

student press law center
report

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Looking Beyond the Glitz

EDITOR
Lance Helms
The University of Georgia

WRITERS

Mike Hiestand, Esq.
SPLC Legal Fellow

Dawn Morville
Washington University
School of Law

COVER ART

Jack Dickason

ART

Andrew Bates
Ben Bays
P.A. Borneman
Ben Burgraff
Jerome Cade
Aaron B. Cole

Brad Conn
Jennifer Nelson
John Pence
Anthony Sansone
Bob Staake

Ellen Stern
Richard Thompson
Keith Turner
Ches Wajda
Adam Van Wyk
Bruce Young

Student Press Law Center Report

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At Large
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* Organizations for purposes of identification only

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SPLC lawsuit is a winner

After years of drawn-out battle, the Buckley Amendment's usefulness in the cover-up of campus crime may be nearing an end. A lawsuit filed by SPLC and three student journalists has forced the Department of Education to stop threatening schools that release campus police reports with the withdrawal of federal funds. (See *JUDGE*, page 5.)

This case marks the first time ever the SPLC has been a plaintiff in a lawsuit to vindicate student journalist's rights. With able representation by attorneys Richard Marks, Alison Lowe and Jonathan Glass of the firm Dow, Lohnes and Albertson, we were able to end irresponsible behavior by the Department of Education that had gone on far too long. It is a sad comment that it took a lawsuit to force Secretary of Education Lamar Alexander to stop his support of this roadblock to the reporting of campus crime.

We hope our success will help the hundreds of college journalists around the nation that have called us in recent months because of their difficulty in getting access to campus crime information. We continue to pledge our support to those students and offer our legal resources to help them take their schools to court if necessary to ensure that the public gets the information about crime it needs.■

The Report staff

Lance Helms is a senior at the University of Georgia in Athens where he is majoring in journalism. This spring, he will serve as editor in chief for the *Red & Black* student newspaper.

In September, Mike Hiestand became the first SPLC Legal Fellow. He received his juris doctor degree from the Cornell Law School in May and has a journalism degree from Marquette University.

This is a celebration?

School censors demean First Amendment

On December 15, the nation marked the 200th anniversary of the Bill of Rights becoming a part of our constitution. This "birthday" for the First Amendment was celebrated by many around the country, including school administrators and their state and national organizations. As part of a new emphasis on constitutional education for young people, this celebration was intended to show the commitment these professional educators have to teaching students about the importance of the Bill of Rights.

We at the Student Press Law Center are singularly unimpressed. In the fall of 1991, we received more reports of censorship of student journalists than any time in the last decade. More than 1,100 of you called or wrote the SPLC in 1991 to ask for legal advice and assistance. A growing number said censorship inspired by the Supreme Court's *Hazelwood* decision was hitting home like never before. Demands for prior review by school administrators are increasing. More school boards are adopting restrictive policies that take content control away from students. And almost everyone agrees that most school officials are oblivious to objections that these actions are inappropriate, counter-educational and just unfair.

So as some school administrators are busy giving lip service to their support for the Bill of Rights by sponsoring essay contests, mock trials and guest speakers, their actions indicate how little they appreciate what the First Amendment is all about. By refusing to allow young people to exercise their free expression rights, the celebration highlights their hypocrisy. Their attempt to dress the First Amendment up like some glitzy lounge act serves only to insult both the constitution and our intelligence.

The message to student journalists from all of this is twofold. First, many who claim to be friends of the First Amendment are anything but. Those who believe in the constitution demonstrate it by their example. And second, despite the demeaning attitude toward the First Amendment evinced by the Supreme Court and many school officials, it still deserves our support this winter and beyond. The protections to press freedom it gives remain greater than those provided by any other country in the world. The only way to ensure that we will have a First Amendment worth celebrating after the next century has passed is to continue to stand up for the ideals for which it stands.■

Kirkwood paper wins SPLC/NSPA award

MISSOURI — The student newspaper at Kirkwood High School that stood up for its right to run ads for pregnancy-related services over the objections of community members was awarded the 1991 Scholastic Press Freedom Award.

The award, sponsored by the SPLC and the National Scholastic Press Association/Associated Collegiate Press, is given each year to a high school or college student or student news medium that has demonstrated outstanding support for the free press rights of students.

The *Kirkwood Call* found itself the focus of controversy in November 1990 after a local newspaper published a story reporting that it accepted advertising for Planned Parenthood. Within a days,

community members began demanding the school censor the paper.

The *Call* staff maintained its right to select ads. Along with the Planned Parenthood ad, it published ads for Birthright, an organization that offers pregnancy counseling and opposes abortion.

Over the course of the controversy, *Call* editor Mike Griffin wrote columns explaining his staff's position and published news stories and letters to the editor expressing the views of those on both sides of the issue.

"The *Call* staff proved itself worthy of support again and again as it stood firmly and eloquently behind the principle of student press freedom," said SPLC Executive Director Mark Goodman.■

Down for the Count

The Buckley Amendment takes a licking,
but the cover-up of campus crime keeps on ticking

Thomas Jefferson once said, "laws and institutions must go hand-in-hand with the progress of the human mind." But when it came to campus crime records access, the minds of some college administrators last fall seemed to trail the latest development in federal law.

U.S. District Judge Stanley Harris in November temporarily enjoined the U.S. Department of Education in Washington, D.C., from withdrawing or threatening to withdraw federal funds from schools that disclose campus crime information as a result of a lawsuit filed by the SPLC and three college journalists.

Harris' ruling ended student journalists' decades-long battle over the Buckley Amendment, during which the Education Department had claimed campus crime records were "education records" under Buckley. (See *JUDGE*, page 5.)

But at least two student journalists, with Harris' order in hand, found administrators at their schools still would not grant them access to campus crime records.

Brett Barrouquere, managing editor of *The Nicholls Worth* at Nicholls State University in Louisiana, said a university official denied his request for campus crime information even after he showed her the judge's order.

Barrouquere, who was denied access prior to Harris' ruling, said the administrator told him she was denying his request because Harris had not yet issued a permanent injunction.

At Salem State College in Massachusetts, officials denied *The Log* editor Bob Fahey's request for campus crime records because his copy of Harris' order was faxed.

Fahey said the administrators, who had denied him access prior to Harris' ruling told him that they did not plan to honor the judge's order no matter how they received it.

On the legislative front, two federal bills would help journalists report campus sex offenses, while another



would reinstate the secrecy formerly sanctioned under Buckley.

The Violence Against Women Act (S15, HR1502) pending in Congress could turn back the clock on Buckley by prohibiting disclosure of campus sexual assault reports.

Section 1071(d)(2) of Title IV of the act contains a provision that could restrict public access to the "outcome of any investigation by campus police or campus disciplinary proceedings brought

pursuant to the victim's complaint against the alleged perpetrator."

The bill says schools that violate the provision would be ineligible for the grant money it appropriates for sexual assault prevention. But in order to qualify for a grant, schools would have to adopt written policies requiring disclosure to the victim of the same information it denies to the general public.

S15, sponsored by Sen. Joseph Biden (D-Del.), was reported out of the Judiciary Committee last summer but was not on the calendar for floor action at press time. House Judiciary Committee hearings were expected on HR1502, sponsored by Rep. Barbara Boxer (D-Calif.).

The Campus Sexual Assault Victim's Bill of Rights Act (HR2363, S1289), could also affect the way sex offenses are reported. It recommends that victims have the right to be notified of the outcome of a campus disciplinary proceeding against their assailants.

At press time, S1289, sponsored by Sens. Joseph Biden (D-Del.) and Arlen Specter (R-Pa.), was in the Senate Labor and Human Resources Committee's subcommittee on Education. The House version is sponsored by Rep. Jim Ramstad (R-Minn.).

The Women's Equal Opportunity Act (S472), would add sexual assaults to the list of crimes schools must report annually in their statistical summaries. Sponsored by Sen. Robert Dole (R-Kan.), the bill was not expected to leave the Senate Judiciary Committee before the end of 1991. ■

Judge benches Buckley

DEPARTMENT OF EDUCATION VIOLATES FIRST AMENDMENT, COURT RULES

WASHINGTON, D.C. — The U.S. Department of Education can no longer block the release of campus crime information by educational institutions, a federal judge ruled in November.

U.S. District Judge Stanley Harris granted a preliminary injunction against the Education Department and Secretary of Education Lamar Alexander barring them from "withdrawing or threatening to withdraw federal funding" from schools in retaliation for disclosing campus law enforcement records in the case of *Student Press Law Center v. Alexander*, No. 91-2575 slip op. (D.D.C. Nov. 21, 1991).

Harris ruled that Education officials could not use the Family Educational Rights and Privacy Act (FERPA), commonly called the Buckley Amendment, to prevent the disclosure of law enforcement records naming individual students without violating the First Amendment.

The SPLC and co-plaintiffs Lyn Schrotberger of Colorado State University and Sam Cristy and Clint Brewer of the University of Tennessee sued Alexander and the department in October after Education officials said they would continue to enforce the Buckley Amendment against schools that released campus law enforcement records naming students.

Schrotberger, Cristy and Brewer were denied access to crime information by their campus police departments as a re-

sult of the Education Department's policy.

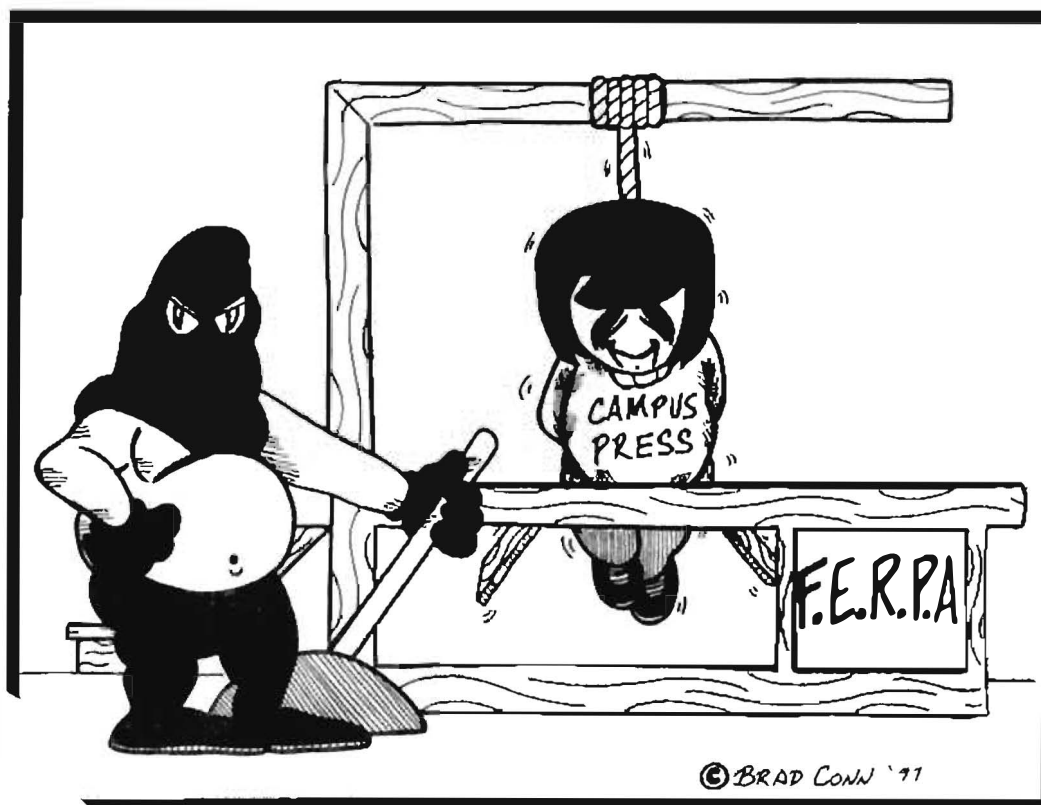
Schrotberger is the editor of the *Rocky Mountain Collegian*. Christy is editor of the *Daily Beacon*, and Brewer, the former editor of the *Daily Beacon*, is president of the Society of Professional Journalists Student Chapter at the University of Tennessee, where Alexander was president before being confirmed as Education Secretary in March.

Although the injunction did not change the wording of the statute, Harris took the teeth out of Buckley by gagging the

Education Department, its sole enforcer.

He said the "Supreme Court has noted in a variety of contexts that the First Amendment 'protects the right to receive information and ideas....' The right to receive information and ideas 'is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution.'"

Although Harris ruled that plaintiffs' First Amendment rights were limited in this context, he noted that the government must show a compelling interest in
(See BUCKLEY, page 6)



Buckley

(Continued from page 5)

abridging that right and found that the Education Department had "not offered a single justification for preventing universities from disclosing the names of students involved in criminal activity."

"The Government apparently takes the position that the FERPA's imposition on the right to receive information is minimal, and therefore requires no justification," he said. "That position is untenable even in an area of limited constitutional protection. In light of the universities' willingness (absent coercion to the contrary) to release campus crime reports in full, the Government must assert some interest that outweighs the public's First Amendment right to receive the information."

"[T]he [interest] of the public in greater access to information ... is at its highest in matters that bear on personal safety and the prevention of crime," he said.

Harris also enjoined the department's Compliance Office from sending "technical assistance" letters (the "coercion to the contrary" he referred to above) warning that the department may withdraw federal funding from a school that

releases campus crime information.

The Compliance Office in March sent letters to 14 schools the SPLC identified in a survey of 24 schools that were releasing campus crime information. Five of those 14 changed their disclosure policies as a result of the letters.

"The President of Arizona State University [one of the schools in the SPLC survey] confirmed that the [department's] technical assistance letter prompted ASU to adopt a policy of deleting student names from campus crime reports before making the reports public," Harris said.

At the hearing, Education lawyers

right of equal protection under the law because the policy applied equally to the non-student press and public.

"The student press suffers no restriction that does not apply to the public as a whole," Harris said.

It was unclear at press time whether Education would appeal the injunction. In the meantime, SPLC Executive Director Mark Goodman hopes Congress will change the statute itself in early 1992.

The fastest vehicle for changing the Buckley Amendment appears to be the omnibus crime bill passed by both houses of Congress and sent to a conference

committee before Thanksgiving. When Congress recessed for Thanksgiving, the House had approved the committee's version of the legislation, but the Senate had not.

If the Senate approves the committee report, Congress will send the crime bill to President Bush for his signature.

The bill contains a clarifying amendment that would exclude from Buckley's definition of "education records" those "records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement."

Since July, the Education Department has found three sponsors for the amendment. At press time, the following bills were also possible vehicles for the amendment:

- Bills to extend The Higher Education Act of 1965: HR3553, sponsored by William Ford (D-Mich.), already contains the Education amendment, so getting the language in the Senate's version as well would make this a sure vehicle for the amendment. At press time a Senate companion, S1150, sponsored by Sen. Claiborne Pell (D-R.I.), did not contain the Education amendment when reported to the floor.

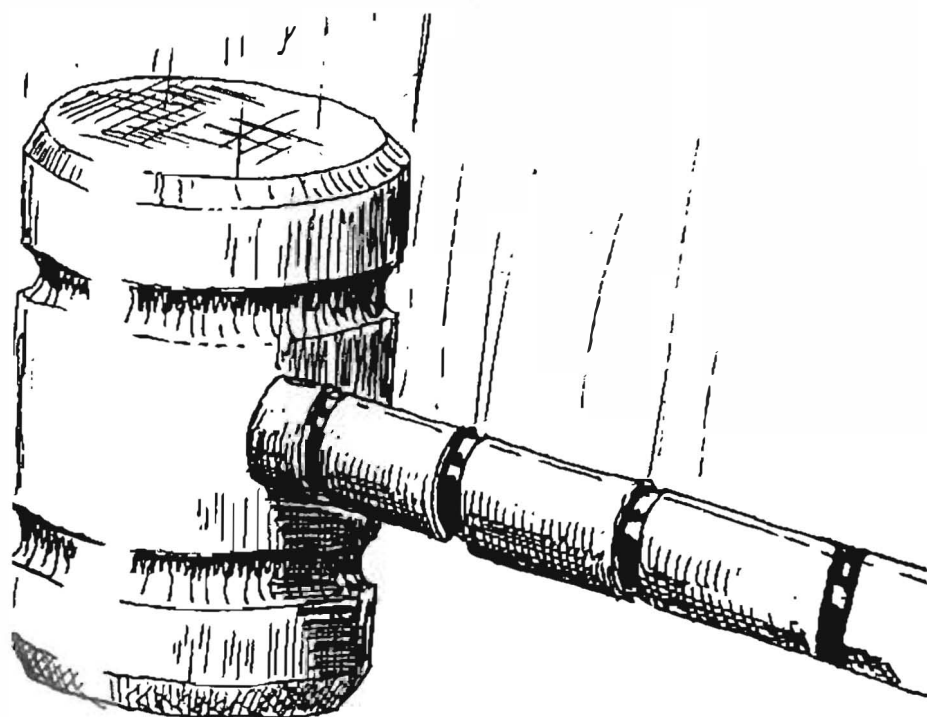
- Education amendments, unattached and unmoving: S1470, sponsored by Sen. Orrin Hatch (R-Utah), was in the Senate Labor and Human Resources Committee's subcommittee on Education when Congress recessed for Thanksgiving. Rep. John Rhodes (R-Ariz.),

'This legislation is not exactly a masterpiece of clarity.'

—Judge Stanley Harris

suggested that student journalists obtain court orders each time a campus police department violated a state sunshine law. Buckley allows schools to violate its provisions in compliance with a court order without jeopardizing their federal funding.

Harris ruled that non-disclosure of campus crime information did not violate the student press' Fifth Amendment



could send his Education amendment, HR3192, to the floor of the House from the Education and Labor Committee depending on what Bill Goodling (R-Pa.), the ranking minority on the committee, decides, a Rhodes aide said. Goodling was responsible for putting the Education amendment in HR3553, a Higher Education re-authorization bill.

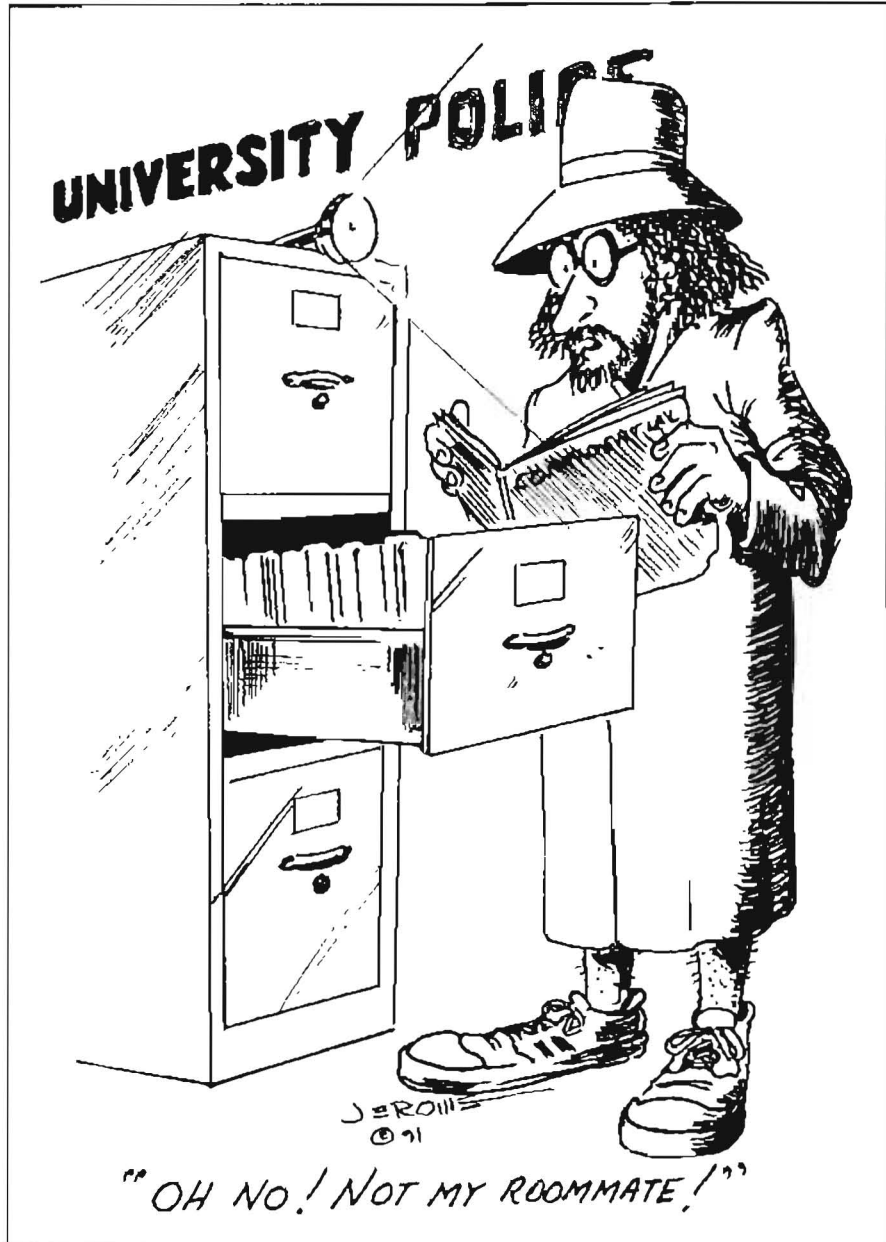
• HR2312, an elementary-secondary education bill: The amendment is in the version that passed the Senate, but not in the House version. The Senate has asked for a conference committee to iron out discrepancies between the two versions; but the Senate's amendments are highly controversial, making this the least likely of the three vehicles to pass, said Lynn Selmser, a House Education and Labor Committee staffer.

In his oral arguments, a lawyer for the Education Department told Judge Harris the SPLC's suit was "frivolous" in light of the legislative remedy at hand in Congress.

In response, Harris questioned the amount of time and legal documentation the Education lawyer had spent responding to a "frivolous" suit and said of Buckley, "This legislation is not exactly a masterpiece of clarity."

The Education lawyer contended that the clarifying language would be in place by early 1992. Congressional sources, on the other hand, could only express optimism that the amendment would become law by the end of the 1992 session.

"Unfortunately, Congress is just such a lethargic beast that to get it to deal with any issue takes a long time," Goodman said. ■



Jerome Cade for *The Nicholls Worth*. Reprinted with permission.

College editor wins Hefner First Amendment award

MISSOURI — Traci Bauer, former editor of the *Standard* at Southwest Missouri State University in Springfield, received the Hugh M. Hefner First Amendment Award at an October ceremony in New York.

Bauer, who sued her school for access to campus

crime records and won, spoke modestly of her achievement.

"I'm really honored to be named among those people who have done things I thought were more important," Bauer told the Associated Press. "I'm really surprised at how well-known this case was — that it was followed in places like New

York and Chicago."

Bauer sued SMSU in federal court, where Judge Russell G. Clark ruled that the school violated her First and Fifth Amendment rights of freedom of the press and equal protection in denying her access to crime records.

Bauer is also the recipient of the 1990 Scholastic Press

Freedom Award, sponsored by the SPLC and the Associated Collegiate Press.

The Playboy Foundation established the Hefner awards in 1979 to honor those who make significant contributions to the defense of the First Amendment. ■

'92 statehouses buy sunshine by the gallon

Campus police logs, now open in Mass., are target of Pa. bill

Now that provisions of a federal campus crime statistics reporting bill have begun to take effect, some state legislatures have begun casting sunshine on a broader spectrum of campus police records, such as police logs.

The Student Right-to-Know and Campus Security Act of 1990 mandates disclosure of annual campus crime statistics to conform with the Federal Bureau of Investigation's Uniform Crime Reporting standards.

Now, pending state bills would require more frequent and specific statistical reports and require schools to publish these statistics in their catalogs. Pending federal legislation would broaden the list of crimes schools must report. (See *HOLLOW VICTORY*, page 4)

The Oklahoma legislature in June passed a law making public and private college and university police departments public agencies subject to the state Open Records Act, considered one of the more liberal state sunshine laws. And a Massachusetts bill signed in July opened the daily logs of public and private college and university police for public inspection.

Pennsylvania state Sen. Richard Tilghman (R-Bryn Mawr) in October introduced Senate bill 1378, which is similar in intent to the Massachusetts law passed in July. The bill



was referred to the Senate Education Committee.

Police logs generally serve as records of all police activity, regardless of whether criminal charges result. SB 1378 would require police logs to include, "in chronological order, all responses to valid complaints received, crimes reported, the names and addresses of persons arrested and the charges against such persons arrested."

"If students know of a rash of break-ins to dormitories, they can take steps to secure their living quarters," Tilghman said in a prepared statement. "If they're unaware, their safety and welfare are needlessly jeopardized, and their chances of becoming a victim are greater."

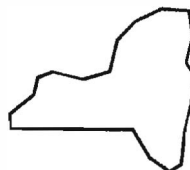
On the campus crime statistics front, 13 states now have crime statistics laws on the books, and five more have such bills pending or ripe for re-introduction.

A crime statistics reporting bill, New Jersey Senate bill 1776, was not expected to leave the Senate Higher Education Committee because it echoed the new federal statistics law.

Although New York already has a statistics law on the books, it does not contain an enforcement provision. A6049, which imposes a \$10,000 penalty on schools who do not comply with the statistics bill, would remedy that.

At press time, a possible December special session would have seen legislative action on A6049 and A 2 6 6 7, which would require schools to report felonies to local police departments and file quarterly crime updates. Both bills are sponsored by Assemblyman Neil Kelleher (R-Troy).

Missouri state Sen. Pat Danner (D-Smithville) said she plans to reintroduce in January a bill that would not only require schools to report crime sta-



tistics, but also to adopt comprehensive security policies and to separate educational records from crime records.

Virginia Del. Bob Purkey (R-Virginia Beach) said he plans to reintroduce a bill that would require colleges to publish in their catalogs the annual statistical crime reports already mandated by a 1990 state law. State Sen. Moody Stallings (D-Virginia Beach), who sponsored that bill, had to give up the catalog requirement when he ran into unexpected opposition to that provision.

The University of California system schools and Hastings College of the Law in San Francisco have begun complying with provisions of A3918, signed into law by then-Gov. George Deukmejian in January 1991.

The law, which requires college and university police departments to make crime reports available to their communities and post campus safety plans, has yet to take effect in the state's community colleges thanks to state budget woes. Under the law's provisions, the legislature will have to appropriate special funding for the community colleges to comply.

In signing the bill, Deukmejian rejected Senate bill 2450, a broader measure that would have mandated compliance by all public and private post-secondary institutions. In a letter to the state Senate, he said SB 2450 was unfair to smaller schools "who may not have the administrative capacity to compile these statistics." ■



Legal Roulette

For more and more high school journalists, First Amendment claims are a high-stakes gamble where the odds are stacked against them

The message Planned Parenthood of Southern Nevada got from a federal appeals court last fall echoed that of other federal rulings around the nation: in the post-*Hazelwood* era, high school journalists' First Amendment claims are no longer a "sure thing."

An *en banc* panel of Ninth Circuit Court of Appeals judges, on rehearing, affirmed an earlier ruling of the court that student publications in a Las Vegas school district are not public forums as defined by the Supreme Court in *Hazelwood School District v. Kuhlmeier*.

The judges ruled that, although the publications in question accepted outside advertising, they still were not entitled to a higher level of First Amendment protection. (See *NINTH CIRCUIT*, page 10.)

The odds were also stacked against two Michigan high school journalism advisers who brought a First Amendment claim against the Gibraltar School District.

Rita Paye and Lynda Kapron sued the school district after the Carlson High School principal impounded a literary magazine their students produced.

A federal judge upheld the school district's claim that "satanic" references and illustrations of alcoholic drinks in *The Jib* could lead students to believe the high school was sanctioning satanism and alcohol abuse.

"If we had it to do over again, we might not bring [the case] in federal court," said Paul Denenfeld, the American Civil Liberties Union attorney for Paye and Kapron. "We were operating under the impression that First Amendment claims were one of the few claims you could reasonably bring in federal court."

Of Michigan, Denenfeld said, "It's not a good environ-



ment for First Amendment issues. I don't think there are students' rights anymore—the pendulum is just swinging absolutely the other way." (See *JUDGE RULES*, page 11.)

The American Civil Liberties Union in New Jersey saw the writing on the wall, argued that the state constitution extended broader free speech rights to its citizens than the First Amendment, and won.

But the Clearview Regional Board of Education, which lost the suit *Desilets v. Clearview Regional Board of Education* in May 1991 (see *STATE CONSTITUTION*, Fall 1991 SPLC Report), has filed an appeal of the state court's ruling that Brian Desilets' freedom of speech is stronger under the state constitution.

The state constitution affirms the right of every citizen to "freely speak, write and publish his sentiments on all subjects."

A student in New York was not as lucky as Desilets.

A federal jury in October said Yorktown High School in Westchester County did not violate Justin Dangler's First Amendment rights by denying him membership in the National Honor Society.

Dangler's parents charged the membership denial was in part a retaliation for a story he wrote for the school paper on racism at Yorktown. The six-person jury said that speech was not a "substantial or motivating factor" in the denial.

"When colleges take a look at my application, they're going to see an incredible record with a lot of strengths, and they're going to say, 'Why isn't this kid in the National Honor Society — what's wrong with him?'" Dangler told *The New York Times* after hearing the verdict. ■

Ninth Circuit OKs ban on ads

Planned Parenthood will not appeal to High Court; lawyer cites improved relations with school district

NEVADA — A panel of 11 federal circuit court judges has upheld a school district's right to ban all pregnancy-related advertising from high school publications, but it affirmed a Ninth Circuit appeals court's ruling that censorship must be viewpoint neutral.

The *en banc* panel's decision in *Planned Parenthood of Southern Nevada v. Clark County School District*, 941 F.2d 817 (9th Cir. 1991), is the first federal appellate court case to apply to high school publications the analysis developed by the Supreme Court in *Hazelwood School District v. Kuhlmeier*.

The case arose in 1984 after the school district proposed a regulation barring student publications from printing ads for birth control products and information, as well as for gambling aids, tobacco and liquor products and "items which may not be legally possessed by students less than 18 years of age."

The measure, though not yet approved by the school board, was sent to all high school principals in the district. All but one rejected the Planned Parenthood ads.

Planned Parenthood said the policy infringed on their First and Fourteenth Amendment rights to freedom of speech and due process under the law because the district had not established "narrow, objective and definite standards to guide their conduct."

The district court that originally heard the case found that Planned Parenthood's First Amendment rights had been violated. After *Hazelwood*, the court "reconsidered and changed its ruling" and a three-judge panel of the appellate court affirmed the second ruling in 1989.

On rehearing, the judges said the school district's ban on all pregnancy-related ads met the *Hazelwood* standard of viewpoint neutrality and was related to "legitimate pedagogical concerns."

In *Hazelwood*, the Supreme Court looked at whether the school had "by policy or practice" created school-sponsored publications as public forums or whether they had reserved to administrators the right to control content. In the case of Clark County, the appeals court found that the publications in question were, by policy, not public forums under *Hazelwood*.

"The school district's intent was most clearly evidenced by written policies that explicitly reserve the right to control content. Its practices were not inconsistent with these policies," the decision reads. "The court found that in light of the schools' policy to accept advertising for school-sponsored publications, and their practice of retaining control and requiring prior approval, the schools' practice did not reveal the requisite clear intent to create a public forum."

"The court found no support for the conclusion that allowing some outside organizations to advertise converted the school-sponsored publications into public forums. Nor was the court persuaded by Planned Parenthood's argument that the nature of the speech at issue here, advertisements from an outside entity rather than student speech, placed this case beyond the reach of *Hazelwood*. Under *Hazelwood*, in cases such as this where school facilities have

not intentionally been opened to indiscriminate expressive use by the public or some segment of the public, school officials retain the authority reasonably to refuse to lend the schools' name and resources to speech disseminated under school auspices.

"The court thus concluded that controlling the content of school-sponsored publications so as to maintain the appearance of neutrality on a controversial issue was within the reserved mission of the Clark County School District.



"Because their decision to limit access, whether wise or unwise, is reasonable and not an effort at viewpoint discrimination, the school district did not violate the [F]irst [A]mendment in declining to publish Planned Parenthood's advertisements."

In a strong dissent, four judges disagreed with the majority's finding that the publications were non-public forums. They said the school district's "sole rationale" that it wanted to avoid contro-

'The schools' practice did not reveal [a] clear intent to create a public forum.'

—U.S. Court of Appeals

versy was critical to the ruling because it met the reasonableness test applied to non-forum publications.

Mark Brandenburg, who represented Planned Parenthood, said they do not plan an appeal, out of an interest in "getting on with things," and because the present Supreme Court is "not likely very receptive" to the organization's case. He said Planned Parenthood is now in a position to improve its relations with the school district.

"It's not the same as winning, but it's some consolation, I suppose," he said. ■

Judge rules high school lit mag censorable, not a public forum

MICHIGAN — A federal judge has ruled that a Carlson High School extracurricular literary magazine is not a "public forum" and may therefore be subject to extensive school censorship under the Supreme Court's *Hazelwood* standard.

U.S. District Judge Robert DeMascio applied the analysis set forth by the Supreme Court in *Hazelwood School District v. Kuhlmeier* and determined that, because *The Jib* was an outlet for creative expression open only to Carlson students, it was not an "open," or public, forum entitled to strong First Amendment protection.

DeMascio, whose decision in *Paye v. Gibraltar School District*, No. 90CV70444DT (E.D.Mich. Aug. 6, 1991), is precedent for the Eastern District of Michigan, also ruled that the students named in the complaint did not have standing to sue because they had graduated and therefore were "no longer subject to the school board's rules and regulations."

Rita Paye and Lynda Kapron, the Carlson English teachers who produced and edited *The Jib*, and several student staff members sued the Gibraltar School District claiming violation of their First and Fourteenth Amendment rights to free speech and due process of law.

Paye and Kapron distributed about 14

copies of the first issue of *The Jib* in 1988 before the principal confiscated the remaining copies. Gibraltar Superintendent Jerome Pavlov had received anonymous letters complaining of "satan-looking pictures" in the magazine and asking, "How come a student is suspended for saying 'asshole,' yet this kid gets [it] printed in a school magazine?"

Pavlov objected to four items in *The Jib* and advised the principal to remove them before releasing it. One was the story of a student who brought a gun to class, shot the teacher and then committed suicide; one was a poem discussing the author's ability to put his pet cat and father to sleep; another quoted Madonna as calling the person who grabbed her "boob" on stage an "asshole;" and the last was an illustration of a champagne bottle and glass.

Pavlov said he thought the illustration might suggest to "a younger mind that the school approved the use of alcohol."

"Clearly, *The Jib* represents school-sponsored expression," DeMascio said. "The intended purpose of *The Jib* was to extend a supervised learning experience to the students. From its inception, neither ... the school district nor Carlson ever intended, or allowed, *The Jib* to become a forum for expression for anyone other than students attending classes at Carlson....

"A school facility may be deemed a public forum only if the school district has, by policy or practice, opened its facilities for indiscriminate use by the general public, or by some segment of the public such as student organizations," DeMascio said. "If school facilities have instead been reserved for internal school purposes, communicative or otherwise, then no public forum has been created and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community."

(See GIBALTAR, page 12)



School board policy calls for censorship

New regulations give Austin principals the right to review district's student publications

TEXAS — Whoever said "everything's bigger in Texas" was not talking about student press freedom in Austin high schools.

But the effect of a new publications policy giving 10 Austin principals broad control over high school publications will depend largely on their willingness to enforce it.

"I do not plan to review every issue of the newspaper," Austin High School Principal Robert Enos told the *Austin Maroon*. "I simply don't have the time."

"Well, good for Bob," said Jacquelyn McGee, interim principal at Anderson High School and a former journalism adviser. "I don't want to take on anything more than's going to take up more of my time and give me more than I can say grace over."

In response to public outcry over stories on AIDS in *The Lone Star Dispatch* at James Bowie High School, the Austin Independent School District Board of Trustees on Sept. 23 passed a publications policy giving principals the right of prior review.

The policy "effectively neutered every journalism teacher in the district," said *Dispatch* adviser John McCartney.

The board decided that the principal's control of the school building should include control of its publications — "a real strange argument" in McCartney's view — and presented the policy as a management issue.

The controversy centered on a six-page spread in the 28-page April 19, 1991, *Dispatch*. Articles included an interview with a man diagnosed with

AIDS-Related Complex; instructions on condom use; a list of "safe," "risky" and "unsafe" sexual practices; and ads dealing with AIDS, condom use, teen pregnancy and homosexuality.

One outraged community member called the stories "pure filth," the *Austin American-Statesman* reported. Others said the stories encouraged promiscuity.

Dispatch staffers countered with statistics that showed Travis County had the highest rate of teen pregnancy in the state, and the *American-Statesman* reported Planned Parenthood statistics showing one in 500 teens in the county may have come into contact with the AIDS virus.

McCartney and Bowie Principal Kent Ewing stood behind the *Dispatch* staff, saying the issues covered in the spread needed to be addressed.

"It wasn't a crusade or anything — it was basically a one-shot deal," said *Dispatch* Editor in Chief Tara Trower. "There was a real vocal minority, and I think the policy was passed to quiet that vocal minority. So far I haven't seen any real change."

"The scary thing is that [the policy is] on the books."

Jack Harkrider, publications adviser at Anderson High School — recently named the top scholastic journalism program in the state by the American Newspaper Publishers Association — said the policy "may be even worse than [the *Hazelwood* decision] because they have not set up a clear chain of due process" for appealing prior restraints.

Now Ewing, the Bowie principal, reviews the content of the *Dispatch*, but he has not pulled any stories, McCartney said. The effect has been that Ewing advises the staff of what he feels the community's reaction will be, he said.

"We do think a lot about how things will be perceived, but it doesn't make us gun-shy," Trower said. The main difference between the roles of the adviser and principal is that "our adviser's there all the time," she said.

McCartney finds that duality discour-

Gibraltar

(Continued from page 11)

In *Hazelwood*, the Supreme Court said that the student newspaper at Hazelwood East High School, which was produced as part of a class, was not an open forum entitled to strong First Amendment protection. But later court decisions had suggested that *Hazelwood* might only apply to those student publications that were curricular, not those that were produced as extra-curricular activities unrelated to a class.

DeMascio said: "The pedagogical goal of *The Jib* was to improve the creative writing skills of students. Any student writing or drawing was eligible for publication.... *The Jib* was

not a class assignment and did not affect student grades or progress toward graduation. Most of the material prepared by the students were [sic] prepared outside of class. However, some of the material was originally prepared as a class as-

signment and later identified as suitable for publication."

DeMascio cited *Hazelwood*'s support of the school's censorship.

"*The Jib* carries the distinct imprimatur of being the literary magazine of Carlson," DeMascio ruled. "The school district has discretion to determine which materials are unsuitable and set high standards for student speech that is distributed as school-sponsored speech. The school district is entitled to control the content of *The Jib* to assure that student contributors' views that advocate killing, vulgar-

ity, or alcoholic consumption are not perceived as acceptable standards for Carlson students."

Paul Denenfeld, who argued the plaintiffs' case for the American Civil Liberties

Union, said they did not intend to appeal.

"It's a bad decision; we're very disappointed," he said. "But we're going to cut our losses and not make worse law in the Sixth Circuit." ■

'It's a bad decision; we're very disappointed.'

—Paul Denenfeld
ACLU Attorney

FREE COUPON FREE

THIS COUPON ENTITLES the

Holder to 1 FREE

Wow! Prior Revue!!! Great

RESTRICTIONS: DOES NOT APPLY TO ANY BAD WORDS INCLUDING THE G-WORD, THE V-WORD, THE X-WORD, THE S-WORD AND OTHER PROFANITIES; DOES NOT APPLY TO ANY OVERLY SENSITIVE TOPIC I.E. ABORTION, TEEN PREGNANCY, FAST CARS, LOUD MUSIC, SWIMMING, TAKING A SHOWER, KISSING AND READING CENSORED BOOKS SUCH AS HUCK FINN, The Catcher in the Rye AND SHAKESPEARE'S WORKS (UNCUT); CANNOT BE USED IN CONJUNCTION WITH AN ANNOUNCEMENT, ANYTHING SAID ALOUD, OR ANYTHING WRITTEN; NOT APPLICABLE IN TEXAS; OFFER ENDS 10-31-91; MAY NOT BE USED BEFORE 10-30-91; NO STUDENTS

Suggestions: SCHOOL APPROVED WELL-LIT FUNCTIONS; SAT & PSAT REVIEW SESSIONS; LATIN & MATH CLUB TUTORING SESSIONS

Ben Bays for *The Maroon*. Reprinted with permission.

aging, even though he says Ewing dispenses constructive criticism.

For instance, when the *Dispatch* staff wanted to run an ad for a homosexual support group, Ewing "played the devil's advocate" to test whether they could defend their decision to the community, McCartney said.

When the students did not have answers, "he gave them sources to go to [and] get that information so that they could get the answers they needed," McCartney said.

"My principal says he wants quality, and he does. He knows that when you have quality, you make some people mad."

"[The principal] knows the community more," Trower said. "He brings up questions like, 'Have you thought about this?' He hasn't harmed the process any."

"[But] you fear that, because he's so visible in the community, he might be pressured to pull something."

'You fear that ... [the principal] might be pressured to pull something.'

—Tara Trower
Editor in Chief, *The Lone Star Dispatch*

The new policy has also affected the Bowie yearbook and literary magazine. Now both have editorial boards with parent and faculty members.

The literary magazine is produced by the yearbook staff after the yearbook has gone to press. Previously, the students voted on including pieces produced in other classes. But McCartney is unsure how it will be produced this spring.

"I don't know what

[Ewing]'s going to do anymore," he said. "I don't know what anybody's going to do. It depends on what the politics of the [school board] are."

McCartney sees the most potential for future controversy in the *Dispatch*, and after that in the literary magazine, which came out during last spring's outcry over the

Dispatch and was accused of promoting satanism, homosexuality and bestiality.

"At that point, if they found a typo [graphical error in the magazine], it was satanic," he said.

Although the *Dispatch* staff has not developed a contingency plan should the *Dispatch* face censorship, McCartney said they are well-schooled in "the fine details of student press law."

McGee, the Anderson interim principal, said that although she does not intend to review the Anderson newspaper, the future of Anderson publications will depend heavily on her successor's enforcement of the new policy.

"At this school, as long as I'm here, we'll continue to operate as the [adviser] and the students decide," she said. "I predict that most principals will continue to let the students and staff members do as they want to ... until somebody else doesn't like something that's printed and makes a big to-do."

"I may be too optimistic, but in the future I foresee getting a new school board and having the policy amended," Harkrider said.

The whirlwind of attention focused on the *Dispatch* last spring tested the eight-person staff's mettle, McCartney said. In the face of harassing letters and phone calls, they bought an answering machine to field calls so they could concentrate on putting out the paper.

"They're really emotionally drained," McCartney said. "Nobody understands what they went through. They just had to bolt themselves in and build walls just to stay focused." ■

Underground paper still subject to review, restraint

In the absence of a school board policy, principal sets distribution, content restrictions

NEW JERSEY — Metuchen High School Principal John Novak has agreed to allow *The Awakening*, an underground newspaper, to be distributed on campus, but neither he nor the Metuchen Board of Education has put a publications policy in writing.

The board recommended in May that high school administrators look at their criteria for reviewing student publications after two Metuchen High School students accused Novak and Superintendent Gennaro Lepre of censorship when Novak attempted to remove three stories from *The Awakening*.

"We never got a full policy developed," Lepre said. "We're not going to blaze any trails."

Lepre said the district now has an informal policy that keeps administrators from reviewing "independent" publications before distribution, but that he has yet to find a written policy he would be willing to recommend to the board.

Novak said a "general statement" on publications is in the student handbook, but he said he does not intend to refine it.

"It's never been a problem," he said.

Brian Glassberg and Howard Mergler, co-editors of *The Awakening*, asked the board to intervene when Novak imposed time and place restrictions on the paper's distribution.

Novak approved before- and after-school distribution of *The Awakening* in the main hall of the school — the same distribution time and place for the *Bulldog's Bark*, the official student newspaper. In order to be distributed in classrooms, for example, *The Awakening* would have had to submit to prior review, Novak said.

"As long as they submitted to prior review, they would have that option," Novak said. *The Bulldog's Bark*, because it is not free, does not have that option, he said.

Novak's advice to underground editors: "You can bet that when I give you a time and a place, the first person to pick up the paper will be a staff member who will quickly take a look at it."

Should an underground newspaper contain objectionable material, Novak said he would ban distribution of that issue.

He said there must be two standards: a higher one — enforced by prior review — for school-sponsored publications, and a lower one — enforced by post-



publication review — for underground publications. Last spring, Lepre said Novak's position was "supported by the law as our attorney saw it."

The attorney, Jim Stahl, refused comment on the advice he gave Novak.

"The issue is not ripe at this time," Stahl said. "I don't want to give an opinion on it."

"He was saying that *Hazelwood* gave school administrators license to do anything they wanted," Ed Martone, executive director of the state chapter of the American Civil Liberties Union, said in reference to *Hazelwood School District v. Kuhlmeier*, in which the Supreme Court ruled that administrators could review school-sponsored publications not designated as open forums.

Martone told the board at its May 7 meeting that administrators should not review *The Awakening* before allowing

students to distribute the newspaper.

Novak said Stahl may have thought *The Awakening* was a school-sponsored publication and therefore subject to prior review.

"It seemed like everybody was on a different wavelength" at the time, Novak said. ■

Principal suspends underground editors for refusing review

PENNSYLVANIA — Five Hollidaysburg Area High School students were suspended last spring for distributing an underground newspaper in violation of school policy.

"We only got about 12 issues out," said sophomore Jennifer Wertz. "Someone turned us in to the administration."

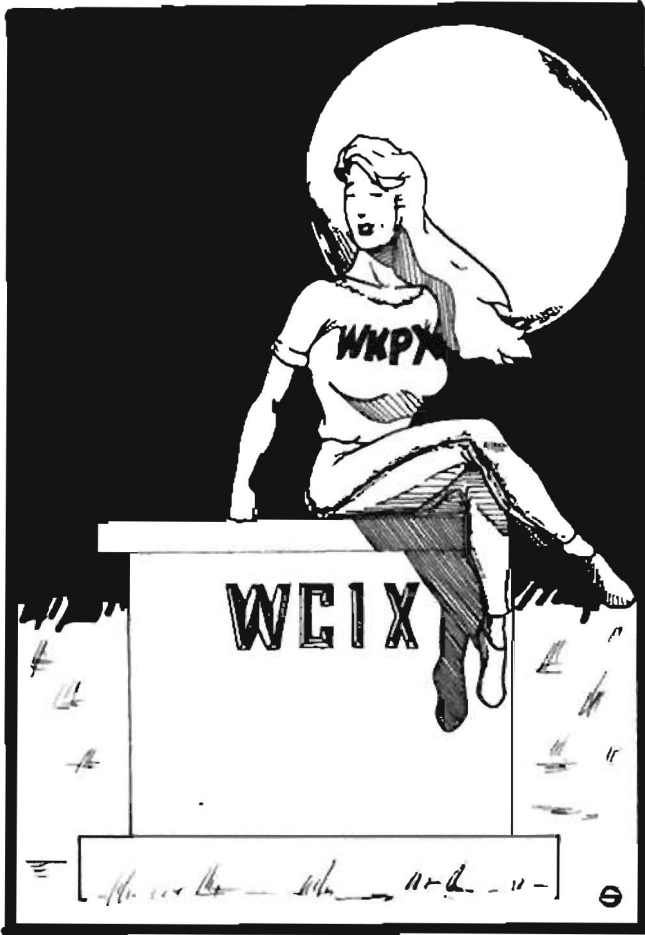
Principal Gary Robinson suspended the five girls, citing a school policy requiring administration approval of student publications prior to their distribution, *The American School Board Journal* reported.

'We only got about 12 issues out.'

—Jennifer Wertz
Suspended student

The newspaper, *Tell All*, included pieces critical of Robinson, the school's student outreach service and student elections. Robinson said the two seniors, one junior and two sophomores were suspended for failing to get *Tell All* approved, and not because he disagreed with the views presented in the paper.

Senior Karen Miller said the girls did not submit *Tell All* for review because they did not believe the administration would approve it for distribution. ■



At long last, Piper gets radio license

FLORIDA - In a battle between a Sunrise high school radio station and CBS-TV, the big guy blinked first — but the fight lasted more than twice as long as most students' high school careers.

The Federal Communications Commission granted a permanent license to WKPX-FM at Piper High School after officials at CBS-owned WCIX-Ch. 6 backed down and applied for UHF licenses to broadcast in areas where they had said WKPX's signal interfered with theirs.

The high school's progressive rock station, 88.5 FM, broadcast with a temporary license for more than eight years.

"It's like we've been driving with a learner's permit," Mike Bigansky, WKPX production manager, told the Associated Press. "Finally, we can kick our parents out of the car."

Some Broward County viewers complained they heard heavy metal music when they tuned into CBS's "As the World Turns." Peter Gutmann, the Washington attorney who represented the Broward County school district before the FCC, blamed it on the weak signal from WCIX's tower in far-away Homestead.

WCIX officials decided to apply for UHF licenses to broadcast in western Broward County rather than continue the fight.

"We have no intention to do anything further about this," said Brian Blum, a WCIX spokesman. ■

Peace symbol banned from literary mag

NORTH CAROLINA — Students at Carroll Middle School in Raleigh who wanted to "give peace a chance" found themselves accused instead of "giving the devil his due."

Some Christians consider a circle around an inverted Y with a third leg — which is similar to the popular symbol for peace — to be a symbol of the Antichrist. After CMS Principal Leon Herndon heard this, he banned peace symbols from the school's literary magazine, *Paw Prints*.

Eighth-grader Kathleen Lloyd's illustration of a peace symbol decorated with flowers was to appear on the

'Where is the separation of the state and religion?'

—Ann Thompson
Episcopal Peace Fellowship

magazine's cover. But after Herndon imposed the ban, a drawing of a tree with a paw print on it ran in the place of Lloyd's illustration.

"We think it's a matter of serious import — not just the rejection of the peace symbol as it is universally accepted now, but also the rejection of the creative expression of the children," Carolyn King of Wake Interfaith Peace and Justice Group told the *Raleigh News and Observer*. Representatives of Wake Interfaith met with Herndon to discuss the incident.

"Where is the separation of the state and religion?" said Ann Thompson of the Episcopal Peace Fellowship. "The decision was based on people being offended." ■



Free expression gains momentum

State legislatures consider bills to protect high school press rights

The push for student free expression picked up new allies in the battle to counteract the effects of the 1988 Supreme Court decision in *Hazelwood School District v. Kuhlmeier*.

To date, Colorado, Iowa and Massachusetts have returned to high school students the rights they lost in *Hazelwood*. Only California had such a law before the Supreme Court decided the *Hazelwood* case.

Of the three bills pending in state legislatures that would reverse the effects of *Hazelwood*, those in Kansas and New Jersey appear closest to passage.

In addition, the Missouri Interscholastic Press Association has drafted a student free speech proposal and is seeking a sponsor in the Missouri legislature.

New Jersey House bill 557, sponsored by Assemblyman Anthony Imparato (D-Hudson), passed the House and was awaiting a vote in the Senate at press time.

The General Assembly was expected to hold special sessions before January, but the Assembly's attitude toward the bill was uncertain in light of November elections that ousted many Democratic state legislators.

Gov. Jim Florio has promised the Garden State Scholastic Press Association he would sign the measure.

The Michigan Board of Education

recently gave its support to House bill 4565, sponsored by Rep. Lynn Jondahl (D-Okemos), the Michigan Freedom of Information Committee reported. But the board's vote was split 5-3.

"Freedom of speech stops sometimes, and young people need direction," said dissenting board member Marilyn Lundy (R-Grosse Pointe).

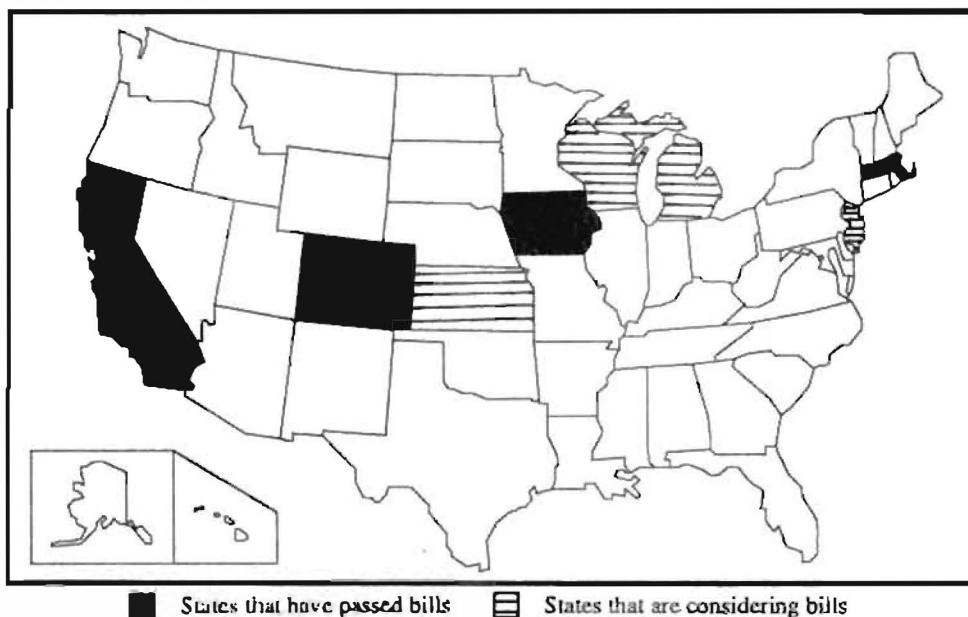
A November hearing was held on the bill, which has heavy backing from the Michigan Interscholastic Press Asso-

ciation. The fight for student press freedom is an old one in the Kansas statehouse, where another bill survived two sessions and a Senate hearing before dying in committee.

The Wisconsin Assembly Education Committee in December held hearings on Assembly bill 567, sponsored by Rep. Peter Bock (D-Milwaukee), which would restore student press rights lost under *Hazelwood* and

protect educators from liability. It was expected to reach the floor in early 1992.

A broader expression bill, AB98, sponsored by Rep. Marsha Coggs (D-Milwaukee), would also counteract restrictive dress codes. Hearings were held in September, and the bill is



ciation but is opposed by the Michigan Association of Secondary School Principals.

Legislation that died in a New Hampshire House committee last year will get another crack in January, when the legislature convenes.

Sponsor Burt Cohen (D-New Castle) and Claire Ebel, director of the New Hampshire Civil Liberties Union, have said they plan to reintroduce the bill, modeled after the Iowa law, until it passes.

Under Kansas legislative rules, Senate bill 62, sponsored by Lana Olen (R-Manhattan), will be resurrected in the

still in the Assembly Urban Education Committee.

The Missouri Interscholastic Press Association's proposal for "Responsible Expression in Missouri Schools" is the centerpiece of a grassroots educational campaign, said MIPA Director Robert Knight, a University of Missouri journalism professor.

MIPA has not yet found a sponsor for the proposal and is still organizing its campaign.

Supporters of student free expression legislation in Washington state also hope to have a new bill ready for introduction in January. ■

If only access to school records and meetings were as easy as saying,

Open Sesame!

For many student journalists, the toughest part about using state and federal open records and open meetings laws is knowing how to use them.

After that, access to records via these laws is often a routine thing: make a request, get some documents. But a growing number of student journalists feel they are not getting everything they are entitled to under the law.

Then they go to court.

Student journalists at Harvard University and The University of Georgia have gone to court on federal and state sunshine requests, respectively, and they have found that justice often takes longer than the typical student journalist's academic career.

A *Harvard Crimson* appeal of federal Freedom of Information Act denials by the U.S. Department of Health and Human Services will go to court sooner than expected, said Theresa Amato of the Public Citizen Litigation Group in Washington, D.C., which is representing the *Crimson*.

Crimson staffer Joshua Gerstein, who coordinated the suit for the paper, has graduated and works for Cable News Network in Washington.

The *Crimson* twice sought documents related to negotiations between Harvard University and the department over the school's indirect research cost, or overhead, rate. HHS denied both requests, but an appeal of the first denial yielded about 80 pages of pre-1987 documents.

Overhead costs are money the federal government pays universities and private companies for maintenance and administrative expenses related to federally funded research.

Harvard last negotiated its overhead rate in October 1987. HHS officials claimed that, because they were negotiating new overhead rates with Harvard, both the pre- and post-

1987 documents fell under the portion of the Freedom of Information Act exempting documents of a deliberative nature.

HHS last fall approved 1,400 pages of pre-1987 docu-

ments for release, but at press time Harvard officials had not indicated what portion of those they were willing to disclose. HHS was scheduled to file briefing papers in early December based on Harvard's approval or denial of that release, and Public Citizen's reply was due January 6.

Amato said the December deadline was an improvement over HHS's request for an April deadline.

A Georgia superior court judge in November heard oral arguments on behalf of *The Red and Black* in its suit against the university system board of regents for access to University of Georgia judicial proceedings involving student organizations.

Attorney Keegan Federal argued that the federal Family Educational Rights and Privacy Act of 1974, commonly called the Buckley Amendment, was not intended to prevent disclosure of disciplinary or criminal records. Defense attorneys said the university risked losing \$64 million in federal funds if officials released records or opened hearings involving student organizations.

University officials last spring denied *The Red and Black* access to campus judicial records and hearings involving two fraternities in response to three state open records/meetings requests.

The assistant attorney general was scheduled to finish arguing the regents' case before Judge Frank Hull on December 16.

Editor in chief Jennifer Squillante, who is named as a plaintiff in the suit, was scheduled to graduate from the university in December but will remain a plaintiff until the case is resolved. ■



Maine law shines on yearbooks

Judge: Buckley no excuse

MAINE — A Maine Superior Court judge ruled in August that the state's open records law required a principal to allow a reporter access to public high school yearbooks.

The case, *Tompkins v. Galway*, No. CV-90-136 (Kennebec Sup. Ct.), was filed in 1990 by the news operations manager of an Auburn television station after the principal at Greely High School in Cumberland Center refused to allow the station's

'A high school yearbook is not an education record.'

—Judge Bruce Chandler

news crew to reproduce a picture from the school's 1989 yearbook. The picture was of a former GHS student who had been convicted of manslaughter.

Maine's open records law defines public records as "any written, printed or graphic matter ... that is in possession or custody of an agency or public official of this State ... [and] contains information relating to the transaction of public or government business." In finding that the law encompassed high school yearbooks, Judge Bruce Chandler ruled that "everything connected with the public education of students of necessity must fall into that part of the statutory definition."

Chandler also dismissed the principal's claim that a high school yearbook was an "education record" and

therefore not allowed to be released under the Buckley Amendment.

The Buckley Amendment, officially known as the Family Educational Rights and Privacy Act (FERPA), is a 1974 law that prohibits schools from releasing student education records to the public. Because of ambiguities in the law, there has been much confusion as to the scope of its "education records" definition.

"A high school yearbook ... is not an education record such as is contemplated by [FERPA] and disclosure of material therein is therefore not constrained by that Act," the judge ruled.

"Information with respect to high school students unless covered by the Family Educational Rights and Privacy Act or other confidentiality statute is no more protected from disclosure than records concerning any other person," the judge ruled.

While yearbooks are public records and therefore required to be released, the judge said that school officials could set "reasonable rules and methods" for obtaining access to such records. Adoption of a crisis management policy, which designates one individual, such as a school superintendent, as the custodian of a public record would not violate the open records law so long as the policy guidelines do not infringe upon the public's right to review those records, the judge said. ■



Iowa prof. loses fight for access

State supreme court says outside parties not allowed at tenure appeal hearing

IOWA — The Iowa Supreme Court ruled in September that a University of Iowa faculty judicial panel that investigates and hears cases involving faculty promotion and tenure decisions is not a public body and is therefore exempt from the state's open meetings law.

The decision, *Donahue v. State of Iowa and Board of Regents*, 474 N.W.2d 537 (Iowa), stemmed from a lawsuit filed by Patricia Donahue, an associate professor of nursing at the University of Iowa. Donahue had been denied a promotion to full professor and had initiated an administrative appeal of the decision claiming both bias and erroneous findings regarding her record and



achievements. As part of the appeals process, Donahue was scheduled to appear before the faculty judicial hearing panel. The panel is formed through and by the university's faculty senate, which in turn is elected by the faculty at large. The panel investigates and hears cases involving faculty promotion disputes. If the panel finds for the faculty member it then makes a non-binding recommendation to the university president who is responsible for making the final decision. If the panel's findings are adverse to the faculty member, the case ends.

Donahue asked that her hearing before the faculty judicial panel be open to the public. She also wanted to bring both a newspaper reporter and a member of a national association of college educators to the proceedings. The panel denied her request and Donahue filed suit claiming the decision violated Iowa's freedom of information law. That law requires that the meetings of governmental bodies "shall be held in open session unless closed sessions are expressly permitted by law" and all infor-

mal as well as formal actions and discussions of the bodies "shall be conducted in open session."

In ruling that the faculty judicial panel was not a public body, the court looked very closely at the law's definition of "governmental bodies." It found that because the panel was not expressly created by statute or "formally and directly" created by another governmental body that was itself subject to the open meetings law it did not fall within the statutory definition. Layers of university officials separate the panel from the Board of Regents, which is a public body, the court said. The court also thought it relevant that the panel was essentially an advisory board, with no policy making power.

The court said that while it still adhered to the view that the open meetings law should be liberally construed so as to prohibit secret or "star chamber" sessions of public bodies, it was up to the legislature to set the law's parameters. The court noted that in 1978 the Iowa state legislature significantly narrowed

the scope of the law by amending the definition of governmental bodies. Previously, a body was subject to the open meetings law where it was merely "authorized" to carry out governmental functions.

"[While] we might or might not set some boundaries differently," the court said, "our clear responsibility is nevertheless to apply the ones established by the legislative branch of government." ■

MSU must give athletic drug testing policies to Detroit News

MICHIGAN — Michigan State University must give the *Detroit News* documents about its athletic program's drug and steroid testing policies, but the paper is not entitled to individual test results, a Michigan judge ruled in September. *The Detroit News, Inc. v. Michigan State University*, No. 90-66-308-AZ (Ingham Cty. Cir. Ct. Sept. 16, 1991).

In an oral opinion, Ingham Circuit Judge Michael Harrison ruled that the Michigan Freedom of Information Act required MSU to release information regarding its drug testing policies. However, the judge said that the law did not require disclosure of information that identified any specific athlete because of the act's physician-patient privilege exemption. Harrison further found nothing in the act that would require MSU to "whiteout" the names of MSU athletes so that the records could be removed from the exempt category.

The judge said, without specifically ruling, that he was not persuaded by the *News'* argument that the public was entitled to know that an individual accepting a publicly funded scholarship was drug-free.

The *News* first requested drug testing results and policies from Michigan State in April 1990 as part of an investigation into reports of widespread steroid abuse among the school's athletes. ■



Shining light on

College Foundations

College and university foundation records and meetings can provide valuable information about the financial situation of your school—if you can get them. The good news is that courts are increasingly inclined to declare them public.

Public colleges and universities have come up with a new way to receive and spend money that can result in less public access to important financial information about the school: creating their own foundation.

College and university foundations are becoming more popular as the umbrella organization to raise money for higher education institutions and to receive all private gifts and donations given for the benefit of the school. State schools have found that they must turn to private funding as the gap grows between state assistance and the costs of improving the quality of education.¹ But as schools rely more on private foundations to raise money, student journalists can find it difficult to get information about this money.

Student journalists who have tried to get access to foundation meetings and records — so they can determine who is giving money to the university, how much money is being donated and how that money is being spent — have been stymied by claims that foundations are not covered by state open records and open meetings laws. Foundation officials often claim that the foundation is a private corporation, and thus not a public agency subject to freedom of information laws that apply to the schools themselves. But student and commercial news media have been successful in some cases in arguing that college and university foundations are covered by those laws.

Only a few cases exist on this issue and because state freedom of information laws vary from state to state, the

decisions in one state would not apply in other states. But the courts' reasoning could be used to determine the application of other states' FOI laws to your college or university foundation.

State Courts Rule

The majority of states that have ruled on the applicability of state FOI laws to school foundations have found that such entities are subject to them. Courts or attorneys general in Louisiana, Michigan and South Carolina have said that foundations at public schools are subject to freedom of information laws, while courts in Kentucky and West Virginia have said university foundations are not. As discussed below, however, case-by-case exceptions to the Kentucky court decision may be available to those seeking access. An attorney general's opinion in Arkansas found a university foundation was subject to FOI laws, but only until the date when the foundation operation changed so that it no longer relied on university funds or services. Records created after that change were not subject to disclosure.

What Foundations Do

Foundations usually have several purposes: raising money for new or existing academic programs; alumni activities; scholarships; grants and loans; memorial funds; fellowships, professorships, endowed chairs, teaching assistantships and internships; and constructing or renovating university buildings. They may also accept gifts-in-kind, such as art objects, equipment for university use, securities, real estate and trusts.²

Foundations are usually created un-

der state law and are chartered as charitable, educational, not-for-profit corporations. It is because of this status as a separate "corporation" that foundation officials claim they are not subject to open meetings and open records laws. But some courts and attorneys general have found that despite a foundation's creation as a corporation, certain factors when added together make the foundation a public body subject to state open meetings and records laws. These factors have included whether the foundation receives support from a state university through the use of personnel, equipment or facilities; whether a majority of the foundation board is comprised of membership of the university board; whether the foundation receives and spends public funds; whether the foundation performs governmental functions or functions that are the university's responsibility by law; and whether the foundation is formed by legislative mandate or by resolution of a public body such as the university board of trustees.

Some Courts Open Records

For example, regarding Nicholls State University in Louisiana, the state supreme court ruled that records of the Nicholls College Foundation showing how it spent student fees must be disclosed because the fees were "public funds" under the state's Public Records Act.³ The court declined to decide whether the foundation was a public body without more information on its duties and functions, although the court did say that the evidence leaned in favor of "public body" status. The court noted that the foundation was located on state

property, used university employees, performed functions that were the university's responsibility, and received student fee money determined by the court to be public funds. The student fee money was especially important to the court because even though the fees were initially collected for an alumni federation, eventually a portion of that money was transferred to the foundation for its use in promoting the university. The court limited the disclosure to records pertaining to the student fees, saying the state could not inspect records on private donors or other receipts and expenditures unrelated to the student fee money.

In what may have been a response to the decision in that case, the state legislature passed a bill that exempted every present or future public university foundation from the state open meetings law and from any aspect of the state public records act, regardless of public funds spent or public functions performed. Governor Buddy Roemer vetoed the bill, saying that the proposal went too far. The governor said the public should be aware of the influence that foundations have when they advise the university on its educational or athletic activities. He also said that under the legislation foundations would not have been required to disclose supplemental payments to university presidents or other university personnel, such as coaches. He sent the bill back to the state legislature and asked it to send him a new version of the bill that would protect the interests of the public as well as the foundations, such as contributors' desires to keep their identities secret.

In a recent case in South Carolina, the state supreme court held that the non-profit private foundation for the Univer-

sity of South Carolina was subject to the freedom of information act and its records must be disclosed because it spent and was supported in whole or in part by public funds.⁴ The foundation received public funds from a sale of university property; received city, county and federal grant money; and received a portion of money from third-party research and development contracts with the university.

Courts Close Foundations to Public

The outcome has not been so bright in West Virginia, where at least two courts have ruled that university foundations are not public bodies whose records would be subject to the state's freedom of information act. The state supreme court of appeals ruled that the West Virginia University Foundation Inc. was not a public body. The foundation board was comprised of private citizens, the foundation did not use state employees, it had its own headquarters off campus and was not formed by legislative mandate.⁵ At Marshall University, efforts by the student newspaper, *The Parthenon*, to get access to foundation records were blocked when a state circuit court ruled that the university foundation was not a public body,⁶ following the earlier decision involving West Virginia University.

The newspaper had filed suit seeking access to financial records, specifically revenue, expenditure and investment information related to the Society of Yeager Scholars that the foundation supported. The society was an academic program created to recruit top students to the school by offering them scholarships, computer equipment and other incentives. The program was funded by private donations received by the uni-

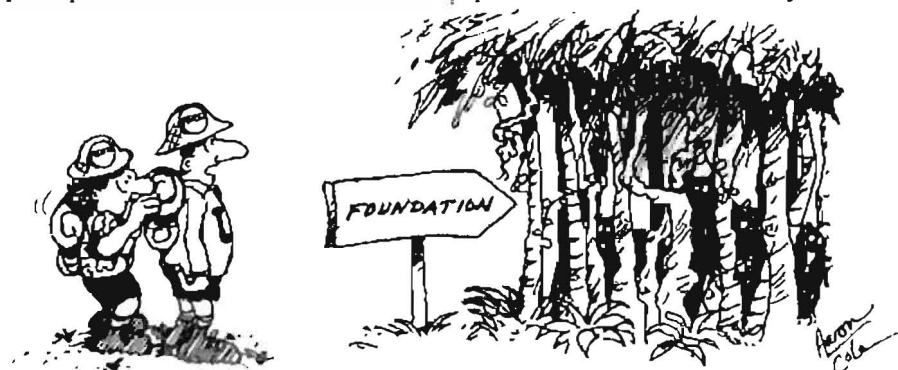
versity foundation, and the foundation disbursed the program's funds.

Factors that may have played a role in the court's decision included considerations that the foundation was created as a non-profit, private corporation by private citizens; it was not created by a local or state authority, which is required for a public body to be subject to the state's freedom of information law; it was not primarily funded by the state; its membership and board of directors were composed of private citizens; it bought its own equipment and office furnishings; and although it used university administrative services to pay its employees' salaries and benefits, the foundation reimbursed the university.

In Kentucky, the state court of appeals held in July that the Kentucky State University Foundation was not a "public agency" under the state's Open Records Act.⁷ The court found the foundation fit into none of the definitional categories for a public agency contained in the statute. The decision reversed the trial court's ruling and would nullify a written opinion of the attorney general that said the KSU Foundation was an agency of the university and therefore subject to the Open Records Act. The decision, however, would apparently not overturn an earlier attorney general's opinion finding that where foundation records are in the custody of the university itself, a reporter may be able to gain access to them. While an attorney general's opinion does not carry the weight of a court decision, student journalists can still point to the opinion as persuasive authority to support their contention that the records should be disclosed.

One avenue for access to foundation records that the Kentucky court hinted might be available, but which it expressly declined to address, might be the state's law requiring every nonprofit foundation holding funds for the benefit of any state university to file specified financial information with the state investment commission.⁸ If the investment commission is found to be a "public agency," journalists might be able to gain access to the information filed with them by university foundations.

(See *FOUNDATIONS*, page 36)



Court axes junior high distribution

Attorney caught off-guard by judge's forum analysis, asks for retrial

ILLINOIS — Megan Hedges may have won a battle, but, at least for now, she has lost the war.

After ruling in January that a junior high school's policy against distribution of all religious material on school property was unconstitutionally overbroad, the same Illinois federal district court judge ruled in October that the school's amended policy was reasonable and could be enforced.

Due to some post-trial legal wrangling, however, the decision is not yet final.

Judge Paul Plunkett ruled in *Hedges v. Wauconda Community Unit School District No. 118*, No. 90-C-6604 (N.D. Ill. Oct. 18, 1991), that the new policy is a valid exercise of school

authority and in keeping with the school's "educational mission," a term that neither the court nor the school defined. Among other things, the policy bans distribution of 10 copies or more of all religious material that "students would reasonably believe to be sponsored, endorsed or given official imprimatur by the school." It also prohibits distribution of written material that is "primarily prepared by non-students or which concerns the activities, or meetings of a non-school sponsored organization." Distribution of written materials by non-students is also forbidden.

Administrators at Wauconda Junior High School used the amended policy in January 1991 to deny Hedges, then a 13-year-old eighth-grade student at the school and a member of the Wauconda Evangelical Free Church permission to distribute copies of the religious publication, *Issues and Answers*, to fellow students.

Hedges was subsequently denied permission to distribute a flyer advertising an event to be held at her church in support of Desert Storm troops. The

flyer contained no religious content, aside from the fact that the activity was to be held on church premises. Hedges filed suit against the administrators and the school district, claiming that the policy infringed her constitutional right to freedom of speech and freedom of religion. It was the second time in less than three months that Hedges and school authorities battled in court.

The new policy was put into effect in January 1991 following an episode the

sion was in error.

The court noted that the school district policy stated that the educational mission of the school was served by open debate. The policy encouraged Wauconda students to express their own views concerning a wide variety of topics and issues and share them with other students in the school — even those ideas that might be unpopular or controversial. Nevertheless, the court found that the school was still a closed forum

because it allowed such speech only in furtherance of the school's educational mission. If specific speech was not part of the school's educational mission, the court said, it could be restricted.

'There were a number of decisions favorable to Megan's claim that we felt the judge should have cited but didn't.'

—Chuck Hervas
Megan Hedges' attorney

previous November in which Wauconda school principal Christine Golden confiscated numerous copies of *Issues and Answers* distributed by Hedges pursuant to an earlier school district policy that banned distribution of all "written material of a religious nature." That policy was ruled unconstitutionally overbroad by Judge Plunkett in December 1990.

In the first case, the court said that the school, through its original policy, had created a limited open forum in the school hallways. In ruling that the school district's new policy was lawful the court reversed its original finding by ruling that all of Wauconda Junior High School was a closed forum. The decision caught Hedges' attorneys by surprise as they believed the issue had already been conclusively decided and therefore felt there was no reason to rehash the issue in their arguments before the court. In explaining its changed position, the court said that it had mistakenly believed that both sides had agreed on the limited forum status in the first case but upon subsequent review found that such a conclu-

Determination of the type of forum involved is critical in First Amendment cases involving censorship of school-sponsored publications as it dictates the level of scrutiny that a court will apply in determining whether the government's regulation of otherwise constitutionally protected speech is valid. In practice, and as the *Wauconda* decision illustrates, a court's decision regarding forum status generally determines which side will eventually prevail. But some courts, relying on the Supreme Court's decision in *Tinker*, have said that forum analysis is irrelevant in cases involving non-school-sponsored publications.

In finding that Wauconda Junior High was a closed forum the court found that the District could reasonably conclude that its educational mission was best served "by encouraging students themselves to articulate their ideas in their own words or through their own preparations." Therefore banning *Issues and Answers*, a publication produced by an outside religious group, was valid, the court held because it was not "primarily prepared" by Hedges.



Likewise, the court found that the principal acted lawfully in preventing Hedges from publicizing the activities of her church's Desert Storm activities because the school was mainly con-

cerned with its own organizations and events and could reasonably decide to limit comment to those activities. The court also felt it reasonable for the school to prevent promotion of non-school activities because of the inability of the school to vouch for the reputation or legitimacy of the outside organizations.

Finally, the court said that distribution of *Issues and Answers* could be prevented because of the school district's reasonable interest in ensuring that school-sponsored and non-school-sponsored publications not be confused. While *Issues and Answers* nowhere identified itself as a school publication the court felt that students might nevertheless be misled.

Remarkably, the court ignored a leading Seventh Circuit case, *Fujishima v. Board of Education*, 460 F.2d 1355 (7th Cir. 1972), which held that a system by which public school administrators review non-school-sponsored publications prior to distribution is unconstitutional on its face and cannot be enforced. That case, which remains the law in Illinois, Indiana and Wisconsin, involved a Chicago Board of Education policy that required the superintendent to approve all publications prior to their distribution on school premises. The court held that "because [the school rule] requires prior approval of publications, it is unconstitutional as a prior restraint in violation of the First Amendment."

"There were a number of decisions favorable to Megan's claim that we felt the judge should have cited but didn't," said Chuck Hervas, Hedges' attorney.

Following the decision, Hervas filed a motion for a new trial based on the judge's surprise switch of forum status. In mid-November the judge agreed that he may have misled Hedges' side and allowed both parties to submit arguments on the forum issue alone. If Hedges wins, a motion will be granted for a new trial. If not, the decision will stand and Hedges will have to make a decision on whether or not to appeal. ■

Slotterback wins hallways in settlement

PENNSYLVANIA — Attorneys for the Interboro School District approved a settlement allowing a student to distribute religious pamphlets in a public high school.

Under the terms of the settlement, Scott Slotterback can distribute religious literature before and after school at a table near the principal's office, in the cafeteria during lunch, and in the hallways between classes. The only caveat to the settlement is that no more than three students can gather around a distribution point at once.

Michael Considine, who negotiated the settlement for Slotterback, said this

may be the first time a student has won the right to distribute religious literature in school hallways.

The school district accepted the settlement in lieu of going to court for a ruling on whether distribution of religious literature violated the *Tinker* standard established by the Supreme Court in 1969. Under *Tinker*, administrators can censor only student expression that would cause a "material and substantial" disruption of school activities.

A federal judge, in *Slotterback v. Interboro School District*, 766 F. Supp. 280 (E.D.Pa. 1991), ruled that high schools do not violate the Establishment

Clause separation of church and state by allowing students to distribute religious literature on school grounds.

"Apparently [the school district] didn't think they were going to win [on the *Tinker* question] or they would have gone to court," said Considine, who called the settlement "too good to pass up."

Under the terms of the settlement, the school district must also pay Slotterback's attorney's fees.

The judge in *Slotterback* also ruled that students would not interpret the school's tolerance of religious distribution as an endorsement of religion. ■

Control Fix

College administrators say they must control student publications to avoid liability. But the courts have said prior review and censorship actually create liability.

For college journalists last fall, censorship came from all sides as administrators, local communities and fellow students tried their hand at handicapping the student media.

Two universities in particular illustrated a baffling trend among college administrators: the conviction that administrative review of student publications will protect the institution from legal liability.

Every federal and state court to rule on the liability of public colleges and universities for the content of their student publications has said schools cannot be held liable for the decisions of the student staff as long as the school is not interfering with content decisions. Schools that do exercise prior review and restraint thus increase their potential liability.

But The Ohio State University's publications committee, on advice from the school's legal counsel, instituted a policy giving the power of prior review to the adviser and limited editorial control to an outside attorney.

The committee saw its choice as whether to exercise more editorial control over the *Lantern* or to make the *Lantern* financially independent. Because independence was not immediately feasible, the committee opted to let the adviser exercise prior review and let an outside attorney exercise prior restraint. (See *POLICY*, page 25.)

The University of Texas at El Paso, whose publications board exercises prior restraint, brought in a University of Texas system attorney and, on his advice, censored a story from *The Prospector*, the official student newspaper.

Both the student who wrote the story and the university system attorney agreed that the article, which alleged sexual harassment by university administrators, would probably land the school in court. The board subsequently voted to pull the story. (See *BOARD*, page 27.)

At the George Mason University School of Law in Vir-



ginia, the dean wants to do away with the school's student-edited law review altogether and replace it with two faculty-edited reviews next fall, but not out of fear of potential liability. Rather, he feels student-edited law reviews have lost their value and prestige and are "elitist." (See *DEAN*, page 26.)

In Louisiana, Loyola University President James Carter resisted community

pressure to fire the editor and adviser of the official student newspaper.

Carter asked the board of communications to consider a petition signed by more than 200 people recommending that he fire *Loyola Maroon* editor Michael Wilson and adviser Raymond Schroth after Wilson ran a column that offended many Puerto Rican students there, *Editor & Publisher* reported.

The board recommended that Carter reprimand the two and review Schroth's performance at the end of the year, which he accepted. In addition, the board said the *Maroon* should develop a code of ethics and separate the positions of editor and opinions columnist.

For a while it looked as though the rights of a student photographer in Pennsylvania would be trampled by administrative concerns about the portrayal of Widener University students in the school newspaper.

The director of student activities at the Pennsylvania school confiscated free-lance photographer Elizabeth Helsley's film in September after she took a picture of a drunk underage student on campus. Helsley had agreed to take pictures of the school band, and the school offered to develop the film for free in return for the band pictures.

After Kelsey Purnell, editor of *The Dome*, threatened to file criminal charges, the school returned the film. She said she planned to use the pictures for an alcohol awareness issue. ■

Policy puts attorney in editor's chair

Seven editors fired, publish off-campus

OHIO — Three editors of *the Lantern* at The Ohio State University in Columbus resigned and seven others were fired after they refused to publish under a policy giving the adviser and an outside attorney the power of prior review.

Although every court to rule on the issue of prior review of college publications has declared it unconstitutional, the university's legal counsel said he believes a court will someday apply the analysis developed by the Supreme Court in *Hazelwood School District v. Kuhlmeier* to a college publication.

In *Hazelwood*, the Court ruled that a high school principal could censor the official student newspaper out of "legitimate pedagogical concerns" because it was an integral part of the school's curriculum rather than an "open forum."

The new *Lantern* policy spells out the 35,000-circulation daily's role as that of a "laboratory experience" in a "realistic newsroom setting."

It gives an outside attorney the responsibility of declaring that stories referred by the editor or adviser constitute libel or an illegal invasion of privacy and

requires the editor to alter them.

The policy also requires the editor to remove any material deemed libelous or an invasion of privacy by lawyer before running the story.

After the 10 editors left *the Lantern*, five paid editors stayed and, with additional staff from *Lantern* reporting and editing classes, continue to produce the paper.

The publications committee rewrote the policy after a candidate for the position of *Lantern* adviser asked what the adviser's control over the editorial process would be.

"I think that interview process brought out the muddiness of the policy," said committee chair Kevin Stoner. "I myself, you might say, opened Pandora's box with regard to this. We'd always operated on a handshake."

When the publications committee said the adviser would review copy, editor in chief Debra Baker protested, and university legal counsel Jim Meeks advised the publications committee to clarify the university's relationship to the paper.

The publications committee is composed of the student editor, a student at large, six faculty members and the *Lantern* business manager.

Under the new policy, the editor must inform the adviser (or vice versa) when

in his or her opinion, there is "reasonable certitude that [a story] constitutes libel or an illegal invasion of privacy." If the two do not agree, independent legal counsel must then determine whether material in the story constitutes libel or an illegal invasion of privacy and then require the editor to alter it.

"I would have phrased [the policy] differently if I had written it," Meeks said, referring to the attorney's ability to demand changes in stories. "The role of the attorney is simply to advise whether the material may constitute libel or invasion of privacy. As a practical matter, I'm sure that's how it'll operate."

Stoner said the policy restricts the editor's freedom as well as the adviser's ability to censor.

"I think it does [restrict the editors' rights], and as a journalist I'm not completely comfortable," he said. "But I'm trying to strike a compromise. Yes, we're asking an attorney to be our Solomon in these cases."

The new guidelines are "what I thought was the most restrictive policy with respect to the role of the adviser," Stoner said.

The policy says, "The outside legal counsel will be an attorney who has been retained by the [p]ublications [c]ommittee as libel expert, and who is acceptable to the Office of the Attorney General of Ohio."

Stoner said the policy makes it clear that counsel should not be consulted on a story that could lead to court action but does not necessarily constitute libel. There must be "reasonable certitude of libel" in the story, rather than a concern for "merely the potential for litigation or the potential outcome of litigation," the policy says.

The attorney's decision is binding on both the editor and adviser. The policy reserves the remaining editorial discretion to the editor and gives the adviser responsibility for grading student reporters, copy editors and photographers, who work on *the Lantern* as part of their coursework at the university.

Two state courts, ruling in the only (See *LANTERN*, page 26)

A cartoon that appeared in *the Lantern* during the controversy.



Dean to kill student-edited review

Students reduced to administrative gofers at new law reviews

VIRGINIA — The dean of the George Mason University School of Law in Arlington plans to replace the law review's student editors with faculty members in the fall.

"[The new law review] will be unique

in that it will be faculty edited," Law School Dean Henry Manne said in a prepared statement. A memo released a month earlier said a 15-member student board would be responsible for "administration" of the review but "will have no substantive editorial authority."

His plan also calls for the *George Mason University Law Review* to contain only articles written by law students at the university. The review now contains the work of professors, students and professionals in the field as selected

by a student editorial board.

Manne plans to introduce next fall the revamped *Law Review* and a *Supreme Court Economic Review* of articles by professors across the nation. But while he hopes the *Economic Review* "will ... [bring] market economic literacy to bear on the work of the Court," *Law Review* staffers say he is ignoring free market principles by refusing to allow the student-edited review to compete with a new one.

"We should be able to continue pub-

Lantern

(Continued from page 25)

libel cases ever decided involving the liability of public schools for material in college student publications, have said schools that exercise content controls can be held liable for published material, while editorial independence absolves a school from liability.

Thus the new *Lantern* policy may have increased the university's potential liability by allowing prior review and restraint, said SPLC Executive Director Mark Goodman.

But Meeks, the university counsel, said he does not see a change in the university's liability as a result.

"I don't think there's any change," Meeks said. "The legal exposure of the university was the same under the old policy. In fact, the new policy clarifies the extent of the responsibility of the students for all material except" what may constitute libel or illegal invasion of privacy.

"My legal opinion is that the university, under the circumstances, is probably liable," he said. "I think we'd have an awful time arguing in a court of law that we were not liable."

"It's just as if a student in a chemistry lab brought in hazardous material that exposed the university to potential liability for an explosion."

The policy further says the adviser should "exercise as little control over [the *Lantern*] as legal and pedagogic responsibilities will allow."

In Meeks' opinion, there is a "very good chance" that a court will someday apply the *Hazelwood* forum analysis to a college newspaper.

"It seems to me that we're more like the *Hazelwood* case," he said. "Even under the old policy, [the similarities to *Hazelwood* were evident from] the masthead statement of the paper."

The masthead statement said the *Lantern* was "an independent, student-written laboratory newspaper."

When it first became clear the policy would be revised, *Lantern* editors threatened to quit but opted instead to pub-

lish "under protest." The Oct. 2 edition contained an editorial on the front page, and the remaining space contained the text of the First Amendment repeated in various point sizes.

"We fear that this policy of prior review may trigger a landslide," said the editorial in that day's *Lantern*. "Today, a story is killed because it is libelous. Tomorrow, a story is killed because it may be libelous. Down the road, a story is killed because it shows a negative side of the trustees."

The Oct. 3 *Lantern* reported that "the money spent on one trustee [for use of the university's airplane] represented more than one-third of the OSU Board of Trustees' travel expenses in the fiscal year."

The editors agreed to publish while the committee drafted the policy and the journalism faculty voted on it. The Undergraduate Student Government Assembly passed a resolution supporting the editors' protest.

In the meantime, two staff members told a *Lantern* reporter that the editors were

trying to ruin the paper and said some sources refused to talk to them until they renounced the protest.

The former *Lantern* editors were offered a page in *The Guardian*, the weekly newspaper at Wright State University in Dayton to publish an alternative publication "for as long as they need," said *Guardian* editor in chief Kevin Kearney.

And Margaret O'Brien, editor of the *Oakland Post* at Oakland University in Michigan, said the *Post* planned to let the former *Lantern* staff produce one issue a week at the *Post* for distribution at OSU.

Stoner said he does not fault Baker for taking a stand.

"How can you possibly criticize a person for taking a stand based on principle?" he said. "I believe [her] to be very clear on the issues here."

"It was probably the saddest day of my academic and my professional career the day she handed in her resignation. Is she still welcome in my office? Yes. You bet she is." ■

lishing and compete with any new publications for the best students and the best articles," managing editor Bruce Serchuk told *The Chronicle of Higher Education*. "The new plans are anti-competitive and demeaning to students who work hard to put out a quality publication."

"Article selection and editing comprise the vast majority of current [staff] members' duties, and contribute significantly to the students' educational experience," the *Law Review* staff said in their rebuttal to the dean. "These are apparently the duties that the 'new' law review eliminates."

Third-year law student John Alevra told *The Washington Post* that Manne's action demonstrated "pure arrogance."

Soon after Manne's announcement, the GMU Student Bar Association began a petition against him for not soliciting student input.

Another student told *The Washington Post* the change would amount to yet another "wacky thing" George Mason law graduates would have to explain in law firm interviews, for which review membership is sometimes a key qualification.

Manne, pointing to a decline in the prestige and quality of student-edited law reviews, said in a prepared statement: "[G]rades and writing ability are no longer the exclusive credentials necessary for election to many law reviews ... [under the new plan] the school will publish a distinguished and responsible scholarly journal."

SPLC Legal Fellow Mike Hiestand, in a letter to Serchuk, said shutting down a student-edited publication at a public school for aesthetic reasons would violate the First Amendment.

"In *Schiff v. Williams*, 519 F.2d 257 (5th Cir. 1975), the court said that firing student editors of a college publication for poor grammar, spelling errors and language expression was a clear violation of the First Amendment," the letter said. "The fact that the university president took the action because he felt that the 'level of editorial responsibility and competence had deteriorated to the extent that it reflected discredit and embarrassment upon the university' was no excuse." ■



Bob Staak for *The Washington Post*. Reprinted with permission of the artist.

Board pulls explosive story to avoid possible lawsuit

TEXAS — A University of Texas at El Paso student still has not found a newspaper that will run his controversial story alleging sexual harassment by UTEP administrators.

Kevin Keich, now a first-year graduate student at UTEP, tried last spring to have his story published in the university's student newspaper, *The Prospector*, but the UTEP publications board delayed publication of the story, and it never ran.

Sam Riccillo, chair of the UTEP communications department, imposed the "delay for review" after *Prospector* adviser Victoria Lozano raised questions about the story's credibility.

The publications board, which must approve the communications chair's delay for review, met on April 30 and invited Keich to defend his story, which the *Prospector* editors had approved. The meeting was closed to the public.

"There was an armed guard at the

door," Keich said of the meeting.

A University of Texas system lawyer Keich described as "pretty slick" attended the meeting as counsel to the board. Riccillo said the lawyer was "to advise on what libel means, what could potentially be libelous or defamatory, and on questions of the committee after they read the story."

"I was there with everything that corroborated my story," Keich said. "I had enough documentation to choke a horse, and they wouldn't listen to it."

Jim Holcomb, an associate professor of economics who chaired the April 30 publications board meeting, would not comment on it. Jim Adams, the only journalism professor on the board at the time, also would not comment on the meeting, which Holcomb closed to the public, but Adams said he voted to run the story.

Asking the communications chair to
(See *PROSPECTOR*, page 28)

Prospector

(Continued from page 27)

view a story is "the call of the editorial adviser—the university staff member charged with overseeing the operations of the newspaper," said Lawrence Johnson, an associate professor of English and communications. "[She] must have forty-eight hours in which to convene a publications board meeting and get the matter resolved."

"I think [Riccillo], who requested the board to review the matter, acted in accordance with the rules," Adams said.

Keich doubted Riccillo's authority to impose the delay because Ray Small, the other *Prospector* adviser, did not concur with Lozano and refused to help Riccillo pull the story from the *Prospector* flats, where it had been pasted up for publication in the next edition.

But Riccillo said he did not need both advisers' approval to delay publication, and that UTEP should have three or four advisers. Lozano, he said, "technically has the duties of two advisers."

"I don't believe anyone's rights were violated," Riccillo said. "At least not intentionally."

He said the rules that allowed the board to delay Keich's story are modeled after those of the University of

Texas system.

After the UTEP publications board delayed Keich's story, he took it to two local newspapers, the *El Paso Times* and *El Paso Herald-Post*, whose editors also decided not to run it. He said he may ask a contact at *The Dallas Morning News* about having it printed there.

Ray Chavez, who was the city editor of the *Herald-Post* when Keich brought his story to the paper, said that although he did not think the story was libelous, he could only run stories written by *Herald-Post* writers. He assigned a *Herald-Post* writer to follow the complaints to their conclusion and then write the story.

"It violates our policy unless we'd hired him on a free-lance basis," Chavez said. "I remember after reading it and talking to Kevin, I reached the conclusion that it wasn't libelous. The nature of the story made it newsworthy."

"I asked him to reconsider it along ethical lines," Chavez said. "One of the cases was still under review. A lot of it was based on off-the-record accounts of what had gone on."

While Keich was writing the story, he asked Barthy Byrd, a UTEP journalism professor, and John Kasdan, his communications law professor at the time, to proofread it. Both said they told Keich to support every fact in his story with on-

the-record sources or documentation.

"Byrd and Kasdan followed me through the whole affair [and] made sure I touched all the bases," Keich said.

Byrd said Keich got his sources on the record and showed her copies of complaints filed with the federal Equal Opportunity Employment Commission, the Texas Commis-

sion on Human Rights and the UTEP Equal Opportunity Office.

Kasdan critiqued the story "sentence by sentence, and that was a long and tedious process to go through," Kasdan said.

"It was sound," Byrd said. "It should have run. Did he have sources? Did he have documentation? He had it all. There's no question in my mind they should have stood by him at *The Prospector*. As far as journalism goes, the guy had a story, and a legitimate one."

On relations between *Prospector* editors, advisers and the publications board, Lozano said, "I have no opinion that's worth publishing."

But Byrd said Lozano and Sam Riccillo, the communications department chair who asked the publications board to meet and discuss the story, should have taken a principled stand on Keich's behalf.

"If you cannot defend the First Amendment... you don't deserve to hold those positions [publications adviser and communications department chair]," Byrd said.

Riccillo said his job is academic, not journalistic: to "provide a forum" for discussing the "provability" of things—not whether they are true.

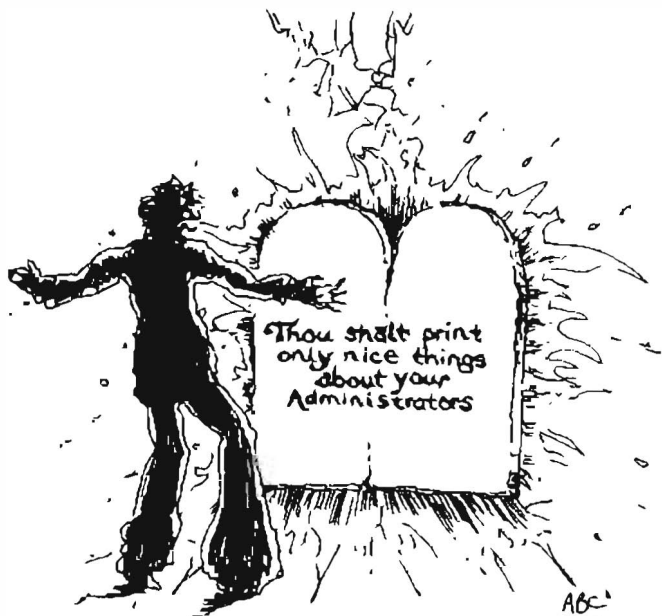
"First of all, on an academic campus, you're not a journalist," he said. "Secondly, you're part of a bureaucracy there. To take a side before the issues could be resolved would be non-academic."

"Everything in my story could be documented [and] was documented," Keich said. "People are afraid to buck the system out there—it's pretty comical."

Kasdan suggested that Keich may have had more success with the publications board if he had tried selling the board members on the story's merits rather than on the First Amendment.

"In my opinion, he is a fighter, but he doesn't know how to politick well," Kasdan said. "Getting things printed in the media is not always a question of 'Can it withstand a libel suit?' There are other external pressures that come to bear."

He called Keich's experience a "real-world" lesson on the pressures a community or a major advertiser could bring to bear on a commercial newspaper. ■



Student leader dumps *Future* in the garbage

FLORIDA — Every reporter has a beat, every editor a desk — and at *The Central Florida Future* in Orlando, each has a dumpster as well.

When University of Central Florida employees called the *Future* wanting to know why they could not find copies of the Feb. 14, 1991, edition, the paper's staffers knew where to look.

"We know exactly where to go," said editor in chief Jamie Carte. "We know where all the dumpsters are now. It's old hat for us."

And that's where they found 4,500 copies of that day's *Future* — in a dumpster near the student center.

A student government senator who was turned in to the police confessed to stealing the newspapers and throwing them into a dumpster. She later recanted, claiming she was coerced by university police who threatened her with arrest.

Donna Fitzgerald, financial adviser to the *Future*, estimated the losses in salaries, advertising commissions and printing costs resulting from the theft at \$1,800. The incident report filed with the university police listed the case as grand theft under state law because the loss was more than \$300.

But the state attorney's office, questioning the illegality of stealing free newspapers, dropped the case in September.

In 1988, a state attorney successfully pursued criminal prosecution of three students who had stolen a free student paper at the University of Florida in Gainesville.

Meanwhile, Carte, who has seen three such thefts in her four years at the *Future*, says she is indignant that the student who confessed still enjoys the "full privileges" of student senate membership.

Carte believes the incident arose from unfavorable pieces the *Future* wrote about individuals involved in the spring



P.A. Borneman for *The Central Florida Future*. Reprinted with permission.

student government elections.

"Student leaders should have a higher standard than other students," she said. "You can't trust these people, because if they don't like something, they can just [steal the paper]."

Even though the university legal counsel is not pursuing the case, Carte said she does not want to ruffle any feathers by pushing for further action because she is hesitant to endanger the *Future's* transition to financial independence from the university.

"We just want to make sure people get the [news]," she said.

Fraternity members were caught "red-handed" stealing the *Future* in 1988, Carte said. The *Future* asked the student affairs office to discipline the students but officials refused to discuss the outcome of the complaint, saying the federal Family Educational Rights and Privacy Act of 1974 (commonly called the Buckley Amendment) prevented them from releasing that information.

And again last spring, Carte complained to student affairs about the theft of the Feb. 14 *Future*. When nothing happened, the publications board advised her to report the incident to the local police.

"I don't know where to go from here," she said. "It's pretty discouraging." ■

Daily Campus editor chilled by conduct code

TEXAS — At Southern Methodist University in Dallas, the editor of *The Daily Campus* faced charges of misconduct for running a story on a sexual assault proceeding in the campus judiciary.

SMU student government president Jonathan Polak charged *Daily Campus* editor Mitch Whitten with violating the university's conduct code last spring for printing a judicial board verdict.

Polak charged Whitten with violating a portion of the code that forbids the SMU media from reporting on judicial proceedings before a final and binding decision is reached. But that provision conflicts with another portion of the code guaranteeing press freedom.

Polak dropped the complaint against Whitten the day of the hearing. The current *Daily Campus* editor, Javier Aldape, said he trusts SMU President A. Kenneth Pye to uphold press freedom while the student government revises the conduct code.

(See DAILY, page 30)

FBI agent tours paper as J-student

NEW YORK — In what an FBI official later termed an "aberration," a bureau agent toured the offices of the Manhattan newspaper *Irish People* last spring, posing as a journalism student.

A team of agents raided the newspaper after she left.

The woman told editor John McDonough she was studying at the College of Mount Saint Vincent in the Bronx. McDonough said campus journalists often visit the weekly, which opposes British rule in Northern Ireland.

The agents arrested Hugh Feeney, who had served a 17-year sentence for blowing up the Old Bailey Court House in Great Britain. The U.S. Immigration Office deported Feeney the next day, saying he had entered the United States illegally.

FBI spokesman Mike Korkan acknowledged the privilege of confidentiality enjoyed by members of the clergy and media and said the U.S. Justice Department is sensitive to that.

"This, quite frankly, didn't seem very complicated," Korkan told *Editor & Publisher*. "When you are dealing with fugitives, you have to make decisions on the spot."

"This is an example of choosing journalists who are defenseless," said Jane Kirtley, executive director of the Reporters Committee for Freedom of the Press. "The agents are not going to impersonate *The New York Times*. No, they pick on people who can't fight back — student journalists and free-lance writers."

"This kind of thing has potential to do a lot of damage," said SPLC Executive Director Mark Goodman. "It is a great way for young reporters, all reporters, to lose their sources of information. People just won't trust them anymore."



Daily

(Continued from page 29)

Only the student government can change the code, Aldape said, and code changes are not normally considered until March. Aldape said *Daily Campus* editors have a better relationship with the current student government president, Marcy Grant, than they did with Polak.

"I'm led to believe that she is very committed to freedom of the press in general," Aldape said. *The Daily Campus* had an "editorial controversy" that had colored relations between Polak and the newspaper before the judicial board story, he said.

Whitten ran afoul of Polak when he printed a reporter's story that an SMU judicial board had found a student guilty of sexual assault. When the story ran in April, it was unclear whether the accused would appeal that decision to a higher judicial board.

In announcing Polak's decision to drop the complaint against Whitten, the university released a statement saying it planned "to conduct a thorough review of the current code provisions and other issues relevant to the relationship of the student press to the university."

Les Hyder and Mark Witherspoon —

director and media adviser, respectively, of Student Media Company, Inc., which owns *The Daily Campus* — called that statement "ominous."

But the committee to consider that relationship has not been and may never be convened, Aldape said.

"Of course you never know what's going to happen this afternoon or tomorrow that's going to make [the conduct code] a front-burner issue," Hyder said. "Someday, somebody's going to be asleep at the wheel and something's going to get in" the paper that will reawaken the controversy, he said.

A separate committee has been appointed by Caswell to consider whether the judiciary should hear "serious" cases, such as rape, in the first place. During the controversy, some questioned the appropriateness of a university board ruling on criminal matters. The committee, chaired by Caswell, was expected to make some findings by January.

"[The judicial process has] really been in shambles for quite a while, and we've been needing to overhaul it," said student government vice president Jeff Zanarini.

"The paper's in kind of a no-man's land," Zanarini said. "[Whitten] wasn't intending to hurt anyone, but half the student body already knew" of the assault case, he said.

Political Correctness v. The First Amendment

The federal judiciary has exhibited little tolerance for restrictions on 'hate speech.'
Will the Supreme Court break that trend?

Even as the courts draw the First Amendment rights of the high school press ever narrower, they are exhibiting little tolerance for the restriction of offensive, or "politically incorrect," speech at colleges and universities.

At the vanguard of the speech regulation movement is the University of Wisconsin System Board of Regents, whose restrictive speech code was found unconstitutional by a federal judge in October.

A federal judge's decision gave pause to many on both sides of the "PC" debate as Capitol Hill policymakers and college administrators alike scrutinized his application of the Supreme Court's "fighting words" doctrine to the "UW Rule," a code the University of Wisconsin Board of Regents adopted for the system's 26 campuses. (See *SPEECH CODE*, page 32.)

University of Wisconsin system schools cannot adopt their own student conduct codes, said system legal counsel Patricia Hodulik. Instead, the regents make amendments to a system-wide code.

As part of their "Design for Diversity," the regents had asked individual schools to prepare their own policies, and they in the meantime drafted the speech code to combat documented harassment and intolerance.

Federal judges in New York and Virginia also found no justification for punishing faculty and fraternity members, respectively, for politically incorrect expression that minority groups found demeaning.

But some college administrators color their restrictions on expression as behavioral or educational measures, rather than as assaults on protected speech.

"This had nothing to do with expression," said Kenneth Bumgarner, the George Mason University dean who sus-

pended a fraternity for staging an "ugly woman contest" that featured ethnic caricatures. "There was no message in this behavior."

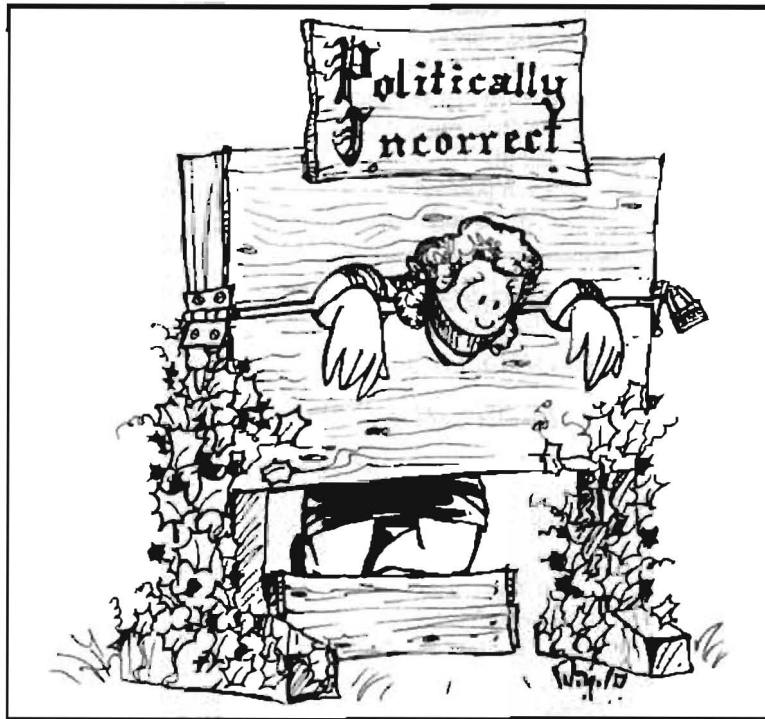
"The university's code of student conduct identifies such concerns in terms of respect for one another ... issues of civility. Bad behavior is treated as bad behavior." (See *SCHOOLS*, page 33.)

Whether offensive speech still qualifies for First Amendment protection is a question the Supreme Court may answer this term when it decides *R.A.V. v. St. Paul*.

The Court in December heard oral arguments in the case, which the Minnesota Civil Liberties Union hopes will set a nationwide precedent on the constitutionality of city "hate speech" ordinances in particular.

The MCLU, arguing for the plaintiff, hopes to defeat a St. Paul, Minn., speech ordinance and in the process obtain a High Court opinion on the "intellectual intimidation" the group says is also chilling free speech on college and university campuses.

The MCLU argued on behalf of Robert A. Viktora, who was charged with violating the ordinance for his part in a cross burning at the home of a black family. ■



Speech code too broad for First Amendment

Judge sends U-Wisconsin regents back to drawing board

WISCONSIN — A federal judge in October threw cold water on an attempt by the University of Wisconsin System Board of Regents to ban expression based on its content.

U.S. District Judge Robert Warren struck down as overly broad and "unduly vague" the "UW Rule," a restrictive speech code that prohibited, among other things, "intentionally [placing] visual or written material demeaning the race or sex of an individual in that person's university living quarters or work area."

"[T]he rule is ambiguous since it fails to make clear whether the speaker must actually create a hostile educational environment or if he must merely intend to do so," Warren said.

The judge also ordered the regents to drop any disciplinary actions taken against "John Doe," a co-plaintiff punished under the policy for shouting epithets at a woman, and to remove from his record all references to the incident.

The American Civil Liberties Union brought the suit on behalf of *The UWM Post*, the student newspaper at the University of Wisconsin at Milwaukee, nine University of Wisconsin system students punished under the policy, including John Doe, and an adjunct lecturer.

Warren said the "fighting words" doctrine, established by the Supreme Court to allow censorship of verbal expression that causes violence, must be narrowly drawn to prohibit only that speech which is directed at an individual and is likely to incite that person to violence.

"Since the UW Rule covers a substantial number of situations where no breach of the peace is likely to result, the rule fails to meet the requirements of the fighting words doctrine," Warren ruled. "[T]he illustrative examples published

with the rule ... suggest that there is no need to prove that a student's speech had any effect on the listener or the educational environment."

"[T]he suppression of speech, even where the speech's content appears to have little value and great costs, amounts to governmental thought control," Warren said.

"[I]t is evident that this court may employ a balancing approach to determine the constitutionality of the UW Rule only if it is content neutral," the judge ruled. "It is clear, however, that the UW Rule regulates speech based on its content."

Warren pointed to case law allowing "time, place and manner restrictions on

'The suppression of speech ... amounts to governmental thought control.'

—Judge Robert Warren

speech, not restrictions based upon the speech's content."

The regents disagreed, arguing that the UW Rule only restricted speech that was "not likely to form any part of a dialogue or exchange of views" and "constitute[d] a kind of verbal assault on the person to whom it is directed."

But Warren said, "Most students punished under the rule are likely to have employed comments, epithets or other expressive behavior to inform their listeners of their racist or discriminatory views. In addition, nothing in the UW Rule prevents it from regulating speech which is intended to convince the listener of the speaker's discriminatory position. Accordingly, the rule may cover a substantial number of situations where students are attempting to con-



vince their listeners of their positions."

And even if speech were not intended to "inform or convince" and were rather an "expression of the speaker's emotions," the Supreme Court has ruled that First Amendment protection extends to "speech for its emotive function as well as its cognitive content," he said.

Warren also rejected the regents' argument that the university's "compelling interest" in regulating speech was a desire for diversity, saying "the UW Rule does as much to hurt diversity on Wisconsin campuses as it does to help it" because it stifled intellectual diversity.

"The problems of bigotry and discrimination sought to be addressed here are real and truly corrosive of the educational environment," Warren said. "But free-

dom of speech is almost absolute in our land and the only restriction the fighting words doctrine can abide is that based on the fear of violent reaction. Content-based prohibitions such as that in the UW Rule, however well intended, simply cannot survive the screening which our Constitution demands."

The regents decided not to appeal the decision, said staff counsel Patricia Hodulik. Instead, they "left open the question of whether they want to redraft the rule," she said in November.

When the decision came down in October, Jeff Kassel, who represented the ACLU, said the regents could have decided that "speech codes are not the way to go" and instead tried to educate University of Wisconsin system students about tolerance and diversity. ■

Schools undaunted by lower court rulings

NEW YORK AND VIRGINIA — Officials at two universities are still seeking constitutional ammunition for their attempts to regulate offensive speech.

Federal judges have ruled that City College of the City University of New York and George Mason University in Fairfax, Va., cannot punish a faculty member and a fraternity, respectively, for "politically incorrect" expression. Both universities have appealed those decisions.

City College is appealing a September ruling in *Levin v. Harleston*, 770 F. Supp. 895 (S.D.N.Y. 1991), that the college had violated a professor's rights after he wrote that blacks are intellectually inferior to whites.

Michael Levin, a philosophy professor, sued the college in 1990 after it formed a panel to review his writings and to consider establishing a "shadow" section of the class he taught.

George Mason is appealing an August ruling in *Sigma Chi v. George Mason University*, 773 F. Supp. 792 (E.D. Va. 1991), protecting the right of a fraternity member to wear blackface in an "ugly woman contest."

A GMU official had suspended the local chapter of Sigma Chi fraternity for two years after students and administrators called the contest racist and sexist.

"One of the fundamental rights secured by the First Amendment is that of free, uncensored expression, even on matters some may think are trivial, vulgar, or profane," Judge Claude M. Hilton said in overturning the fraternity's suspension.

But Kenneth Bumgarner, the dean of student services who punished the fraternity, disagreed with the judge's conclusion that the contest contained "more than a kernel of expression."

"This had nothing to do with expression," Bumgarner said. "I viewed it as a behavioral issue. The university's code of student conduct identifies such concerns in terms of respect for one another [and] issues of civility."

The skit, called "Dress a Sig," was part of "Derby Days," an annual week-

long Sigma Chi event. Members of Gamma Phi Beta sorority dressed 18 men as "ugly women" for the April 4 contest.

For its part in the contest, the sorority was sentenced to a one-year probation. As part of that probation, Gamma Phi Beta has beefed up its existing self-enrichment program, which accompanies rush, Bumgarner said.

"We're putting it behind us," Gamma Phi Beta President Katie Faust said of the controversy.

According to Sigma Chi's complaint, a program submitted prior to the event to Kathryn Schilling, GMU assistant director for student organizations and programs, contained this reference to the

'This had nothing to do with expression. If the same thing happened tomorrow, I would react in the same way.'

—Kenneth Bumgarner
GMU Dean of Students

contest: "Dress a SIG contest (dress coaches like ugly women)." The fraternity claims that in approving the proposal, Schilling required some changes to the program but required none to the "ugly woman" contest.

"Kathryn Schilling never approved any activity" in the manner presented in the complaint, Bumgarner said.

"The contest, as staged, included coaches dressed as all manner of women identifiable as various ethnic caricatures by their appearance, mode of speaking, and otherwise. The event was lawful, peaceful, and offensive," the fraternity's complaint said.

The blackfaced "contestant" in question wore pillows over his chest and buttocks. Although the contest pro-

ceeded uninterrupted, minority students later said the contest offended them, and the fraternity apologized publicly.

Tempers still flared. On April 11, minority student leaders signed a complaint to Bumgarner asking him to discipline the fraternity.

Bumgarner sanctioned the fraternity under "general provisions dealing with civility" in the conduct code, he said. A committee of students, faculty and administrators has been revising the code since last summer and should have a draft ready for the university's legal counsel to read and approve by January.

But Bumgarner said that in light of recent court rulings like the one striking down the University of Wisconsin system's speech code, it is not necessary to substantially alter GMU's code or codify each negative behavior. Rather, the committee's interest is in "clarifying" the existing code, he said.

"We will try to be more specific with respect to certain kinds of [prohibited] behaviors," he said. "But if the same thing happened tomorrow, I would respond in the same way."

At City College, officials objected to three of Levin's writings: a letter to the editor of *The New York Times*, a 1988 book review in an Australian journal, and a 1990 letter in a philosophy journal.

The seven-member panel, convened to consider action against Levin and Leonard Jeffries Jr., the outspoken black studies chair who said in a speech that blacks are intellectually and physically superior to whites, decided in March not to discipline the two. But it upheld the college's decision to offer a parallel course for students who wanted to avoid Levin.

Levin claimed the alternative course was unnecessary because he did not discuss his controversial views on blacks in the class.

Although Jeffries was up for reappointment as chair of the college's black studies department in June, officials waited until November to reappoint him for a term to end in June 1992. City

(See APPEALS, page 35)

Radical Remedies

Conservative politicians have devised novel ways to protect the free expression rights of college students

In the face of increasing intolerance of unpopular views on college and university campuses and a growing movement to modify restrictions on offensive expression, state legislatures and Congress are considering bills that would protect student First Amendment rights.

Free speech bills have been introduced in California, Michigan and Texas, and two more are pending in Congress.

Both of the federal free speech bills say colleges and universities should not make or enforce codes restricting constitutionally protected speech, but each takes a dramatically different approach to enforcement.

One bill would give students at schools with speech codes equal standing to sue in federal court, while the other would make the U.S. Department of Education responsible for safeguarding freedom of expression.

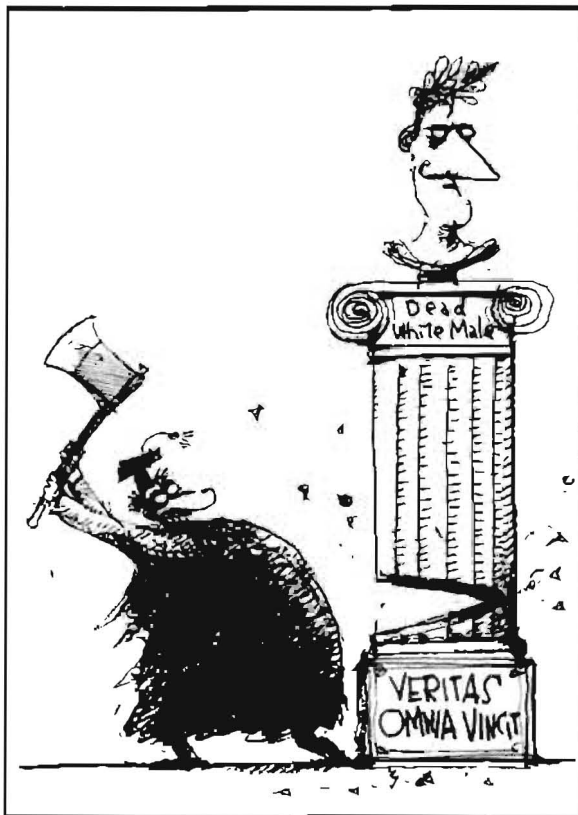
The Collegiate Speech Protection Act, sponsored by Rep. Henry Hyde (R-Ill.), would amend Title VI of the Civil Rights Act of 1964 so that students at schools with speech codes could sue in federal court—even if they had not been punished under the codes.

Students could request injunctive and declaratory relief and could recover attorneys fees if they won.

But they could not win cash awards for damages. Hyde does not want to tempt students to sue for monetary gain, said Sam Stratman, Hyde's press secretary. And schools should not have to use education funds to pay cash awards to prevailing plaintiffs, he said.

The Hyde bill gives students at private schools that are not "controlled by" religious organizations protections similar to those afforded public school students by the First Amendment.

But under the Freedom of Speech on Campus Act, sponsored by Sen. Larry Craig (R-Idaho), the Department of



Richard Thompson for *Academe*. Reprinted with permission.

Education could withdraw federal funds from institutions that prohibit constitutionally protected speech.

The Craig bill would add constitutionally protected speech to the rights guaranteed college students in federally-funded programs under Title IX of the Education Amendments Act of 1972. Rep. Joel Hefley (R-Colo.) has introduced a companion to Craig's bill.

The bill says "...no student attending an institution of higher education shall, on the basis of protected speech, be excluded from participation in, be denied the benefits of, or be subjected to discrimination or official sanction under any education program or activity receiving federal financial assistance under the Higher Education Act of 1965."

Protected speech is that protected by the First Amendment.

Stratman called Hyde's remedy—allowing students to seek relief in court—a "free market approach" to enforcement rather than having a "[Washington] bureaucracy looking over everyone's shoulders."

But Brooke Roberts, Craig's legislative director, said students may not be likely to go to court. Craig feels the "pernicious effect" of speech codes is that students censor themselves because they "don't want to make waves," Roberts said.

Even students who are kicked out of classes for their speech may not go to court because, for example, a "deep sense of loyalty to the school" may be greater than the desire for vindication, Roberts said. On the other hand, she believes administrators will waste no time eliminating rules that would cause them to lose federal funds.

"One thing we do know is that administrators are aware of federal strictures and the threat of losing federal funds," she

said. "There is nothing in the Hyde legislation that would force a school to take action immediately."

The Hyde bill exempts any school "controlled by a religious organization, to the extent that the application of this section would not be consistent with the religious tenets of such organization."

This language is based on a three-pronged test in Title IX of the Education Amendments that says a school, to be considered "controlled" by a religious organization, must meet one of these criteria:

- It is a school or department of divinity, or
- It requires its faculty, students or employees to be members of, or otherwise espouse a personal belief in, the religion of the organization by which it claims to be controlled, or
- Its charter and catalog, or other official publication, contains an explicit statement that it is controlled by a religious organization or an organ thereof or is committed to the doctrines of a particular religion, and the members of its governing body are appointed by the controlling religious organization or an organ thereof, and it receives a significant amount of financial support from the controlling religious organization or an organ thereof.

The Craig bill protects more private schools than the Hyde bill by also exempting those "affiliated with" religious institutions. Roberts said she is unaware of a test for determining whether a school is "affiliated."

In addition, Craig's bill exempts schools "whose primary purpose is the training of individuals for the military service of the United States or the merchant marine."

The Craig bill, S1484, is in the Senate Labor and Human Resources Committee, where action on it is not expected until January. Hesley's companion to the Craig bill, HR3451, is in the House Education and Labor Committee. Hyde's bill, HR1380, is in the House Judiciary Committee's Civil Rights Subcommittee, where subcommittee Chair Don Edwards (D-Calif.) has promised to hold hearings.

The primary difference between the student free speech bills in the state

legislatures is a matter of whose speech they would protect.

Each bill would grant collegestudents the right to sue for relief in state court when their free expression rights have been abridged. In addition, the Texas bill extends First Amendment protection to faculty and the California bill protects speech in high schools.

The "Leonard Free Speech Bill," as California Senate bill 1115, sponsored by state Sen. Bill Leonard (R-Redlands) is called, would allow students punished for exercising free speech in public and private high schools and colleges to seek relief in state court and let prevailing student plaintiffs recover attorney's fees.

"If [people] walk by the quad [and] somebody is giving a speech that they find offensive, I think that's free speech no matter how offensive [it] is," Leonard said.

The bill, which would exempt institutions controlled by religious organizations, passed the state senate in June and now sits in the Assembly Education Committee. The committee is expected to hold a hearing on the bill when the legislature reconvenes in January.

The Michigan Collegiate Speech Protection Act, HB5059, sponsored by Rep. Stephen Dresch (R-Hancock), applies to all post-secondary institutions that receive state aid either directly or indirectly. It also would exempt those schools controlled by religious organizations.

Currently in the House Colleges and

Universities Committee, the bill would allow students to seek relief in state circuit court and recover the costs of legal action should they prevail.

Dresch, a former business dean at Michigan Technical University, said he was attracted to the issue of free speech in part by a University of Michigan graduate student's suit against that university.

A federal judge in 1989 ruled the school's speech code was an unconstitutional violation of student First Amendment rights.

The Michigan Freedom of Information Committee reported that the House committee is "fairly friendly" to the bill.

The Texas Senate in July adopted a measure by state Sen. David Sibley (R-Waco) that, while extending protection to both students and faculty in post-secondary schools, would not have applied to private schools. But the legislation died in the House as part of a mammoth education bill.

Sibley's bill would have allowed faculty and students to file civil suits in state court for injunctive and declaratory relief. He has said he will reintroduce it until it passes.

Jeff Norwood, a Sibley aide, said Sibley was concerned about reports that University of Texas administrators were considering a speech code similar to the University of Wisconsin system code declared unconstitutional by a federal judge in October. (See *SPEECH*, page 32.)■

Appeals

(Continued from page 33)

College department chairs normally are appointed to three-year terms, and Jeffries had held the post since 1972.

Levin called his colleague's term limitation "punishment for extracurricular speech."

In ruling that the college had violated Levin's free speech and due process rights, U.S. District Court Judge Kenneth Conboy enjoined the college from offering the shadow section or disciplining Levin for his statements.

Conboy also warned of the dangers

of "political correctness."

"This case raises serious constitutional questions that go to the heart of the current national debate on what has come to be denominated as 'political correctness' in speech and thought on the campuses of the nation's colleges and universities," he said.

Conboy also ordered the college to prevent disruption of Levin's classes, which have been the occasional target of protesters since 1987. Conboy said college officials knew who two of the alleged protest leaders were but neglected to punish them for violating conduct regulations.■

Editors exercise freedom of press; sponsor of ads claims censorship

ILLINOIS, MICHIGAN, NEW YORK AND NORTH CAROLINA — An ad that ran in at least four college newspapers denying the Holocaust ever took place angered historians and Jews and led to 400-person protests at Cornell and Duke universities.

The California-based Committee for Open Debate on the Holocaust submitted the full-page ad to several university student newspapers last fall, the Associated Press reported.

Duke professors and students rallied in front of the campus chapel in November and demanded that *The Chronicle*, the Duke student newspaper, apologize for printing it, according to *The Chronicle of Higher Education*. The history department bought a separate ad rebutting the arguments in the committee's ad.

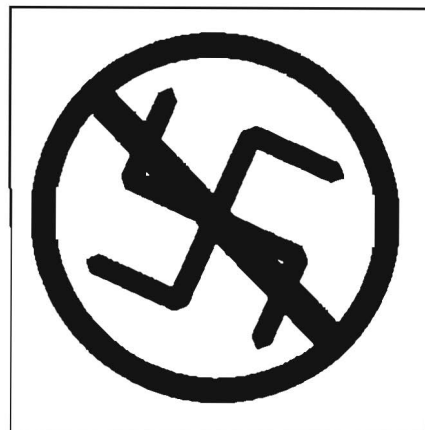
The Duke University president said the *Chronicle* had upheld the principle of free speech, and Duke law professor William Van Alstyne said he admired the *Chronicle* staff's position but that they also had the right to reject

the advertisement in question.

"We're not going to protect our readers from offensive ideas," *Cornell Daily Sun* editor in chief Neeraj Khmlani told the Associated Press.

But *Yale Daily News* publisher Eduardo Braniff returned a \$1,500 money order from committee head Bradley Smith, saying he did not want to offend advertisers or alienate readers and did not want the *Daily News* "associated with the propagandistic nature of this advertisement."

The student newspapers at Harvard and Brown universities, The University



versy: The Case For Open Debate," is "the equivalent of insulting the deaths of nine million people by gas in the gas chambers," said Hal Greenwald, program director of the Duke Hillel Foundation, a Jewish student group.

Chronicle Editor Ann Heimberger said in a column that the decision to run the ad was in support of free speech, and not for the \$700 the ad's author said he paid for it.

"I'm only calling for open debate on a historical

issue, and they're calling me a monster," Smith said. "They are consciously suppressing a radical point of view." ■

'We're not going to protect our readers from offensive ideas.'

—Neeraj Khmlani

Editor in Chief, Cornell Daily Sun

of Pennsylvania and the University of Wisconsin at Madison also rejected the ad.

The ad, titled "The Holocaust Contro-

Foundations

(Continued from page 21)

Previously, the state court of appeals held that the University of Louisville Foundation Inc. was not a public agency within the definition provided by the state open meetings law because it was not "created by or pursuant to state or executive order," but was created by the university board of trustees.⁹ Nevertheless, the court said, the meetings of the foundation's board of directors were subject to the state's open meetings law because the foundation's governing board of directors included the entire membership of the university's board of trustees. When a quorum of the

university's board of trustees was present at meetings and discussed public business, the court said those meetings must be open to the public. The court examined minutes of the foundation board meetings that prompted the *Courier-Journal* and Louisville Times Co. to file the lawsuit and found that public business was discussed because the discussions related solely to the university and not to the foundation.

Key Factors Determine Openness

Although the success of requests for access to foundation records or meetings will often depend on the wording of freedom of information laws in a particular state, these cases indicate that courts look at the specific activities of

the foundation in making a determination of whether it is subject to those laws. A typical analysis of whether a public university foundation is subject to open meetings and open records laws would include answering these questions:

1) *Is the foundation a public body for purposes of the act?* Most state laws define a public body.

2) *Is the foundation publicly funded?* Some states say the organization is subject to the act if it is "supported in whole or in part" by public funds. These funds may be federal, state or local. Some states use a formula, such as if the organization receives more than a certain percent of its funding from a government source, it is covered. Some

states consider indirect sources of public funding, such as use of university employees or state-owned equipment and facilities.

3) *Is the foundation performing a government function?* Generally, this is connected to the public funding aspect. If the foundation is performing a service that the university is required by law to perform, a court may find it is covered under the act. For example, the foundation may be managing assets for the university.

4) *Is the foundation created by statute, executive order, ordinance, resolution or other legislative enactment?* If so, it may be covered.

5) *Is a quorum of a body that is covered by the act represented at meetings of the foundation?* Some foundation boards consist entirely of the membership of the university board of trustees or a majority of the university board serves on the foundation board. If so, the foundation board may be subject to the act because it constitutes a quorum of a public body.

6) *Are the foundation records held by the college or university?* If so, access may be gained from the school, which is subject to the open records act.

Student journalists who have been denied access to their school foundation's records or meetings should first examine their own state law on open meetings and open records or call the Student Press Law Center for more information.

In addition, as the Kentucky court pointed out, journalists would do well to check out their own state laws to determine whether information unavailable under the state open records or open meetings law is nevertheless available through some other means. In addition, federal law gives any citizen the right to inspect the informational tax returns filed by tax-exempt, nonprofit organizations including university foundations. IRS Form 990 and the supporting schedules that go with it disclose a wealth of information, much of which may be of interest to campus journalists. The form can be obtained either through the IRS or inspected on the organization's premises. (A guide to using the IRS Form 990 is available for \$5 from the SPLC).

A foundation's relationship with the

university or college it serves can vary. At some schools, the foundation is located off campus and has established a separate identity from the university. At others, the foundation is closely intertwined with the university by operating on campus and using university employees, university buildings, university equipment and university funds. The closer the relationship between the school and the foundation, the more likely it is that the foundation will be found to be a "public body" under state open meetings and open records laws. The key for student journalists is to identify the connection between their university and its foundation, either through the use of public funds or membership on the foundation board. Those factors have proven to be important in court in deciding the issue.

But student journalists should also be warned that efforts to gain access to foundation meetings and records may become more difficult as university and foundation officials react to court decisions favoring disclosure by changing the way foundations operate. For example, the American Association of State Colleges and Universities recommends in its publication on university foundations that foundations choose a majority of their directors from outside the university, people who are not directly related to the institution by employment or trustee membership. This is recommended in order to minimize any legal questions arising about the foundation being affiliated with the state.¹⁰

Also, as the court in the *Courier-Journal and Louisville Times Co.* case in Kentucky noted, the University of Louisville Foundation meetings would remain open "as long as the bylaws" of the foundation provided for a membership of the quorum of the university board of trustees.¹¹ This could be interpreted to mean that the court might find foundation meetings closed if the bylaws were changed, similar to what occurred at the University of Arkansas where records of the Razorback Scholarship Fund Inc., were no longer subject to the state freedom of information law after a change in operation in which the foundation no longer relied on public facilities, personnel or equipment to ac-

complish its goals.¹²

Student journalists should also be aware that some states, such as Indiana, South Carolina and Washington, have laws exempting disclosure of the identity of a donor of a gift made to a public agency if the donor requires that as a condition of making the donation.¹³

Nevertheless, courts do appear to be favoring a finding that university and college foundations are subject to state open meetings and open records laws. Unless there is an express exemption, courts in many states have said that any doubt as to whether an entity qualifies as a public body subject to disclosure requirements of freedom of information laws should be resolved in favor of disclosure. ■

¹ Ostar, *Foreword to D. Lemish, Establishing a University Foundation* at vii (American Association of State Colleges and Universities, 1989).

² D. Lemish, *Establishing a University Foundation*.

³ *State ex. rel. Guste v. Nicholls College Foundation*, 564 So.2d 682, 688 (La. 1990).

⁴ *Weston v. Carolina Research and Development Foundation*, 401 S.E.2d 161, 164 (S.C. 1991).

⁵ *4-H Road Community Association v. West Virginia University Foundation, Inc.*, 388 S.E.2d 308, 311 (W. Va. 1989).

⁶ *The Parthenon v. Marshall University Foundation, Inc.*, No. 89C-151 (Cir. Ct. of Cabell County, W. Va. May 8, 1991).

⁷ *Kentucky State University Foundation, Inc. v. Frankfurt Publishing Company, Inc.*, 19 Med. L. Rep. 1279 (Ky. Ct. App. 1991), 1991 Ky. App. LEXIS 82 (July 26, 1991).

⁸ Ky. Rev. Stat. Ann. Sec. 42.540 (Michie 1986 & Supp. 1990).

⁹ *Courier-Journal and Louisville Times Co. v. University of Louisville Board of Trustees*, 596 S.W.2d 374, 375 (Ky. App. 1979).

¹⁰ D. Lemish, *Establishing a University Foundation* at 15.

¹¹ *Courier-Journal and Louisville Times Co. v. University of Louisville Board of Trustees*, 596 S.W.2d 374, 378 (Ky. App. 1979).

¹² Op. Ark. Att'y Gen. No. 88-004 (January 13, 1988).

¹³ Ind. Code Ann. § 5-14-3-4 (b)(15) (Burns 1990 Supp.); S.C. Code Ann. § 30-4-40 (a)(11) (Law. Co-op. 1976); Wash. Rev. Code Ann. § 42.17.315 (1991).

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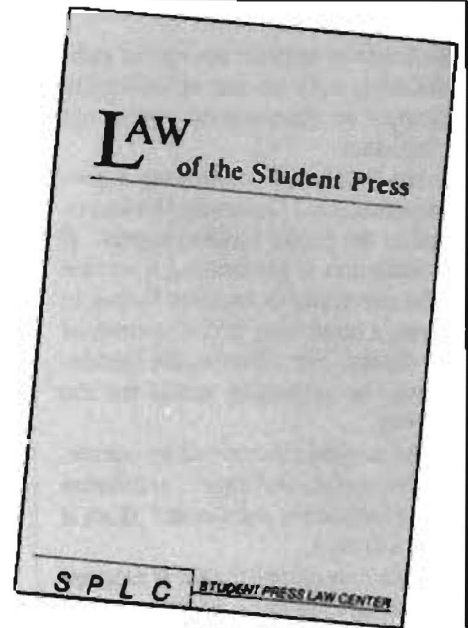
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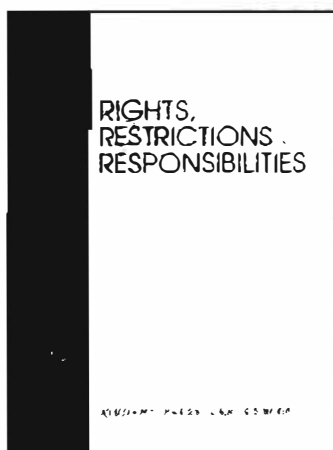
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