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The SPLC Report

SPLC Report, published three times each year by the Student Press Law Center, summarizes current controversies involving student press rights. The SPLC Report is researched, written and produced entirely by journalism and law students.

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Student Press Law Center welcomes submissions of articles, drawings, cartoons and news tips. Please help the SPLC inform the scholastic journalism community by contributing your skills to the SPLC Report.
'Can' does not equal 'should'

Distinguishing ethics from law

By Deni Elliott

Recently, I asked a reporter at The Philadelphia Inquirer to explain why he was considering including some damaging material in a story. I didn't doubt that the information was important, relevant, maybe even vital to the story. But, I wanted to understand how the reporter explained to himself why it was acceptable to use some material that would undoubtedly harm an individual.

The reporter looked at me blankly for a second and then shrugged. 'There's no law against including it, so why not?'

Although an editor has told me since this incident that he finds it very hard to believe that any reporter at the Inquirer would confuse ethical responsibility with legal permissibility, I find that this reporter's automatic, surface justification of 'It's legal, so why not?' reflects a problem that many professional and student journalists have in differentiating questions of law from questions of ethics. The question of 'Should we do this?' is often confused with or reduced to the question of 'Can we do this?'

Legal and ethical guidelines are not the same. A proposed action may be 1) both legal and ethical, 2) legal but not ethical, 3) ethical but not legal, or 4) neither legal nor ethical.

Knowing that a proposed action meets legal guidelines only means that the action is allowable within the social legal structure. People choose what they consider to be correct actions from a large group of actions that are legally allowable. There are many actions which are allowable, but not necessarily the right things to do. Deciding the legal permissibility of an action does not provide much information in helping the journalist decide whether or not a proposed action is ethically correct.

The Parameter of Law

One way to visualize law in society is to imagine a field that symbolizes the entire range of human behaviors. In the center of the field there is a large corral, set off by a low fence that serves more as a boundary marker than a barrier. Legally allowable behaviors are all of those inside the corral; illegal behaviors are those outside the fence.

Law, like the fence, can be expanded to allow in more behaviors. For example, greater understanding of women, children, and minority groups in the last century have broadened legally allowable behaviors for these groups. Women and representatives of minority groups now have

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the same legally protected rights as white males. Thanks to greater protection laws which have developed over the past century, children have more recognized legal rights to grow up safe from physical and sexual abuse.

Law can also be drawn in to create a smaller corral of legally allowable behaviors. State laws raising the allowable drinking age from 18 to 21, laws requiring the use of seat belts, and laws banning cigarette smoking in various public areas all exemplify a shift of law to narrow down legally allowed behaviors.

The low fence is a good metaphor for legal limitations because one can choose to defy the dictates of law just as one can decide to step over a low fence. Legal guidelines do not restrain people. They just tell them what behaviors will result in punishment if the agent is caught.

Law speaks to accountability, and being legally accountable for an action is only one of many reasons people have for choosing what they consider to be the right action. The ethical question of “What behaviors do I choose to engage in?” may have very different answers from the legal question of “What behaviors are we unwilling to tolerate in this society?”

Choosing to stay within the boundary of legal acceptability may be one early step in determining moral acceptability. An individual may say, “One of the things I choose is to keep all of my behavior within legal limitations.” But, that decision alone will not let an individual off the ethical hook.

Ethical and unethical behaviors both are included within the fenced-in legal circle. For example, while the law tells us explicitly not to lie to the IRS, or when under oath of court of law, it is silent when it comes to telling friends the truth. Yet, most of us generally choose to be honest. For most of us, the falsehood is something that needs to be justified; it needs an accompanying explanation to make it “all right” while truth telling rarely requires justification. Choosing to be honest is, for most people, a moral or ethical decision.

Different Reasons for Choosing to Be Ethically Responsible.

People choose to act in ways they consider appropriate for a variety of reasons. The example of truth telling and lying provides an illustration for various types of ethical justification.¹

I. Some people choose to tell the truth because they are afraid that they will suffer if they don’t. The kind of suffering they fear might be anything from religious retaliation to more direct harm. These people might choose not to lie to an employer, for example, because they are afraid that they will lose their job if they lied.

II. Other people choose to tell the truth because they believe they will be rewarded for doing so. Again, the reward differs from individual to individual, and may include heavenly rewards as well as the hope for more mundane worldly goods. These people might choose not to lie to an employer because the hope for a job promotion or greater recognition in the company if they tell the truth.

III. Still others tell the truth because they are concerned about other people’s approval. They choose not to lie because they are afraid that people will not like them if they do.

IV. Some do appeal to law as a reason not to lie, even if it’s not societal law. For example, some social groups, employers, families and other groups have written or unwritten rules concerning the necessity of truth telling. The reason that some people choose truth telling is that there is some rule that says they must.
However, using "obeying the rules" as a justification for ethical behavior is different from saying that a particular behavior is ethical because it is legal. The people who would appeal to a rule as a reason for doing good acts, might respond to the question of "Why wouldn't you print damaging lies about people in the newspaper?" by saying, "because it's against the law." They are saying, in effect, I should not do x because x is against the law. People who confuse ethical obligation with legal permissibility say that an action is acceptable because it is allowed by law. They are saying, in effect, I should do y because y is permitted by law.

V. Another reason that people may give for telling the truth is that truth-telling is good for society. They may explain that society's operations would be disrupted if people didn't generally tell the truth. They reason that the right action is what's good for most people and they make their decisions by appealing to this base.

VI. Some others choose to act in ethically responsible ways because they feel that certain actions are inherently right and others are inherently wrong. They do not judge the adequacy of action against how many people will be harmed or helped, or against what societal laws say, or against how people will feel about them, or by considering how they will personally suffer or be rewarded for their action.

These people may reason, for example, that it is simply wrong to lie. No matter what the outcome for themselves or others, they have decided that the only morally appropriate action is absolute truth at all times. Conscientious objectors provide a good example of this style of moral reasoning. They refuse to take part in wars because they believe that killing of any sort is wrong.

Providing ethical justification for journalistic action, then, is different from saying that the action is allowed under law and is far harder to answer than whether or not an action is legally allowed. It is not easy to decide which of many behaviors is the most responsible journalistic action in each case.

The individual journalist has the responsibility to consider how his/her actions will affect many different groups. What might be a good action when viewed from one perspective may be irresponsible when viewed from another. For example, the journalist has responsibility to the audience, to the sources and subject of the story, to the news organization that employs the journalist and to the practice of journalism as a whole. It is not surprising that many journalists might attempt to avoid the whole issue of how to balance competing responsibilities by saying that any action allowable by law is acceptable.

However, the journalist has primary responsibility to him/herself. As illustrated above with the lying case, individuals need explanations beyond the allowability of law to justify actions as morally permissible. The fact that the individual becomes a journalist does not remove the need to explain actions.

The individual takes on additional responsibilities in choosing to become a journalist; the job classification does not exempt the individual from moral responsibilities held by all.

1. In discussing different reasons for choosing responsible behavior, I have borrowed directly from the levels of moral justification described by educational psychologist Lawrence Echilberg.

Editor's note: Deni Elliott, who has written columns on journalism ethics for the SPLC Report for the past two years, will become Professor Deni Elliott when she joins the journalism faculty of Utah State University in Logan, Utah, this fall. Dr. Elliott's dissertation at Harvard University was on the teaching of journalism ethics.
California

Right to endorse at issue in Humboldt State lawsuit

A college newspaper editor is suing the administration at Humboldt State University (Cal.) because of an unsigned editorial endorsement that resulted in his dismissal.

Adam Truitt, former editor of the Lumberjack, printed the editorial endorsing Walter Mondale last October knowing that it broke a twenty-year ban on endorsements by the California State University system.

Truitt is claiming that the ban is unconstitutional since it prohibits the paper’s right to free speech.

The administration is contesting the case on the grounds that a newspaper supported by state funds is “not supposed to express views on partisan political issues.”

Unsigned editorials making partisan endorsements in newspapers in the California State University system are banned under title 5 of the California Administrative Code because such editorials are considered the policy of the entire newspaper rather than a statement by an individual staffer. It is the avoidance of the appearance of state endorsements which is sought by the ban.

Truitt and the Lumberjack’s editorial board were aware of the regulation and, after talking it over, decided that they felt it was unconstitutional. Before making the endorsements, Truitt wrote to the California State University Chancellor, stating his intent to violate title 5. A lawyer for the Chancellor’s office wrote back urging him not to make the endorsements, but the editorial had already been published. “This seemed to be one of the better ways of bringing attention to it,” Truitt said.

The suit, filed in December in Humboldt County Superior Court on behalf of Truitt and the Lumberjack editorial board, names 46 defendants including university officials and Gov. George Deukmejian. It states that the First Amendment to the Constitution gives student journalists the right to publish unsigned endorsements.

The ban is enforced within the 19-campus California State University system and has been obeyed by most other campus newspapers in that system. One exception is the San Diego State Aztec, a California State University newspaper which also endorsed Walter Mondale and addressed a number of state and local political issues without any reaction, according to survey by the San Francisco Sunday Examiner.

Support or opposition of a political candidate or issue is not banned at any of the schools in the University of California system.

Arnie Braasch, attorney for the Lumberjack, says in the lawsuit that the CSU system incorrectly leans on a 1977 Supreme Court decision that said the state Department of Parks and Recreation should not have campaigned for the passage of a proposition to fund purchase of more parks.

There have been other cases involving the enforced banning of political endorsements. In 1970, many college administrators turned their attention to the possibility of losing their tax-exempt status 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.

One example was at San Jose California State University where 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 University (N.Y.), a private institution, the president issued a ten-point policy statement disassociating the school from the 1970 election campaigns. Included with the policy was a warning that the student paper 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 the stories did appear.

Student papers found themselves restricted by that policy until an IRS ruling in 1972, which stated that
endorsements in students newspapers, despite the fact that the university furnishes physical facilities, do not constitute political activity prohibited to tax-exempt organizations. This ruling appeared to cover not only editorials but also advertisements endorsing political candidates.

Late in 1976, a memorandum submitted to the general counsel of the Trustees of the California State University and Colleges by his staff contended that a section of the California Administrative Code prohibited the CSU system schools from endorsing candidates or taking a stand on any ballot issue. The Administrative Code allows "auxiliary organizations" to operate in connection with educational institutions but neither is allowed to use public funds to support partisan issues. This memorandum sees all college and student body funds as being public monies, thus endorsements by the school newspaper — considered an "auxiliary organization" — are not allowed. The report notes that it is permissible for individuals, including the newspaper editor, to endorse candidates and issues if it is made clear that such stances are personal and not those of the publication.

A Texas state court has tentatively supported endorsements by student papers where a state statute was not involved. In 1976 a student at the University of Texas brought suit to stop a student newspaper from endorsing candidates. The Daily Texan endorsed Jimmy Carter and Spring 1985

candidates for two state offices. The student, who disagreed with the endorsements, said that his payment of a mandatory student fee, part of which supported the Texan, forced an unwanted association between himself and the paper. A Texas appellate court ruled that the student had not shown he would suffer harm from endorsements if any injunction prohibiting them were not issued before a hearing on the merits of the case could take place. Hickman v Board of Regents, 552 S.W.2d 616 (Ct. App. Tex. 1974). The Texan therefore, had the right to print the editorial endorsements as there was no state statute prohibiting them.

Truitt doesn't think the Lumberjack should be viewed as an agency of the state. He said that 87 percent of the newspapers budget is from advertising revenue, about 5 percent is from the university's student government and the rest is from groups that rent the Lumberjack's equipment.

The Lumberjack has received an answer to their complaint and will have to wait until March before briefs will be filed. Their focus now is to amend title 5 so that all college newspapers in the California State University system would have the right to endorse candidates. If that happens the suit would be moot.
Las Vegas gambles on ad refusal

Planned Parenthood of Southern Nevada, Inc. (PPSN) wants to print advertisements for their services in high school newspapers, and is suing the Clark County School District over the right to do so.

The lawsuit, filed December 11 in the U.S. District Court for Nevada, asks for a permanent injunction halting the Clark County School District's policy of refusing Planned Parenthood's paid advertising in student publications despite accepting paid advertising from other sources.

The complaint seeks a judgment declaring that the district's policy for regulating advertisements is unconstitutional because it violates rights secured by the First and Fourteenth Amendments for Planned Parenthood, high school students and other third parties who may need to be aware of the Planned Parenthood services.

Planned Parenthood Executive Director Kim Hansen has said that this is the first court case testing the free speech of family planning providers to advertise their service in high school publications.

The lawsuit names as defendants, the Clark County School District (CCSD), the Board of Trustees, the superintendent of the schools, and ten high school principals. Clark County includes the city of Las Vegas, and over half of Nevada's residents live in the county.

The CCSD issued a memorandum to provide guidance to its high school principals, as to the exercise of their "power" to regulate advertising in publications on April 9, 1984. Each school was granted the power to regulate its publications.

Planned Parenthood is claiming that the memorandum "failed to provide narrow, objective, and definite standards to guide the principals.

Planned Parenthood submitted, at various times in the Spring and again in the Fall of 1984, advertisements for publication in each of the high school newspapers. The submitted advertisements stated the availability of certain medical services, counseling services, and other informational services relating to reproductive health.

The ads were rejected immediately by five of the high schools. Six other schools ran two different advertisements during the year. After some parents complained, two of those schools dropped the ads.

At that point Planned Parenthood consulted Roger Evans, Director of Litigation for the Planned Parenthood Federation of America. He concluded that the CCSD's censorship of the advertising was unconstitutional. Planned Parenthood presented this legal opinion to the CCSD and requested that they insure publication of the ads in the school newspapers which accepted advertising.

On October 11, the CCSD presented a district-wide advertising policy at a meeting of the Board of Trustees Policy Committee. The Board proposed Regulation #1240, "Advertising in School Publications," which would prohibit ads in a number of subject areas including "gambling aids," "drugs," "liquor products," "pornography," "birth control products and information," and "other items which may not be legally possessed by students less than 18 years of age."

Planned Parenthood says the policy violates the First and Fourteenth Amendments because it "delegates the power of censorship to CCSD's high school principals without establishing narrow, objective and definitive standards to guide their conduct," and because it violates their rights to free speech. They also feel that the policy for regulating advertisements in high school publications has been applied unconstitutionally to prevent the receipt of information by third parties who have a constitutional right to receive such information.

"Our ads are not being rejected by the students, but by the high school..."
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said Dan Holt, Community Affairs coordinator for PPSN.

Prior to 1979, Planned Parenthood had placed ads in those high school publications which had directly solicited their advertising. Then, Director of Senior High Schools Terry Manton ordered that no PPSN ads be printed in any publications. PPSN protested and as a result of negotiations with the CCSD, each school was granted the authority to regulate its publications. The advertisements were run occasionally in some schools while other schools refused to print them entirely. That was when Planned Parenthood sought legal council and presented their legal opinion concerning the districts prior restraint to the CCSD with the request that the advertising be printed.

Negotiations took place after the unofficial policy was distributed to the high school principals.

The CCSD policy committee had put off acting on the proposed regulation so that school district attorneys could give the matter “further study.” However, the proposed regulation was distributed to the high school principals. All schools except Clark High School have discontinued PPSN advertising until the situation is resolved.

PPSN’s Board of Directors decided to file the lawsuit when, “it became apparent, after several weeks, that the CCSD was not going to act in a timely manner.”

It is expected that Federal Judge Roger Foley will hold a hearing on the case within ninety days.

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**Georgia**

**Supreme Court finds Cadaver unappealing**

The Georgia Supreme Court has affirmed the Court of Appeals ruling against a medical school lampoon-style magazine, saying that a nursing student who wrote a letter critical of the publication did not “provoke” a harsh satirical response from the editors.

The ruling upholds a decision by the Georgia Court of Appeals which stated that a letter written by Susan Brooks, a nursing student, to the Medical College of Georgia Cadaver did not fulfill the standards of the provoked libel doctrine. The provoked libel doctrine states that one who is at fault himself cannot recover civil damages from another who has retaliated in kind.

The case will now be up to a jury to decide whether the Cadaver’s response was invited or if the magazine has beleaguered Brooks. “There will be a trial sometime this year,” said David Hudson, attorney for former Cadaver editor John Jarman.

The case arose in November 1982 when Susan Brooks wrote a letter to the editors of the Cadaver asking that the content of the paper be upgraded.

The editors wrote in response, “Our style of humor is really out of control…our mothers were German Shepherds; our fathers were Camels, so naturally we love to lump bitches in the heat. Say Ms. Brooks, when do you come in season?” The editors had argued that the magazine is “clear satire” but the Court of Appeals did not accept that argument.

In the State Supreme Court, the editors of the Cadaver were relying on a defense based upon Georgia Power v. Tusbin, 24 Ga. 180, 289 S.E.2d 514 (1982), which would have tied the provoked libel doctrine into the case, possibly dismissing it.

There are two essential elements to the provoked libel doctrine: (1) The plaintiff originally was “at fault”; and (2) the libel defendant merely retaliated “in kind.”

To show that Brooks was at fault, Hudson argued that she had written the letter to the editor with the intent that it be published. At the time she wrote the letter, the Cadaver had a history of making degrading remarks about nurses and women. Hudson claimed that “It is not necessary for Brooks to have known what the editors would say in response. It is sufficient if she solicited the publication of matter which she had reasonable cause to suspect would be unfavorable to her. Brooks’ knowledge of the history of the campus newspaper would have given her reasonable cause to suspect that, if she attacked the Cadaver and its Editors, the Editors would respond in kind.”

The Georgia Supreme Court ruled that Brooks’ letter to the editor did not put her “at fault” because it did not present a reason for the response. This made the argument that the editors merely retaliated “in kind” a moot point.

The Supreme Court decided to hear the case because the Court of Appeals had “apparently overlooked several cases which hold that an individual cannot recover for invited libel in Georgia.”

This did not help the editors of the Cadaver because the Georgia Supreme Court, even after looking at the cases that were binding in Georgia, agreed with the lower court.

The Cadaver editors are now awaiting a court date for their jury trial.
New Hampshire

Libel redux at Dartmouth Review

The Dartmouth Review has again found itself in heated controversy as it is being sued for $3 million in damages for allegedly printing “false, misleading and inflammatory information” about Dartmouth College Associate Chaplin Richard Hyde.

Hyde is suing the Hanover Review, Inc.—the corporation which prints the Dartmouth Review—and several former editors of the newspaper for publishing information which he claims caused him “severe emotional distress, embarrassment, humiliation, indignation, including anxiety over the potential loss of his position at Dartmouth College.”

“We printed some articles which Hyde claims defamed him in some way” because they refer to his personal life, said Laura Ingrin, editor of the Review.

“The articles had been written six months ago,” Ingrin said. “We covered a number of Hyde’s lectures on campus and mentioned him in a few articles” but Hyde has not specifically named the material which he finds libelous.

The lectures the Review has covered include disarmament in South Africa and how sexuality fits into Christianity, Ingrin said.

“The suit has been filed in court” but there has been no activity on the case, according to Dort Bigg, attorney for the Review.

This comes while the case against the Review involving Professor William Cole, a music professor at Dartmouth College, has still not been resolved.

Cole sued the Dartmouth Review for libel after they printed an article which implied that he was incompetent and called his class “the most outrageous gut course on campus.”

In that suit, Cole is asking for $2.4 million in compensatory and punitive damages.

Attorneys made a motion to dismiss the case against the individual editors on the grounds that the court lacked personal jurisdiction over them. Cole, a resident of Vermont, filed the case in Vermont state court although the editors lived and the newspaper was published in New Hampshire. The motion was granted and the case was dismissed.

That did not end the case however, as it has now been filed “against the corporate defendant,” according to Blair Soyster, the Dartmouth Review’s lawyer. The case is now solely against The Hanover Review, Inc.

The Review has also had problems with a pollster for not printing the results of a poll which a trustee of Hanover Review, Inc. had requested.

The pollster had agreed to do a poll for the Review with the understanding that it would be published. The Review published the results of its own survey on the same subject which the pollster said was “obviously selectively done.”

There has been to date no action taken against the newspaper by the pollster.
Michigan

High tech lawsuit comes to standstill

A libel suit against two Michigan State News reporters has come to a standstill until lawyers for the newspaper file a summary judgment motion to dismiss the case against them by Eco Tech, Inc.

Robert H. Boling, Jr., president of Eco Tech, an environmental monitoring and data management firm in East Lansing, Michigan, filed a libel suit against the State News after it printed a series of articles that Boling and his company were misusing funds from a university contract. They said his company was spending a large sum of money on fringe benefits such as “beer and munchies.”

Boling claims he was unfairly singled out and that he informed the paper of its inaccuracies. The paper continued to print the articles despite the fact that professional newspapers which had picked up the story from the State News printed retractions and stopped printing the articles.

Attorneys for the News claim that there never was a chance to publish retractions or corrections of the stories because Boling never specifically directed attention to anything materially false contained in any of the articles.

A motion for summary judgement will be filed in May to dismiss the case in favor of the State News, according to Janine Bauchat, a paralegal at Miller, Canfield, Paddock and Stone, the firm which represents the Michigan State News.

Iowa

Definition of ‘rape’ is issue in appeal

Briefs have finally been filed in the appeal of a $9,000 award against the Iowa State Daily for an article which incorrectly reported a rape.

“The reply briefs are just being filed now,” said James Brewer, attorney for the Daily. “It’s going to be a little while before we get a court date.”

The case arose in February 1982, after the paper reported that a female bartender at the Local American Legion Hall had been raped.

Laurie Hovey sued the paper claiming that she had not been raped but sexually assaulted. According to the Iowa Statutes this is not considered “rape” since penetration had not occurred. Rape is legally defined in Iowa as forcible, nonconsensual sexual intercourse. The court ruled that the word could not be used to describe sexual abuse.

The law as passed by the Iowa state legislature does not contain the word “rape” at all, although the editor of the state code inserted “rape” in the parentheses under the “Sexual Abuse” chapter heading.

Brewer argued that the press should not be obligated to write using only the legal definition of the word rape.

Recently the term “rape” has been eliminated in many states in order to redefine sexual assaults in gender-neutral terms to incorporate new categories of prohibited behavior, according to an article in the National Law Journal.

Brewer is arguing that the term was used in a broad sense when describing what happened. “We say the way we used it was broad,” Brewer said. “It’s been used (that way) in Time magazine.” Brewer also felt that many publications will be in trouble if they have to write using only the legal definitions of rape. Such definitions vary from state to state.

Hovey was not named in the article directly, but she claims that she was easily identified because she was the only female bartender who worked in the early morning hours when the incident was reported to occur.

Her lawyer, Patrick Brooks, argued that Hovey suffered every time she had to relive the incident by explaining to people that she had not been raped. Brewer will argue that she was not identified in the story so there is a question as to the validity of there being libel.

Brewer also stated that “rape, in view of the fact that there is no crime of rape in Iowa anymore, is now defined as sexual abuse.”

“The press has the right to the broader definition,” Brewer said.

The jury in the case was instructed by Judge Carl Baker, who instructed the jurors to base their decision on the legal definition of rape. Brewer said he would focus the appeal on that point.
New York

Classroom ‘newspaper’ loses libel suit

A class project turned into a $10,001 libel judgment when a former cook sued a now-defunct school district because the students reported that school food was “not fit for dogs to eat.”

The New York State Supreme Court jury awarded Carol Gagnon $1 in libel damages and $7,500 for damages caused by the negligence of the Oriskany Falls Union Free School District. Her husband was awarded $2,500 for loss of his wife’s services.

The article appeared in a newspaper-style project that Rebecca Pitkin, a Colgate University student who was a teaching intern, had assigned her students. The jurors ruled that the article entitled “Students Rebel Against New School Cook” had libeled the cook in 1981.

The district asked the judge to overrule the jury verdict but he has not made a decision yet, according to Paul Heintz, attorney for the former Oriskany Falls district.

“There were a lot of errors made in the course of the trial that were unfavorable to the decision,” Heintz said.

The judge rejected the argument that the students were using “fair comment.” Under the doctrine of fair comment, journalists have the freedom to criticize food prepared for public consumption and art or performances shown to the public. New York state law says that a person must be a public figure to be subjected to fair comment.

“The judge didn’t accept it [fair comment] because she was not a public figure,” Heintz said.

The jury also ruled that school officials did not provide enough supervision for the teaching intern. The suit had charged the school district with not properly supervising the college student in her activities with the English class.

Gagnon claimed the article damaged her reputation even though she had already been fired when the article appeared because of student and faculty complaints about the food she prepared and reports that she failed to store food that she ordered for the school cafeterias. She was hired as the school’s cook in January 1981 and was fired about six weeks later.

The students wrote articles as a class assignment and were graded. They typed the project on a master stencil and mimeographed it. Each student in the class got a copy to bring home, according to Heintz.

The Oriskany Falls district merged with the Waterville School District in 1983. Oriskany Falls is a town of about 800 people.
Hazelwood editors await judge’s decision

Three former news editors of Hazelwood East High School in Missouri are awaiting a U.S. District Court judge’s decision as to whether they had the right to print articles in the student paper on teenage sex, marriage, abortion, and runaways.

Cathy Kuhlmeier, Leslie Smart and Leanne Tippett saw three court delays and eighteen months pass before their fight against censorship came to trial on November 5, 1984 in the U.S. District Court for Eastern Missouri.

It began in May 1983 when Hazelwood Principal Robert Reynolds censored two pages from the Spectrum because they contained material which he thought was “too controversial” for a high school newspaper.

The post-trial brief on the case reported that “after months of research, writing and editing under the supervision of their faculty adviser...the defendants [the administration] surreptitiously ordered the stories killed.” When the Spectrum staff members confronted the administration with what they thought was illegal censorship, the administration “responded by threatening to prohibit publication of the final edition of the paper scheduled that year.”

It also stated that when faculty adviser Robert Stergos, under whose supervision the stories had been prepared, encouraged them to stand up for their rights, principal Reynolds “recommended that his teaching credentials be revoked.”

The three editors, who have since graduated, went to the American Civil Liberties Union (ACLU) to file charges against the Hazelwood Board of Education, school principal, district superintendent and substitute adviser.

Steve Miller, an ACLU attorney representing the students, is asking for a mandatory injunction requiring the school district to permit publication of the censored stories and $25,000 in punitive damages and $10,000 in actual damages for each student, but commented that it is difficult to predict if they will receive damages and may receive “little or nothing at all.”

“The case can be broken down into two parts.” Miller said. The first part asked, “Were the students rights violated?” The second part, which will occur only if they win the censorship issue, would be a jury trial for the students rights to collect damages.

The November trial over the press rights violation was held before a judge. Miller argued that although the district has “invoked several official policies, practices, customs, rules and regulations which they contend are applicable to the Spectrum,” those policies were ignored in the decision to censor.

“These fall into two broad categories. The first relates to the paper’s content and procedures for publication. The second concerns budgetary length and restrictions.”

There are three content-related policies used by the school district.

The first of those is Hazelwood School Board Policy No. 348.5 entitled “Student Publications.” which states: “Students are entitled to express in writing their personal opinions. Students who edit, publish, or distribute hand-written, printed or duplicated matter among their fellow students within the schools must assume responsibility for the content of such publications... Libel, obscenity or personal attacks are prohibited in all publications.”

The second of the content-related policies entitled “School Sponsored Publications will not restrict free expression or diverse viewpoints within the rules of responsible journalism... No material will be considered suitable for publication that is commercial, obscene, libelous, defaming to character, advocating religious prejudice, or contributing to the interruption of the education process.”

The third set “policies” mentioned by the administration dealing with content, regarding criteria and procedures for publishing material in the Spectrum, is the District’s Curriculum Guide for Journalism II. Miller explains in the brief that “Even a cursory review of the document however shows that it is addressed exclusively to the general concepts, objectives, exercises, etc. for the Journalism II course. It contains no guidelines or directives whatever re-

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Censorship

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garding what may or may not be published in Spectrum or any other student publication."

Among the policies dealing with curriculum was one entitled “Controversial Issues,” one which principal Reynolds said “he felt he had complied with,” according to the post-trial brief.

The policy states: “As free objective discussion of controversial issues is the heart of the process of representative government, freedom of speech and free access to information are among our most cherished traditions.”

The policy grants specific rights to the students, including “the right to study any controversial issue which has political, economic, or social significance, and concerning which (at his or her level) he/she should begin to have an opinion . . .” and the right “to form and express one’s own opinion on the controversial issues without, thereby, jeopardizing the relationship with the teacher or with the school,” the brief said.

Miller contends that unconstitutional pressure on the Spectrum’s content was included in a directive from Reynolds to Robert Stergos, former advisor of the newspaper, issued in January 1983, requiring Stergos to submit a copy of Spectrum to Reynolds prior to printing and sale.

Superintendent of Schools Thomas Lawson stated that this prior review was not required by District policy, but that it was recognized as "standard procedure" for prior review by the principal of material thought to be "sensitive" or "controversial."

The school district also contended that individual issues of the Spectrum had to meet certain budgets and were supposed to be four pages in length, except for special issues dealing with such issues as homecoming and the prom.

But Miller, in his brief, pointed out that the administration had admitted prior to the trial that written budgets were not prepared for individual issues of the paper. It was also shown that no written guidelines existed on the issue of page limitations, but it was thought to be “understood” that the issue not exceed four pages. However, it was never clearly shown “by whom this was understood,” the brief said.

In the brief Miller found that these policies and practices are “devoid of any substantive standards and procedural safeguards” which the First and Fourteenth Amendments require. The brief said that when some of the administration attempted to rationalize the censorship, they were invoking “rules and regulations which staff members had never before seen.”

Reynolds had admitted that he did not bother to consult an attorney about these stories, contact their authors or the persons quoted to verify the accuracy of the accounts and consent, or even discuss with Howard Emerson, Spectrum’s adviser at that time, the possibility of making changes, the brief said.

The administration could show absolutely no other evidence suggesting in any way that less restrictive alternatives could not have been followed, according to the brief which also said “They chose to use an axe, where a scalpel would have sufficed.”

The staff of the Spectrum did not know about the deletion of the pages until the day the paper was to go on sale.

“The whole staff was mad,” said one student in the brief, “We went down and talked to Mr. Reynolds to find out why it happened.”

The students in the brief said that Reynolds told them “he had ordered the stories removed because they were “too sensitive,” he did not feel they were suitable for publication, and they invoked topics which should not be covered in the paper.

One student in the brief recalled Reynolds as saying “These articles are too mature for our immature audience of readers.”

Miller said that they expected a decision within the next month [April].

Although the three students have graduated, they have not gone without recognition for their efforts. In November, the first Scholastic Press Freedom Award was awarded to Cathy Kuhlmeier, Leslie Smart, and Leanne Tippett by the National Scholastic Press Association/Associated College Press and the Student Press Law Center for their efforts to publish a series of controversial stories in the student paper, demonstrating "the ability to raise difficult and necessary issues in news coverage."
Wyoming

Cartoon case goes to trial

An April 8 trial has been set in the case of Judy Worth, the former sponsor of a student newspaper who was dismissed from her job because of her disagreement with the banning from the paper of a cartoon that ridiculed the Moral Majority and her opposition to the Campbell County (Wyo.) School District's policy that deals with the student press.

Worth claims that she was fired for her outspoken protest of the district's publication policy and her attempts to change it. After issuing a press release denouncing censorship, the Wyoming Educational Association filed suit in the U.S. District Court for Wyoming last August to have Worth reinstated as sponsor of the school paper and yearbook.

The case began when the student run paper, Camel Tracks, wanted to run a cartoon critical of the Moral Majority. They wanted to run the syndicated cartoon to protest efforts by a group of citizens to ban Steven King's The Shining from the library.

School principal Jay Cason banned the cartoon because it "ridicules the conservative viewpoint," which violated a policy prohibiting material which "subjects any person to hatred, ridicule, contempt or inj-
Girls of Rancho on trial

Calif. court hears censorship case

Student editors are awaiting a decision on the censorship of the Rancho Alamitos newspaper whose distribution was halted when the principal thought material in the April Fools edition might be libelous.

After a hearing on a motion for summary judgment—the granting of a verdict in a case before it goes to trial—a California Superior Court judge has decided to consider the arguments before making a ruling, according to Gary Williams, attorney for the American Civil Liberties Union.

A summary judgment in favor of David Leeb, the editor of La Voz del Vaquero, would dismiss the case before it goes to trial.

“We will have to wait and see how he rules,” said Williams. “The judgment will come in sometime next month [March].”

The ACLU is claiming that a California statute and a school district regulation which allow prior restraint are unconstitutional. "Educational Code Section 48907 and Garden Grove Unified School District Administrative Regulation 72120.I establish a system of prior restraint which is unconstitutional... Because these measures infringe upon the First Amendment rights of all students, this court should declare that they are void, and the defendants (the school district) should be permanently enjoined from enforcing their provisions," said the court brief filed by Williams.

Williams hopes the court will adopt the opinion from the California case Rowe v. Campbell Union High School District, (unpublished) (N.D. Cal. Sept. 4, 1972), in which a three judge federal court invalidated an earlier California statutory provision which governed student expression. The Court in Rowe stated: “It may be that no system of prior restraint in the area of student publications can be devised which imposes a restraint sufficiently short-lived and procedurally protected to be constitutional. What may well be best — although not constitutionally compelled — is a simple prohibition against the distribution of certain categories of material.” State courts are not bound by the Rowe ruling.

Although other Federal circuits have stated prior restraint may be possible, the ACLU is hoping that the court will find the educational code and the administrative regulation of the high school press to be unconstitutional.

A favorable ruling on the summary judgment would prevent the principal from using prior restraint on material produced by the student newspaper.

The case arose when principal James Delong halted distribution of the April Fools edition of the paper because it contained "potentially libelous" material.

In the paper was a photograph of five girls along with an article stating that Playboy magazine would feature a nude photo spread called "The Girls of Rancho." The girls reportedly did not know when their picture was taken that it would be used that way in the humor edition.

Wyoming — continued

reinstatement to her former position as sponsor of the newspaper and the yearbook, and suing for damages for the attack on her reputation.

The district has claimed that the quality of newspaper and the yearbook has dropped since Worth took the position as adviser. But Hacker said that her track record with the paper was good if not better than the previous years.

Worth had been put under heavy stress by the case but is reportedly "doing as well as can be expected under the circumstances," according to Hacker.

Hacker also stated that the school district is trying to claim that they were worried about disruption of students in the school about the article. But he said the school "never gave that as a reason" for the ban and "they never made any document of that," so it was too late to raise that claim in court.
California

Ban on booze ads draws suit

Liquor and tobacco ads will continue to be excluded from a student newspaper because of a policy banning the ads set by the administration at Mt. San Antonio College (Cal.)

A request for a preliminary injunction against the ban by the American Civil Liberties Union (ACLU) representing the Mountaineer Weekly was denied by a Los Angeles Superior Court judge.

The injunction would have lifted the ban and allowed the paper to print the ads, but the judge found that "no irreparable injury" would occur if the ban remained in effect, according to ACLU attorney Gary Williams.

The suit, filed November 1 by a journalism professor, two journalism students and a private citizen, charges that the policy severely restricts the revenues that the campus paper could earn. They claim this violates the newspaper staff's and student body's constitutional rights of free speech and of the press.

"About two years ago we were made aware of the policy," said David Agrela, Editor-in-Chief of the Mountaineer. "It's a great place for quick revenue. Not only big companies but restaurants and nightclubs want to advertise. Our business manager has stayed away from night club advertisements because of the policy," Agrela said.

The paper wanted it made clear that they were not advocating the usage of tobacco and alcoholic products by the students.

"What we are arguing is that the district does not have the right to restrict ads in the paper," said Antoinette Cordero, and ACLU spokesman representing the plaintiffs.

The controversy came to a head when President John Randall wrote a letter to the school's journalism advising committee urging the staff to resign if they found the policy oppressive.

The newspaper's staff subsequently appealed to the board of trustees to repeal the ban on alcohol and tobacco advertising. In July, the trustees rejected that appeal.

The newspaper's staff and Donald Newman, the Mountaineer's faculty adviser, said they had no other choice than legal action.

James Albanese, Mt. San Antonio's vice president of business services, said in the Los Angeles Times that the administration would stand by its policy based on the trustees' authority to regulate advertising in the Mountaineer.

"Our position is that the board acted properly in adopting reasonable regulations for the weekly," Albanese said. "The trustees followed the president's recommendations" that the college should not take the responsibility for the sale and advertising of products that may be health hazards to the students.

Cordero disputed that claim, saying the potential health hazards and the district's regulatory authority are irrelevant to the newspaper's right to solicit and publish advertisements in the student newspaper.
order to sustain itself. He said the college, as an arm of the state, is obligated to strictly enforce the constitutional guarantees of freedom of the speech and of the press.

President Randall disagreed with Cordero, claiming that the administration should regulate advertising because work on the publication is done for class credit and is not a separate academic or financial entity as are some four year college newspapers. "That alone tells us we have more control," he said, because the course is primarily for instructional purposes.

The administration's refusal to permit advertising for alcohol and tobacco products has not extended to other advertising which the editors feel may have been controversial.

"We ran without complaint for several weeks an advertisement for the contraceptive sponge," said Agrella. "That's the key issue. There could be an ad for a wet T-shirt contest, something promoting nothing but drunkeness, or a restaurant advertising dinner with a complimentary drink," and they could be printed, said Agrella, who feels the administration wants to make the moral choices that the editors should make.

"We are not filing the suit just on principle," Cordero said, "but because these (advertising) revenues could mean the difference between the number of issues and pages the paper can publish, or its quality."

The advertising ban threatens the weekly's ability to maintain its press run of 6,000 copies or improve its present editorial standards, according to Newman. He also stated that it may eventually threaten the newspaper's ability to continue printing its 30 to 32 editions each year.

"We will probably make a motion for summary judgment," Williams said. "We still have work to do with our clients on that."

Colorado

Adviser quits over 'low-key pressure'

In the wake of the censorship of a letter critical of a baseball coach, at least one adviser has quit her job citing frustration and low-key administrative pressures in one of the nation's largest school districts.

Bobbie Rae Kay told the Student Press Law Center she has decided to take some time off because the Jefferson County (Colo.) School District has continued to enforce guidelines which restrict the rights of the students to publish relevant news articles.

The guidelines were called unconstitutional in a letter to Kay from the Student Press Law Center on November 6, 1984.

According to Kay, a few of the newspapers are good but some are not and many others do not know their rights.

There are eleven student newspapers in the county. Kay considers four to be strong papers, four to be good student publications and three to be weak papers.

Problems with the guidelines came to light when Kevin Kemp, a senior at Alameda High School in Lakewood, submitted a letter to the editor critical of the coaching style of the school's baseball coach.

Alameda Principal John Mitchell threatened to stop distribution of the March edition of the Paragon if the letter was published, explaining that he did not want the paper to become an open forum for students to publicly criticize teachers and their policies.

"Mitchell used as his support those guidelines," Kay said. "Until such time there was little flack in this county, but that incident brought to the forefront that we all live (with) the threat of those guidelines."

Kay feels the school district is using the guidelines as "a means of manipulating the content of the paper." She feels that this is the result of a lack of knowledge of First Amendment law by sponsors of the newspapers.

The sponsor is a faculty member who guides the students to make decisions and helps them to develop skills in journalistic style and content. Kay said a requirement that teachers have training in journalism to be able to teach it in the schools had been "ruled out" by the state several years ago.

"Our certificate of teaching does not carry a journalism endorsement," Kay said.

Kay feels sponsors are supposed to know about First Amendment law, but many do not. If a sponsor does not know the law, the chances are that their students do not know it, she said. Without that knowledge, it is hard for the journalism students to recognize a violation of their rights or to pursue areas of interest that they can legally explore.

The district takes the position that student rights are protected as much as need be under the guidelines. Gerald Caplan, the school district's attorney was consulted by the school district in deciding whether the guidelines, which were drawn up by administrators and citizens, are legally acceptable.

"The district's attorney has reviewed that policy and he's rendered a decision that it's sound," said Don Jones, Head of Language Arts for Jefferson County.

Kay contends, however, that unfair pressures exist. One teacher was charged with misconduct and suspended over what appeared to be school newspaper related events.

Kay said advisers are made up of tenured and nontenured teachers. Nontenured teachers serve at the discretion of the administration, and no reason need be given for them to be released.

Kay said the papers that are
strong remain strong, but the weak papers tend to have a "marshmallow press." She said that a marshmallow press is one that lacks a dynamic editorial page or one in which the content of the copy is controlled by the administration. Topics are avoided "for the simple reason that the administration would prefer they are not done," Kay said, "They don't seek controversy, they avoid it." "The existing guidelines have a chilling effect," Kay said. "The only way they are going to be changed is through a court case. Because there is no policy of (overt) 'censorship' they (the students) are not going to rock the boat." 

**Illinois**

**Guideline revision remains ‘on hold’**

There is no prior review at Richards High School (Ill.), but there is no publications policy either, said Bob Jason, adviser for the Richards' Herald.

Jason and former editor Robin Gareiss presented a proposed set of publications guidelines to the school board last spring after receiving intensive press coverage, culminating in an appearance on Donahue, of their fight to be free from prior restraint. The revision of the existing guidelines was an attempt to end the history of prior review and censorship in the school district. In May, the board sent a proposed policy to the Illinois State Board of Education (ISBE) for comment, but has not yet received word from ISBE on the proposed guidelines, according to school district attorney Alan Mullins.

"I sent a letter (to the board) two months ago [January]," Mullins said. He never received a reply.

The problem arose in fall 1983 when Richards Principal Wayne Erck assigned another administrator, Robert Guenzler, to review all material before it was printed.

Jason and the Herald editors protested the prior review at a school board meeting. They were told that no prior review would be exercised until a new policy was adopted. But the new policy proposed by the school board also includes prior review.

Gareiss had been worried last spring that the board members were stalling with the revised policy until she graduated in May 1984.

"They're pushing it off until when no one's around to fight about it," Gareiss said. School officials denied that claim saying that there was no need to rush the policy since it was not hurting anyone.

"My editor from last year [Gareiss] graduated," Jason said, "That's part of the reason it died down."

When school started this year Jason asked the principal what the policy would be for the Herald. Erck said there was "a policy in the making" and it was one "that we may not like," according to Jason.

There has not been a policy dealing with the student publication this year. But Jason said there was nothing to challenge and that "at least they are leaving us alone."

Principal Erck was not available for comment on the policy that is currently in the hands of the State Board of Education.
The Daily Nebraskan, at the University of Nebraska-Lincoln is having trouble with its Publication Board because of disagreements over who sets policy for the editorial and advertising content in the paper.

Last fall, advertisements in the paper were banned by the administration because it found them to be "discriminatory." That brought about the question of who has control of the paper.

"The Board can set guidelines dealing with advertising content. It cannot set editorial policy," said Don Shattil, adviser for the Daily Nebraskan.

Controversy began last year when the Daily Nebraskan refused to run an ad, submitted by two women, seeking a lesbian roommate. The two women complained to the Publication Board, which is made up of five students, two faculty members and two journalists from outside the school.

The advertising policy, written by the Publication Board, stated that the paper would not discriminate on the basis of race, religion, marital status or racial origin and that the Nebraskan recognizes and respects the right of persons to specify preference of sex when looking for a roommate and will not prohibit stating such a preference, according to Don Shattil.

In response to the complaint of the two women, the Board re-wrote the guidelines. It now prohibits ads from discriminating on the basis of "sexual orientation," but it allows advertisers seeking roommates to specify a roommate's gender. So people placing ads can request a male or female roommate, but cannot specify that roommate's sexual preference.

Chris Welsch, Editor-in-chief of the Nebraskan disagrees with the policy and said he wanted it to say "self description will be allowed."

"It's hypocritical to allow ads to specify male/female and not sexual preference," Welsch said.

"It's hard enough to find a roommate you want to live with. If you move in with someone and find out he is gay you have to make a choice." There is the possibility that the two women might file suit but no legal actions have been taken to date.

The policy also makes it illegal to publish ads for gay bars, said Welsch. Welsch is hoping to get a suit filed by the gay community.

"There is no consensus for a change in the policy," Welsch said. "The Board says we will prohibit these ads."

The sexual preference ban is not the only question concerning a policy decision at the newspaper. The Board of Regents wants the Daily Nebraskan to print budgets and salaries of organizations that use student fees. The Nebraskan was told by the Board that they must print the information as an editorial, which Shattil says the Board lacks the power to do, or they must print it as an advertisement where the paper must absorb the cost, contradicting a rule that no student fee money can be used for editorial advertisements.

"It's a principle battle," Welsch said. "They shouldn't force us to print it."

Welsch said they would have printed the material anyway because it would have been part of the Nebraskan's regular news agenda.

Don Shattil said he does not see much difference between the Publication Board making the Daily Nebraskan print an editorial or printing the material as a free ad, using the Board's advertising control to print an editorial piece.

Welsch said the key issue is whether the Publication Board has control to make up rules as they see fit.

"I don't think the Publication Board has the right to tell us what to print," Welsch said. "They can't make up rules."

After the last meeting with the Publication Board, Shattil said the Board did not address the issue of printing the financial data. "We are not any further (along) on this oppressive matter," he said.
An out-of-court settlement at Louisiana State University has opened the way for pregnancy-related advertising in the student newspaper. The Daily Reveille filed suit last November and the case was to go on trial December when the settlement was made. The school administrators decided to lift the ban, allowing the students to print the ads.

Student journalists and the American Civil Liberties Union filed suit on November 13, after the advertising manager at the Reveille received an administrative memo officially announcing the ban. The ban had been “enforced a while before that,” according to Martha J. Kegel, executive director of the Louisiana ACLU affiliate.

Administrators had originally banned the ads for abortion clinic services because they felt the students should get counseling from the university health service “before getting an abortion,” according to Kegel. She said the university was exhibiting a “paternalistic attitude” and that it “should acknowledge that students are mature enough to make those sorts of decisions on their own.”

The ban on pregnancy-related ads applied to the Reveille and the yellow pages of the student directory. It started as only a ban on abortion ads but then was widened by school administrators to include all pregnancy-related ads. Advertising for adoptive services and right to life groups was also prohibited.

Despite this victory for the newspaper, some feel it may only serve to ward off temporarily a struggle for student control of the paper.

“We sued to have pregnancy-related advertising and won,” said Dane Strother, editor of the Reveille. “But it was too narrow a case. We now have the right to print ads for abortion, but we don’t have full control of the paper.”

The Louisiana State University Board of Supervisors, which feels it has the power to decide editorial policy at the paper, has said control is in the hands of the Chancellor.

There is precedent supporting The Daily Reveille’s claim that they can decide which advertisements to print. In Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073 (5th Cir. 1976), the U.S. Court of Appeals for the Fifth Circuit ruled that student editors have the power to accept and reject political advertising. The right of student editors to accept advertisements granted in the Mississippi Gay Alliance case would imply that no other groups, including administrators, could exercise that power.

But there have been no problems between the administration and the Reveille since the advertising ban was lifted so no further action will be taken by the newspaper, according to Strother.

“There is no need to go back and have another lawsuit,” said Strother after an informal meeting with LSU Chancellor James Wharton. “He doesn’t want any problems. He realizes that there could be a problem if the university tries to censor the paper again,” Strother said.

Spring 1985
Colorado

Landmark case on standing is finally before trial court

A trial date has finally been set for Judy Olson, a college newspaper adviser who is suing the State Board of Community Colleges in Colorado after gaining the right to sue for the First Amendment rights of her students.

The case, which began in August 1979, will finally come to trial October 15, six years after it was first filed by Olson and three students because funding for the Pikes Peak News was cut off by the student government.

But the case has already provided a landmark decision for the student press allowing an adviser to represent the rights of students. The decision is binding in Colorado and could be persuasive precedent for the rest of the country.

The trial court will now consider whether the rights of the students were violated. Olson, whose rights are not considered to have been violated by the funding cut, will be pursuing the case on the students' behalf.

"We are trying to establish that the student's rights were violated," said William Veske, attorney for Olson.

Articles critical of the school and the student government may have been a substantial factor in the student Senate's decision to retaliate against the News by cutting funding, according to Veske.

Veske pointed out that the student Senate action is legally considered part of an action by the state government.

"The student Senate took the vote ... the administration approved it," Veske said. "The Student Senate worked as only a part of the budgetary process," he said.

Veske is claiming that the Supreme Court has basically agreed with Joyner v. Whiting, 477 F.2d 456 (1973), in which the U.S. Court of Appeals for the Fourth Circuit said that censorship of constitutionally protected expression cannot be imposed by withdrawing financial support. The Court also stated that, "if a college has a student newspaper, its publication cannot be suppressed because college officials dislike its editorial comment."

"We anticipate asking the court to make a summary judgment" which would dismiss the case in favor of Olson and the paper, Veske said. "If a summary judgment is granted, a trial would be for an appropriate remedy" for the reinstatement and funding of the Pikes Peak News.

Olson's lawyers will ask the court for legal costs and back pay for the years the paper did not receive its funding. The back pay would be used as capital to buy equipment to run the paper at an equivalent standard to how the News functioned when the funding was withdrawn, according to Veske.

The original case arose after the paper's funds were cut off because the student government at Pikes Peak Community College did not like the News' content. That is when Olson and three students decided to file suit against the State Board of Community Colleges and Occupation Education. After the Court granted a summary judgment motion in favor of the college, Olson appealed. The three students, however, had graduated and did not join the appeal.
The *Pikes Peak News* folded after its funding was withdrawn. The *Pikes Peak Fuse* took its place, but Olson claimed that it is not the same caliber, as it contains 90 percent less content than the *News*.

Because of the loss of funding Olson had to change the format of her class from a newspaper design class to a magazine design class. The court held that Olson had "sufficiently demonstrated, at least for the case of the third party standing, that the administrative decision to terminate the News has a chilling impact on the free speech of the students."

Olson said that the program and the publication of the paper were interrelated and for that reason she could not separate herself from the students.

Olson took the case to the appeals court and the state Supreme Court where she won the right to sue on her students behalf.

The Colorado Supreme Court ruled last August that "Olson's role as a faculty adviser to the *Pikes Peak News* gave rise to a substantial relationship between herself and the student members of the *News* staff" and that the relationship "renders Olson as effective a proponent of the First Amendment rights of the students as the students themselves."

The court held that although Olson had no First Amendment rights of her own in the newspaper, she had a third party claim to defend the rights of the students. Olson had to fulfill at least one of three factors that were applicable to the case. They were: "the presence of a substantial relationship between the party and the third party; the difficulty or improbability of these third parties in asserting the alleged deprivation of their own rights; or the existence of some need to avoid dilution of third party rights in the event standing is not permitted."

Although Olson had met the first requirement of the test, the court stated that Olson could have satisfied all three rules.

The court held that Olson met the second consideration because the students faced obstacles in asserting rights themselves. They said that because *Pikes Peak College* is a two year school students did not have the time to "initiate and bring to a conclusion a lawsuit challenging a cutoff."

The third consideration was met because enforcement of the funding cutoff could inhibit students from exercising their speech and associational rights in a student newspaper.

The Colorado Supreme Court noted that the U.S. Supreme Court has been lenient in applying rules for standing in First Amendment cases to avoid inhibiting freedom of speech.

The Colorado Supreme Court also stated that the First Amendment does not give a teacher the right to require the school to allocate funds to a particular student activity when it is not part of the school official curriculum, is managed by the students, and only advised by the teacher.

The trial court will have to consider all of these issues in resolving the case.

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**California**

**Student government takeover bid stalled**

A student government takeover of the campus newspaper at California State University — Dominguez Hills has been stalled until the university president makes a decision to accept or reject a new publications code.

The code must be approved by Robert Butwell, President of the university before any action can be made to take control of the campus paper *Bull's Eye* by the student government. Butwell has the final word on all legislation introduced by the student government, including the power of veto.

The student government passed the code before submitting it to Butwell for his approval.

Butwell has convened a panel of two journalism professors and a professional newspaper to review the proposed publications code. The group will also review the quality of the *Bull's Eye* and suggest ways to improve it.

The panel includes Jay Berman, advisor for the *Daily Titan*, the campus newspaper at California State University — Fullerton, Steve Harvey, from the editorial department of the *Los Angeles Times*, and Barbara Fryer, advisor to the *Daily 49-er* at California State University — Long Beach.

Butwell will make his decision after receiving advice from the panel which had been suggested by the Dominguez Hills communication department prior to the original introduction of the proposed publications code.

"I would hope that our three consultants, drawing on their own experience and those of other institutions, could make some positive suggestions for improved publication arrangements for the newspaper on the campus," Butwell said.

The fight for control of the paper is being led by Louis Armand, president of the Associated Students of CSU — Dominguez Hills (ASCSUDH).

Armand and the ASCSUDH are trying to push through a new publications code that would give the officers of the ASCSUDH control over the Publications Commission which in turn would control the newspaper. The code would allow the commission to hire and fire newspaper editors, suspend reporters and shift control of the paper's editorial policy to the Commission, which would be reformed by Armand's proposal so that the ASCSUDH President would directly or indirectly appoint four of the five voting members.

*Bull's Eye* staff members contend that the new code would restrict their rights of free expression guaranteed by the First Amendment. They are threatening to sue the student officers if the code is approved, according to Nancy Harby, Editor-in-Chief of the *Bull's Eye*.

Under the structure of the new Publications Commis-
Bull's Eye — continued

sion, the editor and faculty adviser will no longer be voting members of the commission. Harby and several faculty representatives will be taken off the commission.

Armand agreed with Harby that the revised regulations “clearly establish Associated Students as the newspaper’s publisher.” He feels the student editors have lost the job as publishers of the paper because they did not meet its responsibilities.

Harby said the new regulations adopted by the student Senate stripped the paper of its independence and “created a dangerous mechanism for government control of the press.”

The student government says that because half of the Bull’s Eye’s $30,000 annual budget is derived from student fees, that the student government has an obligation to see that the newspaper functions in a manner acceptable to the student body.

Armand and the student government contend that they are not trying to take control of the newspaper, only seeking to make changes which are designed to improve the quality of the Bull’s Eye. Armand has called the newspaper the worst among the 19-campus California State University system. He said the groups purpose is to “more closely scrutinize” operations at the Bull’s Eye and “make sure the paper is doing a good job for the students it is supposed to be serving.”

Armand gave the paper a bad rating because of its poor coverage of campus events, “incompetent” business management, and a tendency to feature “one-sided bellicose” attacks on student officers.

Armand has been a frequent target of attack by the Bull’s Eye, which in editorials labeled him “King Louis” for remarks he had made about a rival student government officer.

In letters to the editor, Armand has also been called “Idi Armand” and “Louis Amin,” likening him to the deposed African dictator Idi Amin.

Armand’s tenure has been filled with controversy as members of the student government have resigned and he has been charged with circumventing the democratic process.

Kevin Clutterback resigned as Controller of the ASC-SUDH saying that Armand “violated the Constitution and he enters into contracts prematurely. He violated almost every theory of every management book ever read. From the beginning there was a conflict of values.”

Armand described Candy Nall, the paper’s faculty adviser, as “too involved in student politics — I hope we can get someone with a fresh, nonpartisan prespective.”

Nall objected to Armand’s claim saying that she avoids involvement in student politics “except where the Bull’s Eye is concerned. I teach journalism and ethics of the profession to the newspaper staff, and certainly I get partisan when it comes to upholding those principles.”

The faculty adviser is hired by the communications department but Nall said that she received a lot of
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"advice" from student officers on how to do her job.

Armand also blamed David Safer, chairman of the communication department of frustrating past efforts to improve the newspaper's operations. He added that a major benefit of the new regulations will be to remove the Bull's Eye from any control by the communications department.

Safer said the communications department "does not control the newspaper in any way. We can only make suggestions and the editors are free to accept or reject them."

A February 12 meeting was held between the editors of the paper, Armand and Gerald O'Connell, the Publications Commissioner appointed by Armand. The meeting was called to discuss the legality of the proposed Publications Code. Present at the meeting was Marc Abrams, Executive Director of the Student Press Law Center.

After several heated exchanges between Armand, O'Connell and Abrams concerning the purpose for Abrams' presence, Armand and O'Connell left the meeting.

Abrams found two main problems with the code.

The first problem is that "moving from a looser control to a tighter one is unconstitutional," Abrams said.

The second problem is that "the nature of the document seeks to deprive, in some ways subtle and other ways not subtle," control of: the editorial policy of the paper; the editors control of the advertising policy, which affects the editorial policy by money alone; control of the staffing; and also allows the student government to punish acts without defining them — which does not allow for due process, according to Abrams.

Butwell sent a memorandum on February 27 to the college administration, the communications department, the newspaper and the student government which read:

Until further notice, the recently passed Publications Code (including the Publications Commission created thereunder) shall be considered inoperative and have no validity or authority with respect to any publication associated with this campus. Any actions taken under this code are hereby voided.

Legal inquiry is underway respecting questions concerning this code (including the commission) as is a review of the impact of the code on the credit-earning course employed in the staffing of the newspaper.

I have asked for the responses to these inquiries by Mar. 13, but I cannot be assured that all the appropriate work will be completed by then. I will need a few days subsequently to review the results of these inquiries. In the interim, the prior Publications Code and Commission stand.

This leaves the editors of the Bull's Eye and the current Publications Board in control of the student paper until Butwell reviews the results, and decides to accept or reject the student governments changes.

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FREEDOM OF INFORMATION

California
Sun shines on UCLA student government

The student press at the University of California Los Angeles (UCLA) has won the right to attend meetings of the Associated Students of UCLA (ASUCLA) after a debate over media exclusion from an ASUCLA Board of Control retreat.

Student media are now working with UCLA's Chancellor in creating a binding, written policy governing public access to UCLA and ASUCLA meetings, and would like to make a permanent policy for the entire University of California system that would be in line with practices at other schools in the state.

The agreement to work on the policy was the result of confusion as to whether the existing open meetings laws in California covered meetings in the University of California system.

The controversy emerged when the ASUCLA Board of Control (BOC) refused to allow media coverage of its Nov. 9-10 retreat, raising legal question about the BOC's policies.

Two reporters from the UCLA campus radio station KLA, and a reporter and photographer from the UCLA Daily Bruin were told by ASUCLA Executive Director Jason Reed that it was the "Board's intention to exclude" them from the meeting.

When the meeting started the media were asked to leave. BOC Chairman Paul Robichaud pointed out a portion of the Board's policy that outlines a specific procedure for media coverage of events. The policy

continued on p.26
The Brown Act is the statute which applies to local agencies within the state. UCLA, along with other University of California branches, California State Universities and state agencies, is covered by the Bagley-Keene Act.

A problem for the school press was the way the act was written. The Bagley-Keene Act states that "Under the provisions of this article, the official student body organization at any campus of the University of California, California State University, or the California Community Colleges, shall be treated in the same manner as a state agency." This is the clause which enables reporters to gain access to student governments at these institutions. But the legislature, in enacting the bill, omitted the University of California from this section.

"I believe the legislature has a clear ... ability to apply ... open meeting requirements to U. of California student governments."

A letter regarding the open meeting laws was written on November 14 to state Senator Herschel Rosen-thal and Assemblyman Tom Hayden of California by Dirk W. van de Bunt, a former publisher of the Daily Bruin and operator of the campus radio station KLA, who is now an attorney representing the media at UCLA. He informed the legislators of the media being barred from the retreat and of the BOC's view that it was not required to hold open meetings and that it could prohibit the attendance of students, the public and the campus press. He also pointed out that the University of California system had been left out of the act and urged that legislation be sponsored which would amend section 11121.5 of the Bagley-Keene Act to read: "Under the provisions of this article, the official student body organization at any campus of the University of California, California State University, or the California Community Colleges, shall be treated in the same manner as the state body."

Then, David P. Gardner, President of the University of California received a letter from state Senator Barry Keene, co-author of the open-meetings act, "blasting the University of California for denying student reporters access to public meetings," according to an article in the Daily Bruin.

"I believe the Legislature has a clear constitutional ability to apply the same open-meeting requirements to UC student governments, which legally exercise authority delegated to them by the Regents, that it has applied to the Regents themselves," Keene said in his January 28 letter.

Keene explained that the University of California system had been left out of the act in 1974 because former system President Charles J. Hitch had made assurance that the University would open its meetings itself. The senator also suggested that if the University still has not carried out these commitments, that he believes it would be "prudent to do so now and avoid the necessity of legislative action."

Then the Board of Control claimed an exemption from the act asserting that they were a private organization and not affiliated with the university. But University of California Chancellor Charles Young said that they were "not a private organization," but a part of the university. He added however, "They are not covered by the Bagley-Keene Act because the university is not

Section 11121.2 of the Bagley-Keene Act states that, "'State body' also means any board, commission, committee ... which is supported, in whole or in part, by funds provided by the state body, whether such body is organized and operated by the state body or by a private corporation."

But Young had overlooked a 1983 amendment to the act which provided that the University Board of Regents is, with certain specific exemptions, subject to the act's rules governing all state bodies.

Attorney Geoffrey Cowan, a UCLA media law lecturer, said in the Daily Bruin that if ASUCLA is part of the university, it is subject to the same provisions of the Bagley-Keene Act as the Regents. "What applies to the Regents applies to everybody delegated authority by the Regents," Cowan said.

It was thought that ASUCLA would be bound to the provisions of the Bagley-Keene Act by the 1983 amendments to the act including the University of California, until the BOC raised the question of its private status. However, Student Press Law Center Executive Director Marc
Abrams told the Bruin that regardless of the BOC's private status or the omission of the University of California from section 11121.5, all ASUCLA meetings had to be open under another clause of the Bagley-Keene Act, section 11121.2.

Section 11121.2 of the Bagley-Keene Act states that, "State body' also means any board, commission, committee, or similar multi-member body which is a state body...and which is supported, in whole or in part, by funds provided by the state body, whether such body is organized and operated by the state body or by a private corporation."

ASUCLA receives state funds.

Chancellor Young admitted he was wrong when he claimed that UCLA and the ASUCLA Board of Control were exempt from the state open meetings act. "Under section 11121.2 arguably ASUCLA is included in the act," Young said. "BOC is going to take action to show that even in spirit it will not go against the Bagley-Keene Act."

Although the 1983 amendment to the Bagley-Keene Act specifically mentions the University of California Board of Regents, confusion still exists over whether or not that includes the student government, according to Nick Grossman, faculty representative of ASUCLA's Communications Board.

The ASUCLA Communications Board unanimously passed a petition on February 7 of this year saying it, "respectfully petitions Chancellor Charles Young to support state legislation amending section 11121.2 of the Bagley-Keene open meeting act which will clearly define the appropriate application of the California Bagley-Keene Act to include the University of California student government and associated organizations."

"We need legislation that specifically includes student government and ASUCLA," said Bruce Shih, Communication Board chairman. "UCLA student media need strong legal grounds on which they can obtain access to student government, which is spending and utilizing state money. Student government must be accountable to the students it is representing and the students should be aware of how the student government is representing them," Shih said.

On February 14, both the Daily Bruin and KLA radio issued editorials that praised Chancellor Young on his effort to resolve the controversy surrounding press access to UCLA and ASUCLA meetings. They acknowledged that this was only the beginning and expressed their willingness to work with the Chancellor towards creating a binding, written policy governing public access to UCLA and ASUCLA meetings. But they both stated that the need for a clear definition spelling out rights to attend university meetings, in line with the spirit of the Bagley-Keene Act, was needed.

The Bruin editorial stated, "If the Regents do not take appropriate steps, then the state legislature must. The purpose of any open meeting act is to ensure the accountability of representatives to their constituents. Without public access, students are denied the opportunity to know, and therefore comment, on what affects their lives."
Mandatory fees

A legal right to funding?

In 1982, the Board of Regents for the University of Minnesota announced that the portion of mandatory student fees used to subsidize the campus newspaper, the Minnesota Daily, would be refunded to any student upon request. The action followed a series of angry complaints and an atmosphere of public outrage resulting from the Daily’s publication of a “Humor Issue,” which included cartoons and advertisements satirizing social, political and religious groups and a “blasphemous interview” with Jesus Christ on the Cross. With a possibly fatal restriction placed on the paper’s financial lifeline, the Daily responded by filing a lawsuit, asking the court to restore the former system of funding. The paper argued that the funding modification, which created a cutback in the amount of money the paper received, violated the Daily’s First and Fourteenth Amendment rights.1

The crux of the matter is the motivation behind the school’s action. If the action is substantially motivated by the content of the newspaper, it will usually be found in violation of the First Amendment. The publication has the responsibility of convincing the court that the action had both a content-related motive and an adverse effect on the publication. The latter can be overcome, for example, by showing a monetary loss or a chilling effect on editorial policy as a result of the withdrawal. The former is the essence of the publication’s First Amendment claim and is met by showing the relationship and proximity between the action and content. In Stanley v. Magrath, the Daily met its requirement by showing that the action — a modification allowing fees used in funding the Daily to be refunded — came on the heels of a public clamor concerning the content of a recent issue, and moreover, that the action was implemented only at the university campus where the Daily was published.2

Once the publication has met these requirements, the responsibility shifts to the school. If the school can show that more likely than not a permissible motive existed and that motive would have brought about the action regardless of the established impermissible motive, the publication’s claim will fail. In dicta, the Stanley court stated, “[i]f the Board of Regents would have changed the funding mechanism simply because of student’s objections to the system, it should prevail here, even if opposition to the Daily’s contents was also in the board’s collective mind.”3 The court, however, found that the university failed to establish such a motive and the action was deemed unconstitutional.

Student publications are therefore constitutionally protected from such actions when they are shown to be not content-neutral. But a school is not precluded from terminating financial support of a student publication for reasons unrelated to the First Amendment. This allowance is understandable since, for example, a school in a budget

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A vast majority of college student publications like the Daily are subsidized with a portion of a mandatory fee assessed every student each year by their school. These fees are usually included with tuition in a student's semester bill. This subsidy, while usually not the publication's sole form of support, nevertheless constitutes a sizeable slice of the publication's annual budget. Consequentially, loss of even a small percentage of this amount could have a serious, possibly fatal, effect on the paper's operation.

Editors' and advisers' concern over the revocation of their funding by the school is justified. A school administration may under certain circumstances terminate or modify this support. What happens when a school — like the University of Minnesota — decides to terminate or modify the financial support to a student publication? Does a paper have any protection from being hung by the purse strings?

The answer, characteristic of the law, is — it depends. A school is under no specific legal obligation to establish support for a student publication. Once it has, however, courts will carefully review any revocation or modification of this support. This review will be applied to any public school or private school where state action, an element needed before the school is subject to constitutional restrictions, is established.4

Certain constitutional protections are afforded to a student publication once it has been established by a college:

[If a college has a student newspaper, its publication cannot be suppressed because college officials dislike its editorial comment... Censorship of constitutionally protected expression cannot be imposed by suspending the editors, suppressing circulation, requiring imprimatur of controversial articles, excising repugnant material, withdrawing financial support, or asserting any other form of censural oversight based on the institution's power of the purse.5]
squeeze [not an unfamiliar situation] may find itself having to revoke or reduce support for the student newspaper solely out of fiscal necessity. Editors and advisers, however, should be wary of the justifications accompanying any withdrawal of funding and take a hard look at the school’s motivation for any improprieties inconsistent with the publication’s constitutional protections.

This restriction on the school’s conduct concerning funding also defeats the complaints of the students who pay these fees every year. But does this also preclude them from questioning the decision of the school to fund the publication in the first place?

Case law indicates that courts will generally allow a school to choose who it will fund with the collected fees and how much each organization will receive so long as the school is not discriminatory in its distribution and does not promote or impose one particular viewpoint with the fees, whether it is social, religious, economic, or political.10

The United States Supreme Court has yet to hand down a decision on this point. In 1974, however, the Court did handle an analogous situation in Abood v. Detroit Board of Education.11 In Abood the Court upheld the assessment of a mandatory “service fee” upon non-union employees as constitutional when it is used only for collective bargaining, contract administration and grievance adjustment and not to support the union’s social or political objectives.12 This distinction in function has been cited by lower courts when dealing with schools’ student activity fee systems.13

Several courts have determined that where a school decides to subsidize an organization it has classified as a forum participant, constitutional challenges by the fee payers against the fee system used will fail unless the payers can convince the court that this classification is wrong.14 A forum participant is an organization which the court determines has a role in the school’s role as a “marketplace of ideas.”15 When a school classifies an organization as such, the courts have said they will respect the school’s choice most of the time.16 As a result, challenges by students will usually fail.

In Kania v. Fordham,17 the Fourth Circuit Court of Appeals held that the University of North Carolina’s use of mandatory fees to subsidize the campus newspaper, The Daily Tar Heel, did not violate the plaintiffs’ Fourteenth Amendment rights. The plaintiff, a group of students, argued that in using their fees to fund The Daily Tar Heel the university required them to subsidize the publication of views with which they disagreed, thereby violating their constitutional immunity from coerced expression under the Fourteenth Amendment.18 The court rejected this contention. Acknowledging the school’s role as a “marketplace of ideas,”19 the court stated that the key issue was whether The Daily Tar Heel played a part in that forum.20 The court determined that the Tar Heel did function as an integral educational element in the forum. Consequently, although the Fourth Circuit agreed that the plaintiff’s immunity was restricted, it concluded that the restriction was minimal and indirect and did not violate the Fourteenth Amendment in view of the fact that the newspaper increased the overall exchange of ideas.21

Specifically, the court stated, “[t]he government may abridge incidentally individuals’ rights of free speech and association when engaged in furthering the constitutional goal of ‘uninhibited, robust and wide open’ expression” [emphasis added].22 In its rationale, the court stressed several aspects of the paper’s situation besides the newspaper’s vital role in UNC’s “educational mission.”23 First, the newspaper was editorially independent from and financially dependent upon UNC. These indicate both the newspaper’s need for the system and that the university did not use the funds to exercise censorial control over the paper. Moreover, the plaintiffs failed to show that the Tar Heel was inaccessible to opposing views.

This rationale was recently extended to refundable fee systems. In general, a refundable system allows any student to request a refund of a portion of her activity fee collected by the school which is used in a way that a student thinks is improper or with which she simply disagrees. Such a system may be viewed as a compromise to the situation which arose in Kania in that creating an opportunity for a refund would eliminate similar challenges to the fee system.
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In Gaida v. Rutgers, the New Jersey District Court rejected a constitutional challenge of a mandatory-but-refundable fee system employed at Rutgers, a state university. Here the students were required to pay the fee but could later request a refund by submitting a form provided by Rutgers. The fee in question helped fund the New Jersey Public Interest Group (PIRG), a nonprofit, nonpartisan corporation engaged in research and lobbying.

Plaintiffs in Gaida asserted a charge similar to that in Kania, adding that the refundable nature of the fee system “did not cure the constitutional infirmity.”

The district handled this contention by first addressing the issue discussed in Kania. The threshold question was whether PIRG was a “forum participant.” In other words, was the group an educational function — as was the Tar Heel in Kania — or essentially a political action group with only an incidental educational component. If PIRG existed as the latter, the funding scheme would probably be found unconstitutional, since it would constitute a promotion by the school of a political and social point of view. The court, based on its deference to the university's classification of the organization and other evidence, concluded PIRG was indeed an element of Rutgers' educational mission. The refundable system used by Rutgers was upheld.

The Gaida ruling seemingly would apply to a student publication as well. Certain similarities between PIRG and a student publication make the application quite logical. A publication has a more obvious educational function than an organization such as PIRG. This makes it harder for the plaintiff to rebut the university's classification. Moreover, unlike many student publications, PIRG was not dependent upon student fees. Therefore a court might

AWARD

Scholastic Press Freedom Award

In November, three young women who fought their old high school for over two years for the right to publish articles relevant to the lives of their fellow students were awarded the first Scholastic Press Freedom Award.

Cathy Kuhlmeier, Leanne Tippett and Leslie Smart continued to fight for what they believed in — all the way to federal court — even though they had graduated from high school.

Each year, the Scholastic Press Freedom Award will be given to students or student media who, like Cathy, Leanne and Leslie, fight for the First Amendment rights of students. The award is given jointly by the Student Press Law Center and the National Scholastic Press Association/Associated Collegiate Press.

Nominees for the award should be a responsible representation of press freedom through writing or actions and the ability to raise difficult and necessary issues in news coverage.

Nominations of any person, student newspaper, student magazine, yearbook or student radio station will be accepted. Nominations should clearly explain why the nominee deserves the Scholastic Press Freedom Award.

Nominations must be received by August 1 of each year to be considered for that year’s award.

Send nominations to:
Scholastic Press Freedom Award
Student Press Law Center
800 18th Street, N.W.
Room 300
Washington, D.C. 20006

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be even more hard pressed to strike down any system, whether refundable or mandatory, when the end result might be the possible shutdown of the publication.

These decisions provide some sense of security for student publications or should at least alleviate the fear of editorial control of a publication via the pocketbook. The fee system method of funding student publications is commonplace and constitutional. Further, student newspapers funded through such a system, whether mandatory or refundable, are protected from influence upon their editorial policies through the threatened loss or modification of this subsidy.

NOTES
2. Id. at 282.
3. Studies show that 13.5 percent of school newspapers are completely funded by the institution and 56.3 percent receive some funding. L. Kopenhaver, "Publications Budgets: CMA survey reveals wide variety of funding programs", 23 College Media Review 8, 9 (1984). To the author's knowledge, there are no public high schools which exact mandatory fees from students, and any such fee system used in parochial or private schools would be private action beyond the reach of the Constitution. See infra note 5. Consequently, the case law discussed would probably not extend to the high school level.
4. 23 College Media Review at 9.
5. The Constitution sets forth restrictions upon the government, not private parties. First Amendment claims, such as the one in Stanley, require the presence of state action when the claims are asserted against private entities. State action comprises a variety of things, discussion of which is beyond the scope of this article.
8. 719 F.2d at 284.
9. Id. at 283.
12. Id. at 235.
13. 702 F.2d 475, 479-80 (4th Cir. 1983).
15. 702 F.2d at 477, citing Healy v. James, 408 U.S. 169, 180 (1972).
16. Id.
17. 702 F.2d 475 (4th Cir. 1983).
18. Id. at 477 and cases cited therein.
20. 702 F.2d at 477.
21. Id. at 480.
22. Id.
23. Id.
25. Id. at 481.
26. Id.
27. See supra note 10 and accompanying text.
Money is not the question

Advertising in the student press

Just how much control can a school exercise over the advertising that goes into its student publications? It's a question that many student journalists and school administrators are asking these days. Most agree that the non-advertising columns of a student newspaper, magazine or yearbook are beyond the control of school officials. Unless the school can prove that certain material is obscene or libelous or that it will create "a substantial disruption of or material interference with school activities," the school probably cannot stop publication.

I—LEGAL ANALYSIS

However, commercial advertising is not entitled to this same high standard of treatment. According to the Supreme Court, the protection afforded commercial speech is less than that afforded other constitutionally guaranteed expression. By combining the Court's four-part commercial speech analysis enumerated in Central Hudson Gas & Electric Corp. v Public Service Commission with the Court's support of students' First Amendment rights as given in Tinker v. Des Moines Independent Community School District, a formula for legally evaluating an advertising restriction can be developed.

Commercial speech, as defined by the Supreme Court is expression related solely to the economic interests of the speaker and its audience. Not all advertisements will fall within this classification. The famous civil rights advertisement involved in the case New York Times Co. v. Sullivan is an example of a noncommercial editorial ad. Most often those advertisements that propose a transaction between advertiser and audience deserve a commercial speech classification.

In Central Hudson, the Supreme Court reemphasized that even purely commercial speech was entitled to First Amendment protection. The court established a four-part analysis to determine when a state or someone acting on its behalf could constitutionally restrict commercial advertising. The four steps used by the court were:

1) Is the speech protected by the First Amendment? To be protected, commercial speech must concern lawful activity and not be misleading.
2) Is the asserted governmental interest substantial?
3) Does the regulation directly advance the governmental interest asserted?
4) Is the regulation more extensive than is necessary to serve that interest?

The court made clear that it would not defer to the judgment of the state or its agent on the third and fourth parts of the analysis. A regulation of commercial speech will not satisfy the third requirement if it "provides only ineffective or remote support for the government's purpose." Moreover, the regulator carries the burden of demonstrating that its interest cannot be protected in a less extensive manner, by a warning or disclaimer for example. "In the absence of a showing that a more limited speech regulation would be ineffective," the Court will refuse to approve an advertising restriction. "To the extent that the order suppresses speech that in no way impairs the State's interest..., [it] violates the First and Fourteenth Amendments and must be invalidated."8

In Tinker, the Supreme Court said that the First Amendment rights of students were not coextensive with those of adults. But the Court did set a standard for limiting speech in the school environment. "[W]here there is no finding and no showing that engaging in the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition [on speech] cannot be sustained."9

Thus the question is whether the
LEGAL ANALYSIS

"Comprehensive authority... of school officials... to prescribe and control conduct in the schools" gives them greater power to control lesser protected commercial speech. The only case to deal specifically with censorship of commercial advertising in a student newspaper is *Williams v. Spencer.* Although the case came before the decision in *Central Hudson,* it was after First Amendment protection of commercial speech had been recognized by the Supreme Court in *Virginia Board of Pharmacy.* In *Williams,* the Fourth Circuit upheld a school district's confiscation of an unofficial student newspaper that contained an advertisement for drug paraphernalia. The court in *Williams* first held that the substantial disruption requirement of *Tinker* was not intended by the Supreme Court to be the only permissible justification for curtailment of student speech. The Fourth Circuit said that avoiding the encouragement of actions endangering the health and safety of students was an equally sufficient reason. Merely as an "additional reason for upholding the prohibition" the court noted the commercial nature of the speech in question. Because commercial speech "is not entitled to the same degree of protection as other types of speech," the court determined that the school's authority to halt and ban was strengthened.12

But *Williams* never really attempted to reconcile the commercial speech and *Tinker* theories. Rather it contrived *Tinker* and casually mentioned commercial speech. One must look to other cases to help develop a commercial student speech standard.

Two recent cases noted both the special nature of commercial speech and the requirements of *Tinker.* *American Future Systems v. State University of New York* and *American Future Systems v. Pennsylvania State University* dealt with university regulations prohibiting group sales demonstrations in residence halls. In the words of the New York court, its task was to "measure the regulation against the *Central Hudson* standard with due consideration for the university's educational objectives."15 Both courts found that the universities could not meet the requirements of *Central Hudson.*

What these cases suggest is that *Tinker* considerations fall within the second part of *Central Hudson* 's four-part analysis. In light of the special situation of the school environment, avoiding a material disruption would be a substantial interest if asserted by the school. It would not be a substantial interest if asserted by some other agent of the state. Thus, as the Supreme Court determined in *Tinker,* those making regulations inside the school environment have greater authority than do those outside of it.

The school's ability, as *Tinker* requires, to "reasonably forecast and prove" that a material disruption will occur without the regulation embodies the third and fourth parts of *Central Hudson* 's analysis. Showing that the regulation goes directly to avoiding the material disruption in the least restrictive way is the burden placed on the school implicit in *Tinker.* Thus, if the school can meet the *Tinker* requirements, the four parts of the *Central Hudson* analysis will be met and commercial speech can be permissibly regulated the same as non-commercial speech.

Practically, it seems that advertising in a student publication will seldom threaten material and substantial disruption of the school environment. In *Portland Women's Health Center v. Portland Community College,* the court found no suggestion that an advertisement for legal abortion services would satisfy that requirement.17 Even the Fourth Circuit found no such threat in *Williams.* More often an interest such as that of protecting the health and safety of students as asserted in *Williams* will be presented, and a school will have the difficult job of showing it to be a substantial governmental interest. Moreover, a restriction on advertising will seldom be more than an "ineffective or remote support" for the asserted purpose. When students see the same ads every day on television or in magazines and newspapers in their own school libraries, restrictions in the student press will be of little consequence. If the school's interest in avoiding the disruption "could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive." As the Court in *Central Hudson* suggested, warnings or disclaimers in many situations will be appropriate less extensive restrictions.

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Some commercial advertisements in high school publications, for example, those selling alcohol or cigarettes, might be prohibited as "concerning unlawful activity." Assumedly all high school students would be under the legal drinking age in a 21-year-old state. Under Central Hudson's first part, such advertisements would not be protected by the First Amendment.

However, the illegality question is not so clear when dealing with cigarettes or alcohol in a 18-year-old state or in the college environment. Statutes prohibiting the sale and use of cigarettes vary from state to state, with some placing restrictions only on those under age 16. Many, if not most, high school students are over that age. Similarly, even in those states that have a drinking age of 21, the majority of a state university's students may be legal drinkers, not to mention the faculty and staff that make up a publication's readership.

Arguably, if the activity were legal for even one person who would see the advertisement, it would not concern unlawful activity per se, and this would deserve First Amendment protection. An advertisement encouraging readers to vote in an upcoming election does not concern unlawful activity simply because some who read it will be underage or convicted felons who legally cannot do so. However, a school could still assert that its interest in protecting even one student from an illegal activity is substantial. The key balancing by a court would most likely come under Central Hudson's fourth step in determining whether the restriction is more extensive than necessary. The percentage of students for whom the activity is illegal will be one relevant factor. But more important will be the fact that the best way to further the state's interest would be to enforce the statutory prohibition at the place of the transaction, rather than placing restrictions on protected speech.

Two side issues may creep into this advertising restriction argument. First, alcohol advertising restrictions might be allowable because of the Twenty-first Amendment, which repealed Prohibition. The language of that amendment has been recognized as giving the states special authority to regulate advertising concerning alcohol. At least two United States Circuit Courts of Appeals have upheld general restrictions on alcohol advertising. Perhaps a public school as agent of the state could make its own restrictions for its student publications that a court would also uphold.

The second issue is whether an advertiser has a First Amendment right of access to the forum of a public school's newspaper. Some courts have suggested that she does, while another has said that the state has no right to interfere with the student editor's First Amendment rights. Thus, whether a right of access exists even when the school has no control over advertising policy is not clear. When advertising restrictions are thrown into question, issues like these are likely to be raised.

Summarized, the standards of Central Hudson and Tinker indicate that avoiding a material disruption of school activities is a substantial state interest toward which a state can directly and restrictively regulate. Of course, a school's power to prevent libel and obscenity is no more restricted for advertising than it is for editorial content. But beyond this special treatment given student expression, a regulation of the content of commercial advertising in student publications must meet the same requirements as any other regulation of commercial speech.

FOOTNOTES

3. 393 U.S. 503.
6. Central Hudson, 447 U.S. at 566.
7. Id. at 564 n. 6.
8. Id. at 570-71.
9. Tinker, 393 U.S. at 509.
10. Id. at 507.
11. 622 F.2d 1200 (4th Cir. 1980).
12. Id. at 1206.
14. 688 F. 2d. 907 (3d Cir. 1982).
19. See Kernal Press, Inc. v. Alcoholic Beverage Control Board, No. 87611 (Franklin, Ky., Cir. Ct. June 8, 1977) (almost 7,000 faculty and staff members plus 57 percent of the students at University of Kentucky were over 21).
Local photographers are raising questions about how you are doing business.

Yearbook Contracts:

Yearbooks seem synonymous with pictures; a yearbook sans photographs would be a pretty dull yearbook. Yearbooks usually include the work of both student and professional photographers, so schools and students often work closely with a local professional photographic service during production. This relationship between school and photographer recently has given rise to two questions: Does an exclusive contract between the two precluding the use in the yearbook of any other professional photographer's work violate federal antitrust law, and is the payment of a commission or "finder's" fee to a school by the photographer for the award of the business likewise unlawful.

As esoteric as this first question may appear on its face, it creates serious concerns. Several high school (and college) yearbooks have been threatened with antitrust suits by professional photographers who claim the exclusive contract made with another service violates antitrust laws. Antitrust laws preclude conduct which may lessen or restrict competition. Enforcement of these laws is instrumental in preserving the free and open marketplace. The possible ramifications of an antitrust charge include judicial termination of the contract and the assessment of treble damages, which require the school to pay triple the dollar amount of injury shown. With the possibility of the school's liability running into thousands of dollars, the question is less abstract than it first appears.

The charges asserted against a school raise several more questions: Does the school have the power to contract a photographer in the first place? If so, can the agreement be exclusive, to effectively protect the contracted photographer from competition? Does the school's control over the yearbook constitute an illegal monopoly?

All high schools have the power to contract. It exists within the managerial control granted by state legislatures. Moreover, the scope of this power is broad. As a result, the emphasis shifts to the validity of the contract under antitrust laws.

The case law on this point is sparse, but generally holds that an exclusive contract given to a photographer or a publisher is not objectionable as violating antitrust law, especially in the case of the contract awarded to the lowest and best bidder.

For the school's conduct to violate the Sherman Act, a federal antitrust statute, the agreement must unreasonably restrain trade, or the conduct must constitute an attempt at monopolization.

An exclusive agreement is not an unreasonable restraint, especially when it results from a bid system. In a bid system, an organization presents an "item," such as a building project or business opportunity, to a general group of interested parties. They each, in turn, confidentially inform the organization what they will offer in exchange for the "item." The organization considers each bid and chooses the one offering the best deal.

Most schools use such a system to distinguish among potential contractors, then select the party submitting the most attractive bid. Assuming it is operated legitimately, this process would seem to promote competition by

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**YEARBOOK CONTRACTS**

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encouraging bidders to offer their best work at their lowest affordable price. In fact, rather than unreasonably restraining competition, a legitimate bid system represents model competition.

One court found such a contract essentially the same as the awarding of a legitimate franchise. The contract in question, the product of a bid system, authorized a studio to photograph students for school ID cards and restricted use of the school premises to that studio only. The plaintiff contended that the restriction exceeded the school's statutory powers. The court disagreed, reasoning that if a school could not protect a valid franchise from competition, there would be no justification for soliciting bids and letting a contract. This is a solid conclusion. To keep the school from dealing exclusively with the party selected renders the entire bidding process meaningless. Moreover, the competitiveness embodied by the process makes a challenge that its outcome unreasonably restrains trade quite illogical.

A section 2 Sherman Act violation requires proof of both the ability and intent to monopolize a market. Ability depends in part on the size of the defendant's market share; monopoly power can be assumed when the market share exceeds seventy percent. Intent is determined by evaluating the purpose behind the defendant's conduct as well as the effect of that conduct upon others.

This section clearly does not apply in this situation. Monopolization means controlling prices or output in a relevant market, and therefore implies that the one doing the monopolizing is the seller. The school, however, is a buyer; it is seeking the performance of a service. The circumstances simply provide enough leverage to enable it to invoke a bid process instead of shopping around itself. Because of the financial appeal of a contract with a yearbook, photographers are willing to do the shopping for the school. But in no way does the school control prices, except in being able to choose the best offer, and anyone is entitled to do that. Because it is not a seller, it is implausible to envision a school as a monopoly.

It is doubtful, however, whether a single yearbook qualifies as a relevant market. The existence of a monopoly by definition means that there are no adequate substitutes. In other words, the monopoly provides the only access to a relevant market. A relevant market comprises a particular line of commerce or products such as automobiles or women's shoes. But a monopoly does not exist just because the product said to be monopolized differs from others. It must lack reasonable interchangability in quality and use with other products. Take for example a company which produces all the cellophane in the world. It would not be considered a monopoly because cellophane itself is not a relevant market. Other wrapping materials, such as saran wrap and wax paper, would be available, and although they are somewhat different from cellophane, they are interchangable. The same applies to school yearbooks. At the most basic level, one yearbook is the same as another. Simple exclusion from one's school yearbook does not prevent one from going to another yearbook. Even if the school was able to fit the role of a seller, the yearbook cannot be classified as a relevant market; as a buyer of services, it cannot in itself be a market. The idea that a single entity would per se be a market for antitrust purposes could eliminate most existing contracts. A section 2 allegation is therefore implausible.

It seems unlikely that an exclusive contract between a school and a professional yearbook photographer would in any way run afoul of antitrust law. The monopolization element of the Sherman Act simply does not apply to this situation and the process used in reaching the agreement openly encourages competition. Therefore, absent proof of fraud or some other wrongdoing in the bidding process, a party has no claim against a school or its conduct.

The second question evolving from the school-photographer relationship is whether the Robinson-Patman Act, another federal antitrust statute, prohibits the payment of a fee or commission to the school as part of the contract. This situation may arise, for instance, if a school accepts a percentage commission based upon the sales of photographs made by the photographer to students. Other forms of this fee may include photographic darkroom supplies and straight cash payments.

The Robinson-Patman Act precludes the payment or acceptance of any compensation by anyone involved in commerce except for services rendered, unless otherwise exempted. Its purpose is to eliminate the use of kickbacks in the buying or selling of goods or services.

The restrictions of the Robinson-Patman Act are specifically avoided if the payment is a fee for services provided to the photographer or if the entire transaction is exempt from the Act.

The relevant exemption is section 13(c) of the Robinson-Patman Act, usually referred to as the Nonprofit Institutions Act. The Robinson-Patman Act does not apply to purchases of supplies by a school for its own use. Thus applicability depends on whether the photographs constitute "supplies," and further, if these supplies are for the school's "own use."

In the only court opinion on the point, Burge v. Bryant Public School District of Saline County, the Eighth
Circuit Court of Appeals held that a contract between a school and a photographer, which contained several unique requirements including the payment to the school of a 10 percent commission for photographs sold, was exempt from the Robinson-Patman Act. The court first found no trouble including photographs within the general meaning of "supplies." The court then said that the photographs would be for the school's "own use" if they could be reasonably regarded as use by the school in the sense that such use is a part of and promotes the . . . overall education of its students. The court believed that the use of the photographs for student IDs, in the school yearbook and on school bulletin boards, adequately fulfilled this definition. The transaction thus fell within the Nonprofit Institutions Act and was not subject to the Robinson-Patman Act.

The court also considered the assertion that the commission was simply compensation for services provided by the school, such as building space and clerical work. Although it was not the basis for the court's decision, the court suggested that a school could charge a reasonable amount for such services, and that amount could be set by the two contracting parties. In other words, a school could charge whatever a photographer would be willing to pay so long as it was not outrageous and such an agreement would not be considered a kickback.

The Burge opinion, however, is not the save all it may seem. While Burge may be followed by other federal courts, it applies only to federal antitrust laws. Qualification under the Nonprofit Institutions Act does not necessarily exempt the conduct from state antitrust laws. In states with their own antitrust laws, the opinion might be insufficient protection. For example, Virginia has a state antitrust law similar to the Robinson-Patman Act. Its counterpart to the Nonprofit Institutions Act, however, is comparatively narrower. It is consequently debatable whether a transaction like the one in Burge is exempt. In fact, Virginia's Attorney General has advised that it probably is not.

In dealing with state antitrust laws, schools should look first for a state counterpart to the Nonprofit Institutions Act and determine whether it is applicable to the situation. If no such exemption exists, these alternatives may provide a way to avoid the state statute:

1. The school may set up a system where it buys the photographs wholesale and sells to the students for retail; this will, however, require some capital outlay.
2. The school could place in their initial bid offering a flat fee requirement of "X" amount per student enrolled.
3. If a charge for services rendered is required by state statute merely to be "reasonable," — as with the Robinson-Patman Act — rather than restricted to the actual cost of the services provided, any sort of commission could be included in that charge. Burge suggests that this would be a matter of bargaining between the parties with no significant differences in levels of bargaining power and therefore not reviewable under antitrust laws.

These suggestions merely attempt to elude a situation typical of the difficult nature of antitrust law, and are not cut and dried solutions. Schools in this dilemma should consult an attorney knowledgeable in this area of the law before taking action. Without further judicial clarification, possible resolutions remain nothing more than thoughtful guesswork.

NOTES
2. State legislatures authorize schools to contract for most necessary supplies and services and act as the sole source of limitation. See supra note 1.
Section 1 of the Sherman Act states in pertinent part, "[e]very contract ... in restraint of trade commerce among the several States is declared illegal." Section 2 reads: "[e]very person who shall monopolize or attempt to monopolize ... any part of trade or commerce among the several States ... shall be deemed guilty of a felony." 15 U.S.C. 1, 2 (1981). For a section 1 violation, the U.S. Supreme Court has held that the restraint must be unreasonable. Standard Oil of New Jersey v. United States, 221 U.S. 1 (1911).

14. The pertinent provision states:
   It shall be unlawful for any person engaged in commerce, ... to pay or grant, or to receive or accept, anything of value as a commission, ... or other compensation, ... except for services rendered in connection with the sale or purchase of goods, ... either to the other party to such a transaction or to an agent, representative, or other intermediary ...

15. See supra note 14

16. The section provides as follows: "Nothing in section 13 to 13b and 21a of this title, shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit." 15 U.S.C. section 13(c).

   18. Id. at 332.
   19. Id.
   20. Id. at 331.
   21. Id. at 332.
   22. Id.
   23. Id. at 333.

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**CHANGING OF THE GUARD**

We are pleased to announce that S. Mark Goodman (left) has been hired to replace J. Marc Abrams (right) as Executive Director.

Mark is a native of Versailles, Mo. He obtained a B.J. with honors from the University of Missouri School of Journalism in 1982, where he ranked in the top five percent of his class all four years and was a member of both Sigma Delta Chi and Kappa Tau Alpha, the Society for Professional Journalists and the journalism honorary.

He then moved to Duke University, where he just completed his Juris Doctor degree. He took the February Bar examination, and hopes to be admitted in Georgia and the District of Columbia.

Mark also becomes the first SPLC Executive Director to rise from the ranks of intern alumni; he worked with us last summer as a legal summer associate.

Marc Abrams will be staying involved with SPLC as a Vice President of the Board of Directors.
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