



EXTRA, EXTRA! READ ALL ABOUT IT! ISSUES IN STUDENT PRESS, PUBLICATIONS, AND CENSORSHIP

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*Shall Make No Law: An Exploration of Current First Amendment
Issues on College Campuses*

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Roadmap

1. Overview of Legal Framework
2. Scenarios
3. Closing Thoughts
4. Questions



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But first...

“They can’t hide behind the First Amendment...”

A Case Study: Texas State University

<https://www.youtube.com/watch?v=auCD2p0XWB8>



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“And were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter.”

--Thomas Jefferson



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LEGAL FRAMEWORK



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Legal Framework



General Principles:

- Student newspapers and other publications have the same rights and responsibilities as other student organizations on campus
- Student journalists have the same rights and responsibilities as other students
- The freedoms afforded to student press are generally the same, regardless of medium (i.e. print vs. electronic)

Except:

- FCC rules apply to student-run television and radio broadcasts
- 18 U.S.C. § 1464 prohibits the utterance of any obscene, indecent or profane language by means of radio communication
- It is a violation of federal law to air obscene programming at any time; it is also a violation of federal law to broadcast indecent or profane material during the period of 6 a.m. and 10 p.m.
- First Amendment and Section 326 of the Communications Act prohibit the FCC from censoring program material, or interfering with broadcasters' free speech rights
- Be mindful that your student-run television and radio stations are following FCC rules

Mandatory Student Fee Allocations to Student Publications:

- At SUNY, mandatory student fees are used to support “student publications and other media” (Policy No. 3901).
- Students do not have a right to challenge the allocation of mandatory student fees to student newspapers that express a particular viewpoint, just as they may not challenge such allocations to other student organizations expressing particular viewpoints.
- When a public institution collects mandatory student fees to support a diverse forum for student expression, those fees must be distributed in a content- and viewpoint-neutral manner.

Legal Framework

Can student government decide to fund some student publications, but not others?

Rosenberger v. Rector and Visitors of University of Virginia, 55 U.S. 819 (1995):

- Involved student publication, Wide Awake: A Christian Perspective at the University of Virginia
- 15 student publications at UVA received funding, but Wide Awake did not because the student council determined that it was religious activity
- Case focusing specifically on viewpoint discrimination issues that may arise when a university or its student government decides to fund some students publications but not others
- Wide Awake's members challenged this denial as a violation of their free speech and press rights under the First Amendment
- Court agreed with Wide Awake and found that this funding was part of a broad program that "supported various student enterprises, including the publication of newspapers, in recognition of the diversity and creativity of student life"
- (Also rejected argument that funding would violate Establishment Clause b/c it sought funding as a student journal, not b/c of its editorial viewpoint)



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Legal Framework

Institutional Regulations on Student Press

CENSORSHIP

A large red prohibition symbol (a circle with a diagonal line through it) is superimposed over the word "CENSORSHIP", which is written in bold black capital letters.



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Legal Framework



“The proper remedy against censorship is restraint of the censor, not suppression of the press.”

Joyner v. Whiting, 477 F.2d 456 (4th Cir. 1973).

Institutional Regulations on Student Press

- In ***Joyner v. Whiting***, 477 F.2d 456 (4th Cir. 1973), the president of North Carolina Central University (a predominantly black state university) permanently terminated university financial support for the campus newspaper after it printed articles urging segregation and advocated the maintenance of an all-black university.
- The president also asserted, as grounds for terminating the paper's support, that the newspaper would employ only black students and would not accept advertising from white-owned businesses.

Institutional Regulations on Student Press

- The court held that the president's action violated the student staff's First Amendment rights and that "if a college has a student newspaper, its publication cannot be suppressed because college officials dislike its editorial comment..."
- That the president considered the newspaper's editorial comment to be abhorrent, contrary to university policy, and inconsistent with constitutional and statutory guarantees of equality was insufficient to justify his irrevocable withdrawal of financial support.
- In sum, institutions cannot alter funding for student newspapers because officials dislike the views put forth, but they may take narrowly tailored action to require newspapers to follow the laws prohibiting discrimination (so, the president was justified in prohibiting racial discrimination in staffing and accepting advertising).

Institutional Regulations on Student Press

- But note that institutions may alter the funding mechanism for student publications as long as they do not do so for reasons associated with a publication's content. *Stanley v. Magrath*, 719 F.2d 279 (8th Cir. 1983).

Institutional Regulations on Student Press

- In ***Bazaar v. Fortune***, 476 F.2d 570 (5th Cir. 1973), the University of Mississippi halted publication of an issue of “Images,” a student literary magazine written and edited with the advice of a professor from the English department, because a university committee had found two stories objectionable on grounds of “taste.”
- The court found that the fact that the student literary magazine was required to be published with advice of the English department did not entitle the university to censor its contents on the theory that the magazine would be identified as speaking for the English department and for the university.

Institutional Regulations on Student Press

- Also, the mere fact that the student's short stories published in the magazine contained “four-letter words,” often referred to as “obscenities,” including use of the “four-letter word” generally felt to be most offensive in polite conversation did not entitle university to censor publication on basis that the stories were too tasteless and inappropriate.
- “As a final word, we can only reiterate that speech cannot be stifled by the state merely because it would perhaps draw an adverse reaction from the majority of people, be they politicians or ordinary citizens, and newspapers. To come forth with such a rule would be to virtually read the First Amendment out of the Constitution and, thus, cost this nation one of its strongest tenets.”

Institutional Regulations on Student Press

- ***Schiff v. Williams***, 519 F.2D 257 (5th Cir. 1975), concerned the firing of the editors of the Atlantic Sun, the student newspaper of Florida Atlantic University. The university's president based his action on the poor quality of the newspaper and on the editors' failure to respect university guidelines regarding the publication of the paper.
- The court characterized the president's action as a form of direct control over the paper's content and held that such action violated the First Amendment.
- The court found that alleged poor grammar, spelling, and use of language which could embarrass and perhaps bring some element of disrepute to the school were not clearly the sort of special circumstances which could lead to significant disruption on campus of university or within its educational processes and could not justify the censorship of student newspaper by dismissing three students from their positions as editors.

Institutional Regulations on Student Press

And then...

- In *Hazelwood School District v. Kuhlmeir*, 484 U.S. 260 (1988), the Court determined that a high school newspaper published by students as part of a journalism class was a ***non-public forum***. The Court ultimately found a school administrator's removal of content from the paper before publication did not violate the First Amendment.
- The Court held that “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”

WHAT?!?

Institutional Regulations on Student Press

- Courts addressing student press cases since *Hazelwood* have applied the “public forum analysis” to determine the degree of control institutions exercise over student newspapers.
- Forum Analysis in a nutshell:
 - *Public Forum*=student run, operated, financed, separately incorporated, limited institutional oversight/supervision/regulation
 - *Non-Public Forum*=prepared as part of a curriculum with direct oversight by faculty, financed by the department, specific standards for content and purpose

Takeaways:

- Despite the holding in *Hazelwood*, courts have applied the law in favor of freedom of speech and expression by the student press and publications over the countervailing institutional interests of regulation
- The prevailing tone of the case law mirrors that of the generous case law protecting the private press



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Legal Framework

Liability for Content of Student Run Newspapers

- The three main areas of legal risk that student publications face are:
 - Defamation (libel is written; slander is spoken)
 - Privacy (intrusion upon seclusion; publication of private facts; right of publicity)
 - Copyright Infringement
- Traditional standards of vicarious liability and negligence apply in evaluating whether a public institution is liable for the indiscretions of its student newspaper.



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Legal Framework

Liability for Content of Student Run Newspapers

- Importantly, a public institution's constitutionally restricted degree of control over newspaper content under the First Amendment will dissuade courts from finding vicarious liability on behalf of the institution.
- With respect to negligence, elimination of the *in loco parentis* doctrine for institutions of higher education has limited the legal duty that institutions have to regulate the behavior of adult students.
- Accordingly, public institutions with student-controlled newspapers are less likely to be found liable for the newspapers' libel.
- **HOWEVER, the greater degree of control an institution exercises over the newspaper, the greater the likelihood of liability.**



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SCENARIOS



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Scenarios

Scenario #1

An editor of your student-run newspaper on campus is responsible for drawing a political cartoon published in conjunction with the headline story entitled “Mother f——— Acquitted,” discussing the trial and acquittal on an assault charge of a local youth who was a member of an organization known as “Up Against the Wall, Mother f———.” The cartoon depicts several policemen raping the Statue of Liberty and the Goddess of Justice. Your institution expels the editor.

Scenario #1

Outcome:

- Protected speech
- The mere dissemination of ideas, no matter how offensive to good taste, on a state university campus may not be shut off in name alone of “conventions of decency.”
- Obscenity is not definable in terms of an institution’s or an administrator’s own personal conceptions of taste, decency, or propriety.

Papish v. Bd. of Curators of Univ. of Missouri, 410 U.S. 667 (1973)

Scenario #2

Shaun, the longtime Head Soccer Coach at Central Connecticut State University, and Paul, the Assistant Coach, recently learned that their team was disqualified from the NCAA and Northeast Conference tournaments because of a sub-standard Academic Progress Rate score. As they walked through the Student Center, they spotted a rack containing copies of The Recorder, the student-run newspaper. The headline read: “CCSU Men’s Soccer Banned From 2012 Postseason.” Angry and upset, Shaun and Paul emptied all four racks of newspapers in the Campus Center and tossed the papers in the dumpster. Unfortunately for them, the entire escapade was caught on a surveillance video.



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Scenarios

Scenario #2

Outcome:

- Shaun was suspended for 60 days without pay, required to issue a written apology to *The Recorder*, and financially compensate the paper for destroying the copies.
- The athletic department was fined \$100,000.00.
- Paul was fired from his job.



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Scenarios

Scenario #3

Each year, the student-run newspaper publishes a satirical April Fools' issue. This year's edition, dated March 32, 2018, purports to be published by The Pessimist, whose tagline is "More Truth Than Trump!" and features several offensive articles, including one that offers mock, offensive "pick-up" lines to be used on women. In another article, authored by Editor-in-Chief Marcus White and published under the fake byline of "Dirty Dan," a Jewish man finds himself at campus and, after being described by a litany of Jewish stereotypes, is told that few Jews remain in the campus community. A student files a grievance with the campus against the publication.

Scenario #3

Outcome:

- The university condemned the newspaper in a lengthy Facebook post, announcing that it was investigating the paper and that it “will not tolerate any form of disrespect – not on April Fools Day or any other day.”
- After FIRE sent a letter to the university a few days later, administrators quickly closed the investigation.
- It is incredibly chilling to subject students to investigation for the publication of speech that is known to be protected.

Scenario #4

Loni McKnown was the envy of the college media advising world. As the student-newspaper advisor for the Butler Collegian, her performance evaluations were sterling. Graduates were landing impressive reporting jobs and national awards adorned the walls of the newsroom. Then, without warning, and shortly after the paper published a story exposing the criminal background of the director of Butler's new multi-million dollar nonprofit center, Loni was fired. No explanation was given for her termination other than that she once forwarded a confidential email and was said to be too heavily involved in editorial choices. Loni was replaced by Marc Allan, a member of Butler's Public Relations staff.

Scenario #4

Outcome:

- Butler received a barrage of criticism and bad press for its “bone-headed move” from national higher-education and journalism communities. For example, “It’s a clear conflict of interest for a university public relations professional to advise a college newspaper,” wrote Rachele Kanigel, president of the College Media Association, in an official statement opposing Butler’s decision. “How could students feel free to seek this person’s advice when his primary job is to protect the university’s image and reputation?”
- A week later, Butler administrators announced that they’d be replacing Allan with the director of the university’s journalism school until a permanent adviser could be hired.

Scenario #5

The student run television station at University Prim-N-Propr is a closed circuit station that can only be viewed on campus. One cold winter night, the station broadcast student-host Ms. Menee Relations performing sexual acts on an adult film actress during an 8-minute clip of her 45-minute show NYM.PHO.TV.

The purpose of the station is “to provide an avenue for students to express a viewpoint or receive coverage for a student event.” Ms. Relations reports that the point of her show is to provide entertainment as well as push for students’ free speech rights/freedom of expression. However, University Prim-n-propr was “saddened” in the way these students decided to express themselves, could not see the “educational value” in it, and wanted to “uphold the integrity of the university.” The Charter allows for indecent but not obscene material to be broadcasted. Should they “pull the plug” on the broadcast? Is the video inappropriate?

The Charter is subsequently amended to prohibit on-air depictions of sexual activity and nudity. A petition, containing more than 2600 student signatures obtained within 5 days, is filed, which forces this matter to go to a special election on the issue of banning nudity/graphic sex. Is the amendment perceived pressure by Administration?

Scenario #5

Outcome:

- Results of the special election:
 - 53% voted to rid the ban on porn
 - 45% wanted to keep the ban on porn
 - Approximately 50% voted to lift the ban barring Ms. Relations from the student run television station as well as barring NYM.PHO.TV from airing on the station.
- Vote is advisory.
- Position of University Prim-N-Prop was that the network should not be “a forum for airing pornography.” Discussions continued between Administrators and the station.

Scenario #6

This past week, your campus student-run online newspaper posted a doctored photo that included a depiction of the severed head of the school's athletic director—bloodied and decapitated from what appears to be a French-Revolution-era guillotine. According to the editor, the image was intended to capture the “mob mentality” of an increasingly vocal group of school sport fans who are fed up with the football team's struggles and a recent on-field incident possibly putting the starting quarterback in harm's way. The photo was meant to be a visual representation of fans' pleas for the football coach's and director's “heads to roll.” But a professor on campus sees something more disturbing and tweets out to University Police to report the posting as a threat, stating “With current events about ISIS, drawing the director decapitated is violent and wrong—REMOVE IT.”



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Scenarios

Scenario #6

Outcome:

- Backlash in the national media for the professor's reaction
- The post was political satire which cannot reasonably be interpreted as a threat

Encouraging Responsible Journalism Through Education

- If your student-run media has a faculty advisor, ensure that the role is properly defined and that they understand their role
 - The proper role of an advisor is to guide and instruct, not to prohibit or censor. Asking advisers to impose their content choices on student editors both offends their professional standards and results in a publication less relevant and connected to the student audience the publication exists to serve.
 - Be mindful that their actions—depending on what they do—could be considered a form of prior restraint



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Closing Thoughts

Encouraging Responsible Journalism Through Education

- Ensure that student journalists feel sense of responsibility for the product they are creating
- Teaching students to make prudent decisions about content requires giving them responsibility to act independently
- If they make poor content choices, let them learn from those mistakes and illuminate the way forward
- The court of public opinion can be unforgiving, but, as educators, you don't have to be

Encouraging Responsible Journalism Through Education

- “School officials themselves have an interest in [students’] autonomy to make educational decisions,” *Yeo v. Town of Lexington*, 131 F.3d 241, 250 (1st Cir. 1997).
- “Officials have determined the best way to teach journalism skills is to respect in the students’ editorial judgments a degree of autonomy similar to that exercised by professional journalists. That choice by the officials parallels the allocation of responsibility for editorial judgments made by the First Amendment itself.”
- Last but not least, schools are most protected from legal liability when they leave content decisions to students.



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QUESTIONS?