas. For example, a university may promulgate rules as to time, place, and manner of distribution of a publication [Tinker, 1969; Healy, 1972]. Any regulatory action a university takes must be a nondiscriminatory application of reasonable rules governing conduct, and not governing otherwise protected content of a publication.

Student newspapers are further restricted in that the First Amendment is not absolute anywhere, for even the public press must legally answer when it publishes libel and obscenity. Although the courts have consistently defended the press's right to participate in "wide open and robust debate" on topics of public interest, that right is always tempered by the state's interest in the individual's right to be free from ridicule [Gertz, 1974]. The courts have also consistently held that obscenity is not protected by the Constitution [United States, 1957].

While rules for censorship on the campus have been narrowly drawn and any form of censorship carries with it a heavy presumption against its constitutional validity, the campus press does not entirely enjoy the same freedom given to the privately owned press.

In a case involving a segregationist editorial written by a student at North Carolina Central University, a federal District Court stressed that "the proper remedy against censorship is restraint of the censor, not suppression of the press" [Joyner, 1973]. One of the best ways to restrain censors is for them to have a clear understanding of the purpose of the press on campus and its benefits to the educational system as a whole. The courts have been willing to look upon the campus as a unique place in our society where ideas are born, nurtured, and brought to maturity. The nourishment of such ideas comes in the form of unrestricted teaching, learning, and expression, for, as one court said,

> [N]o field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding, otherwise our civilization will stagnate and die. [Sweezy, 1957, at 250]

Restricting freedom of expression and imposing restraints not only violate the basic principles of academic and political freedom but also severely hamper the university's educational goals.

The relative age and maturity of students is also a significant factor in extending the Constitution to the college campus. "The university setting of college-aged students being exposed to a wide range of intellectual experiences creates a relatively mature marketplace for the interchange of ideas" [Antonelli, 1970, at 1336]. One of the principal functions of the First Amendment is the invitation of dispute and the exchange of provocative viewpoints [Channing Club, 1971].

Many of these "provocative" ideas are not liked by school officials. Nevertheless, courts have held, "[t]hat the language is annoying or inconvenient is not the test. Agreement with the content or manner of expression is irrelevant; First Amendment freedoms are not confined to views that are conventional or thoughts endorsed by the majority" [Channing Club, 1971, at 691]. Some of the ideas not liked are those dealing with social issues such as race, abortion, or religion; obscenities and indecent language; criticisms of administrators; and radical or militant ideas. The reasons for dislike of such material are varied. One college president has said that a student publication supported by state funds has no right to "reflect discredit and embarrassment upon the university" [Schiff, 1975].

Doubtless, this philosophy is mandatory for administrators, but the problem probably goes much deeper than academic duties. For instance, attacks on local issues such as discrimination or police activities will tend to alienate local sources of revenue and to lose the community's good will. Discussion of sexual matters and use of vulgarities arouse the ire of the alumni—a potential source of university funds. And criticism of state politics and militant viewpoints tend to alienate the state legislators—the primary source of state university funding [Greenfield, 1966*].

The first court decision to extend constitutional rights to campus newspapers involved neither obscenity, severe criticism of the administration, nor even militant or radical ideas—only criticism of the governor of Alabama [Dickey, 1967]. Some newspaper content, however, is not so tame. At the University of Maryland, a student publication was designed with a cover depicting the burning of the American flag. The University president and the state attorney general felt that this action violated a Maryland law, and the printing was stopped. A federal District Court said that even under the cloud of criminal prosecution, University officials could not apply a statute unconstitutionally just because they feared prosecution [Korn, 1970].

While the courts have stated that administrators must formulate reasonable regulations which do not impinge on a student newspaper's First Amendment rights, they have been vague as to just what constitutes "reasonableness." A great deal of latitude in regulations has been allowed, and administrators may control behavior "which tends to impede, obstruct or threaten the achievement of educational goals" [Goldberg, 1967]. The forms of administrative control are numerous, ranging from restriction of funds to disciplinary action against student editors. A new trend has developed whereby the students themselves are wielding a great deal of power in censoring publications. Student newspapers receive funding from a variety of sources; in many larger universities, funding comes from mandatory student activity fees. In theory as well as in practice, it is possible for the student government to kill a student newspaper by restricting funds. No court has yet ruled on whether this practice is unconstitutional.

* Citations in bold type refer to entries in the bibliography.

In most cases it is the administrators who cut funds. At North Carolina Central University, administrators stopped newspaper funds pending agreement on editorial standards. They announced that if no agreement could be reached, the paper would be suspended indefinitely and a new campus paper, sponsored by college officials, would be established. The Court of Appeals for the Fourth Circuit would not condone such action: "Censorship cannot be imposed by asserting any form of censorial oversight based on the institution's power of the purse" [Joyner, 1973, at 461; see also Arrington, 1974; Veed, 1973].

A more common form of administrative control is refusal to print or distribute a particular offensive edition of a publication. This is easy to accomplish when the printing and distribution are handled by the university. It may also be difficult for students to get material published if printing is done off campus, because the printer may fear community pressure and the loss of other university printing business.

Although most of the material contained in this book deals with school-sponsored publications, the Supreme Court has held that off-campus newspapers receive the same protection from administrative controls that on-campus publications receive [Papish, 1973]. However, administrators may make reasonable rules and regulations as to the time, place, and manner of distribution of off-campus publications and may take permissible steps to prevent substantial interference with campus order [e.g., New Times, 1974; Gay Students, 1974].

In order to avoid the possibility that unwanted material will get into a student newspaper, administrators and schools of journalism are fond of setting up an adviser or review board to oversee the publication. A federal District Court has said that when such a review board or adviser acts as an approving or censoring agent, it is clearly a usurpation of the First Amendment [Antonelli, 1970]. However, if they only advise and review, this apparently is legal. Subtle pressures, though, can quickly change an "adviser" into a "censor."

Many of these administrative controls can be used in concert, as occurred at Fitchburg (Mass.) State College, where the president not only refused to pay for the printing of articles he felt were indecent but also established an advisory board to oversee future publications [Antonelli, 1970]. Similarly, at Troy State University in Alabama, an editorial critical of the governor was not only censored, but the editor was refused readmission to the school. The court in *Dickey* [1967] said that "since this state-supported institution did elect to operate the [student newspaper] and did authorize Dickey to be one of its editors, they cannot . . . suspend or expel Dickey for [this] conduct." Suspension, non-readmission, probation, or firing are common tools used to make an example of the student to those who might try similar activities.

The courts have held that once a university has established a newspaper, it "may not then place limits upon the use of that forum which interfere with

protected speech" and which are not justified by an overriding state interest in avoiding material and substantial interference with campus discipline [Trujillo, 1971].

Although courts in recent years have extended constitutional guarantees to student newspapers at public universities, this extension is not complete. School newspapers still do not enjoy the full protection offered the public press. The primary reason for the failure to extend full protection is the courts' reluctance to step into the academic world. While such cases as *Dickey* and *Antonelli* have limited sanctions administrators may use to suppress student publications, there is still much vague and indefinite language in the rulings. While some restrictions can still be legally imposed, many administrators choose to forego legal confrontations. By applying subtle pressures at sensitive points in the operation of a newspaper, administrators can be omnipotent, although by doing so they violate the spirit of the law.

Colleges and Student Publications

Section 1 of the Fourteenth Amendment protects individuals against actions of the state which deny them due process and equal protection of the law. Public college administrators, acting as arms of the state [Tinker, 1969; Bazaar, 1973], can no more abridge students' freedom of expression than can other federal or state government officials, with the important proviso that communication which materially and substantially disrupts the educational process properly can be curtailed and punished [Tinker, 1969]. However, the Supreme Court has said, "[A college, acting] as the instrumentality of the State, may not restrict speech . . . simply because it finds the views expressed by any group to be abhorrent" [Healy, 1972, at 187-188].

The Fourteenth Amendment is not all-inclusive, because it does not protect the individual against *private* actions. Only when state action is involved do constitutional protections come into play. This "state action" doctrine is buttressed by the Civil Rights Act of 1871 (42 U.S.C. sec. 1983), which creates a cause of action against any state official acting under color of state law who subjects "any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution." Thus, the editor of a newspaper on the campus of a state university will have a cause of action against an administrator, faculty member, or staff member who refuses to allow publication of, for example, an otherwise protected editorial. If the material in question did not cause material and substantial disruption on the campus, the courts in most instances would uphold the student's rights.

The reasoning which allows the state action doctrine to apply to state colleges is that the employees of the university, such as administrators, staff, or faculty, are agents of the state; when participating in an action involving censorship, they are for all times and purposes the state [Tinker, 1969].

Public Universities

In considering the amount of protection student journalists have or the constraints administrators at public universities can properly impose on them,

it is instructive to consider the ways in which college student publications are generally organized. One structure is a laboratory publication, one that is part of a formal classroom situation. In this case, one integral purpose of the publication is to act as a vehicle for "practicing" what is taught through classroom instruction; thus, material is usually carefully scrutinized by a faculty member before publication. In a second structure, the publication is free of most formal classroom involvement but has faculty members in key editorial positions. Here too, the material is reviewed by non-students before publication. Third, the structure may be built around an adviser; faculty or staff members who assume this role have varying degrees of control over publications in different institutions. Fourth, a student publication may be affiliated with an academic department, usually journalism. In this arrangement, there may be a publications board empowered to appoint and remove student editors, with faculty members and even administrators sitting on the board with students. Generally, student editors are relatively free to make decisions on their own. While the board may set broad policy, material is rarely reviewed by other than students before publication. Finally, some college student publications are considered independent. These may actually be incorporated bodies working and printing off-campus, doing no more than gathering material and distributing on the campus. Few such publications are truly independent, most having some financial (institutional advertising, free office space) or other (faculty sitting on the board of directors) connection with the college [Ingelhart, 1973]. The extent to which control of copy by non-students may be violative of students' First Amendment rights, insofar as court decisions shed light on the question, is discussed in later chapters ("Administrators as Censors" and "Adviser: Teacher or Censor?").

One court has attempted to define the function of a public college newspaper. In answering the contention of administrators that a student paper was "a journalistic experiment and [an] 'educational exercise' and [therefore] not a newspaper as the term is generally known," a federal District Court said that school newspapers "meet the general definition of 'newspaper' as a 'paper printed and distributed at stated intervals . . . to convey news, advocate opinions, etc., now usually containing also advertisements and other matters of public interest'" [Lee, 1969, at 1100]. A somewhat different view of a private college paper was taken by a New Jersey court which called the *Daily Princetonian* "a newspaper primarily for the students and faculty of Princeton University. Merely to compare it with such newspapers as the New York *Times* [or] the Philadelphia *Inquirer* . . . is to demonstrate the difference. The *Daily Princetonian* is, in the vernacular, a 'house organ,' having a limited appeal to its particular constituency. It is decidedly not a newspaper of general circulation" [Freedman, 1975, at 150-151].

There is little argument that the college is *not* the publisher of clearly independent student papers and magazines. However, many college administrators believe that the school president or board of trustees is indeed the

publisher, with the powers inherent therein, of publications organized in the other ways cited above. It is contended here, to the contrary, that the definition of "publisher" used by privately owned publications cannot apply on public college campuses. A publisher has at least three responsibilities: (1) control over a publication's contents, including power to remove an editor because of a disagreement regarding content; (2) control over a publication's finances; and (3) liability for a publication's mistakes, for example, invasions of privacy or printing of actionable libel. With the possible exception of laboratory publications, in each case, as will be discussed in detail throughout this book, a college's powers are not analagous with those of the publisher of a privately owned newspaper or periodical [Trager, 1975].

Specifically, in terms of content, college students enjoy the same First Amendment protections from governmental interference with their freedom of expression as do other citizens; they do not relinquish those rights as a condition precedent to school attendance. The Fourteenth Amendment applies to all state educational institutions—which operate under the color of state law—and protects the rights of students against unreasonable rules and regulations, including restrictions against freedom of the press [Trager, 1974; Kramer, 1973]. The Supreme Court in *Tinker* [1969] held that "students and teachers do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." For students as well as other citizens, these rights are not absolute. Certain restrictions are allowed in the interests of others and of society generally; these will be discussed in later sections. However, while a publisher of a privately owned newspaper or periodical could at his or her whim stop distribution of a certain edition, fire an editor, or ask to approve all copy prior to publication, judicial decisions strongly indicate that such actions could not be taken regarding the student press in public colleges unless highly unusual circumstances existed.

Similarly, a privately owned publication might have funds withdrawn by the publisher for any reason; the publisher might even disband it. However, while public colleges are under no affirmative obligation to establish a student newspaper or magazine [Joyner, 1973], once established it may be permanently discontinued only for reasons not connected with First Amendment considerations [Joyner, 1973; Antonelli, 1970]. Additionally, unlike a private publisher, supplying financial aid does not give university officials power to place limitations on the use of the very publications they have established [Trujillo, 1971].

Finally, as will be discussed in a later section, it has been argued that college and university officials may be significantly less liable for torts committed by a student publication than is the publisher of a privately owned newspaper or periodical ["Note," 1973]. Although several administrators have been named as defendants in tort actions, in no reported case has an administrator personally had to pay damages, and only rarely have damages been paid at all [Standley, 1972].

Private Universities

The line of reasoning which applies the state action doctrine to public schools does not apply to private institutions, since courts have not found "state action" to be involved in such cases. A private school is not acting in the state's stead, as is a publicly funded college, and therefore by definition cannot violate the First and Fourteenth Amendments' proscriptions against abridging freedom of expression. The student attending a private college is denied constitutional protection against abridgments of freedom of expression while on campus. The school itself would be the final arbiter in such private actions (unless a contract has been abridged), and the Fourteenth Amendment would be dormant.

During the campus turmoils of the late 1960s, students at private universities tried to find some state action within the portals of the private school. They argued that state action manifested itself in such state activities as scholarships, research grants, and tax exemptions [e.g., Grossner, 1968]. Students also used the argument that the private university by its very nature is endowed with state action because it performs a state function—education. Such an argument has been successful in the area of racial discrimination, but it has been less successful where First Amendment rights or disciplinary action has been involved [Powe, 1968]. Justice William Brennan stated the purpose of the state action doctrine in racial discrimination cases:

> The state action doctrine reflects the profound judgment that denials of equal treatment, and particularly denials on account of race or color, are singularly grave when government has or shares responsibility for them. . . . Something is uniquely amiss in a society where the government, the authoritative oracle of community values, involves itself in racial discrimination. . . . This court has condemned significant state involvement in racial discrimination, however subtle and indirect it may have been and whatever form it may have taken. [Adickes, 1961, at 190]

The process of finding state action for racial purposes has been so encompassing that the Court admitted that "only by sifting facts and weighing circumstances, can the nonobvious involvement of the state in private conduct be attributed its true significance" [Burton, 1961, at 722].

Private schools are considered vital parts of America's pluralistic society because they provide a diversity that government cannot always provide. Courts fear the widespread effect upon the independent operations of a private university which would result from a finding of state action [Grossner, 1968]. As a result, in case after case involving private schools, the courts have participated in an ad hoc balancing of due process rights against the necessity of a private system of education and have always found the balance tipped in favor of the private nature of the universities.

In *Grossner* v. *Columbia University*, a District Court rejected the contention that because the University educates people, Columbia performs a state function. However, the existence of two other factors may establish state action in private colleges. First, there must be a significant involvement of the state with the school, so that it is seen as a joint participant in the school. This involvement usually comes in the form of "substantial" financial aid. Such aid must come directly from the state, not the federal government, in order for the Fourteenth Amendment proscription against "state action" to be applied. Colleges and universities may receive considerable federal or private monies, but little state aid. Hence, it is difficult to find "substantial" financial aid coming directly from the state itself. However, receipt of state aid, in itself, is not enough to make the school an agent of the state. There must also be a showing that the state has gone beyond financial aid and, by actual use of its governmental power, has promulgated the rule or regulation challenged. In other words, the state must be involved directly with the activity causing the injury: "The State action, not the private action, must be the subject of the complaint" [Powe, 1968, at 81].

Such a nexus between the state and the specific injury is unlikely because state legislatures have traditionally refused to interfere with the administration of private universities.

There are no reported cases involving a private university which directly confront the problem of the First Amendment and the private college newspaper; however, some recent disciplinary cases will show why state action is an almost insurmountable barrier for the student at a private university.

In April 1968 a riot occurred on the campus of Columbia University. Subsequently, the students involved sued in federal court to stop the disciplinary action being taken against them. Using the Fourteenth Amendment and section 1983 (Civil Rights Act of 1871) as the basis for their suit, the students contended that the disciplinary action against them was state action which denied them their constitutional rights of assembly, speech, and petition. The students argued that the receipt by Columbia University of substantial amounts of federal and state aid and the performance by the University of the public education function constituted state action.

The District Court rejected the contention on three grounds. First, only 20 percent of public monies came from the state (the remainder was federal); therefore, there was minimal *state* involvement. Second, the court held that the receipt of state aid in itself was not enough to make the University a state agent. Third, the plaintiffs were unable to prove that the disciplinary action under question was promulgated by the state [Grossner, 1968].

Oftentimes the relationship between a private university and the state is not clear-cut, as is seen in a case coming out of Alfred University in New York. Alfred is composed of four colleges, including the New York State College of Ceramics. The College of Ceramics was established by the state legislature, which also decreed that Alfred University would administer the college

for the state. The other three colleges are private. In 1967, seven students were suspended from Alfred University for disturbing an ROTC parade. Four of the students were from the private Liberal Arts College and three were from the College of Ceramics. The students sued for readmission, but the case was dismissed in federal District Court for lack of jurisdiction. On appeal, the Court of Appeals for the Second Circuit separated the Ceramics College students from the Liberal Arts students, saying that the latter enjoyed no Fourteenth Amendment protection. The judge said that the state aid to the private colleges was small and that the state's accreditation and degree regulations were not the cause of injury. The students from the Liberal Arts College had failed to prove that the state was involved with the activity causing the injury—the disciplinary codes. The court further held that although state action was found for the College of Ceramics, the ceramics students were not deprived of any rights, since the University's guidelines on demonstrations were reasonable.

Before state action could be found for a student newspaper on a private campus, there would have to be a showing of a substantial financial tie between the state and the university. After such a relationship has been found, it must then be ascertained whether the state itself had any part in formulating the rule under question or was involved with whatever form of censorship was being used. In most instances, such a connection will not exist, and the students who believe their constitutional rights have been infringed will have to look elsewhere for relief.

The alternative for the student or employee who has been deprived of certain rights is the common law doctrine of contracts. The common law has long recognized the sanctity of contracts between private persons, and courts are bound to uphold contractual rights. The contract theory as applied to the student and private university states that when a student pays tuition at a private institution, he or she is agreeing to abide by rules and regulations specified in the school catalog. In return, the university agrees to provide those services and facilities explained in the catalog [Wilkinson & Rolapp, 1973; Greene, 1969]. Although the contract theory has not been fully accepted by the courts, it is a possible avenue for redress. For students at a private university who are concerned about censorship of their publications, the best course of action is to be familiar with what the school catalog and departmental materials say about operation of the newspaper and periodicals.

Administrators: Permissible Control

The Supreme Court in *Near* v. *Minnesota* [1931] said expression can lose its First Amendment protection if it is libelous, obscene or significantly detrimental to national security [New York Times Co., 1971; Organization for a Better Austin, 1971]. Courts have held that student publications can also lose their constitutional protection by materially and substantially interfering with the educational process. *Tinker* v. *Des Moines Independent Community School District* [1969], the touchstone for most students' rights cases, adopts language from the Fifth Circuit, which invalidated a regulation prohibiting the wearing of "freedom buttons" by black students in a Southern high school. School officials were unable to prove disruption resulted because of the students' actions, and the court laid down the rule that is the standard against which student actions are measured:

> [School administrators] cannot infringe their students' right to free and unrestricted expression as guaranteed to them under the First Amendment to the Constitution, where the exercise of such rights . . . [does] not materially and substantially interfere with the requirements of appropriate discipline in the operation of the school. [Burnside, 1966, at 749]

It is significant that in a second case decided by the same Court of Appeals on the same day school officials were upheld in suspending students wearing "freedom buttons" because they attempted to force buttons on other students and created what administrators described, and the court accepted, as material and substantial disruption [Blackwell, 1966].

The Supreme Court in *Tinker* [1969] left room for administrators to control disruptive or potentially disruptive expression, such as that containing words which on their face "inflict injury or tend to incite an immediate breach of the peace" [Chaplinsky, 1942] or which "have all the effect of force" [Near, 1931]. Most recently, the Court reinforced the right of the state to abridge the freedom of expression where "advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action" [Brandenburg, 1969]. Such words, however, are not easily and obviously identified. Of concern are the *degree* of threatened disorder, the reasonableness of the state's determination that such a threat exists, and the

point at which the state should intervene. Not only the content of the expression, but also the circumstances, including the context of the expression and the audience to which it is directed, must be considered [Channing Club, 1971].

Three cases involving college students' distribution of potentially disruptive material illustrate the boundaries courts see for First Amendment rights on campuses.

In *Norton* v. *Discipline Committee* [1969], eight students at East Tennessee State University were suspended by the school's discipline committee for distributing on campus material described as "false, seditious and inflammatory." The Sixth Circuit characterized it as "calculated to cause a disturbance and disruption of school activities and to bring about ridicule of and contempt for the school authorities." For instance, leaflets urged students to "stand up and fight" and to "assault the bastions of administrative tyranny." They called school officials "despots" and referred to the administration as a "problem child." The court saw the language as "an open exhortation to the students to engage in disorderly and destructive activities." After the leaflets were distributed, twenty-five students told a school dean that they "wanted to get rid of this group of agitators." On the strength of this, the court held that the school president properly forecast material and substantial interference with school activities and acted correctly in holding hearings leading to the students' suspensions. The court stressed that school officials did not have to delay action "until after the riot has started and buildings have been taken over and damaged." Instead, they could "nip such action in the bud" and take steps to prevent the inception of disruptions. In a strong dissenting opinion, Judge Anthony J. Celebrezze said he felt there was insufficient evidence to predict disturbances resulting from distribution of the leaflets. Instead, he suggested, the twenty-five students who implied they would cause disorder if the "agitators" were not stopped should have been the ones disciplined.

In a second case, *Jones* v. *State Board* [1969], the Sixth Circuit upheld the suspension and expulsion of a group of students from Tennessee A & I State University in part for distributing leaflets calling for a boycott of class registration and in part for disrupting meetings on campus. The court affirmed the District Court's ruling that the suspension was not as a result of an exercise of First Amendment freedoms, but because of "conduct obstructing the educational functions of the University" [Jones, 1969].

In *Speake* v. *Grantham* [1970], a federal District Court upheld the suspensions of students for, in part, attempting to distribute leaflets containing the false information that classes would be suspended the two days before final examinations because of violence at Jackson State and the "critical situation on our campus." The court said that it is not necessary for school officials to delay action against those who "would disrupt the academic process or interfere with the orderly conduct thereof" or interfere with the rights

of other students until after the action has been taken and the damage inflicted. The students were not suspended for exercising their First Amendment rights, said the court, but for possessing leaflets which contributed, or might have contributed, to the disruption of normal educational activities.

In addition to consideration of "material and substantial disruption," the Supreme Court has recognized that certain conduct may be regulated despite its incidental "speech" element. For instance, the Court said that punishment imposed for burning a draft card did not violate the individual's rights, because (1) the regulation involved was within the constitutional power of the government, (2) it furthered an important governmental interest, (3) the governmental interest was unrelated to the suppression of free expression, and (4) the incidental restriction on free expression was no greater than necessary to further that interest [United States, 1968; Gay Students, 1974]. These criteria may also be used to distinguish impermissible control of expression from acceptable control of action by university administrators. In the special circumstances existing on college campuses, courts have held that administrators should attempt to control potentially disruptive printed material not through direct censorship of content but, if necessary, through nondiscriminatory imposition of regulations regarding time, place, and manner of distribution. The Supreme Court stated in *Healy* v. *James* [1972] that "just as in the community at large, reasonable regulations with respect to the time, the place, and the manner in which student groups conduct their speech-related activities must be respected."

Put differently, one court has indicated that freedom of expression, not being absolute, must be exercised with consideration for the "general comfort and convenience, consonant with peace and good order and the rights of others." Lack of limited regulation of time, place, and manner of distribution of material, said the court, would hinder the educational process [Board of Supervisors, 1973]. Another court has cited two Supreme Court decisions [Breard, 1951; Grayned, 1972] upholding reasonable, nondiscriminatory imposition of regulations necessary to further significant governmental interests; the court cited the necessity to continue school operations as one of these interests. The court said the crucial question in determining whether regulation of free expression is acceptable is whether the manner of expression is basically incompatible with the normal activity of a certain place at a certain time. Thus, distributing newspapers during class time could properly be restricted, but distributing them on campus at points away from classrooms might not be curtailed. Such minor annoyances as litter on campus from discarded newspapers would not be considered sufficient grounds to abridge First Amendment freedoms [New Times, 1974].

A more restrictive view of administrators' powers to set regulations regarding time, place, and manner of distribution is taken by one federal District Court. In a case involving solicitation of members and dues for a political group on a Texas college campus, the court emphasized that it is

"well-settled law" that if state action impinges on "high-order First Amendment rights," the state must prove that governmental interests are sufficiently compelling to justify any impingement on free expression. According to the court, "Absent such a showing, any 'time,' 'manner,' or 'place' regulation is unreasonable." The court did state that prevention of "substantial disorder or material disruption of classroom activity" would be a compelling state interest [New Left, 1971].

Similarly, a dissenting opinion in *Norton* v. *Discipline Committee* [1969] indicates that students may be disciplined for violating established rules regarding time, place, and manner of distribution, such as inhibiting the flow of pedestrian traffic while distributing, accompanying distribution with loud and raucous noises, or distributing at times of the day calculated to disturb others. The implication, however, is that regulations more restrictive than these might not be considered "reasonable."

The Fifth Circuit's view may clarify administrators' powers to impose indirect restrictions:

> Communicative conduct is subject to regulation as to "time, place and manner" in the furtherance of a substantial governmental interest, so long as the restrictions imposed are only so broad as required in order to further the interest and are unrelated to the content and subject matter of the message communicated. [Gay Students, 1974, at 660]

Prior Restraint

The Supreme Court has emphasized that First Amendment protections apply with equal force on college campuses and in the community [Healy, 1972]. Numerous cases have made it clear that once a public college or university makes an activity available to students, it must operate that activity in accordance with First Amendment principles [Trujillo, 1971]. It cannot, for instance, fund a student publication and then arbitrarily restrict the material it may publish [ACLU, 1970].

Administrators are not powerless, however. To some extent they may be permitted to restrict expression on campus, depending on whether the restrictions are (1) direct limitations placed on the content, or (2) indirect limitations placed on conduct incidental to the expression, that is, time, place, and manner of distribution. Indirect limitations may be considered acceptable if they are reasonable, nondiscriminatory, and imposed for the purpose of maintaining public order. But direct limitations on content can be imposed only if there are special circumstances, usually meaning that the material will to a material and substantial degree interfere with school operations [Channing Club, 1971; Tinker, 1969]. Free expression does not mean

unrestricted expression, and students' constitutional rights may be modified or must yield entirely when they interfere with the school's need to maintain order and continue the educational process [Antonelli, 1970].

However, the burden of proof is on school administrators to show that abridgment of basic freedoms is necessary. When First Amendment rights are restricted, "the burden of proof is on the state to show that the governmental interests asserted to support the impingement are 'compelling' " [New Left, 1971]. Prior restraint, that is, administrative approval of all material to be published, is a direct regulation of content and is therefore acceptable only when there is substantial justification, an "overriding governmental interest vindicating interference with First Amendment freedoms" [Channing Club, 1971]. It is instructive to look at William Blackstone's declaration about prior restraint as quoted by Chief Justice Hughes in *Near*: "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publication, and not in freedom from censure for criminal matter when published" [Near, 1931, at 713].

The framers of the Bill of Rights, intensely disliking some forms of censorship and licensing laws in England, assumed that the First Amendment incorporated the common law ban on prior restraints [Emerson, 1955]. It was thought that governments should not have the power to require material to be submitted to them and accepted before allowing distribution. The Supreme Court in *Near* v. *Minnesota* [1931] stated that only in exceptional circumstances will prior restraint be permitted—for expression which would hinder the nation during wartime, for expression which would incite violent or forceful overthrow of the government, for obscene expression, and for certain instances of libel. Forty years later in the Pentagon papers case, the Court again ruled against prior restraint, holding that the government "carries a heavy burden of showing justification for the imposition of such a restraint" [New York Times Co., 1971]. Only for motion pictures has the Court allowed a system of prior restraint, even then requiring safeguards against discriminatory imposition of censorship [Freedman, 1965].

Student publications are similarly protected from prior censorship. A significant case in point is *Antonelli* v. *Hammond* [1970], involving the student newspaper at Fitchburg (Mass.) State College. Funding for the paper had come from compulsory student activity fees which, according to Massachusetts state law, were to be expended "as the president of the college may direct." John Antonelli was elected editor of the paper and changed its name from *Kampus Vue* to *The Cycle* and its focus from "student news and events on campus" to "areas of broader social and political impact." In one issue he attempted to reprint an article by Eldridge Cleaver which had originally appeared in *Ramparts* magazine. The printer "objected to the theme of and the four-letter words generously used in the text of" the article. He informed the president of the college, James J. Hammond, who

stated that "publications should provide an opportunity for students to develop skills in journalism, should not consist primarily of compilations published previously elsewhere and should not serve as a vehicle for the dissemination of obscene material." Hammond then insisted that before he would release funds to pay for future issues, all material to be printed in *The Cycle* would have to be approved by him or his representative. Antonelli agreed that while court proceedings (which were instituted by Antonelli to stop Hammond from reviewing material and withholding funds) were continuing, he would allow stories to be reviewed by an advisory board so that "some form of student publication" could be distributed. The board was established but with "no guidelines of acceptability . . . established and no standards [to] limit the discretion of the two faculty members as they pass[ed] judgment on the material submitted to them."

A federal District Court viewed the board's powers in "the narrowest light possible, i.e., censorial only over the obscene." But the court noted that regardless of how narrow the function, it was still exercising previous restraint and, consequently, there was a "heavy presumption against its constitutional validity." While it is true that obscenity does not fall within constitutionally protected expression, the method of achieving the suppression is crucial. "Whenever the state takes any measure to regulate obscenity it must conform to procedures calculated to avoid the danger that protected expression will be caught in the regulatory dragnet." The court noted that it was doubtful any procedural safeguards could be formulated which would support prior censorship. Certainly, Fitchburg State College had none. This, taken together with President Hammond's apparent lack of knowledge of the complexities of Supreme Court obscenity rulings, as noted in the decision, caused the court to conclude that establishment of the advisory board was "prima facie an unconstitutional exercise of state power."

The decision does state that the "exercise of rights by individuals must yield when they are incompatible with the school's obligation to maintain the order and discipline necessary for the success of the educational process." But there was no such justification here.

Significantly, the decision holds that the Massachusetts law giving the college president power to distribute student body funds "does not make him ultimately responsible for what is printed in the campus newspaper." The president's power

> imposes no duty on [him] to ratify or to pass judgment on a particular activity. The discretion granted is in the determination whether the funds to be expended actually further the activities to which they are intended to be applied. Once that determination has been made, the expenditure is mandatory. [Antonelli, 1970, at 1336-1337]

The decision does concede the state has the power to regulate forms of expression "to some degree, . . . but the creation of the form does not give

birth also to the power to mold its substance. . . . The state is not necessarily the unrestrained master of what it creates and fosters" [Antonelli, 1970, at 1337]. For instance, it might be reasonable to restrict student newspapers to publishing articles written only by students, said the court, but it is not reasonable to restrict what articles students write or the thoughts expressed. The decision concludes: "It would be inconsistent with basic assumptions of First Amendment freedoms to permit a campus newspaper to be simply a vehicle for ideas the state or the college administration deems appropriate" [Antonelli, 1970, at 1337].

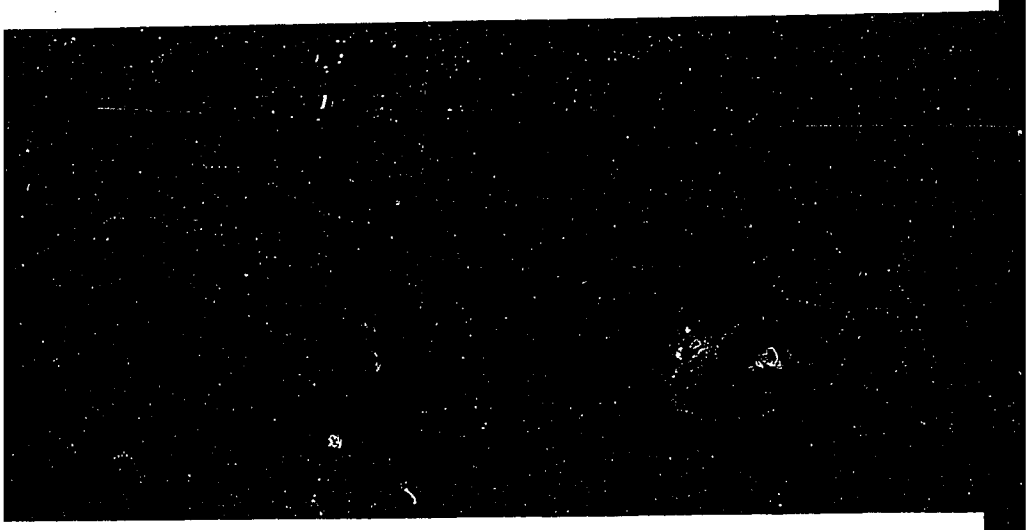
In a second important case involving students' freedom of expression, *Joyner* v. *Whiting* [1973], the president of North Carolina Central University attempted to impose prior restraint on a student newspaper by withholding funds unless published material met his approval. The situation arose when Johnnie Joyner, the student editor, printed a front page editorial indicating that white students were not welcome at the previously all black school. He then declared that white students would not be allowed on the paper's staff and that advertising from white-owned businesses would not be accepted. Fearing that the school would thereby be violating the Fourteenth Amendment and the 1964 Civil Rights Act, President Albert Whiting withdrew financial support from the paper.

The Court of Appeals for the Fourth Circuit refused to accept the District Court's theory that this case was an exception to the "well chartered waters" that school officials cannot withdraw financial support to a newspaper because of disagreement with its editorial stance (though the court did affirm that a newspaper may be discontinued for reasons "wholly unrelated to the First Amendment"). The lower court had ruled that the paper's editorial stance did, indeed, violate the laws against state agencies encouraging racial segregation and that state money could not be used for this purpose. Furthermore, the lower court said, any future funding of a campus paper would come about because the administration accepted that publication's editorial policies. This would be using school funds unconstitutionally to promote one point of view over another. The solution, therefore, was to forbid funding of any campus paper.

However, the Fourth Circuit said the case law concerning the limits of administrators' control over students' First Amendment rights was too strong to allow such a ruling. The court saw no disruption of school activities due to Joyner's policies nor a refusal by Joyner to publish pro-integration material. Since Joyner later disavowed his staffing and advertising policies, the court saw no basis for the claim that the newspaper's editorial policies put the University in the position of violating the law.

The *Antonelli* [1970] and *Joyner* [1973] cases show that public college administrators cannot impose prior restraint on student publications, except in unusual circumstances, just as other government officials cannot impose prior restraint on privately owned print media. However, there is

Prior restraint can involve refusal to print, refusal to pay for the printing of a publication, or refusal to allow distribution. In the first instance, the printing firm itself may balk at the material and may call it to a school administrator's attention, as in the *Antonelli* [1970] case or a case involving a student literary magazine at the University of Mississippi [Bazaar, 1973]. Similarly, a printer faced with a student magazine from the University of Maryland with a picture of a burning American flag on its cover refused to print the issue, informing the school that he believed he would be subject to criminal prosecution under the state's anti-desecration statute. Under Maryland law such a depiction may be a criminal act, and the state attorney general issued a ruling saying it would subject any printer who printed the cover to criminal liability. A second firm agreed to print the magazine, but the University then said that, on the attorney general's advice, it would not pay for their services. The printing was stopped and another cover with the word "Censored" printed diagonally across was printed. A federal District Court ruled the statute was being applied unconstitutionally in this instance [Korn, 1970].



which violated their First Amendment rights. A federal District Court asserted that the newspaper did not intend to speak for the student who brought the litigation, that the newspaper was a "meaningful part of the educational process and complemented formal classroom instruction," and that the students' freedom of expression was in no way constrained by publication of the paper. The court said that governmental agencies may spend money to publish the position they take on controversial matters, but that in this instance

Decisions in several cases have emphasized that prohibiting distribution of student publications because of a disagreement with or dislike of the contents is an unconstitutional form of prior restraint. An important case illustrating this is *Bazaar* v. *Fortune* [1973], which involved *Images*, a student literary magazine at the University of Mississippi. The magazine was chartered and recognized by the University and, according to the court, was intended as a vehicle for student-written and student-edited literary compositions. It was reproduced by the University's central duplicating facility. The magazine was sold at a nominal charge, with additional money coming from the Associated Student Body Activities Fund and any losses being made up by the English Department. The publication had close ties with a regular English Department course in creative writing, the instructor of which served as magazine adviser.

One issue included two short stories, among several poems and illustrations, which were written by one student in the creative writing class and which concerned "inter-racial love and black pride," according to the court. The superintendent of the printing facility suggested that the school chancellor should look closely at the two stories. He did, decided to hold up binding and distributing the issue, and formed a committee of deans of various University departments to determine if the two stories were acceptable. The particular concern was what the court called "some quite 'earthy' language." The committee decided publication would be "inappropriate." The court said that the words to which the committee apparently objected were used in the conversations of characters in the stories who could be expected to use such language and were not used in a "pandering" manner or in a "sexual sense."

The Fifth Circuit sustained a District Court's ruling that the University officials should not interfere in the magazine's distribution. The court said the University's claim that it was publisher of the magazine and, therefore, was able to stop publication was not valid. It found that the University's financial connection with the publication was "tenuous" that part of the financing came from the Associated Students, and that a statement in the magazine that it was published by students at the University with the advice of the English Department was not sufficient to equate the school with a private publisher. More specifically, the court said, "the University here is clearly an arm of the state and this single fact will always distinguish it from the purely private publisher as far as censorship rights are concerned."

An attempt to inhibit distribution on a college campus of a privately owned publication was held unconstitutional in *New Times* v. *Arizona Board of Regents* [1974] by the Arizona Supreme Court. Regents of the University of Arizona established regulations limiting to six the distribution points of off-campus newspapers, requiring that they use dispensing machines, and setting a $2 fee per newsstand per issue. The court held that there was no compelling state interest which would justify such rules, stressing that a con-

cern about an excessive amount of litter on campus would not be acceptable justification.

Emphasizing that freedom of the press extends to circulation and distribution as well as to publishing, the court said the regulations were not "designed to prevent the disruption of the ordinary educational activities of the campus nor to insure that those seeking to distribute newspapers will not interfere with those seeking to occupy the public grounds for other legitimate purposes." The rules, which allowed for no form of distribution other than coin-operated boxes, were also unconstitutional because they demanded obtaining the University's permission to distribute. Additionally, the court saw the $2 fee as a license to distribute, which is impermissible when the fee is not "apportioned to and contingent upon the expense" required to administer the ordinance under which the fee is charged [New Times, 1974].

Prohibition of distribution also was not allowed in two cases involving publications which administrators considered obscene or profane. In one, the Supreme Court held that an "underground" newspaper contained protected expression [Papish, 1973]. In the second, a federal District Court noted that books and magazines containing language similar to that found in the student publication were to be found in the university library and bookstore [Channing Club, 1971].

The Louisiana Supreme Court, however, allowed Louisiana State University (New Orleans) to prohibit distribution of political materials by two students who were the only members of the Revolutionary Communist Youth. A University rule required prior approval before literature could be sold on campus, granting such approval so long as there was no interference with school operations. Additionally, the University claimed that limited space in the Union Center required that only student groups recognized by the University could be granted space to sell publications in that building. To be recognized, a group had to have ten members. Since the Revolutionary Communist Youth did not meet that requirement, the group could not apply for space in the Center. The court agreed that University facilities were limited and therefore could not be "extended to all comers. Somewhere a line had to be drawn." Thus, the court did not deem unconstitutional the denial of permission in this case [Board of Supervisors, 1973].

Some administrators have claimed that student publications, whether school-approved or not, and publications produced off-campus but distributed to students, are "commercial" publications, either because they are sold or because they carry advertising, and therefore are not protected by the First Amendment. Courts have generally held that materials do not lose their constitutional protection simply because they are disseminated under commercial auspices [Jacobs, 1973, at 608-610]. The Supreme Court has said, "The commercial nature of the activity is no justification for narrowing the protection of expression secured by the First Amendment" [Ginzburg, 1966, at 949; see New Left, 1971; New Times, 1974; Bigelow, 1975].

In the face of these protections for student publications, the University of Mississippi attempted to dissociate itself from a literary magazine it believed to be of inferior quality. In the *Bazaar* [1973] case, the Fifth Circuit allowed the University, at its option, to place or stamp on the magazine's cover a disclaimer: "This is not an official publication of the University." In dissenting from this, two judges claimed that the court had in fact ignored the basic issue in the case, namely, whether the University has the right not to sponsor the publication. According to the dissenting opinion, the University made plain it did not want to confiscate the publication or prohibit its private distribution. Rather the dispute was that the school did not want to sponsor the magazine, while the students felt they were entitled to sponsorship. In concurring with the Supreme Court's refusal to hear the case on appeal, Chief Justice Warren Burger commented that he read the decisions of the lower courts as

> not requiring the university to continue to make available to the respondents, at public expense, facilities of the university for the production of any future publication. Those attending a state university have a right to be free from official censorship in their speech and writings, but this right does not require the university to commit its faculty or financial resources to any activity which it considers to be of substandard or marginal quality. [Bazaar, 1974, at 995]

This is not a Supreme Court opinion, but the comment of an individual justice. Courts would certainly have difficulty drawing Burger's distinction between refusal to fund based on quality and refusal based on disagreement with content. In fact, the University of Mississippi administrators' initial concern with the literary magazine seemingly was with the use of certain "earthy language." Did they then wish to separate the University from the magazine because of quality or content? Courts have not yet had to deal with this fine line; in fact, the Court of Appeals avoided it in the *Bazaar* [1973] case.

Vagueness and Overbreadth

In attempting to regulate student expression, some universities have promulgated rules which are vague and/or overbroad. While in colleges such rules are frequently informal and are not codified as they are in secondary schools [Trager, 1974], they are nonetheless subject to attack. Rules must be drawn narrowly and precisely and must be applied in a nondiscriminatory fashion to avoid charges of vagueness and overbreadth [Papish, 1973].

The Supreme Court's "void-for-vagueness" guideline stipulates that a rule "which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process" [Connally, 1926, at 391]. Words in the regulation must provide "an ascertainable standard of conduct" [Baggett, 1964, at 372] and must "be susceptible of objective measurement" [Cramp, 1961, at 286]. Thus, a regulation must contain definite rules of conduct and must specify that certain violations will result in certain punishments [Marinelli, 1973]. For instance, in a case involving the suspension of college students, a District Court judge held the term "misconduct" to be vague [Soglin, 1968]. To avoid vagueness, then, a regulation applied to college students "must be sufficiently definite to provide notice to reasonable students that they must conform their conduct to its requirements and may not be so vague" that its meaning is not clear and understandable [Budd, 1969, at 103-1-1035].

The other prong of the "void-for-vagueness" doctrine is overbreadth, that is, whether a reasonable application of a rule's sanctions could include conduct otherwise protected by the Constitution. Courts have indicated some general conditions rules must meet. First, the rule must be specific, including precise places and times where possession and distribution of student publications are prohibited. Second, the rule must be understandable to persons of the age and maturity it covers. Third, the rule must not prohibit protected activity, such as that which is orderly and nondisruptive [Jacobs, 1973, at 604-605].

There is not total agreement regarding the application of the "void-for-vagueness" doctrine to students. In their General Order on Student Discipline, while holding that detailed codes of student conduct are counterproductive on the college level, a group of federal judges in Missouri stated that the vagueness doctrine "does not, in the absence of exceptional circumstances, apply to standards of student conduct. The validity of the form of standards of student conduct . . . ordinarily should be determined by recognized educational standards" [General Order, 1968, at 146-147].

Several courts dealing with freedom of expression for college students, however, have indicated a displeasure with vague and overbroad regulations. For instance, the *Joyner* [1973] court specified that to comply with the First Amendment, rules must be narrowly drawn to rectify only specific abuses of the freedom. Objections to language in a student magazine on the grounds of "taste" and "appropriateness" were considered vague [Bazaar, 1973]. Informal rules allowing a faculty advisory board to approve or reject material for a student paper were considered overbroad since it was not specified on what constitutionally permissible grounds the board would make its decisions [Antonelli, 1970].

An example of rules both vague and overbroad is found in *New Left Education Project* v. *Board of Regents* [1971]. The University of Texas pro-

hibited the sale of a student newspaper under rules forbidding both "commercial" and "noncommercial" solicitation on campus, the former term being defined very broadly, the latter not being defined at all. A federal District Court held the rules overbroad, encompassing otherwise protected material. While the University could forbid disruptive or fradulent solicitation, the rules went beyond that "small caliber precision" required of regulations affecting First Amendment rights. Classroom disruptions, proliferation of solicitation booths, and litter problems could all be avoided with narrowly drawn rules. But broad regulations unreasonably restricting students' freedom of expression were unconstitutional. Additionally, the court said that a rule allowing sales, if authorized by the University, was an impermissible form of licensing, since no standards existed which governed the granting of permission. Exercising freedom of expression, said the court, cannot be contingent upon arbitrary administrative decisions.

The University and Its "Image"

The Supreme Court in *Tinker* [1969] specified that before students' freedom of expression could be abridged, school officials had to be able to show that their actions were "caused by something more than mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." To some college administrators, the discomfort comes from adverse community reaction to material appearing in student publications. The University of Mississippi, for instance, found certain words in a student literary magazine to be "distasteful" and claimed publication would "endanger the current public confidence and good will" which the University enjoyed. The Fifth Circuit said that such considerations might be involved in determining whether to limit students' free expression but felt such a rationale should be "handled gingerly and applied only in what can be characterized as most extreme cases" [Bazaar, 1973]. Just what the court meant by "extreme cases" is not clear. It would appear, under Supreme Court rulings, that "extreme cases" could be restricted only to "material and substantial disruption" or maintenance of order and discipline. The Fifth Circuit distinguished a previous decision it had made, which involved "quite vitriolic and vulgar personal attacks" on school administrators made by a nontenured teacher. There the court indicated that the effect of such attacks on public confidence in the university might be a factor in dismissing the teacher [Duke, 1972].

The First Circuit considered whether groups might lose their freedom of expression by promoting values "so far beyond the pale of the wider commu-

nity's values" that First Amendment protection could not be granted. The court said that it may not be possible to ascertain a community's values on certain issues, for example, permissive abortions, socialism, and pre-marital sex. The court stated that in almost all cases groups can be found within a community both favoring and disagreeing with particular stands on these and other issues. The First Circuit indicated that the First Amendment permits a wide range of subjects to be discussed, including those that might infuriate the community [Gay Students, 1974].

Schiff v. Williams [1975] is the most significant case dealing with a university's image and community values—dismissal of student editors was based in large part on these factors. During the 1973 fall semester, Florida Atlantic University President Kenneth Williams dismissed three student editors from their positions on the *Atlantic Sun* and began publishing the paper using administrative personnel. In a statement published in the Sun, Williams said that "the level of editorial responsibility and competence has deteriorated to the extent that it reflects discredit and embarrassment upon the university." He said the paper's decreasing quality was irreversible under the editors he dismissed. He claimed the editor did "not respect" the publications guidelines, which stated that the student newspaper would not be a "gripe sheet," a "smear sheet," or "representative of shoddy, 'yellow' journalism." The guidelines, which were approved by the Board of Regents and the president, also specified that the newspaper "must reflect the best interests of the University community it serves." The president said the *Sun* reflected a standard of spelling, grammar, and language unacceptable in a university publication, that it "emphasized vilification and rumor mongering," and that stories had been "incorrect and misleading." He characterized editorials as "immature and unsophisticated."

The editors sued in a federal District Court and won reinstatement to their positions. The University appealed and the Fifth Circuit affirmed, rejecting the University's argument that since the editors were state employees, their free speech could be restricted by the president, as their employer, if their First Amendment freedoms were outweighed by a more significant governmental interest, that is, the school's desire to maintain a publication of high quality so as to project a proper view of the university and its student body."

The court said that unsubstantiated references to the paper's poor technical quality would not support a claim that the University's interests were superior to the students' freedom of expression. The "special circumstances" were not present which would allow abridgment of "the right of free speech embodied in the publication of a college student newspaper." Certainly poor grammar and spelling would not qualify as "special circumstances," though the court admitted they could "embarrass, and perhaps bring some element of disrepute to the school." However, the court said such faults were clearly not of the sort which could lead to a disruption of university operations or educational processes, which are "special circumstances" which might make abridgment of First Amendment rights permissible.

New York state courts also dealt with the question of the public's reaction to articles in student newspapers severely critical of organized religions. One article was entitled "The Catholic Church—Cancer of Society," which the court described as "a scathing attack on the Catholic Church"; the other was "From the Hart [sic]," which the court said could aptly be described as "blasphemous." Student papers supported by mandatory activity fees on two campuses of the City University of New York system were involved. School officials believed publication of such material in public college papers violated the free exercise of religion clause in the First Amendment, which has been held to mean that the government will maintain a strict neutrality, neither aiding nor opposing religion. A lower New York court ordered administrators to "prevent attacks on religion in any and all publications" and to "enforce a strict neutrality toward religion" in publications.

However, the appeals court said that the student papers had been established as forums for the free expression of ideas and opinions. Emphasizing that once such a forum is established school authorities cannot then place restrictions upon it which inhibit students' freedom of expression, the court said that since there was no showing of material and substantial interference with school operations because of the articles, and despite the displeasure of some members of the school community or community at large, imposing strict neutrality regarding religion would be a violation of students' First Amendment rights.

In dissent, one judge agreed that students have a right to express themselves but said that the right was not absolute, by necessity giving way to the rights of other students "to be free from ridicule about their religious beliefs" [Panarella, 1971].

Post-Publication Punishment

As indicated in previous sections, attempts by college administrators to impose prior censorship on student publications before distribution have been generally rebuffed by the courts. Various attempts have also been made to limit student press freedom after material has been published, including suspension or firing of student editors and refusal to fund publications.

As with prior restraint, such methods have been upheld by courts only when "special circumstances" exist, that is, material and substantial threats to orderly school operations. This is based on the Supreme Court's holding in *Tinker* [1969] that free expression can be abridged only if there is interference "with the requirements of appropriate discipline." Such reasons as

criticizing state officials [Dickey, 1967] or printing words considered obscene by administrators but not by the courts [Antonelli, 1970] are not sufficient to warrant curtailing First Amendment freedoms.

The Supreme Court dealt at length with the question of maintaining campus order in *Healy* v. *James* [1972]. A group of students attempted to have a local chapter of Students for a Democratic Society (SDS) recognized as a campus organization by Central Connecticut State College. Recognition would have entitled the group to use school facilities for meetings and to use campus bulletin boards and the student paper for notices. The college president refused recognition primarily on the basis that the group would not be sufficiently independent of the national SDS, which he believed to advocate a philosophy of violence and disruption, although the students stated they would not affiliate with the national group. Lower federal courts upheld the president's action, but the Supreme Court reversed those decisions. The Court viewed the case as having elements of competing interests, that is, the necessity for "an environment free from disruptive interference with the educational process" on the one hand, and "the widest latitude for free expression and debate consonant with the maintenance of order" on the other. The Court saw the First Amendment as resolving the conflict.

Noting that public colleges "are not enclaves immune from the sweep of the First Amendment" and that First Amendment protections must not "apply with less force" on campuses than in the community at large, the Court stressed that denial of recognition also prohibited the group from using campus facilities, thus inhibiting their freedom of association. Ability to meet and exist off campus, said the Court, did not justify abridgment of First Amendment freedoms by the school. Also, the Court emphasized that the burden of proof was not on students to show why they should have been granted recognition, but on the college to show why they should not have been.

The Court said the president's conclusions that the SDS chapter would be "a disruptive influence" at the college and that its "prospective campus activities were likely to cause a disruptive influence" might have been sufficient bases for his decision if they had been factually supported. In the context of the "special characteristics of the school environment," administrators' powers to prohibit "lawless action" are not limited to criminal acts but to any actions which materially and substantially disrupt the work and discipline of the school. However, where state action designed to regulate such actions also restricts constitutionally protected rights, the state must show that its actions are reasonably related to protection of its interests and that the restrictions on First Amendment rights are "no greater than essential to furtherance of that interest" [United States, 1968]. In *Healy* [1972], the Court reaffirmed its statement in *Tinker* [1969] that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."

Finally, stressing the critical line for First Amendment purposes between advocacy, which is entitled to full protection, and action, which may not be, the Court said students might preach changing campus rules and regulations, but they could not violate them.

In a similar situation, the president of the University of New Hampshire, under direct pressure from the state governor to "take firm, fair and positive action to rid your campuses of socially abhorrent activities" or face losing appropriations, imposed a strict ban on social functions of the Gay Students Organization (GSO). The GSO, an officially recognized student organization, sponsored a play on campus. During the evening individuals over which the GSO said it had no control distributed "extremist" homosexual publications. The college president threatened to suspend the GSO as a student group and refused to allow the group to hold social functions on campus. The First Circuit held that while universities may have some discretion in regulating purely social groups such as fraternities and sororities, its efforts to restrict cause-oriented groups abridged the students' First Amendment rights. Relying on *Healy* [1972], the court said that even indirect restrictions may be constitutionally impermissible if they impinge on students' basic First Amendment guarantees [Gay Students, 1974].

That circumstances can exist which justify First Amendment restrictions is shown by the *Norton* [1969] (distributing literature critical of administrators), *Jones* [1969] (distributing literature urging boycott of registration) and *Speake* [1970] (distributing false notices that classes would not meet) cases. In events leading to another case, several students in the lobby of a Texas junior college talked to a crowd finally numbering at least two hundred persons. An administrator asked the students to have the crowd disperse, since access to the college bookstore and to the stairways to classrooms was impeded. They refused and were later suspended after a hearing on charges of causing disruptive behavior. A federal District Court cited the *Tinker* language emphasizing "the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools" [Tinker, 1969, at 507]. The court accepted administrators' contentions that the excited crowd might at any moment become violent and that the students were not suspended for expressing their views but for causing and refusing to abate the disturbance [Haynes, 1974].

Disciplinary Actions and Due Process

Some college administrators, reacting adversely to student publications, have

instituted disciplinary actions against the students responsible. For instance, Barbara Papish was expelled from the University of Missouri for distributing an underground newspaper "containing forms of indecent speech," according to the University's Dean of Students, in violation of the Board of Curator's bylaws [Papish, 1973]. Gary Dickey was denied readmission to the fall term at Troy State University in Alabama for "insubordination" after printing "Censored" across a space reserved for an editorial the school president ordered him not to print in the school newspaper [Dickey, 1967]. Dorothy Trujillo was fired from her position as managing editor of the Southern Colorado State College student paper for attempting to print material her adviser considered controversial [Trujillo, 1971]. Three students were fired from editorial positions on the Florida Atlantic University newspaper for publishing what the school president called "unacceptable and deplorable" material [Schiff, 1975]. In all these cases, courts refused to accept administrators' reasons for such discipline and ordered students returned to their former status.

However, courts will not in all instances overturn discipline of student journalists. In high school cases, several courts have not reached constitutional questions of First Amendment rights but rather have decided cases on the basis of patterns of disruptive behavior or of disobedience of administrators' orders [Trager, 1974: 53-56]. This approach was taken in at least one college case involving a school paper. John D. Yench was the student editor when, on two occasions, the paper printed material deemed "objectionable" by the administration of the Colorado School of Mines. The first time, Yench was put on "probation as editor," the second time he was *put on* "probation as a student," and he was later told that probation extended until graduation. The college had a policy that those graduating at the end of summer term could attend the spring commencement, which Yench did. At the commencement ceremony he wore a Mickey Mouse hat, refused to remove it, and otherwise disrupted the proceedings. He was charged with violating the school's standards, was found guilty at a disciplinary hearing, and was dismissed from the college. He brought suit asking readmission.

The Tenth Circuit said that although "the total of all infractions may aggravate the ultimate penalty," this did not require the court to carefully scrutinize prior events which did not "constitute an aggrievement in the constitutional sense." The court remanded the case for consideration of whether wearing a Mickey Mouse hat to graduation ceremonies was an exercise of free expression [Yench, 1973].

The Yench case turned on the question of due process for students at disciplinary proceedings. Disciplinary actions against students, including student journalists, must comport with procedural due process, that is, certain steps must be taken before an individual can be denied the protected rights of "liberty" and "property" specified in the Fourteenth Amendment. Generally, arbitrary or capricious punishment will not be upheld in the courts.

The autonomy of public educational institutions to punish students was first overturned in *Dixon* v. *Alabama State Board of Education* [1961]. The Fifth Circuit held that administrators are clothed in governmental authority, and any actions they take which can substantially injure a student must comply with minimal requirements of procedural due process. Courts have generally noted that the process need not be equivalent to that required for criminal charges, though certain elements are required: (1) adequate notice in writing must be given so that the student will have sufficient time to prepare a defense (notice should include the specific grounds on which charges are made, the nature of the evidence against the student, and the possible action to be taken if charges are proven); (2) there must be a hearing at which the student is offered fair opportunity to present his or her evidence and explanations and to present witnesses in defense; (3) no disciplinary action may be taken on grounds for which there is no substantial evidence; (4) results and findings of the hearing must be presented in a report open to the student's inspection; and (5) appeal should be available to the highest administrative authority in the university.

Due process in disciplinary hearings does not require cross-examination of witnesses, warnings about self-incrimination or privileges, or opening the hearing to the public or college community. While several lower courts have indicated that the university need not allow a legal counsel to represent the student, unless the school itself is using counsel in the hearing, the Supreme Court has seemingly left the door open on this point. In *Goss* v. *Lopez* [1975] the Court said,

> We stop short of *construing* the Due Process Clause to require, *countrywide*, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel. . . . We should also make it clear that we have addressed ourselves solely to the short suspension, not exceeding 10 days. Longer suspensions or expulsions for the remainder of the term, or permanently, *may require more formal procedures.* [at 583-584]

Hearings are required for interim suspensions, which should not be based on a presumption of guilt but on evidence presented at a preliminary hearing. This, too, requires adequate notice. If it can be shown that the student's presence on campus would be a danger to property, to others, or even to the student, a temporary suspension can be imposed immediately. A hearing should be held within a few days to substantiate the need for suspension, and a full hearing should be scheduled as soon as possible to comport with procedural due process [Young & Gehring, 1974]. Similarly, hearings are required even for short suspensions [Goss, 1975].

Hearings are not necessarily applicable in instances of suspension or expulsion for scholastic reasons, that is, if a student is removed from school for not meeting academic standards.

In the *Yench* [1973] case, the Tenth Circuit held that although the informal conferences at which Yench was given his first two probationary punish-

ments did not comport with due process, Yench's failure to object to this within a reasonable time indicated an acquiescence to the procedure.

Sanctions against Publications

In addition to disciplinary actions that may be instituted against students who engage in protected or unprotected expression, there may be sanctions taken against the newspaper or periodical involved, for example, refusing to fund the publication, refusing to allocate facilities for the staff, or refusing to appoint an editor.

Refusal to fund a publication has been dealt with most clearly in the *Antonelli* [1970] and *Joyner* [1973] cases. The courts said that colleges are under no affirmative obligation to establish student publications, but once such publications are established, administrative actions must be guided by the First and Fourteenth Amendments. Specifically, funds cannot be removed from student publications for reasons having to do with students' freedom of expression, nor can funds be stopped because the administration does not like the content of the publication. Specifically, the *Joyner* court stated:

> It may well be that a college need not establish a campus newspaper, or, if a paper has been established, the college may permanently discontinue publication for reasons wholly unrelated to the First Amendment. But if a college has a student newspaper, its publication cannot be suppressed because college officials dislike its editorial comment. [at 460]

However, Chief Justice Burger said, in concurring with the Supreme Court's refusal to hear the *Bazaar* [1974] case, that he did not believe a university had to support "substandard or marginal" publications. The question may again be one of quality as opposed to content. The *Schiff* [1975] court said dissatisfaction with the grammatical and even reportorial quality of a student paper could not justify firing the editors. There is not yet a clear answer to the questions raised by Burger's comment.

Students have also attempted to stop the funding of campus periodicals. The *Trujillo* [1971] case was precipitated in part by the student government's reallocation of funds, leaving the student paper without sufficient money to pay printer's costs.

A recent example of the power student governments try to exert involves advertising. In the spring of 1975, the student senate at the University of California at Hayward voted to stop the student newspaper's funding if

editors continued to accept ads for Gallo wines. Underlying the controversy was the union dispute between Gallo Industries and the United Farm Workers. Students maintained that running any type of Gallo ad implied that the student newspaper supported the Gallo cause against the UFW. The dispute came to a head in June when eight editors of the student paper resigned in protest of the student government action as well as the publication board's demand that if ads were continued, UFW must be offered free advertising space next to the Gallo ads ["Editor," 1976].

At Diablo Valley (Calif.) College, the student government association refused to allocate any funds to the student newspaper unless editors would agree to share editorial decisions, devote more coverage to student government, eliminate all drug-related articles, and allow prior review by anyone who was to be criticized by the newspaper in a future edition. Student editors refused these stipulations. Appeals to school administrators for funds to support the newspaper, published through a journalism class, were rejected [Reporters Committee, 1975: 94]. At the University of Arizona, a student senator's call for cessation of funds to the student paper and establishment of a student senate newsletter was rejected by the student government [Klahr, 1966]. There has not yet been a court ruling on whether student governments may refuse to allocate, or alter the allocation of, funds to a student publication.

Individual students have attempted to limit funds for student publications by claiming that they should not have to pay that portion of their activity fees allocated to newspapers or periodicals with whose editorial stance they disagree. For instance, a student at the University of Nebraska claimed his mandatory fees were being used to support a newspaper whose editorial policies he disliked and to bring speakers to campus with whose views he disagreed.

A federal District Court saw the question as being whether a state university is constitutionally prohibited from providing a forum for the expression of political and personal views supported by mandatory student fees. The court answered in the negative, noting that no student was forced to become associated with views opposed to his or her own, and that the University did not become an advocate of particular views simply by enabling them to be expressed. A college is free to adopt such educational philosophy as it chooses, said the court, and that may include establishing a student newspaper. Generally, a college is not prohibited from financing through mandatory student fees "programs which provide a forum for expression of opinion, be that expression oral or written" [Veed, 1973].

In a similar case involving the University of North Carolina student newspaper, students claimed that their First Amendment rights of free speech were abridged by the University's requirement that they lend financial support to a publication taking positions with which they disagreed. They also claimed the newspaper censored material, thus forcing them to pay for a publication

which violated their First Amendment rights. A federal District Court asserted that the newspaper did not intend to speak for the student who brought the litigation, that the newspaper was a "meaningful part of the educational process and complemented formal classroom instruction," and that the students' freedom of expression was in no way constrained by publication of the paper. The court said that governmental agencies may spend money to publish the position they take on controversial matters, but that in this instance the University was not attempting to impose its views on the student editors. Simply, the college was funding a forum for the expression of student opinions [Arrington, 1974].

Litigation and Liability

Lawsuits dealing with students' constitutional rights have increased considerably in recent years. Students, who are becoming more aware that they may find solutions in court to what they consider oppressive conduct by administrators, may bring litigation asking for relief from unwarranted interference with their First Amendment guarantees. This may involve asking courts for injunctions forcing administrators to cease certain actions, such as forbidding distribution of student publications, firing student editors, or imposing suspension or expulsion. Courts may be asked to expunge notations of disciplinary proceedings from student records.

Students who believe their First Amendment rights have been abridged by college officials frequently litigate their claims under section 1 of the Civil Rights Act of 1871:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. [42 U.S.C. sec. 1983]

Although the Civil Rights Act was originally designed to redress wrongs inflicted because of race, relief under the statute may be sought for grievances beyond that category—including violations of First Amendment rights. Actions under section 1983 may involve asking for monetary damages from school officials and payment of attorney's fees. Recent court decisions have begun to clarify whether such awards may be made.

While universities may not be "persons" within the context of section 1983 [Kenosha, 1973], individual administrators do come under the meaning of that word and may properly be made parties to Civil Rights Act actions, as private persons and/or in their official capacities [Gay Students, 1974]. However, the Supreme Court has construed the Eleventh Amendment to mean that federal courts do not have jurisdiction over actions which will lead to compensatory awards from general revenues of a state [Edelman, 1974]. Therefore, damage awards against administrators acting in their official capacities may remain unsatisfied, since the state is not required to open its treasury to pay such awards. However, in some states, the state legislatures may have enacted statutes, or taken other action, which amounts to legal consent to payment of the damage awards. Courts may freely impose damage awards against administrators in their individual capacities [Thonen, 1975].

Such awards may be made by courts under certain conditions. While damages can be given to a person deprived of constitutional rights, including First Amendment rights, under color of state law, the Supreme Court has said that public officials have a qualified immunity from damage awards if they acted in "good faith." This means that officials accused of constitutional wrongs while exercising discretionary duties within the scope of their authority may have an immunity, depending upon the scope of discretion they exercised, the responsibilities of the office they hold, and the "circumstances as they reasonably appeared at the time of the action." Thus, the Court said, the key element is the "existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with a good faith belief" that the action taken was proper [Scheuer, 1974].

In *Wood* v. *Strickland* [1975], the Court specified the elements of the "good faith" defense for public school officials. The defense involves both "objective" and "subjective" tests. The latter asks that the administrator act "sincerely and with a belief that he is doing right." But "permissible intentions" cannot justify the "ignorance or disregard of settled, indisputable law" leading to a violation of a student's constitutional rights. An administrator must have a "knowledge of the basic, unquestioned constitutional rights of his charges." The Court stated that a school administrator, including a board member,

> is not immune from liability for damages under section 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. . . . A compensatory award will be appropriate only if the [administrator] has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith. [Wood, 1975, at 322]

In other words, decisions which violate a student's constitutional rights can-

not be justified by a protestation of acting in "good faith" if the administrator reasonably should have known she or he was acting improperly.

State as well as federal courts may entertain section 1983 actions and award damages [New Times, 1974].

In *Schiff* v. *Williams* [1975], the Fifth Circuit upheld an award of damages (though only $1) and back pay to three student newspaper editors fired by the president of Florida Atlantic University because of his displeasure with the quality of the product they produced. The president claimed he was acting in good faith in performing his discretionary functions, but the court noted that he had not sought legal advice before firing the editors. The court also said that his claimed motivation of acting in the University's best interests was not a sufficient defense for abridging the students' First Amendment rights. The court also would not accept the claim that the Eleventh Amendment barred payment of back pay, since the money would come from mandatory student fees, a fund the court saw as "private" rather than state money.

However, the Fifth Circuit did not uphold the award of attorney fees. The court cited the Supreme Court's ruling in *Alyeska Pipeline Service Co.* v. *The Wilderness Society* [1975] that the tradition in America is for each party to pay its own attorney fees except in "cases involving willful disobedience of a court order or instances of bad faith, vexatious, wanton, or oppressive conduct" [at 258-259] and three other exceptions not applicable in this case. While the *Alyeska* decision has not yet been fully interpreted, it may be argued that "bad faith" in this context would be knowing what student rights are in a specific instance and deliberately abridging them—a more severe action (and probably less common) than not acting in "good faith." It is more likely, then, that damages will be awarded under *Wood* [1975] than will attorney fees under *Alyeska*.

Less severe than awarding damages, courts may issue injunctions which enjoin administrators from actions abridging students' rights.

Adviser: Teacher or Censor?

The position of the newspaper adviser is common in journalism departments of both large and small universities. The adviser's responsibilities usually include overseeing the paper's financial and business affairs, being available to students for advice, guiding students in the production of an issue, suggesting story and feature ideas, critiquing student work, acting as liaison between student staff and the rest of the university, and, above all, teaching students the duties and responsibilities of journalists. The National Council of College Publications Advisers suggests that the "adviser serves primarily as a teacher whose chief responsibility is to give competent advice to staff members in the areas to be served, editorial and/or business. . . ."

Advisers are not strictly teachers; because they deal with management, finances, and personnel, they may also be considered administrators. This is where the problem—both ethical and legal—for advisers arises. They are expected not only to teach responsible journalism but also to administer the school newspaper in the college's behalf. The potential for conflict is quite obvious.

The recent case of Pat Endress at Brookdale Community College in New Jersey points out some pitfalls. A journalism instructor, she was teaching students about investigative reporting. On one assignment the students uncovered what appeared to be a deliberate steering of audio-visual equipment contracts to a firm in which the chairman of the Brookdale Board of Trustees had a family interest. The staff of the student paper asked that a non-student assistant working with Endress write the story because of his experience and knowledge about investigative reporting. Endress wrote an accompanying editorial which was approved by the newspaper staff. She was fired by the school president. In the meantime, documents proved not only that the chairman's tie with the audio-visual company was through family, but that he was a member of the firm's board of directors. Endress filed a libel suit against the trustees, claiming they made false statements about her and alleging breach of contract and violation of her rights of free speech and press. After a lengthy court battle, she was ordered reinstated with tenure and was awarded back pay and damages, including $2,500 in punitive damages against the Brookdale Community College president. The libel claim was settled be-

fore trial for $900 and was therefore not before the trial court [Endress, 1976].

Advisers may find themselves in one of two positions when censorship of the student paper is involved. They may be censors, acting on their own or the administrators' behalf to see that certain material is not published [e.g., Trujillo, 1971; Dickey, 1967]. Or, they may refuse to censor, upholding the students' rights to publish as long as there is no substantial or material disruption of campus order [e.g., Bazaar, 1973]. In the first instance, the students may file suit alleging that the adviser, acting on behalf of the school, has deprived them of their constitutional rights under the First and Fourteenth Amendments. In the second, advisers who choose to protect students against censorship may find that their job is in jeopardy. Refusal to censor may be interpreted by the administration as insubordination and cause for dismissal.

Courts have recognized that teachers must be given maximum leeway in order to properly perform their function as teachers. As one justice wrote, "Teachers . . . must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for their practice of a responsible and critical mind are denied to them" [Wieman, 1952, at 196]. Faculty members, like students, do not shed their constitutional rights at the school door [Tinker, 1969]. In *Pickering* v. *Board of Education* [1965], the Supreme Court held that teachers could not be constitutionally forced to give up rights under the First Amendment that they would otherwise enjoy as citizens. Thus, teachers may speak and write freely about the schools in which they work as long as discipline and harmony are not disturbed, the teacher's performance is not impaired, and the statements are not knowingly false or reckless. The *Pickering* decision went far toward protecting teachers from arbitrary discipline by school officials when constitutional rights are being exercised.

Do advisers have a constitutional right to refuse to censor a paper? Or, stated another way, do advisers have any constitutional right to protect students from censorship? No such right has been specifically upheld by the courts.

One high school case points out the problem of the adviser as protector of students' constitutional rights. In *Calvin* v. *Rupp* [1973] the adviser of a high school newspaper refused to allow the news copy to be censored by school officials. The school board voted to withdraw Calvin's contract for the next year. The Court of Appeals upheld the school board, saying that the board may have been hasty or unwise but that "the school board's decision did not deprive [Calvin] of any of his rights under the due process clause of the Fourteenth Amendment." The court did not feel that the right to protect students from censorship was a liberty protected by the Constitution. Questions of tenure and teaching assignments may further confuse this issue.

On the other side, do advisers have the right as teachers to censor publication content because they feel the material is either irresponsible or against the best interests of their school? The answer has not been clearly given by the courts, since the degree to which a publication is connected to an academic department may cloud the situation. However, the scales seem to tip toward a negative answer.

The code of the National Council of College Publications Advisers reads:

> The adviser must guide rather than censor. . . . Student journalists must be free to exercise their craft with no restraints beyond the limitations of ethical and legal responsibility in matters of libel, obscenity and invasions of privacy.

The line between censoring and teaching, though, may be a very fine one for some advisers.

In 1970, the operation of the student newspaper at Southern Colorado State University was transferred from the student government to the Mass Communication Department. The *Arrow*, which had been operated as a campus newspaper and student forum, was to be used as an instructional tool; an adviser, Thomas McAvoy, was named. During the early fall, McAvoy ordered a page deleted from an upcoming issue. McAvoy felt that the material, a cartoon and a story about the president of the university, was irresponsible and libelous. A month later, managing editor Dorothy Trujillo submitted a column about the upcoming attorney general's race and an editorial criticizing a local judge. Again, the adviser felt the material was libelous and unethical, saying that the editorial needed to be rewritten. Before Trujillo revised the editorial, she was fired. The editorial was rewritten by McAvoy, and the column never appeared. Trujillo filed suit against various state officials, the University, and the adviser, seeking reinstatement to her position on the paper.

A federal District Court said that the faculty adviser's conduct had the effect of "reining in on the writings of Miss Trujillo" while leaving the work of other *Arrow* writers free. "We cannot uphold such conduct merely because it comes labeled as Teaching when in fact little or no teaching took place." The court also noted that the change in the operating policy of the paper had not been put into effect "with sufficient clarity and consistency" and that the *Arrow* continued to serve as a student forum. The implications of the Trujillo decision are (1) if there is no teaching by the adviser, only arbitrary censorship of individual copy, the student's rights will be upheld, and (2) if the newspaper is operated as a student or campus forum, censorship by the adviser will not be allowed [Trujillo, 1971].

The Fifth Circuit appeared to modify the *Trujillo* distinction between a student forum and a departmental teaching tool when it involved censorship. The court, speaking of a magazine published by the English Department to provide an outlet for the creative writing course and advised by a faculty member, said that "once a university recognizes a student activity which has

elements of free expression, it can act to censor that expression only if it acts consistent with First Amendment constitutional guarantees" [Zaar, 1973]. Hence, whether a publication is a student forum or a departmental tool, the Fifth Circuit indicates that it is protected by the First Amendment against censorship. In this case, the adviser and the English Department had supported the publication of two articles using street language and "four letter" words. The case speaks only to censorship by administrators.

An argument may be made that in most instances advisers are the administration's representatives to the student publication, and when censorship is effected by an adviser, it is in fact the act of an administrator—the censorship is on the school's behalf. If that is the case, whatever court decisions may say concerning administrative censorship may apply equally to advisers.

In the landmark case on campus press rights, *Dickey* v. *Alabama State Board of Education* [1967], the federal District Court spoke directly to advisers and their activities. In *Dickey*, the adviser of the Troy State *Tropolitan* had refused to allow an editorial to be published which criticized the Alabama governor and legislature. After stating that free press and free expression could be restricted only where the exercise "materially and substantially interferes with requirements of appropriate discipline," the court said: "Boards of education, presidents of colleges, and faculty advisers are not excepted from the rule that protects students from unreasonable rules and regulations" [Dickey, 1967, at 617]. The court appeared to be equating advisers with administrators, holding that advisers can censor only when there is "material or substantial interference."

Only one other case has spoken to the question of censorship by a non-administrator. In *Antonelli* v. *Hammond* [1970], the president of Fitchburg State College became upset with the student newspaper for publishing a reprint of an Eldridge Cleaver article which used "four letter" words and "street language." After the particular publication was refused printing and distribution privileges, the president appointed an advisory board which was responsible for approving material before funds would be released to pay for publication.

A federal District Court said that "prior submission to the advisory board of material . . . [to] decide whether it complies with 'responsible freedom of the press' or is obscene, may not be constitutionally required." The advisory board is analogous to advisers in smaller schools; thus the *Antonelli* proscription against prior censorship could be read as applying to advisers as well.

Although the National Council of College Publications Advisers code allows restraints within the limits of libel, obscenity, and invasion of privacy, this must be understood as self-restraint by student journalists, not censorship by advisers. In *Korn* v. *Elkins* [1970], a federal District Court said that fear of prosecution alone is not sufficient reason to apply a statute unconstitutionally. In other words, if advisers see potentially libelous material, at

least this federal court seems to argue that they can only give advice, that is, suggest its omission or correction, but they cannot actually prevent its publication. The Supreme Court language in *Near* v. *Minnesota* [1931] listing exceptions to the general rule against prior restraint, however, may speak to the contrary.

A Publication's Responsibilities

Libel

The courts have consistently held that libel, obscenity, and slander do not deserve the full protection of the First Amendment [United States, 1957]. For this reason, libelous material is feared by university officials who do not want costly court battles, large damage awards, and the good name of their institution smudged. The facts, however, seem to indicate that the student newspaper has a much better record than its privately owned counterpart when it comes to libel suits. A survey conducted in 1973 indicated that only nineteen libel suits had been brought against college publications since 1930. Of these nineteen, damages were paid out in only seven—one as a result of court litigation (this one involved an advertisement) and six in out of court settlements [Standley, 1972]. However, these figures should not indicate that less caution need be taken in writing and editing the college publication.

Libel is any visual communication (print, signs, or pictures) which exposes a person to hatred, ridicule, or contempt, or which lowers the person's reputation, causes the person to be shunned, or injures the person's livelihood [Nelson & Teeter, 1973: 61]. Libel is traditionally a common law offense, but recent holdings by the Supreme Court indicate that states must adhere closely to Court decisions interpreting libel in light of the First Amendment [New York Times Co., 1964; Gertz, 1974]. Material may be libelous whether it is part of a headline, the story itself, or an advertisement or photograph. Any defamation arising from carelessness, typographical error, or accident is usually no excuse for a libel, although such information may be helpful in lowering damage awards.

The plaintiff in a libel suit must plead and prove four elements—identification, publication, defamation, negligence and/or actual malice (reckless disregard for the truth or knowledge of falsity). "Negligence" has not been defined uniformly throughout the United States, and recent state court decisions should be consulted for the definition used in any particular state.

If negligence is found, and the plaintiff suffered some damage to reputation or pocketbook, he or she may recover what are termed "actual" damages. If, instead, actual malice is found on the publisher's part, the plaintiff may be awarded not only actual damages for actual suffering, but also presumed damages, which are awarded because the court presumes some injury did occur even if no suffering was proven in court. Also, punitive damages will be awarded, not based on the injury, but as punishment to prevent similar libels. (Not all states recognize punitive damages because they are seen as having a "chilling" effect on the press.)

The media have a whole array of defenses which may be used to defeat or lessen damages. The most important defense is truth. In many states truth alone is an absolute defense; in others truth, qualified with "good motives," is a defense. Other absolute defenses include the statute of limitations and consent or authorization from the plaintiff to print the material.

Qualified or conditional defenses are, aside from truth, the most heavily used by media in libel cases. They include accurate reporting of privileged material, fair comment and criticism, and the constitutional or *New York Times* rule. In every state, the media have a conditional privilege to report anything appearing in official reports and proceedings. This includes meetings of the Board of Regents, meetings of the body responsible for higher education, municipal council meetings, open court proceedings and court records (after some official proceedings have been taken), school board meetings, legislative sessions, and meetings of most quasi-judicial, -legislative, and -executive agencies. Most states have an open meetings and open records law which should be consulted before reporting some of the more obscure and lesser known meetings and records. Generally, a meeting will be privileged if it is required or provided for by law. These privileged news reports, however, must be fair and accurate or they will lose their qualified protection [Gillmor & Barron, 1974: 217].

There is only one reported college case falling under the category of privileged reporting. In 1955, the Vanderbilt University newspaper, the *Hustler*, ran a news story about six libel and invasion of privacy suits being brought against the campus humor magazine. The story reported on the plaintiff, who claimed that the magazine had ridiculed and libeled his four-year-old daughter by running her picture on a picture page spoofing Mother's Day. After the suit was filed, the *Hustler* sent a reporter to the courthouse to report on the filing and the contents of the complaints, and also to interview the plaintiff, the Rev. Robert Langford. Langford agreed to the interview and at first was willing to give the reporter a current picture of the daughter to use with the news story. However, on consulting his lawyer, the plaintiff refused to release the picture but added he did want publicity and that the interview could be reported. The Tennessee Court of Appeals in 1958 held that the *Hustler* was not liable for damages, because the six prior suits filed by Langford were a matter of court record, were thus privi-

leged material, and the *Hustler* news story was fair and accurate. The court also held that the consent to interview and Langford's agreement to the publicity foreclosed any possibility of damages [Langford, 1958].

Fair comment is still used in some states. Fair comment on matters of public concern is also qualified by fairness and accuracy. This defense protects honest opinions criticizing the work of public figures or institutions who perform for public approval or who work for the public interest [Gillmor & Barron, 1974: 234]. This particular defense covers comment and opinion, as distinct from facts, and is most helpful when editorial opinion evaluates public performances. Because it is often hard to separate comment from fact, the qualified defense is being replaced by the *New York Times* rule.

One recent case which was dismissed after the plaintiff failed to appear in court involved fair comment and criticism. The Western Illinois University *Courier* ran an editorial in 1972 commenting on the quality of teaching at the university. The editorial said in part:

> We get mad when our tuition rises, but we do little when a better education is stolen from us. As long as we settle for teachers who spend the quarter talking about Raquel Welch and gawking at all the women in class, as happened to me in an introductory journalism class, we deserve what we get. [Center, 1974: 4]

The journalism teacher alluded to sued the paper for libel. Although the suit was dismissed for technical reasons, such an editorial is "fair comment and criticism" of the public performance of a teacher who exposes himself daily to evaluation by students and faculty alike. The only way such a privilege can be defeated is if the comments were made with actual malice.

The privilege of fair comment and criticism adheres not only to persons but also to organizations or businesses which perform public services. In 1971, Iowa State University's newspaper charged a student discount buying service, Campus Alliance, Inc., with being a "slipshod organization . . . whose business approaches are questionable," with receiving "kickbacks and rebates," and with "dishonesty which led to doubts about the professionalism and business ethics" of the firm [Stevens & Webster, 1973: 33-34]. Campus Alliance filed a $100,000 libel suit against the paper. An Iowa court, however, dismissed the suit, based on fair comment and criticism. The court said the organization and its operations were matters of public interest to the University, and the paper had the duty to disclose the nature of these operations. The newspaper's motives, said the court, "were not due to ill will or spite and [were] therefore privileged under the law."

Known as either the constitutional, *New York Times*, federal, or actual malice rule, the protection afforded the media when reporting on public officials and public figures has been expanded greatly. In 1964, the Supreme Court of the United States ruled in a case involving a Montgomery, Alabama, city commissioner that the media require a greater degree of freedom when

reporting on the public actions of public officials. The Court said such an official can recover damages only if she or he can prove actual malice—that the material was published with a knowledge that it was false or with a reckless disregard of whether it was false or not [New York Times Co., 1964]. The protection offered by the rule has been expanded greatly in the last dozen years but has recently seen some diminution. By 1974 the rule had been expanded to include all public officials, all public figures, and any person involved in a matter of public or general concern [Rosenbloom, 1971]. With the *Gertz* [1974] and *Time, Inc.* v. *Firestone* [1976] decisions, however, the Court now seems to be applying the actual malice rule only to public officials and those other persons who have achieved notoriety or fame in a particular controversy or who have achieved general fame or notoriety for all purposes and contexts. The "public official" category has not been changed since the *New York Times Co.* v. *Sullivan* [1964] case. However, it is too early to know how the *Gertz* and *Firestone* decisions will affect the definition of "public figures" on campus. It should be remembered, though, that students are almost always private individuals unless they voluntarily put their names before the public.

In one of the first libel cases to come out of a college campus after the *New York Times Co.* [1964] decision, the Arizona Court of Appeals held that a student senator was a public official. The University of Arizona *Wildcat* ran an editorial in November 1963 criticizing the student senator who had introduced a bill in the student senate attempting to eliminate student subsidies for the newspaper and to establish a senate newsletter. The editorial commented on Gary Peter Klahr's political activities with such phrases as "campus demagogue," "dictator's first move," "junior-grade demagogue," and "troublemaker and a fanatic." Klahr brought a libel suit against the *Wildcat* editor. The court was uncertain whether the *New York Times* rule was meant to be applied to college campuses. In the final analysis, the court concluded that it would be inappropriate for one law of libel to exist for student government officials, "when the systems of politics and news media are so obviously patterned after the situation off campus" [Klahr, 1966].

Another libel suit, brought by city policemen, resulted in a finding that two Newark, New Jersey, mounted policemen were public officials because they "perform government duties directly related to the public interest and have responsibility for the conduct of government affairs." In that suit, a picture of the two policemen was used to illustrate an essay describing the feelings and experiences of one student during a demonstration and skirmish between Students for a Democratic Society and Young Americans for Freedom. The headline accompanying the story and photo read, "YAF'S, COPS, RIGHTISTS: RACIST PIG BASTARDS." The court held that the essay did not identify the policemen and that the article clearly showed that the word "PIGS" referred to the YAF's and neither the policemen nor the police force were termed racists or bastards in the story [Scelfo, 1969].

A third case, which did not involve a student newspaper but which did affect the campus and the question of who is a public figure, was *Sanders* v. *Harris* [1972]. Dr. Mary Sanders was a professor of English and the head of the English Department at Virginia Western Community College. When the English Department merged into the Department of Humanities, a new department head was chosen. The new head, without Sanders' permission and while she was home ill, took the files from her office and placed them in his own file cabinet. The Roanoke *World News* heard about the incident and, after contacting the department head and the public relations officer for the school, wrote that Sanders had "refused" to turn the files over to the new head. Sanders sued the public information officer, claiming she had never refused to turn over the files. The Virginia Supreme Court held that the events surrounding this incident were matters of public and general concern and that Sanders would have to prove actual malice on the part of the public information officer.

It is probable that such a ruling would not be made today in light of the post-*Gertz* [1974] definition of public figures. Sanders had not received fame or notoriety out of the incident; she had been involuntarily pushed into the limelight by the article, and she did not engage the public's attention in an attempt to influence the outcome of the controversy.

One decision involving a public college has been issued since *Gertz* and shows how the courts are trying to reconcile the public figure definition with the *Gertz* holding. At Wilson Junior College in Chicago, two former professors in the Department of Social Science had become "actively engaged" in a college controversy over textbooks. Students at the college charged that the two teachers had refused to use black-authored books in courses in breach of a department agreement with black students. The Wilson College *Press* published statements from the students. In hearing a libel suit brought by the professors, the Appellate Court of Illinois held that the two professors "had become public figures within the Wilson College community, which was the community served by the publication." In a footnote to the opinion, the court made a statement which may serve as a guideline for student publications when trying to adhere to the *Gertz* holding:

> We do not hold here that teachers in a public school are by that very fact public officials. Nor do we hold that teachers in a public school are by that very fact public figures either in the school community or in the local community served by the school. We simply hold that the plaintiffs here, as teachers in a public school, had under the circumstances of this case become public figures in the school community . . . [Johnson, 1975, at 447]

There is no doubt that a member of Congress or a state legislature or a candidate for public office is a public official or public figure, but this does not mean that a student newspaper criticizing such a person will not be drawn into a libel suit. The *Daily Egyptian* at Southern Illinois University at Carbondale twice ran a paid political advertisement criticizing the voting

record of a state senator and asking the students to vote for the opposing candidate. The advertisement read: "Q. What's Worse than a Bad Carbondale Landlord? A: A Bad Carbondale Landlord Who Votes in the Illinois Legislature." This headline was followed by a recitation of four tenant-landlord bills opposed by the senator during his term in office. The senator brought suit, but the Illinois Court of Claims held that the senator, under the *New York Times* rule and subsequent rulings, was a public official and that no actual malice was evident. The senator tried to show actual malice existed by the fact that, contrary to Illinois law, the advertisement did not contain the name and address of the party responsible for the ad. The court held that the failure of the *Daily Egyptian* to notice the omission of adequate names and addresses was not evidence supporting actual malice [Williams, 1975].

In addition to the absolute and conditional defenses, a newspaper also has partial defenses, or mitigating factors. These defenses are used to lessen the damages and include evidence of bad reputation of plaintiff, provocation by plaintiff, honest mistake, probable cause, and retraction.

Retraction is not only a partial defense after a suit has been brought but may very well be the best way to avoid a libel action entirely. For example, in 1961 the *Index*, the student newspaper at Pacific University in Oregon, ran an editorial criticizing the university health center and a health service physician. The physician sued for $50,000 in damages. However, after the *Index* published a retraction, the doctor dropped the suit [Corcoran, 1970].

Any retraction must be full, fair, accurate, prompt and contain no lurking insinuations or additional charges [Prosser, 1971: 800]. Twenty-five states have laws which augment the effect of retraction and specify what is a proper retraction. State statutes should be consulted to determine what type of retraction is required and what format must be used, that is, phrasing, placement, deadlines, type size, and so on.

In a 1972 survey of 159 advisers, 98 said retractions had been printed by their publications, but only 30 were in response to the possibility of suit [Standley, 1972].

Despite attempts by student publications to prevent libel suits, the fear of costly libel actions coupled with a dislike of criticism is one reason administrators try to keep a tight rein on student publications. However, one court has found that prior censorship of possibly libelous material in a college newspaper or periodical is unconstitutional and unjustified under the First Amendment.

In *Trujillo* v. *Love,* Dorothy Trujillo, managing editor of the Southern Colorado State College *Arrow*, ran a political cartoon critical of the college president. The *Arrow's* adviser found it possibly libelous and ordered it deleted. A month later, Trujillo submitted an editorial which characterized a local judge as a "small time farmer." Again, the adviser said it was potentially libelous. Ms. Trujillo agreed to rewrite the article but was fired before

she did so. A federal District Court said that potentially libelous material is not subject to prior censorship. Speech, although potentially libelous, is protected, and the university is not justified in censoring it unless it is necessary to avoid material and substantial interference with discipline and order [Trujillo, 1971, at 1270].

In another case, not involving a civil libel suit but a criminal flag desecration law, the court said that although university officials might be subject to prosecution because they are involved to some extent in the publication, this does not allow them to apply a statute unconstitutionally [Korn, 1970]. It may be argued that this same holding would adhere to libel statutes or state constitutions. Just as in any attempt at prior censorship, the school must prove a substantial and material degree of disruption in order to overcome the right to freedom of expression on the campus.

Privacy

Privacy is defined as the "right to be let alone" or the "right of a person to be free from unwarranted publicity" ["Black's," 1968: 1359]. Although privacy is not mentioned in the Constitution, most states, either by statute or judicial interpretation, have recognized a right to privacy.

Four types of invasion of privacy are recognized by most legal scholars: (1) intrusion on the plaintiff's physical solitude; (2) appropriation of some element of the plaintiff's personality—e.g., name or likeness—for commercial use; (3) publication of true but embarrassing or private facts; and (4) putting a plaintiff in a false light by falsification or fictionalization [Prosser, 1960]. The first type of invasion--intrusion--is rarely a problem for the journalist; however, the latter three may lead to privacy suits against a publication.

Appropriation. The use of an individual's name, likeness, or testimony without consent and for promotional gain is a problem confronting advertising staffs. An early and famous case points out the problem advertisers may face. Franklin Flour Mills used Abigail Roberson's picture to decorate posters advertising flour. The child's parents sued for $15,000, because the picture had been used without her consent. Although the New York courts did not recognize the young lady's right of privacy [Roberson, 1902], the case prompted the New York legislature the next year to pass the country's first privacy statute. The new law made it a misdemeanor and a tort to use a person's name, portrait, or likeness in advertising without consent.

Since consent is a publication's only defense in an appropriation suit, consent forms or model releases are the best protection. Such a form gives the purpose for which the picture or likeness is to be used and includes a statement of consent to be signed by the subject.

Publication of private or embarrassing facts. There have been few instances in which a newspaper has been successfully sued for publishing truthful accounts about a person because of the broad defense available to the newspaper. In every jurisdiction where right of privacy has been recognized, courts have held that if the matter published is newsworthy, the suit cannot stand [Gillmor & Barron, 1974: 289]. The only "private facts" action to come before the Supreme Court involved judicial records. In *Cox Broadcasting Co.* v. *Cohn*, a television station broadcast a sound-on-film newsreel about the trial of two rape and murder suspects. In the report, the newscaster gave the name of the 17-year-old rape victim. According to Georgia law, revealing a rape victim's name is a misdemeanor. The Court held that the information as to name was a matter of public record both at the time of the rape and at the time of the trial and therefore could properly be reported.

The only college privacy case reported also involved private facts and judicial reports. The Vanderbilt University student newspaper, the *Hustler*, reported on a privacy and libel suit being brought against the campus humor magazine. The magazine had published the picture of Rev. Langford's infant daughter with a humorous caption. Langford brought six separate libel and invasion of privacy suits against the magazine. However, before any judicial action was taken, the *Hustler* published a story about the suits, an interview with the girl's father, and a reproduction of the allegedly libelous picture page. Langford then brought suit against the *Hustler*. A Tennessee court held that the *Hustler* story merely related facts that were a matter of public record and that it would be

> unrealistic and illogical to hold that there has been an invasion of this common law of right of privacy . . . by publishing a matter which that individual has already made a matter of public record, available to the eyes, ears and curiosity of all who care to look, listen or read. [Langford, 1958, at 570]

Rarely will a public official or public figure be able to win a privacy suit when matters published are true. Persons who place themselves either willingly or unwillingly before the public may find that most of the details of their lives are public. Even persons who involuntarily come before the public receive little protection [Time, Inc., 1967]. An example from California serves to show how broadly the courts have interpreted newsworthiness. *Reader's Digest* carried a story about truck hijackings and the various ways being used to stop the crime. In the story, the author mentioned the case of Marvin Briscoe, who had stolen a "valuable looking" truck only to find it carried four bowling-pin spotters. Briscoe had been arrested for the hijacking eleven years before the story appeared. Although the article was true, Briscoe

brought suit, claiming that his family and friends had scorned him and left him. He also said he had been leading a rehabilitated life since the incident. The California Supreme Court held that Briscoe was no longer a newsworthy subject and had once again become an anonymous member of the community. Although there was reason to discuss hijacking, there was no valid reason for using Briscoe's name [Briscoe, 1971]. Despite the California court's holding, Briscoe did not win his suit. The case was removed to a Federal District Court which held for the magazine, although the incident had occurred eleven years before publication [Nelson & Teeter, 1973: 199].

False lights or publication of nondefamatory falsehoods. One difference between "false light" and libel is the lack of defamation in the former. The first privacy case ever to reach the Supreme Court involved fictionalization of an otherwise true story. In *Time, Inc.* v. *Hill* [1967], *Life* magazine printed a review of a play adapted from a book about a true incident involving the Hill family. The Hills had been held hostage in 1952 in their suburban home outside of Philadelphia. When the play was produced in 1955, *Life* ran several pictures of the actors in the Hill's former home. The play as well as the *Life* story depicted a violent incident, whereas the Hill incident had not been violent. Hill brought suit against *Life*, arguing that the inaccuracies in the story were fictionalized and invaded his and his family's privacy.

The Supreme Court, in this landmark privacy decision, held that although the Hill family had been involuntarily brought into the public eye, the matter was of public interest, and the plaintiff must prove that the publication was made with reckless disregard for the truth or with knowledge of falsity. Thus, the *New York Times* test of actual malice had been brought into the area of privacy. The *Time, Inc.* ruling has since been extended to all cases falling in the "false light" category.

The most recent Supreme Court case involving privacy reached the problem that "new journalism" has created for some writers. Joseph Eszterhas, a "new journalist" and former Cleveland *Plain Dealer* reporter, wrote a fictionalized news account of a family in West Virginia. The story told of a bridge collapse that had killed Mr. Cantrell, leaving the Cantrell family in poverty and despair. The story falsely depicted the family as living in poverty and reported statements allegedly made by Mrs. Cantrell, despite the fact that she had refused to be interviewed. The Supreme Court held that the fictionalized story was written with actual malice, because the reporter knew the matters reported were false and misleading [Cantrell, 1974]. The main defense, therefore, in a false light case is the *New York Times* privilege.

Where photographs are concerned, publications have not always fared so well. The old adage that photographs never lie has presented problems for newspapers. Photographs which have been air brushed or altered in some way are dangerous to use. Also, misleading captions under photographs have led to serious invasions of privacy. One example involved a photograph by Henri Cartier-Bresson of a Mr. and Mrs. Gill at a candy store they owned

in Los Angeles' Farmers Market. The picture, which depicted Mr. Gill with his arm around his wife, was used by *Ladies' Home Journal* to illustrate an article titled "Sex." The caption read "Publicized as glamorous, desirable, 'love at first sight' is a bad risk." The court held that the article was a "characterization that may be said to impinge seriously upon [the plaintiffs' and the public's] sensibilities" [Gill, 1952].

In recent years, the federal government has been interested in protecting the public's "right of privacy," and a number of laws have been passed which restrict access to private information kept by federal and state agencies. Of particular concern to the campus journalist is the Family Education Rights and Privacy Act of 1974 (20 U.S.C. 1232g), more commonly known as the Buckley Amendment. The purpose of the Buckley Amendment is twofold. First, it is to protect the records of students attending public schools from unauthorized use and publicity. Second, it is to allow students at colleges and universities (or parents of children in lower grades) to inspect and review any and all official records about themselves kept by the school.

Specifically, the types of information controlled by this law are academic work, course grades, attendance data, health information, family information, ratings and observations by school personnel, reports of serious or recurrent behavior patterns, and scores on intelligence, aptitude, psychological, and interest tests. Release of this type of information can be made only upon the written consent of the student, except where release is to school officials or authorized education agencies.

The law does allow certain "directory information" to be made available to the public, but the school must inform the students about what is included in this category and allow them time to submit a written request that such information not be released. Directory information includes such items as address, age, height and weight of athletes, names of parents, classification, telephone number, academic major, social and professional activities, dates of attendance, and degrees received.

The implications of the Buckley Amendment for the student journalist are that if information about a student is needed, a written request must be made to the holder of the record and written consent must be received from the student before the private information can be released. If the material is to be published, the student must be aware of the nature of the publication and must consent to each piece of information that will be released.

Who is Liable?

Despite the fact that relatively few libel or privacy cases have been brought

against college newspapers, universities must still be concerned about their liability in such instances.

Sovereign immunity. Some public universities need not be concerned with tort actions because they cannot be sued under the doctrine of sovereign immunity, that is, the state cannot be sued without its permission. However, the number of such states enjoying sovereign immunity from tort liability is decreasing. Some states have given up all immunity from suits, others have assumed liability by law under certain circumstances, and still others have abrogated their immunity where school districts, boards, universities, or other educational institutions are concerned [Korpela, 1970]. In order to decide whether a university is immune from liability for damages caused by its agents, such as a campus newspaper, state laws and state judicial decisions should be consulted. If a university enjoys immunity, the common law doctrine means that the school is not liable for personal or property damage caused by its officers, agents, or employees ["Black's," 1968: 1568]. A school newspaper, as a recognized organization, may be such an agent.

One state court, however, has found that where a publishing operation such as a university press is incorporated as a distinct legal entity separate from the state, and where money from publishing activities is kept separate from general university funds, the university will maintain its sovereign immunity, but the publishing corporation will be subject to suit [Applewhite, 1973].

Vicarious liability. Because of recent legislation and judicial decisions, many states do not enjoy immunity from liability, and their universities are open to damage suits. The most common form of liability is vicarious liability (also known as *respondeat superior* or imputed liability). The theory behind vicarious liability is that a master (in this case, the university) is liable for the wrongful acts of its servant or agent (newspaper) ["Black's," 1968: 1475]. Three elements necessary for a finding of such a relationship are consent, benefit, and control.

Consent comes in various forms, such as recognition of the paper as a student activity, recognition through financial control, distribution privileges, or simply a written acknowledgment of the newspaper's operation on campus. Benefit is unlikely to be financial, but may be educational or informational. Control may be found in approval of contracts, use of facilities and services, or even a set of rules and regulations for distribution. The administration, however, cannot control the content of publications, and even financial control is not as strong as that of a private publisher. The control element, therefore, is tenuous, but courts may find a sufficient amount for purposes of vicarious liability ["Note," 1973].

Communication liability. In many jurisdictions, the distributor of a libel can be held liable for damages, as can the publisher. The distributor may be a corner magazine vendor, a bookseller, or any news vending agent. This type of liability, known as communication liability, also adheres to a uni-

versity because of its participation in the distribution of school publications. Distribution may be proven by a financial connection with the newspaper; no consent or benefit need be present. One recent college case points out this possibility. Although the suit for $938,000 was dismissed for technical reasons, the judge said:

> [H]e who furnishes the means of convenient circulation, knowing or having reasonable cause to believe, that it is to be used [to distribute a libel], and it is in fact so used, is guilty of aiding in the publication and becomes the instrument of the libeler. ["Note," 1973: 1084]

In both vicarious liability and communication liability, colleges which do not attempt to control the content of student publications may be in a better position to avoid liability than those which impose control. Courts may find it illogical to hold liable schools which are abiding by judicial decisions saying that content decisions should be left to students.

Incorporation. Incorporation does not free a university from liability in all instances, but it does minimize the risk to the pocketbook of student publications which have become incorporated. It would still be possible for a court to "pierce the corporate veil" if the university is found to have any control over an incorporated paper ["Note," 1973: 1075]. It is possible for an incorporated publication to have the necessary strings with the university for vicarious liability to be found. Some courts will overlook the legal separation and find the financial dependence enough to hold the university still liable. To help minimize the risk of courts undoing this legal fiction of incorporation, the university can make sure that (1) the formalities of corporate separation are rigorously adhered to, (2) the newspaper purchases its own liability insurance—a sign of financial independence, (3) a disclaimer is published in the newspaper stating that the views are not necessarily those of the university, and (4) the statement of purpose in the charter includes a clause about the separateness of editorial control ["Note," 1973].

The benefit of incorporation to the corporation itself is that a corporation carries the privilege of limited liability. The newspaper would not be liable for more than its assets.

Personal liability. As a general rule, the individuals involved in the publication may be personally liable if damage resulted from their negligence. Hence, student editors, reporters, advisers, and individual administrators may be sued along with the university. Because negligence is the criterion for personal liability, administrators may escape liability because they do not pass on the material (and are not privileged to do so under First Amendment guarantees). Advisers who work closely with the paper and supervise the daily operations of the news production are more likely to be sued than a board of publications or an adviser who maintains some distance from the overall publication. Hence, the person most likely to be sued aside from the university itself is the editor who was negligent in allowing a libelous story

or an invasion of privacy to be printed. From a purely practical standpoint, however, student editors or reporters are less likely to be defendants than the university because they simply do not have the financial resources to pay damages.

Obscenity

Although there is a great deal of concern on the part of parents and administrators about obscenity in the campus press, a look at reported cases reveals little actual obscenity as defined by the courts. The concern among administrators is primarily about "indecent" or "offensive" language—language which enjoys First Amendment protection. The danger of obscenity prosecution, however, may be lurking nearby. The Supreme Court in 1973 defined obscenity as follows: (1) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest in sex; (2) whether the work portrays in a patently offensive manner sexual conduct specifically defined in state law and (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value [Miller, 1973].

More recently, courts have struggled to define the "community standard," and the results have ranged from a statewide standard to a neighborhood standard. "Community standard" is more commonly accepted as the standards of the city, town, or county from which the jury is drawn to hear an obscenity case. The question raised at the university level is whether the community would include just the university community of students, faculty, and staff, or whether it would also include the town, city, or county where the university is located. If the university is accepted as the standard, would the standards be harsher or more relaxed? Some lower courts would argue that the standards in a university must be stricter and students should exhibit a higher standard of morals than persons off campus [Papish, 1971]. The Supreme Court has rejected this double standard, stating that students should not be subjected to greater standards of conduct than their counterparts off campus [Papish, 1973]. If standards are not to be stricter, can they be more relaxed? One argument is that students are more mature and can more readily see the social value of communications which off campus may be seen as only vulgar or shocking. A good case may be made for the proposition that community standard for obscenity in the campus press should be the audience—the community of students, faculty, and staff which

reads the newspaper. If such an argument were successful, obscenity might be judged by more relaxed standards on campus due to the maturity of the college student and the educational level and tolerance of the faculty and staff.

The question of community standard has not yet been raised in a case involving obscenity in a campus publication. The primary concern has been what control the university has over indecent or vulgar language—language which does not fall under the definition of obscenity. May the university attempt to curtail this type of language by using a review board? May the school suspend or otherwise discipline students engaged in such writing? May the school refuse to appropriate money, refuse to print, or refuse distribution privileges to newspapers that use indecent language? All of these controls have been used at one time or another to suppress or control student publications. However, courts have said that when the material is not obscene, all the safeguards of the First and Fourteenth Amendments must be adhered to [Antonelli, 1970]. If school officials feel the material falls under the definition of obscenity, the most rigorous procedural safeguards must be offered the material until there has been a swift judicial determination of obscenity [Antonelli, 1970, at 1335].

In the landmark case in this area, *Antonelli* v. *Hammond* [1970], President Hammond refused to pay for the printing of an Eldridge Cleaver article and required future editions of the *Cycle* to be approved by a review board which would certify expenditures and approve payments after the publication was approved. Although a federal District Court felt obscenity in the campus press was not likely to cause disruption, the university could still take steps to control its appearance in the student newspaper. But the court warned that when measures are taken to regulate obscenity, the state must be careful that protected expression is not caught in what the court termed "the regulatory dragnet." To prevent prior restraint of protected expression, the court extended to the campus the same prior restraint safeguards used in movie censorship [Freedman, 1965]. First, the burden of proof that the material is obscene is on the censor. Second, a judicial determination must be made quickly. Finally, an avenue of appeal must be made available. Until such time as a judicial determination is made, the school administrators can regulate newspaper content only as long as it relates to the maintenance of order and discipline on the campus. The court said it could not see how indecent or obscene language would be disruptive, adding that the university setting of college-aged students creates a mature marketplace for the exchange of ideas. *Antonelli* [1970] was the first step in advising administrators and faculty that just because the university funds a newspaper, it does not have total control over its content. Nevertheless, school officials continue to censor newspapers for indecent or unconventional language; when such cases reach their final appeal, courts have generally been unsympathetic to the administrators' viewpoint.

At Texas Tech University, a recognized campus organization published and distributed campus-wide a tabloid newspaper, the *Catalyst*, which sold advertising, had a paid circulation, and had permission to sell copies on campus. On one occasion school officials believed the contents of the *Catalyst* violated the student conduct code, which prohibited lewd and vulgar language on campus. The administration refused the newspaper its circulation and distribution privileges, although the student bookstore and library contained books and magazines which used the same language. A District Court repeated the *Antonelli* [1970] warning that before expression can be curtailed it must interfere to a substantial and material degree with campus discipline. For those administrators who wield the heavy arm of censorship at the smallest hint of problems, the court warned that it was not enough that the possibility of disturbance was anticipated: ". . . an unerystallized apprehension of disruption cannot overcome the right to free expression." Because the language in question was not challenged as obscene, but as "lewd and vulgar," the District Court warned against the censorship of challenging and provocative language:

> That the language is annoying or inconvenient is not the test. Agreement with the content or manner of expression is irrelevant. First Amendment freedoms are not confined to views that are conventional, or thoughts endorsed by the majority. [Channing Club, 1971, at 691]

The question of whether a university can prevent publication and distribution solely on grounds of bad taste or inappropriateness has come before the courts several times since the *Channing Club* [1971] ruling. The major case is *Papish* v. *Board of Curators* [1973]. Barbara Papish, a 32-year-old journalism graduate student at the University of Missouri, was a staff member of the local underground newspaper, *Free Press Underground*. In 1968, she and three other students were arrested for distributing obscene material near the Memorial Tower, a tribute to students who died in World Wars I and II. The particular issue of the paper in question carried two pieces which the administrators felt were obscene and against the school conduct code. On the front page of the paper was a political cartoon depicting a club-wielding policeman raping the Statue of Liberty and the Goddess of Justice. The cartoon was reprinted from a nationally distributed, left-wing magazine. Inside was an article headlined "Motherfucker Acquitted." The article concerned the acquittal of a New York youth for assault and battery. The youth was a member of an organization known as "Up against the Wall Motherfucker" or simply "The Motherfuckers." Papish was placed on disciplinary probation for the remainder of the semester, not given credit for one course she passed, and not allowed to re-enter school the next fall.

The University argued at the federal District Court level that Papish had been warned a week earlier that she would not be allowed to distribute the material on campus because it was in violation of the by-laws of the Board

of Curators, which prohibited "indecent conduct or speech" on campus. Papish explained in the issue that

> some might consider the cartoon on the cover of this issue "vulgar." It is not; it is obscene. But it is a social comment concerning a greater obscenity. Chicago cops are obscene; napalm is the greatest obscenity of the 20th Century; and administrators who fear a different view are obscene. [Papish, 1971, at 1330]

Papish's acknowledgment that the material was obscene was to be her undoing at the lower court level. Although she argued that the word "obscene" was used in a metaphorical sense and not for legal purposes, the District Court found the material obscene by her own admission.

The question raised next was whether the material had any "redeeming social value." Although expert testimony was offered as to the social merits of social criticism and the artistic merits of political cartoons, the District Court doubted that the testimony was an expression of "genuine artistic opinion." The court held, instead, that "what is considered in redeeming social value is how it is sold," and the obscene aspect of the newspaper, not the social comment aspect, was emphasized and featured when the paper was being sold. The court described the university community as "mainly comprised of younger and less sophisticated persons than those mature persons who are interested in social comment." The protection of students under 18 from the pandering of indecent publications was a lawful mission of the court:

> The pandering of distinctly and flagrantly indecent, vulgar and obscene sexual cartoons and words to convey a claimed social and political message is not protected by the First and Fourteenth Amendments under the circumstances of this case. . . . The indecencies and obscenities are appropriate neither to the place, the subject nor to the comment thereon. [Papish, 1971, at 1331]

On the challenge that the code concerning "indecent conduct or speech" was vague, the court said that the rule was definite enough to pass constitutional muster "in its nearly being synonymous with 'obscene,' " and "the regulation was as precise as federal statutes and court decisions on obscenity." The court defended this holding by saying that if the university had to describe in detail what speech and activity is vulgar and repulsive, "a provocative game of imagining and implementing endless series of undescribed obscenities and vulgarities and repulsive acts will be to the detriment of education and to the discredit of the law" [Papish, 1971, at 1333].

Finally, the District Court enunciated a double standard of conduct on college campuses, saying that students may be required "to possess and exhibit superior moral standards" in relation to their counterparts off campus.

While the District Court based its decision on the pandering issue, the Eighth Circuit Court of Appeals based its finding for the University on the sufficiency of the rule against "indecent conduct and speech." The court held

that the rule was not ambiguous and did not invite invidious censorship. The code, explained the court, restricted the University to disciplining students where it was necessary to "preserve and enhance the university's function and mission as an educational institution."

Papish also argued that if the rule of conduct was not vague or overbroad, it had certainly been applied unconstitutionally to her because it regulated content, not conduct. The Court of Appeals dismissed this contention saying that she was not barred from expressing her views, only from distributing the newspaper in a manner that flouted conventions of decency. In summation, the Eighth Circuit resorted to a very narrow definition of the First Amendment on a university campus:

> [N]o provision of the Constitution requires the imposition of so high a value on freedom of expression that it can never be subordinated to those interests such as, for example, the conventions of decency in the use and display of language and pictures on a university campus. The Constitution does not compel the University to promote the vernacular of the gutter by allowing such publications as the one in litigation to be publicly sold or distributed on its open campus. [Papish, 1972, at 145]

The Supreme Court, in a 6-3 decision, reversed the lower court. The Court held to the *Channing Club* [1971] decision that the "mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency' " [Papish, 1973, at 670]. The Court made it clear that a university may regulate as to the time, place, and manner of dissemination of such material, but may not regulate as to its content. While the Court of Appeals found Papish had been disciplined because of conduct, the Supreme Court found that content was the cause of expulsion. The Court also answered the District Court's stance on stricter standards for college students, saying that the "First Amendment leaves no room for the creation of a dual standard in the academic community with respect to the content of speech" [Papish, 1973, at 671].

While the *Papish* decision, involving an underground newspaper, was on its way to the Supreme Court, a similar case involving a school-sponsored publication was also progressing through the courts. *Images*, a literary journal published at the University of Mississippi, was refused distribution privileges because of "obscene language" in two articles on racial issues. The stories, one about interracial love and the second about black pride, were written in a creative writing class by an 18-year-old junior who was black. The "heroes" of the stories were described by the Fifth Circuit as modern-day Holden Caulfields (*Catcher in the Rye*) trying to find their place in today's society. The language objected to, said the court, was typical of that used by young blacks to express themselves. While the "four letter obscenities" would "definitely not be suited for parlor conversation," said the court, it would have been strained for the characters to speak and think in "proper prep school diction."

A special panel of academic deans found the articles "inappropriate" and "in bad taste" and recommended that *Images* not be distributed. The Court of Appeals held that the street language was appropriate in the context of the stories, because the vulgar words were used as modifiers for effect and mood rather than in their literal sense. The Fifth Circuit stated that the mere use of one word "cannot be so tasteless . . . that its use is subject to unbridled censorship."

The University argued that its relationship with the publication made it appear to the public that the school endorsed such language. The court countered that just because a magazine is advised by a university does not mean that it speaks for the school. The tenuous financial connection and the statement that *Images* is published by students of the University "is not enough to equate the university with a private publisher and endow it with absolute arbitrary powers to decide what can be printed." The court later allowed the school to apply a stamp to the magazine's cover, reading "This is not an official publication of the University" [Bazaar, 1973].

The Fifth Circuit repeated the open forum doctrine it had used four years earlier [Brooks, 1969]. The court said there was a constitutional right to use university facilities on an equal basis for purposes of speech and hearing once such a forum has been opened by the school. Once a university recognizes a student activity, it can censor only if consistent with First Amendment guarantees.

The most recent case of censorship for indecent language occurred at East Carolina University. William Schell, a student, wrote a letter to the editor of the ECU *Fountainhead* criticizing the school's dormitory policies and warning that the University president, Leo Jenkins, who was seeking Democratic nomination for governor, should choose between politics and education. The letter ended with the phrase, "Fuck you, Leo" [Reporters Committee, 1973: 36]. President Jenkins attempted to fire Robert Thonen, the editor, but school regulations prevented it. Thonen had been warned earlier about the use of vulgarity in the publication. At that time, the president made it clear he had no intention of censoring vulgarity, but he also had no intention of condoning the use of such language in the school paper. It was only when the vulgar language was used in reference to the president himself that it was viewed as a totally unacceptable situation requiring disciplinary action. Jenkins expelled both Schell and Thonen. The Fourth Circuit followed the *Papish* [1973] and *Bazaar* [1973] decisions and held that the use of one vulgar word in a letter dealing with a subject of importance to the campus was not enough to justify suspending the editor and the letter writer [Thonen, 1975].

Frequently, the problem of obscenity on campus has occurred as a result of the activities of underground newspapers. In such situations, administrators would be wise to leave the prosecution of such persons to state law enforcement, as was done in Wisconsin. In May 1968 the *Kaleidoscope*, an under-

ground newspaper in Madison, published a story about the arrest of a *Kaleidoscope* photographer on charges of possessing obscene material. The story, headlined "The One Hundred Thousand Dollar Photos," was accompanied by two pictures of a nude man and nude woman sitting on a bed embracing. The pictures were described as similar to those seized by police. Three months later, the *Kaleidoscope* ran a two-page spread of eleven poems. One poem was titled "Sex Poem" and described in a rambling discourse the author's experiences and feelings while having intercourse. The publisher of the *Kaleidoscope*, John Kois, was arrested under a Wisconsin statute prohibiting dissemination of "lewd, obscene or indecent written matter, picture, sound recording or film" and was sentenced to 2 one-year prison terms and fined $2,000.

In examining the evidence, the Supreme Court found the pictures relevant to the theme of the news article and found the article had not been used as a "mere vehicle" for the publication of the pictures. As for the poem, the Court was a bit more apprehensive but found that it did bear "some of the earmarks of an attempt at serious art." Thus, redeeming social value was found, and both the pictures and the poem required First Amendment protection. Justice William O. Douglas, in a concurring opinion, looked deeper into the motives of authorities, charging the state with using the "vague umbrella of obscenity laws . . . in an attempt to run a radical newspaper out of business" [Kois, 1972].

Advertising

Courts have traditionally held that advertising has less constitutional protection than other forms of expression. It is the portion of media content most heavily regulated by government, for example, through statutes against fraudulent and misleading advertising. The Supreme Court, however, has indicated that "editorial" advertisements, those that discuss matters of public interest, have more protection than purely commercial advertising.

The Court's definition of protected advertising has gone through several changes. In an early ruling on advertising, the Court said that a handbill printed with a commercial solicitation on one side and a protest message on the other was not protected by the First Amendment. The Court held that the public interest message was used solely to evade application of a local ordinance banning distribution of commercial leaflets by purporting to take the handbill out of the category of commercial advertising. According to the Court, "the Constitution imposes no . . . restraint on government as respects purely commercial advertising" [Valentine, 1942].

The Court later held that separating classified advertisements into "Male Help Wanted" and "Female Help Wanted" columns violated a local ordinance forbidding discrimination in hiring on the basis of sex. Basing its decision on *Valentine* [1942], the Court said that the classified ads do "no more than propose a commercial transaction" and do not express a position on matters of public interest [Pittsburgh Press, 1973].

In *New York Times Co. v. Sullivan* [1964], the Supreme Court moved closer to defining "editorial" advertising. The case involved an advertisement objecting to the alleged mistreatment of certain black persons in Alabama. The Court called advertising "an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities." The Court differentiated the ad from commercial advertising because it "communicated information, expressed opinions, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern" [New York Times Co., 1964, at 266].

In a more recent case, *Bigelow v. Virginia* [1975], the Court went a step further toward protecting advertising. The case involved a weekly

newspaper in Virginia which had printed an advertisement for an abortion service in New York City. Virginia then had a statute making it illegal for any person or publication to "encourage or prompt the procuring of abortion." The Supreme Court said that expression does not lose its First Amendment protection simply because it appears in the form of an advertisement. Nor does it lose protection because it "has commercial aspects or reflect[s] the advertiser's commercial interests." The Court held that the abortion service advertisement contained "factual material of clear 'public interest,'" discussing a controversial issue which would expand readers' knowledge. Thus for the first time, the Supreme Court extended a measure of constitutional protection to advertising for a commercial service.

A precursor of the *Bigelow* [1975] case involved the student newspaper at the University of Florida. A state law held it illegal to advertise "any advice, direction, information or knowledge . . . for the purpose of causing or procuring the miscarriage of any woman pregnant with child." Ronald Sachs, the student editor, inserted in the newspaper a list of abortion referral agencies. His conviction under the statute was overturned on the basis that the law was unconstitutionally vague and violated First Amendment guarantees [State, 1972; Stevens & Webster, 1973: 68].

The definition of "editorial" advertisement is important for college papers. While courts have said that privately owned newspapers normally need not accept advertisements, whether commercial or editorial [Chicago Joint Board, 1970], a significant ruling by the Seventh Circuit has held that public college newspapers that accept *any* advertisements must accept editorial ads.

The case involved the *Royal Purple*, the student newspaper at Wisconsin State University-Whitewater. The newspaper staff, on three occasions over the period of a year, refused to print paid advertisements concerning a university employees union, alleged discrimination and race relations, and the Vietnam war. A faculty-staff committee at the school had reviewed policy governing student publications and had adopted a rule of not accepting "editorial advertisements." Both the committee and the school president had been asked to modify the rule but had not done so up to the time suit was brought to force such a change.

A federal District Court, in *Lee* v. *Board of Regents* [1969], considering litigation brought by students whose ads were refused, held that student papers, being important forums for the "dissemination of news and expression of opinion" should be "open to anyone who is willing to pay to have his views published therein—not just open to commercial advertisers." The paper's willingness to publish letters to the editor from the students who wished to advertise was not an acceptable alternative to the court, since "a paid advertisement can be cast in such a form as to command much greater attention than a letter." The court saw refusal to accept the ads as an impermissible form of censorship.

The Seventh Circuit affirmed the District Court's decision, noting that no

question of access to a private publication existed, as in a case in which Chicago papers were upheld in their refusal to accept editorial ads from a union [Chicago Joint Board, 1970], since "the campus newspaper is a state facility." The court held that "a state public body which disseminates paid advertising of a commercial type may not reject other paid advertising on the basis that it is editorial in character." The decision also indicated that no threat of campus disruption was presented by the advertisements [Lee, 1971].

Seemingly, student publications could decide not to accept *any* advertising at all. They may also refuse ads containing legally unprotected speech [Duscha & Fischer, 1973: 76], though it is not acceptable to refuse editorial ads as a means of "protecting the university from embarrassment" and the staff from making difficult judgments as to what material may be "obscene, libelous, or subversive" [Lee, 1971, at 1260].

No case definitively answers the question of whether public college newspapers and periodicals must accept product and service advertisements which are purely commercial. The *Chicago Joint Board* [1970] case answers in the negative for privately owned papers. As the *Bigelow* [1975] case (abortion ad in a Virginia weekly paper) indicates, there is a gray area between purely commercial and clearly editorial ads. For instance, the Florida State University paper refused to accept an ad announcing a Gay Liberation Front meeting, contending that similar ads previously published had cost the newspaper advertising linage from local businesses. The college's Board of Publications overruled that decision, noting that the group had been denied "freedom of speech by a body that receives its funds from the Student Body" [Stevens & Webster, 1973: 67-68].

That situation was not litigated, but a similar case was recently decided by a federal District Court. The Mississippi Gay Alliance attempted to have an information ad published in the Mississippi State University *Reflector*. The ad read in part: "Gay center open . . . . We offer counseling, legal aid and a library of homosexual literature." Bill Goudelock, the student editor, refused to accept the ad, although the paper printed other advertisements, both commercial and editorial. According to the court, neither the faculty advisers nor the school administration played any part in Goudelock's decision. The Gay Alliance officers, three nonstudents, brought legal action to force acceptance of the ad and to recover monetary damages from the student editor, advisers, and college president [Mississippi Gay Alliance, 1974].

The court noted that the newspaper was supported with advertising revenues and mandatory student fees, which it considered private funds, not state moneys. Since no state funds were involved, and since the decision to refuse the ad was not made or encouraged by any faculty member or administrator, the court said the decision was not made under the color of state law. Reinforcing this, the court said that the newspaper was not an official university news organization and that the editor was elected by a student body vote.

The court recognized the right of Gay Alliance members to have free communication of ideas, even though a letter from the group's president said "the ad is really unimportant. . . . It is being used as a tool" to attract attention to the homosexual cause; the court saw this as "inequitable conduct" and said the group did not come into court with "clean hands." However, the court said a competing First Amendment interest was Goudelock's freedom to exercise his editorial judgment, "to accept or to reject such material as he saw fit." Seeing this as the more important interest, the court said the editor "had the undoubted right to exercise an editorial judgment on what to put in and what not to put in the paper. . . . First Amendment rights of student editors of campus newspapers are as good, and as solid and as safeguarded as are the rights of other newspapers."

In its decision, the District Court relied heavily on *Miami Herald* v. *Tornillo* [1974], in which the Supreme Court declared unconstitutional a Florida statute requiring a newspaper which "assailed the personal character of any candidate" to give the candidate free space to reply. The Supreme Court said the statute "fails to clear the barriers of the First Amendment because of its intrusion into the function of editors." The Court emphasized the necessity of allowing editors to exercise their judgment regarding the "limitations on the size of the paper, and content, and treatment of public issues and public officials."

The District Court evidently did not see the Gay Alliance ad as an editorial advertisement, since no mention was made of the *Lee* [1971] case [Mississippi Gay Alliance, 1974]. The American Civil Liberties Union, in appealing the decision to the Fifth Circuit for the Gay Alliance, stressed what it saw as the "state action" aspect of the case. The ACLU contended the newspaper is a publication of the State of Mississippi and therefore could not be closed off to the expression of some ideas because those in charge of such a state facility dislike them. The newspaper was equated with other state facilities, such as a public park or auditorium, which cannot arbitrarily be closed to persons because of a disagreement with what they might say in those forums. The ACLU differentiated between news and editorial material, and editorial advertisements, believing that the former may be selected by student editors using their judgment, but that the latter must all be accepted for publication. This, it contended, will satisfy the competing First Amendment interests of the student editors' right to use their editorial judgment and the rights of citizens to express their views in a public college publication. Hearing the case on appeal, however, a divided Court of Appeals for the Fifth Circuit affirmed the District Court's judgment and ruled that the student editor could not be forced to accept the ad.

At the University of California at Hayward, the student newspaper ran an ad for Gallo wines and was promptly challenged by the student publication board. Gallo Industries and the United Farm Workers have been involved in a lengthy union dispute, and various Mexican-American groups support-

ing UFW were pressuring college newspapers to drop the Gallo ads. The University's publication board ordered that if the paper continued to accept the Gallo ads, it must offer UFW free space next to those ads. The student senate also passed a resolution that would restrict funding for the paper if Gallo ads continued to run ["Editor," 1976]. The ads were strictly commercial, and the Supreme Court has repeatedly held that commercial advertising is exempt from First Amendment protection. Even where state action is present, a student newspaper does not have to offer free advertising space [Lee, 1971].

Some courts have contended that there is state action involved in a public college student newspaper or periodical. One court concluded a publication was "state supported" because its expenses were "payable by the college from funds received from compulsory student fees" [Antonelli, 1970]. Another, referring to a state university newspaper supported by student activity fees, said that "unquestionably" the paper, "supported as it was by the University, constituted 'state action' in the area of civil rights" [Joyner, 1973]. In *Lee* [1971], the Seventh Circuit said, "It is conceded that the campus newspaper is a state facility," because state action was present. This is still an unsettled question.

A case involving a law review substantiates a student editor's powers to select and reject material for publication. An editor of the *Rutgers University Law Review* refused to print an article submitted by a law school professor who later claimed the rejection was based on the editor's disagreement with the article's ideology. The Third Circuit upheld the editor's right to exercise his editorial judgment, noting that more material was submitted to the review than could be published. The court said the article's author could not insist that his piece be published in preference to others the student editors deemed of higher quality. The fact that the review was financed in part with state funds did not require that its pages be open to all who wished to be represented in them [Avins, 1967].

It is important to note that the *Mississippi Gay Alliance* [1974] and *Avins* [1967] cases upheld the right of *student editors* of public college newspapers and periodicals to exercise editorial judgment. Cases cited previously in this book indicate that *school administrators* cannot censor otherwise protected material. As noted, the ACLU believes that student editors may have certain restrictions imposed on them as well. A similar view was expressed by the Fourth Circuit, which stated:

> A college newspaper's freedom from censorship does not necessarily imply that its facilities are the editor's private domain. When a college paper receives a subsidy from the state, there are strong arguments for insisting that its columns be open to the expression of contrary views and that its publication enhance, not inhibit, free speech. [Joyner, 1973, at 462]

These comments were not directly pertinent to the case and are therefore intended more as an observation than as a holding.

Another question involved in student newspaper advertising is presented in *Cass Student Advertising* v. *National Educational Advertising Service* (NEAS) [1976]. Both companies are national advertising representatives for student newspapers. That is, each represents student newspapers to national advertisers and becomes, in effect, an advertising space sales representative for the papers. The company bills advertisers, or their advertising agencies, deducts a commission for itself, and remits the remainder to the student paper. At one time, NEAS was the only company doing such business. When competitors entered the field, NEAS required student papers to sign exclusivity agreements, binding them to accept national advertising only from NEAS. When some papers began ignoring this contractual clause, NEAS withheld the equivalent of commissions for national ads placed by other companies from the money NEAS owed to the paper. Cass, NEAS's only serious competitor, according to the court, claimed it received less than two percent of the annual billings for national advertising in college newspapers because of NEAS's monopolistic position and practices, including the exclusivity agreements. Cass filed suit charging NEAS with violating the Sherman Antitrust Act.

A federal District Court ruled that an individual college paper did not constitute the "relevant market" referred to in the Sherman Act, because college papers are only one part of the total media through which national advertising may reach college students. Since NEAS did not dominate the radio, television, and magazine markets, the company was not in violation of antitrust laws. The Seventh Circuit overturned that decision, holding that NEAS and Cass are "classic middlemen" allowing the advertiser and the college paper to "find each other." The court considered the college paper the "relevant market" because, by paying commissions for NEAS's and Cass's services, the paper was the buyer and, therefore, required protection from monopolistic practices.

On remand, using the Seventh Circuit's definition of "relevant market," the District Court found that NEAS had exercised monopoly powers in violation of the Sherman Act. The court held that exclusivity agreements in NEAS contracts were null and void, that NEAS could not interfere with Cass's business dealings with college newspapers or national advertisers, and that NEAS had to notify all college papers with which it had contracts that they could freely deal with any NEAS competitor.

Additional Matters of Concern

Contempt

When a reporter's activities interfere with the administration of justice, the court may punish the reporter through its power of contempt. In federal courts, a person may be cited for contempt when the misbehavior is in the presence of the court or so near the court as to obstruct justice. Before state courts, this power may be broader or narrower depending on the precedents or laws of the state. Contempt proceedings may also fall into either civil or criminal categories, but the distinction is hazy and the two can often be distinguished only by the penalties that are given out [Nelson & Teeter, 1973: 343].

Of more importance to the journalist is the distinction between direct and indirect contempt. Direct contempt is behavior which occurs in the courtroom or so near the courtroom that it disrupts actual proceedings. Such cases range from disturbing a courtroom by taking pictures to a refusal by a reporter to testify as to sources of information. Indirect, or constructive, contempt refers to out-of-court contempts, such as publication of a derogatory editorial about the judge or publication of material the judge feels is detrimental to the court proceedings. The reporter is just as likely to be guilty of indirect contempt as he is of direct contempt [Nelson & Teeter, 1973: 343].

Direct contempt. In recent years, newspapers have been concerned with direct contempt because of the increased use of this power by the courts to force reporters to reveal sources of information. The four reported college cases involving contempt have concerned the clash of reporter's privilege with the court's power of contempt.

In 1968, Annette Buchanan, editor of the University of Oregon *Daily Emerald*, wrote a story about marijuana use among students. Buchanan interviewed several persons and promised that if they permitted the interview, she would not reveal their names. She wrote the story using fictional names. When subpoenaed before the grand jury investigating marijuana use,

Buchanan refused to reveal the real names and was fined $300 for contempt. Buchanan argued not only that the Constitution protects the gathering of news in its protection of freedom of the press, but that certain news stories cannot be gathered unless the reporter can promise anonymity. The Oregon Supreme Court upheld the contempt conviction saying that newsgatherers have no constitutional right to information which is not accessible to the public generally. "The rights of privacy, freedom of association and ethical convictions are subordinate to the duty of every citizen to testify in court," said the court [Buchanan, 1968, at 731]. The court, however, did leave one loophole for the legislature to fill: "We hold merely that in the absence of statute, nothing in the state or federal constitutions compels the court to recognize such a privilege" [Buchanan, 1968, at 732].

The United States Supreme Court in 1972 ruled for the first time on whether a reporter has the constitutional right under the First Amendment to refuse to testify about confidential sources of information. In three cases heard together, the Court denied reporter's privilege under the Constitution. Earl Caldwell, a reporter for the *New York Times*, was called by a federal grand jury in California to give information on Black Panther activities which he regularly covered. Caldwell refused to appear or testify. Paul Branzburg, a reporter for the *Louisville Courier-Journal*, wrote an investigative article about marijuana and drug use. Branzburg refused to testify about the information he had obtained in gathering the story. Paul Pappas was a television news broadcaster in Massachusetts who refused to testify as to the activities of the Black Panthers.

The Supreme Court held that none of the three was protected by the First Amendment in these instances and that it was the obligation of journalists to respond to grand jury subpoenas just as any other citizen would. However, like the Oregon court, the Supreme Court held that while the Constitution did not provide a shield against contempt citations for refusing to testify, Congress or state legislatures could pass laws providing protection for newsgatherers [Branzburg, 1972].

In early 1976, twenty-six states had some form of legislative protection for journalists. However, such laws frequently are weak and offer little real protection.

Maryland has a shield law for its reporters, but it was passed after Paul Levin, a photographer for the University of Maryland *Diamondback*, had his day in court. Levin had taken photographs during disturbances at the College Park campus and was subpoenaed before a grand jury to produce "all photos taken by him . . . relating to disturbances at the University of Maryland from May 1, 1970, to May 15, 1970." Levin filed a motion to quash the subpoena, but the motion was denied. The state's attorney then revised the subpoena and on the day Levin appealed to the District Court, the revised subpoena was accepted. Despite the fact that the case was moot, the District Court said that it was incumbent on the government prosecutor

to shoulder the burden of showing the need for the issuance and compliance with any such subpoena. The court also warned the state's attorney that the Justice Department's "Guidelines for Subpoenas to News Media" would be adhered to by the court and the state must meet its general rules [Levin, 1970]. The guidelines stated that all reasonable attempts should be made to obtain information from non-media sources before there is any consideration of subpoenaing the press. If a subpoena appears imminent, then negotiations should be attempted with the media. If negotiations fail, a subpoena cannot be issued without the authority of the Attorney General.

That these guidelines, reissued in 1973, extend to members of the college press was made clear in a more recent college case involving the Wounded Knee disturbance. In spring of 1973, Tom Blackburn, a reporter for the Long Beach (Calif.) State University *Forty-Niner*, spoke by telephone with one of the Indian leaders at the Pine Ridge Indian Reservation in South Dakota. Blackburn then published the interview and was subsequently cited by the Los Angeles Newspaper Guild as "Outstanding Journalist of the Year."

In August 1973, Justice Department officials subpoenaed Blackburn to testify at the Wounded Knee trial and to bring all records, notes, and documents relating to the interview. A complaint was filed against the Justice Department, saying that the government had failed to obtain the Attorney General's authorization according to the guidelines. The Justice Department said that the United States Attorney General had not realized that the guidelines extended to members of the college press and that no harrassment of Blackburn was intended. The subpoena was quashed, but subsequently reissued the same day with the Attorney General's approval. The second subpoena was withdrawn within a week because the testimony was found to be "irrelevant to the government's case" [Reporters Committee, 1975: 39].

In 1970, Old Main on the campus of Wisconsin State University-Whitewater was burned, and a building at the University of Wisconsin-Madison was bombed and one person killed. After the bombing at Madison, the local underground paper, the *Kaleidoscope*, ran a front page story headlined: "The Bombers Tell Why and What Next—Exclusive to the Kaleidoscope." The story revealed the bombers' reasons after a promise not to disclose their identities. The *Kaleidoscope* editor, Mark Knops, was subpoenaed before the grand jury, but he refused to answer questions about the identity of the bombers. Knops took the Fifth Amendment, claiming self-incrimination, but when granted immunity from prosecution, he still refused to testify and was given six months in jail for contempt.

Knops purged himself of the first contempt citation by answering some preliminary questions, but he refused to answer five questions pertinent to the identity of the bombers. For this second refusal, Knops was sentenced to five months and seven days in jail. The Wisconsin Supreme Court had no sympathy for Knops, holding that "the need for these answers is nothing

short of the public's need to protect itself from physical attack." The court stated that there was a constitutional right to the privilege not to disclose sources of information received confidentially; "however, when the confidence conflicts with the public's overriding need to know, it must yield to the interest of justice" [State, 1971].

At Stanford University, police did not subpoena materials needed in an investigation of a disturbance at the University's health service. Instead, in April 1971, police and sheriff's deputies entered the Stanford *Daily*'s offices with search warrants and searched desks, files, and personal belongings for photographs of the disturbance. Nothing was found by the police and the *Daily* filed suit to prevent any further searches. In December 1972, a federal District Court ruled that the search was illegal and later awarded the paper $47,500 in legal costs incurred during the two-year court battle [Stanford Daily, II, 1971]. The court held that because a search warrant presented an "overwhelming threat" to the press's ability to gather and disseminate the news and "because 'less drastic means' exist to obtain the same information," third party searches of newspaper offices are impermissible in all but a few situations. Situations where a search warrant can be used are (1) on a clear showing that materials will be destroyed or removed from the jurisdiction and (2) where a restraining order would be futile [Stanford Daily, I, 1973]. On appeal by the police, the Ninth Circuit overturned the monetary award [Center, 1975: 3].

Indirect contempt. Contempt by out-of-court publication is becoming a more common way to punish and suppress discussion of court and grand jury proceedings. The traditional types of indirect contempt occur when a newspaper attempts to influence a court's decision by commenting on a pending case, or when editorial comment is disparaging of the judge and the court's competence. A third area involves grossly inaccurate and misleading news reports of pending judicial proceedings [Nelson & Teeter, 1973: 365].

All three of the above areas may bring contempt charges, and the defenses against such charges are uncertain. In some jurisdictions, lack of intent to influence or disparage the court may help; or, if the material reported is a fair and accurate report of a judicial proceeding, such a defense may be adequate. However, if the court finds that the effect of the article or editorial was "extremely serious" and that there was a clear and present danger to the fairness of the trial, then very few defenses will suffice [Bridges, 1941].

Whereas indirect contempt is traditionally a punishment after publication, courts have recently been issuing court orders, or gag orders, to restrain newspapers in advance from publishing any material about trial activities. Disobedience of a gag order may be grounds for contempt, just as would be disobedience of any court order. A gag order is an effective tool of the courts because an appeal of a gag order may become moot when the trial being reported is concluded. Generally, the Supreme Court has held that any official

restraints on the press in advance of publication bear a heavy presumption against their constitutionality. Recently, Justice Harry Blackmun stayed part of a gag order issued in a controversial mass murder trial in Nebraska. Blackmun was concerned about the delays, saying that "the very day-to-day duration of that delay would constitute and aggravate a deprival of such Constitutional rights." He noted that the four-week delay between the initial order and his opinion "exceeds tolerable limits" and "any First Amendment infringement that occurs with each passing day is irreparable." In the particular case under review, Blackmun lifted a ban on news coverage of the trial, but upheld a ban on reporting the confessions made by the defendant before his trial and a ban on divulging information to the press [Nebraska Press Association, 1975].

The Nebraska case was appealed to the Supreme Court, and a decision was handed down June 30, 1976. The Court held unanimously that the Nebraska gag order prohibiting the reporting of pretrial information and of preliminary hearings was unconstitutional: "We reaffirm that the guarantees of freedom of expression are not an absolute prohibition under all circumstances, but the barriers to prior restraint remain high and the presumption against its use continues intact." Although the barriers remain high, they are not insurmountable. According to the Court's holding, circumstances may exist in a pretrial situation where a gag order would be valid.

Specifically, the Court concluded that the trial judge had not demonstrated that "further publicity, unchecked, would so distort the views of potential jurors" that a fair trial would be impossible. Three justices insisted, in a separate opinion, that gag orders were unnecessary to assure a fair trial [Nebraska Press Association, 1976].

A typical gag order case involved a newspaper in New Orleans. On June 17, 1974, a New Orleans judge ordered the press not to publish any editorials, investigative stories, or pretrial testimony relating to a pending murder trial. The media obeyed the order, but two days later the *Times-Picayune* appealed, claiming the order was an unconstitutional prior restraint. The Louisiana Supreme Court let the gag order stand and, on appeal, the Supreme Court of the United States declared the case moot because the criminal trial from which the order came had been concluded. The decision came from the Supreme Court nine months after the *Times-Picayune* appealed the order [Times-Picayune, 1975].

Although there are no reported cases of gag orders being issued against university newspapers, the increasing presence of student reporters in municipal and county courtrooms makes the threat ever-present.

Copyright

Article I, section 8, of the United States Constitution states that Congress has the power to promote the arts and sciences "by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." This provision has since been implemented with a federal copyright law which protects literary or artistic property after publication [17 U.S.C. sec. 1 (1970)]. However, protection for such material before publication comes not from federal statute, but from the ancient common law concept that a person's creations belong exclusively to that person until he or she gives them to the public. Therefore, a work is protected by common law copyright until publication, at which time the work would become part of the public domain. Thus, to protect published works, the author or creator should apply for a statutory copyright. Only after a statutory copyright has been granted will the published work be protected. A work should be considered copyrighted if a copyright notice is affixed to it.

The heart of the Copyright Act of 1909, still in force, states that the copyright owner "shall have the exclusive right" to "print, reprint, publish, copy and vend the copyrighted work. . . ." The law sounds absolute, allowing only the copyright holder to copy his or her work, thus denying copying privileges to students, libraries, researchers, or scholars. It would also tend to stifle the flow of information if not even a small portion of a work could be cited. To accommodate both the public's need for ideas and information and the need to protect a person's creations, the courts have developed the doctrine of "fair use." Fair use is the privilege to use copyrighted works in a reasonable manner without the copyrighter's consent [Nimmer, 1973]. Because there are few standards and no agreement among the courts on what is and is not a fair use, each case involves an *ad hoc* decision by the courts of whether the material has been used fairly or whether there has been an infringement.

It is generally accepted that a copyright protects only against substantial or material copying, and there is infringement when so much has been copied that it would "sensibly" or "substantially" diminish the value of the original work. Some of the factors used to determine whether copying has been "reasonable," "sensible," or "substantial" are (1) the nature of the work involved, (2) the purpose of the copying, (3) the effect of copying on the copyrighted work, (4) the amount and importance of material used, and (5) the intent of the copier [Folsom, 1841].

Copyright applies only to the artistic or literary style of the creation, not the ideas, themes, or facts contained in it. Hence a news story may be copyrighted, but the only elements protected are the particular order and selection of phrases, sentences, and paragraphs. The facts of the news story are

not copyrightable [International News Service, 1918]. A photograph may be copyrighted for its particular composition and artistic expression, but the subject of the photograph may not be copyrighted.

Newspapers must be aware of copyright at both ends—as both the creator of a copyrightable work and the user of another's copyrighted work. Newspapers must acquire permission to use and publish any copyrighted material, such as news stories, editorials, columns, advertisements, photographs, or art work.

Some persons have insisted that if a newspaper acknowledges the source of the copyrighted material, this is sufficient to protect against charges of infringement. This is not true, as witnessed by a case in Missouri where a newspaper reproduced a cartoon from a copyrighted newspaper. Although the source of the cartoon was given, a District Court held that this was not "fair use" [Inter-City Press, 1958]. The only safe place where material can be copied without permission is in a review, critique, or commentary about the copyrighted work itself. Book reviews may use excerpts or quotes in reviewing the work; this would apply to record reviews and movie reviews as well.

Advertisements may also produce a source of copyright trouble for a newspaper, because advertisements, if they possess at least a token of originality, are copyrightable. This includes both the art work and the advertising copy. Although the copyright of an advertisement does not protect the advertiser's ideas or product, it does protect the arrangement of the material, illustrations, and expressions of the idea [Drechsler, 1969: 286]. When a newspaper makes up its own advertisements for customers, there is a temptation to use copyrighted illustrations which are well-known to the public, such as popular cartoon characters or popular symbols. Such illustrations are usually copyrighted and should not be used without permission.

Not all newspapers are copyrighted; in fact, most are not. The material in a non-copyrighted newspaper becomes public domain once the issue is distributed. To protect individual stories, columns, exclusive or investigative reports, or photographs, the newspaper may acquire individual copyrights. A copyright symbol may be placed on the story and, although publication will be immediate, a copy of the story should be sent to the Copyright Register in Washington, D.C., with the appropriate fees and forms. Full protection can be offered only if the material is registered.

The only true defense against a charge of copyright infringement is the fair use doctrine. Within this defense two factors newspapers may rely on the purpose of the copying and the importance of the material used. If purpose is to convey material of public interest and the material is important because it is essential to fulfill the newspaper's duty of offering a forum for "wide open and robust debate" on public issues, then the infringement may turn into a fair use.

A recent case places the problem of newsworthiness and copyright in per-

spective. In 1954, *Look* magazine published a three-part series on the noted recluse Howard Hughes. In 1962, Random House hired a journalist, Thomas Thompson, to write a book-length biography of Hughes. When Hughes heard about the forthcoming book, he threatened to make trouble if the book was published. Thompson resigned as author and the job was given to John Keats. In 1966, Hughes's associates formed Rosemont Enterprises and bought the copyright to the 1954 *Look* magazine articles. Because the Random House biography was so similar to the *Look* articles, Rosemont Enterprises sought an injunction to stop distribution of the book. Although the Court of Appeals found that the *Look* articles formed the basis of the Random House book, and although portions of the *Look* articles were copied in the book, there was no material or substantial infringement. The court stated that the public interest in the life of a man such as Hughes must be balanced against the copyright. Random House's claim of fair use was upheld [Rosemont Enterprises, 1968].

A more recent case involves the copying of material for scholarly use. It was a common practice of the National Institute of Health and the National Library of Medicine to provide scientists and doctors photocopies of journal articles. Williams and Wilkins Co., publishers of a number of medical journals, sued for damages, claiming copyright infringement by NIH and NLM. The trial court awarded the publishers damages for what it termed "wholesale copying." However, on appeal, the Court of Claims held that the practice did not constitute infringement and that several factors must be examined in deciding fair use, including (1) substantial harm to the copyright holder and (2) the scientific value of the practice. The court hesitated in making any declaration about fair use because of the legislation pending before Congress aimed at revising the 1909 Copyright Act to accommodate the judicial doctrine of fair use [Williams and Wilkins, 1973]. An evenly divided Supreme Court let the Court of Claims decision stand [Williams and Wilkins, 1975].

It would appear from the *Rosemont* and *Williams and Wilkins* decisions that the courts will balance copyright on behalf of the public interest or scientific value of the material.

Endorsements

In the fall of 1974, the Rutgers University *Daily Targum* and other student publications at the college were warned that funds and free rent from

the University would be stopped immediately if any candidate in the New Brunswick, New Jersey, mayoral race were endorsed [Reporters Committee, 1975: 94]. This warning was prompted by a fear that if campus publications endorsed candidates for public office, the school's status as a tax-exempt educational institution might be endangered. An Internal Revenue Service provision defined a tax-exempt organization as one "that is organized and operated exclusively for educational purposes, no substantial part of the activities of which is attempting to influence legislation and which does not participate in any political campaign" [Internal Revenue Code 1954, sec. 501 (c) (3)].

Losing tax-exempt status was brought to administrators' attention in June 1970, when the American Council on Education issued a report warning that participation in any campaign for public office would endanger that status. The result of this warning was a proliferation of guidelines issued to campus newspapers by school officials. For instance, at San Jose (Calif.) State University, the chancellor of the California State University system advised the *Spartan Daily* editors that they could discuss issues editorially but could not endorse candidates. At St. John's (New York) University, the president issued a ten-point policy statement dissociating the school from the 1970 election campaigns. With the policy was a warning to the student paper that it would not be allowed to print editorials, features, signed columns, or letters dealing with the campaigns. Although the paper was allowed to print straight news stories, the school would not allow distribution of the paper off campus if such stories appeared [Stevens, 1971]

Between 1970 and 1972, numerous student newspapers found themselves under such policies as administrators tried to protect their [illegible] from violation of the single IRS regulation. However, this provision was modified by an IRS ruling in 1972 [Revenue Ruling, 72-513]. The ruling stated that endorsements in student newspapers, despite the fact that the university furnishes physical facilities, does not constitute political activity prohibited to tax-exempt organizations.

The student newspaper, the ruling continued, has been a long-established and accepted extension of formal instruction, and the expression of editorial opinion on political and legislative matters is a commonly accepted feature of legitimate newspapers. Such statements are considered acts and expressions occurring in the course of bona fide academic programs and academic-related functions. This ruling would appear to cover not only editorials but also advertisements endorsing candidates.

While there may be no trouble from the IRS, there may be state laws prohibiting the use of public monies for the support of any candidate or issue on a ballot. Application of such laws to public school newspapers would seem to be an unconstitutional attempt at censorship and may not be upheld in the courts.

Explanations of Legal Citations

1. *Supreme Court of the United States.* Example: Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

   After the case name comes the citation, which allows locating the case in the correct volume within the correct series of volumes. In this instance, *Tinker* can be found in Vol. 393 of the United States Reports (U.S.) beginning on page 503. The Court's decision was handed down in 1969.

   Cases too recent to be found in the official United States Reports may be cited as being in the Supreme Court Reporter (S.Ct.). While this is published by an unofficial, private company, it contains the verbatim Court opinion.

2. *Courts of Appeals.* Example: Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961).

   Dixon can be found in Vol. 294 of Federal Reporter, Second Series (F.2d), beginning on page 150. It was decided by the Fifth Circuit Court of Appeals (5th Cir.) in 1961.

   The case was appealed to the Supreme Court (the next highest court), which refused to grant *certiorari* (cert. denied), or to hear the case on appeal, as reported in Vol. 368, page 930, of the United States Reports.

3. *United States District Courts.* Example: Antonelli v. Hammond, 308 F. Supp. 1329 (D. Mass. 1970).

   Antonelli is reported in Vol. 308 of the Federal Supplement (F. Supp.) on page 1329. It was decided in 1970 by the United States District Court for the District of Massachusetts. Abbreviations could also be N.D. for Northern District, W.D. for Western District, and so on. Massachusetts has only one district.

   Example: Lee v. Board of Regents, 306 F. Supp. 1097 (W.D. Wis. 1969), *aff'd*, 441 F.2d 1257 (7th Cir. 1971).

   The District Court's decision in *Lee* was affirmed (aff'd) by the Seventh Circuit Court of Appeals. A higher court may also reverse a lower court's decision (rev'd). Courts may issue opinions as a whole court (per curiam), rather than issuing a ruling signed by a single judge writing for himself or for the court.

4. *State decisions.* Example: Johnson v. Junior College District No. 508, 334 N.E.2d 442 (Ill. 1975).

   Johnson is reported in a volume of the National Reporter System, published by a private company. In this instance, the case is found in Vol. 334 of the Northeastern Reporter, Second Series (N.E.2d), beginning on page 442. The case was decided by the Illinois Supreme Court in 1975 (Ill. 1975). Other abbreviations may be N.W. for Northwestern Reporter, So. for Southern Reporter, and so on. All sections of the National Reporter System are now into a Second Series, merely a convenient way of numbering the volumes. All such regional reporters of the National Reporter System contain state court decisions.

5. *Other abbreviations.*

F.R.D. is Federal Rules Decisions, a series containing some court decisions, but also including such items as court orders.

A.L.R.2d, A.L.R.3d, and A.L.R. Fed. are volumes of the American Law Reports, series of volumes by a private publisher containing court opinions and annotations based on court decisions.

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