Student Press Rights And Tort Liability: A Conflict

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Presence of Malice: A Hypothetical Situation

"SHOP OWNER ADMITS INTIMACY WITH HIGH SCHOOL SENIOR" announced the front page headline in *High Post*, the local high school newspaper. The weekly *High Post*, distributed at no charge to the 2,000 students and staff members, was also available for 10¢ a copy for the remainder of the small Illinois community. Produced by second and third-year journalism students for credit in the Journalism Lab class, *High Post* was seen by some as a competitor for 'scoops' and advertisements to the *Town Crier*, the commercially produced community weekly. *High Post* had a wide following and was well respected in the community.

The shopowner headlined was angry. He remembered the phone call he received from a *High Post* reporter. The reporter identified herself and asked only if he knew Susie Smith. Doe also remembered his reply: "I've come to know Sue quite well. She is a very special young lady."

Doe felt he had given a fair assessment of the young woman he had employed for over a year in his gift shop and had regretfully fired when her school activities and friends interfered with her job. Doe was quoted accurately in the second paragraph, but his assessment had been used as admission of "involvement." Not knowing the purpose of the call, Doe had been set up. Smith's accusation in the lead was an outright lie:

> "It started a couple of months ago," admitted senior Susie Smith, referring to her recently ended affair with Gift and Cards shopowner John Doe. "Mr. Doe said that age doesn't matter when two people are attracted to each other. I finally quit my job because I knew what we were doing was wrong."

Although the paper had only been distributed that afternoon, Doe was feeling the financial effects of the false story. The crowds of high school students who normally stopped in after school were missing. He had received three anonymous calls, the callers suggesting

that he leave town, be locked up, and "keep his perverted hands off the children."

Doe placed the next series of calls—to the principal, the superintendent and his attorney. The principal had already questioned the faculty adviser. "I read all copy that the staff shows me," the adviser explained, "but they didn't show me this. A retraction will be printed in the next issue."

The principal explained to Doe that he never sees the paper before publication, but that he suspended the student reporter after she admitted that she hadn't actually asked Doe if he had been having an affair. The superintendent explained that while he personally regretted the incident, he could not stop students *before* they printed such stories. He pointed out that legally he could only punish students after the fact. However, after the printing of the retraction, he would cut off the paper's funding for the remainder of the school year.

Doe's attorney explained that a libel suit would be costly, time-consuming, and unlikely to help Doe recoup any loss. Only the underaged reporter was likely to be held liable, and because the reporter was a minor, it was unlikely that a court would award damages.

Doe's business was not restored by the reporter's suspension, or by the halt on publication after retraction, "We regret our error in reporting that merchant Joe Doe admitted illicit involvement with senior Susie Smith." Business and reputation ruined, Doe left town. No legal recourse was available for his injuries.

Administrators and advisers are not legally permitted to censor material intended for high school publications in two federal circuits. Their efforts to restrain potentially harmful material are severely limited in the others. This creates a situation where, due to liability laws, injured parties have no legal possibility for recovering if damages should occur in such a publication. Here, I concentrate on the court actions and legal perceptions of liability responsibility that causes such conflict. Policy suggestions are made for dealing with the conflict.

Students received legal assurance of their constitutional rights in 1969 with the U.S. Supreme Court *Tinker*[1] decision. Here the court followed the 5th Circuit Court of Appeals' lead in *Burnside*[2] and *Blackwell*[3] in ruling that student expression (the wearing of armbands in all three cases) could not be curtailed unless the expression "materially and substantially interferes with the requirements of appropriate discipline."[4]

The "material and substantial disruption" rule embodies the Court's effort to balance the fundamental rights of students ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[5]) with the need affirmed for "the comprehensive authority of the States and of school authorities, consistent with fundamental constitutional safeguards to prescribe and control conduct in the schools."[6]

However, "(u)ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[7] For school authorities to legally prevent student expression, they must demonstrate a factual basis for forecasting "substantial disruption of or material interference with school activities."[8] The court will not uphold subsequent punishment of the students who are exercising their rights of expression unless a disturbance did in fact occur as a result of the expression.

This double-edged rule that school authorities may control student actions but that the authorities have a heavy burden of justification when that control interferes with the students' constitutional rights was used as the basis for outlining student press rights. Because of the American tradition of an unfettered free press, case law has allowed for substantial student press rights with little concern for the inability of the minor student to assume full legal responsibility for his actions.

In *Sullivan v. Houston*[9], the first case to rely on *Tinker* in establishing guidelines for high school student press rights, a Texas district court ruled that suspension of students distributing an underground newspaper critical of the school system was illegal because no substantial disruption had occurred. In addition, because the rules forbidding the paper's distribution were drawn up after the students had already distributed the paper, school authorities were found to be in violation of the students' 14th Amendment due process rights. The students could not be held culpable for action that was not in violation of any rule at the time of the action.

A year after *Tinker*, the 7th Circuit Court of Appeals affirmed students' rights to criticize the school administration in a publication, stating that school authorities were in error in punishing students because, "the Board could not have reasonably forecast that the publication and distribution of this paper to the students would substantially disrupt or materially interfere with school procedures."[10]

The "material and substantial disruption" rule adds another unprotected class of speech for student journalists onto the speech that is unprotected for professional journalists—libel and obscenity. It is clear that school authorities may legally punish students who publish such unprotected speech. It is not clear, from a national perspective, as to if and when school authorities may legally restrain unprotected speech prior to publication. This uncertainty, reflected by disagreement among the circuit courts of appeal, seems based on uncertainty as to which has priority—the students' First Amendment rights or the local school authorities rights to control the students' actions.

The 1st Circuit (Maine, Massachusetts, New Hampshire, Rhode Island, and Puerto Rico) and the 7th Circuit (Illinois, Indiana and Wisconsin) Courts of Appeals forbid any prior submission requirements for student material intended for publication. If the school authorities are not allowed to see the material prior to publication, it is obviously impossible for them to restrain it. The 7th Circuit allows only that school officials may punish "students who publish and distribute on school grounds obscene or libelous literature," or those students who violate regulations that reasonably set "forth the time, manner, and place in which the distribution of written materials may occur."[11] The 1st Circuit has held that while time, place, and manner of distribution may be regulated by school authorities, no advance approval of content is allowable.[12]

The 1st and 7th Circuit rulings reflect the traditional abhorrence of governmental control or licensing of the free press. Allowing freedoms fully co-extensive with professional journalists has, however, placed the student journalists in a most vulnerable position. As seen in the hypothetical case presented earlier, these co-extensive rulings place the public in a vulnerable position as well.

In the 2nd Circuit (Connecticut, New York, Vermont), 4th Circuit (North Carolina, South Carolina, Virginia, West Virginia), 5th Circuit (Alabama, Florida, Georgia, Louisiana, Mississippi, and the Canal Zone) and the 9th Circuit (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam), prior approval of high school publications is allowable, at least in theory. However, only the 4th Circuit has found constitutional an actual guideline as drawn up by school officials. In *Williams v. Spencer*[13], a school regulation that prohibits "the distribution of material which encourages actions which endanger the health and safety of students" was found to meet the necessary degree of specificity. Lack of specificity is often a reason for the courts overturning regulations, as described below. Within the 2nd Circuit, an action of prior restraint by school officials was upheld even though the officials had provided no written guidelines prior to their restraint. The lower court hearing the case approved the officials' restraint because the material was found to be libelous.[14]

The 2nd, 4th, 5th, 6th and 9th Circuits join in trying to strike a balance between the students' and school authorities' rights. While the 6th Circuit (Kentucky, Michigan, Ohio and Tennessee) has not addressed content control by school officials, the court has allowed that the regulation of time, place and manner of student expression might be permitted because of the special nature of the school.[15] The 2nd Circuit favors school officials by stating that the court trusts school authorities to be reasonable (*Eisner*[16]) and that "school authorities need only demonstrate that the basis of their belief in a potential disruption is reasonable and not based on speculation" (*Trachtman*[17]). The 4th Circuit recognizes the special nature of the high school but warns that prior restraints "come to the court with a presumption against their constitutionality" (*Baughman*[18]). The 5th Circuit finds nothing inherently unconstitutional in a practice of prior approval (*Shanley*[19]). Perhaps the strongest statement in favor of the prior approval of student material by school authorities is the most recent. A 1982 9th Circuit case, *Nicholson v. Board of Education* No. 79-3824), upheld a district court ruling that the principal may have the opportunity for prior review even if the copy is approved by the high school newspaper adviser.

However, despite the permissibility of prior approval in the 2nd, 4th, 5th and 9th Circuits, school authorities must meet judicial guidelines in developing the prior approval procedure.

The prior approval regulations must:

1. specify the manner of submission (*Eisner, Shanley*)
2. specify who must see the copy (*Eisner*)
3. specify a short time period for consideration (*Eisner, Baughman, Shanley*)
4. allow for student appeal (*Eisner, Baughman, Quarterman*[20], *Shanley*)
5. specifically state what is not allowed for publications.

This last regulation is by far the most difficult for school authorities to meet. Except in the 4th Circuit, as noted above, excluded copy may not extend beyond that which is legally excluded for professional journalists—material that is libelous or obscene—and that material which can be forecast to lead to a material and substantial disruption of school activity. School authorities may have a difficult time properly wording such a regulation. Courts have ruled unconstitutional on grounds of vagueness regulations that prohibited publication which "advocates illegal actions, or is grossly insulting to any group of individual" (*Baughman*). A court has also called vague a regulation that prohibits any publication advocating illegal action or disobedience to published rules of student conduct (*Molpus*[21]). Even prohibiting only the legally unprotected speech of libel and obscenity may result in unconstittional guidelines. A regulation that prohibited "libel" was found unconstitutional because the school's definition of libel differed from that of the U.S. Supreme Court (*Nitzberg*[22]). But, assuming that students understand the acceptable legal definitions may not be enough. In *Baughman*, the school regulation was knocked down because the court believed that the terms "libel" and "obscene" were not sufficiently understandable by students. In addition, the circuit courts have agreed that these regulations must be in place prior to the restraint of any intended publication (*Shanley, Baughman, Quarterman, Eisner*)[23].

School authorities may have more control over student publications in those circuits allowing prior approval than in the 1st and 7th Circuits where authorities are legally prevented from reviewing the material. However, school authorities will be more legally responsible for the publication in Circuits 2, 4, 5, and 9 as well. Perhaps the most vulnerable school authorities are those in New York City, where a board policy prohibits authorities requiring students to submit literature for advance approval.[24] These authorities must choose between the board policy and the 2nd Circuit court ruling that the students' First Amendment rights are subordinate to the power of the school administration to protect students under their care.[25]

No cases on school official control of student publications have reached the appeals courts in the 3rd (Delaware, New Jersey, Pennsylvania and the Virgin Islands), 8th (Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota), or 10th (Colorado, Kansas, Oklahoma, New Mexico, Utah, and Wyoming) Circuits nor in the District of Columbia. However, a smattering of district court cases have shown a tendency of lower federal court judges to continue to strike a balance between student and school authority rights. For example, in the 10th Circuit, a Wyoming district court ruled that faculty advisers have a duty to censor if necessary,[26] while a Colorado court prohibited a principal from preventing publication because of the controversial or critical nature of the article.[27]

The inconsistency between the circuits in dealing with the question of prior restraint suggests a need for the U.S. Supreme Court to come forward with a definitive ruling on this matter. This ruling is needed not only for the protection of students and school administrators, but also for the protection of innocent parties who may be harmed in the publications.[28]

Judging student journalists' rights to be coextensive with those of professional journalists—the interpretation of the 1st and 7th Circuits—is a justifiable extension of the *Tinker* ruling that "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..."[29] However, there is a difference in the nature of the professional journalist from that of the high school journalist.

A professional journalist is employed by a bona fide corporation and is thus controlled and protected by his publisher. Not only is the journalist himself liable for any legal wrongdoing associated with his job, but the employer-organization is liable as well. The acknowledged liability results in careful regulation and outright censorship by the editors and publisher and results in self-regulation by the journalist.

It is traditionally thought that the high school principal serves as publisher of a high school newspaper, particularly when the newspaper is produced in class and functions as a learning tool for the student journalists. "Authority flows (either explicitly or understood) from the publications's legal owner (school board) down the organizational structure to the principal, to the student editors."[30]

However, unlike the publisher of a professional paper, the principal-publisher may have no knowledge and no legal say as to what appears in print. In *Gambino*[31], the 4th Circuit Court of Appeals ruled that even though a student newspaper may be produced during class time, the normal power of the school board to regulate course content does not apply when the publication is distributed to the student population and carries student writing. Here the primary function of the paper is that of an "open forum for student expression" rather than the role it plays in training the journalists.[32]

In more than half the states, where school districts are still at least partially protected by sovereign immunity,[33] it is probably impossible for a plaintiff who has been defamed to establish a claim against the district. In a 1979 Missouri case, the plaintiff who was allegedly defamed in a news broadcast was unable to establish a proprietary rather than governmental function of the school district's radio station. Citing *Kruger*[34], the court said:

> The true ground of distinction (between governmental and proprietary function) to be observed is not so much that the duty is mandatory rather than self-imposed pursuant to authority of general law, but is that the duty assumed is public in character, and not for profit, but for the public good and is directly related to and in aid of the general and beneficient purposes of the state.[35]

If establishment of a proprietary interest is necessary to provide an exception to immunity, it is even less likely that a plaintiff will be able to establish this interest with a school newspaper where there is no license held by the board and any funds raised pay only for the cost of publication.

Because of the difficulty of establishing the necessary elements of tort liability, even in states where school districts are not covered with a state immunity, it is unlikely that the school board—and in some circuits, the principal or faculty adviser—would be found liable for the actions of student journalists.

To establish a legal cause of action, the following elements must be shown to exist:

1. A duty or obligation requiring one to conform to a certain standard of conduct so as to protect others against unreasonable risk.
2. A failure on one's part to act in a manner that conforms to the standard of conduct required.
3. Injury to another caused by one's failure to act in the manner required.
4. Actual damage or loss to the person or injury of another as a result of the failure to act.[36]

Using the case of shop owner John Doe as an example of tort, we see that he has established the required elements #3 and #4 by establishing that he was in fact libeled. That is, he was identified in the story, true defamation took place, and the defamation was published. Financial damages can be shown. Fault, the final element needed for libel, is also in evidence. Being a private individual, Doe need only show that the person responsible for the defamation acted carelessly or was negligent in printing the false and injurous statement.[37]

Doe suffered "actual damage" and his "injury was caused by one's failure to act in the manner required" in the language of the elements of tort liability. However, establishing *which* persons "failed to act in the manner required," and just who had the "duty or obligation" required is far more difficult.

Since the board virtually never serves as the agent responsible for prior review of student material (even where legally allowed), the board could not be found to have failed to act as necessary. In addition, courts have consistently ruled that school districts are not liable for injuries resulting from the negligence of the officers, agents, or employees of that district.[38]

For school authorities, such as the principal or faculty adviser in the John Doe case, to be found responsible for actionable negligence,[39] they must have a duty or obligation to act to protect others. In the 1st and 7th Circuits school authorities are legally bound not to require prior submission of material intended for publication. The authorities cannot be held responsible for failing to meet an obligation they are legally prevented from meeting. In Circuits 2, 4, 5 and 9, where prior approval is legally allowed, the adviser and any other agent responsible for approving material for publication would be found negligent and responsible for the student journalist's wrongdoing. Of course, school officials in these circuits run the risk of having their actions or regulations found unconstitutional if the student journalists themselves take the matter to court. In the other circuits, the legal responsibility of the adviser and principal is unclear.

Lacking the control and protection of a true publisher, the student journalist is, in many cases, on his own. The threat of punishment for printing libelous statements does not carry the same force for the student as it does for the professional. Even if the student is aware of the legal ramifications of his intended action (and there are many student journalists who are not), it is unlikely that his subsequent punishment will harm him in any real way or adequately compensate the injured party if he chooses to publish defamation.

The student journalist, the one person clearly responsible for the tort in a case of defamation, is normally a minor. A minor may be held legally responsible for a tort. Since, in the case of publication, the "minor is engaged in activity that is considered 'adult' in nature, he may be held to adult standards of conduct regardless of age."[40] Although a professional journalist would certainly be assessed punitive damages for intentional defamation such as that in the hypothetical case, it is

unlikely that his student counterpart would be similarly assessed. Courts feel "that, due to youth and inexperience, the minor cannot appreciate the harm that he or she intentionally inflicted. In such cases, the courts may reason that, since the parents usually have to pay, the child will not 'feel' the punishment in any event."[41] Since parents are responsible for the child's tort only if they consented to the action or failed to exercise control[42], parents will certainly not be found liable for their child's action when it occurs on school grounds in a school-sanctioned activity without their knowledge.

Placing the power of the press in the hands of uninformed and uncontrolled high school students is as irresponsible as handing them a loaded gun with no supervision and no instructions as to proper usage. Despite the legal questions concerning control of student publications, school authorities can institute policies that serve to protect the school authorities, the student journalists, and innocent parties.

In circuits where it is not expressly disallowed, prior approval guidelines should be drawn up in consultation with an attorney knowledgeable in school and press law. The guidelines should be followed consistently for all material intended for publication. The agent responsible for approving material, whether it is the adviser or the principal, must have a thorough knowledge of press and student law.

An understanding of legal limitations and ethical considerations of the press should be an essential part of pre-newspaper training for all student journalists in all circuits, and school authorities in all circuits should institute a policy whereby student journalists and advisers seek legal counsel in deciding on the publication of questionable material. Funds should be appropriated, if necessary, to permit student journalists to meet this obligation.

As stated in one student press case, the state may not "necessarily be the unrestrained master of what it creates and fosters,"[43] but even student rights cannot exist in the absence of someone's responsibility to protect the rights of all.

Endnotes

[1]*Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969).
[2]*Burnside v. Byars*, 363 F.2d 744 (1966).
[3]*Blackwell v. Issaquena*, 363 F.2d 749 (1966).
[4]*Tinker.*
[5]*Tinker.*
[6]*Tinker.*
[7]*Tinker.*
[8]*Tinker.*
[9]*Sullivan v. Houston Independent School District*, 307 F.Supp. 1328 (1969).
[10]*Scoville v. Board of Education of Joliet Township*, 425 F.2d 10 (1972).
[11]*Fujishima v. Board of Education*, 440 F.2d 803 (1971).
[12]*Riseman v. School Committee of Quincy*, 439 F.2d 148 (1971).
[13]*Williams v. Spencer*, 622 F.2d 1200 (1980).
[14]*Frasca v. Andrews*, 463 F.Supp. 1043 (1979).
[15]*Guzick v. Drebus*, 431 F.2d. 594 (1970).
[16]*Eisner v. Stamford Board of Education*, 440 F.2d. 803 (1971).
[17]*Trachtman v. Anker*, 563 F.2d 512 (1977).
[18]*Baughman v. Feinmuth*, 478 F.2d 1345 (1973).
[19]*Shanley v. Northeast Independent School District*, 462 F.2d 960 (1972).
[20]*Quarterman v. Byrd*, 453 F.2d 54 (1971).
[21]*Molpus v. Fortune*, 432 F.2d 916 (1970).
[22]*Nitzberg v. Parks*, 525 F.2d 378 (1975).
[23]An exception to this is *Frasca v. Andrews* in which the court ruled in favor of the school authorities' prior restraint without a pre-existing guideline. A justification for the court's action is that the material censored in *Frasca* was libelous, which is unprotected (though not censorable) speech for the professional press.
[24]Matter of Williams, Chancellor of New York City Schools, 3/30/71 in *Captive Voices, The Report of the Commission of Inquiry into High School Journalism*, prepared by Jack Nelson, (New York: Schocken Books) 1974, p. 160.
[25]*Trachtman.*
[26]*Jergeson v. Board of Trustees of School District No. 7, 476 F.2d 481 (1970).*
[27]*Trujillo v. Love*, 322 F.Supp. 1266 (1971).
[28]It is unclear why the U.S. Supreme Court has chosen not to clarify this issue. In denying a writ certiorari in at least three of the cases noted earlier (*Guzick, Scoville,* and *Trachtman*), the court has so far turned down the opportunity to provide a definitive ruling on the role of school authorities in student press control.
[29]*Tinker.*
[30]Stevens, George E. and Webster, John B., *Law and the Student Press*, (Ames, Iowa: Iowa State University Press) 1973, p.84.
[31]*Gambino v. Fairfax County School Board*, 564 F.2d 157 (1977).
[32]*Gambino.*
[33]*Op. cit.*, Stevens, p. 27.
[34]State ex. rel. *Allen v. Barker*, 581 SW 2d 818 (1979).
[35]Kruger, supra 274 SW at 814, in State ex. rel. *Allen v. Barker.*

[36]Cobb, Joseph J., *An Introduction to Educational Law* (Springfield: Charles J. Thomas Publisher) 1981.
[37]*New York Times v. Sullivan*, 376 U.S. 254 (1964).
[38] *Op. cit.*, Cobb.
[39]Actionable negligence is termed the non-performance of a legal duty by the failure to act as a prudent person would or the failure to exercise an ordinary amount of care that results in injury to another.
[40]Ayers, Albert, *The Teenager and the Law*, (Quincy, MA: Christopher Pub. House) 1978, pp. 74-75.
[41]*Ibid.*, p. 75.
[42]Prosser, William L., *Handbook of the Law of Torts*, 4th Ed., (St. Paul: West Publishing Co.) 1971, p. 984.
[43]*Trujillo.*