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First Amendment Rights As Applied to the High School Press.

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FIRST AMENDMENT RIGHTS
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Abstract

First Amendment rights as applied to the high school press is an unsettled area of constitutional law. The courts must focus upon five key topics when hearing student press cases. These include: (1) public v. private institution; (2) reasons for controlling student expression; (3) type and distribution form of student publications; (4) attempted method of controlling expression; and (5) publication established as public forum.

The implementation of publication guidelines is an important procedural safeguard. However, they must be written concisely and specifically in order to avoid vagueness and overbreadth.

Prior review and prior restraint techniques as means of censoring the high school press have resulted in mixed opinions from various courts.

And the age of high school journalists is another factor adding to the confusion of student press rights.

Guidelines define the rights, restrictions, and responsibilities of the student journalists, publications adviser, and school administrators. The existence and enforcement of guidelines should help to settle many First Amendment disagreements outside of the courtroom.

Student press rights is a complicated subject. But, as student journalists and school administrators become more knowledgable about constitutional guarantees, hopefully there will be a better understanding of issues in the area of First Amendment rights as applied to the high school press.

THESIS ACCEPTANCE

Accepted for the faculty of the Graduate College, University of Nebraska, in partial fulfillment of the requirements for the degree Master of Arts, University of Nebraska at Omaha.

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Introduction

Freedom of the press is a constitutional right guaranteed by the First Amendment. However, controversies inevitably arise among the numerous interpretations of the phrase, "Congress shall make no law respecting an establishment . . . of the press. . . ." Understandably, most people envision daily newspapers, weekly magazines, and other professional news publications when considering the freedom of the press issue. But what about the newspapers, yearbooks, and creative writing magazines that are edited by high school students? Are these publications considered "press" that will be protected by the First Amendment guarantees that are extended to the professional news media?

The burden of attempting to determine the intent and extent of First Amendment rights has been a responsibility of the courts. And cases focusing on the freedom of the press issue in regards to the professional news media have been varied and numerous. There have been few absolutist defenders of First Amendment rights for the press, and every case reiterates the questions of media roles and responsibilities. There has been a marked rise in students' awareness of their constitutional rights, and court battles for First Amendment freedoms are multiplying.

Five key topic areas pertaining to First Amendment rights as applied to the high school press must be examined. An analysis of these questions will help determine what

type of controls can be imposed upon the student press. The areas of focus, and discussion of relevant court cases include: public v. private institution, reasons for controlling student expression, type and distribution form of student publications, attempted method of controlling expression, and publication established as public forum.

The establishment and implementation of publication guidelines is an important safeguard for a high school staff in helping to defend its First Amendment rights. Concise and well-written guidelines that have been accepted by the administration and school board can inevitably help alleviate a variety of publication problems encountered by a staff. Obviously, the existence of written publication guidelines is not going to be the answer for every First Amendment question that arises for the high school journalist. This is apparent by noting the vast number of professional news media cases that have been taken to court.

Instead of implementing publication guidelines, members of the professional news media may have codes of ethics similar to the ethical principles adopted by the American Society of Newspaper Editors. Included are statements referring to responsibility, freedom of the press, independence, truth and accuracy, impartiality, and fair play.[2]

Before guidelines are accepted for the high school press, they should be thoroughly explained by the publications adviser to the administrators. The guidelines become written

standards based on law that represent a form of limitations code for the student press. They define the rights, restrictions, and responsibilities of student journalists, the faculty adviser, and the school administration.[3] (Throughout this paper, the faculty adviser is never considered to be a school administrator.) The publication guidelines should become a focal point for high school staff members. Consequently, a significant emphasis of this thesis will be the importance of implementing publication guidelines for the high school press.

Public v. Private Institution

The difference between public and private schools must be understood when discussing First Amendment rights as applied to the high school press. The Fourteenth Amendment protects individuals from interference by local, state, and federal governments. Public schools are recognized as government agencies functioning as arms of the state. Therefore, school administrators may not violate the First Amendment rights of public school students.

Because public school systems represent government or state authority to a sufficient degree, constitutional restrictions can be invoked on their actions.[4] In a state action case involving the high school press, representatives for the student publication will claim that because of a specified action (i.e. censoring material before publication), the school administrators have directly violated

constitutional guarantees by limiting the rights of student journalists.

John E. Nowak, Ronald D. Rotunda, and J. Nelson Young, in their book Constitutional Law, explain that one of the most important state action issues is involved in cases where the challenged activity is alleged to violate an amendment to the Constitution.[5] High school press state action cases would involve First Amendment rights. The state action question is answered by determining whether the challenged party's (school administrators) activities involve sufficient governmental action so that they are subjected to the limitations of the First Amendment.

In addition to public schools being recognized as extensions of the state, the same distinction can be made for the school publications. The district court in Antonelli v. Hammond (1970) said, "The state is not necessarily the unrestrained master of what it creates and fosters." The court added, "Having fostered a campus newspaper, the state may not impose arbitrary restrictions on the matter to be communicated." One element of this case dealt with the fact that expenses for publishing the campus newspaper were payable by the college through funds received from compulsory student activity fees. The court ruled that this did not allow the college president "to ratify or to pass judgment on a particular activity." It was the court's decision that, "The discretion granted is in the determination

whether the funds to be expended actually further the activities to which they are intended to be applied. Once that determination has been made, the expenditure is mandatory."[6]

Although Antonelli was a college press case, references to high school publications are similar. School officials may not withhold or withdraw funds for the publications merely because they find the content objectionable.

Reineke v. Cobb County School District was a public high school publication case involving cutting off funds to the newspaper. The case was decided in February 1980 at the federal district court level. The judge ruled that the school administration could not withdraw funding for the paper because of its content.[7]

However, private schools are not government agencies, and these students are not directly protected by the First Amendment. A rationale espoused by proponents of First Amendment rights for private school students deals with the fact that private institutions may accept government funds. By accepting state aid, students' constitutional rights should be recognized. If private schools wish to maintain fully private status, they should do so without the benefit of government monies. In Norwood v. Harrison (1973), the Supreme Court ruled that the state could not give limited assistance in the form of textbooks to children at parochial schools.[8]

It has been explained that courts will generally consider a private school's relationship with its students in terms of contract law, and "only if the school has violated the terms of its agreement, usually defined by its own rules and regulations, may an aggrieved student . . . obtain judicial relief."[9]

The Student Press Law Center (SPLC), with headquarters in Washington D.C., is probably the nation's most vocal and publicized supporter of student press rights. The SPLC:

> is the only national organization devoted exclusively to protecting the First Amendment rights of high school and college journalists. The Center is a national legal aid agency providing legal assistance and information to student journalists and faculty advisers experiencing censorship and other legal problems.[10]

Referring to censorship in private schools, the SPLC explains, "Censored students at private schools and colleges must employ reasoned argument and political pressure to gain the freedom of expression guaranteed to their counterparts in public schools."[11]

One of the Center's suggestions deals with emphasizing the idea of academic freedom. According to the Center, many private schools would not think of censoring a student because to do so would violate the fundamental precept of modern education, which emphasizes freedom of thought and expression as essential elements of the learning process.[12]

Even if students are attending a private school, they are still members of a democratic society. These students

must not become embittered and disillusioned because certain rights are guaranteed to them when they are not going to school, but are denied while attending school. School experiences prepare students for life in a democratic society. Freedom of protected speech for students must be recognized by private school officials. If the administrators want students to practice democratic principles outside of school, the officials must encourage the same behaviors within school by adhering to First Amendment guarantees.

Another point addressed by the SPLC is that it is unlikely private schools would deny freedom of religion to their students. And since freedom of religion is stated directly in the First Amendment, why not respect the other guarantees--specifically freedom of speech and the press?[13]

Reasons For Controlling Student Expression

Reasons for controlling student expression is another area that must be examined in determining student press rights. There are certain types of expression that can be punished by legal means. As with the professional news media, the student press must adhere to laws dealing with obscenity, libel, and invasion of privacy.

The 1969 Supreme Court case of Tinker v. Des Moines Independent Community School District refers directly to the general interpretation of First Amendment rights of students. It has become the precedent for student press cases

in reference to its "substantial disruption and material interference" test. The Court ruled that high school students could not be prohibited from expressing their protest against the Vietnam war by wearing black armbands to school. In the 7-2 decision, Justice Abe Fortas spoke for the majority of the Court. He referred to reasons for controlling student expression when he wrote:

> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct could 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' prohibition cannot be sustained.[14]

Fortas also wrote:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the States. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.[15]

Dissenting in the Tinker decision were Justices Hugo Black and John Harlan. They both felt the school should

not be stripped of its authority to decide what disciplinary regulations were reasonable under specific circumstances.[16]

Black, usually an outspoken defender of First Amendment rights for the press, evidently had reservations about granting unrestricted freedoms to young student journalists. The majority opinion in Tinker challenged school officials to prove substantial disruption and material interference of school activities before expression could be controlled. Protesting against the Vietnam war by wearing black armbands to school was not considered substantially and materially disruptive.

Justices Black and Harlan felt school officials should have absolute authority to determine the extent of students' right to expression while in school. Black said the Court should allow Iowa educational institutions the "right to determine for themselves to what extent free expression should be allowed in its schools. . . ."[17] And Harlan wrote, "... school officials should be accorded the widest authority in maintaining discipline and good order in their institutions."[18]

These dissenting opinions are so broad that they would allow school officials to stifle student expression in any instance they felt "good order" would not be maintained. Surely, the First Amendment cannot be interpreted in this way. Justices Black and Harlan's reasoning would seem to

exclude adolescents from constitutional protection while they are attending school. As a result of the Tinker majority opinion, school administrators should not be allowed to deny any student's constitutional rights based on the officials' definition of "good order."

Some of the arguments used by administrators in various court cases in an attempt to maintain "good order" include: students were reading copies of an underground newspaper during class and school operations were being disrupted, an article on students' use of contraceptives covered a subject that was too controversial, and a story on a school's losing football team was negative.[19] The administrators were not able to prove in any of these cases that substantial disruption and material interference to school activities would have occurred as a result of allowing the articles to be printed and distributed.

In essence, the Tinker decision shifted the burden of proof from students--to prove they did not disrupt school--to administrators--to prove disruption did result or would have resulted.[20]

Robert Trager, in his book Student Press Rights, explains that most courts agree that a final determination of disruption or interference cannot be made by school officials, "since such a determination would be a highly discretionary one, based on the particular educational philosophy and practice at each school."[21]

Trager adds:

> A student's First Amendment rights must be based on a broader scope than one principal's view of those rights relative to local circumstances, and the Supreme Court held that what a school believes to be disruption and interference 'is not necessarily dispositive for constitutional purposes.' This is not to indicate that circumstances from school to school will not be of crucial concern to a court, but that a review of those circumstances will likely be made by the judge and will not be accepted at face value as reported by school officials.[22]

The substantial disruption and material interference test that must be applied by administrators in order to control expression can be compared to the clear and present danger test proposed by Justice Oliver Wendell Holmes in the 1919 case of Schenck v. United States. The clear and present danger test permitted the restriction of expression when "the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."[23]

Thomas I. Emerson, in his book The System of Freedom of Expression, defined the words in the clear and present danger test. He says "clear" indicates that the danger must be strong and specific. "Present" means the danger is immediate. And "danger" refers to something greater than a likelihood or threat.[24]

The Supreme Court in Tinker was requiring that there

must be a high probability of serious disruption before expression may be curtailed. John H. Garvey, in an article entitled "Children and the First Amendment," also compared the substantial disruption and material interference test to the clear and present danger test. Garvey interpreted some court decisions as granting more leniency to school administrators by "demanding that the finding be not 'clear and present,' but merely a 'reasonable forecast' before expression may be restricted."[25]

The substantial disruption and material interference test of Tinker is also comparable to the incitement test most recently formulated in Brandenburg v. Ohio (1969). The Supreme Court held that the state may not prohibit advocacy of force or unlawful conduct unless the expression is designed to produce imminent lawlessness and is likely to incite such action.[26] Consequently, it is not sufficient to show that the expression is designed to produce immediate unlawful disorder. A prerequisite to the state's exercise of prior restraint is a high probability that the expression will in fact cause such disorder.[27]

Two years after Brandenburg, the Supreme Court heard the highly publicized case of New York Times Co. v. United States (the Pentagon Papers). Again, the doctrine of prior restraint of political speech received special attention. The Court dismissed temporary restraining orders against the New York Times and the Washington Post and

refused to enjoin the newspapers from publishing a classified study on United States policy-making in Vietnam. Nine separate opinions were written in the 6-3 decision. Basically the justices agreed on only two general themes--any system of prior restraint of expression bears a "heavy presumption" against its constitutional validity, and the government carries a "heavy burden" to justify enforcing any system of prior restraint.[28] The justices seemed to be upholding the clear and present danger test.

Of course, it is quite unlikely any high school newspaper would ever attempt to write anything close to the magnitude of a classified study on policy-making during a war. But the two general themes of the decision regarding prior restraint bear significance for student publications. First, the Court again questioned the constitutional validity of <u>any</u> prior restraint system. This should send up warning flags for school administrators. Secondly, the "heavy burden" for <u>enforcing</u> a system of prior restraint is placed upon the administrators. This inference is similar to the substantial disruption and material interference test of Tinker. Both cases (Tinker and New York Times) place major responsibilities upon the school administrators about seriously considering situations and various outcomes before any restrictions are placed on the student press.

Although the Tinker decision was a landmark First

Amendment victory for students, Trager wrote that confusion still exists because the justices left in doubt several other important issues. Trager posed these questions: "What evidence is necessary to support a forecast of disruption due to students' expression of their views? Can 'material and substantial disruption' include non-physical and covert disruption? What age levels are covered by Tinker--junior high school, elementary schools?"[29]

Although Tinker was not a student press case, it has become precedent in this area and is referred to in many high school press cases.[30]

As noted previously, there are types of expression unprotected by the First Amendment. These include obscenity. In the 1973 case of Miller v. California, the Supreme Court ruled that the states should apply a new obscenity test according to their own standards, rather than national ones. The Court established three guidelines to be considered by the states in determining what is obscene. These include:

> whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to prurient interest;
>
> whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
>
> whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[31]

The SPLC reports that most, if not all, of the student

press cases charged with obscenity in actuality contained only profanity and not obscenity. Vulgarity, profanity, and four-letter words are not classified as obscenity. This type of expression may only legally be regulated by school officials where they are able to demonstrate that it will create a substantial disruption of school functions.[32]

Through administrative pressure, school officials may try to discourage students from printing vulgar, profane, or four-letter words. Trager says, "By applying subtle pressures at sensitive points in the operation of a newspaper, administrators can be omnipotent, although by doing so they violate the spirit of the law."[33]

In a 1978 broadcasting case, the Supreme Court ruled that vulgarity, profanity, and four-letter words could be regulated. Protecting children from profanity was a factor considered in the Supreme Court decision of F.C.C. v. Pacifica Foundation. Therefore, the Court approved Federal Communication Commission sanctions against a broadcast station's mid-afternoon airing of comedian George Carlin's "seven dirty words" routine.[34]

Justice John Paul Stevens gave the Court's opinion. He said:

> In this case it is undisputed that the content of Pacifica's broadcast was 'vulgar,' 'offensive' and 'shocking.' Because content of that character is not entitled to absolute constitutional protection under all circumstances, we must consider its context in order to determine whether the Commission's action was constitutionally permissible.[35]

Stevens explained that of all forms of communication, "it is broadcasting that has received the most limited First Amendment protection." He also concentrated upon distinctions between the print media and broadcasting. Stevens wrote:

> . . . the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder. Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content.[36]

Referring to young listeners, Stevens said broadcasting is uniquely accessible to children, even those too young to read. He defended sanctions against the broadcast station in this case by saying, "The ease with which children may obtain access to broadcast material, . . . amply justify special treatment of indecent broadcasting." Justice William Brennan noted in his dissent that if listeners were offended by the broadcast, they could simply turn off the radio.[37]

F.C.C. v. Pacifica and New York Times Co. v. United States both dealt with regulation of content. Stevens referred to the First Amendment protection for content in newspapers, but not broadcasting. He said, ". . . although the First Amendment protects newspaper publishers from being required to print the replies of those whom they criticize, it affords no such protection to broadcasters."[38]

Implications for the student press are that if the

newspaper contains legally protected expression--"dirty words" included--the courts should recognize the right of publication.

The Seventh Circuit Court of Appeals ruled in 1973 that an Indianapolis high school newspaper was not obscene. In Jacobs v. Board of School Commissioners, the court said, "A few earthy words relating to bodily functions and sexual intercourse are used in the copies of the newspaper in the record." The court held that such material was only a small part of the publication and in no "significant way was erotic, sexually explicit, or . . . could plausibly be said to appeal to the prurient interest of adult or minor." And the court found that the occasional presence of "earthy words" in a student publication would not be likely to disrupt normal school activities.[39]

Defamatory expression, like obscenity, is not protected under the First Amendment. Defamation is generally defined as a "false communication which injures an individual's reputation by lowering the community's regard for that person or by otherwise holding an individual up to hatred, contempt, or ridicule." In a libel suit there must be proof of publication (communicated to a third party), identification (be regarded as referring to and reflecting on a specific individual, business, or product), and defamation (false and injures the plaintiff's reputation in the eyes of the community.)[40]

Referring to defamation, there is a concern that due to their age, student journalists may be negligent in their reporting and/or publication. Of course, this is a difficult question to answer with student maturity level as an important factor to consider. Both responsibilities and risks of publication can be explained to the students by the faculty adviser. But writing for school publications is a learning experience for student journalists that involves more than explanations. Learning through writing for school publications will involve risks.

In 1977 the SPLC did an extensive study regarding the law of libel and the high school press. Its research revealed that "fear of libel is largely unjustified. Libel actions are rarely brought against student publications, and there is virtually no appellate record of libel decisions against student journalists."[41]

Proof of publication and identification would appear to be obvious and simple to establish in a libel suit filed against student journalists. But because of the difficulty involved in proving defamation, it seems that potential plaintiffs in a libel suit may decide not to pursue the issue. Of course, it is the adviser's responsibility to instruct students on the consequences associated with libel, and on the importance of printing material that does not defame another person. But the students must be entrusted to make editorial decisions that will provide credibility for themselves, the publication, and the school.

For libel cases a distinction between public and private persons was made by the Supreme Court in Gertz v. Robert Welch, Inc. (1974). One major factor considered by the Court was that the private person has not voluntarily invited public comment.[42] Consequently in a libel suit, private persons only need to prove negligence (a departure from the normal practices of journalism) along with proof of publication and identification.[43]

The 1964 Supreme Court libel decision in New York Times Co. v. Sullivan differentiated between public officials and private persons in regards to recovering damages. The Court said:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'--that is, with knowledge that it was false or with reckless disregard for whether it was false or not.[44]

Public school administrators and teachers are public officials, "since they are paid by taxpayers, responsible to citizens in the community, and hired by school boards which are given their authority by state legislatures." If a school official feels he or she has been libeled in a student publication, actual malice must be proven.[45]

Ordinarily, high school students would be considered private figures. However, a district court ruled in Henderson v. Van Buren Public School (1978) that a Student Senate president was a public figure for purposes of his

libel action against the student newspaper. The court defended the public figure position, citing the student's position of leadership and his admittedly voluntary injection of himself into public controversy.[46]

Because school administrators are public officials, the student newspaper can criticize the officials. The administrators may not control the critical expression, unless it is necessary to prevent disruption of the school.

In the 1970 decision of Scoville v. Board of Education of Joliet, the Seventh Circuit Court of Appeals ruled that administrators could not show disruption would have resulted from distribution of an underground newspaper in which an editorial referred to a school dean as having "a sick mind." The court inferred that more "action" would be required to prove disruption would have occurred.[47] The court implied that mere expression, regardless of its bad taste, cannot be prohibited unless substantial disruption and material interference can be proven.

Invasion of privacy is also a concern when discussing reasons for controlling student expression. The four branches identified as invasion of privacy include: (1) appropriation of another's name or likeness, (2) unreasonable intrusion upon another's seclusion, (3) publicity which unreasonably places another in a false light before the public, and (4) unreasonable publicity given to another's private life.[48]

An individual's concern for the uses of his or her name, personality, or image is protected when referring to appropriation. Unconsented violation of one's legally protected physical sphere of privacy is considered an unreasonable intrusion. Creating a false image for an individual or placing him or her in a false light through publicity may also be an invasion of privacy. Unreasonable publication of private facts of an embarrassing and objectionable nature is the fourth common law branch dealing with invasion of privacy.[49]

Harvey L. Zuckman and Martin J. Gaynes, in their book Mass Communications Law In A Nutshell, explain that public disclosure of private facts is the most troublesome branch because it is not always easy for reporters to determine when publicity is unreasonable or when facts must be viewed as private.[50] So, this would probably cause the most problems for student journalists. Articles on the private lives of school officials, students, or their families could encounter privacy problems dealing with unreasonable disclosure.

Trager reports that no case involving student publications and the question of privacy has yet been decided by the courts.[51]

To help avoid administrative and legal problems dealing with obscenity, libel, and invasion of privacy, the publications adviser should instruct student journalists in constitutional press law. The adviser's position of having to work closely with the administration and the student journalists may leave the adviser caught in the middle. The adviser is a school official, who is hired by the school board and

paid by taxpayers. Therefore the adviser, just like the school administrators, cannot abridge students' First Amendment rights.

On the other hand, Trager explains the adviser's contract may stipulate that the school regulations must be obeyed, including those that may be repressive toward student publications, or that the adviser cannot be insubordinate by disobeying an administrator's orders to censor the student press.[52]

So in this issue of side-takers, should the adviser adamantly defend the students' First Amendment rights? Or should the adviser dutifully adhere to administration demands? With the latter responsible for the paycheck, it is conceivable that money may just speak louder than First Amendment words. But, if the adviser defends First Amendment rights of publication staff members resulting in reprimands from school administrators, the consequence could be a violation of the adviser's First Amendment right to freedom of speech. In terms of their First Amendment rights, teachers, like students, are entitled to freedom of expression, provided it does not lead to substantial disruption and material interference of the work and discipline of the school.[53]

Another argument used by school officials as a reason for controlling expression is the fact that the school publications are products of a learning lab. In other words, they are part of the curriculum, and published as an extension

of a particular class, usually journalism. This argument tries to evade the fact that a newspaper is being published, and constitutional guarantees regarding the student publication must be recognized by the school officials.

Because the publications are printed as part of a class, administrators feel restrictions should be able to be enforced just as in other classes. This would include the withdrawal of school funds for the publication as an effective way to control expression. In public schools, the courts have ruled both of the above (publications as part of curriculum and withdrawal of school funds) unconstitutional if the newspaper was created as a student forum.[54] (Because the establishment of a public forum is an important First Amendment area, it will be discussed separately later in this paper.)

Type and Distribution Form

The type and distribution form of the student publication must also be addressed when referring to First Amendment rights as applied to the high school press. Specifically, this means: is the publication school-sponsored or not, and is it being distributed on campus or off campus?

In any situation, the school administration may enforce a reasonable time, place, or manner of distribution. The courts have upheld the reasonable time, place, or manner restrictions on expression. But, the regulations must be implemented without regard to the content of the speech.

In Grayned v. Rockford (1972), the Supreme Court ruled that an anti-noise ordinance was not unconstitutionally vague or overbroad when it prohibited a person on grounds adjacent to a building in which school is in session from disturbing the peace of the school.[55]

If a high school publication is recognized as an official school publication and is distributed on campus, the administrators can attempt no content control unless they can prove substantial disruption and material interference, or show there is obscene or defamatory expression, or invasion of privacy. When a non-school-sponsored publication is distributed on campus, the administration may not control the expression except in the same instances as described for school-sponsored publications distributed on campus. The administrators can regulate time, place, and manner of distribution.[56]

The courts disagree on the amount of control administrators may exhibit over a non-school-sponsored publication that is distributed off campus by students of the school. The SPLC does explain "where student expression distributed off campus has directly caused a substantial disturbance on campus, there is a risk of disciplinary action against the students directly involved in the disruption."[57]

So, if a non-school-sponsored publication is distributed off campus, which causes a disturbance on campus, school officials may attempt to discipline the students involved

in the disruption. However, this does not mean they have a constitutional right to discipline the students who printed and distributed the publication. By distributing the publication off campus, the students are engaging in an activity as private citizens. And school administrators have no authority to discipline private citizens.[58]

The Fifth Circuit Court of Appeals heard a case in 1972 dealing with an underground newspaper that was distributed off campus and after school hours. In Shanley v. Northeast Independent School District, the court overruled the suspensions of five high school students who had violated school policy by distributing the newspaper without prior approval of school officials. The court said it should shock parents that "their elected school board had assumed suzerainty over their children before and after school, off school grounds, and with regard to their children's rights of expressing their thoughts." It was expressed by the court that schools could have no more power to punish students for expressing their views off campus than on school grounds.[59]

Trager interpreted the court's decision by saying, "Since Tinker and its progeny held that non-disruptive publications which were neither obscene nor libelous were protected under the First Amendment when distributed on campus, such publications must also be protected off campus."[60]

The Fifth Circuit Court of Appeals described the newspaper in Shanley as "one of the most vanilla-flavored ever

to reach a federal court" and held that it was not libelous, obscene, or inflammatory. Despite this mild reprimand, the court still added that there is "nothing unconstitutional per se in a requirement that students submit materials to the school administration prior to distribution." The court saw the purpose of prior review as preventing disruption, not stifling expression.[61]

The decision in Shanley is inconsistent with Tinker. The court made note of the newspaper's mild content, but proceeded to respond that publications could be submitted to school officials for prior review as a means of preventing disruption. This is far from the opinion in Tinker, where the Supreme Court pointedly ordered that "for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[62] In other words, there must be imminent danger that a student newspaper's content would result in substantial disruption of the school's activities.

Two years prior to Shanley, a court upheld the suspensions of two students for distributing off campus an underground paper containing profanity and vulgarity. In Baker v. Downey City Board of Education, a federal district judge agreed with school officials that distribution of the paper

"threatened the educational program of the school and would diminish control and discipline." In distinguishing this case from Tinker, the court noted that while students have the right to criticize and dissent, they may be more severely restricted in their method of expression than their elders.[63]

Since the newspaper in Baker was distributed off-campus, the students are more fully protected by First Amendment rights as private citizens. Also, the newspaper contained profanity and vulgarity, and they are recognized as areas of protected speech under the First Amendment.

The final type and distribution form to be considered is the non-school-sponsored publication which is distributed on campus. In allowing non-school-sponsored publications to be distributed on campus the SPLC notes, "School officials may enact reasonable rules governing the times, places and manner of distribution. But, such rules may not be employed to stifle student expression."[64]

Attempted Method of Controlling Expression

Attempted method of controlling expression is another key topic area in reference to First Amendment rights as applied to the high school press. This involves either prior restraint or post-publication sanctions as means of regulation. Prior restraint deals with controlling content before publication. A post-publication sanction entails taking some sort of action after publication.

The 1931 Supreme Court decision in Near v. Minnesota,

which involved the professional news media, forbade pre-publication censorship except in "exceptional" cases.[65] Student journalists are beneficiaries of this decision. Of course, this does not automatically provide students the opportunity to write anything they wish.

Chief Justice Charles Evan Hughes explained in Near v. Minnesota that the principle that the constitutional guarantee of the liberty of the press gives immunity from previous restraints upon publication is not absolutely unlimited. And the Court said limitations are recognized only in exceptional cases which include time of war which would be a hindrance to national effort, obscene publications, or publications inciting to acts of violence and overthrow by force of orderly government.[66] (The prior restraint on obscene publications was overruled in the 1965 case of Freedman v. Maryland. The Supreme Court held that a community statute was invalid because of its attempts to control obscene publications. Justice William Brennan delivered the Court's opinion. He said the courts, and not communities, must determine if a publication is obscene. Brennan wrote, "... only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint."[67])

In the absence of the exceptions cited in Near (obscenity excluded), post-publication action must always be used

rather than prior restraint. The burden of proof will be on those attempting prior restraint.

In Nitzberg v. Parks (1975), the Fourth Circuit Court of Appeals held that systems of prior review may be used, but only according to precisely drawn regulations. These regulations must be explicit about what expression is prohibited. Examples would include definitions of disruption, libel, or obscenity.[68]

Christopher B. Fager, who served as director of the SPLC in 1976, wrote an extensive study entitled "Ownership and Control of the Student Press: A First Amendment Analysis." Referring to prior review, Fager said, "It is noteworthy that no United States Court of Appeals has ever approved as constitutionally valid a set of rules implementing a prior review mechanism."[69] In other words, no rules have met the courts of appeals' requirement of explicitness.

Prior restraint of non-school-sponsored publications has also failed to gain court approval. The Seventh Circuit Court of Appeals in Fujishima v. Board of Education rejected a system requiring prior approval before distribution of an unofficial student newspaper. The court said in this 1972 decision, "Tinker in no way suggests that students may be required to announce their intentions of engaging in certain conduct beforehand so school authorities may decide whether to prohibit the conduct. Such a concept of prior

restraint is even more offensive when applied to the long protected area of publication." It was reaffirmed by the court that the school could enact reasonable time, place, and manner regulations governing the newspaper's distribution.[70]

A special committee was formed in 1973 by the Robert F. Kennedy Memorial. Its purpose was to investigate the status of high school journalism. The committee's study was entitled "The Report of the Commission of Inquiry into High School Journalism." Summarizing its findings on censorship, the report read:

> Censorship and the systematic lack of freedom to engage in open, responsible journalism characterize high school journalism. Unconstitutional and arbitrary restraints are so deeply embedded in high school journalism as to overshadow its achievements, as well as its other problems.[71]

Evidence compiled by the Commission showed that school administrators' censorship policies focused on three categories of writing. These included: (1) controversial political issues; (2) criticism of school administrations or faculty policies, or unfavorable images of the school; and (3) life styles and social problems.[72]

On censorship issues the Commission recommended that, "The student staff should have ultimate authority over and responsibility for high school media, which means the right to know and to produce and disseminate information free of interference or restrictions."[73]

A case dealing with censorship of articles written about life styles and social problems was decided by the Fourth Circuit Court of Appeals in 1977. An editor of a Virginia student newspaper wrote an article on student sexual practices which was headlined "Sexually Active Students Fail To Use Contraceptives." Because of the article's controversial subject, the principal censored the article prior to publication. Although the case dealt directly with censorship, the court's ruling concentrated more upon the fact that the newspaper was established as a public forum for student expression, and therefore subject to First Amendment protection.[74]

The court also found in this case, Gambino v. Fairfax County School Board, that students are not a captive audience (compelled to listen against their will) merely because of compulsory attendance at school. It was noted that the newspaper could not be considered part of the school curriculum because it was established as a public forum, not as an official publication.[75] Examples of "official publications" would be annual financial statements, minutes from school board meetings, or reports to parents. And once an outlet, such as a student newspaper, is established for public expression, its regulation must adhere to First Amendment guarantees.

This ruling that students are not a captive audience is a change in legal thinking. Opinions prior to 1970 held that

students were a captive audience since high school is essentially mandatory. In the 1970 Antonelli decision the district court emphasized that the school newspaper was considered a public forum, and not part of the school curriculum. The opinion said an educational institution's power to control curriculum does not translate to the ability to control the student press.[76]

Reineke v. Cobb County School District, which was decided at the federal district court level, involved a Georgia high school newspaper. This case has been called the most significant student press censorship case since Gambino. Editor Reineke sued his adviser, principal and school board after numerous articles had been censored, one issue of the paper confiscated, and finally the newspaper terminated.[77]

The censored articles included an editorial calling the daily "devotionals" the school held over its public address system unconstitutional, a board of education candidate's advertisement from 1960 which was advocating segregated education, and a story about the school's losing football team. One issue of the paper was confiscated after Reineke published two stories that already had words and paragraphs censored by the adviser. Reineke asked the American Civil Liberties Union for advice. After the organization's attorney wrote a letter to the school board, the principal shut down the paper.[78]

The judge ordered immediate release of the confiscated issue and publication of all articles previously censored. There also was an injunction issued against the prior restraint of any future material unless it was libelous, obscene, or substantially disruptive. Finally, the court declared that the administration could not terminate the newspaper or cut off its funds.[79]

Publication As Public Forum

Finally, establishing a publication as a public forum is a final area to be discussed in regards to First Amendment rights as applied to the high school press. The Supreme Court ruled in the 1965 non-school case of Cox v. Louisiana that central to the public forum doctrine is the principle that once the government creates a forum for public expression, its regulation of the forum must be consistent with First Amendment guarantees.[80]

A New York district court said in the 1969 case of Zucker v. Panitz that student newspapers are generally recognized as public forums whenever they consist of something more than "a mere activity time and place sheet." Although the courts have not established exact guidelines to help determine when a student publication can be classified as a public forum, general prerequisites are available. A newspaper must be open to news or commentary, it must be circulated among the student body or community at large, and it

must receive some form of state subsidy to satisfy state action requirements.[81]

Elaborating on the third prerequisite, it is important to note that although the school may totally fund a student publication, it is not considered "publisher" with power of editorial control. In Mississippi Gay Alliance v. Goudelock (1976), the Fifth Circuit Court of Appeals stated that choice of material by student editors to be included in a newspaper constitutes exercise of editorial control and judgment.[82]

In its Mississippi Gay Alliance decision, the court quoted from the 1974 Supreme Court professional news media case of Miami Herald Publishing Company v. Tornillo. Referring to government control, the Supreme Court said, "It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time."[83]

Once again, it must be reiterated that establishing the fact that a school publication is a public forum does not prevent the administration from regulating the reasonable time, place, or manner of distribution. It does, however, prevent school officials from discontinuing publication funds or dismissing editors and/or staff members because of the editorial content of their articles. (See responsibilities of boards of publication, page 49.) The publication must adhere to its public forum responsibility in providing

equal access for individuals with competing ideas. This could be in the form of paid advertisements or through letters to the editor columns.[84]

A federal district court judge addressed the public forum issue in Lee v. Board of Regents of State Colleges (1969). The campus newspaper had refused to print paid editorial advertisements concerning a university employees union, alleged discrimination and race relations, and the Vietnam war. The judge said, "As a campus newspaper, the Royal Purple constitutes an important forum for dissemination of news and expression of opinion. As such a forum, it should be open to anyone who is willing to pay to have his views published therein--not just to commerical advertisers."[85]

Although the courts (predominantly at the lower levels) have heard a variety of student press cases, there remain many unanswered questions. Even though Tinker is a landmark case in reference to First Amendment rights of students, Trager asks questions dealing with the substantial disruption and material interference clause and age of students. (See questions previously listed on page 14 of this paper.) Trager declared these questions were unanswered by the Supreme Court.[86]

More students and administrators are beginning to realize the protections guaranteed the student press under the First Amendment. Nat Hentoff, in his book The First Freedom, writes, "In the years since the Tinker decision, . . .

certain principals have moved to reexamine school regulations in order to make certain that students are being assured their constitutional rights." Hentoff adds, "Others (administrators) have been forced to comply with the Constitution when challenged in the courts by students and parents who have become very much aware of their rights."[87]

Because of this growing awareness, schools may attempt to define the responsibilities of high school journalists by adopting publication guidelines. However, the courts have been very vocal regarding the necessity that guidelines be definite and explicit in their statements. In fact, the SPLC has reported that no court of appeals has approved a specific set of student publication guidelines. And, they have struck down as vague, overbroad, or too restrictive every set of student press guidelines submitted to them.[88]

Vagueness and Overbreadth

It is important to understand the importance and meaning of the terms "vagueness" and "overbreadth" since the courts continually refer to them in student press cases. Nowak, Rotunda, and Young define vagueness doctrine as one that includes terms that are so vague as either to allow protected speech in the prohibition or leaves an individual without clear guidance as to the nature of speech for which he can be punished. They explain that an overbroad statute is one that is designed to burden or punish activities which are not constitutionally protected, but that includes within

its scope activities which are protected by the First Amendment.[89]

The 1970 federal court decision of Baker v. Downey City Board of Education dealt with how to avoid vagueness according to constitutional standards. It said a regulation applied to high school students "must be sufficiently definite to provide notice to reasonable students that they must conform their conduct to its requirements and may not be so vague that persons of common intelligence must guess at its meaning."[90]

Allowing vagueness would provide school officials the outlet necessary to alter rules to fit the situation. "This is what we meant in this case" must be replaced by a more definite "this is what we mean in all cases."

The Fifth Circuit Court of Appeals in the 1972 decision of Shanley v. Northeast Independent School District said a rule is overbroad when its reach covers constitutionally acceptable conduct as well as that which is prohibited.[91]

So, school officials cannot try to enforce a general, all-inclusive rule as a way of hoping to control student expression at their discretion. Specific written guidelines approved by school officials and publication staffs must be the acceptable alternative to vagueness and overbreadth.

According to Trager, some general conditions have been indicated by the courts to help avoid vagueness and overbreadth. These include: (1) the rule must be specific,

including precise places and times where possession and distribution of student publications are prohibited; (2) the rule must be understandable to persons of the age and maturity it covers; (3) the rule must include guidelines stating clear and demonstrable criteria school officials will use in applying the rule; (4) the rule cannot put a student in jeopardy of punishment because of the unwarranted reaction or response of another individual; and (5) the rule must not prohibit protected activity, such as that which is orderly and nondisruptive.[92]

This last statement is the only suggestion that allows too much administrative discretion. Activity that is "orderly" and "nondisruptive" could be interpreted in a variety of ways depending on the situation. Also, the words are considerably broad. So it seems ironic that this suggestion, which itself is broad, would be used by a court to indicate ways to avoid overbreadth.

However, in not approving specified publication guidelines, the courts have explained what types of guidelines would be constitutionally valid. Two early 1970 court cases attempted to set minimum constitutional requirements for student publication guidelines.[93]

In Buaghman v. Freienmuth (1973), suit was brought against the school system charging that certain regulations constituted an unlawful prior restraint on distribution of non-school-sponsored literature. Referring to school board

regulations dealing with publications without school sponsorship, the Fourth Circuit Court of Appeals ruled that the guidelines must specifically define the terms distribution and obscenity.[94]

In Nitzberg v. Parks (1975), also decided by the Fourth Circuit Court of Appeals, the opinion outlined the following requirements: (1) the term "substantial disruption of or material interference with school activities" must be defined, (2) guidelines must "detail the criteria by which an administrator might reasonably predict the occurrence of such a disruption," (3) the term "libel" must be fully defined and the definition must take into account the rule announced in New York Times Co. v. Sullivan and its progeny, and (4) any publication guidelines must be included in the official publications of the school or circulated to students in the same manner as other official material.[95]

At the time the suit was filed in Nitzberg, the school board adopted a seven-page policy for student newspapers in Baltimore County, Maryland. H. Emslie Parks was the defendant in the above case. He was serving as Board of Education president of Baltimore County. After four revisions of the policy, the district court continued to find the policy vague and overbroad. The fifth revision was approved by the district court on May 30, 1974. Immediately, attorneys from the American Civil Liberties Union claimed the guidelines allowed official prior restraint and filed suit

with the Fourth Circuit Court of Appeals to overturn the previous decision. The court of appeals did reverse the decision, indicating that the school board's rules were still vague and overbroad. In the court's judgment, the board's rules simply did not provide an adequate definition of the type of student expression prohibited.[96]

In the Nitzberg decision, the Fourth Circuit Court of Appeals: (1) refused to extend the rights of school officials beyond such neutral regulations as are indispensible to the orderly functioning of the school; (2) reiterated the right of administrators to block the distribution of material which would cause substantial physical disruption of the school; (3) required that rules permitting prior restraint on distribution to avoid disruption must specifically define the term disruption; (4) ordered that any procedures calling for prior review of student newspapers must allow students to appear and argue their case in favor of distribution; and (5) suggested that school officials, before trying to ban a publication, should hold free and open discussion with students in an attempt to air and reconcile conflicting points of view.[97]

The courts are offering valid suggestions on how to avoid vagueness and overbreadth. They also seem to be making progress in attempting to require school authorities to be more specific in the application of the Tinker substantial disruption and material interference test. But, the courts

are more divided regarding rulings on prior review and prior restraint.

Prior Review and Prior Restraint

The adoption of systems of prior review or prior restraint would allow the school administrators to read and censor material before distribution. Prior restraint is the more forboding as it allows the actual withholding of information or distribution. Prior review allows administrators to read copy before publication, usually with the option of censoring. It is necessary to distinguish between prior review or restraint tactics, and rules that permit punishment of students after distribution. If the policy allows punishment only after publication, courts have said the wording need not be very specific. However, statements allowing prior review or restraint must be specific and narrowly drawn with all important terms defined.[98]

The courts dealt with rules that were vague and overbroad in the 1973 case of Peterson v. Board of Education and the 1975 case of Jacobs v. Board of School Commissioners. In Peterson, the district court said a ban on literature which "will encroach upon the orderly conduct of the schools" was too vague and overbroad. And in Jacobs, the Seventh Circuit Court of Appeals ruled that the following statement was vague and overbroad: "No student shall distribute in any school any literature that is . . . either by its content

or by the manner of distribution itself, productive of, or likely to produce a significant disruption of the normal educational processes, functions or purposes in any of the Indianapolis schools or injury to others."[99]

It is clear why the courts' rulings in Peterson and Jacobs included vagueness and overbreadth reprimands. In Peterson, how is "orderly conduct" determined? Walking down a school hall, a student reads a newspaper editorial and has a varying opinion. If he tells his opinion in a "loud" voice to another student, is that editorial encroaching upon the orderly conduct of the school? It is impossible to decide because the words are not specific in their meaning as to what is or is not "orderly conduct." The school in Jacobs apparently misread a key word from the Tinker case. The Supreme Court charged schools with providing "substantial" and not "significant" disruption of school activities. Substantial means an effect will be "strong" or "firm." Significant refers to an "important" effect.[100] The Indianapolis Board of School Commissioners used plenty of words in its statement regarding student publications, but they are vague. No answers are provided to questions of what constitutes a "significant disruption" and what is considered "normal educational processes, functions or purposes."

In the 1977 case of Leibner v. Sharbaugh, the district court declared that a requirement stating student publications must conform to "the journalistic standards of accuracy,

taste, and decency maintained by the newspapers of general circulation in the city" was too vague.[101]

Vagueness exists because of the following unanswered questions. How is accuracy defined? Where is the line drawn differentiating between "good" and "bad" taste? And what constitutes the presence or absence of decency? Does "newspapers of general circulation in the city" mean only major papers with daily publication? Or can it include weekly trade or monthly church publications?

And the Fourth Circuit Court of Appeals in Baughman overruled a prohibition against libelous and obscene material stating that the terms "are not sufficiently precise and understandable by high school students and administrators untutored in the law to be acceptable criteria. Indeed, such terms are troublesome to lawyers and judges."[102]

The constitutionality of systems of prior restraint has been a more difficult issue for the courts. Of the five circuit courts that have considered the question of prior restraint, four (1st, 2nd, 4th, 5th) have indicated their belief that prior restraint would be permissible given well-drawn procedures. Only the Seventh Circuit Court of Appeals (Wisconsin, Illinois, and Indiana) has indicated that under no conditions should prior restraints be tolerated.[103] The no prior restraint position taken by the Seventh Circuit Court of Appeals in regards to the high school press is consistent with court decisions regarding the professional news media.

In the 1971 case of Organization for a Better Austin v. Keefe, the Supreme Court relied heavily on the Near decision when it stated, "Any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity."[104]

Referring to prior review, the courts have offered some suggestions. The Fourth Circuit Court of Appeals declared in Baughman and Nitzberg that for a system of prior review to be constitutionally valid, it must contain "narrow, objective, and reasonable standards by which the material will be judged and precise criteria sufficiently spelling out what is forbidden so that a reasonably intelligent student will know what he may write and what he may not write."[105]

Examples of the "precise criteria sufficiently spelling out . . ." include: (1) specifying to whom the material is to be submitted for approval (Eisner v. Stamford Board of Education); (2) limiting the time the official has to reach a decision on whether to approve or disapprove distribution (Baughman, Nitzberg, Eisner, and Quarterman v. Byrd); (3) providing for the contingency of a school official failing to issue a decision within a specified time (Baughman); (4) affording students the right to appeal before the decision-maker and argue why distribution should be allowed (Nitzberg and Leibner); and (5) providing an adequate and prompt appeals procedure if the school official decides to ban distribution (Eisner and Nitzberg). A review procedure which lasts "several weeks" is too lengthy (Leibner).[106]

No court has attempted to specifically determine what amount of time would be acceptable during a review process. The Fourth Circuit Court of Appeals said in Baughman, "It is not our province to suggest a time limit, but we caution that whatever period is allowed, the regulation may not lawfully be used to choke off spontaneous expression in reaction to events of great public importance and impact." The Fourth Circuit Court of Appeals in Nitzberg declared that "two pupil days" was vague because the term "pupil days" was undefined.[107]

The review process would involve presenting the disputed problem before the school's publications board. The principal, adviser, and student editor should meet to discuss the issue if no publications board exists. If the adviser and editor feel First Amendment rights have been violated, and the principal is unwavering, the SPLC or a local attorney could be contacted for legal advice. No matter what review process is used, it should be completed in as short a time as possible. Because court cases are time-consuming and expensive, it is to everyone's benefit to try and settle disagreements within the school.

By requiring school administrations to specify "narrow standards" and "precise criteria" when referring to prior review, the courts could be offering suggestions on how to avoid vagueness and overbreadth. However, post-publication action is still preferable to any system of prior review.

At least one court dealing with prior restraint spoke out against the practice. The opinion (Baughman) said, ". . . we think letting students write first and be judged later is far less inhibiting than vice versa. For that reason vagueness that is intolerable in a prior restraint context may be permissible as part of a post-publication sanction."[108] Of course, as previously noted, this procedure was defended in the 1931 case of Near v. Minnesota. The Supreme Court decision forbade pre-publication censorship.

In his dissenting opinion in A Quantity of Books v. Kansas (1964), Justice John Harlan wrote:

> One danger of a censorship system is that the public may never be aware of what an administrative agent refuses to permit to be published or distributed. A penal sanction assures both that some overt thing has been done by the accused and that the penalty is imposed for an activity that is not concealed from the public.[109]

One thing that is clear from these court cases decided in the 1970's is that any statements written for the intention of helping govern the high school press must avoid being vague, overbroad, or too restrictive.

Publication Guidelines

Upon the recognition of the need for publication guidelines, those people involved with the assignment of writing the guidelines must first of all have some knowledge of student press law. Although not a vital part of the guidelines, an introductory statement can emphasize the role and

responsibility of the student press. Also included may be a summary of the rights granted to the student press under the First Amendment. Justice Fortas recognized the scope of First Amendment rights when he wrote in Tinker, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[110]

The purpose of the publication needs to be described in the guidelines. It should be stated that the publication will be recognized as a forum for student expression. Once this has been done, the courts have recognized certain rights of the publication that cannot be abridged. For example, as decided in Reineke, publication funds cannot be discontinued or staff members dismissed because of article content. And Gambino noted the newspaper was established as a public forum, and therefore could not be considered part of the school curriculum.

Defining what type of student expression will not be permitted in the publication must also be included in the guidelines. Unprotected speech as identified by the courts includes material that is obscene, libelous, invades the privacy of others, and creates a substantial disruption of school activities. It also must be noted that students may not be prohibited from publishing material with critical content.

The guidelines should specify the rights of student

journalists to write about controversial issues both on and off campus. The courts have recognized the listed areas of expression as not being protected by the First Amendment. But, school officials must not try to include controversial issues as a subject of unprotected speech. Courts have denied high school officials the right to suppress student publications dealing with controversial issues such as the Vietnam war (Zucker) and methods of birth control (Gambino).[111]

The publication's position regarding prior review of material should explicitly be outlined in the guidelines. The courts have not agreed upon the constitutionality of prior review, nor the extent to which it may be practiced. However, if courts lean toward allowing prior review, they at least have required that the material be critiqued by narrow, objective, and reasonable standards (Baughman and Nitzberg). It should be explained that the student publication will not be reviewed by school administrators prior to distribution.

However, the faculty adviser has more authority to read material prior to publication. The adviser may review the articles for correct sentence structure, grammar, spelling and punctuation. In addition, the adviser can check the stories for indications of obscenity, libel, invasion of privacy, or content that may cause substantial disruption and material interference to the school activities.[112]

If the school has created a publications board, its

existence and function must also be clarified in the guidelines. If constitutional issues arise, the first step toward resolution should be to present the problem before the publications board. Members of the publication board should include the newspaper's editor and faculty adviser; principal and/or school board member; a faculty member not responsible for the publications; and a non-journalism student, maybe the student council president or another council member. All publications board members must become familiar with First Amendment rights of student journalists. J. William Click, in his book Governing College Student Publications, also suggests community and/or professional representatives may be asked to serve as board members.[113]

Click defends having the editor as a publications board member with a voting seat. He writes:

> The editor always can be outvoted (unless the board has only two members) so there is little threat to orderly governance of the publication by affording the editor a vote. Presidents of corporations nearly always have voting seats on the boards of directors and positions on the executive committees that operate between board meetings. A person with a stake in the operation to the extent that an editor has would seem entitled to a vote rather than to have to sit by passively while the board votes on his or her recommendations or proposals.[114]

Click also explains that if there is a question regarding the removal of an editor from that position, it is the publications board that should handle the procedure. He writes, ". . . the board should follow its charter or accepted course

of due process and bring charges, conduct a hearing, and decide whether to remove the person from the position."[115] As a result, the board's action represents a very formal administrative decision.

As a precautionary measure, it would be helpful for the guidelines to include a section on the adviser's role. Understandably, one of the adviser's primary duties is to advise. And giving advice is not the same as censoring. This distinction needs to be dealt with in the guidelines.

The role of the administration must also be outlined in the publication guidelines. Administrators may not put restrictions on the high school press except in constitutionally valid cases. As previously discussed, this includes expression that is obscene, libelous, an invasion of privacy, or is substantially disruptive.

Finally, the guidelines should include a statement on the time, place, and manner of distribution. The distribution must be scheduled so that it will not be disruptive of school activities. The courts, such as the Seventh Circuit Court of Appeals in Fujishima, have ruled that the administration can regulate distribution of the publication as long as the stipulations are reasonable.

As previously noted, no court of appeals has approved a set of student publication guidelines that has been submitted in reference to high school press cases. The SPLC has written a set of specific and limited model guidelines,

covering virtually all aspects of the student press, that is designed to avoid vagueness and overbreadth challenges.

In the opening paragraphs dealing with statement of policy, the SPLC guidelines defend First Amendment rights for students. The guidelines also suggest that it should be stipulated that the publications are established as forums of student expression. Concluding the statement of policy section, the SPLC emphasizes "that student journalists shall have the ultimate and absolute right to determine the content of official student publications."[116]

As part of the adopted publication guidelines, the responsibilities of student journalists should be stated. The SPLC suggests the following four responsibilities: (1) rewrite material, as required by the faculty advisers, to improve sentence structure, grammar, spelling and punctuation; (2) check and verify all facts and verify the accuracy of all quotations; (3) in the case of editorials or letters to the editor concerning controversial issues, provide space for rebuttal comments and opinions; and (4) determine the content of the student publication.[117]

Even though these are basic suggestions, it still is a good idea to remind student journalists of their obligations. The American Civil Liberties Union Statement on Freedom of the High School Press additionally says "editors should be encouraged through practice to learn to judge literary value, newsworthiness, and propriety."[118]

The guidelines should also include what type of material will not be published. Specifically, this should recognize material that is obscene, libelous, and invades the privacy of others. Definitions of these prohibitory expressions were discussed earlier. The SPLC adds that within the obscenity rule, it should be clarified as material that is "obscene as to minors." It identifies a minor as any person under the age of eighteen.[119]

Previous references to the areas of unprotected expression made note of specifically identifying what is considered obscene, libelous, and an invasion of privacy. So, it is understandable why student press guidelines would stipulate what type of expression is not acceptable for publication. However, Click writes that these areas of unprotected expression are determined by courts of law, not school administrators or their attorneys. Therefore, Click claims that statements referring to the aforementioned areas of expression "are of little use" in guidelines.[120] Even though administrators do not determine what is obscene, libelous, or an invasion of privacy, mention of these areas should be made in the guidelines for the benefit of anyone who may not be aware of the law.

The American Bar Association Statement on Freedom of the Campus Press referred to "willful defamation, public obscenity, and other actionable wrongs" as applied to printed material.[121] However, "other actionable wrongs" is so broad that it is ineffective.

In the proposed guidelines, the SPLC went to considerable length in attempting to describe what type of expression cannot be published or distributed because of the material and substantial disruption of school activities test as stated in Tinker. It described disruption as "student rioting; unlawful seizures of property; destruction of property; widespread shouting or boisterous conduct; or substantial student participation in a school boycott, sit-in, stand-in, walk-out or other related form of activity." It also stressed that material which "stimulates heated discussion or debate" does not constitute the type of disruption prohibited.[122]

In order for a student publication to be considered disruptive, the SPLC guidelines state:

> There must exist specific facts upon which it would be reasonable to forecast that a clear and present likelihood of an immediate, substantial material disruption to normal school activity would occur if the material were distributed. Mere undifferentiated fear or apprehension of disturbance is not enough; school administrators must be able to affirmatively show substantial facts which reasonably support a forecast of likely disruption.[123]

This statement refers to substantial material disruption to normal school activity, which of course is similar to the key Tinker phrase. It is also close to being a rephrasing of the clear and present danger test. And the words "undifferentiated fear or apprehension of disturbance is not enough" are a direct quote from Justice Fortas' majority opinion in Tinker.[124] By structuring the guideline

wording around key phrases from the precedent Tinker case, the SPLC is utilizing the Supreme Court opinion in offering suggestions to administrators on how to determine if a student publication is considered disruptive.

And in determining whether a student publication is disruptive, the SPLC says:

> Consideration must be given to the context of the distribution as well as the content of the material. In this regard, consideration should be given to past experience in the school with similar material, past experience in the school in dealing with and supervising the students in the subject school, current events influencing student attitudes and behavior, and whether or not there have been any instances of actual or threatened disruption prior to or contemporaneously with the dissemination of the student publication in question.[125]

Here it appears that the SPLC has tailored its requirements from other student press court opinions. The courts have distinguished between distributing on or off campus and what type of expression can or cannot be regulated (Shanley, Baker, Jacobs). By referring to court decisions in the guidelines, it is apparent the SPLC is concerned about giving suggestions that have already been sanctioned by various courts.

Still referring to the aforementioned Tinker phrase, the SPLC says that school officials must act to protect the safety of advocates of unpopular viewpoints.[126]

And finally, the SPLC guidelines define student activity as:

> educational activity of students sponsored by the school and includes, by way of example and not by way of limitation, classroom work, library activities, physical education classes, individual decision time, official assemblies and other similar gatherings, school athletic contests, band concerts, school plays, and scheduled in-school lunch period.[127]

The SPLC also provides a section regarding legal advice in its proposed guidelines. It states that the legal opinion of a practicing attorney should be sought if it is suspected that material proposed for publication may be obscene, libelous, invasion of privacy, or cause a substantial disruption of school activities. The SPLC recommends that the services of the attorney for the local newspaper be used, and the attorney's fees charged in connection with the consultation should be paid by the school board.[128] The suggestion to utilize the services of a local newspaper's attorney makes good sense. In disagreements among administrators and student journalists, it would be necessary to request someone with an independent legal opinion. And the model guidelines state that the final decision of whether the material will be published will be left to the discretion of the student editor or student editorial staff.[129]

The ACLU Statement on Freedom of the High School Press made mention of student discretion in regards to content. But the first two words of the sentence provide for many interpretations. It says, "Generally speaking, students should . . . be permitted and encouraged to produce such publications as they wish."[130] Whereas the SPLC advocates

maximum editorial control for the students, the ACLU apparently would take no such stand.

In its section on protected speech, the SPLC states in its guidelines that school officials are restricted in their control of the student press in seven areas. These include: (1) banning the publication or distribution of birth control information in student publications, (2) censoring or punishing the occasional use of vulgar or so-called "four-letter" words in student publications, (3) prohibiting criticism of school policies or practices, (4) cutting off funds to official student publications because of disagreement over editorial policy, (5) banning speech which merely advocates illegal conduct without proving that such speech is directed toward and will actually cause imminent lawless action, (6) banning the publication or distribution of material written by non-students, and (7) prohibiting the school newspaper from accepting advertising.[131]

The SPLC tied these seven particular restrictions to leading student press cases. Included are: (1) banning of birth control information = Gambino, (2) censoring vulgar or four-letter words = Baker, (3) prohibiting criticism of school policies = Baughman, (4) cutting off publication funds = Reineke, (5) banning speech merely advocating illegal conduct = Quarterman, (6) banning publication or distribution of material written by non-students = Antonelli, and (7)

prohibiting the newspaper from accepting advertising = Zucker.

Regarding non-school-sponsored publications, the SPLC model guidelines state that school officials may not ban the distribution of these materials on school grounds. However, the SPLC says the students may be disciplined after distribution if the materials contain unprotected expression. It is understood that school officials may reasonably regulate the time, place, and manner of distribution.[132]

The SPLC also recommends that "no student publication whether non-school-sponsored or official, will be reviewed by school administrators prior to distribution."[133] (The adviser is not considered to be a school administrator.)

Adviser job security is covered in the model guidelines. The guidelines read, "No teacher who advises a student publication will be fired, transferred or removed from the advisership for failure to exercise editorial control over the student publication or to otherwise suppress the rights of free expression of student journalists."[134]

Finally, the SPLC model guidelines say that the guidelines "will be included in the handbook on student rights and responsibilities and circulated to all students in attendance."[135]

Age of High School Journalists

As mentioned earlier, one issue in the controversy of

student press rights that holds many uncertainties is the age or relative immaturity of high school students. Many people undoubtedly feel that First Amendment rights of the press should not be granted to the high school publications precisely because of the students' ages. After all, Trager writes, high school students have restricted freedoms in other areas: they are forced to attend school until they are a certain age, they can be punished by their parents, they are subject to corporal punishment in the schools of most states, and they cannot legally execute binding contracts.[136]

In the Tinker case the Supreme Court did not discuss the difference between the First Amendment rights of adults and minors. However, in a case decided by the Supreme Court one year prior to Tinker, the justices did make this distinction. In Ginsberg v. New York (1968), Justice Potter Stewart summarized the feeling of the Court in his concurring opinion. He wrote:

> I think a State may permissibly determine that, at least in some precisely delineated areas, a child . . . is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees. It is only upon such a premise, I should suppose, that a State may deprive children of other rights--the right to marry, for example, or the right to vote--deprivations that would be constitutionally intolerable for adults.[137]

Seven years after Ginsberg, the Supreme Court heard another case dealing with interpretations of differing First

Amendment rights for adults and minors. Jacksonville, Florida, was enforcing an ordinance which made it a public nuisance and a punishable offense for a drive-in movie theater to exhibit films containing nudity when the screen was visible from a public street or place. The Supreme Court held the ordinance facially invalid as an infringement of First Amendment rights. Justice Lewis Powell delivered the Court's opinion in Erznoznik v. Jacksonville (1975). He wrote:

> Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors.[138]

Concluding the opinion, Powell said, "Thus, if Jacksonville's ordinance is intended to regulate expression accessible to minors it is overbroad in its proscription."[139]

Referring to the Supreme Court's decision in Tinker not to attempt to differentiate between the First Amendment rights of adults and minors, one source said the Court "appears to have concluded either that minors do in fact possess the necessary capacity for claiming and exercising first amendment rights or that the level of capacity is not crucial to making the threshold determination whether such rights are applicable to minors."[140]

Interpreting the legal area of children's rights under

the First Amendment is a highly debatable issue. In fact, Denise M. Trauth and John L. Huffman, in an article entitled "Heightened Judicial Scrutiny: A Test for the First Amendment Rights of Children," said the area is "unexplored and judicially undeveloped." They explain that "the courts have not yet articulated any special factors that might determine how existing legal mechanisms for analyzing First Amendment rights of adults can be applied to minors." Trauth and Huffman also note that "the constitutional tests of equal protection traditionally used to determine if an adult has been afforded civil rights are themselves . . . in a state of flux."[141]

Tinker did reaffirm that students' constitutional rights must be guaranteed while they are attending school. Regarding First Amendment rights for student journalists, the Tinker substantial disruption and material interference test still seems to be the most applicable guideline to follow.

In delivering the opinion of the Court in Tinker, Justice Fortas had no reservations regarding the age of students. Instead of emphasizing the maturity level of high school students, Fortas dealt with the encompassing region of the First Amendment. He wrote, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[142]

But Trager states that courts have consistently viewed

high school students as being relatively less mature than college students and adults. Because of this belief, some courts feel the extent of First Amendment application "may properly take into consideration the age and maturity of those to whom it (communication) is addressed." The age of students is also a consideration for some courts when distinguishing between the high school and college or university press.[143]

In Schwartz v. Schuker, decided one month after Tinker, the judge referred to high school students as being "much more adolescent and immature than college students" and "less able to screen fact from propaganda." A district court upheld the 1969 expulsion of a high school student for distributing copies of an underground newspaper. The newspaper contained profanity and was critical of school officials.[144] This case is similar to Baker v. Downey City Board of Education (see page 26 of this paper). The newspaper was distributed off campus, and contained profanity--not obscenity.

Because of the age of high school students, Garvey distinguishes between the use of Tinker's substantial disruption and material interference test for students, and the clear and present danger test for adults. He says:

> . . . that the child may not appreciate the gravity of consequences that can follow incitement may imply that school authorities should be allowed to establish a demilitarized zone between protected speech and dangerous speech, merely as a precaution against students crossing the latter line. That is

> what the Tinker formula does, by allowing school administrators to shut off discussion once it reaches a 'reasonable forecast of substantial disruption,' but before it occasions a 'clear and present danger.'[145]

One of the main problems in the controversy of First Amendment rights as applied to the high school press is the necessity for the courts to balance these student rights with the duties and responsibilities of administrators. Trager writes that school officials traditionally have strong supervisory power over students. He adds, "The state's interest in maintaining its educational system is a compelling reason, courts contend, to allow reasonable regulations essential to upholding order and discipline on school property."[146]

But regarding the high school press, Trager explains that the Tinker forecast rule "seems to mean that students' rights 'must be balanced against the duty and obligations of the state to educate students in an orderly and decent manner to protect the rights not of a few but of all the students.'" Trager concludes, "If administrators can adequately show that distribution of student publications will disrupt that state obligation, their actions in punishing students for such distribution will be upheld. But 'undifferentiated fear' of a disturbance, to use the language in Tinker, is not sufficient."[147]

In the 1969 decision of Ferrell v. Dallas Independent School District, the judge for the Fifth Circuit Court of

Appeals addressed this issue. He wrote:

> Free expression is itself a vital part of the education process. But in measuring the appropriateness and reasonableness of school regulations against the constitutional protections of the First and Fourteenth Amendments the courts must give full credence to the role and purpose of the schools and of the tools with which it is expected that they deal with their problems, and careful recognition to the differences between what are reasonable restraints in the classroom and what are reasonable restraints on the street corner.[148]

Conclusion

In recent court decisions regarding the student press, the scales appear tipped toward freedom of expression for students. Where administrators have attempted to regulate the student press through publication guidelines that are not specific or explicit, all appellate courts have rejected the rules as either vague, overbroad, or too restrictive. One of the main objectives of this paper has been to relate the importance and necessity of adopting publication guidelines for the student press. However, it is not the intention that they be written and accepted solely for the benefit of either the school administration or the student publications. A good set of publication guidelines, like those suggested by the Student Press Law Center, can be advantageous for both the student press and the administration. Based on law, the guidelines can serve as a contract between the press and administration with the rights and responsibilities clearly presented and understood before publication.

Despite the advantages of implementing publication guidelines, one source wrote in May 1980 that "probably no more than one school in ten that has a student newspaper has written guidelines. . . ."[149] And it is unpredictable how many of those would be considered vague, overbroad, or too restrictive.

Along with the First Amendment's freedom of the press guarantee, comes the responsibilities associated with it. Student journalists, who expect the school administration and courts to recognize their First Amendment rights, must also expect to uphold their responsibilities. Publication guidelines can help clarify the role of the student press. But it ultimately will be the student journalists themselves who are going to determine how extensive the courts will be in interpreting First Amendment rights as applied to the high school press.

Endnotes

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3. Mary Hartman, "Official Guidelines & Editorial Policies: Remedying the Confusion," Scholastic Editor 57 (April-May 1978): 4.

4. John E. Nowak, Ronald D. Rotunda, and J. Nelson Young, Constitutional Law (St. Paul: West Publishing Co., 1978), p. 452.

5. Ibid., p. 452.

6. Antonelli v. Hammond, 308 F. Supp. 1329, 1336-1337 (D. Mass. 1970).

7. See Communication: Journalism Education Today, Spring 1980, p. 19, discussing Reineke v. Cobb County School District (N.D. Ga. 1980).

8. Norwood v. Harrison, 413 U.S. 455 (1973).

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27. Forrest E. Claypool, "Public Forum Theory in the Educational Setting: The First Amendment and the Student Press," Law Forum (University of Illinois, 1979), p. 903.

28. New York Times Co. v. United States, 403 U.S. 713, 713-714 (1971).

29. Trager, Student Press Rights, p. 21.

30. See Shanley v. Northeast Independent School District, 462 F. 2d 960 (5th Cir. 1972); Fujishima v. Board of Education, 460 F. 2d 1355 (7th Cir. 1972); Baughman v. Freienmuth, 478 F. 2d 1345 (4th Cir. 1973); Nitzberg v. Parks, 525 F. 2d 378 (4th Cir. 1975); and Communication: Journalism Education Today, Spring 1980, p. 19, discussing Reineke v. Cobb County School District.

31. Miller v. California, 413 U.S. 15, 24 (1973).

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70. Fujishima v. Board of Education, p. 1358.

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91. Shanley v. Northeast Independent School District, p. 976.

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