Brigham Young University Education and Law Journal

Volume 2005 | Number 2 Article 6

Fall 3-2-2005

Freedom of the Press: How University Newspapers Have Fared in the Face of Challenges From Students, Administrators, Advertisers, and State Legislatures

Lisa Bohman

FREEDOM OF THE PRESS: HOW UNIVERSITY NEWSPAPERS HAVE FARED IN THE FACE OF CHALLENGES FROM STUDENTS, ADMINISTRATORS, ADVERTISERS, AND STATE LEGISLATURES

I. INTRODUCTION

Traditionally, newspapers have served as a means to inform and influence. Campus newspapers fill this role in the university setting, offering news and editorial opinions to millions of college students throughout the country. However, unlike privately held newspapers that function in the marketplace, campus newspapers operate in the unique environment of higher education. As a result, such publications not only serve as a means to inform but also offer educational opportunities for students and receive operational subsidies from their sponsoring universities. While private sector newspapers clearly fall under the full protection of the First Amendment, the unique position of campus newspapers, with their academic purposes and financial subsidies, has led to questions about the degree of constitutional protection available to them.

This paper examines the different constituencies, including student groups, college administrators, advertisers, and even state legislatures, that have attempted to influence the content of university-sponsored newspapers at public universities and evaluates the varying degrees of success these groups have realized. It concludes that efforts at controlling campus newspapers have met with little success. However, in their efforts to protect the First Amendment rights of the editors of such newspapers, courts have gone too far and have eliminated virtually all sources of influence over publications that exist, at least in part, for the purpose of providing universities with a means to educate their students.

II. STUDENTS' ATTEMPTS TO CONTROL CAMPUS NEWSPAPERS

Students have had little success in gaining control over the content of campus newspapers. Because they are typically distributed at no cost, most university newspapers are not financially self-sustaining. Many rely on mandatory student fees to make up the difference between advertising

revenue and publication costs. Students dissatisfied with the content of their campus newspapers have challenged the payment of these mandatory fees in court, arguing that they should not be forced to provide financial support for publications with which they disagree.[1] The intent of such litigation is most likely an effort on the part of students to force editors into more moderate and more popular positions or risk losing financial support from students.

Courts have not been sympathetic to these arguments and have rejected student attempts to influence campus newspapers in this way. For example, in *Arrington v. Taylor*,[2] five students at the University of North Carolina (UNC) disagreed with *The Daily Tar Heel*'s position on such topics as "the death penalty, the Equal Rights Amendment, student strikes, food worker's strikes, protests against the war in Southeast Asia, and abortion" and sued over the mandatory fees that went to support the paper.[3] The UNC Board of Trustees had previously established a mandatory student activity fee, a portion of which went to *The Daily Tar Heel*,[4] but did not provide an exemption for those students who disagreed with the positions of the newspaper.[5] The *Arrington* court refused to allow the students to withhold their fees for several reasons. First, the court stated that, while the subsidy of *The Daily Tar Heel* constituted state action, the publication of the newspaper was more similar to the function of "an independent newspaper than . . . a state agency" and deserved heightened protection from the First Amendment.[6] Second, the court refused the plaintiff's argument that the mandatory student fee reduced "their economic ability to further their positions,"[7] stating that allowing the students to refuse to pay the fee would "undermine the entire tax collection system" by allowing people to refuse to support programs or organizations with which they may disagree.[8] Third, the court determined that the political positions advocated by the newspaper's staff were not imposed on the plaintiffs. The court stated, "*The Daily Tar Heel*'s position on a given subject is no more attributable to (and therefore imposed upon) plaintiffs than is the position of the Federal Government on South Vietnam attributable to each of the

1. *See Kania v. Fordham*, 702 F.2d 475 (4th Cir. 1982); *Arrington v. Taylor*, 380 F. Supp. 1348 (M.D.N.C. 1974).

2. 380 F. Supp. 1348.

3. *Id.* at 1357.

4. *Id.* at 1351–52.

5. *Id.* at 1356.

6. *Id.* at 1360.

7. *Id.* at 1361–62.

8. *Id.* at 1362.

citizens who annually pay their federal taxes."[9] Ultimately, the court's refusal to side with the plaintiffs came down to the fact that the newspaper was not established or used to further a government position.[10] As a result, the court determined that students can be required to pay mandatory fees to support a campus newspaper, regardless of the views espoused by the paper.[11] The Fourth Circuit Court of Appeals affirmed the lower court's decision based on the same reasoning.[12] Thus, the primary legal means by which students have attempted to influence the content of newspapers has been unsuccessful.

III. ADMINISTRATORS' ATTEMPTS TO CONTROL CAMPUS NEWSPAPERS

A. *Direct Supervisory Controls over Content*

Courts have also been reluctant, absent procedural safeguards and compelling circumstances, to allow university administrators to influence the content of student newspapers. In *Antonelli v. Hammond*,[13] Fitchburg State College created an advisory board and required the board to preapprove materials to be published in the campus newspaper, *The Cycle*.[14] The administration established the board in response to the decision of *The Cycle's* editor to print an article by Eldridge Cleaver entitled "Black Moochie," which the college president believed to be obscene.[15] As a result of the Cleaver article, the president refused to provide funding for the edition of *The Cycle* containing the article and created an advisory board comprised of faculty members.[16] The "primary function of the advisory board [was] to pass on the acceptability of material intended to be published" and "to prevent the printing of articles which the administration [felt were] not fit for the campus newspaper."[17] However, the advisory board had no guidelines for determining if material was acceptable and no procedures in place for accommodating appeals of its decisions.[18]

In the ensuing litigation, the court considered the narrow issue of

9. *Id.*
10. *Id.* at 1363.
11. *Id.* at 1364.
12. *See Kania*, 702 F.2d at 476 (recognizing that *Arrington* was correctly decided).
13. 308 F. Supp. 1329 (D. Mass. 1970).
14. *Id.* at 1332.
15. *Id.*
16. *Id.* at 1332.
17. *Id.* at 1332–33.
18. *Id.* at 1333.

whether the advisory board could censor obscene material.[19] In reaching its opinion, the court indicated that the actions of the advisory board constituted a "direct previous restraint" that carried a heavy burden against constitutionality.[20] The college failed to overcome this presumption,[21] primarily because it did not provide "procedures calculated to avoid the danger that protected expression w[ould] be caught in the regulatory dragnet."[22] The court specifically pointed to the board's lack of a definition for obscenity[23] and the college's failure to provide a mechanism for reviewing the board's decisions.[24] The court ultimately concluded that an administration can exercise prior restraint over a student publication only where the content of a newspaper would be "incompatible with the school's obligation to maintain the order and discipline necessary for the success of the educational process."[25] However, the court added that "[o]bscenity in a campus newspaper is not the type of occurrence apt to be significantly disruptive of an orderly and disciplined educational process."[26]

In *Trujillo v. Love*,[27] the court addressed a broader attempt at censorship in which administrators at Southern Colorado State College implemented a new policy that required student editors to submit any content that was "controversial" for review.[28] The court concluded that the college's actions were unconstitutional restraints on the First Amendment. The court held that "[t]he state is not necessarily the unfettered master of all it creates. Having established a particular forum for expression, officials may not then place limitations upon the use of that forum which interferes with protected speech and are not justified by an overriding state interest."[29] The court explained that a state interest overrides protected speech if "[i]n the context of an educational institution, . . . [it is] 'necessary to avoid material and substantial interference with schoolwork or discipline.'"[30] The university did not establish such an interest, and the court struck down the policy.

Thus, college administrators attempting to withhold materials from

19. *Id.* at 1334.
20. *Id.* at 1335.
21. *Id.* at 1337–38.
22. *Id.*
23. *Id.* at 1333.
24. *Id.* at 1335–36.
25. *Id.* at 1336.
26. *Id.*
27. 322 F. Supp. 1266 (D. Colo. 1971).
28. *Id.* at 1269.
29. *Id.*
30. *Id.* (quoting *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 511 (1969)).

publication must overcome several very high hurdles. First, a university must provide, at a minimum, procedural safeguards including clear guidelines as to what materials are not acceptable for publication, as well as a review process to accommodate appeals. Second, based on *Antonelli*, the restricted material would have to interfere with the educational process, which is arguably the same standard defined by the *Trujillo* court as an "overriding state interest."[31] The *Antonelli* court has indicated that obscenity most likely does not create such interference.

B. Funding Restrictions

Because courts have rejected the efforts of administrators to censor newspapers absent extraordinary circumstances, college administrators, following the reasoning of student groups, have looked to funding in an effort to exert control over campus papers. However, these attempts have also been unsuccessful and have been labeled by the courts as improper attempts at censorship. In *Joyner v. Whiting*,[32] Joyner, the editor of the university newspaper entitled the *Echo*, published an article in which he advocated maintaining the black majority population at North Carolina University.[33] As a result of this article, the president of the university refused to fund the *Echo* until an "agreement [could] be reached regarding the standards to which further publications [would] adhere."[34] When the two sides failed to find a resolution, the president terminated the university's financial support of the paper.[35]

The Fourth Circuit Court of Appeals held that the university's withdrawal of funding was improper.[36] The court applied the rule that, while a college does not have to establish a campus newspaper or may discontinue it for reasons "unrelated to the First Amendment," a university "publication cannot be suppressed because college officials dislike its editorial comment."[37] The court wrote that any activity on behalf of the administration including "suspending the editors, suppressing circulation, requiring imprimatur of controversial articles, excising repugnant material, withdrawing financial support, or asserting any other form of censorial oversight based on the institution's power of the purse" constituted inappropriate censorship.[38] The court, however,

31. *Id.*
32. 477 F.2d 456 (4th Cir. 1973).
33. *Id.* at 458.
34. *Id.* at 459.
35. *Id.* at 459–60.
36. *Id.* at 463.
37. *Id.* at 460.
38. *Id.* (internal citations omitted).

limited the freedom enjoyed by campus editors.[39] The court described this limit as "advocacy which 'is directed to inciting or producing imminent lawless action and is likely to . . . produce such action,'"[40] similar to the standard relied on in *Trujillo* and *Antonelli*.[41] Because the president of the university admitted that there was no danger of physical violence, the court held that his refusal to provide the *Echo* with student funds was censorship forbidden by the First Amendment.[42] The court rejected the notion that the issue of whether the *Echo* was a state agency was dispositive.[43] Instead, the court held that the Fourteenth Amendment only prohibited "state action that denie[d] . . . equal protection of the laws, not state advocacy."[44]

This case established a rule that provides an extremely wide berth to campus editors and broadly defines the actions that constitute censorship while substantially limiting the range of options available to college administrators who deal with campus newspapers. However, the case also suggests that if a university can persuade a court that the school's reasons for discontinuing funding of a newspaper are not associated with content, a university may successfully terminate financial support of a student publication. *Joyner* left universities wondering what reasons courts would find legitimate and how a university could prove that its decisions were not based on content.

Several years later, the Eighth Circuit Court of Appeals provided at least a partial answer to these questions.[45] In 1979, the University of Minnesota's campus newspaper, the *Minnesota Daily*, published a controversial issue that included a mock interview with Jesus Christ during the crucifixion. The issue drew many complaints from students as well as the community. As a result, the Board of Regents expressed a desire to review the financial support given to the newspaper.[46] The university postponed its review until the following year so that its actions would not be considered "punitive," in violation of the First Amendment.[47] In the interim, Minnesota's Higher Education Division met and authorized the Board of Regents to allow a means of funding for the newspaper that would give students the option of withdrawing the

39. *Id.* at 461.

40. *Id.* (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

41. *See Trujillo*, 322 F. Supp. at 1270; *Antonelli*, 308 F. Supp. at 1336.

42. *Joyner*, 477 F.2d at 461.

43. *Id.*

44. *Id.* at 461–62.

45. *Stanley v. Magrath*, 719 F.2d 279 (8th Cir. 1983).

46. *Id.* at 280.

47. *Id.* at 281.

portion of their funds that supported the *Daily*. In 1980, the Board of Regents approved the change in the fee structure.[48]

Several former editors, the paper, and the Board of Student Publication brought suit, claiming that the change in funding was motivated by the content of the controversial issue and that the Board of Regents' action violated their First Amendment rights.[49] The Board of Regents countered with the argument that it did not change the fee structure for punitive reasons but was motivated by the desire to give students objecting to the content of the *Daily* a means by which they could express their disfavor with the opinions of the editors.[50] The court determined that this case involved "mixed motives" and required that the Board of Regents bear the burden of proof and "show by a preponderance of the evidence that the permissible motive would have produced the adverse result, even in the absence of the impermissible motive."[51] The Eighth Circuit was persuaded by the fact that the university did not change the funding structures on its Duluth, Morris, or Waseca campuses and concluded that "[i]f the Regents had truly been motivated by the principle that a student ought not be forced to support a newspaper that espouses views the student opposes, then one would expect that they would have taken some action in regard to the newspapers at the other campuses."[52] This decision clarified that a university seeking to withdraw or reduce the funding of a student newspaper bears the burden of proof in showing that the university would have withdrawn financial support from the newspaper absent any controversial content. The passage of time alone, it appears, is insufficient to meet this burden.

C. *Publication Restrictions Attributed to Technical Deficiencies*

In some instances, university administrators have attempted to influence campus newspapers under the guise of dismissing student editors for technical deficiencies. This has not proved to be a successful approach either. In *Schiff v. Williams*,[53] the president of Florida Atlantic University dismissed student editors in part due to "a standard of grammar, of spelling and of language expression unacceptable in any publication, certainly unacceptable and deplorable in a publication of an

48. *Id.*
49. *Id.* at 281–82.
50. *Id.* at 282.
51. *Id.* at 283.
52. *Id.* at 284.
53. 519 F.2d 257 (5th Cir. 1975).

upper-level graduate university."[54] The court refused to rule on this nonconstitutional issue because the administration failed to present evidence to support the allegation of deficiencies.[55] The court did, however, indicate that "the right of free speech embodied in the publication of a college student newspaper cannot be controlled except under special circumstances"[56] and that "poor grammar, spelling and language expression . . . are clearly not the sort which could lead to significant disruption on the university campus or within its educational processes."[57]

D. University Control over Commercial Content

Administrators have not been successful in restricting the commercial content of student newspapers any more than any other type of content. In *Leuth v. St. Clair County Community College*,[58] the *Erie Square Gazette*, a student run newspaper, printed an advertisement for a nude dance club.[59] The college's Dean and Board of Control prohibited the *Gazette* from printing the advertisement in the future,[60] although the college had not established a policy for identifying advertisements that were to be rejected by the newspaper.[61] In the subsequent litigation, the court addressed the issue of whether the administration could place restrictions on commercial speech.[62] In order for the college's decision to pass constitutional muster, the Fifth Circuit Court of Appeals required that the school's interest be narrowly tailored[63] to meet the important objective of preventing underage drinking and the degradation of women.[64] The court concluded that "the asserted regulatory mechanism respecting the *Gazette's* content [was] anything but 'carefully designed'" and refused to allow the college to ban such advertisements.[65]

In sum, administrative efforts to influence the commercial and editorial content of campus newspapers, either directly, through funding restrictions, or through allegations of technical deficiencies, have not

54. *Id.* at 259.
55. *Id.* at 260.
56. *Id.*
57. *Id.* at 261.
58. 732 F. Supp. 1410 (E.D. Mich. 1990).
59. *Id.* at 1412.
60. *Id.*
61. *Id.* at 1416.
62. *Id.* at 1413.
63. *Id.* at 1416.
64. *Id.* at 1415–16.
65. *Id.* at 1416.

been successful. First, administrations can only regulate publications if the content interferes with the educational process, and the *Antonelli* court has suggested that obscenity does not rise to this level. Second, a university may not withdraw funding from a campus newspaper based on content, and the university bears the burden of proof of establishing that funding would have been eliminated without controversial content. Third, an administration may not be able to remove editors for technical deficiencies. Finally, the courts have suggested that administrators may have some influence over commercial speech in campus newspapers, but their actions must meet the standard of strict scrutiny. These decisions appear to give campus administrators little control over the newspapers they subsidize and enable editors to publish virtually anything they chose so long as the content does not interfere with the educational purposes of their universities.

IV. ADVERTISERS' ATTEMPTS TO CONTROL CAMPUS NEWSPAPERS

Commercial entities have also sought to influence the content of student newspapers through the placement of advertisements with mixed results. The issue of whether a campus newspaper has the power to refuse to carry certain advertisements was addressed in *Sinn v. Daily Nebraskan*.[66] In this case, Michael Sinn attempted to place an ad that announced he was a gay male looking for a roommate. The University of Nebraska-Lincoln refused to print the advertisement because of the newspaper's policy that prohibited any advertisement indicating the advertiser's sexual preference.[67] In upholding the newspaper's decision, the Eighth Circuit cited the district court's view that "the editors of a campus newspaper are entitled to the freedom of expression necessary to choose what the newspaper will publish and reject"[68] and concluded "that the action of the newspaper was not 'fairly attributable' to the state.[69] An important factor in the state action determination was the lack of evidence that the university had ever attempted to "regulate or direct the content of the *Daily Nebraskan*."[70]

The Fifth Circuit applied the same analysis when it upheld the decision of *The Reflector*, the Mississippi State University student newspaper, to reject an advertisement from the Mississippi Gay Alliance

66. *Sinn v. Daily Nebraskan*, 829 F.2d 662, 663 (8th Cir. 1987).

67. *Id.*

68. *Id.*

69. *Id.* at 665 (quoting *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982)).

70. *Sinn*, 829 F.2d at 663.

announcing counseling and legal aid.[71] In its decision, the court made it clear that it would not have tolerated the decision to reject the advertisement had it been made by the university itself. The court wrote:

> Since there is not the slightest whisper that the University authorities had anything to do with the rejection of this material offered by this off- campus cell of homosexuals, since such officials could not lawfully have done so, and since the record really suggests nothing but discretion exercised by an editor chosen by the student body, we think the First Amendment interdicts judicial interference with the editorial decision.[72]

Despite these decisions, not all courts have reached similar conclusions regarding a university newspaper's ability to reject advertisements based on content. In *Portland Women's Health Center v. Portland Community College,*[73] the District Court of Oregon determined that a campus newspaper can only reject advertisements if the advertisements interfere with the educational process.[74] In this case, the Portland Women's Center requested that *The Bridge*, the campus newspaper, carry an advertisement for women's health services, including abortions.[75] The faculty member responsible for *The Bridge* refused to print the advertisement.[76] The court held that *The Bridge* was a public forum[77] and that "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."[78] The court left open the possibility that a newspaper could reject an advertisement, but only if "it is necessary to avoid material and substantial interference with schoolwork or discipline."[79]

These contrasting decisions may be distinguished by the fact that the student editors made the decisions in *Sinn* and *Mississippi Gay Alliance,* but a faculty member made the determination in *Portland Women's Health Center.* In addition, the differences in the decisions may hinge on the courts' determinations regarding whether the newspapers at issue were public forums. Regardless of the reasons, it appears that student newspapers may reject advertisements based on content-based selection

71. *Miss. Gay Alliance v. Goudelock,* 536 F.2d 1073, 1074 (5th Cir. 1976).

72. *Id.* at 1075.

73. 1981 U.S. Dist. LEXIS 17072 (D. Or. Sept. 4, 1981).

74. *Id.* at **8–9.

75. *Id.* at **3–4.

76. *Id.* at *4.

77. *Id.* at *8.

78. *Id.* at *6.

79. *Id.* at **8–9 (quoting *Tinker,* 393 U.S. at 509, 511). This is the same test referred to and used by *Trujillo,* 322 F. Supp. at 1270.

criteria in certain jurisdictions, while in other jurisdictions such decisions are constitutionally forbidden. It should be noted, however, that these cases involve commercial speech and not efforts to influence the editorial content of newspapers. In that sense, advertisers' efforts toward influencing the decisions of newspaper staff to accept or reject particular types of advertisements are fundamentally different than those of students or administrators who seek to alter a newspaper's editorial content, perhaps explaining the limited success of advertisers.

V. STATE LEGISLATIVE ATTEMPTS TO CONTROL CAMPUS NEWSPAPERS

Recently the Third Circuit Court of Appeals addressed the question of how much control a state legislature can exert over a student-run newspaper.[80] In *Pitt News v. Pappert*,[81] the issue revolved around the Pennsylvania legislature's prohibition on advertisements of alcoholic beverages in university newspapers.[82] The state's Liquor Code prohibited "'any advertising of alcoholic beverages' in virtually any medium of mass communication that is affiliated with 'any educational institution.'"[83] Those who advertised alcoholic beverages in campus newspapers risked losing their liquor licenses.[84] After advertisers began canceling their contracts, the editors of *The Pitt News* filed a complaint alleging that their First Amendment rights had been violated.[85] The Third Circuit held that the statute was unconstitutional for three reasons. "First, the law represent[ed] an impermissible restriction on commercial speech. Second, the law [was] presumptively unconstitutional because it target[ed] a narrow segment of the media."[86] Finally, the court concluded that the state could not demonstrate that the law "'alleviate[d]' the cited harms" of preventing the consumption of alcohol by under-aged drinkers because college students were still exposed to advertisements for alcoholic beverages in other newspapers distributed on campus.[87] Again, this decision deals with commercial speech, but the case is interesting because it suggests that university newspapers operate outside the control of state legislatures under certain circumstances.

80. *The Pitt News v. Pappert*, 379 F.3d 96 (3d Cir. 2004).

81. *Id.*

82. *Id.* at 101.

83. *Id.* at 102 (citing 47 Pa. Consol. Stat. Ann. §§ 4-498 (e)(5), (g) (2002)).

84. *Pitt News*, 379 F.3d at 103.

85. *Id.*

86. *Id.* at 105.

87. *Id.* at 107.

VI. CONCLUSION

These cases give rise to the concern that perhaps the protection afforded by courts to campus newspapers has gone too far for a subsidized, educational forum. Student newspapers are not subject to the same types of external controls exerted on traditional newspapers. If private newspapers print stories that are controversial, they run the risk of alienating readers and losing profits. Students, however, are not permitted to withdraw their financial support if they disagree with the content of a paper.[88] Likewise, administrators are not permitted to withdraw funding or stop production of a publication unless the content interferes with the university's ability to provide its students with an education.[89] Even if the content contains obscene material or is technically inferior, administrators are powerless.[90] Advertisers in certain jurisdictions cannot insist that editors carry their advertisements.[91] Even the Pennsylvania legislature does not have the power to prohibit campus newspapers from carrying advertisements for liquor.[92]

These cases show that the courts' application of the First Amendment to campus newspapers has resulted in the virtually complete insulation of such newspapers from any traditional pressures that would influence or regulate their content. The only consistent line the courts have drawn is prohibiting a campus newspaper's interference with the educational purposes of the college or university.[93] In their decisions, courts have failed to recognize that universities "routinely make countless decisions based on the content of communicative materials. They select books for inclusion in the library, they hire professors on the basis of their academic philosophies, they select courses for inclusion in the curriculum, and they reward scholars for what they have written."[94] Furthermore, many lower court decisions do not appear to be entirely congruent with Supreme Court precedent finding that a university is not a public forum subject to traditional public forum analysis. The Supreme Court has recognized that

---

88. *Supra* nn. 2–12 (discussing student attempts to control content of campus newspapers).

89. *Supra* nn. 13–27 (discussing administrative attempts to control content of campus newspapers).

90. *Antonelli*, 308 F. Supp. at 1336.

91. *Supra* nn.66–72 (discussing advertisers' attempts to control content of campus newspapers).

92. *Pitt News*, 379 F.3d at 105-07.

93. *Trujillo*, 322 F. Supp. at 1270 (quoting *Tinker*, 393 U.S. 503, 511 (1969)).

94. *Kania v. Fordham*, 702 F.2d 475, 480 (4th Cir. 1983) (quoting *Widmar v. Vincent*, 454 U.S. 263, 278–79 (1981)).

> a university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities.[95]

The standard of reasonable regulations referred to by the Supreme Court is dramatically different from those of lower courts that require an interference with the educational process before enabling a university to influence the content of student publications. However, as case law illustrates, lower courts have refused to balance the interests of students and administrators against those of campus editors. Without a Supreme Court decision to the contrary, student newspapers will most likely continue to enjoy the great protection afforded to them by the courts and withstand efforts by other parties to influence or control the content that they publish.

Lisa Bohman

95. *Widmar v. Vincent*, 454 U.S. at 268 n. 5.