

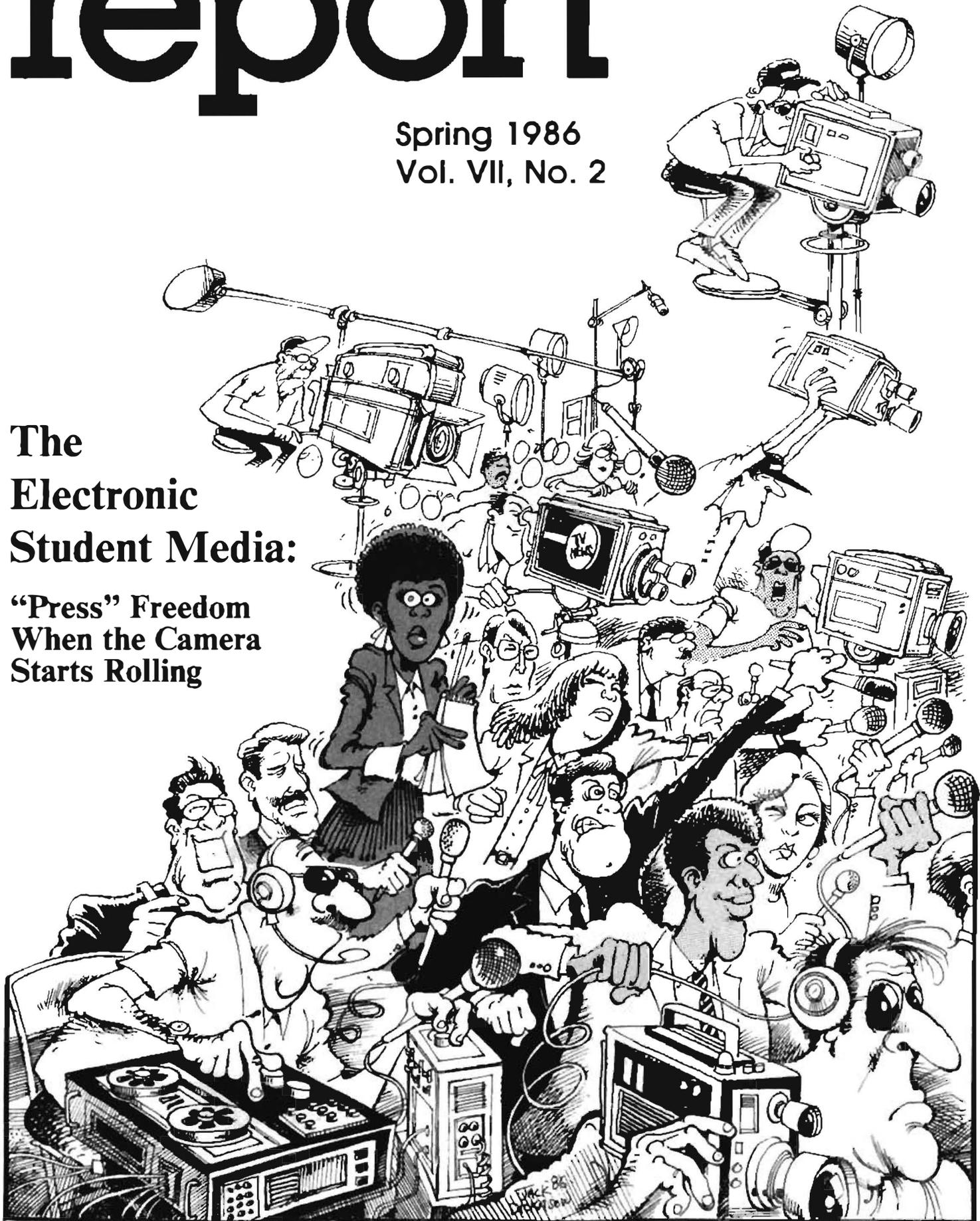
student press law center

# report

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## The Electronic Student Media:

“Press” Freedom  
When the Camera  
Starts Rolling



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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 student interns.

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Justice William J. Brennan, Jr.

# Challenging High School

## Could Fraser's Supreme Case Be the Landmark of the 1980s?



Justice Lewis F. Powell, Jr.

Three years ago, Matthew Fraser was just another precocious senior at Bethel High School in Spanaway, Washington. But in March, he demonstrated that he was really quite out of the ordinary when he pursued the legal battle that began back at Bethel up to the highest court in the land.

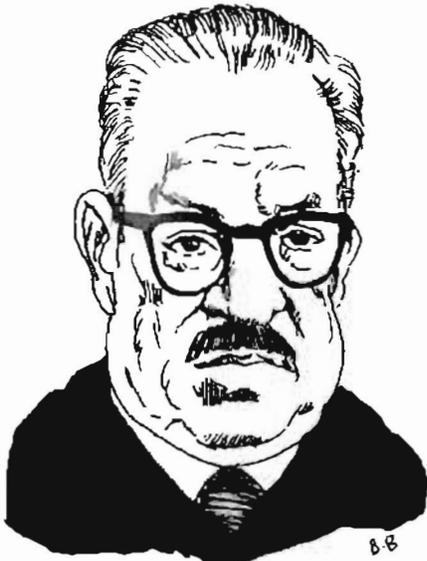
An endorsement Fraser gave in 1983 for a student government candidate raised enough significant free expression questions that the U.S. Supreme Court agreed to hear the case on March 3.

*Bethel School District v. Fraser*, 755 F.2d 1356 (9th Cir. 1985) cert. granted, 106 S.Ct. 56 (1985), is the first free expression case directly involving the rights of high school students that the court has agreed to hear since its landmark decision in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). And this case could "certainly have a major effect on the scope of freedom of speech in high schools," said Fraser's attorney, American Civil Liberties Union affiliate, Jeffrey T. Haley.

The text of Fraser's speech that Bethel administrators allege caused such an uproar at the student-run assembly, and which carried him into the legal limelight, was as follows:

I know a man who is firm — he's firm in his pants, he's firm in his shirt, his character is firm — but most of all, his belief in you, the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack

*continued on next page*



Justice Thurgood Marshall



Justice John Paul Stevens



Justice Byron R. White



Justice Harry A. Blackmun

## COURTS



**Justice Sandra Day O'Connor:**

*If you incorporated a string of profane words... would the speech have been protected?*



**Justice William H. Rehnquist**

*continued from previous page*

things in spurts — he drives hard, pushing and pushing until finally he — succeeds. Jeff is a man who will go to the very end — even the climax, for each and every one of you. So vote for Jeff for ASB vice-president — he'll never come between you and the best our high school can be.

Although administrators were not present during the assembly, some of the teachers said they were shocked by the speech and complained to school officials. Administrators took action the following day, suspending Fraser for three days and striking his name from the graduation speaker ballot. The school said Fraser had used vulgar and indecent language and that administrators had a right to control such speech. The school's regulations prohibit conduct that "materially and substantially interferes with the education process... including the use of obscene, profane language and gestures."

After exhausting the school district's appeals process, Fraser took Bethel to court claiming a violation of his First Amendment rights. During testimony, one teacher said students "hooted and hollered" and that some students made sexually suggestive movements in response to the speech. But others testified that such reactions were not uncommon at assemblies.

The U.S. District Court for the Western District of Washington struck down the school district's claim that Fraser's speech was disruptive of the educational process. The judge ruled that Fraser had been

wrongly punished and that the school's regulations were unconstitutionally overbroad and vague.

Fraser was allowed to give his graduation speech in June 1983, but the board wasn't satisfied with the court decision and appealed to the Ninth Circuit Court of Appeals in San Francisco. It upheld the lower court's ruling.

Bethel appealed the decision to the nation's highest court. "I think it was gutsy when the school board took this on," said Jerry Hosman superintendent of schools for the Bethel District. "If the lower court had just ruled on the issue and said we were wrong, we wouldn't have appealed," Hosman said. "But the lower court ruled that the administration's rules were overly broad and vague. They struck down the rules from the entire state of Washington as adopted by the board of education."

The Supreme Court justices were asked to decide whether school officials have the authority to control "indecent" speech that is not legally obscene. But the case also questions the definition of student speech that creates a "material and substantial disruption of school activity," and the constitutionality of school policies regulating speech. "This issue is important to the community at large and America," Hosman said.

The school district's attorney, William A. Coats, said, "the school had a duty to the other students, to protect young adults from something inherently demeaning. The speech was not appropriate, and a lesser form of corrective action wouldn't have worked."

No matter how specific the school's regulation banning speech was, Haley told the court that Fraser's speech would have been protected by the First Amendment.

During oral arguments before the Supreme Court, the justices "probed" both attorneys to determine how far each was willing to go with his argument.

"If you incorporated a string of profane words (into the speech) instead of the sexual innuendo, with the same amount of disruption, would the speech have been protected?" asked Justice Sandra Day O'Connor.

"Profanity can be regulated in this school setting, whereas mere connotations cannot," Haley said. "It's easy to identify profanity or dirty words, but it's difficult to identify sexual connotations. Profanity or dirty words are used to arouse negative emotions," he continued. "whereas sexual metaphor is used for humor, lightness and good feeling, as it certainly was in this case."

But earlier testimony revealed that some students at the assembly had been embarrassed and insulted by Fraser's speech.

"In order to participate in student government, students shouldn't have to put up with this conduct," Coats said. The purpose of these assemblies is to "teach students the art of public discourse, specifically (that affecting) the relationship between students and instructors.

Haley emphasized that the assembly was optional. Students could have attended study hall during that period. "This form of expression is not unusual for students," he said, and



**Chief Justice Warren E. Burger:**

*Does a school have any duty to teach societal values, morality, self respect and civility?*

the defense never argued that the speech created a material disruption in the curriculum until they spoke to their attorney, he added.

Haley agreed with Coats and Chief Justice Warren Burger that the school has a duty to teach "societal values, morality, self respect and civility," but, he said, "the question is whether the speech was protected by the First Amendment, not if it was inappropriate or distasteful."

Because the Fraser case concerns the free expression rights of high school students, as have few cases other than *Tinker*, it promises to set precedent for future decisions.

The Student Press Law Center filed a friend of the court brief in support of Fraser arguing that his speech was a recognized form of student expression, and could not be censored unless found to be materially disruptive or legally obscene.

If the Court decides with the school district, Haley said the case would not overrule *Tinker*, but depending on their opinions, he said, the implications of *Tinker* could be reduced by half. "People used to think a lot of speech was protected by *Tinker*," but this decision could mean that only expression that is expressed in an approved form and concerns a view point that is a matter of public concern, will be protected, Haley said.

Although Coats argues that *Tinker* concerns different issues, specifically the expression of points of view, and is not wholly applicable to *Fraser*, he said that Bethel's position is consistent with the earlier decision. "We're not trying to suppress any view

points, we're trying to maintain a level of decency appropriate for high school. "Free expression rights in a high school are different than those "on skid row," he said. "There's a totally different relationship between a teacher and students than between the police and someone running an adult bookstore. We're asking the court to recognize that difference."

"We're not asking for any radical changes in the way things are operated right now," Coats said, "because administrators currently require a certain level of decency."

Although administrators may expect a "certain level of decency," Haley said, from talking to other school district's attorneys, he understands that "schools in Washington have been following the *Tinker* standard strictly since the decision came out, and the court of appeals have likewise."

So the changes Haley said he anticipates, if the Court decides for the school district, are anything but minor. "If the Court rules that this was not protected speech, it could eliminate about 15 decisions made by the court of appeals, and may serve to undermine a large portion of what has been treated as free speech under *Tinker*."

Neither attorney would venture a guess at how the justices would decide, saying that guessing on opinions from oral arguments is "risky." The Court adjourns for summer recess July 1. A ruling is expected to be handed down by May or June, but until then, for the first time in three years, they have only to wait. ■

**Brief**

A ban prohibiting the advertisement of alcohol and tobacco products is still policy for the *Mountaineer Weekly* at Mount San Antonio College because after more than a year of litigation, the case is still in a state of "limbo", said Antonette Cordero, attorney for the American Civil Liberties Union of Southern California.

In November 1984, the *Mountaineer Weekly* adviser, two journalism students and a private citizen filed suit against Mount San Antonio President John Randall and the college's board of trustees for refusing to amend the paper's existing advertising policy. Those suing, claim that the ban is a prior restraint that violates both the U.S. and the California constitutions. But a request for preliminary injunction, allowing the paper to accept such advertisements until the dispute is settled, was denied by a Los Angeles Superior Court judge in January 1985.

No progress has been made in the suit since then, but Cordero said it is likely that a motion for summary judgement will be filed this spring. ■



**Corrections**

A story in the Winter 1985-86 issue regarding a ruling of the Connecticut Freedom of Information Commission incorrectly identified Paul Thiel. Theil is the editor of the University of Connecticut at Storrs *Daily Campus*. In the same story, Paul Parker of the *Daily Campus* was misquoted. His quote should have read, "Last year (while at the University's Waterbury campus) I presented a poor case and this year's was better."

In the same issue, Susan Borges was misidentified in a story concerning a controversy at Rancho Alamitas High School in Garden Grove, Calif. Borges is a volunteer attorney for the American Civil Liberties Union of Southern California who assisted Rancho Alamitas students in their case against the school district.

The Report regrets the errors.



Georgia

*Cadaver* case still pending; litigation not yet laid to rest

A legal dispute involving the Medical College of Georgia's satirical newspaper, the *Cadaver*, has died down, but the attorney for the woman suing the paper, assured the *Report* that they aren't ready to bury the argument yet.

Four years ago, Susan Brooks, a former nursing student at the Augusta college, filed suit against the editors of the paper saying they "degraded her personally and her reputation in the community where she attended school."

Brian Stone and Johnny Jarmen, former editors of the *Cadaver*, responded to a letter Brooks submitted to the paper in November 1982. Brooks asked them to upgrade the quality of the newspaper saying, "If you do — maybe the *Cadaver* will be in the hands of students more — and in the bottoms of bird cages less."

The editors claim that Brooks knew the paper was satirical and that she provoked a lampoon of the kind she received.

"You're obviously a sensitive, caring member of society. . . and with your God-given sensitivity you should try to understand how and why those less fortunate members of our society

deviate from acceptable forms of behavior. . . We have backgrounds different from the rest of you. Our mothers were German Shepherds; our fathers were camels, so naturally we love to hump bitches in heat. Say, Ms. Brooks, when do you come in season?"

A trial court agreed with the editors, but both the appellate court and the state supreme court reversed the earlier decision and said that Brooks' letter did not constitute a case of provoked libel.

The case was sent back to the trial level to determine whether the editors' response was libelous, and since then, Brian Hudson, attorney for Jarmen, said there have been no new developments in the case.

The College's board of regents were also named as defendants in the case. Alfred Evans, the board's attorney, filed a petition to have his clients dismissed from the case, but he said it hasn't been ruled on yet. And Evans reiterated Hudson's sentiments. "There's been no activity in about a year. From the defendant's viewpoint, if the plaintiff isn't pushing, let a sleeping dog lie." ■

Texas

*Twisted Times* editor still shouts dispute not moot

A Texas student is appealing a state-appointed hearing officer's decision that the controversy between the senior and his high school is now moot. Karl Evans was suspended last Fall from Bryan High School for distributing an unreviewed issue of his "alternative" newspaper, *The Twisted Times*.

At the October prehearing before the State Commissioner of Education, Bryan Independent School District agreed to remove references of Evans' suspension from his record.

But the school "gave Evans the relief he was requesting because my clients had violated another statute dealing with the disciplining of students," said Jeffrey L. Rogers, the attorney representing the school district. "We would lose based on the state law issue."

Rogers was referring to a requirement which disallows the suspension of a student for minor violations of school rules. Instead, the student is placed in an alternative education program at special assignment centers in order to "keep the kid in school and off the streets," he added. Administrators at Bryan High School failed to follow this procedure when they suspended Evans.

But James C. Harrington, an American Civil Liberties Union attorney representing Evans, said all references to the suspension have not been removed from the file. "They just changed the language. The school doesn't deny that there are references to the incident." The hearing officer instructed Harrington to demonstrate that references to the punishment remained in the student's file, Rogers said.

Harrington is also contesting the constitutionality of the school's publication policy, which he challenged on its face during the prehearing, and labeled as an "attempt to suppress the discussion of ideas on the basis of their content." The policy "remains

available for future use against Evans and all other students in a similar situation," he said.

Evans "was punished for failing to submit the paper (before distribution), and he admitted that he was aware (of that requirement.)" Rogers said. But "such licensure is precisely the kind of 'prior restraint' prohibited by both (the U.S. and Texas) Constitutions," Harrington argued. "Students cannot be deprived of their rights as citizens without the State's demonstration of a compelling interest in doing so, and no such demonstration can be made in this case."

Included in the district's policy are prohibitions on the sale of student publications, discussion about candidates for public office and "attempts to impose extra-territorial jurisdiction upon student conduct," by disallowing distribution of unreviewed publications off campus. Harrington said all of these and other elements of the policy are issues in the case. "Why is student writing thought to be so much more a danger than the writing of adults that the former alone must be subjected to licensure and prior restraint?" Harrington argued.

But "the constitutional issue of the policy has not been addressed," Rogers said. He argues that the hearing officer agreed to hear only discussions on was the constitutionality of prior submission, and therefore, other complaints about the policy are unrelated to the issue. "The law is very clear cut that prior submission is not unconstitutional *per se*," he said citing the decision in *Shanley v. Northeast Independent School District* 462 F.2d 960 (5th Cir. 1972). "The ACLU wants to change the law because (Harrington) doesn't like the law," Rogers said.

The school district is waiting for Harrington to prove that references to suspension still exist in Evans' file, but Rogers said he is doubtful that any action will be taken. "I expect this to linger in its present stage for a month or so, and then I'll file a motion to dismiss for failure to present (evidence).

"If they had something to claim, I feel sure they would have presented it by now."

A clerk for Harrington said they are waiting for a decision on their appeal to the State Commissioner of Education. "If that's turned down, we'll go to district court." ■



## Colorado

### Olson decision only temporary plateau in case

Litigation is nothing new for Judith Olson, a journalism teacher at Pikes Peak Community College in Colorado Springs. So after seven years of legal pugilism, her appeal of a Colorado circuit court's decision last November, is hardly surprising.

Since 1979, when she first challenged the school for violating her First Amendment rights and those of her students, Olson has argued her case at every level of the state's court system. Although two years ago the state Supreme Court made a landmark decision in *Olson v. State Board of Community Colleges and Occupational Education*, 687 P.2d 429 (Colo. 1984), allowing an adviser to sue on behalf of her student's, Olson had to return to the trial level to obtain a ruling on the First Amendment issue in the case, No. 79CV5570 (D. Ct. Colo. Nov. 26, 1985).

The *Pikes Peak News* folded in 1979 after the student government terminated funding for the paper. It was replaced by a smaller, low-budget magazine, the *Pikes Peak Fuse*, which is dependent solely on advertising revenues. Olson said that under the new format, student editors have had to run more advertisements in the

paper and sacrifice news content. She said losing the *News* removed a valuable teaching tool from her journalism class, which she has been forced to modify to produce the *Fuse*.

Olson claims that the student government's decision to cut off funds for the *News* was made solely because they disapproved of the paper's content and editorial policies. She is suing for the return of funding, so the *News* can begin publishing again. Bill Bethke, Olson's attorney said a persuasive precedent for their case was a federal court's decision in the 1973 case, *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973), which decided that censorship of constitutionally protected expression cannot be imposed by withdrawing financial support.

But the trial judge's recent decision favored the college. Pikes Peaks is arguing that there was not a breach of First Amendment rights because economic concerns had necessitated the funding cuts.

"I think (the decision) was pretty far off base," Bethke said. "That's why we're appealing."

Bethke said that after the trial he felt confident he had demonstrated that some members of the student government had decided to terminate *News* funding because of the paper's content. From the start of the dispute, Bethke said, the school has claimed that budgetary and administrative problems were the reasons for the cut. "They said they were trying to save money and the paper wasn't cooperating."

He said he was surprised by the judge's decision, because "at least one (person's) testimony, was shaken on cross-examination" and two defendants admitted, during deposition, that content of the *News* was a factor in their decision. "I thought it was an adequate enough demonstration of the wrong motive (for removal of funds) to make a First Amendment case," he said.

Olson was "obviously disappointed" by the decision, Bethke said. "But she thought it (the trial) went well. She's pleased with the progress."

As soon as the record of the trial is filed and Bethke is given the briefing schedule, he said he and Olson will be ready to continue on this "unusual and long course of litigation.

"We're back in the appellant rut again." ■

Iowa

# Paper's retraction settles libel case

A retraction that appeared in a January issue of *The Daily Iowan* ended a three year libel dispute between the paper and a local police officer.

Officer Daniel A. Dreckman brought suit against the paper in 1983 after *The Daily Iowan* reported his efforts to break up an argument on an Iowa City bus. The woman who police removed from the bus, later filed a criminal complaint against Dreckman for racial harassment.

Included in the original story was a quote from a local NAACP official who said "similar complaints" had

been made against the officer in the past. In fact, no official complaints had been filed against Dreckman, said Thomas McDonald, attorney for the paper. McDonald said the complaints were actually made against the bus driver.

"People were looking at him weird when he walked down the street," McDonald said. "And he was upset about it."

McDonald said his client agreed to settle out of court last year. "This is a perfect example of fighting for the principle, not the money." The settlement was delayed, McDonald said,

because of "dickering over" placement of the retraction and the type of print to be used.

Neither Bill Casey, the paper's publisher, nor Phillip Mears, attorney for the defendant, would comment on the settlement.

The one paragraph retraction ran under the "Correction" heading of *The Daily Iowan*. It appeared on page two and was printed in bold type.

"His (Dreckman's) record was clean," McDonald said. "Now it's settled in his own mind even if nobody read it." ■

Missouri

# Spectrum staff awaits appeal ruling

A St. Louis federal court of appeals heard oral arguments in January on a student censorship case, but it may not render a decision on the constitutionality of a high school principal's actions until this summer, said American Civil Liberties Union attorney, Leslie Edwards.

But Catherine Kuhlmeier, Leslie Smart and Lee Ann Tippett-West, three former Hazlewood East (Mo.) High School students, are used to waiting on the law. They filed suit against their principal three years ago and have been waiting ever since to find out whether his actions in May 1983 violated their First Amendment rights as student journalists.

The three women were editors and reporters for the school's paper, the *Spectrum*, when Principal Robert Reynolds censored articles, which he called inappropriate, from an issue of the publication.

Reynolds, without informing the editors, ordered the paper's adviser to delete a spread of articles that covered teen-age marriages, teen pregnancy, runaways and the effects of divorce on children. He said the material was "totally unnecessary and too sensitive to be included in the school paper." He also said the stories that quoted unnamed students

constituted an invasion of privacy and might be libelous.

Since then, the ACLU of Eastern Missouri and attorneys for the school district have been arguing the matter. One of the main questions in the case is whether the *Spectrum* is an "open forum" for student expression.

Robert Baine, attorney for the school has argued that the paper "is an integral part of the curriculum, I think that's clear." The trial court accepted his argument and said as a part of the curriculum, the newspaper could be censored.

But Edwards and her clients contend despite the *Spectrum's* ties to a journalism class, the paper covered controversial issues and printed letters to the editor, making it a forum for student expression similar to those many other courts have found protected by the First Amendment. They sought an appeal which was heard in January by the Eighth Circuit Court of Appeals.

Edwards said she thought the oral argument went well. "The Eighth Circuit has done a lot of work (in this area). They have a good background, but you can still never tell (how they will decide)." She said one of the judges who heard the case, has served on the judicial bench since the 1960's

and was involved in the 1969 *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), decision that clarified the extent of students' First Amendment rights on school property.

Edwards said she doesn't expect the judges to take any action until early summer. But Baine predicts a decision to be made even later. "I don't think we'll hear anything till fall. It's over, we've done our job. It's in the hands of the court now." ■



## Illinois

## Invasion of privacy litigation creates new law in Midwest

A five-year-old invasion of privacy case involving a student could make legal history in the Land of Lincoln this year.

Courts recognize four torts, or wrongful acts, that warrant invasion of privacy, but *Boos v. Board of Education Township District 214*, No. 81-L-28020 (Cook Cty. Cir. Ct. 1981), marks the first time an Illinois court has agreed to hear a dispute involving this specific invasion of privacy claim.

"I know of no other Illinois authority where the tort of invasion of privacy has been sustained on the basis of public disclosure of private facts," said Arnold Landis, attorney for the plaintiff.

The suit, filed in December 1981, claims that the paper Madeline Boos wrote for her English class as a student at Arlington High School, was submitted only for a grade. She alleges that the paper was given to the

yearbook editor and later published, without her consent.

"Invasion of privacy applies," Landis said, "because Boos asked that the work not be disseminated. When it was, it contained confidential facts about her and was published with her name," he said.

Landis requested the court to impound both the original work and legal documents containing excerpts, to prevent further dissemination of private facts. Therefore, neither he nor Nancy Arnold, the attorney for the board of education, could comment on the content of the paper.

But for about two years, Arnold, has worked to get the case dismissed on the grounds that there was never any cause of action. "We don't think this is something the law provides a remedy for," she said.

Arnold said she has moved to dismiss three times, and has been able to reduce the number of Landis'



requests for relief from "somewhere in the teens, to four." The school has also denied Boos' allegation that she didn't submit her essay for publication.

The case has not yet gone to trial because of delays that Landis blames on the motions for dismissal. But Arnold said she hopes it will be heard within the year. She still seems confident of her position, because even though the court sustained the cause of action, "it doesn't mean we can't get a reversal on appeal."

And it is at the appeal level that both attorneys agree *Boos v. Board of Education* could have an impact on future privacy cases, and make "a lot of new law." ■

## California

## Court orders high school to run story

When Michael Shindler and the Huntington Beach Union High School District settled their dispute out of court in January, "They gave us everything we wanted," the student's attorney said.

The school district decided to drop their appeal and accept an Orange County, Calif., Superior Court order allowing Shindler to publish his editorial on Acquired Immune Deficiency Syndrome in the *Scroll*.

The editorial, which was originally scheduled to run in the November issue of the Westminster High School student newspaper, criticizes the media as well as religious and political leaders, like the Rev. Jerry Falwell, for spreading myths about AIDS. Principal Robert Boehme said he was

concerned that parts of the editorial might be libelous.

But Susan Borges, Schindler's attorney, argued that the school had not met the burden of proving that the article was libelous as required by the California Education Code. "I keep hearing 'potentially libelous,'" she said. "But that's not allowed. It either is or it isn't."

The provision in the state Education Code allowing limited prior restraint of libelous or obscene material was also challenged in this case. But Judge Judith Ryan reserved judgment on the constitutionality of such a provision.

Borges said she finds fault with the state Education Code because it is wrong to assume that an administra-

tor, with limited legal knowledge, can correctly determine when material in a publication meets the definitions of libel and obscenity. "It is such a difficult decision to figure out. It's much too vague," she said. "We've placed administrators in a position that even the Supreme Court has a hard time with."

Borges said she thinks the press coverage given to the Shindler case is another positive result of the dispute. "It brought to the public's attention some of the difficulties student journalists have. These kids don't have the money for lawyers or they don't have parental and peer support. Sometimes only if the (professional) press gets involved (can they get help)." ■

## California

## Editors win settlement in cut-and-dried case



The skirmish between editors of an underground student newspaper and the Fallbrook Union High School District in California was finally settled out of court last December. Although litigation lasted only 15 months — a short time in comparison to many student press disputes — the students' attorney said he was surprised the case dragged on that long.

"This was an unusual case, in the sense that, I believe a reasonable attorney representing the school board would have settled this as soon as it arose," said Robert DeKoven an instructor at California Western School of Law in San Diego and volunteer attorney for the American Civil Liberties Union. DeKoven helped represent the two students, Daniel Gluesenkamp and Philip Tiso. He said that the terms of the settlement agreed upon in February were the same ones he initially suggested when the suit was filed.

Last December a San Diego Superior Court judge found the suspension of the editors of the *Hatchet Job* illegal, because the punishment didn't meet the requisites of California Education Code 48900.5. DeKoven said that the code has specific categories for suspending a student. There is no such category for distribution of an underground paper, he said.

Gluesenkamp and Tiso originally published a series of photocopied

sheets called the *Hatchet Job* in September 1984. The official student paper at Fallbrook is the *Tomahawk*. This edition of the underground featured a picture of then Secretary of Education Terrel Bell shaking hands with a local congressman and the president of the board of trustees of the school district. Included was a caption suggesting that "mind altering substances" were being exchanged.

Fallbrook Principal Henry Woessner confiscated all copies of the paper saying that they were libelous and obscene. Gluesenkamp and Tiso appealed their suspension to the school district's board of trustees and sought representation from the ACLU after their complaint was rejected.

"We filed a motion as to the illegality of the suspensions and the unconstitutionality of the school board's publication policy," said DeKoven. The school district's policy disallowed publication of articles that discussed child birth and related issues, and any material that would be considered injurious to others or contained profanity, DeKoven said.

But Walt Frazer, a reporter covering the story for the *Oceanside Blade-Tribune*, said little progress was made until the ACLU requested assistance from an outside attorney, Charles Bird. The school district followed suit by also hiring new legal counsel in a move that Frazer described as part of

a "legal arms race." "They got some high-powered, heavy weight attorneys from big corporate firms who really knew their stuff."

The superior court judge ruled that the school violated the state Education Code by suspending the students. The judge granted Bird's request for a temporary injunction thereby enjoining the school from enforcing their publications policy.

But litigation was prolonged by settlement conferences in which both parties worked to agree on the damages to be awarded. The students were asking for \$9 million. "When we originally filed suit," DeKoven explained, "the damages were high because I had to estimate what the damages *could* be if the case went to trial. It was a leverage issue." Bird said then the school district made "serious efforts to reach a settlement."

The school district agreed to write apologies to Gluesenkamp and Tiso in which they admitted the illegality of the suspensions and the publications policy. In exchange, the students agreed not to pursue their case. DeKoven said that the students were also awarded \$22,000. He said part of that will pay for attorney's fees and the rest will be donated to the ACLU.

But because the California court ruled only on the legality of the suspensions under the state Education Code, and not the question of libel or obscenity, the First Amendment free expression issues were never reached. DeKoven said he thinks the judge would have ruled in the students favor if he had had to. "This was clearly protected free speech."

The case probably would have taken less time had the judge ruled on both statutory and constitutional grounds, Bird said. "You couldn't find (the *Hatchet Job*) obscene or libelous under any standard in the country. There was no depiction of sex, and the caption was an obvious joke."

As part of the damages, the district will also sponsor a one day workshop addressing the rights of free expression on public school campuses. ■

California

No Fooling:  
Editors question  
legality of statute

In 1984, the April Fools Day issue of *La Voz del Vaquero*, ran a story that student editors at Rancho Alamitas High School intended only as a joke.

But two years later, former staff members of the student newspaper are fighting a serious legal battle that extends beyond the paper's parody issue. The case raises questions about the constitutionality of the California statute that allowed their principal to prevent distribution of the paper in the Garden Grove high school.

The original article is "not important to the case anymore," said Gary Williams, American Civil Liberties Union attorney. "What is most important is whether the statute under which the principal acted was in fact constitutional." Williams represents David Leeb, former editor of *La Voz*,

Distribution of that April edition was stopped by Rancho Alamitas principal James DeLong because he said one of the articles might be libelous. The article, "Girls of Rancho," was accompanied by a picture of female students and a caption indicating that they were a few in the lines of prospective playmates that were forming for interviews with *Playboy* magazine. The girls admitted to DeLong that they hadn't known how the picture would be used, but none had complained or been upset, Williams said.

Leeb filed suit against DeLong and the Garden Grove School district to allow distribution of the paper. But he lost at the trial level on the basis that he had acted irresponsibly, "with unclean hands," by not informing the women of his intentions for the photograph. The court also refused his request for a preliminary injunction. The judge did not, however, rule that the original article was libelous.

The case is now on appeal, but because of backlogs in the Fourth Appellate District, it could be another year before the case is heard, said Ron Wenkhart, attorney for the school district. Wenkhart agrees that the original article is no longer an



issue. Instead, he will be defending the provision in the state education code that allows a principal, like DeLong, to restrain any material that is libelous, obscene or may cause a significant disruption to the school environment.

Wenkhart said the case will not set a legal precedent for anyone outside California, because the ACLU is challenging the statute as a violation of state, rather than federal law.

The California constitutional provision protecting free speech has been more broadly interpreted than has the First Amendment to the federal constitution, and has been consistently upheld by the California courts. Williams said, explaining why he chose to argue at this level. But he admits that this is a case of "first impression", because the California constitutional provision has never been squarely applied to a high school setting.

Wenkhart will argue that the school district would be held financially responsible for any libel suits caused by a student publication. Therefore, giving administrators power to restrain material included in the current provision is their only means of protection.

But Williams disagrees. "The district would not be held liable because they have no control over the editorial policies of the paper. (The district) is not in the same position as a private publisher," he said.

Williams said he hopes the court will follow its earlier decisions based on the state constitution. That is, Williams said, that the state cannot act in the capacity of issuing prior restraints. It should apply the rules imposed on the professional press — "punishment after the fact, which is less chilling." ■

Briefs

A Minnesota federal district court ruled in March that any prior review of unofficial student publications by public high school administrators is a violation of the First Amendment. The court granted a summary judgment for the student publishers of the underground newspaper *Tour de Farce*. The students were threatened with suspension by **Fridley High School** officials for not seeking prior approval before distributing the paper in spring 1985. The school is appealing the decision. (*Bystrom v. Fridley High School*, No. 3-85-911 (D. Minn. March 5), appeal docketed, No. 86-5140 (8th Cir. April 7, 1986).) ■

A Nevada federal district court judge heard arguments in April in the two-year-old case, *Planned Parenthood of Southern Nevada, Inc. v. Clark County School District*. But a decision on PPSN's motion for summary judgement is not expected until fall.

PPSN filed suit against the school district in December 1984 for refusing to allow high school newspapers to carry the non-profit organization's advertising. It claims that the district's ban on the advertising, which was enacted in 1979, violates the First and Fourteenth Amendment rights of PPSN, high school students and others "who may need to be aware of Planned Parenthood's services," said Daniel M. Holt, PPSN Community Affairs Coordinator. PPSN is "asking the court to rule against arbitrary censorship in the absence of narrowly objective guidelines," he added. ■





New York

## Adviser steering into court

When Michael Romano was herded out of his tenured advisory position at Port Richmond High School in Staten Island, N.Y., he decided to "grab the bull by the horns."

The teacher and former newspaper adviser at Port Richmond filed suit against the school's principal and the school board two years ago for breach of his contract and violation of his First Amendment rights.

A controversial student editorial that appeared in the February 1984 edition of the *Crow's Nest* prompted Principal Margaret Harrington's decision to relieve Romano of his seven-year advisory position. She said the editorial, which questioned the worth of celebrating Martin Luther King's birthday as a federal holiday, would probably spark racial unrest within the school. Harrington's letter of dismissal, which reprimanded Romano for failing to fulfill his "responsibility as a teacher and as an adviser to present a balanced view of controver-

sial issues," was added to his teaching file.

Romano said that a student editorial presenting an opposing view of the federal holiday was submitted for publication, but the student editor of the *Crow's Nest* refused it because "it needed work."

"The editor, and not me, said the article needed work in the way (the opinion) was presented, and not *what* was presented," Romano said. He said he tried to discuss the editorial with the writer, but she never resubmitted it.

School officials have "no question about Romano's right to put the story in," said Paul Janis, Romano's attorney. "They're not saying he should have stopped the article, they're saying he should have encouraged an opposing article." But to what extent must an adviser attempt to balance an issue in a student newspaper, Janis asked. "What efforts should he have to go through?"

Robert Ligansky, the school's attor-

ney, admitted "this is not an easy case," but he declined further comment.

The actual decision-making is done by the student editor, Janis said. But the school's disciplinary action "had nothing to do with the editor who published the paper," he said. "It affected the faculty adviser who is one-removed from the publication."

Although no court date has been set, the case will be tried on the basis of breaches of Romano's First and Fourteenth Amendment rights. Janis said he is not aware of a similar case, and therefore Romano's could set a precedent for student press law. "It would give an adviser the same protection as the editor."

Edmund Sullivan, director of the Columbia Scholastic Press Association, is encouraged by this case. "Things don't get challenged in the New York City school system; a lot of water goes under the bridge. Student press law is very weak in this area, because it never really made it into the curriculum here as it did in other parts of the country.

"If (Romano) loses this appeal now, I don't think other student advisers will try to take a stand in court again," Sullivan said.

Romano, a judge for the CSPA, said most advisers with similar problems probably never take their cases to court because the extra money they earn for advising isn't worth the hassle. "Unfortunately, public school advisers don't get much money; they do it because they enjoy it. I'm one of those." ■



Oklahoma

# No settlement in sight so adviser sues school

A March settlement conference failed to settle anything in the legal dispute between a high school newspaper adviser and the Putnam City School District in Oklahoma City, said Judith Slayman Onken, attorney for Patricia Miller.

But Onken said she had not, "realistically," expected to end the two year dispute out of court. "There was no middle ground for settlement. There was no give there," she said.

Miller claims she was fired from her position at Putnam West High School because she allowed a six part series of articles on birth control, abortion, teenage pregnancy and adoption to run in the April 1984 issue of the *Towne Cryer*.

"The (school) said she failed to comply with *unwritten* regulations, to

clear controversial issues with the administration before allowing them to run," Onken said. Miller claims the dismissal violated her First Amendment rights.

But William Bleakly, attorney for the Putnam County School District, said the contents of the publication were not the basis for her dismissal. "This is not a First Amendment issue. There were other personnel reasons . . . prior to that issue of the paper."

A chart describing the reliability of various contraceptives and their effect on sexual activities was included in that April issue. Onken said "the articles dealt with the issue of teenage pregnancy in a balanced and responsible way," but the administration found the chart offensive. "It was the

principle of the matter for both sides," Onken said.

"The school recognizes the fact that students have a First Amendment right . . .," Bleakly said. "The article was probably considered controversial, but I think the attitude about the quality of the article was that it was a pretty good issue."

Miller is seeking reinstatement as faculty adviser of both the newspaper and yearbook. She said she thinks the trial will be set for May or June of this year. Onken is also requesting compensatory and punitive damages, because "I think the (school district) acted in bad faith, and were in violation of (Miller's) constitutional rights." ■

Virginia

# Best in bunch rated worst by Godwin

The Godwin High School *Politician* was recognized by the University of Virginia as one of the best last year in a statewide publications competition. But neither the 1984-85 yearbook nor faculty adviser Paige Whitten scored very well with Godwin administrators when the book was distributed in the Richmond, Va., high school last September.

"We tried to depict Godwin the way we saw it everyday," said Susan Oehler, copy editor of the *Politician*. "(But) they didn't like it. They wanted it all red and white and full of school spirit."

Administrators thought some photographs and copy were offensive, Oehler said. Photographs of a student "illegally" chewing tobacco on campus, and a story about dating dilemmas for senior girls were among the objectionable on an itemized list presented to Whitten.

Whitten was demoted from her position as yearbook adviser, but was allowed to continue teaching English at Godwin.

She said she considered taking legal action against the school, but "I weighed other things and decided it

would jeopardize my teaching, which is ultimately more important."

Dennis Wimer, the present yearbook faculty adviser, said "In the previous yearbook, some pictures, captions and copy could have been read two ways. They were read the wrong way; people read *into* lines and pictures."

In the past, the principal had allowed almost anything to run, in both the newspaper and the yearbook, "with little censorship." But this year, the original theme for the annual, "Red Tape", has been disallowed, Wimer said.

The theme last year was "In pursuit of excellence," and was depicted by using the design of the board game "Trivial Pursuit." Wimer said administrators felt the students were poking fun at Godwin by implying that the "pursuit of knowledge is trivial."

"The irony of this thing was that Paige resigned and right after, knew that she would get a good standing within the Virginia High School League. The things (administrators) were damning, were the things the people within the field looked at objectively and thought were very

good." The Virginia High School League is the annual statewide publications competition. Over the past three years, Godwin has been awarded first place standing three times, Wimer said.

The students on the yearbook staff probably didn't pursue legal action because they felt it might "damage them in school with their peers and the faculty and administrators," Wimer said. "If they pushed, knowing their rights, they would have been marked, win or lose. So they threw up their arms," he said.

The incidents that occurred at the beginning of the year "put a damper on the students," Wimer said. "They're being truthful (in their coverage), but they're not giving all the truth." After all that, Wimer said sometimes he even wonders, "'Am I going to be ripped out in the middle of the year.'"

Now, "we worry about how they're going to interpret what we print," Oehler said. "After all this mess, I think about it automatically.

"The yearbook this year is going to be really blah, really typical — 'We love our school.'" ■

Oklahoma

# Dispute still stings adviser but school salvaged

Parties interested in the Tulsa School District student publications policies are in dissent over more than just the constitutional aspects of the guidelines. In fact, they can't even seem to agree on whether a current dispute exists.

Attorneys at the Oklahoma Education Association described discussion over the school district's publications guidelines, which began in September 1984 when administrators at Washington High School restrained an issue of the *Hornet Voice*, as "on-going."

But neither the school district's attorney, nor district officials are aware of any discussion. "I thought we put that to bed," said Frances Powell,

the assistant to the superintendent for communications and media information. "Internally, everything has settled down," she said. "The majority of the journalism teachers have not had any problems (with the guidelines) at all." The dispute originally concerned the vagueness of the district's policy, but the school asserted that the newspaper was an integral part and product of the journalism class, and, therefore, did not warrant the same constitutional treatment reserved for an open forum.

But Eileen Simmons, former adviser at Washington High School, present adviser at Central High School, is not satisfied. Her OEA attorney, Karen

Long, said district teachers have been collectively bargaining with the administration and "talking with the school's attorney to see whether we can reach some agreement on a policy that protects the school district's interests, but doesn't limit students."

Any legal action would probably surprise David Fist, the school board's attorney. "I'm not aware of pending litigation," he said. Fist also said he has not heard of further discussion on the case since July 1985.

"Everybody is interested in dealing with the issues," Long said. "But it's up to the students and advisers involved to decide on litigation." ■

## BRIEFS

The vice president of Chemeketa Community College in Salem instructed all student organizations to comply with the provisions of the Oregon Open Meetings law regardless of whether the college is officially covered by the state statute.

Jerry Burger made the decision in January after student reporters for the *Courier Four* were barred from an executive session between the college dean and the student government. Although the state does not recognize community colleges under the statute's guidelines, Chemeketa professors plan to present such a provision to the legislature within the year. ■

A student reporter for *The New Voice* at Hofstra University in Uniondale, N.Y., has been subpoenaed in a criminal assault case. William Berezansky covered a September 1985 fight involving Hofstra students outside a local bar and quoted several witnesses to the incident who requested anonymity. Attorneys for the individuals charged with the assault demanded that Berezansky appear before the court to reveal the names of his sources and turn over all notes he took for the stories. Although New York has a shield law that gives journalists

an absolute right to refuse to reveal confidential sources, the statute does not cover student reporters, says Berezansky's attorney, Marvin Zevin. Zevin has asked the court to recognize a privilege based on the First Amendment that would protect Berezansky and his sources. He expects the court to make a decision on his request by May. ■

Student editors of the *Cougar Review* at Patrick County High School in Stuart, Va., have retained an attorney through the American Civil Liberties Union and have demanded that the school board amend their current publications procedures.

Patrick administrators have refused to allow students to accept advertising from a Pennsylvania draft and military counseling agency, claiming the ads are unpatriotic and inappropriate for the school newspaper. The school's principal has reviewed and censored the paper since the original ad appeared in November. Stephen W. Bricker, the students' attorney, said he hopes to resolve the matter without going to court. "The law is clear in terms of the school system's obligation, going to court on this would be rather pointless." ■



California

# Camera snatching restrains a story

Philip Bacuyani tried to tell the story of an accidental shooting at his Oakland Calif., high school — in a single photograph.

But the 17-year-old managing editor of the Fremont High School *Green and Gold* and 1985 "Cub Reporter of the Year" never got that picture in October. Instead, for his efforts, Bacuyani was given a three-day suspension.

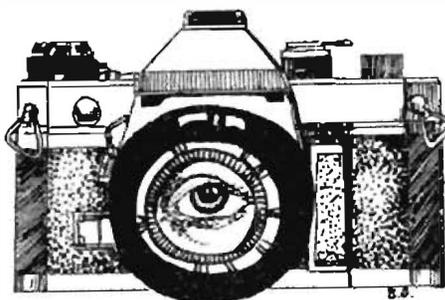
Bacuyani and other student journalists were ordered by Student Services Dean Lee Etta Mouton to stay away from the scene of the accident. But when the student was shot on Fremont's campus last fall, it was big news, and "I didn't think she was justified," Bacuyani said. Disobeying orders, he surveyed the crowded area for an angle from which to shoot the departing ambulance.

Mouton spotted Bacuyani and confiscated his camera. "I didn't mind the suspension so much, but I was mad when she snatched the camera," Bacuyani told *The Oakland Tribune*.

*Green and Gold* adviser Stephen O'Donoghue said Bacuyani talked to American Civil Liberties Union attorneys, but decided not to file suit after Principal Donald Holmstead ended Bacuyani's initial five-day suspension after only three days. Holmstead also told Bacuyani that the suspension

would not be included in the student's personal file.

Edward M. Chen, staff member of the ACLU who counseled the photojournalist, said because the photograph could not have been defined as "obscene, libelous or slanderous," and because it didn't pose a "clear and present danger" of inciting un-



lawful acts by students or substantial disruption of the school's operation, the administration had no justification for even the limited prior restraint allowed for by California state law.

"Dean Mouton's forceful confiscation of Mr. Bacuyani's camera constituted an unlawful prior restraint of

the press in its crudest form. Indeed, such act was more insidious than prior censorship of a publication, as the act prevented the student press from even gathering and depicting newsworthy facts," Chen wrote in a letter to Holmsted.

But O'Donoghue said media coverage may have been most significant in ending this controversy. "We received incredible support from the local media — television, radio and print." He said he doesn't anticipate future squabbles at Fremont over press freedoms because of the attention this case brought to the school. "But I expect (prior restraint) to happen elsewhere, because the state guidelines are never really enforced." O'Donoghue explained "each school district writes up their own guidelines in accordance with legal precedents and state law, to decide how they're going to handle student publications."

Although he admitted Fremont enjoys greater press freedom than most of the schools in the district, O'Donoghue said he suggested changes to Dean Mouton that would alter the existing publications policy. He said he wants a policy that both, ensures administrative control in serious situations and allows students to cover the story. ■

New York

# AIDS story has students up in arms

Student editors and staff members of the *Pace Press* voted not to sue Pace University after administrators forced the editor to resign and confiscated thousands of the Nov. 14 issue that contained a controversial article.

"I pushed for suing," said Denise Wall, the present editor-in-chief of the *Press* on the New York City campus. "But a lot of people on the staff were angry about the article. No one's opinion was asked for before the story was published."

The article, which former editor-in-chief Brian Sookram approved,

was the second in a five-part series on Acquired Immune Deficiency Syndrome. Sookram, a senior, was forced to resign by university administrators because the story used graphic language to describe healthy sex and ways for homosexuals to avoid AIDS, said Roman Brice, managing editor.

The University's chancellor, Dr. Edward J. Mortola, called the article offensive and said it was "inappropriate treatment of an important subject." But "(author, Richard Wells.) had a reason for writing each one the way he did," Wall said. She described

the Pace campus as "conservative" and "apathetic," and said that Wells intended to focus student body attention on an important issue.

"It didn't serve the purpose it was supposed to," said Brice. He said when he read the story during layout, he advised Sookram against running it. "I didn't think it belonged in the paper, but he (Sookram) was determined to put it in."

Brice also criticized the author's choice of words in the article. "He (Wells) said it was incumbent upon

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him to use this language to break through barriers." Instead, Brice said, students were offended by the insinuation that they had to be spoken to in street language to understand the topic. "In the January issue, we did an article on healthy sex guidelines by a doctor;" it was written in medical terminology and the University had no complaints.

Administrators defined their own handling of the situation as "a swift, justifiable act. And the students seemed to agree," Wall said. The Nov. 14 issue was sent to the shredder, and "everyone was pleased," she said. "Pace is not known for its student activism."

"Frankly, the University overreacted," Brice said. "The decision was so emotional that they broke their own rules framed in their constitution for our paper. That shows how much value they have for (the policy), because they walked all over it themselves."

Last fall wasn't the first time the administration has acted "swiftly" when "offensive material" has been published in the *Press*. Wall said in the fall of 1984, when many alumni were visiting the campus, the paper published an editorial regarding the University's MBA program. "The editorial put Pace in a bad light," Wall said. Brice said the administration never admitted they confiscated the



papers, but "made it sound like they disappeared" — all 3,000 of them. "The story was critical of Pace and they were really embarrassed."

Although Brice admitted the *Press* has fewer legal alternatives because Pace is a private university, therefore not entitled to the same First Amend-

ment protection enjoyed by a public university, he said *Press* editors plan to "challenge" the University's publication policies in the future. "We're going to make a real major problem for them and follow journalistic ethics" instead of the rules set down by administrators. ■

## California

# Editor fights censors to save a story

Emelyn Lat, the 17-year-old editor-in-chief of The James Logan High School *Courier*, found herself fighting her own battle last December when school officials attempted to censor an edition of the paper.

Lat was already working on a story about youth gangs in the area near her Union City, Calif., high school, when a 19-year-old student at a nearby school was killed. His death resulted from a decade-long turf war between two gangs: the "All Brothers Together" of Union City and the "Junior Hayward Boys."

Lat originally intended the story for Pacific News Service, but this

latest occurrence of gang violence prompted her to publish the article in *The Courier*. The story was scheduled to run Dec. 16, but James Logan Principal Judy Bender intervened, stopping the story and suspending publication of *The Courier*.

Douglas Baldwin, adviser for the paper, said school officials explained that their actions were meant to insure the safety of the students. "They thought there would be danger on campus, that other gangs would react, that there would be repercussions (from the article) on campus," Baldwin said.

Local media gave extensive cover-

age to the controversy at James Logan, and *The Courier* was published two days later, after a few minor changes were made in Lat's article.

Since then, the gangs have been keeping a very low profile, Lat said. "They haven't been flying their colors anywhere."

In the edited version of the story, Lat agreed to change the description "school gangs" as it appeared in her original article, to "youth gangs," to delete the names of alleged gang members and to eliminate two photographs of teenagers identified as gang members. "I was pretty much satisfied at the end. The essence of the

# CENSORSHIP

story was there," Lat said. "But I still think what they did was wrong."

The journalism students on the paper were familiar with their First Amendment rights, Baldwin said. They met with attorneys from the American Civil Liberties Union, but decided not to sue school officials because cases of this type frequently drag on for years.

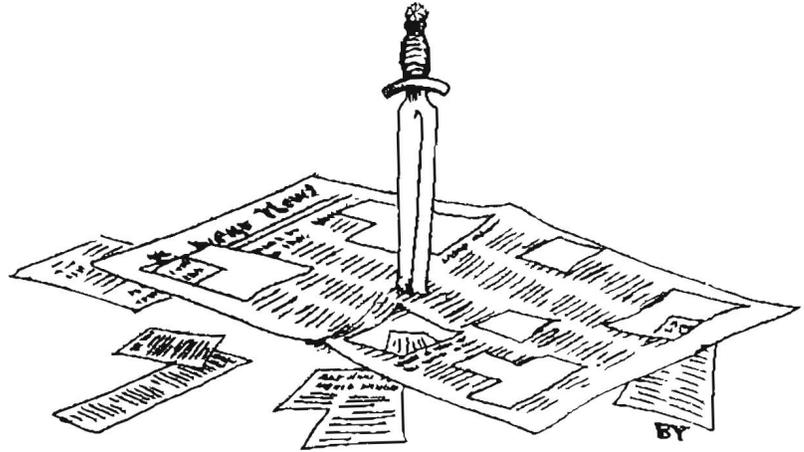
"They feared they would be long graduated-and-gone before (the case) was resolved," Baldwin said. "The students were most concerned with getting the paper out, he said. "It was a Christmas issue, and they cared about it."

Bender had told Lat that she would now keep in close contact with the journalism class, but neither Baldwin nor Lat has met with her, or been informed of any guidelines changes.

"I don't think this will happen again. There's been no effort on the part of the administration to see the next issue (of the paper) and there never has been in the past," Baldwin said.

He said he had worried that his students might have "a feeling of being burned and be more scared to do something. But I haven't seen that yet."

Lat wrote another article that focused on "girls and gangs". She said she wasn't intimidated by the events surrounding the first article. "I don't think they'll let me do anything I want to, but I don't think they'll try this again." ■



## Oklahoma

# Condom quote sparks debate

An editorial in the *Seminole Collegian* started some squawking at the November Seminole (Okla.) Junior College's Board of Regents meeting, and was the basis for a motion to establish guidelines for the student newspaper.

John Pruitt's comment in the Nov. 14 issue of the student paper suggested that the school's current mascot, "D-Bear," wasn't manly enough to represent the Seminole Trojans. "It was suggested that we get a second, more masculine mascot. The two could take sides in 'shouting matches' at future regents meetings." The editorial continued by saying that some students had suggested a "'giant condom' would be appropriate, but who would wear it? (Ted Phillips hasn't been asked yet)."

Pruitt later said his comment referred to the behavior of the Board members at their latest meeting, saying that their last "shouting match" was "childish, and I thought a childish satire would be the way to display this."

Phillips, an SJC regent, objected to the editorial, particularly the word "condom", and told the local paper that both President Greg Fitch and journalism adviser Jeff Cox should be held accountable for "the journalism standards being taught at the school."

Phillips claimed at the meeting that SJC regents act as the "publishers" of the *Collegian* and should have established some guidelines regarding proper standards for the paper. "We need to set some guidelines

so Cox will know how to publish this thing, so his students will know what is in line and what is out of line."

Cox, Pruitt and *Collegian* editor Beth Bergen attended the meeting to defend the editorial. Cox said he read the editorial before it was published. "I went into this thing with open eyes...the one thing I checked for was to make sure it was not libelous, and it is not. I knew that it would be controversial, (but) we have no legal right to censor the school newspaper.

"There's no point in offending people unless you have a real reason to. (The students) have also learned something about libel law, censorship and student freedoms. You've got to take advantage of those freedoms, because there are people who will take them (away from you)." Cox said he thinks his students were informed of their First Amendment rights, but that this controversy reinforced their awareness.

"I thought they handled it well," he said, commenting on the students' reactions. "They aren't more apprehensive now, but they're thinking now in terms of public reaction."

Cox said he agreed that the offensive language included in the editorial could have been avoided and that an alternative word could have "gotten the job done."

"I've taught in class that there is no legal censorship of the student 'press'" Cox said. I taught them the best I could; I'm not going to tell them what to do with the knowledge they get." ■



Nebraska

# UNL classifieds are scrutinized

The editor of the *Daily Nebraskan* no longer has to deliberate over the advertisements that run in the student paper at the University of Nebraska at Lincoln. "There's a separation of powers now," said Chris Welsch, former editor-in-chief and current copy editor on the paper. "Now (advertising decisions are) up to the ad and business managers."

The separation of news and advertising may relieve this year's editor, but a two-year legal battle continues to needle the paper and its publications board.

In 1984, Pam Pearn and Michael Sinn filed suit against the *Daily Nebraskan* and the publications board because the paper refused to accept ads submitted by the students seeking homosexual roommates.

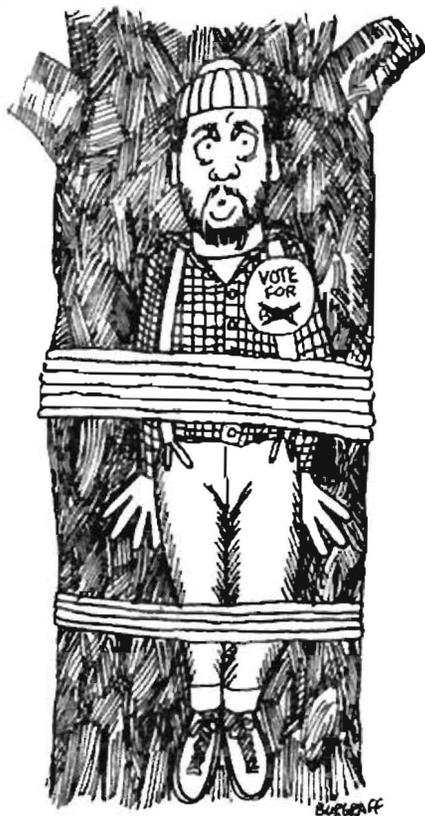
The publications board had already established a "non-discriminatory" ad policy stating that the newspaper should not accept ads specifying race, religion, or marital status. Only for ads seeking roommates could gender and smoking habits be indicated.

Welsh, editor at the time, wanted to hold the ad. "I wanted to think about it, because ultimately the (publications) board sets policy," he said. Welsh said he wasn't sure whether the policy prohibited references to sexual orientation.

After reviewing the submitted ads, the publications board added sexual orientation to the policy. Welsch said he had decided to run the ad. "I think self-description should be allowed. It's perfectly acceptable to discriminate about who you want to live with." But he said at that point the publications board would have fired him had he gone against their decision.

They have raised the question of the public's right of access to the forum of a public school's student paper and the constitutionality of the publication board's policy controlling editorial decisions.

No briefs have been filed in the case to date.■



California

# Lumberjack still trying to fell law

No trial date has been set to argue the dispute between *The Lumberjack*, Humboldt State University's student paper, and the University's Board of Trustees. The paper is still pushing the case, though their attorney admitted it's only slogging along.

Adam Truitt, former editor of the paper, and the rest of *The Lumberjack's* editorial board are pursuing a two-year legal battle that questions the constitutionality of an interpretation of the California Administrative Code.

Title 5 of the code prohibits the funds of any organization in the California State University (CSU) system to be used to support or oppose any political candidate or issue. The introduction of a legislative bill has grown out of this regulation alone, but the paper's fight is over the interpretation of the code by CSU administrators. They determined that under Title 5, all political endorsements had to be

signed to avoid implication that the statements were the official opinions of the paper, the students or the university.

In 1984, Truitt was fired because the paper endorsed political candidates in the name of *The Lumberjack*. The endorsement was allegedly a violation of Title 5 because the paper is funded by the Associated Students of Humboldt State University. Truitt claims the action violates state and federal constitutions.

The California State Student Association (CSSA), who initiated Assembly Bill 1720, claims that Title 5 itself is unconstitutional. The bill is the offshoot of *The Lumberjack* dispute, but the paper and its attorney, Arnie Braafladt, are not in full agreement with the CSSA's suggested amendments.

The CSSA is seeking amendments to the Education Code that allow political endorsements in student papers as long as it states that the editorial position or opinion is that of the publication staff of the publication, and not necessarily the California State University's, or any other entity providing financial support for the publication.

But the bill is still in a conference committee of the California legislature. Paul Knepprath, legislative director for the CSSA, said the bill has been delayed because the CSU Board of Trustees went on record opposing it. "That killed almost any chance we had. We've been working with the trustees for the last six months, addressing their concerns, trying to get this thing to the governor's desk."

Knepprath said their complaints were politically-oriented and content-related. He said the trustees felt they had not been properly informed about the bill. Other trustees feared if they supported the bill money spent on the student papers would be used to support candidates they opposed.

But Knepprath said there are several trustees who support the bill. "We're letting them cool off a bit, hoping they'll change their minds, or at least not be so adamantly opposed." But if the governor vetoes the bill, Knepprath said he doubts there will be enough votes to override it.

He said he expects the bill to reach the governor in April, and Braafladt said he thinks the trial will be later in the year than that.■

## Illinois

## Underground editors prevented from tunneling papers door-to-door at UI

Student journalists and housing officials at the University of Illinois are feuding over newspaper distribution requirements on the Champaign campus.

Door-to-door distribution of the *Illini Chronicle*, a free, alternative student weekly, has been halted by residence halls officials who said distributors of the paper were security risks and solicitors. The *Daily Illini*, a subscription-based student paper still enjoys the right to distribute door-to-door.

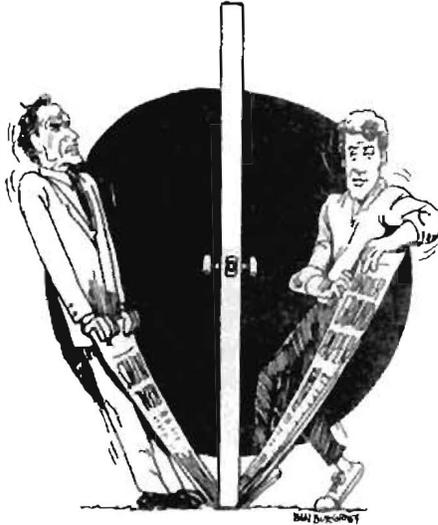
The University does provide stands for publications like the *Chronicle*, said Gary North, University housing director. "There are distribution areas at all public access places, and they're very accessible — they're not upstairs in some janitor's closet," he said.

But editors of the *Chronicle* said the University's distinction between the two papers is unfair. "The University can regulate time, place and manner of distribution, but they must not discriminate," said Mark Royko, managing editor of the *Chronicle*.

"Restraints on one paper and not the other violate the First Amendment. You have to treat the publications equally," said Barbara O'Toole, staff attorney for the American Civil Liberties Union. The ACLU is providing counsel for the *Chronicle*.

But North said he told publishers if they provide him with a list of subscribers, he will allow them to distribute the publication door-to-door. Mike Cleary, editor of the *Chronicle*, claims he was told a different story and that his offer to charge subscribers a penny was rejected. "One problem Gary North has is understanding that a penny is as good as a dollar (in this situation)."

O'Toole said she asked the University's attorney for their policy on subscriptions. "I've had no response from him," but the issue of paid subscriptions will be investigated.



"We're looking at whether the University has made a narrow, specific, objective rule for distribution. In First Amendment law, you can't make up the rules as you go along."

Cleary said he thinks the real reason housing officials object to the *Chronicle* is because "it's different." *Chronicle* editors readily admit their alternative paper is different in content from the *DI*. It is a politically independent paper which runs up to 12 pages an issue and covers news that Cleary claims the *DI* doesn't want to get involved in. He said the *DI* practices journalism in a kind of "USA Today vein — it's more streamlined — for the masses," Cleary said.

Royko and news editor Phil Rockrohr are former *DI* staff members, but the *Chronicle* offers them "more freedom and a chance to try something different," Cleary said.

The paper is not only independent politically, but it is also independent from the school, North said. And this fact adds to his list of gripes against door-to-door distribution rights. "If this were a regular student organization, it would be different. They

would have different distribution rights. (But) they don't want to be associated with the university. They've made that very clear."

All these publications requirements are included in the residence halls handbook, North said. But O'Toole said "There is nothing in the book authorizing a ban on the *Chronicle*."

"The *DI* is not an (official) student organization," Royko argued. "If you become one, you have to funnel all money through the University and there are certain things you can and can't do. The bottom line is, they don't want anyone else in the dorm because it's a bureaucratic hassle." He said the "security risk" North mentioned was not a legitimate argument because *Chronicle* distributors work only in their own dorms.

North also questions the validity of the paper's news dissemination because of the amount of advertising it contains. "Essentially this is a commercial paper and it falls more under the solicitor area than distributor."

Although the *Chronicle* covers hard news, Royko admits that they depend on advertisements to stay afloat and to make a profit. "We have to be able to distribute under the doors, there's more advertising impact. Advertisers don't like the idea of things (papers) being dumped."

The American Civil Liberties Union wrote the University requesting their position on the distribution issue, but no response has been given, O'Toole said.

In the meantime, the *Chronicle* is in financial trouble. "We're pretty much out of business. The dorms were about half of our circulation. We've lost ads and we lost money last semester," he said.

"We're a student paper," Royko said. "Any rights they give to the *DI*, they have to give to us. This is a basic principle of freedom of the press. They have no concept of this, and they've folded our paper." ■



Virginia

## Students push for new policy

The Student Advisory Council for Fairfax County, Va., public schools, decided in March it was time for a change. The body, which represents students from the district's 24 high schools, officially voted to amend the publications policies in the student handbook, and presented the changes to the school board.

But a week after receiving the students' opinion, the school board notified the SAC that it would not act on the vote. Paul Galison, chairman of Langley High School's SAC Students' Rights and Responsibilities Committee, said.

Mary Collier, chairman of the Fairfax County School Board, said the committee she referred to as the Student Government Association, did officially request amendments in the policy. "We have sent (the proposals) to our attorney and we're working on a response to the request," Collier said.

Galison said he was surprised the school board had acted on the matter at all, because the response from the school board indicated that members had no evidence of problems with the current policy. "I thought, in the letter, they said they're not going to do anything about (the policy) because they don't think it needs to be changed."

Students, however, have scrutinized the policy since February 1984, when an editor of an underground newspaper was suspended from Fairfax High School for distributing his publication on campus. The district policy re-

quires that all material intended for distribution must first be approved by the principal. Brian Corbey who graduated last May told the *Fairfax Journal* that his three-day-suspension was "for hurting another person's feelings."

Corbey published his *Ratical* during the 1985-86 school year without punishment, but in June, a student editor at Langley High School was not so fortunate. The co-editor of *The LOON*, who writes under the pen name "Boris," was suspended for "illegal distribution of material."

These were just two of the estimated half dozen underground newspapers distributed in Fairfax County public schools last year. But many of those, including the *LOON*, have since shut down. Students "were scared to get involved," Galison said. Other students have made attempts at newspapers, but Galison said none have been very serious, and the papers weren't distributed. "They're just dropped on the ground. (The administration) can't bust you for that."

The fourth edition of *The LOON*, billed as Langley's only objective newspaper, exemplified exactly what administrators and school board members said they find objectionable. The publication not only encouraged students to protest apartheid in South Africa, but administrators felt it encouraged drug use. The *LOON* ran a recipe for Apple Pot, a dessert that calls for one quarter cup of marijuana. "We're not dealing with obscenity," Collier said. "We're dealing with en-

couraging the use of illegal substances, and that's a big issue. We don't allow that. It's counter to school board policy."

Although "Boris" claims the recipe was intended as a joke, Galison cites in his letter to the school board a Fourth Circuit decision that determined "material advocating illegal actions cannot be uniformly prohibited in a prior review guideline. Rather, advocating illegal activity can be prohibited only to the extent it will create a substantial disruption of or material interference with school activities." *Baughman v. Freienmuth*, 478 F.2d 1349 (4th Cir. 1973).

Galison and two other seniors at Langley, Colin Fisher and Adrian Bardon, have been working on amending the Responsibilities and Rights manual since "Boris" was suspended a year ago. They are requesting that the publications policy be amended "to the extent necessary to meet the constitutional requirements for prior review of student publications guidelines." Those requirements would make the existing guidelines more specific, and would only restrain publications defined as libelous or obscene, or publications that "create a substantial disruption of or material interference with school activities." *Nitzberg v. Parks*, 525 F.2d 378, 383 (4th Cir. 1975).

"We do have a policy in the school system requiring some review because parents expect that, in terms of student activities," Collier said. She said the school board's attorney has had the proposed amendments for a few weeks and she expects a decision soon. "But I don't foresee any changes."

That won't surprise Galison. "We're pretty sure they're not going to accept it," he said. "Since there's no action, no legal pressure now, they probably won't accept it without a big fight. (The school board members) are all very conservative. They like the status quo."

"We're hoping to engage them in some legal battle," Galison said. "But first we're giving them a chance to change without force because we think it's the fairest thing we can do. But if they say no to the suggestion, we may have to add bite to our argument."

"We're not calling for anything radical," Galison said. We're trying to update Fairfax County with the rest of the world." ■

Florida

Four represent thousands with *Not For Profit*

Manny Sferios has, in part, accomplished his mission. The students in Pinellas County, Fla., high schools are starting to "open their eyes", thanks to the 16-year-old's magazine, *Not For Profit*.

But if Sferios is going to keep his peers awake, he'll have to fight the Pinellas County School Board to do it. The board voted to ban the "zine" after the first issue of the Pinellas underground was distributed last October. It has been labeled a "filthy rag" by some administrators because it contains "dirty words" and scathing criticism of local board members and national and international figureheads.

But Sferios thinks his publication is worth fighting for, so he and three other students have filed suit in federal district court against the school board, on behalf of all area public high school students. The exact number of students that includes is not known, but it would not be less than 5,000. Michael S. Schwartzberg, Sferios' attorney, said his clients are suing for the right to distribute and the right to receive *Not For Profit*, because with a "blanket ban on distribution, all of the students' rights have been denied."

Schwartzberg filed a request for a permanent injunction that, if approved, would allow Sferios to distribute the fourth issue of his bi-monthly magazine while the dispute is being settled.

As a junior in high school, Sferios said he was "freaked out" that his peers knew "more about make up than about how close we are to blowing ourselves up." He said he was amazed when his friends knew nothing about apartheid, a subject he gave much attention to in the October issue. "They don't read the (local news) paper," he said. So Sferios and some other friends decided to start a student publication that would "get students communicating with each other on important issues."

But the magazine not only raised

consciousness, it also raised some eyebrows in the community that Sferios said has been labeled "the retirement capitol of the world," since the release of the movie *Cocoon*.

Sferios broke the school board's publication policy when he failed to submit *Not For Profit* for review prior to distribution. "He didn't follow the procedure," said B. Edwin Johnson, attorney for the school board. "We haven't gotten to (the question of) content yet." Johnson did say the magazine contained four-letter words, although he admitted those words could not be defined as obscene. "Obscenity is not the issue," he said. The question is, "are Pinellas County school district kids allowed to produce this kind of material, and if not, why should a non-public school student be allowed to?" (Sferios moved from St. Petersburg High School's zone and now attends the private Thom Howard Academy.) "I'm talking about words with A's and F's," Johnson said. "This is not the kind of language we teach our journalism students."

Issues of *Not For Profit* were confiscated from students, and Sferios said officials at the school even searched his locker for the "obscene publication." He was ordered not to distribute the magazine on school grounds. About 3,000 copies of *Not For Profit* were printed for distribution to the 13 area high schools.

The American Civil Liberties Union and Schwartzberg advised the students to distribute the magazine off school property "to avoid hassles. We gave them (the school) every opportunity to back off," Schwartzberg said. "It was our intention not to pursue it if they (school officials) allowed them to distribute off campus. At least then, kids could take it home to read it." But school officials confiscated copies of both the second and third issues of *Not For Profit* when students brought them back on campus, claiming that the magazine was obscene and unsuitable for the

curriculum.

Johnson said the problem with the publication is "not so much that it's an underground paper, produced by a non-Pinellas County public school student, it's the fact that it contained advertisements." Johnson said the school district has a blanket policy disallowing the distribution of advertisements on campus. "We don't want our schools cluttered with garbage." The official school newspapers are, however, partly funded by advertisements.

But "this is an underground document," Johnson said. "This boy, who is not a Pinellas County school student, is trying to distribute a document that contains paid advertisements. You know, Pizza Hut couldn't come in here and pass out flyers and say 'come on in for some great pizza.'"

Schwartzberg said he had not yet been informed of the school's position on paid advertisements in *Not For Profit*, but he said, "I would love for them to make that argument, because then we could nail them on the Equal Protection Clause (of the 14th Amendment)."

Only the complaint has been filed in the case, and Johnson said he expects litigation to last at least a year.

Already, Sferios has been the trail blazer for other students interested in publishing papers. He said that he knows of five that have come out since his first issue. Most of these didn't use four-letter words and were circulated only in the editor's own high school. Sferios said he doesn't think these others followed suit "just to piss off the school board. I think they have a genuine interest in world events. And to me, that's great."

"Other kids are using the rights they have, once they realize they can. So many never knew they could do something like this, legally. They thought the school board had the ultimate authority." ■



Florida

# School changes policy and settles with student

A seventh grader and the Venice Area Middle School she attends in Florida finally "ironed out their differences" in April and settled their case out of court.

"The school admitted they were wrong in prohibiting the distribution of Testaments," said the student's attorney, Larry L. Crain.

In May 1985, Rebecca Higgins was "admonished" by her principal, for giving copies of the New Testament to her sixth grade reading teacher and classmates, following her secular book

report on the Bible. Principal John Zablakas, Higgins claims, confiscated the testaments from the students and told her "what she had done was illegal." Higgins said she offered Bibles only to those students requesting them.

Higgins said when she distributed Bibles at school the next day, she was escorted to Zablakas' office, where he and three other school officials "interrogated (her) concerning her religious beliefs and affiliations." She claims she was told not to repeat her actions. The Bibles were returned to Higgins on the condition that they be taken to her locker.

Zablakas and his attorney argued that the school's actions were consistent with the requirements in the Establishment Clause of the First Amendment. The clause compels governmental bodies to remain neutral concerning religious matters, thereby upholding the principle of separation of church and state.

But Crain, staff counsel for the Rutherford Institute, a nonprofit legal defense organization specializing in First Amendment freedom of religion issues, said that argument was not viable. "There was no involvement by the state. There was no sponsorship by teachers or staff. This student voluntarily passed out Bibles." To back up his argument, Crain cited *Sullivan v. Houston Independent School District*, 307 F. Supp. 1328 (S.D. Tex 1969), which decided that "the right of free speech also protects distribution of literature by students while on school property."

The parties finally agreed that no student may be questioned about his or her religious beliefs and that a statement regarding distribution of religious literature in the Sarasota County School System policy would be amended. Crain said he originally wanted the school to designate an area for distribution of religious materials, but the board voted that down. ■



New York

# Confiscated film was catalyst for student lawsuit

Upstate New York is known for its rough winters.

Although the climate this season in Ithaca was no worse than in past years, conditions in the New York burg's public high school have been, notably, more turbulent.

Problems began when changes in student publications policies were announced just before Ithaca High School recessed in late December for winter break. Students and administrators clashed over this and other First Amendment issues throughout the semester, until in March one controversy finally erupted into a law suit.

Michael Heath, a junior at IHS, has filed suit in federal district court against the Ithaca City School District for violations of his First and Fourth Amendment rights, said Elizabeth Bixler, the student's attorney. Daniel Bordoni, an attorney with the firm of Bond, Schoeneck and King which represents the school district, said he has not been informed of a filed complaint. "Don't be so sure a law suit is pending," he said.

In March, Heath photographed the principal and student Gabriel Borden following a discussion about



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Borden's suspension. John Caren, IHS principal, said photographing the incident was disruptive and an invasion of Borden's privacy. He confiscated Heath's film. Heath claims the suspension was newsworthy and as photographer for the official school paper, the *IHS Press*, and the yearbook, he had a right to snap the photograph. Borden and his father have signed forms permitting Heath to develop the roll, but the principal has refused to return it.

"His position seems to be that (that photograph) violates the integrity of the disciplinary process," Bixler said. The principal's act was an unlawful seizure of property, and a violation of Heath's Fourth Amendment rights, she added. Bixler also said another student later photographed other students being disciplined, but that the photographer "stood up to the principal, and he (Caren) backed down" when she refused to give him the film. The student was not disciplined.

Heath's interest in the controversial photographs was sparked by Borden's controversial suspension. Borden, a senior, was suspended for distributing his unofficial student publication, *The Thing*. He failed to exhaust the schools appeal process after the director of student activities reviewed *The Thing* and decided the satirical magazine was inappropriate for campus distribution. Caren informed Borden that the magazine "may have problems with copyright laws; contains advertisements to sell materials for profit; and contains material which is not appropriate to be distributed on the high school campus." But Borden's first *Thing* in December was not submitted for prior review, and he said the administration never reprimanded him. Caren said he didn't know the paper existed.

Prior review of unofficial student publications has been the topic of debate since December when Caren first attempted to change the school's policy. The high school has occasionally been "denounced for its permissive bent," but the District's policy book is more conservative, in that authorities may regulate the content of these publications in order to avoid "material and substantial interference with the requirements of appropriate discipline in the operation of the school," and to prevent publi-

cation of material that is legally obscene or libelous. But Caren announced his decision to discontinue reviewing "unofficial" student publications, thereby removing himself from the screening process required by the Student Handbook.

"The censorship role has really been uncomfortable for me," he told a local newspaper in January. He said, in the past, community members have misinterpreted his role and assumed that he agreed with material just because it passed his review. But because publications were no longer subject to review, Caren required that their distribution be limited to non-school hours.

Student editors of two other unofficial newspapers balked. Paul Rossi, 16, editor of *The Spectator*, and Peter McMurray, 17, editor of *The Young Plumbers Weekly*, complained that the changes in procedure actually imposed greater restrictions on their freedom of speech.

*The Spectator*, a political/literary newspaper, and winner of a first place certificate in a Columbia Scholastic Press Association contest, is funded by advertising. Rossi and McMurray, whose humor magazine is funded by subscriptions, said they were more in favor of retaining the old policy of censorship. Both feared that the new constraints on distribution would reduce the number of recipients of the papers and would hurt them financially.

The dispute was widely publicized in January, and Caren eventually reneged on his decision to limit

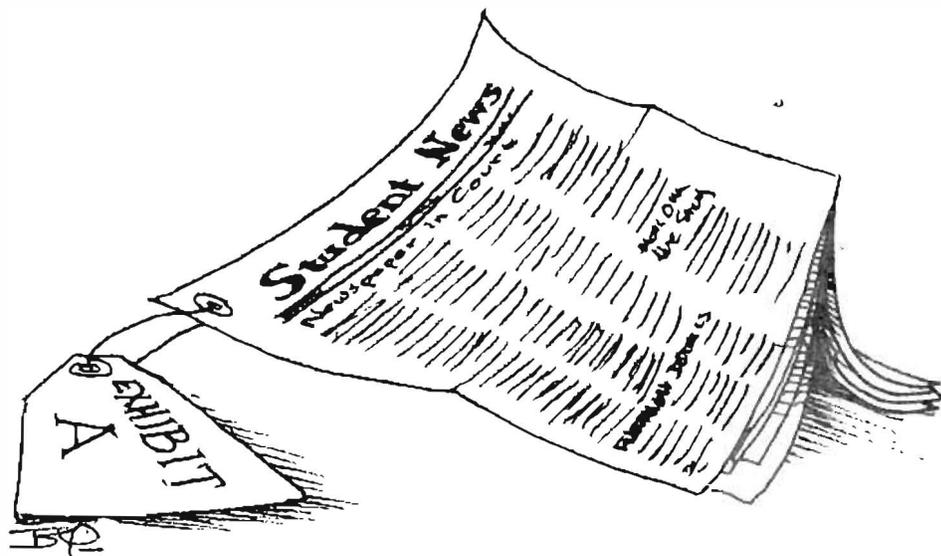
distribution saying that it might be illegal. He reinstated the policy of prior review.

"Whatever he's done, now conforms to the general rules regulating time, place and manner," said Leslie Deming, of the school district's law firm. The courts have ruled that a school may establish reasonable time, place and manner restriction on editors, so that distribution does not disrupt the normal operation of the school.

Borden's suspension was eventually waived with the understanding that he would not distribute until the issue in question had been approved via the appeals process. After a publication is rejected by Caren, it is sent to the superintendent, then the school board.

But "I'm troubled by the screening process in itself," said Nelson Roth, an Ithaca attorney who counseled Rossi in January. "I don't understand this," he added. "Ithaca is a highly educated community with a high percentage of involved students. And these students are making admirable attempts (to produce good publications). This seems counter productive."

The district's policy was also criticized in a March 6 *Ithaca Journal* opinion. The local paper's editorial said "screening and censorship ought to be abandoned: . . . An adult society that has been unable to define 'pornography' or 'obscene' can't ask school principals to take on this task and act as unwilling censors, on top of everything else." ■



Kansas

# High school cable show in Shawnee Mission avoids controversy to promote the district

Every six weeks one of the five public high schools in Shawnee Mission, Kansas, produces a news program to be aired on a local cable station. But, as students and advisers have learned, calling the broadcasts "news," is a bit misleading.

For more than four years, the Shawnee Mission School District has provided "a lot of money to give students some kind of experience in production and speech before a camera," said Shawnee Mission South's principal, Charles Nichols. But when Shawnee Mission South's program, KSMS-TV, tried to cover last September's contract dispute between the school board and teachers, the district

decided they needed to clarify their goals for the program.

"The district never visualized this as another avenue of journalism," Nichols said. "It's intended to publicize school events." But Cathy McNamara, KSMS-TV adviser said the dispute was an issue the students couldn't ignore. "Teachers were demonstrating in front of the school."

But that kind of event wasn't one the district wanted to publicize, and the program's lead story was censored before the October airing.

"There are many things to learn in TV production other than journalism," said Wayne Hickox, Educational Media Director for the District.

"And there are many good things in the district to promote. We don't get a whole lot of coverage on good things. We get all the bad things we need," he said. Hickox said, the program, was intended to create good public relations for the district, and he equated that to a magazine, rather than news format.

But the original format featured student anchors at desks, "and that's news," said Susan Coughenour, newspaper adviser, and adviser of KUGR at Shawnee Mission Northwest. "We were mandated to cover nothing controversial, but my background is in journalism, so I had a real difficult time when (the district) told us what to do.

"My argument is, if we're going to do news, let's do news with a news format. But if not, let's not call it news. Let's get some good equipment that serves the PR purpose so we can put together a slick, glitzy package that has high impact," she said. "(As it is now), we end up covering organizations that have done well and sports that have done well."

That is exactly what the district envisioned, Nichols said. "Since the idea is not journalism, strictly speaking, there's no reason for controversy. This is not another *60 Minutes*."

Coughenour said broadcast journalism was the area that interested her students. She said about 1/3 of her class is composed of students who also work for the school paper. "From the beginning, the students wanted the program to be more 'Mike Wallace style' — like *60 Minutes*, or *20/20* — looking into the problems in an issue," she said. "At first, the students were very frustrated" by the limitations imposed by the district. But Coughenour said the students have complied with policy and never tried to cover anything that could be considered anything but public relations, so she has not be confronted with censorship.

Following the controversy at Shawnee Mission South, Nichols said advisers and administrators from the



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five high schools met and agreed that any material that might be controversial would be submitted to the principal of each school.

McNamara described the newly established process as a "system of checks," — a principal first screens the material, and then passes it to other officials in the district for their approval. Two stories McNamara submitted to Nichols were delayed from airing, because he was "too busy" to review them. "The problem then is that we lose the timeliness of the issue," McNamara said. One of the stories, on the Kansas drinking age, was eventually rejected.

The story opened with a shot of students in front of a local bar, "with ads and neon signs in the windows behind the students, indicating that's where all the South kids go to drink," Nichols said. He said he perceived the story as promotion, and "the promotion of alcohol is not something I'm comfortable with. We don't allow alcohol ads in the yearbook or newspaper." Hickox said he was unaware of the rejection, but said, it's the principal's decision. We don't allow our kids to cuss on TV either."

The guidelines assigned to the broadcast show do not affect any of the high schools' newspapers. *The Patriot*, Shawnee Mission South's student paper, covered the teacher contract dispute and even ran an editorial submitted by a *KSMS* staff member complaining about the program's censorship. "I don't feel this (censorship) will affect the paper," said *Patriot* adviser Linda Barber. "I have enjoyed freedom for seven years since I've been here; no one ever reads (before distribution) or censors the paper. Dr. Nichols has been wonderful in working with us," she said.

"There have been several stories that I thought might cause problems," she added. And he has backed me up 100 percent and given me information on court cases backing up student press rights. So he's not unaware of press rights.

"I don't understand why the TV station isn't handled the same way," Barber said.

But Nichols said there is a difference. "I'm aware of the positions on student journalism, but I don't see this as the same type of thing.

And if it came to fighting for media rights, teachers admit they might treat the TV program differently.

Nancy Hall said her position as *KSMN* adviser at Shawnee Mission North was just another deadline dumped onto her already full schedule as newspaper and yearbook adviser. She admitted that that burden could be the reason she might approach a controversy affecting television differently than she would print journalism. "I'm not in the habit of hesitating if it involves the paper. But I don't know if I would go out on a limb (for the TV program)."

Coughenour cites other reasons for her apprehensions about battling the

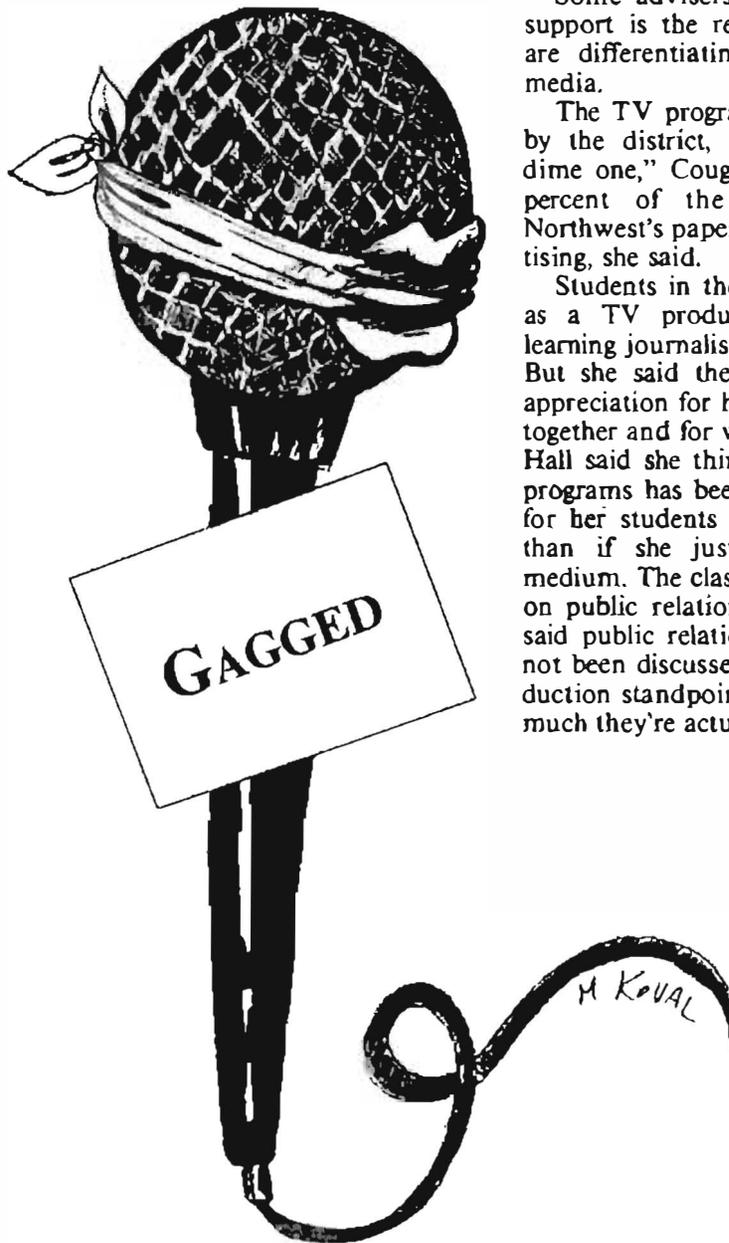
administration on behalf of the program. "I've already been to bat for the paper this year," she said. "But with broadcast, it's so fuzzy, there's no true law. There's nothing to look at to say 'here's what will happen if we run this.' I can look at the law with print. But with radio and TV, I don't know if I'm right," she said. "That's the most frightening thing. If I could say 'we're right,' (I'd fight for the TV program), but I don't want to go to bat and lose."

Nichols explained that "the district is pouring a lot of money into this to give the students some kind of (production) experience," and Hickox added, "If the program is not going to accomplish what the district intended, we'll just stop."

Some advisers think the financial support is the reason administrators are differentiating between the two media.

The TV program is totally funded by the district, "We can't pitch in dime one," Coughenour said. But 65 percent of the Shawnee Mission Northwest's paper is funded by advertising, she said.

Students in the class, now "touted as a TV production class," aren't learning journalism, Coughenour said. But she said they have acquired an appreciation for how a program is put together and for what they see on TV. Hall said she thinks the airing of the programs has been a good experience for her students and more beneficial than if she just talked about the medium. The class doesn't have a text on public relations, and Coughenour said public relations techniques have not been discussed. "Beyond the production standpoint, I'm not sure how much they're actually learning." ■



## Electronic Journalism

# The First Amendment Extends Beyond Print

Radio and television are an important part of life for students in the 1980s. Many grew up on television and the popular music of radio, and studies show most rely on these electronic media as their primary source of news.

Significantly, student journalists are frequently becoming a part of radio and television themselves. Today high schools and colleges have student-run stations that provide news and programming, much like the student newspaper, for the school and community.

But with the popularity comes the problems that student newspapers have been facing for years. Censorship, sometimes blatant, sometimes subtle, is turning up at student radio and television stations across the country leaving electronic media journalists wondering just what their legal rights are.

constitutional protections attach and that medium must be operated in accord with First Amendment principles. As the courts have long recognized, "the fact that a public authority provides funds for the establishment and maintenance of a forum does not bestow absolute control over the content of expression taking place therein."<sup>1</sup>

Thus, the first and foremost question in evaluating the legality of the censorship of any state-run medium, such as a newspaper or radio station at a public school, must refer to what has been called the "forum theory." Was this medium established as or has it become a forum for student expression?

The forum theory was most clearly applied to the student media in the landmark 1977 case *Gambino v. Fairfax County School Board*.<sup>2</sup> That case established that a school-sponsored student newspaper which operated "as a conduit for student expression on a wide variety of topics" was protected by the First Amendment from censorship by school administrators. The court in *Gambino* noted several factors that contributed to its determination that the student newspaper, *The Farm News*, was a forum. The paper ran student stories and opinions on topics other than those ordered by school officials. In other words, *The Farm News* provided opportunities for students to voice their opinions or report on issues of interest to them.<sup>3</sup>

Many other student newspapers, magazines and yearbooks have relied on *Gambino* to establish their standing as a forum for student expression. Letters to the editor, editorials and advertising in a student medium have each been seen as strong evidence of forum status. Similarly, the fact that a publication is circulated to students or members of the community beyond the publication staff creates a strong implication that the activity is not merely an academic exercise. A non-forum publication would more likely remain in class files.

Practically, there is almost no student newspaper that does not qualify as a First Amendment-protected forum for student expression. Student radio and television stations may or may not be so different.

Many public university-run television stations are managed by non-student employees who may serve as editors, station managers or program directors with students working as reporters or production assistants. Such a station is less likely to be considered a forum for student

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Although there have been no reported court cases involving the censorship of the student electronic media, student journalists and teachers need not feel as if they are operating in a legal void. The relative wealth of cases involving student print media censorship provide significant guidance as to how a court would look at the censorship of any student medium. In addition, a recent case involving a public university-owned television station gives helpful insight into the issues in question. All of these cases indicate that the relevant legal distinctions between print and non-print student media are fewer than one might think.

An important starting point for discussion about censorship of student electronic media is to note the fact that no public school is required to start a student newspaper or radio or television station. The decision to establish a medium as a forum for student expression is left committed to the discretion of school officials. However, once that decision is made and a medium is created as a means for student communication or expression,

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expression than would a cable station at another school where the editorial positions are filled by students. The key is whether the station has become an avenue for students to express themselves.

A school cannot "foreclose constitutional scrutiny" of its censoring actions simply by labelling a student medium as a public relations device or as a curricular tool.<sup>4</sup> Once a student medium is determined to be *in substance* a forum for student expression (that is, students are given more than minor control over the topics covered or opinions issued), school officials are bound by the prohibitions of the First Amendment.<sup>5</sup>

One recent case came close to confronting the issues that would be raised in a student electronic media censorship dispute. *Muir v. Alabama Educational Television Commission*<sup>6</sup> involved an incident of "censorship" at two state-owned public television stations, one of which was run by a public university. Both of the stations had refused to air a controversial Public Broadcasting Service program called "Death of a Princess," a dramatization of the events surrounding the 1977 execution for adultery of a Saudi Arabian princess. Regular viewers of the stations filed lawsuits claiming that such an action by a government television station violated the viewers First Amendment rights.

The court in *Muir* ultimately determined that the state-run stations had not violated the viewers rights, but in reaching that decision it made careful use of the forum analysis. It noted that the First Amendment "condemns content control by governmental bodies where the government sponsors and financially supports certain facilities through the use of which others are allowed to communicate and to exercise their own right of expression" and cited several student press cases for that assertion.<sup>7</sup> The

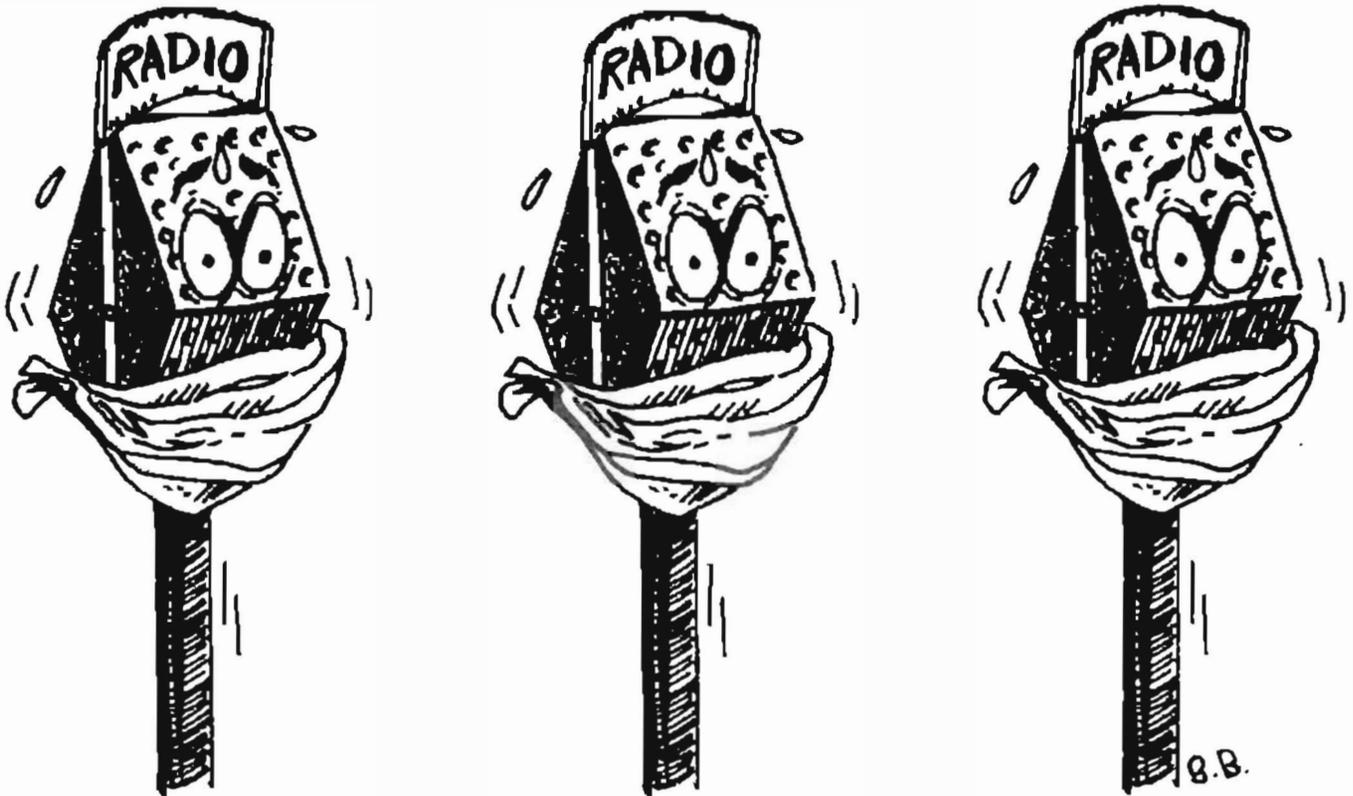
court decided the PBS-affiliate stations in question were not public forums because they did not provide the general public with a right of access to their use. But both the majority and the dissenting judges in *Muir* recognized that a claim of censorship in a government-sponsored medium must be examined "in the context of the existing editorial format."<sup>8</sup> Many school-sponsored radio and television stations *do* allow students to communicate and to exercise their own right of expression. *Muir* strongly implies that censorship of a student television station would be no more permissible than is censorship of a student newspaper.

Once the forum for student expression determination is made, strong First Amendment protections apply. As court after court has held, financial support does not entitle a school to control content. Censorship of constitutionally protected expression cannot be imposed at a public high school or college by punishing editors, suppressing distribution, requiring approval of controversial articles, removing displeasing material, withdrawing financial support or asserting any other form of censorship based on an institution's power of the purse.<sup>9</sup>

However, the law has recognized that the free expression rights of students can be limited by school officials in extreme situations. When it is necessary to avoid material and substantial disruption of school activity, some sort of speech restricting action may be appropriate.<sup>10</sup> But courts have made clear that this disruption standard means much more than lively controversy, and it is a standard few schools have been able to meet.<sup>11</sup>

Some school officials suggest that there is a special justification for censoring a student radio or television program simply because the medium is different from that

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of a student publication. But for a non-broadcast station, this appears not to be the case. There is no recognized legal distinction between closed circuit television, for example, and newspapers or magazines that could justify any different First Amendment protection. But with broadcast stations a justification may exist.

All broadcast stations, that is, those radio and television stations that send their programming out over the airwaves to be picked up by the antennae of their listeners and viewers, are licensed by an agency of the federal government. Because there are a finite number of spaces on the broadcast spectrum, the Federal Communications Commission has been given the authority to assign broadcast frequencies to radio and television station applicants in a way that furthers the public's interest.<sup>12</sup> This authority has allowed the FCC to require that broadcast licensees cover all sides of a controversial issue (the "Fairness Doctrine")<sup>13</sup> and avoid the use of "indecent" language during child-listening hours.<sup>14</sup>

When a student broadcast station is licensed to the school (as opposed to an independent organization), school officials might be able to justify certain acts of censorship by showing that the censorship was necessary under the terms of their license with the FCC. For example, a student broadcast reporter who uses a string of four-letter words during his daytime broadcast would probably not be able to claim a First Amendment violation if the school punished him as a result of his speech. But the weight of student media law makes clear that a school official that took such censoring action would have the weighty burden of demonstrating that the school's duties as broadcast licensee required him to enforce such a punishment. Vague references to FCC requirements without substantial evidence to back them up would not suffice.

These content-related restrictions on broadcast stations have been held not to apply to individual cable station programmers.<sup>15</sup> Thus, only true broadcast licensees could use FCC requirements as a justification for censorship.

The implication of all this mish-mash of cases does make one point clear. Student radio and television journalists are not living in a First Amendment limbo. Like their Colleagues on newspapers, magazines and yearbooks, these young reporters and editors have the legal right to be free from the unconstitutional censorship of school officials. ■



<sup>1</sup>*Antonelli v. Hammond*, 308 F. Supp. 1329, 1337 (D. Mass. 1970).

<sup>2</sup>429 F. Supp. 731 (E.D. Va.), *affirmed per curiam*, 584 F.2d 157 (4th Cir. 1977).

<sup>3</sup>429 F. Supp. at 735.

<sup>4</sup>*Trujillo v. Love*, 322 F. Supp. 1266, 1270 (D. Colo. 1971); *Gambino*, 429 F. Supp. at 734.

<sup>5</sup>*See Gambino*, 429 F. Supp. at 734.

<sup>6</sup>688 F.2d 1033 (5th Cir. 1982), *cert. denied*, 460 U.S. 1023 (1983).

<sup>7</sup>688 F.2d 1043. *See also* 688 F.2d at 1050 (Rubin, J., concurring).

<sup>8</sup>*Id.* at 1058 (Frank M. Johnson, J., dissenting).

<sup>9</sup>*See Joyner v. Whiting*, 477 F.2d 456, 460 (4th Cir. 1973).

<sup>10</sup>*Tinker v. Des Moines Independent Community School*

*District*, 393 U.S. 503 (1969).

<sup>11</sup>*See Courts uphold, expand Tinker standard*, Student Press Law Center Report, Winter 1985-86, at 35.

<sup>12</sup>Federal Communications Act of 1934, 47 U.S.C. sections 151-609.

<sup>13</sup>The constitutionality of the Fairness Doctrine is currently being questioned in the courts. *Radio-Television News Directors Assn. v. FCC*, No. 85-1691 (D.C. Cir.).

<sup>14</sup>*FCC v. Pacifica*, 438 U.S. 726 (1978).

<sup>15</sup>Fairness Doctrine only applies to programming created by the cable system franchise, not individual station programmers. 20 F.C.C.2d 201 (1969). Regulation of indecent but not obscene speech cannot be regulated on cable television system. *Community Television of Utah Inc. v. Roy City*, 555 F. Supp. 1164 (1982).

## The Right To Be Let Alone

# When Reporters Invade Privacy

In the pursuit of journalistic excellence, student writers often lean towards "hard-core" investigative reporting. This kind of reporting can give rise to serious invasion of privacy questions, whether the reporter is taking a picture of someone in a private place or recording a private conversation. It is important for the student journalist to protect himself by knowing the limits of invasion of privacy law as they exist today.

increasing concern to everyone in the United States. Technological improvements have made otherwise private lives accessible to those with an interest. The advent of telephoto lenses and wiretapping devices have greatly improved the ability to "get the story." In the realm of journalism, privacy issues have come in conflict with the freedom of the press rights guaranteed by the First Amendment.

Four kinds of invasion of privacy claims have been recognized by the courts: intrusion, portrayal in a false light, public disclosure of private facts and appropriation. Privacy is considered a personal right, and only the individual involved can bring suit except in the case of a minor when the parents can also initiate action.

Few privacy cases involving the student press have actually gone to trial; however, a number have been filed in recent years. It should be noted that almost all the cases which have been settled out of court have involved the publication paying the plaintiff.

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As this field of law develops the threat of privacy suits grows for all journalists including those of the student press. At any time if an individual feels that his privacy has been invaded it is possible that you, the student journalist, could be sued. Another ramification of privacy issues possibly of more immediate concern for the student press is that administrators may come to lean on privacy concerns as a basis for censorship.

The student journalist should always be aware of and concerned about the delicate balance between an individual's rights to privacy and the reporter's rights under the First Amendment.

The legal right of privacy has been defined as the right to be let alone, the right of a person "to withhold himself and his property from public scrutiny if he so chooses."<sup>1</sup> However, privacy is not a right explicitly guaranteed to citizens of the United States by the Constitution or the Declaration of Independence. In fact, privacy was not considered part of American or English common law until 1890.

At this time an article appeared in the Harvard Law Review written by two Boston lawyers, Samuel D. Warren and Louis D. Brandeis. The article was a response to complaints by the city's prominent citizens of a "yellow press" that served "idle and prurient curiosity." Brandeis and Warren held in their article that previous defamation and breach of confidences cases had actually been decided on the larger concept of privacy. They went on to say that privacy was necessary to protect private people from "mental pain and distress far greater than could be inflicted by mere bodily injury."<sup>2</sup>

Since Warren and Brandeis' article appeared almost one hundred years ago, privacy has become a matter of



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### Intrusion

Intrusion is usually defined as a physical invasion of privacy. It can take many forms including secret surveillance, trespass, taping of phone conversations or exceeding the consent given by the subject. Activities such as misrepresentation fall under intrusion and therefore could be construed as an invasion of privacy.

As stated above, technological developments in recent years have made this form of invasion of privacy more of a concern both to reporters and their subjects. Pictures taken with a telephoto lens are safe from an intrusion claim if they are taken in a public place. This is extended to anything that can be easily seen from a public place. For instance, taking a photograph of someone in front of a window visible from the street by passersby would be acceptable; however, climbing a tree to photograph in a second story window would not.

One of the best known cases involving secret recording and photography occurred in California in 1971. Two *Life* magazine reporters posed as patients to record the activities of a "quack" doctor who was later convicted of unauthorized practice of medicine. The "doctor" successfully sued the magazine for intrusion invasion of privacy. The court said that although a person who invites others into his home takes the risk that they may not be what they seem and will repeat what they saw or heard, he

should not be required to take the risk that he will be recorded or filmed. The court also held that the publication of the story and pictures was not necessary to make the privacy claim stand. Thus, a reporter or publication can be sued for intrusion even though the information obtained from the intrusion is never published.<sup>3</sup>

A 1969 trespass case established that the reporter of illegally obtained information is protected from an invasion of privacy suit if someone else actually obtained the information. The reporter, however, is in no way to solicit or encourage such activity.<sup>4</sup>

There have been few college cases testing the intrusion claim of privacy law. One case arose in Maryland in 1979 when six basketball players at the University of Maryland sued the university's paper, the *Diamondback*, asking \$72 million for invasion of privacy. The paper did not solicit the players' academic records but had received them from an unnamed source and had subsequently printed them. The records showed the athletes to be in less than good academic standing. The Maryland circuit court found that the plaintiffs did not show that the reporters actively pursued the submission of the records or in any other way encouraged their submission to the paper. The court also stated that by joining the basketball team at the University of Maryland, the students had thrust themselves into the limelight. The court said that they "will not be heard to complain when the light focuses on their potentially imminent withdrawal from the team. [Their] possible exclusion from the team — whether for academic or any other reason — [is] a matter of legitimate public interest."<sup>5</sup>

Some courts have found that the press can intrude upon private places during the coverage of a news event. This aspect of privacy was tested in a Florida case involving pictures of a 1972 fire. The reporter accompanied the fire marshal into a home destroyed by a fire that had killed a young girl. Among other pictures, the reporter took a photograph of the outline of the girl's body left by the fire. The mother sued for trespass, invasion of privacy and intentional infliction of emotional distress after the publication of the picture. Her case was based on the claim that the press had no right to enter a private dwelling. The paper's defense stated that it was covering a newsworthy event and therefore denied the trespass claim.

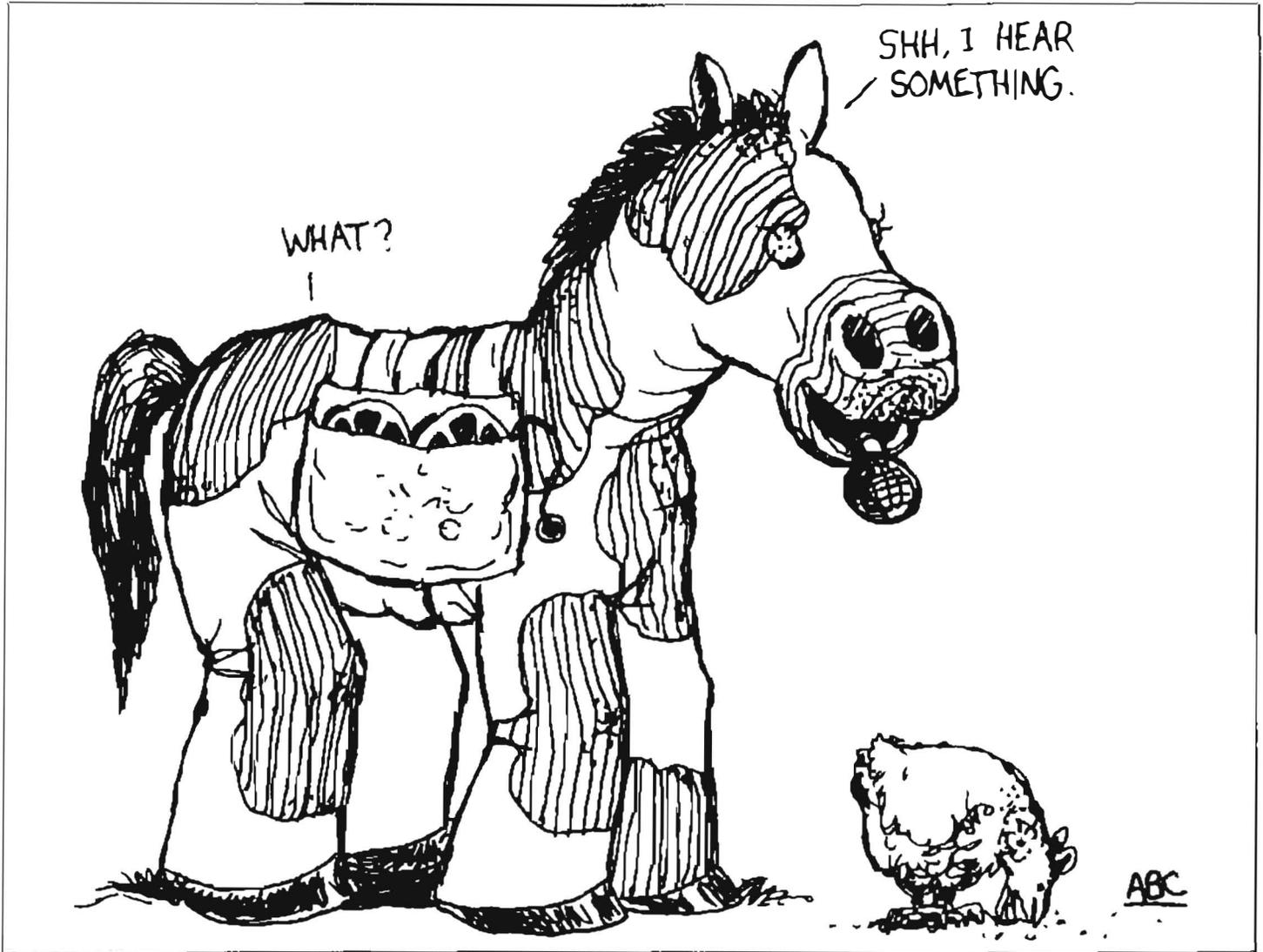
The Florida Supreme Court ruled in favor of the reporter but said that if the reporter had been informed at the time of entry by the owner or anyone acting in his stead that entrance was denied, the reporter would have had to abide by the person's wishes.<sup>6</sup>

Reporters' entry to private areas has often been linked with the idea of consent. A 1978 decision of a New York State court refused to dismiss a trespass claim against two reporters for CBS. They entered a restaurant which had recently been cited for health violations with their camera running. The court found that although the restaurant was open to the public, the reporters had no intention of patronizing the restaurant's service and had failed to get consent from the owners to enter for other purposes.<sup>7</sup>

The issue of limited consent came up in a 1978 case when Pam Bapick sued the *Daily Aztec*, the student newspaper of San Diego State University, for \$400,000 after it used a nude photograph of her holding her baby. She had allowed an organization called Childbirth at Home International to use the picture but sued on the



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grounds that the consent did not extend to newspapers such as the *Aztec*. The paper paid Bapick \$5,000 out of court after the judge told them in a pre-trial conference that the *Aztec* would probably lose.<sup>8</sup>

### False Light

False light is the second kind of invasion of privacy claim. It occurs when true information is used in a photograph or story, but is portrayed in a way so as to change the meaning.

An example of false light would be using a photograph showing two women walking down the street and placing a caption under the picture describing rampant prostitution. This could be an actionable false light claim unless the women were in fact prostitutes.

To qualify as a false light claim the material must satisfy four conditions: it must be false, it must have been published (communicated to a third party), it must have been done without consent and, in the case of a public figure (a person who seeks the public's attention or is thrown into the limelight by her achievement or activity) or public official (one who holds elected or appointed public office), it must have been published with knowledge of its falsity or reckless disregard for its truth or falsity.

Recent false light claims have fallen into three basic categories. First is embellishment, where false material is

added to a story thus portraying the subject in a false light. Second is distortion where factual material appears in such a distorted manner that it is offensive. The third category is fictionalization, fiction, including references to real people as themselves or disguised but still recognizable.

A leading case exemplifying embellishment is the U.S. Supreme Court's decision in the 1974 case *Cantrell v. Forest City Publishing Company*<sup>9</sup>. In that case a woman and her daughter sued a newspaper and a reporter after they published a story about the death of the father and its impact on the family. The court found that the paper had knowingly and recklessly printed untruths. The primary embellishment pointed to by Mrs. Cantrell was the statement that she was "wearing the same mask of non-expression that she wore at her husband's funeral," thus, implying that the reporter had interviewed her for the follow-up article. In fact, he had not talked to her at all.

A 1983 college case made a false light claim that would come under the heading of distortion. Lisa Kuhn sued the *Campus Digest* for \$30,000 for invasion of privacy. The *Digest*, an independent newspaper distributed on three college campuses in Columbia, Mo., produced a humor issue renamed the *Campus Disgust*. The paper included a candid photo feature normally entitled "Faces," changed for this issue to "Tits and Asses." A picture of Kuhn's

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bust appeared in this section. Although her face was cropped out, leaving only her upper torso, Kuhn insisted that she was still recognizable and thus suffered emotional distress, embarrassment, shame, humiliation, mortification and mental shock. The false light claim was based on the claim that the photo implied that "here is someone who is nothing but a pair of tits." The *Campus Digest* settled out of court.<sup>10</sup>

In another college case Sandra Chinnis claimed invasion of privacy based on distortion and sued the University of South Carolina's student paper, the *Gamecock*, for \$250,000. A picture had appeared in the paper of her waving a T-shirt over her head after winning a wet T-shirt contest at a Fort Lauderdale, Fla., bar. But the court ruled against the Chinnis saying that the picture was a true depiction of a newsworthy event.<sup>11</sup>

Complex issues are raised by the last category of false light claims, fictionalization. When a real person is clearly a public figure, or the events portrayed are of public concern, false light claims usually do not hold.<sup>12</sup> The courts have made a distinction between fictionalization of a newsworthy event and pure fiction.<sup>13</sup>

Perhaps one of the best-known cases involving a false light in a fiction piece was described as levitating men during oral sex. Although the article was brought by a former Miss Wyoming against *Penthouse* magazine. In a section of the magazine titled "Humor", an article appeared about a Miss Wyoming named Charlene who was described as levitating men during oral sex. Although the article was obviously beyond the realm of reality, the woman claimed that some of Charlene's characteristics, such as baton twirling as a skill and the color of her costume, linked her to the character. A jury found for the former Miss Wyoming but this decision was later overturned by a federal judge. The court said that the article was obviously fantasy and did not assert false claims

about the plaintiff and thus was protected by the First Amendment.<sup>14</sup>

A member of the staff of a news medium does not have to actually write a fictional account for a false light case to be made against a publication or broadcast program. For example, in 1981 Karen Crawley sued the University of Missouri student newspaper, the *Maneater*, for invasion of privacy and libel after the paper published three classified ads in her name. The advertisements, which Crawley had not submitted, indicated that she was associated with sexual acts of gross immorality. Before the case went to trial, Crawley settled with the paper for \$7,800.<sup>15</sup>

Despite their similarities, there is a distinction between false light and libel. A person may sue for false light, libel, or both. Libel must be defamatory and injure the individual's reputation, but it is possible that a person is put in a false light without his reputation being injured.

### Public Disclosure of Private Facts

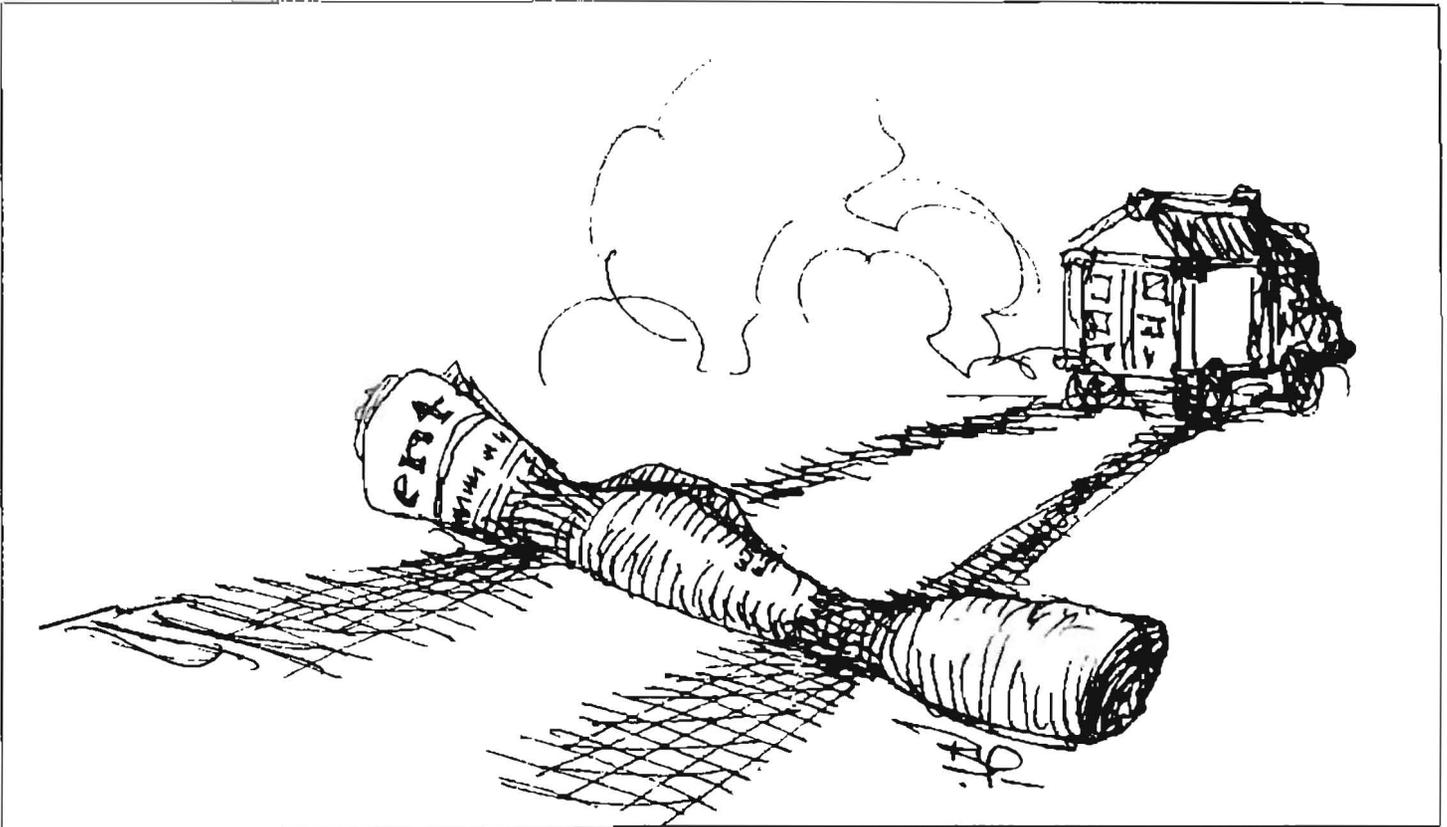
The third area of invasion of privacy law involves reporting information about a person that can be classified as private facts. The courts have ruled that to qualify as public disclosure of private facts the material must meet several requirements: be embarrassing, published, sufficient to identify the complainant and, sometimes in the case of a public figure, done with a known falsity or reckless disregard for the truth. The material may not be newsworthy, already in the public record or published with consent. In such cases the truth is irrelevant. Newsworthiness is the best and most used defense. Usually, the courts have agreed with the media's view of what is newsworthy or is of public interest.

The courts will protect the media in cases where information has been obtained from public record. In *Cox Broadcasting v. Cohn*<sup>16</sup> the U.S. Supreme Court determined that the name of a rape victim could be published if it had been obtained from public records.

A jury in a California district court accepted *Sports Illustrated's* defense of newsworthiness in a case brought against the magazine by a champion body surfer, Michael Virgil. Virgil, when interviewed by a *Sports Illustrated*



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reporter, told the reporter that his hobbies included eating spiders, diving down flights of stairs to impress women and putting out lighted cigarettes in his mouth. Later, Virgil revoked his consent for the article, but it was published anyway. The court granted the defendant's motion for summary judgment noting that the information on Virgil's hobbies related to a "legitimate journalistic attempt" to explain his lifestyle and was of sufficient public interest.<sup>17</sup>

In a decision involving a student, but not a student paper, a California court found for the first female student body president of the College of Alameda in her suit against a local paper. The paper reported the fact that the new president was a transsexual, having had gender corrective surgery. The court stated that the paper had not proved a sufficiently compelling need to publish the information as there was little connection between the information published and her fitness for office.<sup>18</sup>

Although public figures have little cause for action under privacy law, the courts have determined that the passage of time can dilute a person's standing as a public figure to the extent that he may have a claim of invasion of privacy. A person who had been convicted of contempt of court for failing to respond to a grand jury subpoena 16 years before was found not to be a public figure and therefore had a basis for an invasion of privacy action.<sup>19</sup>

In recent years, there have been an increased number of invasion of privacy suits based, at least in part, on a breach of promise by the reporter. Although, if true, such a breach constitutes a violation of journalism ethics, the courts have generally found that it is not actionable under privacy law. One such case involved the publication of the name of a rape victim obtained from the prosecutor as a result of an alleged promise of confidentiality. The court found that the publication was constitutionally protected even if the promise was given.<sup>20</sup>

### Appropriation

The final category of invasion of privacy claim is appropriation — the unauthorized use of a person's name, personality, visage, or photograph for commercial purposes. For a successful appropriation claim to be made, the material must have been published without consent, identified the person and used for commercial gain.

The Supreme Court has decided only one case of appropriation. A Cleveland, Ohio, news station filmed "Human Cannonball" Hugh Zacchini being shot out of a cannon and aired it on the nightly news. Zacchini sued saying that the film of his 15-second act commercialized and appropriated "professional property." The Court found that the First Amendment does not protect the press in such a situation as the broadcast posed a "substantial threat to the economic value of his performance."<sup>21</sup>

Most cases of appropriation arise from advertising, for instance using a file photograph in an advertisement without getting the permission of the person in the picture. However a growing number of cases arise from non-advertising use. Usually, if the picture is reasonably related to an article or book of public interest, the case is not actionable.

Although such a case has not reached the courts, it appears fairly clear that a free newspaper, as opposed to one that is sold, would not be protected from an appropriation claim. It could be argued that using an unauthorized photograph would help increase the circulation and thus attract more advertising dollars. As in *Zacchini*, claims could be made that the publication or broadcast in question hurt someone's commercial success in their chosen profession.

It is important for all student journalists to remember that two defenses almost always exist to invasion of

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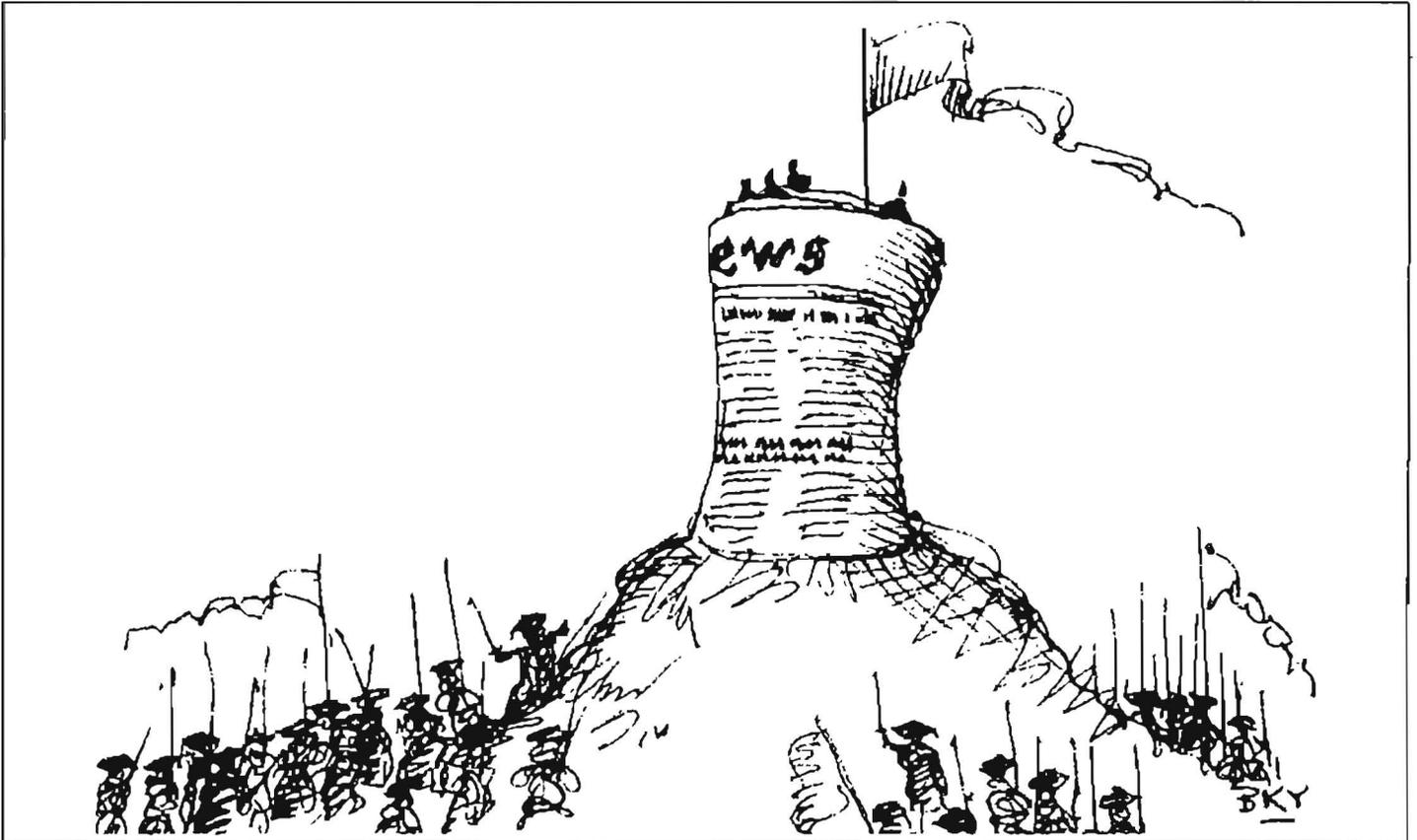
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privacy claims: newsworthiness and consent. Newsworthiness refers to the readers. Consent involves checking with the subjects to ensure that they agree to what is said about them or that the picture of them may be used. Consent should always be explicit and in writing to ensure full protection for the journalist. However, consent can be withdrawn at any time up to the point of publication. If this happens, a great deal of consideration should be given to the publication of the information because, if confronted with an invasion of privacy suit, the publication will be forced to prove the newsworthiness of the article or picture.

A student journalist's first concern should always be the newsworthiness of the information being considered for publication. It is also wise to get the consent from the individual of any material which applies to someone's private life.

Invasion of privacy interests are not meant to hamper the journalist's right under the First Amendment to pursue any story which he desires. Thus, the student journalist should be aware of individuals' rights to privacy but if the reporting is careful and thorough with regard for the subject's rights, the risk of privacy suits is greatly diminished. ■



<sup>1</sup>*Federal Trade Commission v. American Tobacco Co.*, 262 U.S. 298 (1924).

<sup>2</sup>Warren and Brandeis, "The Right to Privacy", *Harvard Law Review*, Vol. 4, p. 193 (1890).

<sup>3</sup>*Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971).

<sup>4</sup>*Pearson v. Dodd*, 410 F.2d 701 (D.C. Cir.), cert. denied, 395 U.S. 947 (1969).

<sup>5</sup>*Bilney v. Evening Star*, 43 Md. App. 560, 406 A.2d 652 (1979).

<sup>6</sup>*Florida Publishing Co. v. Fletcher*, 340 So. 2d 914, (Fla. 1976), cert. denied, 431 U.S. 930 (1977).

<sup>7</sup>*LeMistral, Inc. v. Columbia Broadcasting System*, 61 A.D.2d 491, 402 N.Y.S.2d 815 (N.Y. App. Div. 1978).

<sup>8</sup>"No nudes is good news" *SPLC Report*, Vol. 3, No. 2 (Winter 1979-80, p. 30).

<sup>9</sup>419 U.S. 245 (1974).

<sup>10</sup>Louis E. Inglehart, *Freedom for the College Student Press* (Greenwood Press: Westport, Conn), 1985, p. 157.

<sup>11</sup>*Chinnis v. Gamecock*, (unreported) No. 80-CP-40-3246 (Court of Common Pleas for Richland County, S. C.,

1982).

<sup>12</sup>*Street v. NBC*, 645 F.2d 1227 (6th Cir. 1981) cert. dismissed, 454 U.S. 1095 (1981).

<sup>13</sup>*Silwa v. Highgate Pictures*, 7 Med. L. Rptr. 1386 (N.Y. Sup. Ct. 1981).

<sup>14</sup>*Pring v. Penthouse International, Ltd.*, 695 F.2d 738 (10th Cir. 1982), cert. denied, 462 U.S. 1132 (1983).

<sup>15</sup>"Paper Reaches Settlement in Classified Ad Dispute," *SPLC Report*, Vol. 4, No. 3, (Fall 1981, p. 28).

<sup>16</sup>420 U.S. 469, 491 (1975).

<sup>17</sup>*Virgil v. Sports Illustrated, Inc.*, 424 F. Supp. 1286 (S.D. Cal. 1976).

<sup>18</sup>*Diaz v. Oakland Tribune*, 139 Cal. App. 3d 118, 188 Cal. Rptr. 762 (Cal. Ct. App. 1983).

<sup>19</sup>*Wolston v. Readers Digest*, 443 U.S. 157 (1979).

<sup>20</sup>*Poteet v. Roswell Daily Journal*, 92 N.M. 170, 584 P.2d 1310 (1979).

<sup>21</sup>*Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

## A Rebirth

# The New Undergrounds

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In recent years the term "scholastic press" was synonymous with a group of students who published their work on campus as a school-sponsored activity using materials and equipment provided by their school. Almost every high school and college had an official school newspaper that provided students with their sole outlet for campus journalism.

But the scholastic press in 1986 has taken on a new character perhaps more typical of the late 1960s and early 1970s. At high schools and colleges across the country,

## I-LEGAL ANALYSIS

unofficial, non-school sponsored, "underground" newspapers are turning up to present the viewpoints and ask the questions that more traditional publications may be missing. Spurred by personal computer publishing and a new wave of student activism, these news and opinion sheets often find a less than welcome reception from school officials and members of the community. The frequent result is outright censorship. So how far can a public school go in prohibiting or controlling unofficial student publications without infringing on First Amendment rights?

The United States Supreme Court has outlined the outer limits of a public school official's power to restrict student expression: expression can be limited on campus only when the school authorities have facts which lead them to reasonably forecast a substantial disruption of or a material interference with school activities.<sup>1</sup> If the content of the expression at issue does not materially interfere with the requirements of discipline and school operation, or if school authorities do not have facts which justify a reasonable forecast of these harms, the expression may not be prohibited. If a public school official demands the right to review unofficial publications and, if found objectionable, refuse to allow their distribution, his action is labeled a prior restraint. Prior restraints by high school officials of underground student newspapers have been approved in theory by some courts when the school can prove that the newspaper contained libel or legal obscenity, which would constitute substantially disruptive material.<sup>2</sup> But the federal courts with jurisdiction over Indiana, Illinois, Wisconsin and perhaps Minnesota have refused to approve any prior restraint,<sup>3</sup> and no court has allowed it in a public college.<sup>4</sup>



Although courts normally do not interfere in the decision-making process of school officials, they will do so when officials attempt an unacceptable prior restraint on material that students seek to distribute on campus. Courts have held that when an underground newspaper causes no disruption on a school's campus during class hours it may not be censored merely because the school officials dislike its content.<sup>5</sup> Similarly, a prohibition of expression highly critical of school officials that does not cause any substantial disruption on campus is unconstitutional. In fact, courts have said that speech highly critical of school officials is to be fostered because it develops the students' ability to think critically. Finally, they have held that the intent of the student journalist is unimportant: even though a student intends his work to cause substantial disruption on campus, it can only be censored when school officials can reasonably forecast that it will actually be disruptive.<sup>6</sup>

Not only must a school where prior restraint is allowed forecast substantial disruption to censor, but it must also set up adequate guidelines delineating what kinds of material will be considered disruptive and the procedure

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The scholastic press in 1986  
is taken on a new character....”

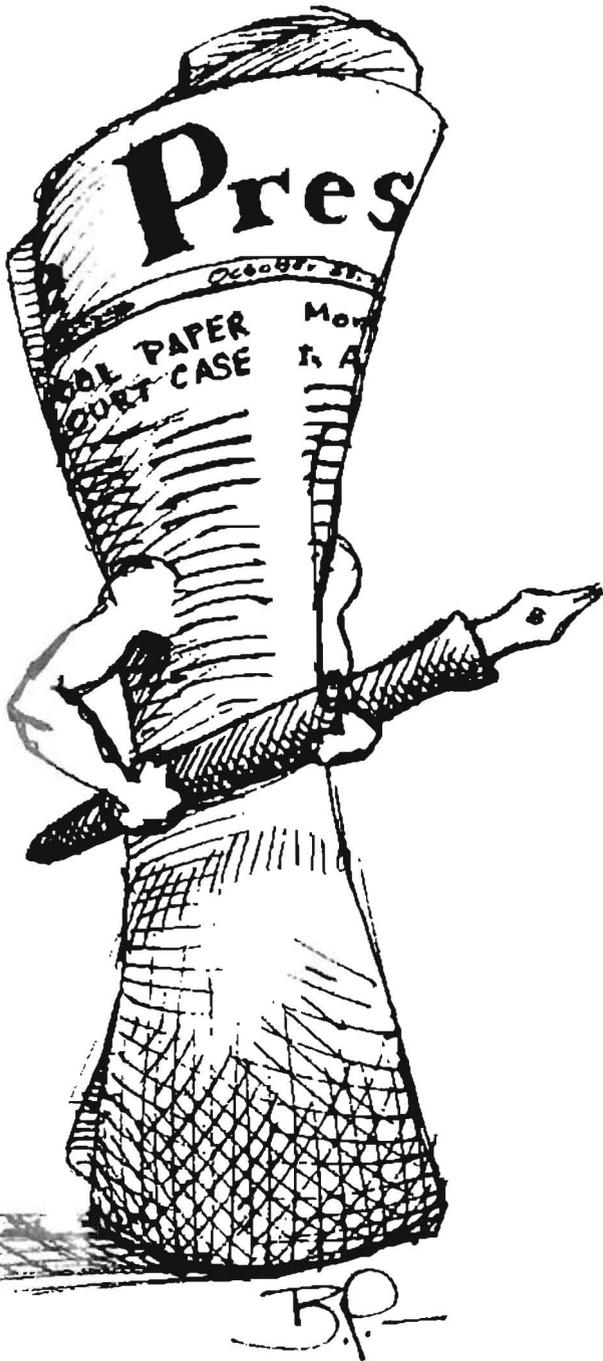
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to be used to determine whether a publication should be restricted. The guidelines must be very precise. They must prohibit only that speech which reasonably leads school officials to forecast a substantial disruption of school activities, inform a reasonably intelligent student of what is prohibited, specify the exact procedure for the initial decision to censor and provide for a prompt system of appeal.<sup>7</sup> The emphasis is on fairness: the person desiring to speak out must know what is prohibited, not be confused by vague guidelines.

Often school officials will attempt to justify their censoring actions by basing them on neutral-sounding restrictions that make no reference to an underground newspaper's content. The courts have recognized that school officials can make reasonable regulations as to the time, place and manner of distribution.<sup>8</sup> But the key word here is "reasonable." School officials cannot use time, place and manner restrictions to prohibit viewpoints they dislike. One court has defined reasonableness in this context as "whether such regulations measurably contribute to the maintenance of order and decorum within the educational system, are calculated to prevent interference with the normal activities of the University, or obstruction of its functions to impart learning and to advance the boundaries of knowledge, or are important in maintaining order."<sup>9</sup>

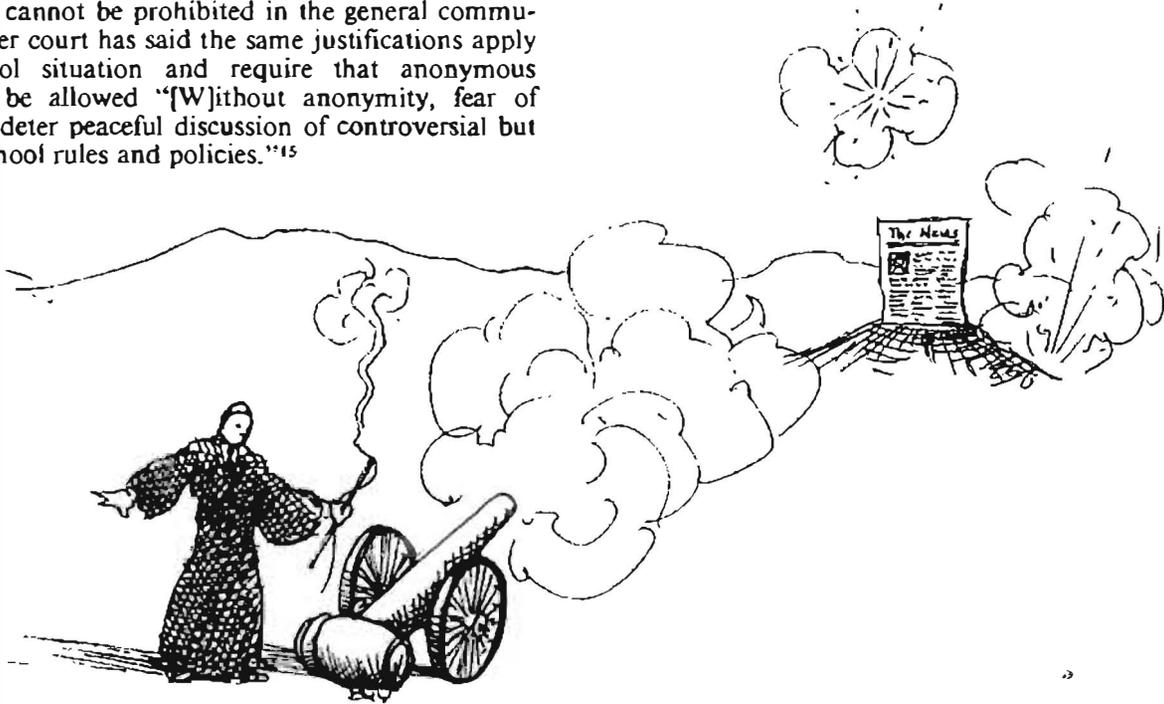
One neutral-sounding regulation common at many schools is a ban on the distribution of publications that contain advertising or that are sold rather than given away. School officials claim that the commercial nature of these publications makes them bannable. But as the United States Supreme Court has recognized, commercial speech is important because it informs consumers of ideas and goods and it is protected by the First Amendment.<sup>10</sup> Only if they can prove that a substantial disruption will result from its distribution, or assert some other compelling reason that cannot be dealt with in some less restrictive manner, can school officials make an across-the-board prohibition of underground publications that contain advertising.<sup>11</sup> Similarly, non-disruptive sales of underground publications would seem to be protected by the First Amendment under Supreme Court cases. "Freedom of speech [and] freedom of the press are available to all, not merely to those who can pay their own way."<sup>12</sup>

What about restrictions on anonymity? Can a school require all underground publications to print the names of the authors and publishers? In the states where the courts have approved prior restraints of high school publications, there is a practical need for an identifiable person who



submits the material and who can be notified if it does not satisfy the guideline requirements. But in the states where prior restraint in public high schools has been condemned and in all public colleges, a prohibition against anonymous literature would be hard to justify. One court has said that such a rule could be constitutional if the school could demonstrate a legitimate reason for it.<sup>13</sup> But the United States Supreme Court has long recognized that the distribution of anonymous material serves an important function and cannot be prohibited in the general community.<sup>14</sup> Another court has said the same justifications apply in the school situation and require that anonymous publications be allowed "[W]ithout anonymity, fear of reprisal may deter peaceful discussion of controversial but important school rules and policies."<sup>15</sup>

As the foregoing material indicates, the law in this area is certainly not lacking. A broad foundation of cases, most decided in earlier years when radical and controversial unofficial publications were at their peak, provide strong protection for the First Amendment rights of underground journalists. Before a school can silence these new voices it must show the compelling presence of substantial disruption and not just the fear of a new wave of non-conforming views. ■



<sup>1</sup>*Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

<sup>2</sup>*Baughman v. Freienmuth*, 478 F.2d 1345 (4th Cir. 1973).

<sup>3</sup>*Fujishima v. Board of Education*, 460 F.2d 1355 (7th Cir. 1972). The recent grant of summary judgment in the case *Bystrom v. Fridley High School*, No. 3-85-911 (D. Minn. March 5, 1986) (order granting summary judgment), appeal docketed, No. 86-5140 (8th Cir. April 7, 1986), indicates that the judge adopted the reasoning of *Fujishima* and refused to accept any system of prior review. However, the case is not binding law until the appeal is completed.

<sup>4</sup>See *Antonelli v. Hammond*, 308 F. Supp. 1329 (D. Mass. 1970); *Trujillo v. Love*, 322 F. Supp. 1266 (D. Colo. 1971).

<sup>5</sup>*Shanley v. Northeast Independent School District*, 462 F.2d 960 (5th Cir. 1972).

<sup>6</sup>*Scoville v. Board of Education*, 425 F.2d 10 (7th Cir.

1970).

<sup>7</sup>*Baughman*.

<sup>8</sup>*Sword v. Fox*, 446 F.2d 1091, 1097 (4th Cir.), cert. denied, 404 U.S. 994 (1971).

<sup>9</sup>See *New Times v. Arizona Board of Regents*, 110 Ariz. 367, 519 P.2d 169 (1974).

<sup>10</sup>*Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

<sup>11</sup>*Hernandez v. Hanson*, 430 F. Supp. 1154 (D. Nebr. 1977).

<sup>12</sup>*Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

<sup>13</sup>*Spartacus Youth League v. Board of Trustees*, 502 F. Supp. 789 (N.D. Ill. 1980).

<sup>14</sup>*Talley v. California*, 362 U.S. 60 (1960).

<sup>15</sup>*Jacobs v. Board of School Commissioners*, 490 F.2d 601 (7th Cir. 1973), vacated per curiam as moot, 420 U.S. 128 (1975).

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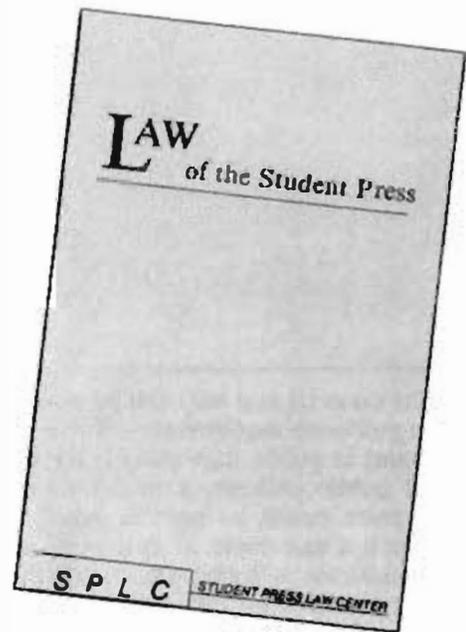
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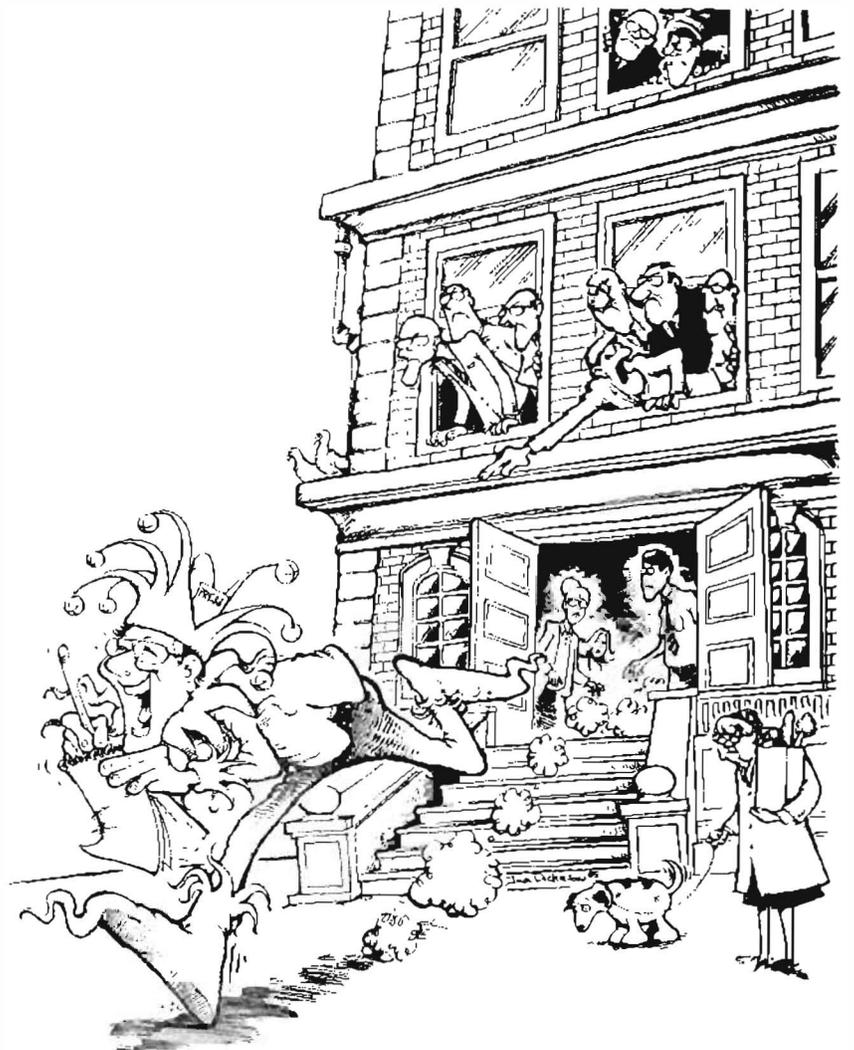
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