

The First Amendment Rights of Student Publications in Higher Education:
A Look into Policy Implications of the Student Press

Danielle J. Alsandor

Introduction

When the steady increase in attorneys and law firms is combined with the rapid hike in lawsuits, it comes as no surprise that most employers require their administrators to possess some knowledge of the law as it pertains to their industry. Therefore it is important for employees to be educated on, or at least knowledgeable of, the laws governing their institution. With this information, employees are then equipped with the necessary skills to prevent legal problems, as well as handle litigation that does arise. The field of education is certainly no stranger to this.

As Margaret Barr (1993, p. 524) states, “Ignorance of legal issues is not bliss. Each student affairs professional should remain current with the ever-changing legal ...factors influencing student affairs and higher education.” However, one must understand that not all higher education policies are universal. Legal differences exist because different types of institutions exist – public and private. Typically public institutions encounter more regulation than their private counterparts (Kaplin & Lee, 1995). Yet, even among private institutions variations can occur depending if the institution has a religious affiliation. However, the issue addressed in this paper will only be applied to public institutions.

The legal issue this paper discusses is the student press and student publications in higher education. This paper seeks to investigate the rights of student newspapers, magazines, and yearbooks; focusing on the specific policy issues surrounding the role of publication advisors, the use of censorship tactics, and the distribution of student fees. Some of the major court cases that have affected higher education policy and shaped the role of the student press include *Kincaid v. Gibson*, *Bazaar v. Fortune*, *Stanley v. Magrath*, and *Joyner v. Whiting*. These cases will be discussed and the precedent set by *Kincaid v. Gibson* will be explored as it separates itself from *Hazelwood v. Kuhlmeier* and establishes a landmark precedent.

Discussion: The Role of the Student Press and the Affects of *Kincaid v. Gibson*

Documenting students' collegiate life dates back into the late 1600s, but over time the practice of doing so has become a unique university task. Today, the student press operates similar to a student organization. However, "student publications must also be viewed from an additional perspective...the perspective of freedom of the press" (Kaplin & Lee, 1995, p. 539). It is the right to a free press which "protects student publications from virtually all encroachments on their editorial prerogatives by public institutions" (Kaplin and Lee, 1995, p. 539). Various court rulings over time have protected the student press and ensured that student publications' First and Fourteenth Amendment rights are not violated.

In 2001, a major court decision regarding higher education student publications came out of the Sixth Circuit United States Court of Appeals. In the final court case of *Kincaid v. Gibson* the court ruled in favor of the two students, Kincaid and Coffey, and found that indeed their First Amendment rights had been violated by the university. It stated that the lower courts erred in initially granting summary judgment for the university and its vice president of student affairs Betty Gibson and also by ruling on its behalf. The factual background for this case involves Kentucky State University (KSU) officials confiscating the 1993-1994 edition of the university's yearbook, *The Thorobred*.

Yearbook editor and registered KSU student, Capri Coffey created the majority of the yearbook with minimal help from yearbook staff members and with "limited advice from the university's student publications advisor" (*Kincaid v. Gibson* 236 F.3d 342; 6th Cir. 2001). After the yearbook was completed, university administration disapproved of its contents and consequently confiscated the books so that they could not be dispersed (*Kincaid v. Gibson* 236 F.3d 342; 6th Cir. 2001). Administrators found the color of the book (purple; and not the university's colors green and gold), its theme and title ("Destination Unknown"), and some of its contents to be "inappropriate" (*Kincaid v. Gibson* 236 F.3d 342; 6th Cir. 2001). The books upon arrival from the publisher were therefore withheld from the KSU community and "hidden away on campus" (*Kincaid v. Gibson* 236 F.3d 342; 6th Cir. 2001).

As a result of this administration's conduct, the subsequent lawsuit was filed and this mandated a review of the institution's policy on student publications. A review of the "Student Publications" section of the student handbook showed that the "policy places editorial control of the yearbook in the hands of a student editor or editors" (*Kincaid v. Gibson* 236 F.3d 342; 6th Cir. 2001). The university's policy "expressly limits the types of changes that the advisor may make to the yearbook...but such changes must deal only with the form or the time and manner of expressions rather than alteration of content (*Kincaid v. Gibson* 236 F.3d 342; 6th Cir. 2001). This therefore allowed for the court to prove that the university had no true foundation to withhold the yearbooks; content was not and could not be a factor. Yet in an attempt to exert some control, university officials argued that the yearbook was not a public forum. However, the fact that the university had a stated policy provided "strong evidence" that the university did recognize the yearbook as a public forum. The court then, as stated earlier, determined that the university's actions were unconstitutional.

This case was quite important because not only did it state that Kincaid and Coffey's First Amendment rights were violated, but it also demonstrated that student publications in higher education operate rather independently with very little university oversight. The student press in all regards is not to be controlled by university administration simply because some officials find the end product to be of "poor quality" (*Kincaid v. Gibson* 236 F.3d 342; 6th Cir. 2001). It also reminded university officials to review and familiarize themselves with their current university policies as it pertains to student publications. Universities should ensure that their actions are in accordance with their policies and that no attempts to infringe upon First Amendment rights are made. As this case demonstrates, trying to censor student press by not distributing yearbooks is clearly a violation and not an appropriate tactic to employ.

Discussion: *Bazaar v. Fortune* and University Disclaimers

In an effort to show that higher education freedom of the press issues arise in all types of publications, this next case demonstrates how a literary magazine can impact university policy. The United States Court of Appeals for the Fifth Circuit heard *Bazaar v. Fortune* which discusses

the content of the University of Mississippi's student literary magazine *Images*. The magazine is published by UM students and printed by the University's printing services. In printing the 1972 edition of *Images*, the superintendent of printing facilities discovered the magazine's text and informed the Chancellor, Porter Fortune. Fortune then created a panel to review the magazine's content. "This panel of deans decided that publication would be 'inappropriate,' apparently basing its decision on matters of 'taste.' The University then refused to finish binding the journal or allow its distribution" (*Bazaar v. Fortune* 476 F.2d 570; 1973 U.S. App.). The main issue with this edition of the magazine revolved around two short stories, one on interracial love and the other on black pride. "Offensive" words were used in the stories and the stories themselves were found to be "distasteful," thus production was halted.

The court therefore had to address whether or not the university had the right to "prevent publication and distribution of a student publication solely on the grounds for 'taste' and 'appropriateness' merely because certain words appear therein, no matter in what context and for what reasons the words are used" (*Bazaar v. Fortune* 476 F.2d 570; 1973 U.S. App.). The court ruled in favor of the students stating that

speech cannot be stifled by the state merely because it would perhaps draw an adverse reaction from the majority of people...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 (*Bazaar v. Fortune* 476 F.2d 570; 1973 U.S. App.).

Not to mention this issue also deals with student assessed fees because "the magazine, at least for this past academic year, received a \$400.00 grant from the Associated Student Body Activities Fund, which is, in turn, collected from student fees" (*Bazaar v. Fortune* 476 F.2d 570; 1973 U.S. App.).

Higher education policy was affected in multiple ways – stating how university disclaimers are to be used, how student fees are allocated, and how censorship tactics should not be attempted. The university sought to include a disclaimer in the front of the magazine which would read "that it is published by students at the University with the advice of the English department" (*Bazaar v. Fortune* 476 F.2d 570; 1973 U.S. App.).

This was in an effort to demonstrate or establish the existence as a private publisher. However the court reviewed the disclaimer and student fees allocation and stated, "We do not feel that this simple statement, even if joined with the somewhat speculative financial connection, is enough to equate the University with a private publisher and endow it with absolute arbitrary powers to decide what can be printed" (*Bazaar v. Fortune* 476 F.2d 570; 1973 U.S. App.). The ruling also recognized, as the law textbook stated, that existing university policy on a given issue is important. "It seems a well-established rule that once a University recognizes a student activity which has elements of free expression, it can act to censor that expression only if it acts consistent with First Amendment constitutional guarantees" (*Bazaar v. Fortune* 476 F.2d 570; 1973 U.S. App.). This therefore reinforces the need for administrators to be aware of their university policies and understand that attempting to add a disclaimer and to use student allocated fees are not sufficient reasons to engage in censorship.

Discussion: University Funding and *Stanley v. Magrath* and *Joyner v. Whiting*

University newspapers are an integral part to the student press in higher education. In the following two cases, attempts to adjust university funding policies are explored. Displeased with the "Finals Week" edition of the 1978-1979 *Minnesota Daily*, the University of Minnesota's Board of Regents later changed the funding policy for the university's newspaper. This policy change reduced the amount of funds allocated to the newspaper. Therefore, Catherine Stanley and the *Daily's* three other editors filed suit against the University's President Peter Magrath and all of the Board of Regents. The case made it to the United States Court of Appeals for the Eighth Circuit where the issue of higher education funding policies was addressed (*Stanley v. Magrath* 719 F.2d 279; 1983 U.S. App.).

To briefly summarize the events, this issue of the *Minnesota Daily* "contained articles, advertisements, and cartoons satirizing Christ, the Roman Catholic Church, evangelical religion, public figures, numerous social, political, and ethnic groups, social customs, popular trends, and liberal ideas" (*Stanley v. Magrath* 719 F.2d 279; 1983 U.S. App.). In response to this edition, the Board of Regents on the recommendation of the University attorney did not change the fees

immediately because “it could be viewed as punitive action in violation of the First Amendment” (*Stanley v. Magrath* 719 F.2d 279; 1983 U.S. App.). However in May of 1980, the funding policy to the newspaper was changed; students now had the option to seek a refund for the amount allocated to the Board of Student Publications.

Since approximately 1920, the *Daily* has received part of its funding from the Board of Student Publications, which in turn has received its funding from the student-service fee that students are charged as a condition of registration. Until the Regents' decision in May of 1980, University regulations did not allow students to obtain a refund of that portion of the student-service fee which is allotted to the Board of Student Publications (*Stanley v. Magrath* 719 F.2d 279; 1983 U.S. App.).

It is also important to note that none of the other 23 organizations on that campus who received student-service fees could have their fees refunded. In addition, this move only applied to this campus, thus other University of Minnesota campuses were not impacted. This tactic was clearly aimed at the Twin Cities campus and a direct response to the controversial newspaper edition.

Now, students who may have been displeased with the issue or who simply wanted a reduced amount of student assessed fees could obtain a refund. Over the next two years however, the student publication fee for those who sought to pay it was increased, so the amount allocated to the newspaper actually increased. The court addressed this fact, “We conclude nevertheless that the *Daily* has suffered an injury in fact. Although the total amount of fee support has risen, it has concededly risen less because of the change to refundability” (*Stanley v. Magrath* 719 F.2d 279; 1983 U.S. App.). The court’s argument is that if the policy would have remained the same, the publication could have an even higher level of financial support. As a result the court voted in favor of the newspaper editors and concluded that the lower courts erred and that the Board of Regents had no legal right to adjust the funding. This proves that changing the student assessed fees policy in an effort to “punish” is not allowed.

In *Joyner v. Whiting*, which served as a precedent for *Stanley v. Magrath*, another university newspaper faced a similar funding situation. In *Joyner v. Whiting*, the Editor-in-Chief of North Carolina Central University’s newspaper, Johnnie Joyner filed suit after the University President Harvey Lee Whiting withdrew all funding from the newspaper “on the ground that the

paper's segregationist editorial policy and racially discriminatory practices violate the Fourteenth Amendment and the Civil Rights Act of 1964" (*Joyner v. Whiting* 477 F.2d 456; 1973 U.S. App.). The Fourth Circuit Court of Appeals concluded that the President in doing so violated the freedom of the press and the First Amendment. These two cases therefore set clear examples that attempts to censor student publications by altering financial support or removing it all together are illegal and clearly violate the First Amendment. University administrators must therefore be very careful in how they approach student publications and any policies regarding it.

Review and Conclusion: Higher Education Policy Implications

In the aforementioned cases a variety of policy issues surrounding student publications were faced. The general consensus when it comes to the student press and student publications in higher education is stated best by Kaplin and Lee (1995, p. 541), "The clear lesson is not 'don't regulate' but rather 'don't censor'." Legal complications can and do arise when administrators want publication advisors to have more control over content, when attempts to change funding mechanisms are made, and when existing university policies are not followed. These rulings therefore affect policy by informing administrators and policy makers of what not to do.

Particularly, the landmark case of *Kincaid v. Gibson* (the KSU yearbook confiscation) stands out most, since it is a recent case and because it clearly defined the role of the collegiate student press. As an article in *The News Media and The Law* (2001, p. 46) states, "The ruling also established that college and university student publications are not subjected to the same stringent regulations imposed on high school media." Prior to the *Kincaid v. Gibson* judgment, *Hazelwood v. Kuhlmeier* was considered the law. However, the court in *Kincaid v. Gibson* investigated whether *Hazelwood* was applicable to collegiate media; determining it was not. The significance of *Hazelwood* not being applicable to higher education is stated in *The News Media and The Law* article; "The application of a high school standard to a collegiate media 'is antithetical to the robust discussion that is the essence of higher education'" (2001, p. 47). Therefore it was necessary for a distinction to be made. One should note that this ruling was *not* made by the United States Supreme Court, and therefore only applicable to the Sixth Circuit

(Kentucky, Michigan, Ohio, and Tennessee). However as the article states, "It should have a nationwide impact" (2001, p. 47).

As one looks at the changing trends in student populations since the millennial generation has entered higher education, it may be best for administrators to prepare just in case students begin to push the envelope of the freedom of the press in higher education student publications. From current literature, this generation is described as community service driven, competitive, intelligent, and tech-savvy. If this "new type" of college student chooses to become politically involved, newspapers and yearbooks are ideal methods to address these concerns; particularly by employing political and satirical comic strips. As a result, student affairs administrators involved with student activities and student publications should understand clearly the policies at their given institutions and work to educate their students of their rights. The key is for administrators to remain knowledgeable on current events and university policies, and to not attempt to censor publications or abruptly change its funding. In the end, this will help to minimize the number of lawsuits involving publication editors and colleges and universities. By simply being more proactive, administrators can help minimize university legal action; and that is the goal of any higher education institution.

Personal Assessment: Recommendations for Administrators

The following are recommendations for university administrators on how to best approach student publications at their given institutions: (a) know the rules and resources, (b) avoid personal biases, (c) do not punish, and (d) select appropriate personnel.

First and foremost, as demonstrated by the court cases, administrators need to adhere strictly to the guidelines stated in their student handbook on student publications. Most of the above problems could have been eliminated if administrators would have thoroughly read the university guidelines, referenced the First Amendment, or researched previous litigation on similar matters. Secondly, administrators must separate their personal beliefs, values, and opinions from their role as university administrators when dealing with publications and deciding matters of "taste" and "appropriateness." An administrator must remember that his/her role as a publication

advisor, dean of students, or vice president of student affairs does not grant him/her the opportunity to decide matters of that nature. With that said, thirdly administrators should not attempt to change existing guidelines as a method of punishment or as a way to adapt guidelines to fit his/her personal agenda. Lastly, administrators should be very methodical and careful in selecting its personnel. Many problems in higher education stem from personnel issues, so possessing a good, strong staff that understands their role in the publication process could avoid unnecessary legal issues. Overall, the message to administrators is to stay informed and to keep their students informed about the rights governing student publications at their institution. It is also pertinent to inform students of available resources that exist to help them produce law abiding documents, such as the Student Press Law Center which is accessible on-line at <http://www.splc.org/default.asp>.

References

Barr, M. & Associates (1993). *The handbook student affairs administration*. San Francisco, CA: Jossey-Bass.

Bazaar v. Fortune, 476 F.2d 570, *rehearing*, 489 F.2d 225 (5th Cir. 1973).

Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

Joyner v. Whiting 477 F.2d 456; 1973 U.S. App.

Kaplin, W.A. & Lee, B.A. (1995). *The law of higher education: A comprehensive guide to legal implications of administrative decision making*. (3rd ed.). San Francisco, CA: Jossey-Bass.

Kincaid v. Gibson, 236 F.3d 342, (6th Cir. 2001).

Stanley v. Magrath 719 F.2d 279; 1983 U.S. App.

University official violated first amendment by seizing yearbooks. (2001, Winter). *The News Media & The Law*.